AGRICULTURE DECISIONS

Volume 58

July – December 1999

UNITED STATES DEPARTMENT
OF AGRICULTURE

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AGRICULTURE DECISIONS

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

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LIST OF DECISIONS REPORTED

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COURT DECISIONS

CAL-ALMOND, INC. v. THE UNITED STATES DEPARTMENT OF AGRICULTURE.
No. CV-F-98-5049 REC SMS.
Filed August 13, 1998.

Almonds - First amendment - Freedom of speech - Freedom of association.

Plaintiffs sought a declaration that assessments for funding almond advertising and promotion required by the Almond Marketing Order (7 C.F.R. pt. 981) violates plaintiffs' First Amendment rights to freedom of speech and freedom of association under the United States Constitution. The United States District Court for the Eastern District of California granted USDA's motion to dismiss plaintiffs' complaint on the ground that *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997), which held a similar marketing order program not to violate the First Amendment, controls the outcome of the case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

I. Introduction

On January 13, 1998, Plaintiff Cal-Almond, Inc. ("Cal-Almond") and eleven other almond handlers (collectively, "Plaintiffs") filed a complaint against the United States Department of Agriculture ("USDA" or "Defendant") seeking, inter alia, a declaration that the Almond Marketing Order ("AMO"), 7 C.F.R. Part 981, violates Plaintiffs' First Amendment rights under the United States Constitution. On May 4, 1998, this court heard Defendant USDA's motion to dismiss the complaint on the grounds that the recent Supreme Court decision in *Glickman v. Wileman Bros. & Elliot, Inc.*, ___ U.S.___, 117 S. Ct. 2130 (1997), which held a similar marketing order program not to violate the First Amendment, controls the outcome of this case. For the following reasons, this court grants the USDA's motion, and denies Plaintiffs leave to amend.

II. Background

A. The Almond Marketing Order

The Almond Marketing Order, 7 U.S.C. Part 981, was promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act ("AMAA"), 7 U.S.C. §§ 601, *et seq.*, with the goal of stabilizing the almond industry. *See* Defendant's Opening Brief at 2. The Almond Order is administered by an Almond Board, consisting of ten members, who are nominated by almond growers and handlers and appointed by the Secretary of Agriculture. *See* 7 C.F.R. §§ 981.41; 981.441.

All handlers of almonds, who are regulated under the Order, are liable for assessments to finance the administrative expenses of the Board, and to cover the cost of research, generic advertising, and promotion. The assessment rate, which can vary annually, is currently set at 2 cents per pound of assessable almonds. *See* 7 C.F.R. § 981.343, 62 Fed. Reg. 43459.

Plaintiffs challenge that part of the AMO that imposes assessments for the funding of almond advertising and promotion. The promotion program is as follows. A portion of the assessment per pound of almonds went to the Almond Board, who then used it to fund generic promotion and advertisement of California almonds. However, at all relevant times, Plaintiffs could obtain credit against that portion of the assessment that went to fund generic advertising by spending money to promote their own brand of almonds in certain, specified ways. This program of advertising-promotion credits took two forms: (1) the "creditable" program, in place from 1986 - 1993; and (2) the "credit-back" program, in place from 1993 to the present.[1] The regulation governing the "creditable" program is 7 C.F.R. § 981.441 (1990). The regulation governing the "credit-back" program is 7 C.F.R. § 981.441 (1996). The court now turns to a discussion of these programs.

1. The "Creditable" Program

Under the "creditable" program, almond handlers could obtain 100% credit against the generic-advertising assessment. However, certain kinds of advertising were not eligible for the credit. For example, under the "creditable" program, no credit was available for money spent to advertise products containing almonds, unless the product contained at least 50% raw shelled almonds by weight, and

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[1]Plaintiffs do not challenge assessments imposed after 1995.

unless the almond product displayed the handler's own brand. The program also gave no credit for money spent on advertising when more than two complimentary branded products were included in an advertisement, nor when the advertisement promoted not only California almonds, but also non-complementary commodities or products, or competing nuts. Finally, no credit was available for money spent promoting retail outlets.

2. The "Credit-Back" Program

The "credit-back" program simultaneously expanded the ways in which almond handlers could receive credit for promoting their own brands and reduced the amount of credit it was possible to receive.

Generally, the "credit-back" program reduced the 100% credit to 2/3rds credit. The handlers therefore had to spend $150,000 to earn the $100,000 credit. The "credit-back" program removed the restrictions on credit for promoting almond-containing products, but limited the credit obtainable by the general 2/3rds, as well as by a function of the percentage of almonds in the product. For example, if a handler spent $150,000 to promote a product containing 20% almonds, the amount of the credit would be as follows: $150,000 reduced by 2/3rds = $100,000 x 20% = $20,000.

Although the "credit-back" program expanded the promotions that could receive credit, restrictions remained. For example, a handler could not obtain credit for advertising in a publication that targeting the farming or the grower trade. Also, there was no credit available for billboard advertisements, unless the advertisement directed consumers to a handler-operated outlet offering direct purchase of almonds. Finally, travel expenses were not creditable even if the travel involved meeting with a buyer to convince him to purchase almonds.

In addition to these specific restrictions, the program provided generally that a handler could not receive credit unless it was "appropriate when compared to accepted professional practices and rates for the type of activity conducted." 7 C.F.R. § 981.441(e)(1) (1996). "The clear and evident purpose of each activity [had to] be to promote the sale, consumption, or use of California almonds, and nothing . . . [could] detract from this purpose." *Id.* at (e)(2). Whether a particular promotion could be eligible for credit was decided initially by the Almond Board Staff. *See id.* at (e)(6). That initial decision could be appealed to the public relations and advertising committee of the Board, and then to the Secretary of Agriculture. *See id.*

B. Plaintiffs' Claim For Relief

Plaintiffs allege that the assessment program violates their First Amendment rights for three reasons. First, they allege that the restrictions on Plaintiffs' advertising and promotion violated Plaintiffs' rights to freedom of speech and association. Second, they allege that Board approval of advertising constituted a prior restraint on speech. Third, both the "creditable" and the "credit-back" advertising programs placed unconstitutional conditions on a government benefit.

Plaintiffs' primary concern with both the "creditable" and the "credit-back" programs is that the types of advertising on which credit was allowed were essentially useless to them, because Plaintiffs sell mostly processed almonds to be used as ingredients in other products. The only handlers who can make good use of the credits are sellers of packaged snack almonds, such as Blue Diamond. Forcing them to contribute to the generic advertising fund, Plaintiffs allege, had two effects: (1) it reduced the overall assessments on handlers who sell mostly packaged snack almonds, such as Blue Diamond; and (2) it forced handlers who sell mostly ingredient almonds, such as Plaintiffs, to match the snack-almond producers' advertising budget. According to Plaintiffs, the powerful Blue Diamond company influenced the "creditable" and the "credit-back" advertising programs to serve exactly this purpose. Moreover, Plaintiffs are not the only ones that advance this theory. Both the Administrative Law Judge below and the Ninth Circuit found that the advertising programs at issue were designed to benefit Blue Diamond. *See* ALJ Opinion at 10-11, attached as exhibit to Plaintiffs' complaint; *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.3d 429, 438-440 (9th Cir. 1994).

C. *Cal-Almond I*

The present matter does not represent the first time this court has heard a First Amendment challenge to this AMO. On February 20, 1991, a number of different almond handlers - plus some of the same handlers involved in this case, as will be discussed more fully below - filed a complaint that attacked the AMO on a number of grounds, including that it violated the First Amendment. The ALJ and the Judicial Officer for the Secretary of Agriculture both ruled that the AMO did not violate the First Amendment. This court affirmed that ruling based on the following reasoning:

> The court concludes that the creditable advertising assessments do not implicate First Amendment rights because plaintiffs are not 'compelled' to

> advertise. Section 608c(6)(I) authorizes marketing orders to provide for 'production research [and] marketing research and development projects,' including 'projects . . . provid[ing] for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . . The Almond Marketing Order contains regulations, duly promulgated through formal on-the-record rulemaking, which authorize the Almond Board to establish market development projects including paid advertising, 7 C.F.R. § 981.14, to credit a portion of a handler's direct expenditures for market promotion, including paid advertising, for the sale of almonds, and to prescribe appropriate rules and regulations as are necessary to effectively regulate the crediting of the pro rata expense assessment of handlers, 7 C.F.R. § 981.41(c). The regulations do not permit plaintiffs to receive a credit against their annual assessment unless their advertising complies with the regulations regarding creditable advertising, but do not compel plaintiffs to participate in advertising because plaintiffs are otherwise free to engage in any advertising they wish without interference with the Almond Board. As the Department argues, however, the Board is not obligated to subsidize any and all advertising that plaintiffs choose to engage in.

Cal-Almond, Inc. v. U.S. Dept. of Agriculture, No. CV-F-91-122 REC, slip op. at 7 (E.D. Cal. June 3, 1992) (order affirming the decision of the Secretary of Agriculture).

The Ninth Circuit reversed this court's decision in a published opinion. *See Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.3d 429 (9th Cir. 1993). The Ninth Circuit first found that the AMO regulations implicated the plaintiffs' First Amendment rights because they "compelled" the plaintiffs to speak, either by forcing them to subsidize generic advertising, or by forcing them to choose creditable advertising. *See id.* at 434-436. After finding that the plaintiffs' First Amendment rights were implicated, the Ninth Circuit subjected the regulations to the test announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). The Ninth Circuit concluded that the AMO regulations failed the *Central Hudson* test because the regulations did not directly advance the USDA's interests in assisting, improving, or promoting the marketing, distribution, and consumption of almonds. *See id.* at 436-439.

On October 6, 1996, the Supreme Court denied certiorari, *see Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 117 S. Ct. 72 (1996), but after the *Wileman* decision, the Court granted certiorari, vacated the judgment of the Ninth Circuit, and

instructed the Ninth Circuit to reconsider its decision in light of *Wileman*. This court received what it thought was the official mandate of the Ninth Circuit instructing it to dismiss the First Amendment claim of the *Cal-Almond* plaintiffs. This court did so on September 16, 1997. However, this court reconsidered and vacated that order on October 1, 1997, because pursuant to Federal Rule of Appellate Procedure 41 and 42, this court did not have jurisdiction in this matter. The Ninth Circuit on March 24, 1998, issued an order granting the plaintiffs' motion for a stay of mandate until June 1, 1998. On July 22, 1998, the mandate from the Ninth Circuit issued, instructing this court to dismiss the First Amendment claims in *Cal-Almond I*. The Ninth Circuit cited *Wileman* in support of its mandate.

Four of the 12 Plaintiffs in this matter, Cal-Almond, Gold Hills Nut Co., Frazier Nut Farms, Inc., and Carlson Farms, are also parties to *Cal-Almond I*. For that reason, these four plaintiffs are not challenging the "creditable" program.

III. Analysis

Although the Ninth Circuit did not issue a published opinion with its mandate, this court believes that it is clear that the Ninth Circuit has found that *Wileman* bars a First Amendment challenge to the "creditable" advertising program. Because the "creditable" program is legally indistinguishable from the "credit-back" program, as far as the *Wileman* analysis is concerned, this court concludes that the Ninth Circuit would also find that the *Wileman* case bars the challenges to the "credit-back" program. Accordingly, this court will dismiss the First Amendment challenges to both programs.

IV. Conclusion

In accordance with the foregoing, IT IS ORDERED that Plaintiffs' complaint is DISMISSED. Leave to amend is DENIED, because in the face of a controlling Supreme Court decision, amendment would be futile. The Clerk of the court is directed to enter judgment in favor of Defendant.

MIDWAY FARMS v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 98-16592.
Filed August 24, 1999.

(Cite as 188 F.3d 1136 (9th Cir.))

Raisin order - Handler - Administrative law judge powers.

The United States Court of Appeals for the Ninth Circuit concluded that, where the Raisin Administrative Committee took the position that Midway Farms was a handler and subject to the Raisin Order (7 C.F.R. pt. 989), Midway Farms had standing to file an administrative petition with the Secretary of Agriculture under 7 U.S.C. § 608c(15)(A) despite Midway Farms' position that it was not a handler subject to the Agricultural Marketing Agreement Act. The Ninth Circuit remanded to the Secretary of Agriculture with instructions to rule on the merits of Midway Farms' 15(A) petition and held that, on remand, the administrative law judge has inherent powers to conduct hearings *in camera*, to allow Midway Farms to submit redacted materials, and to impose protective conditions upon any materials submitted by Midway Farms for *in camera* review.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Before: REINHARDT, O'SCANNLAIN, and FLETCHER, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether a raisin processor has standing to file an administrative petition under the Agricultural Marketing Agreement Act challenging the Raisin Administrative Committee's determination that it is a "handler" subject to the Federal Raisin Marketing Order.

I

Midway Farms, Inc. ("Midway") is a California corporation that purchases off-grade raisins and various raisin residue matter that raisin handlers grade out of the raisins intended for human consumption. Midway processes these products into distillery material, cattle feed, and concentrate material. It does *not* sell

"raisins" as that term is defined in 7 C.F.R. § 989.5.[1]

The United States Department of Agriculture ("Department") is responsible for the promulgation and enforcement of the Federal Raisin Marketing Order ("Raisin Marketing Order") pursuant to 7 U.S.C. § 601, *et seq.* Under the Raisin Marketing Order, raisin handlers must account for the disposition of off-grade raisins, other failing raisins, and raisin residue material. To administer the marketing order regulating the handling of California raisins, *see* 7 C.F.R. Part 989, the Secretary of Agriculture ("Secretary") established a Raisin Administrative Committee ("Committee"). *See id.* § 989.26.

On June 13, 1994, the Committee sent Midway a letter requiring it to complete and to submit certain forms because it was a processor and, as such, a "handler" subject to the Raisin Marketing Order. *See id.* §§ 989.13, 989.15.[2] Midway, however, took the position that it was not a raisin "handler" because that term encompasses only "first handlers," and not those who purchase from handlers.[3] Nevertheless, to avoid possible penalties for non-compliance with the Marketing Order, *see* 7 U.S.C. § 608c(14), Midway began filling out the forms demanded by the Committee and has continued to comply with the Committee's demands to the present date.

On July 1, 1994, Midway filed an administrative petition with the Secretary

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[1]"'Raisins' means grapes of any variety grown in the area, from which a significant part of the natural moisture has been removed by sun-drying or artificial dehydration, either prior to or after such grapes have been removed from the vines." *Id.*

[2]*Handler* means:

> (a) Any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: *Provided*, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) A producer who, in his capacity as a producer, blends raisins entirely of his own production in the course of his usual and customary practices of preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels; or (3) a dehydrator who, in his capacity as a dehydrator, blends raisins entirely of his own manufacture.

7 C.F.R. § 989.15.

[3]Midway argued alternatively that the Raisin Marketing Order, to the extent it does cover Midway, is contrary to the Agricultural Marketing Agreement Act, 7 U.S.C. § 601, *et seq.*

pursuant to 7 U.S.C. § 608c(15) (A), seeking a declaration, *inter alia*, that it is not subject to the Raisin Marketing Order. Midway instituted this proceeding in part because the filing of an administrative petition tolls civil penalties pending its resolution so long as the petition is filed and prosecuted in good faith. *See id.* § 608c(14)(B). The Department filed a motion to dismiss the petition, arguing that the plain language of section 608c(15)(A) made clear that only a "handler" could file an administrative petition and that Midway did not qualify because it was claiming *not* to be a handler. Curiously, the Department did not discuss the Committee's determination that it was indeed a "handler" for purposes of the Marketing Order.

The Secretary then subpoenaed various documents from Midway, which in turn provided them with the names of its customers and the sales prices redacted. Fearing that the Secretary's representatives were untrustworthy, Midway refused to provide unredacted documents to the Secretary, explaining that, if the names of its buyers and its sales prices were made public, those from whom it purchased off-grade raisins would contract directly with those to whom it sold, thereby cutting it out as the middleman. The Secretary deemed the redacted documents nonresponsive. Midway then offered to allow the Administrative Law Judge ("ALJ") to review the unredacted documents *in camera* and specifically agreed to permit the manager of the Committee to look at them. The ALJ initially approved this proposal, but later concluded that he lacked authority to review documents *in camera*.

On May 10, 1996, the ALJ dismissed the petition on the basis that Midway could not show that it was a "handler" under section 608c(15)(A). Midway appealed to the Secretary's Judicial Officer, who determined that, because it denied being a handler subject to the Marketing Order, it lacked standing to bring an administrative petition. The Judicial Officer further concluded that the ALJ, in initially agreeing to review documents *in camera*, erred in giving credence to Midway's claim that the Secretary's agents were untrustworthy and would leak information to Midway's competitors.

Midway subsequently filed a petition for review in the United States District Court of the Eastern District of California pursuant to 7 U.S.C. § 608c(15)(B). It argued that the ALJ and Judicial Officer erred in concluding that it lacked standing to file an administrative petition and also sought a declaration that the ALJ had the authority to review documents *in camera*.

Midway filed a motion for summary judgment in which it conceded that only a "handler" can file an administrative petition with the Secretary and argued that, for purposes of section 608c(15)(A), it *was* a "handler" because it was a person "to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51. The

district court denied this motion. Noting that section 608c(15)(A) limits its application not just to any handler, but more specifically to "any handler *subject to an order*," 7 U.S.C. § 608c(15)(A) (emphasis added), the district court concluded that Midway was not a "handler subject to an order" because Midway itself claimed *not* to be subject to the Marketing Order and because, notwithstanding the Committee's determination to the contrary, the Secretary had not yet determined that it was subject to the Marketing Order. The court also denied Midway's motion for summary judgment on its claim that the ALJ had authority to review documents *in camera*, noting that Midway failed to cite any supporting legal authority. Acting *sua sponte*, and after giving Midway an opportunity to respond, the district court granted summary judgment in favor of the Department.

Midway appeals the grant of summary judgment in favor of the Department as well as the denial of its motion for summary judgment on its claim that the ALJ had authority to review documents *in camera*.

II

The operative statute allows "[a]ny handler subject to an order" to file an administrative petition with the Secretary. 7 U.S.C. § 608c(15)(A).[4] The term "handler" is defined by regulation for purposes of section 608c(15)(A) as "any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i).[5] Neither party contends, for purposes of this action, that Midway is a "person who, by the terms of a marketing order, is subject thereto." Thus, the sole question is whether Midway is a "person . . . to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i).

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[4]Section 608c(15)(A) provides in relevant part that:

> Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

Id. § 608c(15)(A).

[5]Courts must defer to an agency regulation defining a statutory term unless contrary to clearly expressed congressional intent. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Midway contends that, notwithstanding the fact that it is seeking a declaration that it is *not* a "handler" as defined in 7 C.F.R. § 989.15, it is deemed a "handler" for purposes of 7 U.S.C. § 608c(15) and 7 C.F.R. § 900.15(i) because the Committee sought to make it subject to the Raisin Marketing Order. The Department concedes that the Committee sought to apply the Raisin Marketing Order to Midway, but regards that fact as irrelevant. According to the Department, the Committee is powerless to apply the Marketing Order because it is the Secretary, rather than the Committee, who makes the final determination on handler status. The Department contends that Midway is not a handler for purposes of section 608c(15)(A) unless the *Secretary* seeks to make the Raisin Marketing Order applicable to Midway.

The Department's rather strained argument depends crucially on the curious contention that the Committee does not have authority to seek to apply the Raisin Marketing Order to Midway. However, the Department does not cite any evidence in the record or legal authority (other than the district court's order) for this proposition. A review of the Secretary's own regulations reveals that the Committee has the power to "administer the terms and provisions of [the Raisin Marketing Order]," 7 C.F.R. § 989.35(a). The authority to "administer" the Raisin Marketing Order is essentially the power to apply the Order. In addition, the Committee has the power to "make rules and regulations to effectuate the terms and provisions of," to "recommend to the Secretary amendments to," and to "receive, investigate, and report to the Secretary complaints of violations of" the Raisin Marketing Order. *Id.* § 989.35.[6]

The Secretary's own regulations make clear that the Committee *does* have the authority to apply the Raisin Marketing Order. Because it cannot be controverted that the *Committee* did in fact seek to apply the Raisin Marketing Order to Midway, we conclude that Midway is a person to whom a Marketing Order has been sought to be made applicable and is thus a "handler," if only for purposes of section 608c(15). Accordingly, we hold that Midway has standing to file an

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[6]Other of the Secretary's regulations vest the Committee with similar authority to apply the Marketing Order: "Each handler shall, upon request of the committee, file promptly with a committee a certified report, showing such information as the committee shall specify with respect to any raisins which were held by him"; "Each handler shall submit to the committee in accordance with such rules and procedures as are prescribed by the committee, with the approval of the Secretary, certified reports, for such periods as the committee may require, with respect to his acquisitions of each varietal type of raisins during the particular period covered by such report . . . ." *Id.* § 989.73. Also, the Committee has the duty "to investigate compliance and to use means available to it to prevent violations of [the Raisin Marketing Order]." *Id.* § 989.36.

administrative petition with the Secretary under section 608c(15)(A). Of course, we express no views on the ultimate merits of whether Midway is a "handler" for purposes of the Raisin Marketing Order; our conclusion is limited to the narrow question of standing to petition.

III

For the foregoing reasons, we remand to the Secretary with directions to rule on the merits of Midway's petition. *See* 7 U.S.C. § 608c(15)(B) ("If the court determines that such 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."). Upon remand, it is within the inherent powers of the ALJ, in his discretion, to conduct hearings *in camera* upon showing of good cause. *Cf. Norinsberg Corp. v. United States Dep't of Agric.*, 47 F.3d 1224, 1228 (D.C. Cir. 1995); *Morgan v. Secretary of Hous. & Urban Dev.*, 985 F.2d 1451, 1456 (10th Cir. 1993). To preserve the meaningfulness and efficacy of any *in camera* hearings, the ALJ may allow Midway to submit redacted materials or may impose protective conditions upon any materials submitted by Midway for *in camera* review. *Cf.* 7 C.F.R. § 900.55(c) (setting forth the powers of ALJs, authorizing them to rule upon motions and requests, to examine witnesses and receive evidence, to admit or exclude evidence, and to "[d]o all acts and take all measures necessary for the maintenance of order at the hearing and the efficient conduct of the proceeding").

REVERSED and REMANDED.

KREIDER DAIRY FARMS, INC. v. GLICKMAN.
Nos. 98-1906, 98-1982, 98-1983.
Filed August 27, 1999.

(Cite as 190 F.3d 113 (3d Cir.))

Milk marketing order – Appellate jurisdiction – Remand order – Appeal of administrative law judge's decision – Untimely appeal of Judicial Officer's decision.

Kreider Dairy Farms, Inc., appealed from a 1996 District Court order remanding the proceeding to the Secretary of Agriculture and the Secretary of Agriculture appealed from a 1998 District Court order vacating the Judicial Officer's determination that Kreider's administrative appeal on remand was

untimely and remanding the case to the Judicial Officer for a decision on the merits. The United States Court of Appeals for the Third Circuit stated that, while normally a remand order is not a final order subject to immediate appellate review under 28 U.S.C. § 1291, immediate appellate review is available when a District Court finally resolves an important legal issue and denial of appellate review before remand to the agency would foreclose appellate review. The Third Circuit dismissed Kreider's appeal of the 1996 District Court Order, holding that it had no jurisdiction because the District Court's 1996 remand order was not subject to immediate appeal. However, the Third Circuit held that it did have jurisdiction over the Secretary of Agriculture's appeal of the 1998 District Court Order because the District Court's 1998 decision resolves an issue of law that may evade review if immediate appeal is not permitted. On the merits, the Third Circuit found that the District Court did not have jurisdiction over Kreider's February 2, 1998, complaint in which Kreider sought review of the ALJ's decision because the ALJ's decision was not a final agency decision subject to judicial review. The Third Circuit found that the District Court did not have jurisdiction over Kreider's April 3, 1998, amended complaint because Kreider did not have a viable theory upon which to relate the amended complaint back to the February 2, 1998, complaint, and pursuant to 7 U.S.C. § 608c(15)(B), the amended complaint was an untimely appeal of the Judicial Officer's January 12, 1998, decision.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Before: SLOVTRER and MANSMANN, Circuit Judges, and WARD, * District Judge.

OPINION OF THE COURT

MANSMANN, Circuit Judge.

These appeals implicate important issues related to our appellate jurisdiction in the context of a dispute over dairy regulations. Specifically, we must determine the extent to which our jurisdiction extends to District Court orders remanding for further factual findings in administrative proceedings in light of *Forney v. Apfel*, 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269 (1998). We hold today that because the discussion on appellate jurisdiction in *Forney* is founded upon specific language located within the Social Security Act, the holding in *Forney* does not extend to all District Court orders remanding for further administrative proceedings. We also reaffirm our longstanding rule that we lack jurisdiction over District Court orders remanding for further administrative findings unless an important legal issue has been finally determined which would evade appellate

*Honorable Robert J. Ward, United States District Judge for the Southern District of New York, sitting by designation.

review in the absence of an immediate appeal.

Applying these principles to the appeals before us, we find that we lack jurisdiction over the appeal filed by Kreider Dairy Farm, Inc. ("Kreider") in 1998 from a 1996 District Court order which remanded for further factual findings relating to the merits of the dairy dispute. Accordingly, we will dismiss Kreider's appeal (No. 98-1982) for lack of jurisdiction. Under these same principles, however, we find that we do have appellate jurisdiction over the timely appeal filed by the Secretary of the United States Department of Agriculture ("USDA") from the District Court's August 10, 1998 order reversing a USDA determination that Kreider's administrative appeal on remand was untimely (No. 98-1906) and remanding for further administrative proceedings on the merits.

With respect to the merits of the USDA's appeal, we hold that the District Court erred in exercising jurisdiction over Kreider's appeal and accordingly will vacate the District Court's 1998 Order. Finally, we will dismiss summarily Kreider's "cross-appeal" from the District Court's August 10, 1998 order (No. 98-1983) as Kreider has informed us that it never intended to cross-appeal from that order and has not pursued that cross-appeal in its briefing or at oral argument before us.

I.

These appeals come to us after a long and tortured procedural history that spans nearly a decade. Because this procedural history is central to our decision, we shall discuss it in some detail. By contrast, because we do not reach the merits of the parties' dispute over the dairy regulations at issue in these appeals, the underlying factual background that forms the basis of that dispute will be discussed only generally.[1]

A.

Kreider is a dairy farm corporation that produces and distributes packaged kosher fluid milk within the New York-New Jersey milk marketing area with the aid of two independent subdistributors. The production and sale of milk within the

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[1]For a more detailed discussion of the merits of the dairy regulation dispute see *Kreider Dairy Farms, Inc. v. Glickman*, No. Civ. A. 95-6648, 1996 WL 472414 (E.D. Pa. August 15, 1996); *In re: Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M-1-2, 1995 WL 598331 (U.S.D.A. September 28, 1995).

New York-New Jersey milk marketing area is regulated by Order 2 which was promulgated under the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 601 *et seq.* Under Order 2, certain milk producers can qualify for producer-handler status which entitles them to an exemption from paying certain fees in connection with the sales of milk. Kreider first applied for producer-handler status under Order 2 by letter dated December 19, 1990.

The Market Administrator ("MA") responsible for administering Order 2 denied Kreider's application for producer-handler status, finding that Kreider did not meet the producer-handler requirements due to Kreider's use of independent subdistributors. *See generally* 7 C.F.R. § 1002.12(b) (1999) (setting forth exclusive control requirements for producer-handler exemption). On December 23, 1993, Kreider challenged the MA's decision by filing a petition with the USDA pursuant to section 608c(15)(A) of the AMAA.

After a December 14, 1994 hearing, an Administrative Law Judge ("ALJ") issued a decision holding that Kreider was entitled to producer-handler status under Order 2. The Agricultural Marketing Service appealed to a Judicial Officer ("JO") of the USDA, who acts on behalf of the Secretary of Agriculture in all adjudicative matters. *See* 7 C.F.R. § 2.35 (1999). The JO reversed the ALJ's decision, holding that Kreider was not entitled to producer-handler status. See *In re: Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M-1-2, 1995 WL 598331 (U.S.D.A. September 28, 1995).

On October 18, 1995, Kreider filed a complaint pursuant to the AMAA in the District Court challenging the JO's decision. *See* AMAA, 7 U.S.C. § 608c(15)(B) (1994). By opinion and order filed August 15, 1996 ("1996 Order"), the District Court denied the parties' cross motions for summary judgment and remanded for further administrative findings on whether Kreider was "riding the pool," *i.e.*, whether Kreider was the type of dairy for which producer-handler status should be denied pursuant to the promulgation history of the producer-handler exemption. See *Kreider Dairy Farms, Inc. v. Glickman*, No. Civ. A. 95-6648, 1996 WL 472414 (E.D. Pa. August 15, 1996). Neither Kreider nor the USDA appealed the District Court's 1996 Order at that time.

B.

On remand, the ALJ held a hearing and issued a decision on August 12, 1997 holding that Kreider was "riding the pool" and therefore was not entitled to producer-handler status. Under applicable regulations, the ALJ's decision becomes effective thirty-five (35) days after service upon the parties unless appealed to the JO thirty days (30) after service. *See* 7 C.F.R. §§ 900.64(c), 900.65(a) (1999). The

ALJ's decision was served on Kreider on August 15, 1997.

On September 12, 1997, Kreider moved for an extension of time to file its appeal from the ALJ's August 12, 1997 decision. The JO granted Kreider an extension until September 19, 1997. On September 19, 1997, Kreider sent its appeal via Federal Express next day delivery. The Office of the Hearing Clerk stamped Kreider's appeal as received on September 25, 1997.

On January 12, 1998, the JO issued an opinion denying Kreider's administrative appeal as untimely because, under applicable regulations, an administrative appeal is deemed to be filed "when it is postmarked, or when it is received by the hearing clerk." 7 C.F.R. § 900.69(d) (1999). The JO held that because the term "postmarked" requires a United States Postal Service postmark, a date label generated by Federal Express does not toll the appeal period. *See In re: Kreider Dairy Farms, Inc.*, No. 94 AMA Docket No. M-1-2, 1998 WL 25746, at *8 (U.S.D.A. January 12, 1998). Kreider filed a timely motion for reconsideration.

While Kreider's motion for reconsideration was pending before the JO, Kreider filed a complaint with the District Court on February 2, 1998 challenging the ALJ's August 12, 1997 decision and noting that the JO had denied its appeal as untimely.[2] The JO denied Kreider's motion for reconsideration on February 20, 1998. On April 3, 1998, Kreider filed an amended complaint challenging the JO's January 12, 1998 and February 20, 1998 decisions. The USDA filed a motion to dismiss.

By opinion and order entered August 10, 1998 ("1998 Order"), the District Court denied the USDA's motion to dismiss, vacated the JO's January 12, 1998 and February 20, 1998 decisions, and remanded for the JO to consider the merits of Kreider's appeal of the ALJ's August 12, 1997 decision. *See Kreider Dairy Farms, Inc. v. Glickman*, No. 98-518, 1998 WL 481926 (E.D. Pa. August 10, 1998). The District Court held that because Kreider's April 3, 1998 amended complaint challenging the JO's decisions related back to Kreider's initial complaint

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[2]An appeal to the District Court must be taken within twenty days of the entry of the administrative decision. *See* 7 U.S.C.A. § 608c(15)(B) (1994). If Kreider had filed a complaint on February 2, 1998 challenging the JO's January 12, 1998 decision rather than a motion for reconsideration, Kreider's February 2, 1998 complaint would have constituted a timely appeal of that decision because the twentieth day after entry, February 1, 1998, fell on a Sunday. As Kreider conceded before the District Court, however, the District Court lacked jurisdiction over Kreider's February 2, 1998 complaint challenging the ALJ's August 12, 1997 decision because that decision was not a final administrative determination. *See Kreider*, 1998 WL 481926 at *7; *see also* 7 C.F.R. § 900.64(c) (1999) (stating that no decision is final for purposes of judicial review except a final decision issued by the Secretary pursuant to an appeal by a party to the ALJ proceeding).

filed on February 2, 1998, Kreider's appeal of the JO's January 12, 1998 decision was timely. The District Court further determined that because the JO erred in holding that a United States postmark was required under applicable regulations, Kreider's appeal to the JO from the ALJ's decision was timely and should have been considered by the JO. The District Court accordingly entered the 1998 Order remanding for the JO to consider the merits of Kreider's appeal from the ALJ's determination that Kreider was riding the pool and therefore was not entitled to producer-handler status.

C.

On October 7, 1998, the USDA filed a timely appeal from the District Court's 1998 Order which was docketed with us at 98-1906. On October 21, 1998, Kreider filed a cross-appeal. In Kreider's notice of appeal, Kreider listed the docket numbers from the District Court's two prior proceedings hoping to bring an appeal from the District Court's 1996 Order. Kreider's cross-appeal was treated as two separate appeals: 1) a cross-appeal from the District Court's 1998 Order (docketed at 98-1983); and 2) an appeal from the District Court's 1996 Order (docketed at 98-1982).

On October 30, 1998, we sent a letter to the parties questioning our jurisdiction over Kreider's appeal from the District Court's 1996 Order. We invited submissions by the parties outlining the basis for our jurisdiction. Both parties submitted letters. In its letter, the USDA contends that we have jurisdiction over Kreider's appeal from the District Court's 1996 Order under *Forney v. Apfel*, 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269 (1998) and *Sullivan v. Finkelstein*, 496 U.S. 617, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990). In addition, both the USDA and Kreider cite *Forney* as the basis for our jurisdiction in their briefs. Kreider also asserts various other grounds for jurisdiction in its letter. Both parties seem to recognize that Kreider never intended to file a cross-appeal from the District Court's 1998 Order.

II.

Even though Kreider and the USDA agree that we have jurisdiction over the appeals before us, it is well established that we have an independent duty to satisfy ourselves of our appellate jurisdiction regardless of the parties' positions. *See, e.g., Collinsgru v. Palmyra Bd. of Ed.*, 161 F.3d 225, 229 (3d Cir. 1998). The District Court orders from which both Kreider and the USDA have appealed are orders remanding for further administrative proceedings. Normally, an order remanding

for further proceedings is not a final order subject to immediate appellate review under 28 U.S.C. § 1291. *See AJA Assocs. v. Army Corps of Eng'rs*, 817 F.2d 1070, 1073 (3d Cir. 1987) (quoting *United Steelworkers of Am., Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 909 (3d Cir. 1981)). Naturally, however, this general rule is subject to several exceptions.[3]

A.

We traditionally have recognized an exception to the general finality rule for certain District Court orders remanding for further administrative proceedings. Specifically, we have exercised appellate review when a District Court finally resolves an important legal issue in reviewing an administrative agency action and denial of appellate review before remand to the agency would foreclose appellate review as a practical matter. *See AJA*, 817 F.2d at 1073 (citing *Horizons Int'l, Inc. v. Baldrige*, 811 F.2d 154 (3d Cir. 1987)); *Union R.R.*, 648 F.2d at 909.

An example of an immediately appealable remand under this exception is found in *AJA*, 817 F.2d 1070. After the Army Corps denied AJA's application for a permit, AJA filed suit in District Court. *AJA*, 817 F.2d at 1071-72. The District Court denied the Corps' motion for summary judgment and remanded holding that *AJA* was entitled to an administrative hearing. *Id.* at 1072. The Corps appealed.

We exercised jurisdiction over the Corps' appeal even though the District Court's order remanding for further administrative proceedings was not a final order. We noted that the District Court had resolved an important legal issue opening the door to arguments by all applicants that they are entitled to a hearing prior to a permit denial. *Id.* at 1073. In addition, we found that the issue may evade appellate review; if the Corps granted AJA a permit on remand, the Corps would be unable to appeal the hearing issue and if the Corps denied AJA a permit, the issue of whether AJA is entitled to a hearing would be moot. *Id.* For these reasons, we held that the Corps' appeal fell within our previously recognized exception to the finality rule.

B.

In addition to our well established exception to the finality rule for certain

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[3]We refer to "exception" in its general sense that the order on appeal has not resolved all of the issues with respect to all of the parties. We agree with the concurrence that only Congress can set forth the jurisdiction of the federal courts.

District Court orders remanding for further administrative proceedings, the Supreme Court recently carved out a very specific exception to the finality rule for remand orders under the Social Security Act. *See Forney*, 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269, and *Finkelstein*, 496 U.S. 617, 110 S.Ct. 2658, 110 L.Ed.2d 563. In *Finkelstein*, the Court held that the District Court's order effectively holding that certain regulations were invalid and remanding for further administrative findings without resort to those regulations was immediately appealable. The Court relied heavily upon specific language within the Social Security Act in reaching this decision.[4] The Court, however, also noted that if benefits were awarded on remand under the inquiry mandated by the District Court "there would be grave doubt" as to whether the Secretary could appeal his own order. *Finkelstein*, 496 U.S. at 625.

As the Court's recent decision in *Forney* makes clear, however, the *Finkelstein* rationale is limited to the specific language found in the Social Security Act. In *Forney*, the Court held that not only can the Secretary appeal immediately an order remanding for further administrative proceedings, but that a claimant equally is entitled to appeal a District Court order remanding for further administrative proceedings. The Court reasoned that *Finkelstein* primarily was based on the language of the Social Security Act and that the reasoning in *Finkelstein* does not "permit an inference that 'finality' turns on the order's importance, or the availability (or lack of availability) of an avenue for appeal from the different, later, agency determination that might emerge after remand." *Forney*, 524 U.S. at 118 S.Ct. at 1987.

After *Forney*, it is clear that *Finkelstein* did not simply apply our general exception to finality to a social security case, but rather created a separate exception to the finality rule based on the language of the Social Security Act.

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[4]Specifically, the Court found that a District Court's order remanding for further administrative proceedings under the Social Security Act is a final judgment subject to immediate appeal under the following language:

> [T]he district court shall have the power to enter "a *judgment* affirming, modifying, or reversing the decision of the Secretary, *with or without remanding the cause for rehearing*."
>
> * * *
>
> "[t]he judgment of the court *shall be final* except that it shall be subject to review in the same manner as a judgment in other civil actions."

Finkelstein, 496 U.S. at 625, 110 S.Ct. 2658 (emphasis in original).

Accordingly, *Forney* cannot be read to extend appellate jurisdiction to all District Court orders remanding for further administrative proceedings as the parties contend, but rather speaks only to appellate jurisdiction under statutes containing language comparable to that found in the Social Security Act. This conclusion is supported by the fact that, to date, no court has applied *Forney* to a case not arising under the Social Security Act. As the USDA concedes, the AMAA does not contain language comparable to that found in the Social Security Act. *Forney* and *Finkelstein* therefore do not control our jurisdiction over these appeals.

C.

Given that *Forney* and *Finkelstein* do not control our jurisdiction over these appeals, we return to our general exception to the finality rule to determine whether we have jurisdiction over either of the appeals before us. Specifically, we must determine whether either the 1996 Order or 1998 Order finally resolves an important legal issue over which appellate review would be foreclosed as a practical matter in the absence of an immediate appeal.

In its 1996 Order, the District Court determined that the language relating to producer-handler status was ambiguous and that it was appropriate to resort to the promulgation history of the provision at issue. The District Court then remanded for further factual findings as to whether Kreider was the type of dairy the provision was meant to include. On remand, the ALJ determined that Kreider was not entitled to producer-handler status. This determination was subject to review by a JO and then by the District Court.

Under our exception to the finality rule, the 1996 Order is not subject to immediate appeal. It does not finally resolve a particularly important legal issue and, more importantly, it is not an order that will evade appellate review. Absent an order that would evade review, our interest in avoiding piecemeal litigation and duplicative efforts overrides any interest we may have in entertaining the merits of Kreider's appeal at this juncture. Accordingly, our traditional exception to finality in agency proceedings does not afford us jurisdiction over Kreider's appeal from the 1996 Order.[5]

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[5]At oral argument, the USDA asserted that if we intended to examine the merits of Kreider's appeal, the USDA could file a cross-appeal from the District Court's 1996 Order at this juncture to bring its position on the merits before us. Setting aside the obvious problems with the timeliness of such an appeal at this late date, we wish to make clear that because the District Court's 1996 Order is not a final order over which we have appellate jurisdiction, the USDA is equally precluded from
(continued...)

Our exception, however, does provide appellate jurisdiction over the USDA's timely appeal from the 1998 Order. This order vacated the JO's determination that Kreider's appeal was untimely and remanded for the JO to hear the merits of Kreider's appeal from the ALJ's decision. This decision resolves an issue of law that may evade review if immediate appeal is not permitted; should Kreider receive the relief it seeks on remand, it is doubtful that the USDA would be able to appeal its own decision in order to raise the procedural issues decided by the District Court in its 1998 Order. Therefore, under our exception for agency appeals, we have jurisdiction over the USDA's appeal from the 1998 Order.[6]

III.

Having established that we have jurisdiction over the USDA's appeal of the District Court's 1998 Order, we turn now to the merits of that appeal. The USDA asserts that the District Court erred in exercising jurisdiction over Kreider's appeal and in holding that Kreider's administrative appeal was timely. Because we agree that it was improper for the District Court to exercise jurisdiction over Kreider's appeal, we will vacate the District Court's 1998 Order without reaching the issue of whether Kreider's administrative appeal was timely.

After the District Court's initial remand via the 1996 Order, Kreider first filed a complaint in the District Court on February 2, 1998. In this complaint, Kreider sought review of the ALJ's August 12, 1997 decision on the merits. At that time, Kreider's motion for reconsideration of the JO's January 12, 1998 order, which dismissed Kreider's administrative appeal as untimely, was still pending. It is clear to us that the District Court did not have jurisdiction over Kreider's February 2, 1998 complaint.

First, as the District Court recognized, it did not have jurisdiction to review the

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[5](...continued)
appealing the 1996 Order.

[6]Our exception to the finality doctrine for agency appeals mirrors to a large extent the collateral order doctrine, which Kreider has raised as a possible basis for our jurisdiction over its appeal. Under the collateral order doctrine, an otherwise non-final order is immediately appealable if it finally and conclusively determines the disputed question, resolves an important issue separate from the underlying merits, and is effectively unreviewable after final judgment. See *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 378 (3d Cir. 1997) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)). Under either exception to the finality rule, we have jurisdiction over the USDA's appeal but not Kreider's appeal. We likewise reject Kreider's other asserted grounds for our jurisdiction over its appeal as baseless.

ALJ's August 12, 1997 decision because that decision is not a final agency decision subject to judicial review. *See Kreider*, 1998 WL 481926 at * 7. Second, even if Kreider's February 2, 1998 complaint had challenged the JO's January 12, 1998 decision, which it did not, the District Court would have lacked jurisdiction to review that decision at that time due to Kreider's pending motion for reconsideration. *See Stone v. INS*, 514 U.S. 386, 391, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) (noting the general rule that the timely filing of a motion to reconsider an agency's action generally renders the underlying order nonfinal for purposes of judicial review); *West Penn Power Co. v. United States Envtl. Protection Agency*, 860 F.2d 581, 584 (3d Cir. 1988) (same).[7]

Because the District Court lacked jurisdiction to entertain any appeal by Kreider on February 2, 1998, the date Kreider filed its first complaint, the District Court erred in exercising jurisdiction under the theory that Kreider's April 3, 1998 amended complaint related back to Kreider's February 2, 1998 complaint. An amended complaint that purports to relate back to an original complaint asserting an improper appeal which was filed on a date upon which the District Court would have lacked jurisdiction over the appeal raised in the amended complaint, must be dismissed for lack of jurisdiction. *See, e.g., Reynolds v. United States*, 748 F.2d 291, 293 (5th Cir. 1984) (holding that District Court properly dismissed for lack of jurisdiction amended complaint that could only relate back to pleading filed on a date upon which the District Court would have lacked jurisdiction over the issues asserted). Absent a viable relation back theory, Kreider's April 3, 1998 complaint is an untimely appeal of the JO's January 12, 1998 decision.[8] Accordingly, because the District Court lacked jurisdiction over Kreider's appeal of the JO's January 12, 1997 decision, we will vacate the District Court's 1998 Order.

IV.

For the foregoing reasons, we will dismiss summarily Kreider's cross-appeal

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[7]The courts have recognized a limited exception to this rule for immigration cases based upon language found in the Immigration and Naturalization Act. See *Stone*, 514 U.S. at 393-95, 115 S.Ct. 1537. Because the AMAA contains no comparable language, this exception does not apply to Kreider's appeal.

[8]Kreider does not dispute that its April 3, 1998 amended complaint was filed more than twenty days after the District Court's February 20, 1998 denial of Kreider's motion for reconsideration of the JO's January 12, 1998 decision and therefore is untimely absent a viable relation back theory. *See* 7 U.S.C. § 608c(15)(B) (1994).

from the District Court's 1998 Order (No. 98-1983), dismiss Kreider's appeal from the District Court's 1996 Order (No. 98-1982) for lack of jurisdiction, and vacate the judgment of the District Court in the USDA's appeal from the District Court's 1998 Order (No. 98-1906).

SLOVTRER, Circuit Judge, concurring.

I concur in the opinion of Judge Mansmann. I write separately to express my concern that our opinions, and those of other courts, dealing with the issue of appellate jurisdiction over district court orders remanding to an administrative agency have used language that is inconsistent with basic principles of federal jurisdiction. In particular, I take issue with language referring to our jurisdiction in that instance as an "exception" to the finality rule. *See, e.g., Bridge v. United States Parole Commission*, 981 F.2d 97, 101-02 (3d Cir. 1992); *United States v. Spears*, 859 F.2d 284, 287 (3d Cir. 1988); *Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991). In plain words, there can be no judicially created "exception" to the jurisdiction Congress has granted the courts of appeals.

I.

Any analysis of the jurisdiction of the courts of appeals must begin with the recognition that under our Constitutional separation of powers it is Congress that sets the jurisdiction of the federal courts, and the judiciary has no power to make exceptions to the congressional determinations in that respect. *See United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 264, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) (per curiam); *see also* 15A Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 3905, at 232 (2d ed. 1991).

When Congress made its initial division of the jurisdiction between the federal trial courts and the appellate courts, it drew the line at final decisions. "The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." *DiBella v. United States*, 369 U.S. 121, 124, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962) (citing First Judiciary Act, §§ 21, 22, 25, 1 Stat. 73, 83, 84, 85 (1789)); *see also* 15A Wright, Miller & Cooper, *supra*, § 3907, at 268 ("For two centuries, the final judgment rule has been the heart of appellate

jurisdiction in the federal system.").[9]

With few exceptions, that remains the touchstone today. The Supreme Court has explained that the final judgment rule discourages piecemeal appeals which carry with them the potential for harassment and excessive costs for litigants, *see Cobbledick v. United States*, 309 U.S. 323, 325-26, 60 S.Ct. 540, 84 L.Ed. 783 (1940); 15A Wright, Miller & Cooper, *supra*, § 3905, at 239, and protects the independence of the district judge, *see Firestone*, 449 U.S. at 374, 101 S.Ct. 669. The final judgment rule has survived because it is generally believed that it "promot[es] efficient judicial administration." *Id.* (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974)).

Over the years, Congress has made discrete decisions "that particular policies require that private rights be vindicable immediately." *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 880 n. 7, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994) (discussing provision for immediate appeal under 9 U.S.C. § 16(a) when district court declines to send case to commercial arbitrator). However, such a decision is always characterized by an express congressional judgment. *See, e.g.*, 28 U.S.C. § 1292(a)(1) (authorizing appeal from interlocutory orders granting, modifying, denying etc. injunctions); 28 U.S.C. § 1292(b) (authorizing interlocutory appeal on certification). The Supreme Court has cautioned that the existence of those congressional policy judgments "by no means suggests that [the courts] should now be more ready to make similar judgments for themselves" and to expand the scope of appellate jurisdiction beyond that set by Congress. *Digital Equip. Corp.*, 511 U.S. at 880 n. 7.

II.

It follows that the references to "exceptions" to our statutorily authorized jurisdiction are misguided. Even the Supreme Court has no power to make an exception to the finality rule that does not have a statutory predicate. Nonetheless, opinions of the lower federal courts repeatedly refer to the collateral order "exception" emanating from the holding of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), that the courts of appeals have jurisdiction over "a small class of orders" that, albeit not the final decision in the case, resolve important questions completely separate from the

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[9]A final judgment is "a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981).

merits, which would be effectively unreviewable were they to wait appeal from the final judgment in the underlying action. The notion of an "exception" to the finality doctrine is illogical as Congress alone establishes our appellate jurisdiction.

The collateral order doctrine was hardly a new theory of finality never previously comprehended. More than two decades earlier, the Court stated that although final judgments are the rule,

> it is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation.

United States v. River Rouge Improvement Co., 269 U.S. 411, 414, 46 S.Ct. 144, 70 L.Ed. 339 (1926).

A leading treatise observes that "[t]he most certain aspect of collateral order appeals is that they depend on 28 U.S.C. § 1291, and thus must be characterized as appeals from 'final decisions.'" 15A Wright, Miller & Cooper, *supra*, § 3911, at 347; *see also id.* § 3911, at 349 (emphasizing that § 1291 "remains the only available foundation" for collateral orders doctrine). Indeed, the Supreme Court has repeatedly adopted the view that jurisdiction to hear an appeal from a collateral order falls within the authority conferred by § 1291.

In *Johnson v. Fankell*, 520 U.S. 911, 917, 117 S.Ct. 1800, 138 L.Ed.2d 108 (1997), the Court stated: "In [*Cohen*], as in all of our cases following it, we were construing the federal statutory language of 28 U.S.C. § 1291." In his scholarly opinion in *Digital Equipment Corp.*, Justice Souter explained that "[t]he collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." 511 U.S. at 867, 114 S.Ct. 1992. *See also Firestone*, 449 U.S. at 368, 101 S.Ct. 669 ("*Cohen* did not establish new law; rather, it continued a tradition of giving § 1291 a 'practical rather than a technical construction.'"); *Coopers & Lybrand*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) ("[T]he Court held [the *Cohen* order] appealable as a 'final decision' under § 1291."); *Abney v. United States*, 431 U.S. 651, 658, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) ("[T]his Court held [in *Cohen*] that the Court of Appeals had jurisdiction *under § 1291* to entertain an appeal from the District Court's pretrial order." (emphasis added)).

I agree with the majority that the two cases arising under the Social Security Act, *Sullivan v. Finkelstein*, 496 U.S. 617, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990), and *Forney v. Apfel*, 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269 (1998), represent an exception to the final judgment rule. But the exception is one

made by Congress, not the courts.

In *Finkelstein*, the Court considered the jurisdiction of the courts of appeals to hear an appeal by the Secretary of Health and Human Services from a district court's order invalidating regulations issued by the Secretary and remanding to the agency for renewed consideration of the claim for benefits. The Court observed that the language of 42 U.S.C. § 405(g) in the Social Security Act permitted a district court to enter "'a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.'" *Id.* at 625, 110 S.Ct. 2658 (quoting § 405(g)) (emphasis omitted). Further, § 405(g) made clear that such a judgment was "'final except that it shall be subject to review in the same manner as a judgment in other civil actions.'" *Id.* (quoting § 405(g)) (emphasis omitted). In light of this language, the Court concluded that Congress had "define[d] a class of orders as 'final judgments' that by inference would be appealable under § 1291." *Id.* at 628, 110 S.Ct. 2658. Justice Blackmun concurred, but stated he would have treated the appeal as falling within the confines of the collateral order doctrine. Id. at 632, 110 S.Ct. 2658 (Blackmun, J., concurring).

The issue arose eight years later in *Forney v. Apfel*, 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269 (1998). There, it was an individual seeking benefits, rather than the government, who appealed the district court's decision following a remand to the agency under § 405(g). The Court rejected the collateral order theory as the basis for appellate jurisdiction and emphasized, in a unanimous opinion, that Congress had created a class of orders through § 405(g) that were appealable as final orders under § 1291. Thus, because the district court decisions at issue in *Finkelstein* and *Forney* were a class of orders declared "final" by Congress by construction of the language of the Social Security Act, they provide little assistance on the issue facing us now, the appealability of an order remanding to an agency under a statute that has no comparable provision for appeal.

Of course, it would have facilitated our decision as to our appellate jurisdiction over an order remanding to an administrative agency if Congress had explicitly provided for such, and it may be that cases such as this will lead it to consider doing so. In any event, the precedent allowing such an appeal in appropriate circumstances, including that from this court, precludes any retreat now.

The most obvious analog, and the one relied on by many courts of appeals, is the collateral order doctrine, notwithstanding the fact that most of the agency remand orders would not qualify because the remand would rarely be on an issue separate from the merits. *See* 15B Wright, Miller & Cooper, *supra*, § 3914.32, at 240 (asserting that "[a]n impressive number of cases" permit appeal under the doctrine). It has been suggested that the tendency is to accept the appeals of

government agencies, apparently because "administrative agencies, as more or less coordinate branches of government, deserve the protection of special appeal opportunities." *Id.* at 56-57 n. 9 (Supp. 1999) (citing, *inter alia*, *Bergerco Canada v. United States Treasury Dep't*, 129 F.3d 189, 191-92 (D.C. Cir. 1997); *Baca-Prieto v. Guigni*, 95 F.3d 1006, 1008-09 (10th Cir. 1996); *Hanauer v. Reich*, 82 F.3d 1304, 1306-07 (4th Cir. 1996); *Schuck v. Frank*, 27 F.3d 194, 196-97 (6th Cir. 1994)). *But see Cotton Petrol. Corp. v. United States Dep't of the Interior*, 870 F.2d 1515, 1521-22 (10th Cir. 1989); *AJA Assocs. v. Army Corps of Eng'rs*, 817 F.2d 1070, 1072-73 (3d Cir. 1987).

Wright, Miller, and Cooper have summarized the reasons courts rely on the collateral orders doctrine. In some circumstances, an agency may be statutorily barred from appealing its own decision. In others, the agency's decision will render the issue moot, because the agency has complied with the district court's order. Additionally, agencies ought not face the risk of contempt to prompt an immediate appeal, or the danger that the agency will be unable to recapture later any benefits paid in the interim. *See* 15B Wright, Miller & Cooper, *supra*, § 3914.32, at 240-41.

I agree that a practical construction of finality suffices to justify review of an agency remand order in appropriate cases. Such an approach is a considerable improvement over viewing the basis of our jurisdiction as an "exception to finality."

CAL-ALMOND, INC. v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 98-16921.
Decided September 21, 1999.

(Cite as 192 F.3d 1272 (9th Cir.))

Almonds – First amendment.

Almond handlers sought judicial review of the Judicial Officer's denial of their First Amendment challenge to USDA's Almond Marketing Order (7 C.F.R. pt. 981), which imposes mandatory assessments on almond handlers to fund generic almond advertising. The United States District Court for the Eastern District of California upheld USDA's decision and the almond handlers appealed. The United States Court of Appeals for the Ninth Circuit found that the Almond Order does not compel speech or endorsement of messages that are not germane to the purposes of the Agricultural Marketing Agreement Act and the Almond Order and that almond handlers are free to advertise on their own. The Ninth Circuit concluded that the Almond Order is merely a species of economic regulation and does

not violate the almond handlers' First Amendment rights.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Before: REINHARDT, O'SCANNLAIN and W. FLETCHER, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

I

Cal-Almond, Inc., *et al.* (collectively "Cal-Almond"), are almond handlers subject to an almond marketing order ("Almond Order") issued by the United States Department of Agriculture ("USDA") pursuant to the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601 *et seq.* ("Act"). The Almond Order imposes assessments upon handlers based on the tonnage of almonds handled, and a substantial portion of the assessments is used to fund generic advertising, promotion, and marketing of almonds. The Almond Order affords almond handlers the option of directly advertising their own products in certain specified ways, for which they can receive credit against their assessments. More specifically, credit can be received for promotional activities, such as advertising directed at "end users, trade or industrial users," 7 C.F.R. § 981.441(e)(4)(i), so long as "[t]he clear and evident purpose of each activity shall be to promote the sale, consumption or use of California almonds," *id.* § 981.441(e)(2). Prior to the 1993-94 crop year, handlers could receive 100% credit for their own direct advertising pursuant to the "creditable" advertising program. Beginning with the 1993-94 crop year, handlers could receive only two-thirds credit for their own direct advertising pursuant to the "credit-back" advertising program. *See id.* § 981.441(a).

Cal-Almond filed an administrative petition with the USDA alleging that the creditable and credit-back advertising programs violated its First Amendment rights. The ALJ upheld Cal-Almond's First Amendment challenge to the advertising programs, relying on our decision in *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.3d 429 (9th Cir. 1993) ("*Cal-Almond I*"), which held that the creditable almond advertising program constituted compelled speech that violated the almond handler's First Amendment rights, *see id.* at 440. Both parties appealed the ALJ's decision to the USDA's judicial officer, who stayed the proceedings pending the Supreme Court's decision in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) ("*Wileman*").

In *Wileman*, the Court upheld mandatory assessments for generic advertising of California tree fruits as "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." *Id.*, 521 U.S. at 477, 117 S.Ct. 2130. In turn, the Supreme Court granted certiorari in *Cal-Almond I*, vacated this court's decision, and remanded for reconsideration in light of *Wileman*. *See Dept. of Agriculture v. Cal-Almond, Inc.*, 521 U.S. 1113, 117 S.Ct. 2501, 138 L.Ed.2d 1007 (1997) ("*Cal-Almond II*"). We, in turn, remanded *Cal-Almond I* to the district court with instructions to dismiss the First Amendment challenges to the advertising programs, citing *Wileman*. *See Cal-Almond, Inc. v. Dept. of Agriculture*, No. 94-17160 (9th Cir. Sept. 4, 1997) ("*Cal-Almond III*").

In light of the Supreme Court's decision in *Wileman* and *Cal-Almond II*, and our remand for dismissal in *Cal-Almond III*, the USDA's judicial officer reversed the ALJ's decision in this case and held that *Wileman* foreclosed Cal-Almond's First Amendment claims. Cal-Almond sought review in the United States District Court for the Eastern District of California, which also held that Cal-Almond's claims were foreclosed by *Wileman*. Cal-Almond subsequently brought this appeal.

II

Cal-Almond asserts that the *Wileman* analysis does not apply here because the Supreme Court considered the constitutional validity of purely mandatory assessments for generic advertising, while this case concerns the constitutional validity of assessments for generic advertising that are not purely mandatory because credit against the assessments is provided for certain forms of branded advertising. In *Gallo Cattle Co. v. California Milk Advisory Bd.*, 185 F.3d 969 (9th Cir. 1999) ("*Gallo*"), we explained that, in order "[t]o determine whether *Wileman* is dispositive of the claims asserted by [a party], we will go through the same analytical steps that the Court used in *Wileman*." *Id.* at 974 (applying *Wileman* analysis and rejecting First Amendment challenge to mandatory assessments imposed under dairy promotion program that included generic and branded advertising). Thus, in order to determine whether *Wileman* is dispositive here, we must again go through the *Wileman* analytical steps.

Following *Gallo's* lead, we first examine the statutory scheme under which the mandatory assessments for almond marketing were imposed to determine whether constraints have been placed upon the handlers' independent action. *See id.* at 974. After assessing the statutory context, we proceed to *Wileman's* tripartite test, which determines whether the creditable and credit-back advertising programs abridge

Cal-Almond's First Amendment rights, or are "instead part of a 'regulatory scheme' subject to review only as an economic regulation." *Id.* We must consider (1) whether the advertising programs impose a restraint on Cal-Almond's freedom to communicate any message to any audience; (2) whether the advertising programs compel Cal-Almond to engage in any actual or symbolic speech; and (3) whether the advertising programs compel Cal-Almond to endorse or finance any political or ideological views that are not germane to the purposes for which the compelled association is justified. *See id.*

A

The Act confers on the Secretary of Agriculture the power "to establish and maintain [ ] orderly marketing conditions for agricultural commodities." 7 U.S.C. § 602(1). Pursuant to this mandate, the Secretary is empowered to "[e]stablish or provid[e] for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of" almonds, among other commodities. *See id.* § 608c(6)(I). Thus, as in *Gallo* and *Wileman*, it would appear that the almond handlers are "part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme," *id.*, 521 U.S. at 469, nor, indeed, does Cal-Almond dispute in its briefs on appeal whether handlers are so regulated.

B

Cal-Almond asserts that the assessments imposed under the Almond Order restrict its freedom to communicate by limiting the money that it has for advertising; most of Cal-Almond's other objections to the creditable and credit-back advertising programs also boil down to the impact that the assessments imposed under those programs have on its advertising budget. Cal-Almond effectively concedes that purely mandatory assessments would be constitutional under *Wileman*, but asserts that the credit option renders the assessments here unconstitutional. Cal-Almond contends that because it is less likely to receive credit for advertising that suits its purposes, its advertising budget is limited as compared to its competitors.

In *Gallo*, however, we expressly rejected the argument that a decrease in a producer's advertising budget constitutes a limitation on speech, stating that "although the assessments made under the Marketing Order may, as Gallo argues, 'substantially reduce the amount of money Gallo has to spend on its own

advertising used to distinguish its own product,' this 'incidental effect of constraining the size of [Gallo's] advertising budget' does not itself amount to a restriction on speech." *Id.* at 975. This portion of our holding in *Gallo* followed necessarily from *Wileman*, wherein the Supreme Court made plain that "[t]he fact that an economic regulation may indirectly lead to a reduction in a handler's individual advertising budget does not itself amount to a restriction on speech." 521 U.S. at 470, 117 S.Ct. 2130.

The Almond Order does not impose a restraint on Cal-Almond's freedom to communicate because Cal-Almond remains "free to advertise or otherwise communicate any message that it desires in any manner that it desires to any audience that it desires." *Gallo*, 185 F.3d at 975. Cal-Almond's assertion that the credit programs have a disparate impact upon the various handlers' advertising budgets is not relevant to the *Wileman* analysis. As the Supreme Court made plain:

> Similar criticisms might be directed at other features of the regulatory orders that impose restraints on competition that arguably disadvantage particular producers for the benefit of the entire market. Although one may indeed question the wisdom of such a program, its debatable features are insufficient to warrant special First Amendment scrutiny.

Wileman, 521 U.S. at 474, 117 S.Ct. 2130.

C

Cal-Almond asserts that the creditable and credit-back programs compel speech because the Almond Board dictates how individual handlers must conduct their direct advertising if they wish to receive credit against their assessments. We are not persuaded, however. Because almond handlers remain free to choose whether and how to advertise directly, it cannot be said to constitute compelled speech. Handlers can decline to advertise directly and simply pay their assessments. They can directly advertise in an attempt to receive credit against their assessments. Or, they can directly advertise regardless of whether they will receive credit. *Cf. Gallo*, 185 F.3d at 975 (holding that the requirement that producers display promotional seal in order to fully benefit from generic advertising campaign did not constitute compelled speech because producers remained "free to choose not to carry the seal"). Rather than supporting Cal-Almond's assertion that *Wileman* is distinguishable, the flexibility provided by the creditable and credit-back programs instead supports the conclusion that the assessments here are indeed constitutional.

The program upheld in *Wileman* imposed purely mandatory assessments and therefore provided little recourse to those producers who objected to the messages disseminated, questioned the wisdom of the way the assessments were spent, or doubted the efficacy of generic advertising. By contrast, the programs here potentially accommodate objectors: handlers who object to generic advertising or believe there is a more cost-effective means of promoting almonds have the option of performing their own direct advertising for which they may receive credit against their assessments. Thus, the creditable and credit-back programs potentially limit the extent to which almond handlers must fund advertising to which they object, and if the handlers cannot receive credit for their preferred form of direct advertising, they can simply pay the assessments and will be no worse off than the producers in *Wileman.*

D

Cal-Almond attempts to distinguish *Wileman* based on its objection to the messages funded by the assessments and the messages for which credit may be received. As *Gallo* makes plain, however, regardless of whether Cal-Almond has legitimate ideological objections to those messages, those objections do not render the advertisements compelled speech in violation of the First Amendment so long as the messages are germane to the purposes of the Almond Order and the Act. *See id.*, 185 F.3d at 975. Here, there can be no dispute that messages, generic or branded, promoting almond sales are germane to the Almond Order's and the Act's purpose, which is "to assist, improve, or promote the marketing, distribution, and consumption" of almonds. 7 U.S.C. § 608c(6)(I); *cf. Wileman*, 521 U.S. at 476, 117 S.Ct. 2130 ("Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme."); *Gallo*, 185 F.3d at 976 ("The [ ] employment of a generic advertising campaign of California Milk and dairy products . . . is obviously 'germane' to [the California dairy marketing order's] purposes.").

Moreover, at base, Cal-Almond's objections to the advertising programs and the assessments imposed thereunder do not appear to be ideological or "to engender any crisis of conscience." *Wileman*, 521 U.S. at 472, 117 S.Ct. 2130. Instead, Cal-Almond questions the effectiveness of the advertising programs and the messages funded by the assessments. More specifically, Cal-Almond objects to the Almond Board's generic advertising for snack almonds, because Cal-Almond does not sell snack almonds. *Wileman*, however, makes plain that such challenges to the wisdom or effectiveness of a promotional program raise

questions of economic policy, rather than questions of constitutional import:

> Neither the fact that respondents may prefer to foster [a] message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message. The mere fact that objectors believe their money is not being well spent "does not mean [that] they have a First Amendment complaint."

Id. (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 456, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984)).

Cal-Almond also objects to the provision of credit against the assessments for branded direct advertising. In *Gallo*, we were presented with a similar objection to the use of assessments to fund promotional activities that were not generic, but rather branded, and thus promoted certain brands to the exclusion of others. Following *Wileman*, we rejected the objection as irrelevant to the constitutionality of the advertising program, stating that "[t]his claim, 'while perhaps calling into question the administration of portions of the program, [has] no bearing on the validity of the entire program.'" *Gallo*, 185 F.3d at 976 n.9 (quoting *Wileman*, 521 U.S. at 468, 117 S.Ct. 2130).

Similarly here, Cal-Almond's objections have no bearing on the constitutionality of the creditable and credit-back programs, but rather, call into question the administration of those programs. Because those programs do not compel speech or the endorsement of non-germane messages, leaving Cal- Almond free to advertise however it desires, the Almond Order 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." *Wileman*, 521 U.S. at 477, 117 S.Ct. 2130.

III

Lastly, Cal-Almond asserts that *Cal-Almond I* is dispositive. However, in light of the Supreme Court's remand in *Cal-Almond II* and our subsequent remand for dismissal in *Cal-Almond III*, *Cal-Almond I* has been implicitly overruled.

IV

For the foregoing reasons, the Almond Order does not abridge Cal- Almond's First Amendment rights.

AFFIRMED.

ANIMAL WELFARE ACT

COURT DECISION

PETER A. LANG; NANCY ANNE LANG, dba SAFARI WEST v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 98-70807.
Filed July 16, 1999.

(Cite as 189 F.3d 473 (9th Cir.))(Table)

Animal Welfare Act – Handling animals – Substantial evidence – Due process – Amended complaint.

The United States Court of Appeals for the Ninth Circuit denied petitioners' petition for review of the Judicial Officer's finding that Peter A. Lang violated 9 C.F.R. § 2.131(a). The Court held that the Judicial Officer's decision was supported by substantial evidence and that the petitioners' contention that the Judicial Officer's decision was arbitrary and capricious lacks merit. The Court rejected petitioners' contention that Lang's due process rights were violated when the government sought to amend its complaint against him and add additional violations. The Court stated that this contention lacks merit because the ALJ explicitly denied the request to amend the complaint and the Judicial Officer did not consider any evidence not relevant to the allegations in the complaint.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

MEMORANDUM[1]

On Petition for Review of an Order of the Judicial Officer of the United States Department of Agriculture

Submitted July 12, 1999[2]

Before: FARRIS, HAWKINS, and GRABER, Circuit Judges.

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[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2]The Langs' request for oral argument is denied. The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Peter A. Lang and Nancy A. Lang, doing business as Safari West, petition pro se for review of the order of the Judicial Officer ("JO") dismissing their appeal from the administrative law judge's ("ALJ") assessment of a civil penalty and issuance of an order to cease and desist from handling animals in violation of the Animal Welfare Act, 7 U.S.C. §§ 2131-2159.[3] We have jurisdiction under 7 U.S.C. § 2149(c), and we deny the petition.

Our review of administrative decisions is narrow, and administrative agency decisions will be upheld unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Farley & Calfee, Inc. v. Department of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991). The JO's findings must be upheld if they are supported by substantial evidence. *See Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1454 (9th Cir. 1988). Lang contends that the JO's decision was arbitrary and capricious and his findings were not supported by substantial evidence. This contention lacks merit. Substantial evidence supports the JO's finding that Lang failed to handle an animal in his care as "expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort." *See* 9 C.F.R. § 2.131(a)(1).

Lang contends that his due process rights were violated because the government sought to amend its complaint against him and add additional violations. This contention lacks merit because the ALJ explicitly denied the request to amend the complaint and the JO did not consider any evidence not relevant to the allegations in the complaint concerning the handling of the lechwes.

PETITION FOR REVIEW DENIED.

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[3]The Langs also appeal the ALJ's original decision. The ALJ's decision, however, is not a final appealable order. *See* 28 U.S.C. § 2342(2).

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: NANCY M. KUTZ AND STEVEN M. KUTZ.
AWA Docket No. 99-0001.
Decision and Order as to Nancy M. Kutz filed July 12, 1999.

Default — Failure to file timely answer — Failure to respond to complaint — Dealer — Operating without license — Ability to pay — Cease and desist order — Civil penalty — License suspension — License disqualification.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt assessing a civil penalty of $16,000 against Respondent, suspending Respondent's Animal Welfare Act (Act) license, and directing Respondent to cease and desist from violating the Act and the Regulations and Standards issued under the Act. 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 Judicial Officer stated that even if Respondent's late-filed answer had been timely filed, it would be deemed an admission of the allegations of the complaint because Respondent's answer did not respond to the allegations in the complaint. The Judicial Officer also concluded that Respondent's ability to pay the civil penalty is not a basis for setting aside or reducing the civil penalty assessed by the ALJ.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator, 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 (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on October 15, 1998.

The Complaint alleges that Nancy M. Kutz and Steven M. Kutz [hereinafter Respondents] operated as a dealer, as defined in the Animal Welfare Act and the Regulations without obtaining an Animal Welfare Act license, 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) (Compl. ¶ II).

The Hearing Clerk served Respondents with a copy of the Complaint, a copy of the Rules of Practice, and a service letter on October 22, 1998.[1] Respondents failed to answer the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On November 19, 1998, Respondent Nancy M. Kutz filed a late Answer, which does not respond to the allegations of the Complaint, as required by section 1.136(b) of the Rules of Practice (7 C.F.R. § 1.136(b)).

On March 2, 1999, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed 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]. The Hearing Clerk served a copy of Complainant's Motion for Default Decision, a copy of Complainant's Proposed Default Decision, and a service letter on Respondent Nancy M. Kutz on March 11, 1999,[2] and on Respondent Steven M. Kutz on April 23, 1999.[3] Respondents did not file objections to Complainant's Motion for Default Decision or Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On May 19, 1999, Administrative Law Judge James W. Hunt [hereinafter the ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Initial Decision and Order]: (1) concluding that Respondents operated as a dealer, as defined in the Animal Welfare Act and the Regulations without obtaining an Animal Welfare Act license, 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) directing that Respondents cease and desist from violating the Animal Welfare Act, the Regulations, and the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) [hereinafter the Standards]; (3) assessing Respondents a $16,000 civil penalty; and (4) suspending Respondents' Animal Welfare Act license for 90 days.

On June 1, 1999, Respondent Nancy M. Kutz appealed to the Judicial Officer; on June 21, 1999, Complainant filed Memorandum in Opposition to Appeal; and

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[1]See Domestic Return Receipt for Article Number P 368 427 000 and Domestic Return Receipt for Article Number P 368 427 0001 [sic].

[2]See Domestic Return Receipt for Article Number P 368 427 112.

[3]See memorandum of "TMFisher" dated April 23, 1999.

on June 23, 1999, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision as to Respondent Nancy M. Kutz.[4]

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)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order as to Nancy M. Kutz. Additional conclusions by the Judicial Officer follow the ALJ's Conclusions, as restated.

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

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[4]The Hearing Clerk served the Initial Decision and Order on Respondent Steven M. Kutz on June 3, 1999. (See memorandum of "TMFisher" dated June 3, 1999.) Respondent Steven M. Kutz did not appeal the Initial Decision and Order, and in accordance with section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the Initial Decision and Order became effective as to Respondent Steven M. Kutz on July 8, 1999.

(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. . . .

. . . .

§ 2151. Rules and regulations

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. §§ 2131, 2132(f), 2134, 2149(a), (b), 2151.

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. . . .

. . . .

(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)(1), (f).

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

Respondents 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)).[5] Section 1.136(c) of the

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[5]Respondent Nancy M. Kutz filed an Answer on November 19, 1998, 28 days after the Hearing Clerk served the Complaint on Respondent Nancy M. Kutz. Respondent Nancy M. Kutz's late-filed (continued...)

Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file a timely answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the allegations of the Complaint are adopted as Findings of Fact, and this Decision and Order as to Nancy M. Kutz 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. Respondents, Nancy M. Kutz and Steven M. Kutz, are individuals whose mailing address is P.O. Box 203, Highmore, South Dakota 57103.

2. Respondent Nancy M. Kutz was licensed as a dealer until she surrendered her Animal Welfare Act license effective March 3, 1997. Respondent Nancy M. Kutz was also the respondent in *In re Nancy Kutz* (Consent Decision), 55 Agric. Dec. 427 (1996).

3. Respondent Steven M. Kutz became licensed as a dealer under the Animal Welfare Act and the Regulations on August 12, 1998, and Respondent Nancy M. Kutz is a co-owner of the licensed business.

4. Respondents, during the period from at least March 21, 1997, through at least August 19, 1997, were operating as a dealer, as defined in the Animal Welfare Act and the Regulations, without having obtained a license, 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). Respondents sold dogs in commerce for resale for use as pets and transported the dogs and offered the dogs for transportation. The purchase, transportation, offer for transportation, and sale of each dog constitutes a separate violation of the Animal Welfare Act and the Regulations. Respondents' violations include, but are not limited to, the sale and the transportation of at least 15 dogs (1 dog on March 21, 1997; 8 dogs on May 21, 1997; 2 dogs on July 24, 1997; and 4 dogs on August 19, 1997).

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[5](...continued)
Answer does not respond to the allegations of the Complaint, as required by section 1.136(b) of the Rules of Practice (7 C.F.R. § 1.136(b)). Therefore, even if I found that Respondent Nancy M. Kutz's Answer was timely filed (which I do not find), I would deem her Answer to be an admission of the allegations of the Complaint, as provided in section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)).

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. The Order issued in this Decision and Order as to Nancy M. Kutz, *infra*, is authorized by the Animal Welfare Act and warranted under the circumstances.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Nancy M. Kutz states in a letter addressed to Robert Ertman, Complainant's counsel, dated May 28, 1999, and filed on June 1, 1999, that she has "done nothing wrong" and that she is unable to pay the $16,000 civil penalty assessed by the ALJ in the Initial Decision and Order. I infer that Respondent Nancy M. Kutz's letter to Mr. Ertman, dated May 28, 1999, is Respondent Nancy M. Kutz's Appeal Petition.

Respondent Nancy M. Kutz's denial in her Appeal Petition of the allegations of the Complaint is the first filing in which Respondent Nancy M. Kutz denies the allegations of the Complaint. Respondent Nancy M. Kutz's denial is too late to be considered.

On October 22, 1998, the Hearing Clerk served a copy of the Complaint, a copy of the Rules of Practice, and a service letter on Respondents.[6] Sections 1.136(a), 1.136(c), and 1.139 of the Rules of Practice clearly state the consequences of failing to file a timely answer, 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.

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[6]See note 1.

§ 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.

7 C.F.R. §§ 1.136(a), (c), .139.

Moreover, the Complaint served on Respondents on October 22, 1998, informs Respondents of the consequences of failing to file a timely answer, as follows:

The respondents 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.

Similarly, the Hearing Clerk informed Respondents in the service letter, which accompanied the copies of the Complaint and the Rules of Practice, that a timely answer must be filed, as follows:

CERTIFIED RECEIPT REQUESTED

October 16, 1998

Ms. Nancy M. Kutz
Mr. Steven M. Kutz
P.O. Box 203
Highmore, South Dakota 57103

Dear Sir/Madam:

Subject: In re: Nancy M. and Steven M. Kutz - Respondents
AWA Docket No. 99-0001

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 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/
Regina Paris
Acting Hearing Clerk

Letter dated October 16, 1998, from Regina Paris, Acting Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Nancy M. Kutz and Steven M. Kutz (emphasis in original).

Respondents' Answer was required to be filed no later than November 12, 1998.[7] Respondent Nancy M. Kutz's first filing in this proceeding was filed on November 19, 1998, 28 days after the Hearing Clerk served the Complaint on Respondents. Respondents' failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Therefore, Respondents are deemed, for the purposes of this proceeding, to have admitted the allegations of the Complaint.

Moreover, Respondent Nancy M. Kutz's late-filed Answer does not respond to the allegations of the Complaint. Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that a failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for the purposes of the proceeding, an admission of the allegation. Therefore, even if I found that Respondent Nancy M. Kutz's Answer was timely filed (which I do not find), I would deem her Answer to be an admission of the allegations of the Complaint, as provided in section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)).

On March 2, 1999, in accordance with 7 C.F.R. § 1.139, Complainant filed Motion for Default Decision and Proposed Default Decision, based upon Respondents' failure to file a timely answer and Respondent Nancy M. Kutz's failure to respond to the allegations of the Complaint in her late-filed Answer. On March 11, 1999, the Hearing Clerk served a copy of Complainant's Motion for Default Decision, a copy of Complainant's Proposed Default Decision, and a

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[7]Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) provides that an answer must be filed within 20 days after the service of the complaint. The Hearing Clerk served the Complaint on Respondents on October 22, 1998, and 20 days after service would require Respondents to file an answer no later than November 11, 1998. However, November 11, 1998, was Veteran's Day, a legal public holiday. See 5 U.S.C. § 6103(a). Section 1.147(h) of the Rules of Practice (7 C.F.R. § 1.147(h)) provides that when the time for filing any document expires on a Saturday, Sunday, or Federal holiday, the time for filing shall be extended to include the next following business day. Therefore, Respondents' Answer was due November 12, 1998.

service letter dated March 3, 1999, on Respondent Nancy M. Kutz,[8] and on April 23, 1999, the Hearing Clerk served a copy of Complainant's Motion for Default Decision, a copy of Complainant's Proposed Default Decision, and a service letter dated March 3, 1999, on Respondent Steven M. Kutz.[9] The March 3, 1999, service letter from the Hearing Clerk states, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> March 3, 1999
>
> Ms. Nancy M. Kutz and
> Mr. Steven M. Kutz
> P.O. Box 203
> Highmore, South Dakota 57103
>
> Dear Sir/Madam:
>
> Subject: In re: Nancy M. and Steven M. Kutz - Respondent
> AWA Docket No. 99-0001
>
> 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 Fact 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

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[8]See note 2.

[9]See note 3.

March 3, 1999, letter from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Nancy M. Kutz and Steven M. Kutz.

Respondents 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, and on May 19, 1999, the ALJ filed the Initial Decision and Order.

On June 1, 1999, Respondent Nancy M. Kutz filed her Appeal Petition in which she asserts she has "done nothing wrong." I infer that Respondent Nancy M. Kutz's assertion that she has "done nothing wrong" is a general denial of the allegation in the Complaint that she 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). Respondent Nancy M. Kutz's denial, which was filed more than 6 months after Respondent Nancy M. Kutz's answer was due and filed 42 days after Respondent Nancy M. Kutz's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were due, is filed too late to be considered.

Respondent Nancy M. Kutz also indicates in her Appeal Petition that she is unable to pay the $16,000 civil penalty assessed by the ALJ. Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and Standards, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondent Nancy M. Kutz's inability to pay the $16,000 civil penalty assessed by the ALJ is not a basis for setting aside or reducing the $16,000 civil penalty assessed by the ALJ.[10]

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[10]The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. *See In re James E. Stephens*, 58 Agric. Dec. ___, slip op. at 66-67 (May 5, 1999) (stating that the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act and the Regulations and the Standards); *In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 94 (Dec. 14, 1998) (stating that a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed); *In re David M. Zimmerman*, 57 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

(continued...)

Although on rare occasions default decisions have been set aside for good cause shown or where the complainant did not object,[11] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer[12] or based upon a respondent's failure in an answer to respond to

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[10](...continued)
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 a 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).

[11]*See In re H. Schnell & Co.*, 57 Agric. Dec. ___ (Sept. 17, 1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the United States Constitution); *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) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

[12]*See generally In re Anna Mae Noell*, 58 Agric. Dec. ___ (Jan. 6, 1999) (holding that the default decision was properly issued where the respondents filed an answer 49 days after service of the (continued...)

[12](...continued)
complaint on the respondents and that the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Jack D. Stowers*, 57 Agric. Dec. __ (July 16, 1998) (holding that the default decision was properly issued where the respondent filed his answer 1 year and 12 days after service of the complaint on the respondent and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding that the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding that the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding that the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding that the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and that the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding that the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994, and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding that the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny material allegations of the complaint and that the respondent is deemed, by his failure to file a timely answer and failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding that the default decision was properly issued where the respondents failed to file a timely answer and that the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of
(continued...)

the allegations of the complaint.[13]

The Rules of Practice provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent Nancy M. Kutz's first filing in this proceeding was filed 28 days after the Hearing Clerk served Respondents with the Complaint, and Respondent Nancy M. Kutz's first filing does not respond to the allegations of the Complaint. Respondent Nancy M. Kutz's failure to file a timely answer is deemed, for the purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Moreover, even if Respondent Nancy M. Kutz's first filing had been timely, it would be deemed an admission of the allegations of the Complaint because it does not respond to the allegations of the Complaint.

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[12](...continued)
the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

[13]*See generally In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733 (1992) (stating that since the respondent failed to deny the allegation of interstate commerce in its answer, the allegation as to interstate commerce in the complaint is deemed admitted); *In re Rex Kneeland*, 50 Agric. Dec. 1571 (1991) (holding that the default decision was properly issued where the answer, filed late, does not deny the material allegations of the complaint); *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) (stating that the respondent's answer was filed late and fails to deny the material allegations of the complaint; either reason warrants a default decision); *In re Kathleen D. Warner*, 46 Agric. Dec. 763 (1987) (Ruling on Certified Question) (ruling that a default decision should be issued because the respondent's answer does not deny the material allegations of the complaint); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding that the default decision was properly issued where the answer admits or does not deny material allegations of the complaint); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding that the default decision was properly issued where an answer, filed late, does not deny material allegations of the complaint); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding that the default decision was properly issued where the answer does not deny material allegations of the complaint); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding that the default decision was properly issued where an answer, filed late, does not deny material allegations of the complaint); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding that the default decision was properly issued where the answer does not deny material allegations of the complaint); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding that the default decision was properly issued where the answer, filed late, does not deny material allegations of the complaint); *In re Michael A. Lucas*, 43 Agric. Dec. 1721 (1984) (stating that since the respondent's answer fails to deny the allegations of the complaint, the administrative law judge's default decision was properly issued).

Further, the Rules of Practice require that any objections to a motion for a default decision and proposed default decision must be filed within 20 days after service of the motion and proposed default decision (7 C.F.R. § 1.139). Respondents did not file any objections to Complainant's Motion for Default Decision and Proposed Default Decision.

Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding.

Accordingly, the Initial Decision and Order was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent Nancy M. Kutz of her rights under the due process clause of the Fifth Amendment to the United States Constitution.[14]

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

Order

1. Respondent Nancy M. Kutz, 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 engaging in any activity for which a license is required under the Animal Welfare Act and the Regulations, without being licensed.

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

2. Respondent Nancy M. Kutz is assessed a civil penalty of $16,000.[15] The

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[14]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the United States Constitution where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

[15]The ALJ assessed Respondents a $16,000 civil penalty (Initial Decision and Order at 4). The ALJ's Initial Decision and Order became effective as to Respondent Steven M. Kutz on July 8, 1999. The Initial Decision and Order did not become effective as to Respondent Nancy M. Kutz due to her timely appeal. The $16,000 civil penalty assessed against Respondent Nancy M. Kutz in paragraph

(continued...)

civil penalty shall be paid by a certified check or money order, made payable to the "Treasurer of the United States," and sent to:

Robert A. Ertman
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

Respondent Nancy M. Kutz's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 65 days after service of this Order on Respondent Nancy M. Kutz. Respondent Nancy M. Kutz shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 99-0001.

3. (a) If Respondent Nancy M. Kutz has an Animal Welfare Act license at the time this Order is issued, Respondent Nancy M. Kutz's Animal Welfare Act license is suspended for a period of 90 days and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and this Order, including the payment of the civil penalty assessed in paragraph 2 of this Order. When Respondent Nancy M. Kutz demonstrates to the Animal and Plant Health Inspection Service that she has satisfied the conditions in paragraph 3(a) 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 Nancy M. Kutz's Animal Welfare Act license.

The Animal Welfare Act license suspension provisions of this Order shall become effective on the 65th day after service of this Order on Respondent Nancy M. Kutz.

(b) If Respondent Nancy M. Kutz does not have an Animal Welfare Act license at the time this Order is issued, Respondent Nancy M. Kutz is disqualified

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[15](...continued)
2 of this Order is not in addition to the civil penalty assessed by the ALJ against Respondent Steven M. Kutz. Instead, paragraph 2 of this Order has the effect of making Respondent Nancy M. Kutz jointly and severally liable with Respondent Steven M. Kutz for a single $16,000 civil penalty.

from obtaining an Animal Welfare Act license for a period of 90 days and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and this Order, including the payment of the civil penalty assessed in paragraph 2 of this Order. When Respondent Nancy M. Kutz demonstrates to the Animal and Plant Health Inspection Service that she has satisfied the conditions in paragraph 3(b) 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 disqualification of Respondent Nancy M. Kutz from obtaining an Animal Welfare Act license.

The Animal Welfare Act license disqualification provisions of this Order shall become effective on the day after service of this Order on Respondent Nancy M. Kutz.

In re: MICHAEL A. HUCHITAL, Ph.D., d/b/a QUALITY ANTISERA DEVELOPMENT AND PRODUCTION.
AWA Docket No. 97-0020.
Decision and Order filed November 4, 1999.

Research facility – Dealer – Testing – Animal facilities – Housekeeping – Veterinary care – Ventilation – Inspection – Civil penalty – Sanction policy – Cease and desist order.

The Judicial Officer affirmed the decision by Judge Hunt (ALJ) that Respondent failed to comply with the Standards of care for rabbits: that Respondent failed to provide interior building surfaces of indoor housing facilities that were substantially impervious to moisture and capable of being readily sanitized (9 C.F.R. § 3.51(d)); that Respondent failed to keep the premises (buildings and grounds) clean and in good repair to protect animals from injury and to facilitate prescribed husbandry practices (9 C.F.R. § 3.56(c)); that Respondent failed to sufficiently ventilate indoor housing facilities for rabbits to provide for the health and well-being of the rabbits and to minimize odors and ammonia levels (9 C.F.R. § 3.51(b)); that Respondent failed to sanitize primary enclosures for rabbits at least once every 30 days (9 C.F.R. § 3.56(b)(1)); and that Respondent failed to clean pans under primary enclosures for rabbits at least once each week (9 C.F.R. § 3.56(a)(3)). In addition, the Judicial Officer found that Respondent failed to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and to provide veterinary care to an animal in need of care (9 C.F.R. § 2.40) and that Respondent refused to permit Animal and Plant Health Inspection Service officials to document, by the taking of photographs, conditions of noncompliance in Respondent's facility (9 C.F.R. § 2.126(a)(5)). The Judicial Officer rejected Complainant's contention that Respondent operated a *research facility*, as defined in the Animal Welfare Act (AWA) and the regulations issued under the AWA. The Judicial Officer assessed a $3,750 civil penalty against Respondent and ordered Respondent to cease and desist from violations of the AWA and the

regulations and standards issued under the AWA.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, 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 3, 1997.

The Complaint alleges that Michael A. Huchital [hereinafter Respondent] violated the Animal Welfare Act and the Regulations and Standards. On April 2, 1997, Respondent filed an Answer denying the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the ALJ] presided over a hearing on November 18, 1998, in New York, New York. Frank Martin, Jr., and Carla M. Wagner, Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], appeared on behalf of Complainant.[1] Respondent appeared pro se.

On January 19, 1999, Respondent filed a brief [hereinafter Respondent's Brief], and on January 21, 1999, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof [hereinafter Complainant's Brief]. On March 29, 1999, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondent violated the Animal Welfare Act and the Standards; (2) directed Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessed Respondent a $1,200 civil penalty (Initial Decision and Order at 15-16).

On June 24, 1999, Complainant appealed to the Judicial Officer; on October 26, 1999, Respondent filed a response to Complainant's appeal; and on October 27,

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[1]On April 2, 1999, Colleen A. Carroll entered an appearance as counsel for Complainant (Notice of Appearance).

1999, 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 agree with the ALJ's Initial Decision and Order, except that I disagree with the civil penalty assessed by the ALJ, and I find, in addition to the 13 violations of the Standards found by the ALJ, that Respondent violated 9 C.F.R. § 3.56(c) on April 18, 1995; 9 C.F.R. § 2.126(a)(5) on May 28 and May 29, 1996; and 9 C.F.R. § 2.40 on April 18, 1995, and October 16, 1996. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order with modifications, which reflect my disagreement with the ALJ. Additional conclusions by the Judicial Officer follow the ALJ's Conclusions of Law, as restated.

Complainant's exhibits are referred to as "CX" 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

§ 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—

. . . .

(e) The term "research facility" means any school (except an elementary or secondary school), institution, or organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or transports live animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments: *Provided*, That the Secretary may exempt, by regulation, any such school, institution, organization, or person that does not use or intend to use live dogs or cats, except those schools, institutions, organizations, or persons, which use substantial numbers (as determined by the Secretary) of live animals the principal function of which schools, institutions, organizations, or persons is biomedical research or testing, when in the judgment of the Secretary, any such exemption does not vitiate the purpose of 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.

. . . .

§ 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

. . . .

(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.

. . . .

§ 2151. Rules and regulations

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. §§ 2131, 2132(e)-(f), 2134, 2146(a), 2149(b), 2151.

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.

. . . .

Research facility means any school (except an elementary or secondary school), institution, organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or

transports live animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments: *Provided*, That the Administrator may exempt, by regulation, any such school, institution, organization, or person that does not use or intend to use live dogs or cats, except those schools, institutions, organizations, or persons, which use substantial numbers (as determined by the Administrator) of live animals the principal function of which schools, institutions, organizations, or persons is biomedical research or testing, when in the judgment of the Administrator, any such exemption does not vitiate the purpose of the Act.

. . . .

PART 2—REGULATIONS

. . . .

SUBPART C—RESEARCH FACILITIES

. . . .

§ 2.31 Institutional Animal Care and Use Committee (IACUC).

(a) The Chief Executive Officer of the research facility shall appoint an Institutional Animal Care and Use Committee (IACUC), qualified through the experience and expertise of its members to assess the research facility's animal program, facilities, and procedures. Except as specifically authorized by law or these regulations, nothing in this part shall be deemed to permit the Committee or IACUC to prescribe methods or set standards for the design, performance, or conduct of actual research or experimentation by a research facility.

(b) IACUC Membership. . . .

. . . .

(3) Of the members of the Committee:

. . . .

(ii) At least one shall not be affiliated in any way with the facility other than as a member of the Committee, and shall not be a member of the immediate family of a person who is affiliated with the facility. The Secretary intends that such person will provide representation for general

community interests in the proper care and treatment of animals;

. . . .

(c) IACUC Functions. With respect to activities involving animals, the IACUC, as an agent of the research facility, shall:

(1) Review, at least once every six months, the research facility's program for humane care and use of animals, using title 9, chapter I, subchapter A—Animal Welfare, as a basis for evaluation;

(2) Inspect, at least once every six months, all of the research facility's animal facilities, including animal study areas, using title 9, chapter I, subchapter A—Animal Welfare, as a basis for evaluation; *Provided, however*, That animal areas containing free-living wild animals in their natural habitat need not be included in such inspection;

(3) Prepare reports of its evaluations conducted as required by paragraphs (c)(1) and (2) of this section, and submit the reports to the Institutional Official of the research facility; *Provided, however*, That the IACUC may determine the best means of conducting evaluations of the research facility's programs and facilities; and *Provided, further*, That no Committee member wishing to participate in any evaluation conducted under this subpart may be excluded. The IACUC may use subcommittees composed of at least two Committee members and may invite *ad hoc* consultants to assist in conducting the evaluations, however, the IACUC remains responsible for the evaluations and reports as required by the Act and regulations. The reports shall be reviewed and signed by a majority of the IACUC members and must include any minority views. The reports shall be updated at least once every six months upon completion of the required semi-annual evaluations and shall be maintained by the research facility and made available to APHIS and to officials of funding Federal agencies for inspection and copying upon request. The reports must contain a description of the nature and extent of the research facility's adherence to this subchapter, must identify specifically any departures from the provisions of title 9, chapter I, subchapter A—Animal Welfare, and must state the reasons for each departure. The reports must distinguish significant deficiencies from minor deficiencies. A significant deficiency is one which, with reference to Subchapter A, and, in the judgment of the IACUC and the Institutional Official, is or may be a threat to the health or safety of the animals. If program or facility deficiencies are noted, the reports must contain a reasonable and specific plan and schedule with dates for correcting each deficiency. Any failure to adhere to the plan and schedule that results in a significant deficiency remaining uncorrected shall

be reported in writing within 15 business days by the IACUC, through the Institutional Official, to APHIS and any Federal agency funding that activity;

. . . .

(6) Review and approve, require modifications in (to secure approval), or withhold approval of those components of proposed activities related to the care and use of animals, as specified in paragraph (d) of this section[.]

. . . .

(d) IACUC review of activities involving animals. (1) In order to approve proposed activities or proposed significant changes in ongoing activities, the IACUC shall conduct a review of those components of the activities related to the care and use of animals and determine that the proposed activities are in accordance with this subchapter unless acceptable justification for a departure is presented in writing; *Provided, however*, That field studies as defined in part 1 of this subchapter are exempt from this requirement. Further, the IACUC shall determine that the proposed activities or significant changes in ongoing activities meet the following requirements:

(i) Procedures involving animals will avoid or minimize discomfort, distress, and pain to the animals;

(ii) The principal investigator has considered alternatives to procedures that may cause more than momentary or slight pain or distress to the animals, and has provided a written narrative description of the methods and sources, *e.g.*, The Animal Welfare Information Center, used to determine that alternatives were not available;

(iii) The principal investigator has provided written assurance that the activities do not unnecessarily duplicate previous experiments;

(iv) Procedures that may cause more than momentary or slight pain or distress to the animals will:

(A) Be preformed with appropriate sedatives, analgesics or anesthetics, unless withholding such agents is justified for scientific reasons, in writing, by the principal investigator and will continue for only the necessary period of time;

. . . .

(viii) Personnel conducting procedures on the species being maintained or studied will be appropriately qualified and trained in those procedures;

. . . .

(5) The IACUC shall conduct continuing reviews of activities covered by this subchapter at appropriate intervals as determined by the IACUC, but

not less than annually[.]

. . . .

(e) A proposal to conduct an activity involving animals, or to make a significant change in an ongoing activity involving animals, must contain the following:

(1) Identification of the species and the approximate number of animals to be used;

(2) A rationale for involving animals, and for the appropriateness of the species and numbers of animals to be used;

(3) A complete description of the proposed use of the animals;

(4) A description of procedures designed to assure that discomfort and pain to animals will be limited to that which is unavoidable for the conduct of scientifically valuable research, including provision for the use of analgesic, anesthetic, and tranquilizing drugs where indicated and appropriate to minimize discomfort and pain to animals; and

(5) A description of any euthanasia method to be used.

§ 2.32 Personnel qualifications.

(a) It shall be the responsibility of the research facility to ensure that all scientists, research technicians, animal technicians, and other personnel involved in animal care, treatment, and use are qualified to perform their duties. This responsibility shall be fulfilled in part through the provision of training and instruction to those personnel.

(b) Training and instruction shall be made available, and the qualifications of personnel reviewed, with sufficient frequency to fulfill the research facility's responsibilities under this section and § 2.31.

(c) Training and instruction of personnel must include guidance in at least the following areas:

(1) Humane methods of animal maintenance and experimentation, including:

(i) The basic needs of each species of animal;

(ii) Proper handling and care for the various species of animals used by the facility;

(iii) Proper pre-procedural and post-procedural care of animals; and

(iv) Aseptic surgical methods and procedures;

(2) The concept, availability, and use of research or testing methods that limit the use of animals or minimize animal distress;

(3) Proper use of anesthetics, analgesics, and tranquilizers for any

species of animal used by the facility;

(4) Methods whereby deficiencies in animal care and treatment are reported, including deficiencies in animal care and treatment reported by any employee of the facility. No facility employee, Committee member, or laboratory personnel shall be discriminated against or be subject to any reprisal for reporting violations of any regulation or standards under the Act;

(5) Utilization of services (e.g., National Agricultural Library, National Library of Medicine) available to provide information:

(i) On appropriate methods of animal care and use;

(ii) On alternatives to the use of live animals in research;

(iii) That could prevent unintended and unnecessary duplication of research involving animals; and

(iv) Regarding the intent and requirements of the Act.

§ 2.33 Attending veterinarian and adequate veterinary care.

(a) Each research facility shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section:

(1) Each research facility 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 research facility;

(2) Each research facility 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; and

(3) The attending veterinarian shall be a voting member of the IACUC; *Provided, however*, That a research facility with more than one Doctor of Veterinary Medicine (DVM) may appoint to the IACUC another DVM with delegated program responsibility for activities involving animals at the research facility.

(b) Each research facility 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) Guidance to principal investigators and other 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 current established veterinary medical and nursing procedures.

. . . .

§ 2.35 Recordkeeping requirements.

(a) The research facility shall maintain the following IACUC records:

(1) Minutes of IACUC meetings, including records of attendance, activities of the Committee, and Committee deliberations;

(2) Records of proposed activities involving animals and proposed significant changes in activities involving animals, and whether IACUC approval was given or withheld; and

(3) Records of semiannual IACUC reports and recommendations (including minority views), prepared in accordance with the requirements of § 2.31(c)(3) of this subpart, and forwarded to the Institutional Official.

. . . .

§ 2.36 Annual report.

(a) The reporting facility shall be that segment of the research facility, or that department, agency, or instrumentality of the United States, that uses or intends to use live animals in research, tests, experiments, or for teaching. Each reporting facility shall submit an annual report to the APHIS, REAC Sector Supervisor for the State where the facility is located on or before December 1 of each calendar year. The report shall be signed and certified by the CEO or Institutional Official, and shall cover the previous Federal fiscal year.

(b) The annual report shall:

(1) Assure that professionally acceptable standards governing the care, treatment, and use of animals, including appropriate use of anesthetic, analgesic, and tranquilizing drugs, prior to, during, and following actual research, teaching, testing, surgery, or experimentation were followed by the research facility;

(2) Assure that each principal investigator has considered alternatives to painful procedures;

(3) Assure that the facility is adhering to the standards and regulations under the Act, and that it has required that exceptions to the standards and regulations be specified and explained by the principal investigator and approved by the IACUC. A summary of all such exceptions must be attached to the facility's annual report. In addition to identifying the IACUC-approved exceptions, this summary must include a brief explanation of the exceptions, as well as the species and numbers of animals affected;

(4) State the location of all facilities where animals were housed or used in actual research, testing, teaching, or experimentation, or held for these purposes;

(5) State the common names and the numbers of animals upon which teaching, research, experiments, or tests were conducted involving no pain, distress, or use of pain-relieving drugs. Routine procedures (e.g., injections, tattooing, blood sampling) should be reported with this group;

(6) State the common names and the numbers of animals upon which experiments, teaching, research, surgery, or tests were conducted involving accompanying pain or distress to the animals and for which appropriate anesthetic, analgesic, or tranquilizing drugs were used;

(7) State the common names and the numbers of animals upon which teaching, experiments, research, surgery, or tests were conducted involving accompanying pain or distress to the animals and for which the use of appropriate anesthetic, analgesic, or tranquilizing drugs would have adversely affected the procedures, results, or interpretation of the teaching, research, experiments, surgery, or tests. An explanation of the procedures producing pain or distress in these animals and the reasons such drugs were not used shall be attached to the annual report;

(8) State the common names and the numbers of animals being bred, conditioned, or held for use in teaching, testing, experiments, research, or surgery but not yet used for such purposes.

. . . .

§ 2.38 Miscellaneous.

. . . .

(b) *Access and inspection of records and property.* (1) Each research facility shall, during business hours, allow APHIS officials:

. . . .

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

. . . .

(k) *Compliance with standards and prohibitions.* (1) Each research facility shall comply in all respects with the regulations set forth in subpart C of this part and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals; *Provided, however*, That exceptions to the standards in part 3 and the provisions of subpart C of this part may be made only when such exceptions are specified and justified in the proposal to conduct the activity and are approved by the IACUC.

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

(3) No person shall acquire, buy, sell, exhibit, use for research, transport, or offer for transportation, any stolen animal.

(4) Each research facility shall comply with the regulations set forth in § 2.133 of subpart I of this part.

. . . .

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 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:

. . . .

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

. . . .

PART 3—STANDARDS

. . . .

SUBPART C—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT AND TRANSPORTATION OF RABBITS

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.51 Facilities, indoor.

. . . .

(b) *Ventilation.* Indoor housing facilities for rabbits shall be adequately ventilated to provide for the health and comfort of the animals at all times. Such facilities shall be provided with fresh air either by means of windows, doors, vents, or air conditioning and shall be ventilated so as to minimize drafts, odors, and moisture condensation. Auxiliary ventilation, such as exhaust fans and vents or air conditioning, shall be provided when the ambient temperature is 85° F. or higher.

. . . .

(d) *Interior Surfaces.* The interior building surfaces of indoor housing facilities shall be constructed and maintained so that they are substantially impervious to moisture and may be readily sanitized.

. . . .

§ 3.56 Sanitation.

(a) *Cleaning of primary enclosures.* . . .

(3) If primary enclosures are equipped with wire or mesh floors, the troughs or pans under such enclosures shall be cleaned at least once each week. If worm bins are used under such enclosures they shall be maintained in a sanitary condition.

(b) *Sanitization of primary enclosures.* (1) Primary enclosures for rabbits shall be sanitized at least once every 30 days in the manner provided in paragraph (b)(3) of this section.

. . . .

(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. Premises shall remain free of accumulations of trash.

9 C.F.R. §§ 1.1; 2.31(a), (b)(3)(ii), (c)(1)-(c)(3), (c)(6), (d)(1)(i)-(d)(1)(iv)(A), (d)(1)(viii), (d)(5), (e)(1)-(e)(5), .32(a)-(c), .33, .35(a)(1)-(a)(3), .36, .38(b)(1)(v), (k), .40, .100(a), .126(a)(5); 3.51(b), (d), .56(a)(3), (b)(1), (c) (1997).

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

Facts

Respondent is an individual doing business as Quality Antisera Development and Production at 29 Distillery Road, Warwick, New York 10990 (Answer ¶ II(A)). Respondent has a doctorate degree in bio-chemistry. He worked for 17 years as an immunologist and bio-chemist and as a researcher and developer of immunoassays, vaccines, and antisera. (Tr. 267-68.)

About 1990, Respondent opened his own facility to use rabbits to produce antisera for laboratories on a contract basis. The number of rabbits at the facility varies with the contracts with his customers. At the time of the hearing, Respondent had 80 rabbits. On the advice of his friend, Gary Monteith, a rabbit handler, Respondent registered with the Animal and Plant Health Inspection Service [hereinafter APHIS] as a research facility, when he opened the facility. (CX 1; Tr. 203-04, 214, 273, 277.)

Mr. Monteith has over 30 years' experience handling rabbits, including work for a company raising rabbits for laboratories and 10 years' experience as a laboratory technician handling rabbits for a company producing bacterial tagasera from rabbit antisera. Mr. Monteith is now a private contractor who provides services to Respondent for about one day every other week. (Tr. 197, 205.) His services include an examination of each of Respondent's rabbits to be injected with an immunogen[2] to determine that the rabbits are in good health (Tr. 198). The immunogen is provided by Respondent's customers (Tr. 200-01, 285). Each of Respondent's rabbits is then given multiple injections with a small volume of the immunogen to avoid the open sores that may be caused by fewer injections with a higher volume of the immunogen (Tr. 199). Each rabbit is later given a booster shot in the leg to raise the titer (Tr. 289). The rabbit responds to the immunogen by developing what the witnesses referred to as a lesion at the site of the injection. Mr. Monteith testified that the lesion is a "known response" to the immunogen injection and is similar to a child's reaction to a smallpox vaccination. (Tr. 199-201, 207-08.) A vaccine is an immunogen (Tr. 291). Mr. Monteith testified that he examines the lesions to determine whether they are open sores which, he says, does not occur with Respondent's rabbits after receiving injections. He testified that, based on his familiarization with handling rabbits, the rabbits do not suffer any pain.[3] The rabbit is then bled and the blood is refrigerated to allow the serum to separate from the blood. The serum is sent to the customer and the rabbit is euthanized. (Tr. 198-202, 286-87.)

Respondent testified that these procedures "are all proven, tried and true methods in the literature" and that "[t]he results are predictable" (Tr. 270). Respondent said he does not evaluate or test the serum before sending it to the customer (Tr. 267). Respondent said he is not familiar with all the uses to which his customers put the antisera, but knows that it is used to develop immunoassays,

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[2]Mr. Monteith referred to the substance injected in the rabbits as an "antigen." Two of Complainant's witnesses, an inspector and a doctor of veterinary medicine, also referred to the substance variously as "antigena," "agoven," and "antigen" (Tr. 93, 96, 189). Respondent, however, testified that the rabbits are injected with an immunogen and Freuns incomplete adjament rather than with an antigen. Respondent testified that the response by a rabbit to an antigen could be "extremely deleterious." (Tr. 285, 289.) Complainant also refers to the substance injected into rabbits by Respondent as an immunogen (Complainant's Brief at 2).

[3]Section 1.1 of the Regulations defines a *painful procedure* as "any procedure that would reasonably be expected to cause more than slight or momentary pain or distress in a human being to which that procedure was applied, that is, pain in excess of that caused by injections or other minor procedures" (9 C.F.R. § 1.1).

which could be used for diagnostic testing, and that one of his larger customers uses the antisera to detect low molecular allides in soil and ground water (Tr. 287-88). Respondent summed up his work as "[w]e do not evaluate the serum, we do not select the animals, we raise antisera on a contract basis. We immunize, we bleed, we ship." (Tr. 267.)

APHIS officials have inspected Respondent's facility. The Complaint alleges that APHIS officials found violations of the Regulations and Standards during inspections of Respondent's facility conducted on April 18, 1995, March 5 and 7, 1996, May 28 and 29, 1996, and October 16, 1996. The alleged violations fall into two general categories. The first category relates to requirements for research facilities in sections 2.30 through 2.38 of the Regulations (9 C.F.R. §§ 2.30-.38). The second category relates to requirements for the humane handling, care, treatment, and transportation of rabbits in sections 3.50 through 3.66 of the Standards (9 C.F.R. §§ 3.50-.66). Complainant contends, and Respondent denies, that Respondent's facility is a research facility.

Research Facilities

The Animal Welfare Act applies to, *inter alia*, research facilities, dealers, and exhibitors. Dealers and exhibitors must be licensed by APHIS (9 C.F.R. § 2.1(a)). Research facilities must be registered with APHIS (9 C.F.R. § 2.30(a)). The term "research facility" is defined in section 2(e) of the Animal Welfare Act (7 U.S.C. § 2132(e)) and in section 1.1 of the Regulations (9 C.F.R. § 1.1).

Respondent contends that even though he had registered as a research facility, on the advice of Mr. Monteith, he later read the Regulations and determined that his facility was not a research facility because he does not perform any research, testing, or experiments on the rabbits according to the literal dictionary definition of those terms, but only "harvests" untested antisera serum from the rabbits which he forwards to customers with whom he has contracts (Tr. 287-91).

Mr. Monteith described his reason for advising Respondent to register his facility as a research facility, as follows:

> To be quite honest with you, when I -- when Mike [Respondent] first approached me about possibly doing this antisera business because at the time I had the antisera production just after I finished up doing the antisera production at work, I told him if we're going to do it, we have to do it right and we have to be -- we should abide by all the laws. We're not going to do anything underhanded and I was actually the one that suggested that we file for USDA and Public Health.

Tr. 214.

Mr. Monteith, who was employed at the time with a registered research facility engaged in antisera production and research (Tr. 215, 221), referred to his rabbit handling as "testing," as follows:

[BY JUDGE HUNT:]

Q. Again about the procedure now, the rabbit receives all these injections at the same time?

[BY MR. MONTEITH:]

A. Yes.

Q. And then the lesion shows a reaction to the injection?

A. Yes.

Q. And then after that at some point in time they're then bled, the rabbits are then bled?

A. Yes.

Q. Is the rabbit destroyed after that?

A. After all the testing is completed, yes, but the rabbit is not bled out.

Q. Is not bled out?

A. The rabbit is not bled out to a point where it dies. The customer for some reason just wants a certain amount of blood. We provide the blood, the serum and then when they no longer need any more serum they take the rabbit off test.

Q. Then what happens to the rabbit at that point? What do you do with it?

A. Then Dr. Huchital euthanizes him.

Tr. 218.

However, neither Mr. Monteith nor other witnesses testified that this reference to "testing" at Respondent's facility was anything more than to inject and bleed the rabbits. Respondent, in Respondent's Brief at 2, states that "[i]n the field of antibody production the initial bleed is sometimes referred to as the test bleed, however, we do no testing of bleeds." Mr. Monteith testified that rabbits respond in varying degrees to the immunogen and that the customer decides whether to do a "production" on a rabbit that did not respond to the immunogen in the way the customer desired (Tr. 206). Dr. Mary Ellen Geib, a veterinary medical officer employed by APHIS, evaded giving a direct answer when asked whether Respondent's procedure constituted testing, except to call it the "first step" (Tr. 98-99).

Mr. Monteith testified he does not believe that Respondent's activities constitute research, experimentation, or testing, as follows:

[BY DR. HUCHITAL:]

Q. How many years have you been working in the field of raising antibodies by the literature procedures that we've described?

[BY MR. MONTEITH:]

A. Close to twenty years.

Q. Would you say this is considered research?

A. No.

Q. Experimentation?

A. No.

Q. Testing?

A. No.

Q. Thank you. Since you have been in the field for years, what is your feeling with respect to the IACUC committee and the impact on the health

of the animals?

A. I understand the concept of the IACUC which I feel as far as research experiments is very necessary. I believe in that but when you're doing a procedure that is a known procedure, we only have the one procedure, we're not deviating from that. I don't feel that what we are doing in our facility constitutes research. We're just following what our customer wants us to do as far as they provide us with the antigen [immunogen], we inoculate the rabbits, we maintain them, then we bleed them and we ship out the serum and that's all we do.

JUDGE HUNT: The response is known beforehand or any unpredictability in this?

MR. MONTEITH: No. The antigen [immunogen], they've developed it so that they know they're going to get a response from the rabbits. So all we're doing is actually producing the antisera for the customer. It's a known response.

Tr. 200-01.

Complainant contends in Complainant's Brief that Respondent's activities in the production of antisera constitute "testing" within the meaning of the Animal Welfare Act and the Regulations. Dr. Geib testified that a facility, such as the facility operated by Respondent, is considered a research facility because it is engaged in a "collaborative" association with the person who supplies the immunogen and performs the testing even if the only procedures performed at the facility are injection of immunogen and drawing of blood:

When the customer provides the antigen [immunogen], we consider it a collaborative research effort between the person or persons responsible for caring for the rabbits, injecting the rabbits and drawing the blood and the person who is providing the antigen [immunogen]. We regulate that entity.

Tr. 96.

Dr. Geib testified that this interpretation of the Animal Welfare Act and the Regulations by APHIS is contained in a document called "Policy #10" (Tr. 96). It states in relevant part:

> A facility that produces antibodies or antisera is "testing" animals for their immune response and selects animals for production based on the results of this testing. Therefore, the facility must be **registered** as a research facility.

CX 34 at 2 (emphasis in original).

Dr. Geib testified that Policy #10 was issued by APHIS to clarify the definition of the term "research facility" in the Animal Welfare Act and the Regulations, as follows:

> The Code of [Federal] Regulations specifies that we do cover testing. Our policies were developed, they're not in addition to our regulations but they kind of expand. We make policies where we hear the same questions over and over again or there may be a misunderstanding out in the field or the regulated community or the public and policy ten was developed to further clarify what activities actually fall under the jurisdiction of the Animal Welfare Act and it also along with policy ten specifying that we do cover antibody production because it involves testing the animal's response to the antigen [immunogen] injection.

Tr. 96.

Dr. Geib testified that Policy #10, issued on April 14, 1997, is based on "correspondences [sic] and memos and policies that had been previously issued" (Tr. 100). Kay Carter-Corker, a supervisory animal care specialist employed by APHIS, testified that the interpretation of the term *research facility* that is articulated in Policy #10 had been in place since 1990 and, although not distributed, was available to the public (Tr. 241). The previous correspondence, memoranda, and policies, on which Policy #10 is purportedly based, were not offered as evidence at the hearing.

Complainant has the burden of proving its allegations by a preponderance of the evidence.[4] The evidence presented fails to establish that Respondent's facility

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[4]The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re James E. Stephens*, 58 Agric. Dec. ___, slip op. at 3 (May 5, 1999); *In re Judie*

(continued...)

was a research facility as defined in section 2(e) of the Animal Welfare Act (7 U.S.C. § 2132(e)) and section 1.1 of the Regulations (9 C.F.R. § 1.1), during the times relevant to the Complaint. Respondent's procedure of injecting a rabbit with a customer-provided immunogen and then bleeding the animal to collect untested serum to forward to the customer does not establish that Respondent was, himself, using rabbits or their blood in research, tests, or experiments. Although the procedure was referred to as a test bleed, the record does not show that Respondent performed any actual testing on the rabbits or their blood. The procedure was, as Respondent claimed, a production or harvesting operation. Dr. Geib also declined to call Respondent's procedure testing. However, she said that, according to the rationale for Policy #10, Respondent's operation is now considered to be a research facility because Respondent is engaged in the first step of what she described as a collaborative effort with his research customers. (Tr. 96-100.)

Complainant argues that deference must be accorded to APHIS' interpretation, in Policy #10, of the Animal Welfare Act and the Regulations that a facility that produces antisera is to be considered a research facility (Complainant's Brief at 43

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[4](...continued)
Hansen, 57 Agric. Dec. 1072, 1107-08 (1998), *appeal docketed*, Nos. 99-2640, 99-2665 (8th Cir. June 1 and June 25, 1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1052 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1015 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *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 Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *aff'd*, No. 98-70807 (9th Cir. July 16, 1999) (unpublished) (not to be cited as precedent under 9th Circuit Rule 36–3); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *aff'd*, No. 98-3100 (3d Cir. Dec. 21, 1998) (unpublished); *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), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *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).

n.2). However, Policy #10 was not issued until April 14, 1997, after the violations alleged in the Complaint, and Complainant failed to introduce APHIS policy statements regarding antisera production that are applicable to the period during which the violations that are the subject of this proceeding are alleged to have occurred. The evidence is not sufficient to establish that such an interpretation existed before the promulgation of Policy #10 on April 14, 1997. I therefore find that APHIS did not adopt the interpretation that a facility engaged solely in the production of antisera was a research facility, until the issuance of Policy #10 on April 14, 1997, which was 2 months after Complainant filed the Complaint. Such an interpretation has no retroactive effect and is therefore inapplicable to this proceeding which covers a period of time prior to APHIS' issuance of Policy #10. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).

Complainant further argues that this proceeding is governed by *In re Lee Roach*, 51 Agric. Dec. 252 (1992) (Complainant's Brief at 45-46). However, the facts in *Roach* show, *inter alia*, that the facility in question was a research facility because the respondents in *Roach* not only sold blood extracted from animals for research and testing but also, unlike Respondent, conducted tests on the blood. *Roach* is therefore not applicable to this proceeding.

I find that Respondent did not operate a research facility during the times relevant to this proceeding. The Complaint is therefore dismissed to the extent it alleges violations which apply only to research facilities.

However, Respondent is still subject to the Regulations as a dealer. Section 1.1 of the Regulations (9 C.F.R. § 1.1) defines *dealer* as including 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 blood or serum of animals for research, teaching, testing, or experimentation.

On his registration form, Respondent indicated that his rabbits were covered by the Animal Welfare Act, i.e., in commerce (CX 1) and, as discussed in this Decision and Order, *supra*, he sold serum derived from the rabbits' blood to facilities engaged in research and testing. Accordingly, Respondent was a dealer and, as such, was required to comply with the Standards for the humane handling, care, treatment, and transportation of rabbits (9 C.F.R. §§ 3.50-.66) during the times covered by the Complaint.

Handling, Care, Treatment, and Transportation of Rabbits

Sharon Fairchild, an APHIS-employed doctor of veterinary medicine, testified that she inspected Respondent's facility on April 18, 1995.

Paragraph II(L)(1) of the Complaint alleges that on April 18, 1995, APHIS

inspected Respondent's facility and found that the interior building surfaces of indoor housing facilities were not impervious to moisture and capable of being readily sanitized, in violation of section 3.51(d) of the Standards (9 C.F.R. § 3.51(d)). Dr. Fairchild testified that she inspected Respondent's facility on April 18, 1995, and found water-damaged ceiling tiles in a rabbit room which she said could not be cleaned and needed to be replaced (CX 6 at 10; Tr. 62-63).

Dr. Fairchild's testimony that tiles were water-damaged shows that surfaces were not impervious to moisture and thus supports a finding that Respondent violated 9 C.F.R. § 3.51(d) on April 18, 1995, as alleged in paragraph II(L)(1) of the Complaint.

Paragraph II(L)(2) of the Complaint alleges that on April 18, 1995, APHIS inspected Respondent's facility and found that the premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices, in violation of section 3.56(c) of the Standards (9 C.F.R. § 3.56(c)). Dr. Fairchild testified that, during her April 18, 1995, inspection of Respondent's facility, she found that two empty cages were dirty (Tr. 63-64). In addition, the April 18, 1995, Animal Care Inspection Report, completed by Dr. Fairchild, states:

> # 37 Housekeeping 3.56(c)
> Premises shall be kept clean in order to facilitate prescribed husbandry practices.
> (1) There were at least two empty but used, dirty cages that were not in use and had not been cleaned and sanitized. Empty cages that have been used and are dirty need to be cleaned and sanitized after use.
> (2) The walls of all the rabbit rooms had urine & feces on them and need to be kept clean & free of contaminating material.
> (3) There was pop & paint stored in the first rabbit room. Only materials needed for actual animal husbandry should be stored in animal areas.
> (4) The fans on both rabbit room doors had hair on the filter and must be cleaned.

CX 6 at 10-11.

Dr. Fairchild's testimony that two empty cages were dirty and the April 18, 1995, Animal Care Inspection Report support a finding that Respondent violated 9 C.F.R. § 3.56(c) on April 18, 1995, as alleged in paragraph II(L)(2) of the Complaint.

Paragraph II(M) of the Complaint alleges that on April 18, 1995, APHIS inspected Respondent's facility and found that Respondent had failed to maintain

programs of 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.

The April 18, 1995, Animal Care Inspection Report, completed by Dr. Fairchild, states, as follows:

> #48 Veterinary care. 2.33(b)(2)
> Each research facility shall maintain programs of adequate veterinary care.
> Rabbit #13 had long nails that need to be trimmed.

CX 6 at 11.

Moreover, Dr. Fairchild testified regarding her finding that Respondent failed to provide veterinary care on April 18, 1995, as follows:

> [MR. MARTIN:]
>
> Q. Doctor, did you identify any other deficiencies during this inspection?
>
> [DR. FAIRCHILD:]
>
> A. Yes, I did.
>
> Q. Would you tell us what the next one was, please.
>
> A. The next one was veterinary care.
>
> Q. What did that entail?
>
> A. That was -- each research [sic] needs to maintain a program of adequate veterinary care and there was one rabbit that had long toe nails that needed to be trimmed.
>
> Q. How would you characterize that deficiency?
>
> A. As a significant deficiency.
>
> Q. Why?

A. The rabbit[']s toe nails, if they get long, they could grow around or even just walking he could -- he can't put his pads down the way he should, it could cause pain.

Q. So could that affect the animal's health?

A. Yes, it could.

Q. How?

A. It could cause them to not be able to walk as well, maybe get their toes hooked in the cage and could if not taken care of, eventually grow around.

Tr. 64-65.

I find, based on the April 18, 1995, Animal Care Inspection Report and Dr. Fairchild's testimony that Complainant proved a preponderance of the evidence that, on April 18, 1995, Respondent failed to provide veterinary care to an animal in need of veterinary care, as alleged in paragraph II(M) of the Complaint.

John Lopinto, an APHIS-employed doctor of veterinary medicine, conducted inspections of Respondent's facility on March 5 and March 7, 1996.

Paragraph III(A) of the Complaint alleges that on March 5 and March 7, 1996, APHIS inspected Respondent's facility and found that Respondent had failed to maintain programs of 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.

While Complainant introduced some evidence which indicates that Respondent may have failed to maintain programs of adequate veterinary care on March 5 and March 7, 1996, Complainant has not proved by a preponderance of the evidence that Respondent failed to maintain programs of adequate veterinary care on March 5 and March 7, 1996, as alleged in paragraph III(A) of the Complaint.

Paragraph III(B)(1) of the Complaint alleges that on March 5 and March 7, 1996, APHIS inspected Respondent's facility and found that the interior building surfaces of indoor housing facilities were not substantially impervious to moisture and capable of being readily sanitized, in violation of section 3.51(d) of the Standards (9 C.F.R. § 3.51(d)). The March 7, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states that "[r]abbit restraint device is made of wood. Interior part is bare wood which cannot be sanitized" (CX 8 at 2). He added in his testimony that "[bare wood] has to be impervious to be sanitizable"

(Tr. 118). Dr. Lopinto, however, did not provide any basis for his determination that the rabbit restraint device was an interior building surface of an indoor housing facility. Therefore, Complainant has failed to prove that Respondent violated 9 C.F.R. § 3.51(d) on March 5 and March 7, 1996, as alleged in paragraph III(B)(1) of the Complaint.

Paragraph III(B)(2) of the Complaint alleges that on March 5 and March 7, 1996, APHIS inspected Respondent's facility and found that the premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices, in violation of section 3.56(c) of the Standards (9 C.F.R. § 3.56(c)). The March 7, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states:

> III Item 37 Housekeeping 3.56(c)
> Premises shall be kept clean and in good repair to facilitate good husbandry practices.
> 1) Rabbit rm 2 had a ceiling leak
> 2) Rabbit rm 1 had assorted debris in the room to include cage parts, fly strips, paint cans, open terramycin package
> 3) Lab area had clutter of adjuvant bottles, old glass syringes and blood tubes on floor and table.
>
> Facility shall clean and maintain good housekeeping standards
> Correct by 3/10/96

CX 8 at 2.

These findings of a ceiling leak and accumulated trash constitute a violation of 9 C.F.R. § 3.56(c), as alleged in paragraph III(B)(2) of the Complaint.

Paragraph III(B)(3) of the Complaint alleges that on March 5 and March 7, 1996, APHIS inspected Respondent's facility and found that the indoor housing facilities for animals were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors and ammonia levels, in violation of section 3.51(b) of the Standards (9 C.F.R. § 3.51(b)).

Dr. Lopinto testified that the ammonia odors were "[s]trong enough that they were bothering my respiratory [system] and eyes" (Tr. 122). Respondent contended that the odor level in his facility complies with OSHA standards (Respondent's Brief at 3). Whether it does or not, OSHA standards are not applicable to this proceeding. The odor of ammonia that affects a person's respiratory system and eyes would certainly affect a rabbit's health and comfort and thus constitutes a violation of 9 C.F.R. § 3.51(b).

Paragraph III(B)(4) of the Complaint alleges that on March 5 and March 7, 1996, APHIS inspected Respondent's facility and found that primary enclosures for rabbits were not sanitized every 30 days and pans under primary enclosures were not cleaned once every week, in violation of section 3.56(a)(3) and (b)(1) of the Standards (9 C.F.R. § 3.56(a)(3), (b)(1)). The March 7, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states:

> IV Non-Compliant Items Identified on Last Inspection That Have Not Been Corrected as of This Inspection.
>
> Item 36 Cleaning and Sanitation 3.56(b)(1) & (a)(3)
> 1) Primary enclosures for rabbits shall be sanitized at least once every 30 days.
> There is still no evidence that the cages are being sanitized according to the regulations.
> 2) Pans under enclosures continue to have urine scale & debris buildup.

CX 8 at 4.

Although Dr. Lopinto did not explain how he determined that the cages were not being sanitized as frequently as required, his finding of urine scale and debris buildup raises at least the inference that Respondent was not cleaning primary enclosures and pans under primary enclosures, as required by section 3.56 of the Standards (9 C.F.R. § 3.56). Respondent also implies that he was not performing adequate cleaning by testifying that, since the inspections, he works full-time at the facility and has been able to improve the cleaning (Tr. 271). Substantial evidence supports the finding that Respondent violated 9 C.F.R. § 3.56(a)(3) and (b)(1), as alleged in paragraph III(B)(4) of the Complaint.

Paragraph IV(A) of the Complaint alleges that on May 28 and May 29, 1996, Respondent refused to permit APHIS employees to conduct a complete inspection of Respondent's facilities by not allowing inspectors to take photographs of conditions of noncompliance.

The May 29, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states, as follows:

> III Non-Compliant Items Newly Identified on This Inspection of 5/96
>
> Item 51 Miscellaneous 2.38(b)(v)
> Each research facility shall allow APHIS officials to document by taking photographs of conditions of non-compliance.

APHIS officials were not allowed to take photographs of conditions of non-compliance.
APHIS officials shall be allowed to document with photographs areas of non-compliance.
Correct from this date forward.

CX 24 at 2.

Dr. Lopinto testified that Respondent refused to allow APHIS officials to take photographs of Respondent's facility during the May 28 and May 29, 1996, inspection of Respondent's facility (Tr. 141-43).

I find that Complainant proved by a preponderance of the evidence that, during the May 28 and May 29, 1996, inspection of Respondent's facility, Respondent refused to allow APHIS officials to take photographs of conditions of noncompliance, in violation of 9 C.F.R. § 2.126(a)(5).

Paragraph IV(D) of the Complaint alleges that on May 28 and May 29, 1996, APHIS inspected Respondent's premises and found that Respondent had failed to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

While Complainant introduced some evidence which indicates that Respondent may have failed to maintain programs of adequate veterinary care on May 28 and May 29, 1996, Complainant has not proved by a preponderance of the evidence that Respondent failed to maintain programs of adequate veterinary care on May 28 and May 29, 1996, as alleged in paragraph IV(D) of the Complaint.

Paragraph IV(E)(1) of the Complaint alleges that on May 28 and May 29, 1996, APHIS inspected Respondent's facility and found that the interior building surfaces of interior housing facilities were not substantially impervious to moisture and capable of being readily sanitized, in violation of section 3.51(d) of the Standards (9 C.F.R. § 3.51(d)). During the inspection on May 28 and 29, 1996, Dr. Lopinto found that "ceiling tiles in back rabbit rm still show evidence of water damage" (CX 24 at 8). The May 29, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, constitutes substantial evidence that Respondent violated 9 C.F.R. § 3.51(d), as alleged in paragraph IV(E)(1) of the Complaint.

Paragraph IV(E)(2) of the Complaint alleges that on May 28 and May 29, 1996, APHIS inspected Respondent's facility and found that the premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices, in violation of section 3.56(c) of the Standards (9 C.F.R. § 3.56(c)). During the inspection on May 28 and 29, 1996, Dr. Lopinto found that the lab area had a "clutter" of bottles, old glass syringes and blood tubes, and walls of the rabbit room had urine and fecal residue on surfaces

(CX 24 at 3). The May 29, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, constitutes substantial evidence that Respondent violated 9 C.F.R. § 3.56(c), as alleged in paragraph IV(E)(2) of the Complaint.

Paragraph IV(E)(3) of the Complaint alleges that on May 28 and May 29, 1996, APHIS inspected Respondent's facility and found that indoor housing facilities for animals were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors and ammonia levels, in violation of section 3.51(b) of the Standards (9 C.F.R. § 3.51(b)). During the inspection on May 28 and 29, 1996, Dr. Lopinto found that "there is still a strong ammonia odor present in all rabbit rms and facility" (CX 24 at 5). The May 29, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, constitutes substantial evidence that Respondent violated 9 C.F.R. § 3.51(b), as alleged in paragraph IV(E)(3) of the Complaint.

Paragraph IV(E)(4) of the Complaint alleges that on May 28 and May 29, 1996, APHIS inspected Respondent's facility and found that primary enclosures for rabbits were not sanitized every 30 days, and pans under primary enclosures were not cleaned once every week, in violation of section 3.56(a)(3) and (b)(1) of the Standards (9 C.F.R. § 3.56(a)(3), (b)(1)). Dr. Lopinto cited the facility for not sanitizing the cages, but without providing any supporting details. However, he also said that the pans under rabbit enclosures "continue to have urine scale & debris" (CX 24 at 5). The May 29, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, constitutes substantial evidence that Respondent violated 9 C.F.R. § 3.56(a)(3), as alleged in paragraph IV(E)(4) of the Complaint.

Paragraph V(A) of the Complaint alleges that on October 16, 1996, APHIS inspected Respondent's facility and found that Respondent had failed to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

The October 17, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states Respondent failed to employ an attending veterinarian, as follows:

> III Non-compliant Items Newly Identified on This Inspection of 10/96
>
> Item 48 Vet. Care 2.33(a)(1)
> Each research facility shall employ an attending veterinarian under formal arrangements which shall include a written program of vet. care.
> A blank program of vet. care was left with the facility at last inspection because . . . it indicated facility was changing vet.
> There is no indication at the time of inspection that program has been completed.

Program of vet. care shall be completed.
Correct by 10/20/96

CX 25 at 2.

Dr. Lopinto explained the entry in the October 17, 1996, Animal Care Inspection Report, as follows:

[BY MR. MARTIN:]

Q. Doctor, did you identify any deficiencies during this inspect [sic]?

[DR. LOPINTO:]

A. Yes, I did.

Q. Would you tell us what the first one was, please.

A. Again vet care. Each research facility shall employ an attending veterinarian on a formal arrangement which shall include a written program of veterinary care. Now facilities that have a consulting vet have to maintain this written program. When they change, they have to get a new program. There was a change in veterinarians, there was no program. So here again that's to establish who will be the new veterinarian, a program -- a blank program is left for review at that time, so that can be completed.

Q. How would you characterize that deficiency?

A. That would be serious because once you get -- if you know there's going to be a change, you've got pro active on that so that there is that continuity that when you get a change, the new veterinarian is on board so that he can be descriptive. He's assuming a role immediately. So from the get go he has to have that too.

Q. Does that deficiency affect animal health?

A. You cannot operate if you don't have an attending veterinarian.

. . . .

Q. You refer to CX 24, page 8?

A. Right. If you look on May 28th and 29th, you will notice a notation on page 8, "Note: Institutional official is changing vets. A blank program was left with institutional official at the time of inspection." So back in May when I was up there, he said he was changing it. So I didn't write it up because I said okay, you're changing vets, here you are. I left a blank as you'll notice.

In October, again if I wrote it -- the reason I wrote it up is it probably wasn't done in October. So therefore with that month interlude not getting done, then I had grounds to write it up.

Q. So you left a blank form in May.

A. Five months.

Tr. 151-53.

I find that Respondent failed to employ an attending veterinarian under formal arrangements on October 16, 1996, and that this failure constitutes a failure to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, as alleged in paragraph V(A) of the Complaint.

Paragraph V(B)(1) of the Complaint alleges that on October 16, 1996, APHIS inspected Respondent's facility and found that the premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices, in violation of section 3.56(c) of the Standards (9 C.F.R. § 3.56(c)). Dr. Lopinto reported that he found the following deficiencies in the facility's housekeeping during the October 16, 1996, inspection:

A) Walls of rabbit rm still had urine and feces stains & residue on surfaces
B) Fly strips are full of flies and need to be replaced
C) Ventilation fans had accumulation of dust & hair
D) Lab area counter still had a clutter of debris
E) Ceiling tile in back rm still shows water damage

CX 25 at 3.

The October 17, 1996, Animal Care Inspection Report, completed by

Dr. Lopinto, constitutes substantial evidence that Respondent violated 9 C.F.R. § 3.56(c), as alleged in paragraph V(B)(1) of the Complaint.

Paragraph V(B)(2) of the Complaint alleges that on October 16, 1996, APHIS inspected Respondent's facility and found that indoor housing facilities for animals were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors and ammonia levels, in violation of section 3.51(b) of the Standards (9 C.F.R. § 3.51(b)). During the inspection on October 16, 1996, Dr. Lopinto again reported a strong ammonia odor in all rabbit rooms and the facility, which constitutes a violation of section 3.51(b) of the Standards (9 C.F.R. § 3.51(b)) (CX 25 at 2).

Paragraph V(B)(3) of the Complaint alleges that on October 16, 1996, APHIS inspected Respondent's facility and found that primary enclosures for rabbits were not sanitized every 30 days, and pans under primary enclosures were not cleaned once every week, in violation of section 3.56(a)(3) and (b)(1) of the Standards (9 C.F.R. § 3.56(a)(3), (b)(1)). Dr. Lopinto found urine scale in the rabbit cages and pans, which constitutes a violation of section 3.56(a)(3) and (b)(1) of the Standards (9 C.F.R. § 3.56(a)(3), (b)(1)).

Sanction

Drs. Fairchild and Lopinto testified that, despite the violations, Respondent's rabbits were watered, well-fed, and "in good flesh," which indicates that they were in good health (Tr. 67, 76, 176). However, they also testified that the lesions resulting from the injections were "open" and, in Dr. Lopinto's opinion, were painful. They based their conclusions on observing the rabbits without actually handling them. Both doctors said that Respondent should consider using analgesics in his procedure. (Tr. 51, 67, 73, 126, 138, 157, 170.) Although both doctors were experienced veterinarians, it was not shown that either had rabbit-handling experience.

Mr. Monteith, who has had over 30 years' experience handling rabbits, said that he personally examines the rabbits after the injections by running his hand over the lesions and that, although the lesions may appear "shiny," the lesions are not open. He said that, based on his experience, he knows when rabbits react to pain and that the procedures that he and Respondent use do not cause the rabbits to experience pain. (Tr. 196-201, 208-09, 219-20.)

I give greater weight to Mr. Monteith's testimony in view of his greater experience in handling rabbits and his physical examination of the rabbits than I give to Drs. Fairchild and Lopinto. Moreover, Drs. Fairchild and Lopinto, who did not examine the lesions, may also have assumed that the rabbits experienced pain

and developed open lesions because of their mistaken belief that the rabbits were injected with an antigen rather than with an immunogen. I accordingly find that Respondent's procedure was not a painful procedure as defined by section 1.1 of the Regulations (9 C.F.R. § 1.1).

Considering all the circumstances, I find that a $3,750 civil penalty is appropriate.

Findings of Fact

1. Respondent Michael A. Huchital, Ph.D., is an individual doing business as Quality Antisera Development and Production, 29 Distillery Road, Warwick, New York 10990.

2. At all times material to this proceeding, Respondent was registered with APHIS as a research facility.

3. Respondent obtains rabbits in commerce. Respondent produces antisera from the blood of these rabbits, which he obtains by injecting the rabbits with an immunogen provided by his customers for the purpose of producing antisera. Respondent draws blood from the rabbits, separates the antisera serum from the blood, and sells the serum in commerce to customers for research and other purposes. Respondent does not use the rabbits or their blood in research, testing, or experiments.

4. On April 18, 1995, interior building surfaces of Respondent's indoor housing facilities were not substantially impervious to moisture and capable of being readily sanitized; Respondent's premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices; and Respondent failed to provide veterinary care to an animal in need of care.

5. On March 5 and 7, 1996, Respondent's premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices; Respondent's indoor housing facilities for rabbits were not sufficiently ventilated to provide for the health and well-being of the rabbits and to minimize odors and ammonia levels; and Respondent's primary enclosures for rabbits were not sanitized every 30 days, and pans under primary enclosures were not cleaned once every week.

6. On May 28 and 29, 1996, Respondent refused to allow APHIS officials to document, by the taking of photographs, conditions of noncompliance; interior building surfaces of Respondent's indoor housing facilities were not substantially impervious to moisture and capable of being readily sanitized; Respondent's premises (buildings and grounds) were not kept clean and in good repair to protect

the animals from injury and to facilitate the prescribed husbandry practices; Respondent's indoor housing facilities for rabbits were not sufficiently ventilated to provide for the health and well-being of the rabbits and to minimize odors and ammonia levels; and Respondent's pans under primary enclosures were not cleaned once every week.

7. On October 16, 1996, Respondent failed to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine; Respondent's premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices; Respondent's indoor housing facilities for rabbits were not sufficiently ventilated to provide for the health and well-being of the rabbits and to minimize odors and ammonia levels; and Respondent's primary enclosures for rabbits were not sanitized every 30 days, and pans under primary enclosures were not cleaned once every week.

Conclusions of Law

1. Respondent is a *dealer* within the meaning of the Animal Welfare Act and the Regulations.

2. On April 18, 1995, Respondent violated sections 2.40 and 2.100(a) of the Regulations and sections 3.51(d) and 3.56(c) of the Standards (9 C.F.R. §§ 2.40, .100(a); 3.51(d), .56(c)).

3. On March 5 and March 7, 1996, Respondent violated section 2.100(a) of the Regulations and sections 3.51(b), 3.56(a)(3), 3.56(b)(1), and 3.56(c) of the Standards (9 C.F.R. §§ 2.100(a); 3.51(b), .56(a)(3), (b)(1), and (c)).

4. On May 28 and May 29, 1996, Respondent violated sections 2.100(a) and 2.126(a)(5) of the Regulations and sections 3.51(b), 3.51(d), 3.56(a)(3), and 3.56(c) of the Standards (9 C.F.R. §§ 2.100(a), .126(a)(5); 3.51(b) and (d), .56(a)(3) and (c)).

5. On October 16, 1996, Respondent violated sections 2.40 and 2.100(a) of the Regulations and sections 3.51(b), 3.56(a)(3), 3.56(b)(1), and 3.56(c) of the Standards (9 C.F.R. §§ 2.40, .100(a); 3.51(b), .56(a)(3), (b)(1), and (c)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises eight issues in Complainant's Appeal of Decision and Order and Response to Respondent's Appeal of Decision and Order [hereinafter Appeal Petition].

As an initial matter, Complainant contends that on April 20, 1999, Respondent

filed an appeal (Appeal Pet. at 1-3). I disagree with Complainant's contention that Respondent filed an appeal on April 20, 1999. Instead, I find that on April 29, 1999, Respondent filed a letter, dated April 20, 1999, addressed to the ALJ, requesting that the ALJ amend the Initial Decision and Order. The ALJ treated Respondent's letter as a motion for reconsideration of the Initial Decision and Order, and on April 29, 1999, the ALJ denied Respondent's motion (Order Denying Motion for Recons.). Thus, I find Respondent's April 29, 1999, filing is not Respondent's appeal, and the ALJ has disposed of Respondent's April 29, 1999, filing.

First, Complainant contends that the ALJ erred in finding that Respondent does not use animals in testing (Appeal Pet. at 4).

Complainant contends that Respondent was testing animals and that, because Respondent was testing animals, Respondent was a *research facility* as that term is defined in section 2(e) of the Animal Welfare Act (7 U.S.C. § 2132(e)) and section 1.1 of the Regulations (9 C.F.R. § 1.1).

Complainant asserts that "the ALJ glossed over the fact that the individual whom [Respondent] employs to inject and bleed rabbits described what he does as 'testing.'" (Appeal Pet. at 4.)

I disagree with Complainant's assertion that the ALJ "glossed over" Mr. Monteith's characterization of Respondent's injection and bleeding of rabbits as "testing." The ALJ quoted Mr. Monteith's testimony in which Mr. Monteith characterized injection and bleeding as "testing," and the ALJ provided cogent reasons for finding that Mr. Monteith's characterization of Respondent's procedures was not accurate. See Initial Decision and Order at 5-7.

Complainant also contends that the ALJ misreads *In re Lee Roach, supra*. I disagree with Complainant. The ALJ properly analyzed *Roach* and found that it was not applicable to this proceeding. The administrative law judge, who issued the *Roach* decision, found that the respondents in *Roach* operated a *research facility*, as defined in the Animal Welfare Act and the Regulations, based not only on the production of antiserum, but also on the respondents' testing of blood to determine the level of antibodies. *In re Lee Roach, supra*, 51 Agric. Dec. at 257-59.

Second, Complainant contends that the ALJ erred in finding that before 1997, APHIS had no policy that antisera production is testing (Appeal Pet. at 5).

The record does establish that APHIS had a policy that may have been similar to the policy set forth in Policy #10 (CX 34 at 2); however, the record is not sufficiently clear to find that prior to April 14, 1997, APHIS had a policy that antisera production is testing. Policy #10 (CX 34 at 2), which is dated April 14, 1997, provides that it "[r]eplaces memos dated August 28, 1990, entitled

'Determination of Need for Licensing or Registration for Antibody Production/Serum Collection' and April 17, 1992, entitled 'License Fees for the Production and Sale of Blood Products.'" However, Policy #10 does not indicate what policy is in the August 28, 1990, and April 17, 1992, memoranda. Moreover, while Dr. Carter-Corker testified that "the policy [articulated in Policy #10] had been in place since 1990" (Tr. 236), Drs. Geib and Lopinto were much less specific about the date of issuance of the previous APHIS policy and the similarity of the previous APHIS policy to the policy articulated in Policy #10 (CX 34 at 2).[5]

Complainant's failure to introduce documents setting forth the APHIS policy that was applicable at the time of the alleged violations and reliance on Policy #10 (CX 34 at 2), which was issued after the violations alleged in the Complaint, is perplexing. The record is not sufficiently clear to find that the ALJ erred when he found that before 1997, APHIS had no policy that antisera production is testing.

Third, Complainant contends that the ALJ erred in not considering Respondent's registration as a research facility as an admission that he was "engaged in regulated activities as a research facility" (Appeal Pet. at 6).

I disagree with Complainant's contention that the ALJ erred in not considering Respondent's registration as a research facility as an admission that Respondent was engaged in regulated activities as a research facility. Respondent's applications for registration, which were admitted into evidence (CX 1, CX 2), do not contain an admission that Respondent was "engaged in regulated activities as a research facility." Moreover, Respondent consistently took the position in this proceeding that, while he was registered as a research facility, he did not operate as a research facility, as defined in the Animal Welfare Act and the Regulations (Answer ¶ I(B); Respondent's Brief at 1, 3; Respondent's response to Complainant's Appeal Petition [hereinafter Response to Appeal Pet.] at 1-2; Tr. 268-70). Finally, it does not necessarily follow that a person who is registered as a research facility always engages in regulated activities as a research facility.

Fourth, Complainant contends that the ALJ erred in failing to find that Respondent violated 9 C.F.R. § 3.56(c) on April 18, 1995, as alleged in paragraph II(L)(2) of the Complaint (Appeal Pet. at 10).

I agree with Complainant that the ALJ erred in failing to find that Respondent violated 9 C.F.R. § 3.56(c) on April 18, 1995, as alleged in paragraph II(L)(2) of the Complaint. Paragraph II(L)(2) of the Complaint alleges that on April 18, 1995,

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[5]Dr. Geib testified that Policy #10 is based on "correspondences [sic] and memos and policies that had been previously issued" (Tr. 100-05). Dr. Lopinto testified that "some of the fundamentals of [Policy #10] had been evolved earlier, written up earlier than in April 1997" (Tr. 191).

Respondent's premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices. The ALJ states that there is a lack of substantial evidence to support a finding that Respondent violated 9 C.F.R. § 3.56(c), as follows:

> The complaint (¶ II L.2.) alleges a violation of the housekeeping standard at the [April 18, 1995,] inspection based on Dr. Fairchild's finding that two empty cages were dirty. (CX 6; Tr. 63-64.) . . . .
>
> . . . .
>
> Dr. Fairchild, however, did not describe in any factual detail in her testimony or in her report to support her conclusion that the cages were not clean. I find that there is a lack of substantial evidence to support this allegation.

Initial Decision and Order at 10.

However, the April 18, 1995, Animal Care Inspection Report, completed by Dr. Fairchild, states, as follows:

> # 37 Housekeeping 3.56(c)
>
> Premises shall be kept clean in order to facilitate prescribed husbandry practices.
> (1) There were at least two empty but used, dirty cages that were not in use and had not been cleaned and sanitized. Empty cages that have been used and are dirty need to be cleaned and sanitized after use.
> (2) The walls of all the rabbit rooms had urine & feces on them and need to be kept clean & free of contaminating material.
> (3) There was pop & paint stored in the first rabbit room. Only materials needed for actual animal husbandry should be stored in animal areas.
> (4) The fans on both rabbit room doors had hair on the filter and must be cleaned.

CX 6 at 10-11.

Further, Dr. Fairchild specifically addressed the dirty cages which are referenced in the April 18, 1995, Animal Care Inspection Report, as follows:

> [BY MR. MARTIN:]
>
> Q. Did you identify any other deficiencies?

[BY DR. FAIRCHILD:]

A. Yes, I did.

Q. Would you tell us what the next one was.

A. The next one is a housekeeping deficiency.

Q. What did that entail?

A. We had a requirement that premises be kept clean so that husbandry can be practiced in a good manner. There were two empty cages, dirty cages. They weren't actually in use at the time, however they hadn't been cleaned and sanitized and we have a requirement that the empty cages be, once they've been used and they're dirty be cleaned and sanitized.

Q. How would you characterize that deficiency?

A. As a significant deficiency.

Q. Why?

A. These cages that have hair and dirt or haven't been cleaned are a source of contamination for the rest of the animals.

Q. Could that affect an animal's health?

A. Yes, it could[.]

Q. How?

A. By being a source of contamination for animals in the facility.

Tr. 63-64.

In response to Complainant's contention that the ALJ erred in failing to find that Respondent violated 9 C.F.R. § 3.56(c) on April 18, 1995, Respondent states that the empty cages, the walls, and the fans are cleaned regularly; the cans, which contained water-based paint, were removed; and all the rabbits in Respondent's facility have always been found in good health (Respondent's Response to Appeal

Pet. at 3).

Respondent's assertion that the empty cages, walls, and fans were cleaned regularly does not rebut the evidence that the empty cages, walls, and the fans were not clean on April 18, 1995, when Dr. Fairchild inspected Respondent's facility. Moreover, while one of the purposes of the requirement that the premises must be kept clean is to protect animals from injury, the good health of Respondent's rabbits does not rebut the evidence that Respondent violated 9 C.F.R. § 3.56(c) on April 18, 1995.

Finally, even if I found that Respondent removed the cans containing paint from a rabbit room immediately after they were found by Dr. Fairchild, the correction does not eliminate the fact that the violation of 9 C.F.R. § 3.56(c) occurred.[6]

I find, based on the April 18, 1995, Animal Care Inspection Report (CX 6) and Dr. Fairchild's testimony, that Complainant proved by a preponderance of the evidence that on April 18, 1995, Respondent violated section 3.56(c) of the Standards (9 C.F.R. § 3.56(c)), as alleged in paragraph II(L)(2) of the Complaint.

Fifth, Complainant contends that the ALJ erred in failing to find that Respondent violated 9 C.F.R. § 3.51(d) on March 5 and March 7, 1996, as alleged in paragraph III(B)(1) of the Complaint (Appeal Pet. at 11).

I disagree with Complainant's contention that the ALJ erred in failing to find that Respondent violated 9 C.F.R. § 3.51(d) on March 5 and March 7, 1996, as alleged in paragraph III(B)(1) of the Complaint. Paragraph III(B)(1) of the Complaint alleges that the interior building surfaces of indoor housing facilities were not substantially impervious to moisture and capable of being readily sanitized. The ALJ states that Complainant failed to prove that Respondent violated 9 C.F.R. § 3.51(d) on March 5 and March 7, 1996, because the inspector,

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[6]It is well-settled that a correction of a violation of the Animal Welfare Act or the Regulations and Standards does not eliminate the fact that the violation occurred. *In re James E.* Stephens, 58 Agric. Dec. ___, slip op. at 48 (May 5, 1999); In *re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, No. 98-3100 (3d Cir. 1998) (unpublished); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1316 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999) (not to be cited as precedent under 6th Circuit Rule 206); *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)).

Dr. Lopinto, "did not provide any basis for his determination that the wood [on a rabbit restraint device] was not impervious, such as finding that the wood had not been treated with a water sealer" (Initial Decision and Order at 11).

The March 7, 1996, Animal Care Inspection Report, Dr. Lopinto's testimony, and the photograph of Respondent's rabbit restraint device (CX 8 at 2, CX 19; Tr. 117-18, 138) support a finding that Respondent's rabbit restraint device was not substantially impervious to moisture and was not capable of being readily sanitized. However, 9 C.F.R. § 3.51(d) requires that the interior building surfaces of indoor housing facilities must be substantially impervious to moisture and capable of being readily sanitized, and the record does not clearly establish that Respondent's rabbit restraint device or any part of the device is an interior building surface of an indoor housing facility. Therefore, while I disagree with the ALJ's basis for finding that Complainant failed to prove that Respondent violated 9 C.F.R. § 3.51(d) on March 5 and March 7, 1996, I agree with the ALJ's conclusion that Complainant failed to prove that Respondent violated 9 C.F.R. § 3.51(d) on March 5 and March 7, 1996.

Sixth, Complainant contends that the ALJ erred by failing to find that Respondent failed to maintain programs of adequate veterinary care under the supervision of and assistance of a doctor of veterinary medicine on April 18, 1995, March 5 and March 7, 1996, May 28 and May 29, 1996, and October 16, 1996, as alleged in paragraphs II(M), III(A), IV(D), and V(A) of the Complaint, respectively, and failed to provide veterinary care to animals in need of care on April 18, 1995, and March 5 and March 7, 1996, as alleged in paragraphs II(M) and III(A) of the Complaint, respectively (Appeal Pet. at 12-18).

I agree with Complainant's contention that the ALJ erred in failing to find that Respondent failed to provide veterinary care to animals in need of care on April 18, 1995, as alleged in paragraph II(M) of the Complaint.

The April 18, 1995, Animal Care Inspection Report, completed by Dr. Fairchild, states, as follows:

> #48 Veterinary care. 2.33(b)(2)
>
> Each research facility shall maintain programs of adequate veterinary care.
> Rabbit #13 had long nails that need to be trimmed.

CX 6 at 11.

Respondent does not refer to evidence that rebuts the allegation in paragraph II(M) of the Complaint, but rather contends that "[t]he fact that one rabbit did not

have its toenails clipped demonstrates the frivolous nature of Complainant's allegations" (Respondent's Response to Appeal Pet. at 3). However, Dr. Fairchild testified regarding her finding that Respondent failed to provide veterinary care on April 18, 1995, and the significance of the violation, as follows:

[MR. MARTIN:]

Q. Doctor, did you identify any other deficiencies during this inspection?

[DR. FAIRCHILD:]

A. Yes, I did.

Q. Would you tell us what the next one was, please.

A. The next one was veterinary care.

Q. What did that entail?

A. That was -- each research [sic] needs to maintain a program of adequate veterinary care and there was one rabbit that had long toe nails that needed to be trimmed.

Q. How would you characterize that deficiency?

A. As a significant deficiency.

Q. Why?

A. The rabbit[']s toe nails, if they get long, they could grow around or even just walking he could -- he can't put his pads down the way he should, it could cause pain.

Q. So could that affect the animal's health?

A. Yes, it could.

Q. How?

A. It could cause them to not be able to walk as well, maybe get their toes hooked in the cage and could if not taken care of, eventually grow around.

Tr. 64-65.

I find, based on the April 18, 1995, Animal Care Inspection Report and Dr. Fairchild's testimony that Complainant proved by a preponderance of the evidence that, on April 18, 1995, Respondent failed to provide veterinary care to an animal in need of veterinary care, as alleged in paragraph II(M) of the Complaint.

I disagree with Complainant's contention that the ALJ erred in failing to find that Respondent failed to maintain programs of adequate veterinary care under the supervision of and assistance of a doctor of veterinary medicine on March 5 and March 7, 1996, as alleged in paragraph III(A) of the Complaint, and on May 28 and May 29, 1996, as alleged in paragraph IV(D) of the Complaint.

Dr. Lopinto identified items on the March 7, 1996, and the May 29, 1996, Animal Care Inspection Reports, which he characterized as failures to maintain programs of adequate veterinary care (CX 8 at 2-3, CX 24 at 3-4). While these items may constitute violations of the requirement that Respondent maintain programs of adequate veterinary care, these items are not sufficiently described, either in the Animal Care Inspection Reports or in Dr. Lopinto's testimony, to find that they constitute violations of the requirement that Respondent maintain programs of adequate veterinary care.

I agree with Complainant's contention that the ALJ erred in failing to find that Respondent failed to maintain programs of adequate veterinary care under the supervision of and assistance of a doctor of veterinary medicine on October 16, 1996, as alleged in paragraph V(A) of the Complaint.

The October 17, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states Respondent failed to employ an attending veterinarian, as follows:

III Non-compliant Items Newly Identified on This Inspection of 10/96

Item 48 Vet. Care 2.33(a)(1)
Each research facility shall employ an attending veterinarian under formal arrangements which shall include a written program of vet. care
A blank program of vet. care was left with the facility at last inspection because . . . it indicated facility was changing vet.
There is no indication at the time of inspection that program has been completed.

Program of vet. care shall be completed.
Correct by 10/20/96

CX 25 at 2.

Dr. Lopinto explained this entry on the October 17, 1996, Animal Care Inspection Report, as follows:

[BY MR. MARTIN:]

Q. Doctor did you identify any deficiencies during this inspect?

[DR. LOPINTO:]

A. Yes, I did.

Q. Would you tell us what the first one was, please.

A. Again vet care. Each research facility shall employ an attending veterinarian on a formal arrangement which shall include a written program of veterinary care. Now facilities that have a consulting vet have to maintain this written program. When they change, they have to get a new program. There was a change in veterinarians, there was no program. So here again that's to establish who will be the new veterinarian, a program -- a blank program is left for review at that time, so that can be completed.

Q. How would you characterize that deficiency?

A. That would be serious because once you get -- if you know there's going to be a change, you've got pro active on that so that there is that continuity that when you get a change, the new veterinarian is on board so that he can be descriptive. He's assuming that role immediately. So from the get go he has to have that too.

Q. Does that deficiency affect animal health?

A. You cannot operate if you don't have an attending veterinarian.

. . . .

Q. You refer to CX 24, page 8?

A. Right. If you look on May 28th and 29th, you will notice a notation on page 8, "Note: Institutional official is changing vets. A blank program was left with institutional official at the time of inspection." So back in May when I was up there, he said he was changing it. So I didn't write it up because I said okay, you're changing vets, here you are. I left a blank as you'll notice.

In October, again if I wrote it -- the reason I wrote it up is it probably wasn't done in October. So therefore with that month interlude not getting done, then I had grounds to write it up.

Q. So you left a blank form in May.

A. Five months.

Tr. 151-53.

I find that Respondent failed to employ an attending veterinarian under formal arrangements on October 16, 1996, and that this failure constitutes a failure to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, as alleged in paragraph V(A) of the Complaint.

Dr. Lopinto identified additional items on the October 17, 1996, Animal Care Inspection Report which he characterized as a failure to maintain programs of adequate veterinary care (CX 25 at 4). While these additional items may constitute violations of the requirement that Respondent maintain programs of adequate veterinary care, these items are not sufficiently described, either in the Animal Care Inspection Report or in Dr. Lopinto's testimony, to find that they constitute violations of the requirement that Respondent maintain programs of adequate veterinary care.

The ALJ found that Respondent was not a research facility and dismissed paragraphs II(M), III(A), IV(D), and V(A) of the Complaint because they allege violations of section 2.33 of the Regulations (9 C.F.R. § 2.33), which applies to research facilities. However, the ALJ found that Respondent is subject to the Animal Welfare Act and the Regulations and Standards as a dealer (Initial Decision and Order at 9).

Section 2.40 the Regulations (9 C.F.R. § 2.40) places the same requirement on dealers to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and to provide veterinary care to

animals in need of care as section 2.33 of the Regulations (9 C.F.R. § 2.33) places on research facilities. Therefore, while I agree with the ALJ that Respondent is not a research facility and therefore did not violate 9 C.F.R. § 2.33, I find that Respondent was a dealer and Complainant proved by a preponderance of the evidence that on April 18, 1995, and October 16, 1996, Respondent violated section 2.40 of the Regulations (9 C.F.R. § 2.40).

It is well-settled that the formalities of court pleading are not applicable in administrative proceedings.[7] 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.[8] I find that paragraphs II(M) and V(A) of the

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[7]*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).

[8]*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, 277 (1998); *In re Peter A. Lang*, 57 Agric. Dec. 91, 104-05 (1998) (Order Denying Pet. for Recons.); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1323 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 200 n.9 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *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.
(continued...)

Complaint reasonably apprise Respondent of the issues in controversy, and the references in paragraphs II(M) and V(A) of the Complaint to section 2.33 of the Regulations (9 C.F.R. § 2.33) did not mislead Respondent so as to deprive Respondent of due process.

Seventh, Complainant contends that the ALJ erred by failing to find that Respondent refused to allow APHIS inspectors to take photographs of his facility on May 28 and May 29, 1996, as alleged in paragraph IV(A) of the Complaint (Appeal Pet. at 18).

I agree with Complainant that the ALJ erred in failing to find that Respondent refused to allow APHIS employees to conduct a complete inspection of Respondent's facility on May 28 and May 29, 1996, as alleged in paragraph IV(A) of the Complaint. Paragraph IV(A) of the Complaint alleges that on May 28 and May 29, 1996, Respondent refused to permit APHIS employees to conduct a complete inspection of Respondent's facilities by not allowing inspectors to take photographs of conditions of non-compliance, in violation of section 2.38(b)(v) of the Regulations (9 C.F.R. § 2.38(b)(v)).

The May 29, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states, as follows:

> III Non-Compliant Items Newly Identified on This Inspection of 5/96
>
> Item 51 Miscellaneous 2.38(b)(v)
> Each research facility shall allow APHIS officials to document by taking photographs of conditions of non-compliance.
> APHIS officials were not allowed to take photographs of conditions of non-compliance.
> APHIS officials shall be allowed to document with photographs areas of non-compliance.
>
> Correct from the date forward.

CX 24 at 2.

Respondent contends that he did not refuse to allow APHIS officials to take photographs of his facility, as alleged in paragraph IV(A) of the Complaint.

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[8](...continued)
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).

Instead, Respondent contends that he was not present at the facility at the time of the inspection and that Respondent's father, Mr. E. Huchital, told the APHIS officials that he (Mr. E. Huchital) was not authorized to allow the APHIS officials to take photographs. Further, Respondent contends that, despite Mr. E. Huchital's admonition, APHIS officials took photographs of the facility, during the inspection. (Respondent's Response to Appeal Pet. at 6.)

However, while Mr. E. Huchital did testify (Tr. 250-66), he did not testify regarding statements he made concerning photographs of the facility during the May 28 and May 29, 1996, inspection. Moreover, there are no photographs from the May 28 and May 29, 1996, inspection that were introduced into evidence, and Dr. Lopinto testified that he was not allowed to take photographs of conditions and areas of noncompliance during the May 28 and May 29, 1996, inspection, as follows:

> [MR. MARTIN:]
>
> Q. Would you tell us what the first deficiency was that you identified during this inspection.
>
> A. The first one was under refusal to allow APHIS officials to take photographs.
>
> Q. What did that entail?
>
> DR. HUCHITAL: Excuse me, may I make an objection.
>
> JUDGE HUNT: I'm sorry.
>
> DR. HUCHITAL: It's been stated that we have been cited in this inspection report for refusing to allow the APHIS official to take photographs. What were those photographs then?
>
> DR. LOPINTO: Those photographs were taken from the previous inspection of March 1996. In May 1996 when I went in there to document, Mr. Eugene Huchital was there and said we couldn't take pictures and I documented that. At the conclusion of that, that's why it was documented. So as far as I was concerned at the time of inspection, I was refused to allow to take pictures of the facility.

Q. Doctor, how would you characterize that deficiency?

A. That is serious because that is interference with the APHIS officials. When a person assumes responsibility and signs off on that, that means he's going to abide by it all the way, therefore he has to allow us to do our job.

Q. Were you told why you were not being allowed to take photographs?

A. When we took the initial photographs, Dr. Zaidlicz and I, and if you see on the previous inspection from March going back to March when we took our pictures, if you'll notice the inspection took place over a three day period at that time. We took our photographs, we went back, we wrote up the report and went back the additional day. Dr. Huchital, Michael Huchital had called the office speaking to our then sector supervisor, at that time it was Joe Walker, again saying that we had no right to take pictures, there was confidentiality and so forth. We're documenting areas of non-compliance. We have the right to take pictures and we can.

Now I can also bring up another aspect that I was personally involved with that photographs – I had another facility that one time refused to allow us to take photographs but we also went in there, our camera and our photographs are part of our inspection, so therefore we can take them and we're not worried about confidentiality or patents. We're documenting areas of non-compliance under the Animal Welfare Act.

Q. So you wouldn't take a photograph of something sensitive like if there was a document or a protocol on the table, you wouldn't take a photograph of that, would you?

A. Not unless that document has a specific bearing on a particular protocol or so forth in the sensitivity of relating to the Animal Welfare Act.

Tr. 141-43.

I find that Complainant proved by a preponderance of the evidence that, during the May 28 and May 29, 1996, inspection of Respondent's facility, Respondent refused to allow APHIS officials to take photographs of conditions of noncompliance.

The ALJ found that Respondent was not a research facility and dismissed

paragraph IV(A) of the Complaint because it alleges a violation of section 2.38(b)(v) of the Regulations (9 C.F.R. § 2.38(b)(v)), which applies to research facilities. However, the ALJ found that Respondent is subject to the Animal Welfare Act and the Regulations and Standards as a dealer (Initial Decision and Order at 9).

Section 2.126(a)(5) of the Regulations (9 C.F.R. § 2.126(a)(5)) places the same requirement on dealers to allow APHIS officials to document, by the taking of photographs and other means, conditions and areas of noncompliance, as section 2.38(b)(v) of the Regulations (9 C.F.R. § 2.38(b)(v)) places on research facilities. Therefore, while I agree with the ALJ that Respondent is not a research facility and therefore did not violate 9 C.F.R. § 2.38(b)(v), I find that Respondent was a dealer and Complainant proved by a preponderance of the evidence that on May 28 and May 29, 1996, Respondent refused to permit APHIS officials to take photographs of conditions of noncompliance at Respondent's facility, in violation of section 2.126(a)(5) of the Regulations (9 C.F.R. § 2.126(a)(5)).

It is well-settled that the formalities of court pleading are not applicable in administrative proceedings.[9] 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.[10] I find that paragraph IV(A) of the Complaint reasonably apprises Respondent of the issue in controversy, and the reference to Respondent's refusal to allow APHIS employees to conduct a complete inspection of Respondent's animal research facility, in violation of section 2.38(b)(v) of the Regulations (9 C.F.R. § 2.38(b)(v)) in paragraph IV(A) of the Complaint, did not mislead Respondent so as to deprive Respondent of due process.

Eighth, Complainant contends that the ALJ's assessment of a civil penalty of $1,200 is error and seeks the assessment of a civil penalty of "at least $10,000"[11] (Appeal Pet. at 6-9, 18).

Respondent asserts that the assessment of a civil penalty of the magnitude recommended by Complainant would destroy his business and "put [him] and [his]

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[9]See note 7.

[10]See note 8.

[11]Complainant originally sought a civil penalty of $17,500 (Complainant's Brief at 41, 85). Complainant now seeks the assessment of a civil penalty of "at least $10,000" (Appeal Pet. 18), but provides no explanation for the change in the amount of the civil penalty which it seeks.

family out on the street." (Respondent's Response to Appeal Pet. at 3.) Collateral effects of a civil penalty on a respondent's business or family are not relevant to determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations and Standards. Nonetheless, for the reasons described, *infra*, I have not assessed the civil penalty recommended by Complainant.

The ALJ concluded that Respondent committed 13 violations of the Standards.[12] As discussed in this Decision and Order, *supra*, I find that Respondent committed 17 violations of the Regulations and Standards.[13] Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that I may assess a civil penalty of not more than $2,500 for each violation. Therefore, the maximum civil penalty that could be assessed against Respondent for the 17 violations of the Regulations and Standards is $42,500.

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) requires that in determining the civil penalty to be assessed, I must give due consideration to the size of the business of the person involved, the gravity of the violations, the violator's good faith, and the history of previous violations.

Respondent has about 80 rabbits and grosses approximately $57,000 annually (CX 2; Tr. 203, 277-78). Respondent contends that "[a] business that grosses between $57,000 and $70,000 is by today's standards far from successful. One must consider the cost of rent, employee salaries, insurance, utilities,

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[12]Specifically, the ALJ concluded that Respondent violated: (1) 9 C.F.R. § 3.51(d), as alleged in paragraph II(L)(1) of the Complaint; (2) 9 C.F.R. § 3.56(c), as alleged in paragraph III(B)(2) of the Complaint; (3) 9 C.F.R. § 3.51(b), as alleged in paragraph III(B)(3) of the Complaint; (4) 9 C.F.R. § 3.56(a)(3), as alleged in paragraph III(B)(4) of the Complaint; (5) 9 C.F.R. § 3.56(b)(1), as alleged in paragraph III(B)(4) of the Complaint; (6) 9 C.F.R. § 3.51(d), as alleged in paragraph IV(E)(1) of the Complaint; (7) 9 C.F.R. § 3.56(c), as alleged in paragraph IV(E)(2) of the Complaint; (8) 9 C.F.R. § 3.51(b), as alleged in paragraph IV(E)(3) of the Complaint; (9) 9 C.F.R. § 3.56(a)(3), as alleged in paragraph IV(E)(4) of the Complaint; (10) 9 C.F.R. § 3.56(c), as alleged in paragraph V(B)(1) of the Complaint; (11) 9 C.F.R. § 3.51(b), as alleged in paragraph V(B)(2) of the Complaint; (12) 9 C.F.R. § 3.56(a)(3), as alleged in paragraph V(B)(3) of the Complaint; and (13) 9 C.F.R. § 3.56(b)(1), as alleged in paragraph V(B)(3) of the Complaint.

[13]In addition to the 13 violations of the Standards found by the ALJ, I find that Respondent violated: (1) 9 C.F.R. § 3.56(c), as alleged in paragraph II(L)(2) of the Complaint; (2) the requirement that Respondent provide veterinary care to animals in need of veterinary care, as alleged in paragraph II(M) of the Complaint; (3) the requirement that Respondent allow APHIS officials to conduct a complete inspection of his facility, as alleged in paragraph IV(A) of the Complaint; and (4) the requirement that Respondent maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, as alleged in paragraph V(A) of the Complaint.

transportation, legal fees, taxes, building repairs, animal feed and care, etc." (Respondent's Response to Appeal Pet. at 3.) However, neither the success of the business nor the profitability of the business is a criterion that I must examine when determining the amount of the civil penalty to assess. I find that Respondent's business is large. Respondent chronically failed to comply with the Animal Welfare Act and the Regulations and Standards during the period April 18, 1995, through October 16, 1996. Many of Respondent's violations were serious and could have affected the health of Respondent's rabbits. However, Drs. Fairchild and Lopinto testified that, despite the violations, Respondent's rabbits were watered, well-fed, and "in good flesh," which indicates that they were in good health (Tr. 67, 76, 176). Respondent's refusal to allow APHIS officials to complete inspection of the facility is a very serious violation of the Regulations because it thwarts the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act.

The repeated violations found during four inspections of Respondent's facility evidence a lack of good faith and the ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)).

USDA'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.[14]

The administrative officials base their sanction recommendation on the 65 violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint; therefore, I reject Complainant's recommendation of a civil penalty of at least $10,000. Instead, I am assessing Respondent a civil penalty of $3,750, which I believe is sufficient to deter Respondent and similarly situated persons from future violations of the Animal Welfare Act and the Regulations and Standards.

I agree with Complainant that, in addition to the assessment of a civil penalty, Respondent should be ordered to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

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 provide interior building surfaces of indoor housing facilities which are substantially impervious to moisture and capable of being readily sanitized;

(b) failing to keep premises (buildings and grounds) clean and in good repair to protect animals from injury and to facilitate prescribed husbandry practices;

(c) failing to provide veterinary care to animals in need of care;

(d) failing to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(e) failing to sufficiently ventilate indoor housing facilities for rabbits to

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[14] *In re James E. Stephens*, 58 Agric. Dec. ___, slip op. at 44 (May 5, 1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal docketed*, Nos. 99-2460, 99-2665 (8th Cir. June 1 and June 25, 1999).; *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999); *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).

minimize odors and ammonia levels;

(f) failing to sanitize primary enclosures for rabbits at least once every 30 days;

(g) failing to clean pans under primary enclosures at least once each week; and

(h) failing to allow APHIS officials to document, by the taking of photographs, conditions of noncompliance.

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 $3,750. The civil penalty 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, DC 20250-1417

The certified check or money order shall be sent to, and received by, Colleen A. Carroll within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 97-0020.

HORSE PROTECTION ACT

COURT DECISION

WILLIAM J. REINHART; JACK R. STEPP v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 98-3765.
Filed August 13, 1999.

(Cite as 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir.))

Horse protection - Soring - Substantial evidence.

The United States Court of Appeals for the Sixth Circuit affirmed the Judicial Officer's decision that Jack Stepp violated 15 U.S.C. § 1824(2)(B) by entering a horse in a horse show while the horse was sore and that William Reinhart violated 15 U.S.C. § 1824(2)(D) by allowing the entry of a horse in a horse show while the horse was sore. The Sixth Circuit concluded that William Reinhart's and Jack Stepp's evidentiary challenge to the Judicial Officer's decision lacked merit and that the Judicial Officer's decision employed the proper legal standards and was supported by substantial evidence.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

ORDER

Before: NORRIS and SUHRHEINRICH, Circuit Judges; RICE, District Judge.*

Jack Stepp, a horse trainer, and William Reinhart, owner of the horse "Honey's Threat," appeal from the decision of the United States Department of Agriculture's ("USDA") Judicial Officer ("JO") that they violated the Horse Protection Act ("HPA"), as amended (15 U.S.C. §§ 1821-1831), by attempting to show Honey's Threat when the horse was sore. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

The Acting Administrator of the Animal and Plant Health Inspection Service instituted a disciplinary administrative proceeding under the HPA, and the Rules

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*The Honorable Walter H. Rice, United States District Judge for the Southern District of Ohio, sitting by designation.

of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151) by filing a complaint on March 30, 1994. The complaint alleged that: (1) on August 3, 1991, Jack Stepp entered, for the purpose of showing or exhibiting, a horse known as "Honey's Threat," as Entry No. 362, in Class No. 15, at the Wartrace Horse Show at Wartrace, Tennessee, while the horse was sore, in violation of § 5(2)(B) of the HPA; and (2) on August 3, 1991, William Reinhart allowed the entry, for the purpose of showing or exhibiting, a horse known as "Honey's Threat," as Entry No. 362, in Class No. 15, at the Wartrace Horse Show at Wartrace, Tennessee, while the horse was sore, in violation of § 5(2)(D) of the HPA. Reinhart and Stepp responded to the complaint by denying that Honey's Threat was sore when entered in the Horse Show.

On October 8, 1997, an Administrative Law Judge ("ALJ") conducted a hearing in the matter. On February 6, 1998, the ALJ issued a Decision and Order in which the ALJ: (1) concluded that Stepp violated § 5(2)(B) of the HPA by entering Honey's Threat in the Wartrace Horse Show on August 3, 1991, while the sore was sore; (2) concluded that Reinhart violated § 5(2)(D) of the HPA by allowing the entry of Honey's Threat in the Wartrace Horse Show on August 3, 1991, while the horse was sore; (3) assessed each respondent a civil penalty of $2,000; and (4) disqualified each respondent for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction.

On March 11, 1998, Reinhart and Stepp appealed to the JO, who serves as the delegate of the Secretary of Agriculture for judicial matters, 7 C.F.R. § 2.35, and has final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556, 557. The JO affirmed the ALJ's factual findings. In their appeal to this court, Reinhart and Stepp challenge an evidentiary ruling of the ALJ and question the sufficiency of the evidence to support the ALJ's findings.

Upon review, we conclude that the Secretary's decision employed the proper legal standards and is supported by substantial evidence. *See Elliott v. Administrator, Animal & Plant Health Inspection Serv.*, 990 F.2d 140, 144 (4th Cir.), *cert. denied*, 114 S.Ct. 191 (1993); *Fleming v. United States Dep't of Agric.*, 713 F.2d 179, 188 (6th Cir. 1983). Moreover, Reinhart's and Stepp's evidentiary challenge lacks merit.

Accordingly, the JO's decision is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

MUSHROOM PROMOTION, RESEARCH, AND CONSUMER INFORMATION ACT

COURT DECISION

UNITED FOODS, INC. v. UNITED STATES OF AMERICA.
No. 98-6436.
Filed November 23, 1999.

(Cite as 197 F.3d 221 (6th Cir.))

Mushrooms – First amendment – Freedom of speech – Commercial speech.

The United States Court of Appeals for the Sixth Circuit held that portions of the Mushroom Promotion, Research, and Consumer Information Act of 1990, which authorize coerced payments for advertising, are unconstitutional and the effort by the Department of Agriculture to force payments from the plaintiff for advertising is invalid under the First Amendment. The Court read *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), as holding that nonideological, compelled, commercial speech is justified in the context of extensive regulation of an industry but not otherwise. The Court found that, unlike the collectivized California tree fruit industry at issue in *Wileman*, mushrooms are unregulated; thus, *Wileman* is inapposite.

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT.

Before: MERRITT and CLAY, Circuit Judges; ALDRICH,* District Judge.

OPINION

MERRITT, Circuit Judge.

In this case of compelled, commercial speech challenged under the First Amendment, the Department of Agriculture requires the plaintiff, a mushroom producer, to contribute funds for advertising mushrooms, on a regional basis, as authorized by the Mushroom Promotion, Research, and Consumer Information Act

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*The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

of 1990, 7 U.S.C. § 6101 *et seq.*[1] The District Court upheld the Act and the government's action compelling payments for mushroom advertising. The plaintiff claims that other mushroom producers shape the content of the advertising to its disadvantage and that the administrative process allows a majority of producers to create advertising to its detriment. The issue before us is whether the answer to the First Amendment question presented here should be the same as in the recent case of *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), in which the Supreme Court in a controversial 5-4 decision[2] upheld a similar agricultural advertising program in the heavily regulated California tree fruits business (peaches, plums and nectarines). But unlike the tree fruit business in *Wileman*, the mushroom growing business in the case before us is unregulated, except for the enforcement of a regional mushroom advertising

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[1]Enacted by Congress in 1990, the Mushroom Act states:

> It is declared to be the policy of congress that it is in the public interest to authorize the establishment of an orderly procedure for financing through adequate assessments on mushrooms produced domestically or imported into the United States, program of promotion, research, and consumer and industry information designed to–
>
> (1) strengthen the mushroom industry's position in the marketplace;
> (2) maintain and expand existing markets and uses for mushrooms; and
> (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b). These policy objectives are supported by findings set forth in the Act that mushrooms are not only an important food valuable to the human diet, but that they play a significant role in this country's economy and that their production benefits the environment. The Act does not permit the regulation of prices or mandatory quantity or quality controls of mushrooms produced and sold by farmers, nor does it subsidize or restrict the growth of mushrooms or otherwise collectivize the industry. It is basically a commercial advertising statute designed to assess mushroom growers for the cost of advertising. 7 C.F.R. Part 1209.40(a).

Pursuant to the Mushroom Act, the Secretary of Agriculture promulgated an Order establishing a Mushroom Council made up of mushroom producers nominated by producers and importers for appointment by the Secretary. 7 U.S.C. § 6104(b); 7 C.F.R. Part 1209. The Order generally directs the Council to "carry out programs, plans, and projects designed to provide maximum benefits to the mushroom industry." 7 C.F.R. § 1209.39(l). The Council's activities are funded through mandatory assessments on larger producers and importers of fresh mushroom products for domestic use, based upon poundage of mushrooms marketed in the United States and not to exceed a penny per pound. 7 U.S.C. § 6104(g), 7 C.F.R. § 1209.51. The Council has used these funds solely to finance generic advertising efforts on behalf of the mushroom industry.

[2]*See, e.g.*, Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929 (1998); *Leading Case, Commercial Speech–Compelled Advertising*, 111 HARV. L. REV. 319 (1997).

program.

The government argues that the degree of regulation or "collectivization" of an industry should make no First Amendment difference on the compelled advertising issue so long as the compelled advertising is nonpolitical and so long as the plaintiff is not restricted in its own advertising. The plaintiff contends to the contrary that the constitutionality of the compelled speech under the 1990 Mushroom Act–in light of Wileman–must turn on the degree of regulation of the industry. The question for us is whether the degree of government regulation of an industry controls the outcome or whether the government is right that this is irrelevant under *Wileman*.

In prior restraint and compelled speech cases involving nonbroadcast political speech, the First Amendment prohibition is nearly absolute, *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), holding that newspapers have a right to publish without prior restraint, *West Virginia v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), holding that schoolchildren may not be compelled to join in a flag salute ceremony, and *Miami Herald v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), holding that newspapers may not be compelled to publish a reply by political candidates. But commercial speech compelled by government is governed by a different, and as yet unsettled, set of principles which require a court to balance a number of factors according to its judgment concerning the welfare of buyers and sellers in the market place.

In the *Wileman* case, the Supreme Court emphasized and reemphasized that the compelled advertising program for California tree fruits under the Agricultural Marketing Agreement Act of 1937 contemplates "a uniform price to all producers in a particular market," a "policy of collective, rather than competitive, marketing" and an exemption from the antitrust laws in order "to avoid unreasonable fluctuation in supplies and prices." *Wileman*, 521 U.S. at 461, 117 S.Ct. 2130. In his opinion for five members of the Court, Justice Stevens repeatedly "stress[ed] the importance" of the fact that the advertising takes place "as a part of a broader collective enterprise in which [the producers'] freedom to act independently is already constrained by the regulatory scheme." *Id.* at 469, 117 S.Ct. 2130. In contrast, the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply. Except for the compelled advertising program assessing growers based on their volume of mushroom production, there appears to be a

relatively free market in mushrooms, both processed and fresh.[3]

On the other side of the ledger, the government correctly argues that Justice Stevens also emphasized repeatedly in his opinion that the compelled agricultural advertising in *Wileman* is not a *restriction* on commercial advertising as in cases that have invalidated such regulation, *see, e.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), because separate, individual, producer advertising of tree fruits is not prohibited or restricted. *See Wileman*, 521 U.S. at 469-70, 117 S.Ct. 2130. The opinion emphasizes that the test for compelled advertising is not the same as the four-part test for restrictions on advertising set out in *Central Hudson*. *See id.* The government also correctly argues that Justice Stevens repeatedly emphasizes that no "symbolic," "ideological" or "political" speech is involved in the tree fruit advertising. *See id.* Justice Stevens' opinion sets out these various factors concisely when he says that the compelled advertising of tree fruits passes muster "because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders [which collectivize the industry] and, (2) *in any event*, the assessments are not used to fund ideological activities." *Wileman*, 521 U.S. at 473, 117 S.Ct. 2130 (emphasis added).

The question for us then is whether these two elements–(1) germaneness to a valid, comprehensive, regulatory scheme and (2) nonideological content–are independent of each other and each provide a sufficient basis for upholding compelled commercial speech. In other words, even though the mushroom

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[3]Justice Souter's twenty-five page dissenting opinion in *Wileman* provides an extensive history of compelled advertising in the market for agricultural commodities. His reading of the history of the agricultural regulations is that it shows that the advertising is simply the result of interest group lobbying, not a response to economic conditions. *See Wileman*, 521 U.S. at 491-99, 117 S.Ct. 2130 (Souter, J., dissenting). Justice Souter's dissent recounts that in 1952 Congress began providing for compelled advertising for an ever-expanding list of agricultural commodities. Sometimes the legislation, and the marketing orders authorized by the legislation, cover a commodity from just one section of the country–for example, California peaches but not Georgia peaches. In recent years Congress has added many farm products to the list in which compelled advertising is the main or the only form of regulation. Justice Souter explains that this comes about because of "the view of the Department of Agriculture that 'any fruit or vegetable commodity group which actively supports the development of a promotion program by this means should be given an opportunity to do so.'" *Id.* at 495-96, 117 S.Ct. 2130 (citing S. REP. NO. 92-295, at 2 (1971)). Justice Souter concludes that these programs of compelled advertising appear to rest only on "the preference of a local interest group." *Id.* at 497, 117 S.Ct. 2130. "Without more, the most reasonable inference is not of a substantial Government interest, but effective politics on the part of producers who see the chance to spread their advertising costs." *Id.* at 498, 117 S.Ct. 2130.

advertising program before us is not "germane" to any collective program setting prices or supply, does the fact that the advertising is "nonideological" or "nonpolitical" in nature mean that it should be permitted under the First Amendment?

We do not read the majority opinion in *Wileman* as saying that any compelled commercial speech that is nonpolitical or nonsymbolic or nonideological does not warrant First Amendment protection. We conclude that the explanation for the *Wileman* decision is to be found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of a free market, as well as in the nonpolitical nature of the compelled speech. The majority uses this concept of collectivization and the nonideological nature of the advertising together. The conjunction "and" germaneness "and" nonpolitical–is used in the Court's holding. Our interpretation of *Wileman* is that if either of the two elements is missing–either the collectivization of the industry or the purely commercial nature of the advertising–the First Amendment invalidates the compelled commercial speech, absent some other compelling justification not present in the case before us. The Court's holding in *Wileman*, we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise. The purpose of this principle joining regulation and content is to deter free riders who take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits such free riders receive at the hands of the government. Whether wise or unwise, or true or untrue, the legislative theory behind such extensive regulation is that the interests of producers and consumers are furthered by the monopoly powers inherent in government control of price and supply. In exchange for such power in the market place, members of the industry may have to provide certain benefits to their industry in the form of payments for nonideological advertising of industry products. If an economic actor chooses to remain aloof from the regulated industry, he owes no reciprocal duty to promote the industry; but if he chooses to join, he has a reciprocal duty to promote its interest. This principle of reciprocity designed to control free-ridership is essentially the same basis upon which the Supreme Court upheld some, and struck down other, compelled speech in the union, closed-shop context in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991).

Applying this interpretation to the case at hand, we find that the context of the mushroom business is entirely different from the collectivized California tree fruit business. Mushrooms are unregulated. Hence the compelled commercial speech is not a price the members must pay under the reciprocity principle in order to further their self-interest which is regarded as arising from heavy regulation

through marketing orders controlling price, supply and quality. Thus in the absence of extensive regulation, the effort by the Department of Agriculture to force payments from plaintiff for advertising is invalid under the First Amendment. The portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are likewise unconstitutional.

Accordingly, the judgment of the District Court is reversed.

NATIONAL DAIRY PROMOTION AND RESEARCH BOARD

COURT DECISION

GALLO CATTLE COMPANY v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 98-17318.
Filed July 27, 1999.

(Cite as 189 F.3d 473, 1999 WL 547427 (9th Cir.)).

Dairy program – Freedom of speech – First amendment.

The United States Court of Appeals for the Ninth Circuit, relying on *Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S. Ct. 2130 (1997), concluded that the Dairy Promotion Program, which compelled appellant to fund generic advertising, did not violate appellant's right to freedom of speech guaranteed under the First Amendment to the United States Constitution.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

MEMORANDUM*

Before: REINHARDT, O'SCANNLAIN and W. FLETCHER, Circuit Judges.

The facts are known to the parties and need not be repeated here.

The advertising program here is indistinguishable in all relevant aspects from the programs held constitutional by the Supreme Court in *Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S. Ct. 2130 (1997) ("*Wileman*"), and by this court in *Gallo Cattle Co. v. California Milk Advisory Bd.*, No. 97-17182, slip op. 7879 (9th Cir. July 14, 1999) ("*Gallo I*"), the *Wileman* analysis is applicable because "[t]he dairy farmers 'are compelled to fund the generic advertising . . . as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.'" *Id.* at 7894 (quoting *Wileman*, 117 S. Ct. at 2138). Under that analysis, the advertising program here does not impose a restraint on Gallo's freedom to communicate because "Gallo is free to advertise or

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

otherwise communicate any message that it desires in any manner that it desires to any audience that it desires." *Id.* Nor does the advertising program compel Gallo to engage in any actual or symbolic speech; Gallo is not publicly associated with the generic advertising, nor do the mandatory assessments themselves constitute compelled speech. *See id.* at 7895. Moreover, while Gallo asserts that it has ideological objections to the advertising program's promotion of bovine growth hormone, such objections do not render the advertisements compelled speech in violation of the First Amendment so long as the promotion of bovine growth hormone is germane to the advertising program's purposes and goals. *See id.* at 7896. Regardless of the legitimacy of Gallo's ideological objections, we cannot conclude that the promotion of bovine growth hormone is not germane to the advertising program's purposes. Arguably, to the extent that the use of growth hormones increases milk production, the dairy industry might well be better able to supply the current market for dairy products and to expand that market. *See* 7 U.S.C. § 4501 (stating that the Dairy Promotion Program was "designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products").

AFFIRMED.

NONPROCUREMENT DEBARMENT AND SUSPENSION

DEPARTMENTAL DECISION

In re: CARL H. FREI.
DNS-FS Docket No. 99-0001.
Decision and Order filed November 12, 1999.

Nonprocurement Debarment - Conviction of Crime - Suspension Affirmed.

Judge Edwin S. Bernstein affirmed the decision of the debarring official suspending Respondent for 18 months because Respondent was convicted of unlawfully taking trees in violation of his contract with the Forest Service.

Lori Polin Jones, for Debarring Official.
Dennis L. Albers, for Respondent.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions pursuant to 7 C.F.R. part 3017, the regulations which implement a governmentwide system for nonprocurement debarment and suspension. The regulations at 7 C.F.R. § 3017.100(a) state "Executive Order (E.O.) 12549 provides that to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurment debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have a governmentwide effect."

On August 23, 1999, Respondent, Carl H. Frei, filed a timely appeal of the July 20, 1999 decision of the debarring official, Paul Brouha, acting on behalf of the United States Department of Agriculture, Forest Service ("the Forest Service") which debarred Respondent from entering into primary or lower tier covered transactions with the Federal Government, or any participants in such programs, for 18 months until November 3, 2000. The debarment was based upon Respondent's actions in violation of his contract with the Forest Service which resulted in Respondent's conviction of a criminal offense by the United States District Court for the District of Idaho. Respondent asserts that this conviction was not serious enough to warrant debarment, that the debarring official failed to consider mitigating facts, and that any administrative penalty should be limited to

a period of probation.

On August 31, 1999, Acting Chief Judge Dorothea A. Baker entered a ruling respecting procedural requirements governing this proceeding. Pursuant to that ruling, the Forest Service filed the record of the administrative proceeding below ("the Record"), and on September 9, 1999, the Forest Service filed its "Debarring Official's Response in Opposition to Appeal." Respondent did not file any reply to this response.

Findings of Fact

On June 3, 1998, Frei Logging, a partnership consisting of Carl H. Frei and Bill M. Frei was awarded a Timber Sale Contract for Clearwater National Forest by the United States Department of Agriculture, Forest Service. The contract stated that the Forest Service agreed to sell and permit Frei Logging to purchase, cut and remove specified timber in Clearwater National Forest. (Record Tab 4). The specifications for the contract were contained in a bid submitted by Frei Logging on May 13, 1998 (Record Tab 5).

On February 25, 1999, by Judgment in a Criminal Case filed in United States District Court, District of Idaho, Respondent, Carl H. Frei was convicted of "Violating Term or Condition of Timber Sale Contract Without Approval" in violation of 16 U.S.C. § 551 and 36 C.F.R. § 261.10(1). (Record Tab 3). The Court ordered Respondent to pay fines totaling $35 and pay restitution to the Forest Service of $764.26.

Conclusion

The decision of the Debarring Official, debarring Carl Frei for a period of 18 months until November 3, 2000, is appropriate.

Discussion

The Department of Agriculture's Government Nonprocurement Debarment and Suspension regulations provide that debarment may be imposed for conviction of theft. 7 C.F.R. § 3017.305(a)(3). On February 25, 1999, Respondent was convicted, by virtue of his guilty plea, of unlawfully taking trees in violation of his contract with the Forest Service. Therefore, Mr. Frei's conviction is valid cause for debarment.

Violations of the prohibitions contained in Forest Service regulations at 36 C.F.R. Part 261, for which Mr. Frei was convicted, and the seriousness of such

violations have been contemplated by federal courts. *See, e.g., United States v. Northwest Pine Products, Inc.*, 914 F. Supp. 404, 407 (D. Or. 1996); and *see also, United States v. Wilson, et al.*, 438 F.2d 525 (9th Cir. 1971) in which (the Ninth Circuit declined to find that wilfulness or *mens rea* is an element of the prohibition against cutting or otherwise damaging any timber, tree or other forest product except as authorized, and affirmed the District Court's conviction of two offenders under 36 C.F.R. § 261.6(a)).

The prohibition violated by Mr. Frei, and upon which he was convicted, in 36 C.F.R. § 261.10, is very similar to those prohibitions determined by courts to be serious offenses. Section 261.6(a) of Title 36 of the Code of Federal Regulations states: "[c]utting or otherwise damaging any timber, tree, or other forest product, except as authorized by a special-use authorization, timber sale contract, or Federal law or regulation" is prohibited conduct. *See also*, 36 C.F.R. §§ 261.6(c) & (e) which prohibits the removal of timber except as otherwise authorized.

Respondent's arguments in defense of his actions are without merit. The fact is that he pleaded guilty and was convicted of committing these wrongful and illegal actions.

Order

The suspension of Respondent Carl H. Frei until November 3, 2000, is affirmed.

This Order shall take effect immediately. This Decision and Order is final and not appealable within this Department. 7 C.F.R. § 3017.515(d).

[This Decision and Order became final November 12, 1999.-Editor]

PLANT QUARANTINE ACT

DEPARTMENTAL DECISION

In re: LA FORTUNA TIENDA.
P.Q. Docket No. 99-0013.
Decision and Order filed September 1, 1999.

Default — Avocados — Failure to file timely answer — Civil penalty — Sanction policy.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt, concluding that Respondent moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to Mt. Airy, North Carolina, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff. The Judicial Officer found that the respondent's movement of 11 boxes of avocados constituted 11 violations of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff and increased the $500 civil penalty assessed by the ALJ to $1,000. The Judicial Officer also held that the sanction policy in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988), was not applicable to the proceeding because the complainant did not request a specific civil penalty in the complaint. Further, the Judicial Officer found that the assessment of a $1,000 civil penalty against the respondent was warranted in law and justified by the facts. The Judicial Officer also found that the number of plant quarantine and animal quarantine cases filed with the Hearing Clerk had declined in recent years and there was no further need for the sanction policy in *Kaplinsky*. The Judicial Officer held that sanction policy in *Kaplinsky* would not be applied to any case in which the complaint instituting the proceeding was filed after September 1, 1999.

Sheila Hogan Novak, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Acts]; regulations issued under the Acts (7 C.F.R. §§ 301.11(b) and 319.56-2ff) [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, 1999.

The Complaint alleges that on or about December 28, 1998, La Fortuna Tienda [hereinafter Respondent] moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to La Fortuna Tienda, Mt. Airy, North Carolina, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff (Compl. ¶ 2).

The Hearing Clerk served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and a service letter on April 8, 1999.[1] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On May 18, 1999, 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 and a proposed Default Decision and Order. Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's proposed Default Decision and Order, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On June 16, 1999, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt [hereinafter the ALJ] issued a Default Decision and Order [hereinafter Initial Decision and Order]: (1) concluding that on or about December 28, 1998, Respondent moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to La Fortuna Tienda, Mt. Airy, North Carolina, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff; and (2) assessing Respondent a $500 civil penalty (Initial Decision and Order at 2).

On July 30, 1999, Complainant appealed to, and requested oral argument before, the Judicial Officer. The Hearing Clerk served Respondent with a copy of Complainant's Proposed Findings of Fact, Conclusions, and Order and Brief In Support Thereof [hereinafter Appeal Petition] on August 6, 1999.[2] Respondent failed to file a response to Complainant's Appeal Petition within 20 days after service of the Appeal Petition, as provided in section 1.145(b) of the Rules of Practice (7 C.F.R. § 1.145(b)), and on August 31, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

Complainant's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Complainant has thoroughly addressed the issues; thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order, except that I disagree with the civil penalty assessed by the ALJ. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order with modifications that reflect my disagreement with the civil penalty assessed by

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[1]See Domestic Return Receipt for Article Number P 040 136 701.

[2]See Domestic Return Receipt for Article Number P093175108.

the ALJ. Additional conclusions by the Judicial Officer follow the ALJ's conclusion.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 7B—PLANT PESTS

. . . .

§ 150gg. Violations

. . . .

(b) Civil penalty

Any person who—

(1) violates section 150bb of this title or any regulation promulgated under this chapter[]

. . . .

may be assessed a civil penalty by the Secretary not exceeding $1,000. The 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.

. . . .

CHAPTER 8—NURSERY STOCK AND OTHER PLANTS AND PLANT PRODUCTS

. . . .

§ 163. Violations; forgery, alterations, etc., of certificates; punishment; civil penalty

. . . Any person who violates any . . . rule[] or regulation [promulgated by the Secretary of Agriculture under this chapter] . . . may be assessed a civil penalty by the Secretary not exceeding $1,000. The 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.

7 U.S.C. §§ 150gg(b), 163.

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

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

. . . .

PART 301—DOMESTIC QUARANTINE NOTICES

SUBPART—IMPORTED PLANTS AND PLANT PARTS

. . . .

§ 301.11 Notice of quarantine; prohibition on the interstate movement of certain imported plants and plant parts.

(a) In accordance with part 319 of this chapter, some plants and plant parts may only be imported into the United States subject to certain destination restrictions. That is, under part 319, some plants and plant parts may be imported into some States or areas of the United States but are prohibited from being imported into, entered into, or distributed within other States or areas, as an additional safeguard against the introduction and establishment of foreign plant pests and diseases.

(b) Under this quarantine notice, whenever any imported plant or plant part is subject to destination restrictions under part 319:

. . . .

(2) No person shall move any plant or plant part from any such quarantined State or area into or through any State or area not quarantined with respect to that plant or plant part.

. . . .

PART 319—FOREIGN QUARANTINE NOTICES

. . . .

SUBPART—FRUITS AND VEGETABLES

QUARANTINE

. . . .

§ 319.56-2ff Administrative instructions governing movement of Hass avocados from Mexico to the Northeastern United States.

Fresh Hass variety avocados (*Persea americana*) may be imported from Mexico into the United States for distribution in the northeastern United

States only under a permit issued in accordance with § 319.56-4, and only under the following conditions:

(a) *Shipping restrictions. . . .*

(3) The avocados may be distributed only in the following northeastern States: Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin.

. . . .

(c) *Safeguards in Mexico. . . .*

. . . .

(3) *Packinghouse requirements.* The packinghouse must be registered with Sanidad Vegetal's avocado export program and must be listed as an approved packinghouse in the annual work plan provided to APHIS by Sanidad Vegetal. The operations of the packinghouse must meet the following conditions:

. . . .

(vii) The avocados must be packed in clean, new boxes. The boxes must be clearly marked with the identity of the grower, packinghouse, and exporter, and the statement "Distribution limited to the following States: CT, DC, DE, IL, IN, KY, ME, MD, MA, MI, NH, NJ, NY, OH, PA, RI, VA, VT, WV, and WI."

7 C.F.R. §§ 301.11(a), (b)(2), 319.56-2ff(a)(3), (c)(3)(vii).

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

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 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 as 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. La Fortuna Tienda is a business whose mailing address is 103 East Pine Street, Mt. Airy, North Carolina 27030.

2. On or about December 28, 1998, Respondent moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to La Fortuna Tienda, Mt. Airy, North Carolina.

Conclusion of Law

By reason of the Findings of Fact in this Decision and Order, *supra*, Respondent violated the Acts and the Regulations (7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises one issue in Complainant's Appeal Petition. Complainant contends that the ALJ's failure to assess Respondent a $1,000 civil penalty, as Complainant requested in Complainant's Motion for Adoption of Proposed Default Decision and Order, is error.

The ALJ assessed Respondent a $500 civil penalty stating that "[a]s the complaint does not allege more than one incident as constituting a violation, the penalty is reduced to $500 in accordance with *Shu[lam]is Kaplinsky*, [47] Agric. Dec. 613 (1988)" (Initial Decision and Order at 2 n.1).

Complainant contends that the Complaint alleges multiple violations of the Regulations and that the ALJ's conclusion that the Complaint only alleges "one incident as constituting a violation," is error (Appeal Pet. at 5-9).

Paragraph 2 of the Complaint provides, as follows:

> On or about December 28, 1998, [R]espondent moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to La Fortuna Tienda, Mt. Airy, North Carolina, in violation of 7 C.F.R. §§ 301.11(b)(2), 319.56-2ff because such movement is prohibited.
>
> By reason of the facts alleged herein, the *[R]espondent has violated the Acts and regulations promulgated thereunder with the movement of each box of Mexican Hass avocados* outside of the state quarantined for Mexican Hass avocados.

Compl. ¶ 2 (emphasis added).

The language in paragraph 2 of the Complaint supports Complainant's contention that the Complaint alleges that each box of Mexican Hass avocados that Respondent moved from Chicago, Illinois, to Mt. Airy, North Carolina, constitutes a separate violation of the Regulations. Therefore, I find that the ALJ erred when he found that the Complaint alleges only "a violation."

Moreover, I agree with Complainant's position that each box of Mexican Hass avocados moved by Respondent from Chicago, Illinois, to Mt. Airy, North Carolina, constitutes a separate violation of the Regulations. Neither the Act of August 20, 1912, as amended, nor the Federal Plant Pest Act, as amended, defines the term *violation* and any reasonable interpretation of the term must be upheld. The Regulations provide that fresh Hass variety avocados imported from Mexico may be distributed only in Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin (7 C.F.R. § 319.56-2ff(a)(3)) and that in order to ensure that avocados are not distributed to other states, each box of avocados must be clearly marked with the statement "Distribution limited to the following States: CT, DC, DE, IL, IN, KY, ME, MD, MA, MI, NH, NJ, NY, OH, PA, RI, VA, VT, WV, and WI" (7 C.F.R. § 319.56-2ff(c)(3)(vii)). Because each box of avocados is required to be marked with the states to which the avocados may be distributed, I conclude that each box of avocados, which is distributed to a state other than a state identified on the box, is a separate violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff.[3]

Complainant also contends that the sanction policy in *In re Shulamis Kaplinsky*,

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[3]The conclusion that Respondent's movement of each box is a separate violation of the Regulations is consistent with cases under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], in which each misrepresented carton of produce constitutes a separate violation of the PACA. See *In re Sunland Packing House Co.*, 58 Agric. Dec. ___, slip op. at 72 (Feb. 17, 1999) (stating that the respondent misrepresented 10,622 cartons of hybrid grapefruit and that each misrepresented carton constitutes a separate violation of 7 U.S.C. § 499b(5)); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 35 (Sept. 30, 1998) (stating that the respondent misrepresented at least 2,319 cartons of grapefruit and that each misrepresented carton constitutes a separate violation of 7 U.S.C. § 499b(5)); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 36 (Aug. 18, 1998) (concluding that the respondent's misrepresentation of the country of origin of 411 cartons of limes sold to three customers on three occasions constitutes 411 violations of 7 U.S.C. § 499b(5)), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); and *In re Potato Sales, Co.*, 54 Agric. Dec. 1382, 1404 (1995) (stating that each misrepresented carton of apples, rather than each shipment, constitutes a violation of the PACA), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

47 Agric. Dec. 613 (1988), is not applicable to this proceeding and that the ALJ's application of the sanction policy in *Kaplinsky* to this proceeding, is error.

In *Kaplinsky*, the Judicial Officer adopted a sanction policy that applies to plant quarantine cases[4] in which no hearing is required because the respondent fails to file an answer, files a late answer, or files an answer either admitting or not denying the material allegations of the complaint. In these plant quarantine cases, the civil penalty requested by the complainant in the complaint is reduced by one-half, unless the complaint contains an allegation that the alleged violation is so serious that a civil penalty larger than one-half the amount requested in the complaint is required. *In re Shulamis Kaplinsky, supra*, 47 Agric. Dec. at 633-34, 637.

Complainant does not request the assessment of a specific civil penalty in the Complaint, but rather, requests an order assessing an unspecified civil penalty, as follows:

> The Animal and Plant Health Inspection Service requests:
>
> . . . .
>
> 2. That an order be issued assessing civil penalties against the respondent in accordance with the Acts (7 U.S.C. §§ 163, 150gg), and as warranted by the facts upon which the complaint is based.

Compl. at 3.

Moreover, neither 7 U.S.C. § 150gg nor 7 U.S.C. § 163, which Complainant references in its request in the Complaint for the assessment of a civil penalty against Respondent, provides for a specific civil penalty for each violation of the Regulations. Instead, each of the pertinent statutory provisions authorizes the Secretary of Agriculture to assess a civil penalty not exceeding $1,000 for each violation of the Regulations.

Since Complainant did not request a specific civil penalty in the Complaint, the sanction policy in *Kaplinsky* is not applicable to this proceeding, and the ALJ's reliance on *Kaplinsky* to reduce, by one-half, the amount of the civil penalty

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[4]Plant quarantine cases are proceedings conducted in accordance with the Rules of Practice and instituted under the Act of August 20, 1912, as amended; the Act of January 31, 1942, as amended; the Federal Plant Pest Act, as amended; the Act of February 2, 1903, as amended; or related laws designed to prevent the introduction into the United States, and dissemination within the United States, of plant pests and plant diseases.

requested by Complainant in Complainant's Motion for Adoption of Proposed Default Decision and Order, is error.

Complainant contends that the assessment of a $1,000 civil penalty against Respondent is warranted in this proceeding (Appeal Pet. at 12-15).

Respondent is deemed by its failure to file an answer to have admitted that on or about December 28, 1998, it moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to La Fortuna Tienda, Mt. Airy, North Carolina, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff.

A sanction by an administrative agency must be warranted in law and justified in fact.[5] The Secretary of Agriculture has authority to assess a civil penalty not exceeding $1,000 for each violation of the Regulations (7 U.S.C. §§ 150gg, 163); therefore, the assessment of a $1,000 civil penalty against Respondent for 11 violations of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff is warranted in law.

Moreover, the assessment of a $1,000 civil penalty is justified by the facts. 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):

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[5]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (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); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re James E. Stephens*, 58 Agric. Dec. ___, slip op. at 50 (May 5, 1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___, slip op. at 9 (Mar. 15, 1999); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 29-30 (Aug. 18, 1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order 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*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 1575 (1999); *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), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

> [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.

The Acts and the Regulations are designed to prevent the introduction into the United States, and dissemination within the United States, of plant pests and plant diseases. The success of the program designed to protect United States agriculture by preventing the introduction of plant pests associated with Mexican Hass avocados is dependent upon compliance with the Regulations by persons such as Respondent. Respondent's violations of the Regulations directly thwart the remedial purposes of the Acts and the Regulations and could have caused losses of billions of dollars and eradication expenses of tens of millions of dollars.

Complainant could have sought the maximum of $1,000 for each of Respondent's 11 violations of the Acts and the Regulations. Instead, Complainant seeks a civil penalty of approximately $90.91 for each of Respondent's 11 violations. In light of the number of Respondent's violations and the serious nature of the violations, I am perplexed by the modest civil penalty recommended by Complainant for each violation. However, Complainant states that a $1,000 civil penalty will serve the remedial purposes of the Acts and Regulations and deter Respondent and other similarly situated persons from future violations of the Acts and the Regulations (Appeal Pet. at 15). Civil penalties assessed by the Secretary of Agriculture are not designed to punish persons who are found to have violated the Acts or the Regulations. Instead, civil penalties are designed to deter future violations by persons found to have violated the Acts or the Regulations and other potential violators.

United States Department of Agriculture sanction policy requires that I give appropriate weight to the sanction recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the

statute in question,[6] and despite the facts of this case, which would appear to warrant the assessment of more than the $1,000 civil penalty recommended by Complainant, I am reluctant to assess a civil penalty larger than that recommended by Complainant.

Complainant also suggests that I abandon the sanction policy in *In re Shulamis Kaplinsky, supra* (Appeal Pet. at 11-12). The sanction policy in *Kaplinsky*, which is described in this Decision and Order, *supra*, was adopted because of the large number of plant quarantine cases that the Animal and Plant Health Inspection Service instituted prior to the issuance of *Kaplinsky* and the number of plant quarantine cases that the Judicial Officer expected the Animal and Plant Health Inspection Service to institute in the future. The Judicial Officer described what he referred to as "unique administrative problems peculiar to Plant Quarantine Act and related cases" and the expected effect of reducing, by one-half, the civil penalty requested in a complaint when no hearing is required because a respondent fails to file a timely answer, files a late answer, or admits or does not deny the material allegations in the complaint, as follows:

> Complainant states that there "are approximately 13 thousand alleged baggage violations of the Animal and Plant Quarantine and related laws and regulations promulgated thereunder for which the Department seeks to assess a civil penalty at ports of entry each year" (Appeal to Judicial Officer at 5-6). During the last 12 months, 101 formal cases have been filed with the Hearing Clerk under the Plant Quarantine Act alone. If the Department had to hold a hearing in a large number of Plant Quarantine Act cases, it would require additional [administrative law judges], which is not contemplated.
>
> In view of the great number of cases that will be filed under this Act, and the small amount of the civil penalties that will be imposed, it seems appropriate to provide an economic incentive to respondents not to force the Department to hold unnecessary hearings where there is no real basis for challenging the allegations in the complaint.

In re Shulamis Kaplinsky, supra, 47 Agric. Dec. at 633.

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[6]*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).

Complainant states that the number of plant quarantine cases filed with the Hearing Clerk has declined in recent years,[7] and consequently, the premise for the sanction policy in *Kaplinsky* no longer exists. I agree with Complainant that the number of plant quarantine cases has declined in recent years and that there is no longer a basis for the sanction policy adopted in *Kaplinsky*. Moreover, the sanction policy in *Kaplinsky* has been applied to animal quarantine cases[8] for the same reason as it was applied to plant quarantine cases. The number of animal quarantine cases filed with the Hearing Clerk has declined in recent years. Therefore, the sanction policy in *Kaplinsky* will not be applied to any case in which the complaint instituting the proceeding is filed after the date this Decision and Order is issued, September 1, 1999.

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

Order

La Fortuna Tienda is assessed a civil penalty of $1,000. The civil penalty 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.

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[7]Complainant states that "in 1992, 164 Plant Quarantine Act cases were filed with the Hearing Clerk" and "[i]n fiscal year 1998, only 19 complaints alleging violations of the Plant Quarantine Act were filed." (Appeal Pet. at 11.)

[8]Animal quarantine cases are proceedings conducted in accordance with the Rules of Practice and instituted under the Act of May 29, 1884, as amended; the Act of August 30, 1890, as amended; the Act of February 2, 1903, as amended; the Act of March 3, 1905, as amended; the Act of July 2, 1962, as amended; the Act of May 6, 1970, as amended; the Swine Health Protection Act, as amended; or related laws designed to prevent the introduction into the United States, and dissemination within the United States, of animal diseases.

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 99-0013.

MISCELLANEOUS ORDERS

In re: JOHNNY BEASLEY, AN INDIVIDUAL DOING BUSINESS AS B&F FARMS.
AMAA Docket No. 99-0001.
Order of Dismissal filed August 4, 1999.

Brian Thomas Hill, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

In view of Complainant's notice of its withdrawal of the Complaint, the case is dismissed.

In re: W.B. HART, AN INDIVIDUAL DOING BUSINESS AS W.B. HART FARMS.
AMAA Docket No. 99-0002.
Order of Dismissal filed August 4, 1999.

Brian Thomas Hill, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

In view of Complainant's notice of its withdrawal of the Complaint, the case is dismissed.

In re: GREG RAUMIN, AN INDIVIDUAL DOING BUSINESS AS JEWELL DATE CO., A SOLE PROPRIETORSHIP OR UNINCORPORATED ASSOCIATION, AND SUCCESSOR IN INTEREST TO COVALDA, INC., ALSO KNOWN AS COVALDA DATE COMPANY, A CALIFORNIA CORPORATION.
AMAA Docket No. 98-0004.
Case Closed filed September 3, 1999.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

By reason of the matters set forth by Complainant in its "Notice of Complainant's Withdrawal of Complaint as to Respondent Greg Raumin," filed September 1, 1999, the above-entitled case is closed.

Copies hereof shall be served upon the parties.

In re: JAMES DUNN, d/b/a GREAT DATE IN THE MORNING AND COACHELLA VALLEY DATE CO.; AND MATILDE TORRES, CARMEN LEAL, FRANCISCO RODRIGUEZ, BEATRIZ ACOSTA AND THOMAS J. BARKMAN, d/b/a COACHELLA VALLEY DATE CO.
AMAA Docket No. 97-0004.
Order Dismissing Complaint filed November 19, 1999.

Colleen A. Carroll, for Complainant.
Thomas Slovak, Palm Springs, CA, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

In view of Complainant's November 17, 1999, notice that it has withdrawn its complaint in this matter, it is ordered that the case be dismissed.

In re: MIDWAY FARMS, INC.
94 AMA Docket No. F&V 989-1.
Remand Order filed November 30, 1999.

Raisin order – Remand – Handler – Standing – ALJ powers – In camera review.

The Judicial Officer remanded the proceeding to Chief ALJ James W. Hunt for assignment to an administrative law judge for further proceedings in accordance with the instructions in *Midway Farms v. United States Dep't of Agric.*, 188 F.3d 1136 (9th Cir. 1999).

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

Midway Farms, Inc. [hereinafter Petitioner], instituted this proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of Raisins Produced From Grapes Grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin 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) by filing a Petition To Modify Raisin Marketing Order Provisions/Regulations and/or Petition To Terminate Specific Raisin Marketing Order Provisions/Regulations, and/or Petition To Exempt Petitioner From Various Provisions Of The Raisin Marketing Order and Any Obligations Imposed In Connection Therewith That Are Not In Accordance With Law [hereinafter Petition] on July 1, 1994.

On May 10, 1996, former Chief Administrative Law Judge Victor W. Palmer [hereinafter the former Chief ALJ] filed an Initial Decision and Order holding that he lacked the requisite power to conduct an *in camera* inspection of Petitioner's records and dismissing the Petition without prejudice on the grounds that Petitioner has not shown and, without producing its records, cannot show itself to be a handler subject to the Agricultural Marketing Agreement Act of 1937, as required by 7 U.S.C. § 608c(15)(A).

On June 4, 1996, Petitioner appealed to the Judicial Officer; on August 9, 1996, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a response to Petitioner's appeal petition and a cross-appeal; on September 6, 1996, Petitioner filed a reply to Respondent's response and cross-appeal; and on September 9, 1996, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision.

On April 18, 1997, I issued a Decision and Order concluding that Petitioner's

position that it is not a handler subject to the Raisin Order leaves Petitioner no standing to bring a petition under 7 U.S.C. § 608c(15)(A) and dismissing the Petition with prejudice. *In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 114, 117 (1997).

On May 5, 1997, Petitioner filed a petition for review with the United States District Court for the Eastern District of California, which denied Petitioner's motion for summary judgment and granted summary judgment in favor of the United States Department of Agriculture. *Midway Farms, Inc. v. United States Dep't Agric.*, CV F 97-5460 AWI SMS (E.D. Cal. May 18, 1998, and June 15, 1998) (Memorandum Opinion Re Plaintiff's Motion for Summary Judgment and Defendant's Motion for Judgment on the Pleadings and Memorandum Opinion and Order Granting Summary Judgment to Defendant USDA). Petitioner appealed the grant of summary judgment in favor of the United States Department of Agriculture and the denial of Petitioner's motion for summary judgment.

The United States Court of Appeals for the Ninth Circuit held that Petitioner is a handler and has standing to file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). The Court remanded the proceeding to the Secretary of Agriculture with instructions to rule on the merits of Petitioner's Petition. The Court also stated that, upon remand, the administrative law judge, to whom the proceeding is assigned, has inherent power: (1) to conduct hearings *in camera*, upon showing of good cause; (2) to allow Petitioner to submit redacted materials; and (3) to impose protective conditions upon any materials submitted by Petitioner for *in camera* review. *Midway Farms v. United States Dep't of Agric.*, 188 F.3d 1136 (9th Cir. 1999).

On October 28, 1999, Petitioner's counsel informed me that Petitioner will not seek review of *Midway Farms v. United States Dep't of Agric., supra.* On November 24, 1999, the time for filing a petition for certiorari expired, and on November 29, 1999, Mr. Bradley Flynn, Office of the General Counsel, United States Department of Agriculture, informed the Office of the Judicial Officer that Respondent has not filed a petition for certiorari.

The former Chief ALJ retired from federal service, effective January 3, 1999. Accordingly, the proceeding cannot be remanded to the former Chief ALJ and must be assigned to another administrative law judge.

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

Order

The proceeding is remanded to Chief Administrative Law Judge James W. Hunt for assignment to an administrative law judge for further proceedings in

accordance with the instructions in *Midway Farms v. United States Dep't of Agric., supra.*

In re: DONALD BURKE.
A.Q. Docket No. 99-0001.
Order Dismissing Complaint filed October 27, 1999.

Jane H. Settle, 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 on September 30, 1998, be dismissed.

In re: DAVID M. ZIMMERMAN.
AWA Docket No. 94-0015.
Order Lifting Stay filed July 12, 1999.

Robert A. Ertman, for Complainant.
David A. Fitzsimons & Elizabeth J. Goldstein, Harrisburg, PA, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On June 6, 1997, I issued a Decision and Order: (1) concluding that David M. Zimmerman [hereinafter Respondent] willfully 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 (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; (2) assessing Respondent a $51,250 civil penalty; (3) suspending Respondent's Animal Welfare Act license for 60 days; and (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards. *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997).

On August 7, 1997, Respondent filed an Application for Stay Pending Review requesting a stay of the Order in *In re David M. Zimmerman, supra*, pending the completion of proceedings for judicial review. On August 8, 1997, I granted Respondent's Application for Stay Pending Review. *In re David M. Zimmerman*, 56 Agric. Dec. 1636 (1997) (Stay Order).

Respondent filed a petition for review of *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997), with the United States Court of Appeals for the Third Circuit, and on May 26, 1998, the Court denied Respondent's petition for review. *Zimmerman v. United States*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998). On June 4, 1999, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed Motion to Lift Stay. The Hearing Clerk served Respondent with Complainant's Motion to Lift Stay on June 14, 1999,[1] and in accordance with section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(d)), Respondent had 20 days after service in which to respond to Complainant's Motion to Lift Stay. Respondent did not file a response to Complainant's Motion to Lift Stay within 20 days after Respondent was served with the Motion to Lift Stay, and on July 8, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

Complainant's Motion to Lift Stay is granted. The Stay Order issued August 8, 1997, *In re David M. Zimmerman*, 56 Agric. Dec. 1636 (1997) (Stay Order), is lifted, and except with respect to the 60-day suspension of Respondent's Animal Welfare Act license, the Order issued in *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997), is effective,[2] as follows:

Order

PARAGRAPH I

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

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[1]See Domestic Return Receipt for Article Number P 368 427 126.

[2]I do not make effective in this Order Lifting Stay, the license suspension provisions in paragraph III of the Order issued in *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997). Respondent is no longer licensed under the Animal Welfare Act. Moreover, in another administrative proceeding instituted against Respondent, I disqualified Respondent from obtaining a license under the Animal Welfare Act. *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 6 (Jan. 6, 1999) (Order Denying Pet. for Recons.). Therefore, Respondent no longer has, and cannot obtain, an Animal Welfare Act license which could be suspended.

the Animal Welfare Act, and in particular, shall cease and desist from:

a. failing to maintain complete records showing the acquisition, disposition, and identification of animals;

b. failing to maintain a current, written program of veterinary care under the supervision of a veterinarian;

c. failing to provide veterinary care to animals as needed;

d. failing to provide a suitable method for the removal and disposal of animal wastes from primary enclosures;

e. failing to provide animals with shelter from inclement weather;

f. failing to maintain primary enclosures which are structurally sound and in good repair and are free of any sharp points or edges which could injure animals;

g. failing to provide enclosures for animals that are constructed and maintained so as to provide sufficient space to allow each animal to turn about freely and to easily stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner;

h. failing to have housing facilities for dogs physically separated from other businesses;

i. failing to store food so as to protect it against spoilage, contamination, and vermin infestation;

j. failing to clean primary enclosures for animals, as required;

k. failing to keep food and water receptacles for animals clean and sanitized, as required;

l. failing to have a sufficient number of employees to maintain the prescribed level of husbandry practices and care;

m. failing to ensure that the floors, walls, and ceilings of indoor housing facilities and other surfaces coming in contact with animals are impervious to moisture;

n. failing to handle animals in a manner which does not cause trauma, behavioral stress, physical harm, and unnecessary discomfort;

o. failing to ensure that housing facilities for dogs and areas used for storing animal food are free of an accumulation of trash, waste material, junk, and other discarded materials;

p. failing to provide each dog housed in an enclosure with an adequate amount of floor space;

q. failing to provide indoor housing facilities for dogs which are sufficiently ventilated and lighted well enough to provide for their health and well-being and to allow routine inspection and cleaning of the facility, and observation of the dogs;

r. failing to individually identify all dogs on the premises by means of an

identification tag or a legible tattoo; and

s. failing to maintain a means of direct and frequent communication with an attending veterinarian so as to ensure that timely and accurate information affecting an animal's health and well-being is accurately conveyed to the attending veterinarian.

Paragraph I of this Order shall become effective on the day after service of this Order on Respondent.

PARAGRAPH II

Respondent David M. Zimmerman is assessed a civil penalty of $51,250. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

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

The certified check or money order shall be sent to, and received by, Robert A. Ertman within 60 days after service of this Order on Respondent. Respondent should indicate on the certified check or money order that payment is in reference to AWA Docket No. 94-0015.

In re: MIKE GOCHNAUER.
AWA Docket No. 99-0010.
Dismissal of Complaint filed August 16, 1999.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to "Notice of Complainant's Withdrawal of Complaint," filed August 10, 1999, said Complaint, filed on January 11, 1999, is hereby dismissed

without prejudice.

Copies hereof shall be served upon the parties.

In re: ANNA MAE NOELL AND THE CHIMP FARM, INC.
AWA Docket No. 98-0033.
Order Denying The Chimp Farm, Inc.'s Motion to Vacate filed August 30, 1999.

Petition for reconsideration — Untimely petition for reconsideration — Argument raised for first time on appeal.

The Judicial Officer found that the Chimp Farm, Inc.'s Motion to Vacate was a petition for reconsideration filed 6 months and 11 days after the Chimp Farm, Inc., was served with the Judicial Officer's decision. The Judicial Officer denied the Chimp Farm, Inc.'s petition for reconsideration because it was not filed within 10 days after service of the decision, as required by 7 C.F.R. § 1.146(a)(3). The Judicial Officer also stated that even if the Chimp Farm, Inc.'s petition for reconsideration had not been late-filed, it would be denied because it raised the issue of improper service of the Complaint for the first time in the proceeding and that the issue was raised too late to be considered.

Brian T. Hill, for Complainant.
Thomas John Dandar, Tampa, Florida, for the Chimp Farm, Inc.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, 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 (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on August 10, 1998.

The Complaint alleges that on November 15, 1995, October 9, 1996, July 22, 1997, and April 1, 1998, Anna Mae Noell and the Chimp Farm, Inc. [hereinafter Respondents], violated the Animal Welfare Act and the Regulations and Standards.

The Hearing Clerk served Respondents with the Complaint on August 13, 1998. Respondents failed to answer the Complaint within 20 days after service of the Complaint on Respondents, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On October 1, 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 Decision and Order and a Proposed Decision and Order Upon Admission of Facts by Reason of Default. Also, on October 1, 1998, Respondents filed a letter, dated September 14, 1998, in which they denied the material allegations of the Complaint.

On November 3, 1998, Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision] in which the ALJ: (1) found that Respondents violated the Animal Welfare Act and the Regulations and Standards, as alleged in the Complaint; (2) issued a cease and desist order, directing that Respondents cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessed a civil penalty of $25,000 against Respondents jointly and severally; and (4) revoked Respondents' Animal Welfare Act license.

On December 3, 1998, Respondents appealed to the Judicial Officer; on December 23, 1998, Complainant filed a response to Respondents' appeal petition; and on December 29, 1998, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision. On January 6, 1999, I issued a Decision and Order in which I adopted the ALJ's Default Decision as the final Decision and Order.

On January 15, 1999, the Hearing Clerk served Respondents with the Decision and Order.[1] On July 26, 1999, 6 months and 11 days after Respondents were served with the Decision and Order, the Chimp Farm, Inc., filed Motion to Vacate Default and Decision and Orders. On August 24, 1999, Complainant filed Opposition to Respondents' Motion to Vacate Default and Decision and Orders, and on August 25, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the January 6, 1999, Decision and Order.

The Chimp Farm, Inc., contends that it was not properly served with a copy of the Complaint and requests that I vacate the ALJ's Default Decision and the Decision and Order, as they apply to the Chimp Farm, Inc. I find that the Chimp Farm, Inc.'s Motion to Vacate Default and Decision and Orders constitutes a petition for reconsideration of the ALJ's November 3, 1998, Default Decision and the Judicial Officer's January 6, 1999, Decision and Order.

As an initial matter, the Chimp Farm, Inc.'s Motion to Vacate Default and Decision and Orders, as it relates to the ALJ's Default Decision, cannot be

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[1]See Domestic Return Receipt for Article Number P 368 427 006.

considered. Section 1.139 of the Rules of Practice provides, as follows:

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

. . . Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145: *Provided, however*, That no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.139.

On December 3, 1998, Respondents filed a timely appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145. Consequently, while the ALJ's Default Decision is part of the record,[2] the ALJ's Default Decision never became final and effective and no purpose relevant to this proceeding would be served by vacating the ALJ's Default Decision.

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

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

(a) *Petition requisite*. . . .

. . . .

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

[2]See 5 U.S.C. § 557(c).

stated.

7 C.F.R. § 1.146(a)(3).

Thus, petitions for reconsideration filed pursuant to section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)), after the Judicial Officer's decision has been issued, relate to reconsideration of the Judicial Officer's decision only.[3] Therefore, the Chimp Farm, Inc.'s Motion to Vacate Default and Decision and Orders, as it relates to the ALJ's Default Decision, is denied.

Moreover, the Chimp Farm, Inc.'s Motion to Vacate Default and Decision and Orders, as it relates to the Judicial Officer's Decision and Order, is denied because it was filed too late. Section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) provides that a petition for reconsideration must be filed within 10 days after the date of service of the decision on the party filing the petition. The Hearing Clerk served the Decision and Order on the Chimp Farm, Inc., on January 15, 1999.[4] The Chimp Farm, Inc., did not file its Motion to Vacate Default and Decision and Orders until July 26, 1999, 6 months and 11 days after the Hearing Clerk served the Chimp Farm, Inc., with the Decision and Order. Accordingly, the Chimp Farm, Inc.'s Motion to Vacate Default and Decision and Orders was filed too late to be considered and must be denied.[5]

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[3]See *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 719-20 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (stating that a petition for reconsideration, filed after the Judicial Officer's decision has been issued, relates to reconsideration of the Judicial Officer's decision and does not relate to the administrative law judge's initial decision which, because of a timely appeal, did not become effective); *In re Peter A. Lang*, 57 Agric. Dec. 91, 101 (1998) (Order Denying Pet. for Recons.) (stating that a petition for reconsideration, filed after the Judicial Officer's decision has been issued, relates to reconsideration of the Judicial Officer's decision and does not relate to the administrative law judge's initial decision which, because of a timely appeal, did not become effective); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418, 1435 (1996) (stating "[p]etitions for reconsideration under the Rules of Practice relate to reconsideration of the Judicial Officer's decision"); *In re Lincoln Meat Co.*, 48 Agric. Dec. 937, 938 (1989) (stating "[t]he Rules of Practice do not provide for a Motion for Reconsideration to the Administrative Law Judge").

[4]See note 1.

[5]*See In re Paul W. Thomas*, 58 Agric. Dec. ___ (Aug. 4, 1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___ (May 14, 1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. ___ (Apr. 14, 1999) (Order Denying Pet. for

(continued...)

Even if the Chimp Farm, Inc., had filed a timely Motion to Vacate Default and Decision and Orders, the motion would be denied.

The Chimp Farm, Inc., states in its Motion to Vacate Default and Decision and Orders that it was not properly served with a copy of the Complaint and contends that it was, therefore, not afforded due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The Chimp Farm, Inc., raises the issue of service of the Complaint for the first time in its Motion to Vacate Default and Decision and Orders.[6] It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial

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[5](...continued)
Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. ___ (Sept. 15, 1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *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 the date the Hearing Clerk served the respondents 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 the date the Hearing Clerk served the respondent 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 the date the Hearing Clerk served the respondent 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 the date the Hearing Clerk served the respondent 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 the date the Hearing Clerk served the respondent with the decision and order); *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 the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *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 the date the Hearing Clerk served the respondent with the decision and order).

[6]The Chimp Farm, Inc., did not raise the issue of improper service in its previous filings, and in its Motion to Vacate Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Appeal Petition], filed December 3, 1998, the Chimp Farm, Inc., states that its failure to file a timely Answer resulted from its not being represented by counsel at the time it was served with the Complaint and the age, health, and hospitalization of Respondent Anna Mae Noell (Appeal Pet. at ¶¶ 1-2). The Chimp Farm, Inc., requested in the Appeal Petition that I vacate the ALJ's Default Decision on the ground that its failure to respond to the Complaint was excusable neglect and that Complainant would suffer no prejudice if Respondents were permitted to respond to the Complaint (Appeal Pet. ¶¶ 7-8).

Officer.[7] The Chimp Farm, Inc.'s contention that it was not properly served with the Complaint is raised too late to be considered.

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

Order

The Chimp Farm, Inc.'s Motion to Vacate Default and Decision and Orders is denied.

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[7]*In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1911(1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th Cir. Mar. 27, 1997) (unpublished); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher, Jr.*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

In re: MARY MEYERS.
AWA Docket No. 96-0062.
Order Denying Petition for Reconsideration filed October 14, 1999.

Default — Failure to file timely petition for reconsideration — Failure to file timely answer — Pro se — Issue raised for first time on appeal — Estoppel — Civil penalty — Ability to pay.

The Judicial Officer denied Respondent's Petition for Reconsideration because it was not timely filed. The Judicial Officer stated that even if Respondent's Petition for Reconsideration had been timely filed, it would be denied because Respondent had not raised a meritorious basis for finding that the Decision and Order, *In re Mary Meyers*, 56 Agric. Dec. 322 (1997), had been erroneously decided. The Judicial Officer stated that the Decision and Order had been properly issued based on Respondent's failure to file a timely answer. The Judicial Officer rejected Respondent's contention that the Decision and Order must be set aside because a United States Department of Agriculture employee stated to Respondent that the charges would be dropped and rejected Respondent's contention that the $26,000 civil penalty assessed against her must be vacated because neither Respondent nor Respondent's husband had the financial ability to pay the civil penalty.

Robert A. Ertman, for Complainant.
Charles C. Steincamp, Wichita, Kansas, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, 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 (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on September 9, 1996.

The Complaint alleges that on September 12, 1994, June 14, 1995, July 26, 1995, and October 4, 1995, Mary Meyers [hereinafter Respondent] violated the Animal Welfare Act and the Regulations and Standards.

On September 14, 1996, the Hearing Clerk served Respondent with the Complaint.[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)), and on January 21, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt [hereinafter the ALJ]

[1]See Domestic Return Receipt for Article Number P 592 003 692.

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) directed Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessed a $26,000 civil penalty against Respondent; and (4) disqualified Respondent from becoming licensed under the Animal Welfare Act for 10 years and continuing after the 10-year disqualification period, until Respondent demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Animal Welfare Act and the Regulations and Standards and pays the assessed civil penalty (Default Decision at 8-9).

On January 29, 1997, Respondent appealed to the Judicial Officer; on February 26, 1997, Respondent filed an addendum to her appeal; on February 28, 1997, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision; and on March 7, 1997, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order. On March 13, 1997, I issued a Decision and Order in which I adopted the ALJ's Default Decision as the final Decision and Order. *In re Mary Meyers*, 56 Agric. Dec. 322 (1997).

On March 24, 1997, the Hearing Clerk served Respondent with the Decision and Order.[2] On September 13, 1999, 2 years 5 months 20 days after the Hearing Clerk served Respondent with the Decision and Order, Respondent filed a letter dated September 7, 1999 [hereinafter Petition for Reconsideration], requesting that "these charges be dropped and the fines be vacated" (Pet. for Recons. at 1). On September 23, 1999, Complainant filed Complainant's Statement Regarding Respondent's Motion to Reopen and Motion to Vacate Administrative Penalty. On October 13, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the March 13, 1997, Decision and Order.

Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, 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.* . . .

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[2]See Domestic Return Receipt for Article Number Z 138 687 944.

. . . .

(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).

Respondent's Petition for Reconsideration, which was filed 2 years 5 months 20 days after the date the Hearing Clerk served the Decision and Order on Respondent, was filed too late, and, accordingly, Respondent's Petition for Reconsideration must be denied.[3]

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[3]*See In re Anna Mae Noell*, 58 Agric. Dec. ___ (Aug. 30, 1999) (Order Denying the Chimp Farm Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months and 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 Agric. Dec. ___ (Aug. 4, 1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___ (May 14, 1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. ___ (Apr. 14, 1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. 1280 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *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 the date the Hearing Clerk served the respondents 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 the date the Hearing Clerk served the respondent 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 the date the Hearing Clerk served the respondent 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 the date the Hearing Clerk served the respondent 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 the date the Hearing Clerk served the respondent with the decision and order); *In re Charles*

(continued...)

Moreover, even if Respondent's Petition for Reconsideration had been timely filed, it would be denied because Respondent raised no meritorious basis for finding the Decision and Order erroneous.

First, Respondent contends that she disputed each and every allegation of the Complaint, but that Respondent was unable to afford counsel and, consequently, her response to the Complaint was not "in the proper format to obtain a hearing" (Pet. for Recons. at 1).

The Decision and Order is not based upon Respondent's failure to file an answer in the proper format, as Respondent contends, but rather, the Decision and Order is based upon Respondent's failure to file a timely answer. Sections 1.136(a), 1.136(c), and 1.139 of the Rules of Practice provide that an answer must be filed within 20 days after a respondent is served with a complaint, that a failure to file a timely answer shall be deemed, for the purposes of the proceeding, an admission of the allegations in the complaint, and that a failure to file an answer shall constitute a waiver of hearing, 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.

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[3](...continued)
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 the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *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 the date the Hearing Clerk served the respondent with the decision and order).

. . . .

§ 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.

7 C.F.R. §§ 1.136(a), (c), .139.

Respondent first filed in this proceeding on January 29, 1997, which is 137 days after the Hearing Clerk served Respondent with the Complaint and 117 days after Respondent's Answer was due. Respondent's failure to file a timely answer constitutes an admission of the allegations in the Complaint and a waiver of Respondent's right to a hearing. Moreover, Respondent is not exempt from the Rules of Practice merely because Respondent was *pro se* at the time her answer was due.

Second, Respondent contends that the Decision and Order must be set aside because she was told that the charges would be dropped, as follows:

> [A]t the time that the initial charges were brought against [Respondent,] she had indicated to a U.S. Department of Agriculture employee that she did not have the financial means to defend herself and was told that in the event she ceased all kennel and dog raising activities immediately the charges would be dropped. In reliance on these representations[, Respondent] immediately placed all of her remaining dogs in new homes and ceased all kennel operations. It now appears that the charges have not been dropped as [Respondent] had been lead [sic] to believe.
>
> In light of the fact [Respondent] has ceased all kennel activities in reliance on the U.S. Department of Agriculture's agreement to drop all charges against her in return, we would ask that these charges be dropped and the fines be vacated.

Pet. for Recons. at 1.

Respondent raises for the first time in her Petition for Reconsideration the issue of a representation by a United States Department of Agriculture employee that all charges would be dropped. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.[4] Respondent's failure, prior to her filing the Petition for Reconsideration, to argue that a United States Department of Agriculture employee agreed to drop the charges against Respondent comes too late to be considered.

Even if I considered Respondent's contention and found that a United States Department of Agriculture employee stated that the charges against Respondent would be dropped, that finding would not constitute a basis for setting aside the Decision and Order. It is well settled that individuals are bound by federal statutes and regulations, irrespective of the advice of federal employees.[5] Therefore, even

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[4]*In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 6 (Aug. 30, 1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); In *re Michael Norinsberg*, 57 Agric. Dec. 791, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1911 (1997), *aff'd* 178 F.3d 743 (5th Cir. 1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th Cir. Mar. 27, 1997) (unpublished); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

[5]*See FCIC v. Merrill*, 332 U.S. 380, 382-86 (1947); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1049-50, 1058 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 227 (1998), *appeal* (continued...)

if Respondent was given erroneous advice by a United States Department of Agriculture employee, Respondent was bound by the Animal Welfare Act and the Regulations and Standards, and a proceeding could be instituted against Respondent for violations of the Animal Welfare Act and the Regulations and Standards, despite any statement that such a proceeding would not be instituted.

I infer that Respondent contends that the Secretary of Agriculture is estopped from issuing the Decision and Order and imposing a sanction against Respondent because of a United States Department of Agriculture employee's statement to Respondent that the charges against Respondent would be dropped. 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.[6] 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.[7] Respondent has not shown that her position in this proceeding was changed for the worse based upon the alleged statement by a United States Department of Agriculture employee.

Further, even if Respondent had acted to her detriment based on a United States Department of Agriculture employee's statement, it is well settled that the government may not be estopped on the same terms as any other litigant.[8] 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

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[5](...continued)
dismissed, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 20 (1990); *In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1477 (1988); *In re Maquoketa Valley Coop. Creamery*, 27 Agric. Dec. 179, 186 (1968); *In re Leslie E. Donley*, 22 Agric. Dec. 449, 452 (1963).

[6]*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).

[7]*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).

[8]*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).

when it thwarts enforcement of public laws.[9] Equitable estoppel does not generally apply to the government acting in its sovereign capacity,[10] as it was doing in this case,[11] 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.[12] Respondent bears a heavy burden when asserting estoppel against the government, and Respondent has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Therefore, I find no basis upon which to grant Respondent's request to set aside the Decision and Order based upon an alleged statement by a United States Department of Agriculture employee that the charges against Respondent would be dropped.

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[9]*Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Trapper Mining, Inc. v. Lujan*, 923 F.2d 774, 781 (10th Cir.), *cert. denied*, 502 U.S. 821 (1991); *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).

[10]*United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982).

[11]*See In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1059 (1998) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act); *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 Sunland Packing House Co.*, 58 Agric. Dec. ___, slip op. at 81-82 (Feb. 17, 1999) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended); *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).

[12]*Lehman v. United* States, 154 F.3d 1010, 1016-17 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 1336 (1999); *United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997); *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).

Third, Respondent requests that the $26,000 civil penalty assessed against Respondent be vacated because "[Respondent] and her husband have no financial ability to pay these fines" (Pet. for Recons. at 1). Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and Standards, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondent's and Respondent's husband's inability to pay the $26,000 civil penalty assessed against Respondent is not a basis for setting aside or reducing the $26,000 civil penalty assessed against Respondent.[13]

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

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[13]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 Nancy M. Kutz* (Decision and Order as to Nancy M. Kutz), 58 Agric. Dec. ___, slip op. at 16 (July 12, 1999) (stating that the respondent's inability to pay the $16,000 civil penalty assessed by the administrative law judge is not a basis for setting aside or reducing the civil penalty); *In re James E. Stephens*, 58 Agric. Dec. ___, slip op. at 66-67 (May 5, 1999) (stating that the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act and the Regulations and Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating that a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (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 a 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).

Order

Respondent's Petition for Reconsideration is denied.

In re: WERNER WALLACE.
AWA Docket No. 97-0027.
Order Dismissing Complaint filed October 15, 1999.

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

The Complainant has moved that the Complaint be dismissed, without prejudice, stating that further formal proceedings in this matter are not required in the public interest because on April 12, 1999, a Consent Agreement and Order was issued by the Kansas Livestock Commissioner in a proceeding before the Kansas Animal Health Department captioned "In the Matter of Werner Wallace," Case No. 99-0020. A copy of said Order is incorporated herein by reference. In that order, Werner Wallace admitted and the Commissioner found certain violations of the Kansas Pet Animal Act, K.S.A. (1997 Supp.) 47-1701 *et seq.*, and the regulations issued thereunder, K.A.R. 9-23-1 *et seq.* The violations included the following provisions:

- Requirements that each "kennel structure be constructed of material that will provide for a sound structure, that such structure shall be maintained in good repair and protect animals housed inside from injury."
- Requirements for "the removal of animal and food wastes, bedding and debris on a regular basis and at reasonable intervals."
- Requirement for "each kennel pen to be maintained in strict sanitary condition."
- Requirements for "the removal of excreta as often as necessary to prevent contamination of the animals, prevent disease and to reduce odors."
- Requirements for "adequate ventilation to reduce moisture condensation and adequate drainage to prevent and eliminate excess water from each hobby kennel unit."
- Requirements that "each kennel shall protect animals housed inside from injury."
- Requirements that "the animals shall be handled in a manner which will not

cause discomfort, stress or physical harm to the animals."

- Requirements for "an adequate veterinary care program for the animals and that each animal shall be observed each day by the person in charge of the hobby kennel."
- Requirements that "animal food . . . be wholesome, palatable and of nutritional value sufficient to maintain each animal in good health and food and water shall be provided to each animal at least once during each 24-hour period and any animal with nutritional need or disease shall be fed more frequently."

Mr. Wallace was required to relinquish all of the animals in his possession except two dogs, which he was required to have spayed or neutered. He was also required to close his breeding kennel facility and to remove all signs advertising his facility. He was prohibited from engaging in any type of breeding business requiring licensure from the Kansas Health Department for a minimum of 24 months and thereafter until he has applied to the Department, paid the applicable fee, and passed an inspection of his facility. Finally, Mr. Wallace was fined $8,000.00, which was held in abeyance but which will become immediately due and owing if he fails to comply with the terms and conditions of the Consent Agreement and Order.

Accordingly, upon motion of the Complainant and for good cause shown, the complaint in this matter is dismissed, without prejudice.

In re: NORTHWEST AIRLINES, INC.
AWA Docket No. 99-0038.
Order Granting Complainant's Application to Withdraw its Complaint filed December 2, 1999.

Brian T. Hill, for Complainant.
Glenn C. Fuller, St. Paul, MN, for Respondent.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Upon good cause shown, Complainant's application to withdraw its Complaint is granted. This matter is dismissed without prejudice.

In re: THOMPSON & WALLACE OF N.C., INC.
CRPA Docket No. 98-0001.
Order Dismissing Complaint Without Prejudice filed July 23, 1999.

Sharlene A. Deskins, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Wherefore, for good cause shown the complaint against the Respondent is dismissed without prejudice.

In re: HY-POINT FARMS, INC.
DNS-FNS Docket No. 00-0001.
Order Dismissing Appeal filed November 16, 1999.

Rachel H. Bishop, for Complainant.
Craig J. Huber, Haddonfield, NJ, for Respondent/Appellant.
Order issued by James W. Hunt, Administrative Law Judge.

This matter arises under section 3017.515 of the regulations for nonprocurement debarments and suspensions. (7 C.F.R. §§ 3017.100-.515.)

On September 3, 1999, Hy-Point Farms, Inc., Respondent/Appellant herein, received a notice (decision) from the Debarring Official in this matter, the Administrator of the Food and Nutrition Service, United States Department of Agriculture (USDA), that it was debarred under 7 C.F.R. §§ 3017.314(a) from participation in federal nonprocurement programs until March 8, 2002. Respondent/Appellant was advised in the notice that "You may appeal this debarment to the Office of Administrative Law Judges (OALJ) by filing the appeal in writing to the Hearing Clerk, OALJ, USDA, Washington, DC 20250. The appeal must be filed within 30 days of receiving this decision. . . . You will be notified of the decision in the appeal within 90 days of the date the appeal is filed with the Hearing Clerk."

Respondent/Appellant sent an appeal via Federal Express, with a shipping receipt dated September 30, 1999, to the Hearing Clerk. The appeal was received by the Hearing Clerk on October 7, 1999.

On October 15, 1999, counsel for the Debarring Official filed a motion to dismiss the appeal on the ground that it was untimely filed. Counsel contends that the effective date for the filing of an appeal is the date the appeal is actually

received by the Hearing Clerk, that the 30-day period within which Respondent/Appellant in this matter could appeal ended on October 4, 1999, but that the appeal was not filed with the Hearing Clerk until three days later on October 7, 1999.

Respondent/Appellant filed opposition to the motion contending that the Debarring Official had not followed the regulations when he sent his decision to Respondent/Appellant by Federal Express rather than by certified mail as required by the regulations and that the address for the Hearing Clerk that it was given by the Debarring Official was insufficient. Respondent/Appellant states, with supporting affidavits, that on October 5, 1999, it was notified by Federal Express that it was unable to deliver the appeal because the address it was given for the Hearing Clerk was incomplete. Respondent/Appellant further states that, after giving Federal Express a more complete address on October 5, 1999, Federal Express was able to deliver the appeal on October 7, 1999.

Respondent/Appellant contends that the failure of the Debarring Official to serve a copy of his decision on Respondent/Appellant by certified mail should toll the 30-day appeal period and that the incomplete address constitutes good cause to extend the time for filing the appeal.

It is USDA policy that the time allowed in its proceedings for an appeal is "mandatory and jurisdictional." If an appeal is not filed within the time required, the decision being appealed becomes final and effective and the USDA official to whom the appeal is filed lacks jurisdiction to review the matter. *Toscony Provision Company, Inc.*, 43 Agric. Dec. 1106 (1984).

The regulations for nonprocurement debarment and suspension actions state that an appeal must be filed with the Office of the Hearing Clerk but does not state when it is considered actually filed. 7 C.F.R. § 3017.515(a) provides in relevant part:

> If a decision to debar or suspend is made by a debarring or suspending official under § 3017.314 or § 3017.413, the respondent may appeal the decision to the Office of Administrative Law Judges (OALJ) by filing the appeal, in writing, to the Hearing Clerk, OALJ, United States Department of Agriculture, Washington, DC 20250. The appeal must be filed within 30 days of receiving the decision and it must specify the basis of the appeal.

Counsel for the Debarring Official in this proceeding argues in its motion that USDA's Rules of Practice for its other administrative proceedings, while not specifically applicable to debarment proceedings, should be followed in determining the effective date for the filing of an appeal of a debarment decision.

Section 1.147(g) of the Rules of Practice provides that "Any document or paper 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).) Thus, appeals in cases subject to the Rules of Practice received by the Hearing Clerk after the appeal period has elapsed will be dismissed. *Charles Brink*, 41 Agric. Dec. 2146 (1982); *Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996). Similarly, appeals in debarment proceedings that are not timely filed with the Hearing Clerk will also be dismissed. *Leon Howard d/b/a Howard Construction*, 53 Agric. Dec. 1400 (1994).[1]

The time for filing an appeal with the Hearing Clerk in this proceeding was not tolled. Whether the Debarring Official served his decision on Respondent/Appellant by mail or by some other means, the decision was in either event actually received by Respondent/Appellant on September 3, 1999. Section 3017.515(a) provides that "the appeal must be filed within 30 days of receiving the decision." (7 C.F.R. § 3017.515(a).) September 3, 1999, was thus the starting date to calculate the running of the appeal period. As for the inability of Federal Express to deliver the appeal, the address for the Hearing Clerk given to Federal Express was not incomplete. It is the official mailing address for the Hearing Clerk as provided in section 3017.515(a) of the regulations. Even though Respondent/Appellant may not be at fault because of Federal Express' inability to deliver the appeal on time, the decision of the Debarring Official became final and effective after 30 days and I lack jurisdiction to extend the time to file an appeal.

In view of the common requirement that an appeal in both debarment and nondebarment USDA proceedings must be filed with the Hearing Clerk, I find that "filing" has the same meaning in both types of cases and that an appeal in a debarment proceeding, like an appeal in a case subject to the Rules of Practice, is deemed to be filed when it is received by the Hearing Clerk. As the appeal in this matter was not received by the Office of the Hearing Clerk within the 30-day appeal period it must be dismissed.

Order

Respondent/Appellant's appeal, filed on October 7, 1999, is dismissed.

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[1]Time is of the essence in all phases of debarment proceedings. Appeals not only must be timely filed but the debarring officials must likewise act within strict time limits. In *Prairie Farms Dairy, Inc.*, 53 Agric. Dec. 1407 (1994), a decision in which a debarring official's decision was vacated for failure to adhere to the required time limit, it was held that "stringent time restraints must be applied in an evenhanded manner."

In re: PAUL W. THOMAS AND LEONA THOMAS.
EAJA-FSA Docket No. 99-0004.
Order Denying Petition for Reconsideration filed August 4, 1999.

Failure to file timely petition for reconsideration.

The Judicial Officer denied Applicants' Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)).

Margit Halvorson Williams, for Respondent.
Applicants, Pro se.
Initial decision issued by Byron Bennes, Hearing Officer.
Order issued by William G. Jenson, Judicial Officer.

Paul W. Thomas and Leona Thomas [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 filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture, National Appeals Division, Western Regional Office, on October 19, 1998.

Applicants allege in their EAJA Application that: (1) Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W, in which Applicants appealed the denial, by the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], of Applicants' application for a $76,000 emergency loan and Applicants' $175,515 subordination request; (2) Applicants incurred fees and expenses of $83,469 in connection with *In re Paul W. Thomas*, Case No. 98000848W; and (3) Applicants are eligible for an award of $83,469, in accordance with the criteria for eligibility in section 1.184 of the EAJA Rules of Practice (7 C.F.R. § 1.184).

On December 22, 1998, Respondent filed Answer to Application for Fees and Expenses [hereinafter Answer], in which Respondent: (1) admits that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) states that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified; (3) states that Applicants request relief that is not available under the Equal Access to Justice Act; (4) states that Applicants' EAJA Application does not comply with the requirements in the Equal Access to Justice Act or the EAJA Rules of Practice; and (5) states that Applicants' request for professional fees is not supported by documentation.

On January 11, 1999, Applicants filed a response to Respondent's Answer, and on January 15, 1999, Larry T. Jordan, Assistant Director, National Appeals

Division, United States Department of Agriculture, issued a Notice of Closing of EAJA Record which states that neither Applicants nor Respondent requested any further proceedings, as authorized by section 1.199 of the EAJA Rules of Practice (7 C.F.R. § 1.199).

On April 1, 1999, Byron Bennes, Hearing Officer, National Appeals Division, United States Department of Agriculture, issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which he: (1) found that Applicants filed a complete and timely EAJA Application (Initial Decision and Order at 2-4); (2) found that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 8); (3) found that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified (Initial Decision and Order at 4-6); and (4) awarded Applicants $2,392.50 for fees Applicants incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 6-8).

On May 4, 1999, Respondent appealed to the Judicial Officer; on May 11, 1999, Applicants filed a letter responding to Respondent's appeal; and on May 18, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

On June 15, 1999, I issued a Decision and Order: (1) finding that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) finding that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified; (3) finding that Applicants failed to file a timely and complete Equal Access to Justice Act application; (4) finding that Applicants' alleged additional interest payments, lost spring wheat, lost income from 150 calves, and forfeited down payment for, and a lost discount on, a drill are not fees and expenses that they incurred in connection with *In re Paul W. Thomas*, 98000848W; (5) finding that Applicants failed to establish that all of the fees charged by the North Dakota Agricultural Mediation Service were incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W; (6) concluding that Applicants are not entitled, under the Equal Access to Justice Act (5 U.S.C. § 504) and the EAJA Rules of Practice (7 C.F.R. §§ 1.180-.203), to fees and other expenses that they allege they incurred in connection with *In re Paul W. Thomas*, 98000848W; and (7) denying Applicants' request, under the Equal Access to Justice Act, for fees and other expenses, which Applicants allege they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W. *In re Paul W. Thomas*, 58 Agric. Dec. ___, slip op. at 26-27 (June 15, 1999).

On June 19, 1999, the Hearing Clerk served Applicants with the Decision and

Order.[1] On July 8, 1999, 19 days after the Hearing Clerk served Applicants with the Decision and Order, Applicants filed a letter addressed to the Hearing Clerk requesting reconsideration of the Decision and Order [hereinafter Petition for Reconsideration]. On August 3, 1999, Respondent filed Response to Applicants' Request for Reconsideration, and on August 3, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the June 15, 1999, Decision and Order.

Section 1.146(a)(3) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter 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).

Applicants' 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 the date the Hearing Clerk served the Decision and Order on Applicants, was filed too late, and, accordingly, Applicants' Petition for Reconsideration must

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[1]See Domestic Return Receipt for Article Number PO93175073 and Domestic Return Receipt for Article Number PO93175074.

be denied.[2]

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

Order

Applicants' Petition for Reconsideration is denied.

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[2]*See In re Nkiambi Jean Lema*, 58 Agric. Dec. ___ (May 14, 1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. ___ (Apr. 14, 1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. ___ (Sept. 15, 1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *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 the date the Hearing Clerk served the respondents 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 the date the Hearing Clerk served the respondent 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 the date the Hearing Clerk served the respondent 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 the date the Hearing Clerk served the respondent 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 the date the Hearing Clerk served the respondent with the decision and order); *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 the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *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 the date the Hearing Clerk served the respondent with the decision and order).

In re: KENNETH B. DAVIS.
FCIA Docket No. 99-0004.
Order Dismissing Complaint filed December 3, 1999.

Donald McAmis, for Complainant.
William C. Bridforth, Pine Bluff, Arkansas, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

Pursuant to the joint stipulation of Complainant and Respondent to have this proceeding dismissed, it is ordered that the complaint, filed herein on August 13, 1999, be dismissed.

In re: BILLY JACOBS, SR.
HPA Docket No. 95-0005.
Order Lifting Stay filed July 13, 1999.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On August 15, 1996, I issued a Decision and Order: (1) concluding that Billy Jacobs, Sr. [hereinafter Respondent], violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and (2) assessing Respondent a $3,000 civil penalty. *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996).

On October 21, 1996, Respondent filed a Request for Stay requesting a stay of the Order in *In re Billy Jacobs, Sr., supra*, pending the completion of proceedings for judicial review, and on January 29, 1997, I granted Respondent's Request for Stay. *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 516 (1997) (Stay Order).

Respondent appealed the Order issued in *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996), and on June 16, 1997, the United States Court of Appeals for the Eleventh Circuit dismissed Respondent's appeal. *Jacobs v. United States Dep't of Agric.*, No. 96-7124 (11th Cir. June 16, 1997). On June 11, 1999, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed Motion to Lift Stay Order; on July 7, 1999, Respondent filed a response to Complainant's Motion to Lift Stay Order; and on July 8, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift

Stay Order.

Respondent states in his response to Complainant's Motion to Lift Stay Order that he was in poor health at the time of the violation, which is the subject of this proceeding, and remains in poor health, that he was unaware of the violation, and that the proceeding depresses, aggravates, and humiliates him.

I find Respondent's poor health unfortunate and I hope for Respondent's speedy recovery; however, Respondent's health is not relevant to the issue of whether to grant or deny Complainant's Motion to Lift Stay Order. Further, Respondent's feelings regarding this proceeding are not warranted. Administrative proceedings under the Horse Protection Act are not designed to depress, aggravate, or humiliate respondents, but rather, are designed to provide those alleged to have violated the Horse Protection Act with due process. In any event, Respondent's emotions engendered by this proceeding are not relevant to the issue of whether to grant or deny Complainant's Motion to Lift Stay Order. Moreover, Respondent's denial of knowledge of the violation is not relevant to the issue of whether to grant or deny Complainant's Motion to Lift Stay Order.

I issued the Stay Order in *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 516 (1997) (Stay Order), in accordance with 5 U.S.C. § 705, to postpone the effective date of the Order issued in *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996), pending judicial review. Respondent does not dispute Complainant's contention that after the Court's dismissal of Respondent's appeal in *Jacobs v. United States Dep't of Agric.*, No. 96-7124 (11th Cir. June 16, 1997), "Respondent Billy Jacobs, Sr., has not filed any further appeal petitions and the time for filing such has expired" (Motion to Lift Stay Order ¶ 3).

I find that proceedings for judicial review are concluded and the time for filing further requests for judicial review has expired. Therefore, Complainant's Motion to Lift Stay Order is granted, the Stay Order issued on January 29, 1997, *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 516 (1997) (Stay Order), is lifted, and the Order issued in *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996), is effective, as follows:

Order

Respondent Billy Jacobs, Sr., 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:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel

Marketing Division
1400 Independence Avenue, SW
Room 2014 South Building
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Colleen A. Carroll within 30 days after service of this Order on Respondent. Respondent should indicate on the certified check or money order that payment is in reference to HPA Docket No. 95-0005.

In re: DAVID FIELDS AND SARENA WESTENHAVER.
HPA Docket No. 99-0022.
Order of Dismissal filed August 4, 1999.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

In view of Complainant's notice of its withdrawal of the Complaint, the case is dismissed.

In re: JANET BRACALENTE, THOMAS BRACALENTE, AND RONALD BRACALENTE.
HPA Docket No. 99-0027.
Order Granting Withdrawal filed October 25, 1999.

Donald A. Tracy, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to withdraw its Complaint as to Ronald Bracalente is hereby granted.

Copies hereof shall be served upon the parties.

In re: JACQUELINE CREARY.
P.Q. Docket No. 99-0047.
Order Dismissing Complaint filed July 9, 1999.

Jane H. Settle, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

The complaint, filed in this matter on June 11, 1999, is dismissed.

In re: MENDEZ WHOLESALE, INC., TIENDA-EL MEXICANA, AND TIENDA NAYARIT #2.
P.Q. Docket No. 99-0049.
Order Dismissing Complaint filed July 13, 1999.

James D. Holt, for Complainant.
Respondent, Pro se.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Complainant's July 12, 1999, "Motion to Dismiss as to Tienda Nayarit #2" is granted. The Complaint as to Respondent Tienda Nayarit #2, filed on June 24, 1999, is dismissed.

In re: LEADERMAR (USA) CORPORATION.
P.Q. Docket No. 99-0004.
Ruling Denying Motion to Waive Rules of Practice filed July 15, 1999.

The Judicial Officer denied Respondent's request that the Judicial Officer waive the provision in the Rules of Practice limiting the time within which a party may file a petition for reconsideration. The Judicial Officer held that he has no authority to depart from the Rules of Practice.

James A. Booth, for Complainant.
Jerold H. Tabbott, Jacksonville, FL, for Respondent.
Initial decision issued by Edwin S. Bernstein, Acting Chief Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

On July 1, 1999, Leadermar (USA) Corporation [hereinafter Respondent] filed a motion requesting that "the provision limiting filing petition for reconsideration

be waived." On July 14, 1999, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Response to Respondent's Petition to Reconsider the Judicial Officer's Decision [hereinafter Complainant's Response], and on July 14, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's motion.

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] limit the time within which a party may file a petition for reconsideration, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite. . . .*
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

I issued the decision in this proceeding on May 19, 1999, *In re Leadermar (USA) Corp.*, 58 Agric. Dec. ___ (May 19, 1999), and the Hearing Clerk served Respondent with the decision on May 24, 1999.[1] Thus, any petition for reconsideration, which Respondent contemplated filing, was due June 3, 1999. Moreover, if Respondent required additional time within which to file a petition for reconsideration, Respondent's request for additional time must have been filed prior to the time that the petition for reconsideration was due.

Respondent requests that I waive the provision in the Rules of Practice limiting

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[1]See Domestic Return Receipt for Article Number P093175049.

the time within which a party may file a petition for reconsideration. The Judicial Officer has no authority to depart from the Rules of Practice;[2] therefore, Respondent's request that I waive the Rules of Practice and allow it to file a late petition for reconsideration is denied.

Complainant assumes that Respondent's July 1, 1999, filing is Respondent's petition for reconsideration of *In re Leadermar (USA) Corp.*, 58 Agric. Dec. ___ (May 19, 1999) (Complainant's Response at 1). Respondent is required by section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) to file any petition for reconsideration within 10 days after the date the Hearing Clerk serves the Decision and Order on Respondent. Respondent's July 1, 1999, filing was filed 38 days after the Hearing Clerk served the Decision and Order on Respondent. Thus, even if I found Respondent's July 1, 1999, filing to be a petition for reconsideration (which I do not so find), I would deny the petition for reconsideration because it was filed late.[3]

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[2]*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); *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); *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). *Cf. In re Kinzua Resources, LLC*, 57 Agric. Dec. ___, slip op. at 20 (June 5, 1998) (stating that generally administrative law judges and the judicial officer are bound by the rules of practice, but they may modify the rules of practice to comply with 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 Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding that the Chief Administrative Law Judge did not err when he modified 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); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating that generally administrative law judges and the judicial officer are bound by the rules of practice, but they may modify the rules of practice to comply with 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 Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding that the Chief Administrative Law Judge did not err when he modified 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).

[3]*See In re Nkiambi Jean Lema*, 58 Agric. Dec. ___ (May 14, 1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. ___ (Apr. 14, 1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as

(continued...)

In re: KYO HEUM LEE.
P.Q. Docket No. 98-0002.
Order Dismissing Complaint filed August 12, 1999.

Susan Golabek, 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 on November 14, 1997, be dismissed.

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[3](...continued)
late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. ___ (Sept. 15, 1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *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 the date the Hearing Clerk served the respondents 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 the date the Hearing Clerk served the respondent 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 the date the Hearing Clerk served the respondent 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 the date the Hearing Clerk served the respondent 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 the date the Hearing Clerk served the respondent with the decision and order); *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 the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *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 the date the Hearing Clerk served the respondent with the decision and order).

In re: DE ANDA TORTILLAS.
P.Q. Docket No. 99-0036.
Complaint Dismissed filed September 15, 1999.

James D. Holt, for Complainant.
William Horneber, South Sioux City, Nebraska, for Respondent.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to Motion filed September 8, 1999, the Complaint filed herein on April 21, 1999, is hereby dismissed.

Copies hereof shall be served upon the parties.

DEFAULT DECISIONS

ANIMAL WELFARE ACT

In re: SHERMAN JACK WALTON AND TRACEY WALTON, d/b/a RUNNING SPRINGS EXOTICS.
AWA Docket No. 97-0045.
Decision and Order filed June 2, 1999.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.)*.

An Amended Complaint was filed on August 19, 1998. Copies of the Amended Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondents by regular mail on December 2, 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 amended complaint would constitute an admission of that allegation.

Respondents failed to file an Answer addressing the allegations contained in the amended complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Amended Complaint, which are admitted as set forth herein by respondents' 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

1. A. Sherman Jack Walton and Tracey Walton, hereinafter referred to as

respondents, are individuals doing business as Running Springs Exotics, whose mailing address is P. O. Box 947, Meridian, Texas 76665.

B. The respondents, at all times material herein, were operating as an exhibitor as defined in the Act and the regulations.

2. From on or about September 14, 1994, and continuing until August 7, 1997, the respondents operated as an exhibitor as defined in the Act and the regulations on at least 74 occasions, without being licensed, in willful violation of section 2.1 of the regulations (9 C.F.R. § 2.1). Each exhibition constitutes a separate violation.

3. From on or about September 2, 1997, and continuing until the present, the respondents operated as an exhibitor as defined in the Act and the regulations on at least 33 occasions, without being licensed, in willful violation of section 2.1 of the regulations (9 C.F.R. § 2.1). Each exhibition constitutes a separate violation.

4. On October 2, 1997, APHIS attempted to conduct an inspection of respondent's exhibit at the Fort Bend County Fair. Although no one was available for the inspection, the following violations were observed from outside the petting area:

(a) Primary enclosures for animals were not constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement (9 C.F.R. § 3.128)); and

(b) Animals in primary enclosures were not maintained in compatible groups (9 C.F.R. § 3.133)).

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

2. The respondents are jointly and severally assessed a civil penalty of $7,000.00, which shall be paid by a certified check or money order made payable

to the Treasurer of United States.

3. The respondents are disqualified for a period of two years from becoming licensed under the Act and regulations.

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 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final July 15, 1999.-Editor]

In re: STEVEN GALECKI AND CORINNE BROZ, d/b/a FUNKY MONKEY EXOTICS.
AWA Docket No. 98-0039.
Decision and Order filed June 17, 1999.

Frank Martin, Jr., for Complainant.
Respondents, 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 wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondents by personal service on December 7, 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 by respondents' failure to file an Answer pursuant to the Rules of Practice, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the

Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. (a) Steven Galecki and Corinne Broz, hereinafter referred to as respondents, are individuals doing business as Funky Monkey Exotics, 1946 West Norfolk, Crete, Illinois 62241.

(b) The respondents are, and at all times material hereto were, operating as an exhibitor as defined in the Act and the regulations.

2. On June 26, 1997, APHIS attempted to inspect respondents' premises and records, but were unable to do so because respondents failed to have a responsible party available during business hours, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.126(a) of the regulations (9 C.F.R. § 2.75(b)(1)).

3. On August 6, 1997, APHIS attempted to inspect respondents' premises and records, but were unable to do so because respondents failed to have a responsible party available during business hours, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.126(a) of the regulations (9 C.F.R. § 2.75(b)(1)).

4. (a) On August 7, 1997, APHIS attempted to inspect respondents' premises and records, but were unable to do so because respondents failed to have a responsible party available during business hours, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.126(a) of the regulations (9 C.F.R. § 2.75(b)(1)).

(b) On August 7, 1997, APHIS found that respondents used an unapproved method of euthanasia, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

5. On August 12, 1997, APHIS found that respondents used an unapproved method of euthanasia, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

6. (a) On August 20, 1997, APHIS inspected respondents' place of business, and found that respondents failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

(b) On August 20, 1997, APHIS inspected respondents' place of business and found the following willful violations of the standards specified below:

(1) The premises (buildings and grounds) were not kept clean and in good repair and free of accumulations of trash (9 C.F.R § 3.131(c)); and

(2) An effective program for the control of pests was not established and maintained (9 C.F.R. § 3.131(d)).

7. On August 21, 1997, APHIS attempted to inspect respondents' premises and records, but were unable to do so because respondents failed to have a

responsible party available during business hours, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.126(a) of the regulations (9 C.F.R. § 2.75(b)(1)).

Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act, as well as standards and regulations promulgated under the Act.
3. The following Order is authorized by the Act and warranted under the circumstances.

Order

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

(a) Failing to have a responsible party available during business hours to allow APHIS inspectors access to the facilities and records;

(b) Failing to provide proper veterinary care;

(c) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes; and

(d) Failing to establish and maintain an effective program for the control of pests.

2. The respondents are assessed a civil penalty of $8,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. The respondents are disqualified for a period of five years from becoming licensed under the Act and regulations.

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 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final August 17, 1999.-Editor]

In re: FRANCIS LEWIS AUSTIN AND SUPERIOR PETS, INC.
AWA Docket No. 99-0007.
Decision and Order filed June 21, 1999.

Brian T. Hill, for Complainant.
Respondents, Pro se.
Decision and Order issued by Edwin S. Bernstein, 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 pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served by the Hearing Clerk on Superior Pets, Inc. on November 21, 1998. Copies of the complaint and the Rules of Practice were also sent via certified mail to Francis Lewis Austin, return receipt requested, on November 13, 1998. The copies sent to Francis Lewis Austin were returned to the office of the Hearing Clerk marked "unclaimed" on February 19, 1999. Pursuant to the Act, 7 C.F.R. § 1.147(c)(1), copies of the Complaint and the Rules of Practice were sent by ordinary mail to Francis Lewis Austin on March 8, 1999. Each 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. Respondents have 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 respondents' 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

I

A. Respondent Francis Lewis Austin is an individual whose mailing address is Route 2, Box 92, Elkland, MO 65644. Respondent Superior Pets, Inc., is a

corporation and has the same mailing address.

B. At all times material herein, the respondents were licensed and operating as a dealer as defined in the Act and the regulations and the actions of respondent Superior Pets, Inc. were directed, managed, and controlled by respondent Francis Lewis Austin as president and secretary.

II

A. On October 9, 1997, APHIS found that the respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On October 9, 1997, APHIS found that the respondents had failed to individually identify dogs, in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

C. On October 9, 1997, APHIS found that the respondents had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

D. On October 9, 1997, APHIS found that the respondents had transported twenty-six dogs in commerce without health certificates issued by a licensed veterinarian, in willful violation of section 2.78(a) of the regulations (9 C.F.R. § 2.78(a)).

E. On October 9, 1997, APHIS found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Primary enclosures were not strong enough to contain the dogs securely and comfortably, and to withstand the normal rigors of transportation (9 C.F.R. § 3.14(a)(1));

2. Primary enclosures failed to prevent animals from putting parts of their body outside the enclosure in a way that could result in injury to the animals, to handlers, or to person or animals nearby (9 C.F.R. § 3.14(a)(3));

3. Primary enclosures in the vehicle of transport did not have handles or handholds on their exterior that enable the enclosures to be lifted without tilting them and to ensure that anyone handling the enclosure will not come into physical contact with animals inside (9 C.F.R. § 3.14(a)(5));

4. Primary enclosures were not clearly marked to indicate both the presence of live animals and the correct upright position of the primary enclosure

(9 C.F.R. § 3.14(a)(6));

5. Primary enclosures were not cleaned at least once for every 24 hours of continuous travel (9 C.F.R. § 3.14(b));

6. Dogs that were not compatible were transported in the same primary enclosure with each other (9 C.F.R. § 3.14(d)(1));

7. Three dogs were transported in a primary enclosure which only provided room enough for one to turn about normally while standing, to sit and stand erect, and to lie in a natural position (9 C.F.R. § 3.14(e)(1));

8. The animal cargo space of primary conveyances used to transport dogs was not maintained in a manner that protected the health and well-being of the animals housed in them, and assured their health and comfort (9 C.F.R. § 3.15(a));

9. Animals that were in obvious physical distress during transportation were not given immediate veterinary care at the closest available veterinary facility (9 C.F.R. § 3.17(a)).

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. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to provide primary enclosures that were strong enough to contain the dogs securely and comfortably, and to withstand the normal rigors of transportation;

(b) Failing to clean primary enclosures at least once for every 24 hours of continuous travel;

(c) Failing to provide immediate veterinary care at the closest available veterinary facility to animals that were in obvious physical distress during transportation.

2. Respondents are jointly and severally assessed a civil penalty of $15,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

3. Respondents' license is suspended for a period of two years and continuing

thereafter until he demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein.

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 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final September 8, 1999.-Editor]

In re: MARY ANN SKLAR, d/b/a LIVING TREASURES.
AWA Docket No. 99-0021.
Decision and Order filed July 8, 1999.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, 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 by certified mail on May 7, 1999. 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.

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 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. Mary Ann Sklar, hereinafter referred to as the Respondent, is an individual doing business as Living Treasures, with a mailing address of P.O. Box 96, Newport, Tennessee 37831.

2. The Respondent, at all times material herein, was licensed and operating as an exhibitor as defined in the Act and the regulations.

3. When the Respondentbecame licensed and annually thereafter, she received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

4. On March 2, 1999, Respondent refused to permit Animal and Plant Health Inspection Services employees to conduct an inspection of her animal facilities and records, in willful violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

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 refusing to make her animal facilities available for inspection pursuant to the Act and regulations.

2. The 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 Departmentof Agriculture, Room 2014 South Building, Washington, D.C. 20250.

3. Respondent's license under the Act is revoked.

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 and 1.145.

Copies of this decision shall be served upon the parties.
[This Decision and Order became final September 25, 1999.-Editor]

In re: MARY ANN SKLAR, d/b/a LIVING TREASURES.
AWA Docket No. 97-0042.
Order Dismissing Complaint filed September 10, 1999.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Upon motion of the Complainant and for good cause shown, the complaint in this matter is dismissed, without prejudice.

In re: MARIANO V. RUGGERI, CYNTHIA V. RUGGERI, AND CRANE LABORATORIES, INC.
AWA Docket No. 98-0009.
Amended Decision and Order filed July 12, 1999.

Brian T. Hill, for Complainant.
Respondents, 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 wilfully 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. §§ 1.130-1.151, 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 were deemed admitted by Respondents' failure to file an answer and were adopted as Findings of Fact and Conclusions of Law in a Default Decision and Order, filed on June 15, 1998, pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Thereafter, Complainant and Respondents agreed that the Findings of Fact and Conclusions of Law in the June 15, 1998, Decision and Order be amended. Accordingly, in view of the agreement of the parties, the June 15, 1998, Decision and Order is hereby ordered amended by substituting the following Findings of Fact and Conclusions of Law for those contained in the June 15, 1998, Decision and Order.

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 wilfully 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 wilfully 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 wilfully 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 Services employees to conduct a complete inspection of their animal facilities and records.

7. On May 3, 1995, Respondents wilfully 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 wilfully 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 wilfully 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 wilfully 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 wilfully 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 wilfully 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 wilfully 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 wilfully 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(a));

(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 wilfully 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 Services employees to conduct a complete inspection of their animal facilities and records.

16. On January 2, 1997, Respondents wilfully 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, Respondents wilfully 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 Respondents have 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 in particular, shall cease and desist from:

(a) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(b) Failing to 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.

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 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final August 21, 1999.-Editor]

In re: ROGER D. FIGG.
AWA Docket No. 99-0013.
Decision and Order filed July 12, 1999.

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 respondent 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. §§ 1.130-1.151, were sent via certified mail to the respondent, return receipt requested, on March 3, 1999. The copies were returned to the office of the Hearing Clerk marked "unclaimed" on March 31, 1999. Pursuant to the Act, 7 C.F.R. § 1.147(c)(1), copies of the Complaint and the Rules of Practice were sent by ordinary mail to the respondent on April 6, 1999. 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

I

A. Roger D. Figg, hereinafter referred to as respondent, is an individual whose mailing address is 734 Horton Avenue, Riverhead, New York 11901.

B. The respondent, at all times material hereto, was operating as an exhibitor as defined in the Act and the regulations.

II

A. On or about June 3, 1997, the respondent failed to notify the APHIS, REAC Sector Supervisor of his change of address within 10 days of the change (9 C.F.R. § 2.8).

B. On or about June 3, 1997, the respondent failed to notify the APHIS, REAC Sector Supervisor of his change of site location within 10 days of the change (9 C.F.R. § 2.27).

C. On or about April 2, 1998, respondent failed to notify Animal and Plant Health Inspection Services employees of his change in site locations, therefore they were unable to conduct a complete inspection of his animal facility, in willful

violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

D. On or about June 27, 1998, the respondent failed to claim registered mail from APHIS on three occasions as required, in willful violation of 2.5(c) of the regulations (9 C.F.R. § 2.5(c)).

E. On or about May 30, 1998, the respondent operated as an exhibitor as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and subsection 2.1 of the regulations (9 C.F.R. § 2.1). Respondent exhibited one (1) liger.

F. On or about May 31, 1998, the respondent operated as an exhibitor as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and subsection 2.1 of the regulations (9 C.F.R. § 2.1). Respondent exhibited one (1) liger.

G. On or about June 7, 1998, the respondent operated as an exhibitor as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and subsection 2.1 of the regulations (9 C.F.R. § 2.1). Respondent exhibited one (1) liger.

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. 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 exhibiting animals without a license which is required under the Act and regulations.

2. The respondent is assessed a civil penalty of $2,500.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

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 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final August 23, 1999.-Editor]

In re: DELL L. EISENBARTH, d/b/a TASMANIAN FARMS.
AWA Docket No. 99-0014.
Decision and Order filed August 12, 1999.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was duly served on the respondent by the Office of the Hearing Clerk. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

I

A. Dell L. Eisenbarth, hereinafter referred to as the respondent, is an individual doing business as Tasmanian Farms, with a mailing address of R.R. 1 Box 45, Solsberry, Indiana 47459.

B. The respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations.

II

A. On December 10, 1997, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On December 10, 1997, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. A suitable method was not provided to rapidly eliminate excess water from outdoor housing facilities for animals (9 C.F.R. § 3.127(c)); and

2. Indoor housing facilities for nonhuman primates were not sufficiently heated when necessary to protect the animals from cold and to provide for their health and comfort, which resulted in the death of one Gibbon monkey (9 C.F.R. § 3.76(a)).

III

A. On December 22, 1997, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On December 22, 1997, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. 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));

2. Provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.125(d));

3. Primary enclosures for nonhuman primates were not kept clean and spot-cleaned daily, and free of accumulation of trash and debris (9 C.F.R. § 3.84(a) and (c));

4. Animals kept outdoors were not provided with adequate shelter from inclement weather (9 C.F.R. § 3.127(b));

5. Animals were not provided with food of sufficient quantity and nutritive value to maintain them in good health (9 C.F.R. § 3.129(a));

6. Animals were not provided with adequate water (9 C.F.R. § 3.130); and

7. Primary enclosures were not kept clean and spot-cleaned daily, and free of accumulation of trash and debris (9 C.F.R. § 3.131(a) and (c)).

IV

On December 29, 1997, Animal and Plant Health Inspection Service employees were not permitted to conduct a complete inspection of her animal facilities, in willful violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

V

A. On January 13, 1998, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On January 13, 1998, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. 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));

2. Animals kept outdoors were not provided with adequate shelter from

inclement weather (9 C.F.R. § 3.127(b));

3. A suitable method was not provided to rapidly eliminate excess water from outdoor housing facilities for animals (9 C.F.R. § 3.127(c)); and

4. Animals were not provided with adequate water (9 C.F.R. § 3.130).

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:

(a) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

(b) 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;

(c) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes;

(d) Failing to maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary;

(e) Failing to provide animals with food of sufficient quantity and nutritive value to meet their normal daily requirements;

(f) Failing to provide animals with adequate potable water;

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

(h) Failing to provide adequate heating for animals in indoor and sheltered housing facilities when necessary to protect the animals from cold and to provide for their health and comfort;

(i) Failing to provide for the rapid elimination of excess water from housing facilities for animals;

(*l*) Failing to provide animals with adequate shelter from the elements;

(k) 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

2. The respondent is assessed a civil penalty of $5,700.00, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

3. The respondent's license is terminated and the respondent is disqualified from becoming licensed under the Act and regulations for a period of five (5) years and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty.

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 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final December 25, 1999.-Editor]

In re: THOMAS W. RASPOPTSIS AND PETS AND US, INC.
AWA Docket No. 99-0005.
Decision and Order filed August 20, 1999.

Sharlene A. Deskins, for Complainant.
Respondents, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondent by certified mail. On March 12, 1999, the attorney for the Respondents requested a thirty day extension in which to file their answer. On March 12th, Acting Chief

Administrative Law Judge Bernstein granted the Respondent an extension until April 9, 1999 in which to file their answer. 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. Moreover, Acting Chief Judge Bernstein informed the Respondent in the Order granting the extension that the Answer must be actually received by the Hearing Clerk by April 9, 1999.

The 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 Respondents' 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

I

A. Respondent Thomas W. Raspoptsis is an individual whose address is 25001 W.8 Mile Road, Redford Michigan 48240. Respondent Pets and Us, Inc. is a Michigan corporation and has the same mailing address.

B. At all material times the Respondents operated as a dealer and exhibitor as defined in the Act and the regulations and the actions of Respondent Pets and Us, Inc., were directed, managed, and controlled by Respondent Thomas W. Raspoptsis as the owner.

II

C. Since September 26, 1997, the respondents have operated as a dealer and as an exhibitor 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).

III

D. On February 24, 1998, APHIS inspected respondents' premises and found that the respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and

assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

E. On February 24, 1998, APHIS inspected respondents' premises and records and found that the respondents had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

F. On February 24, 1998, APHIS inspected the respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Surfaces of housing facilities for nonhuman primates (including perches, shelves, swings, boxes, dens, and other furniture-type fixtures or objects within the facility) were not maintained on a regular basis and replaced when necessary (9 C.F.R. § 3.75(c)(1));

2. The respondents failed to develop, document, and follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of nonhuman primates (9 C.F.R. § 3.81);

3. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals (9 C.F.R. § 3.125(a));

4. The surfaces of housing facilities were not constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled (9 C.F.R. § 3.1(c)(1));

5. Toxic substances were improperly stored in animal areas (9 C.F.R. § 3.1(e)); and

6. Surfaces of housing facilities were not cleaned and sanitized, as required (9 C.F.R. § 3.1(c)(3)). During 1995 and 1996, the respondent willfully violated section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1) by operating as a dealer as defined in the Act and the regulations without having obtained a license. Respondent sold, in commerce, at least 1200 animals for resale for use in research, for use as pets or for exhibition. The sale of each animal constitutes a separate violation.

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act and regulations promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. 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 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 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;

(C) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required;

(D) Failing to maintain housing facilities for dogs in a structurally sound condition and in good repair;

(E) Failing to store supplies of food and bedding so as to adequately protect them against infestation or contamination by vermin;

(F) Failing to maintain surfaces of housing facilities for nonhuman primates;

(G) Failing to develop, document, and follow an appropriate plan for environmental enhancement; and

(H) Failing to clean and sanitize housing facilities.

2. The respondents are jointly and severally assessed a civil penalty of $6,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States. The check shall be sent to Sharlene Deskins, 1400 Independence Avenue, S.W., Room 2014-South Building, Stop 1417, Washington, D.C. 20250-1417.

3. The respondents are disqualified for nine months from applying for or becoming licensed under the Act and regulations. The disqualification from applying for a licensed or becoming licensed will continue until they have paid the civil penalty assessed against them.

The provisions of this Order shall become effective on the first day after service of this decision on the respondent.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.
[This Decision and Order became final October 1, 1999.-Editor]

In re: LYNDA DANIEL.
AWA Docket No. 99-0029.
Decision and Order filed September 29, 1999.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served via certified mail by the Hearing Clerk on Lynda Daniel on June 26, 1999. The respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

I

A. Lynda Daniel, hereinafter referred to as respondent, is an individual whose mailing address is 1310 SE Cook Road, Maysville, Missouri 64469.

B. The respondent, at all times material hereto, was licensed and operating as

a breeder as defined in the Act and the regulations.

II

A. On April 29, 1998, APHIS inspected respondent's premises and found that the respondent had failed to maintain adequate programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On April 29, 1998, APHIS inspected respondent's premises and records and found that the respondent had failed to individually identify animals, in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

C. On April 29, 1998, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Provisions were not made for the 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 (9 C.F.R. § 3.1(f));

2. Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b));

3. Dogs were not provided sufficient space, as required (9 C.F.R. § 3.6(c)(1));

4. Primary enclosures for dogs were not kept clean (9 C.F.R. § 3.11(a)); and

5. The premises, including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses and bushes were not controlled, in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R § 3.11(c)).

III

A. On June 17, 1998, APHIS inspected respondent's premises and found that the respondent had failed to maintain adequate programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations

(9 C.F.R. § 2.40).

B. On June 17, 1998, APHIS inspected respondent's premises and records and found that the respondent had failed to individually identify animals, in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

C. On June 17, 1998, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b));

2. Primary enclosures for cats did not contain adequate resting surfaces (9 C.F.R. § 3.6(b)(4));

3. Dogs were not provided sufficient space, as required (9 C.F.R. § 3.6(c)(1)); and

4. The premises including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses and bushes were not controlled, in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R § 3.11(c)).

IV

A. On September 9, 1998, APHIS inspected respondent's premises and found that the respondent had failed to maintain adequate programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On September9, 1998, APHIS inspected respondent's premises and records and found that the respondent had failed to individually identify animals, in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

C. On September 9, 1998, respondent refused to permit Animal and Plant Health Inspection Service employees to conduct a complete inspection of her animal facilities, in willful violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

D. On September 9, 1998, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Housing facilities for dogs 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. § 3.1(a));

2. Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b));

3. Dogs housed in the same primary enclosure were not compatible (9 C.F.R. § 3.7(b));

4. Primary enclosures for dogs were not kept clean and sanitized as required (9 C.F.R. § 3.11(a), (b)); and

5. The premises, including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses and bushes were not controlled, in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R § 3.11(c)).

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:

(a) 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, and dead animals, in a manner that minimizes contamination and disease risks;

(b) Failing to construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated;

(c) Failing to provide a suitable method for the rapid elimination of excess water and wastes from housing facilities for animals;

(d) Failing to provide sufficient space for animals in primary enclosures;

(e) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

(f) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes;

(g) Failing to maintain animals in primary enclosures in compatible groups;

(h) 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

(i) Failing to individually identify animals, as required.

2. The respondent is assessed a civil penalty of $12,000.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent's license is suspended for 30 days and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein. When respondent demonstrates to the Animal and Plant Health Inspection Service that she has satisfied this condition, a supplemental order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension.

The provisions of this order shall become effective on the first day after 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 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final November 8, 1999.-Editor]

FEDERAL CROP INSURANCE ACT

In re: RONALD L. BOILINI.
FCIA Docket No. 99-0002.
Decision and Order filed August 19, 1999.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of respondent, Ronald L. Boilini, 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 Federal Crop Insurance Act (7 U.S.C. § 1506(n), the Act).

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 one year and from receiving any other benefit under the Act for a period of 5 years. The period 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 2, 1999.-Editor]

HORSE PROTECTION ACT

In re: DWAYNE WEBB AND GERALD W. SHARPE.
HPA Docket No. 99-0025.
Decision and Order as to Dwayne Webb filed September 27, 1999.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This proceeding was instituted under the Horse Protection Act, as amended (15 U.S.C. § 1821 *et seq.*)(the "Act"), 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.

The Hearing Clerk served on the respondents, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondents were 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. Respondent Dwayne Webb 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 said 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 Dwayne Webb is an individual whose mailing address is 6639 McMinnville Highway, Smithville, Tennessee 37166. At all times mentioned herein, said respondent was the owner of the horse known as "Beaucoup's of Gen."

2. On September 18, 1998, respondent Dwayne Webb allowed respondent Gerald W. Sharpe to enter "Beaucoup's of Gen" as entry number 64 in class number 47 at the 19th Annual National Spotted Saddle Horse Association World Grand Championship, in Murfreesboro, Tennessee (the "Spotted Saddle Horse Show"), for the purpose of showing or exhibiting it in that horse show.

Conclusions of Law

On September 18, 1998, respondent Dwayne Webb allowed respondent Gerald

W. Sharpe to enter "Beaucoup's of Gen" as entry number 64 in class number 47 at the Spotted Saddle Horse Show, while the horse was sore, for the purpose of showing or exhibiting the horse in the horse show, in violation of section 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)).

Order

1. Respondent Dwayne Webb is assessed a civil penalty of $2,000.

2. Respondent Dwayne Webb is disqualified for one year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, family member or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction, and this disqualification shall continue indefinitely so long as the civil penalty described in paragraph 1 above remains unpaid.

3. For purposes of the disqualification described in paragraph 2 above, "participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.

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 8, 1999.-Editor]

In re: JAMES E. WILLIAMS AND ERIC RUSSELL WILLIAMS.
HPA Docket No. 99-0021.
Decision and Order filed September 23, 1999.

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 Horse Protection Act, as amended (15 U.S.C. § 1821 *et seq.*)(the "Act"), 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.

The Hearing Clerk served on the respondents, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondents were 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. Respondents have 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 respondents' 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. Respondents James E. Williams and Eric Russell Williams are individuals whose mailing address is 402 Venus Place, Murfreesboro, Tennessee 37130. At all times mentioned herein, respondent James E. Williams was the owner of the horse known as "Eb's Mark of Color."

2. On September 19, 1998, respondent Eric Russell Williams entered for the purpose of showing or exhibiting, "Eb's Mark of Color" as entry number 122 in class number 52, at the 19th Annual National Spotted Saddle Horse Association Grand Championship, in Murfreesboro, Tennessee (the "Spotted Saddle Horse Show").

3. On September 19, 1998, respondent James E. Williams allowed respondent Eric Russell Williams to enter "Eb's Mark of Color" as entry number 122 in class number 52, at the Spotted Saddle Horse Show, for the purpose of showing or exhibiting the horse.

Conclusions of Law

1. On September 19, 1998, respondent Eric Russell Williams entered "Eb's Mark of Color" as entry number 122 in class number 52 at the Spotted Saddle Horse Show for the purpose of showing or exhibiting the horse in the horse show, while the horse was sore, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)).

2. On September 19, 1998, respondent Eric Russell Williams entered "Eb's Mark of Color," as entry number 122 in class number 52 at the Spotted Saddle Horse Show, for the purpose of showing or exhibiting the horse in the horse show, while the horse was wearing a substance prohibited under the horse protection

regulations (9 C.F.R. § 11.2(c)), in violation of section 5(7) of the Act (15 U.S.C. § 1824(7)).

3. On September 19, 1998, respondent James E. Williams allowed the entry of "Eb's Mark of Color" as entry number 30 in class number 122 at the Spotted Saddle Horse Show, for the purpose of showing or exhibiting the horse in the horse show, while the horse was sore, in violation of section 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)).

Order

1. Respondent James E. Williams is assessed a civil penalty of $2,000.
2. Respondent Eric Russell Williams is assessed a civil penalty of $4,000.
3. Respondent James E. Williams is disqualified for one year, and respondent Eric Russell Williams is disqualified for two years, from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, family member, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.

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 December 6, 1999, for Eric Russell Williams, and final December 13, 1999, for James E. Williams.-Editor]

PLANT QUARANTINE ACT

In re: ENCALADA DIEGO.
P.Q. Docket No. 97-0004.
Decision and Order filed June 16, 1999.

Cynthia Koch, 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 movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on November 8, 1996, 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 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. Encalada Diego is an individual whose mailing address is 559 50th Street, Brooklyn, New York 11220.

2. On or about November 16, 1994, respondent imported fresh tomatoes from Ecuador into the United States, in violation of Section 7 C.F.R. § 319.56(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. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of seven hundred fifty dollars ($750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403
(612) 370-2221

Respondent shall indicate that payment is in reference to P.Q. Docket No. 97-0004.

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 31, 1999.-Editor]

In re: ESTELA OLVERA-RIOS.
P.Q. Docket No. 99-0001.
Decision and Order filed April 28, 1999.

Howard Levine, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Act of February 2, 1903, as amended (21 U.S.C. § 111), and the regulations

promulgated thereunder (7 C.F.R. § 319.56 *et seq.* and 9 C.F.R. § 94 *et seq.*) .

This proceeding was instituted by a complaint filed against Estela Olvera-Rios, Respondent, on December 22, 1998, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By Respondent's failure to answer, Respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Estela Olvera-Rios, hereinafter referred to as the Respondent, is an individual with a mailing address of 44770 Palo Verde Apartment 61, Indio, California 92201.

2. On or about August 28, 1997, Respondent violated 7 C.F.R. § 319.56(c) of the regulations by importing thirty (30) fresh pears, four (4) avocados, five (5) pitayas, and ten (10) fresh limes from Mexico into the United States, importation of which was prohibited.

3. On or about August 28, 1997, Respondent violated 7 C.F.R. § 319.56-3(a) of the regulations by importing one (1) mango from Mexico into the United States without a permit.

4. On or about August 28, 1997, Respondent violated 9 C.F.R. § 94.9(b) by importing two (2) pounds of Chorizo from Mexico into the United States without the required certificate.

Conclusion

By reason of the facts contained in paragraphs one through four above, Estela Olvera-Rios, Respondent, has violated 7 C.F.R. § 319.56(c), 7 C.F.R. § 319.56-3(a), and 9 C.F.R. § 94.9(b).

Therefore, the following order is issued.

Order

Estela Olvera-Rios is hereby assessed a civil penalty of one thousand five hundred dollars ($1,500).[1] This penalty shall be payable to "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final August 1, 1999.-Editor]

In re: ESTELA OLVERA-RIOS.
P.Q. Docket No. 99-0001.
Order Vacating Default Decision and Order and Dismissing Complaint filed October 15, 1999.

Howard Levine, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's October 14, 1999, "Motion to Vacate Default Decision" is granted. The Default Decision and Order, filed on April 28, 1999, is vacated and the complaint, filed herein on October 15, 1998, is dismissed without prejudice.

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[1]Complainant's proposed maximum penalty of $3,000 for the three violations is reduced to $1,500 pursuant to *Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *M. Higgs*, 52 Agric. Dec. 333 (1993).

In re: MI PUEBLO.
P.Q. Docket No. 99-0023.
Decision and Order filed July 12, 1999.

Jeffrey Kirmsse, 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 fruits and vegetables into the United States (7 C.F.R. 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the rules of practice set forth in 7 C.F.R. 1.130 *et seq.* and 380.1 *et seq.*).

This proceeding was instituted by a complaint, filed on April 1, 1999, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about December 2, 1998, and on or about January 26, 1999, the respondent moved boxes of Mexican Hass avocados from Chicago, Illinois, to Mi Pueblo, Muscatine, Iowa, in violation of 7 C.F.R. 301.11(b)(2) and 319.56-2ff, because such movement is prohibited.

The complaint was served upon the respondent by certified mail on April 2, 1999. The respondent failed to file an answer which denied or otherwise responded to the allegations in the complaint. In accordance with section 1.136(c) of the rules of practice (7 C.F.R. 1.136(c)), such failure to deny or otherwise respond to an allegation in the complaint is deemed, for the purposes of this proceeding, an admission of said allegation.

In view of the aforementioned facts, the respondent is deemed to have admitted the material allegations in the complaint and, therefore, has waived his right to a hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139). This Default Decision and Order, therefore, is issued, pursuant to sections 1.136 and 1.139 of the rules of practice (7 C.F.R. 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which respondent is deemed to have admitted, are adopted and set forth herein as the Findings of Fact.

Findings of Fact

1. Mi Pueblo, hereinafter referred to as the respondent, is a business with a mailing address of 801 Oregon Street, Muscatine, Iowa 52761.

2. On or about December 2, 1998, the respondent moved 2 boxes of Mexican Hass avocados from Chicago, Illinois, to Mi Pueblo, Muscatine, Iowa, in violation

of 7 C.F.R. 301.11(b)(2) and 319.56-2ff, because such movement is prohibited.

3. On or about January 26, 1999, the respondent moved 2 boxes of Mexican Hass avocados from Chicago, Illinois, to Mi Pueblo, Muscatine, Iowa, in violation of 7 C.F.R. 301.11(b)(2) and 319.56-2ff, because such movement is prohibited.

Conclusion

By reason of the facts in the Findings of Fact set forth above, the respondent has violated the Act and sections 301.11(b)(2) and 319.56-2ff of the regulations (7 C.F.R. 301.11(b)(2) and 319.56-2ff. Therefore, the following Order is issued:

Order

The respondent, Mi Pueblo, is hereby assessed a civil penalty of five hundred dollars ($500.00), which shall be made payable to the "TREASURER OF THE UNITED STATES" by a certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O Box 3334
Minneapolis, MN 55403

within thirty (30) days from the effective date of this Order. The respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 99-0023.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon the 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 August 24, 1999.-Editor]

In re: HOANG THANH TRUONG.
P.Q. Docket No. 99-0003.
Decision and Order filed September 24, 1999.

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 violations of the regulations governing the importation of fruits and related articles (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.*

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts) and the regulations promulgated thereunder, by a complaint filed on October 23, 1998, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Hoang Thanh Truong is an individual whose mailing address is 3000 West 12th Street, Erie, Pennsylvania 16505.

2. On or about June 24, 1997, the respondent imported approximately 5 cases of mangoes, 3 coconuts, 25 pounds of litchi, and 10 bitter melons, into the United States at Buffalo, New York, from Canada, in violation of 7 C.F.R. §§ 319.56(a), 319.56-2(a), 319.56-2(e) and 319.56-3, in that the mangoes, coconuts, litchi, and bitter melons were not imported under permit, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Act (7 C.F.R. §§ 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00). This civil 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. 99-0003.

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 November 9, 1999.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

Consent Decision as to Covalda, Inc., a/k/a Covalda Date Company. AMAA Docket No. 98-0004. 8/16/99.

ANIMAL QUARANTINE AND RELATED LAWS

Consent Decision as to Mary's Ranch, Inc., d/b/a Cabrera Slaughterhouse. A.Q. Docket No. 99-0006. 12/17/99.

Consent Decision as to Rodolfo Cabrera, Jr. A.Q. Docket No. 99-0006. 12/17/99.

Compania Panamena De Aviacion. A.Q. Docket No. 00-0001. 12/29/99.

ANIMAL WELFARE ACT

Ronald and Carol Asvestas. AWA Docket No. 99-0015. 8/11/99.

Laurinda Rae Drain. AWA Docket No. 96-0071. 8/16/99.

James Uriell and Charlette Uriell, d/b/a Rocking U Kennel. AWA Docket No. 99-0024. 8/16/99.

Aeroground, Inc. AWA Docket No. 99-0030. 8/17/99.

The Coulston Foundation. AWA Docket No. 98-0014. 8/24/99.

Bill Strong, d/b/a Bill's Pawn Shop. AWA Docket No. 98-0042. 9/7/99.

Danny Schachtele and Mildred Schachtele. AWA Docket No. 98-0037. 11/2/99.

Gregg Holland, d/b/a Animal Arts. AWA Docket No. 99-0042. 11/17/99.

Sara Trotter. AWA Docket No. 99-0019. 11/24/99.

Dennis Hill and Lorri Hill, d/b/a Hill's Exotics. AWA Docket No. 99-0031. 12/10/99.

BAX Global, Inc. AWA Docket No. 99-0035. 12/29/99.

BEEF PROMOTION AND RESEARCH ACT

Christensen Sales Corporation. BPRA Docket No. 99-0001. 12/22/99.

FEDERAL MEAT INSPECTION ACT

Shannondale Country Market and Bradley D. Lockwood. FMIA Docket No. 99-0003. 8/12/99.

Charles Barry Gashel, Fred M. Gashel, and Lee Gashel & Sons, Inc. FMIA Docket No. 99-0002. 9/23/99.

Bretensky's Meat Market, Inc., and Stephen T. Brestensky. FMIA Docket No. 98-0002. 10/29/99.

Roberto Morales Enterprises, Inc., d/b/a Casanova Meat Company, and Roberto Morales. FMIA Docket No. 00-0002. 12/30/99.

HORSE PROTECTION ACT

Consent Decision as to D.P. Strickland. HPA Docket No. 98-0008. 7/30/99.

Consent Decision as to Robert D. Floyd. HPA Docket No. 98-0008. 7/30/99.

Randy Wimberly. HPA Docket No. 98-0009. 8/16/99.

Consent Decision as to Larry Wheelon. HPA Docket No. 98-0007. 8/23/99.

Consent Decision as to William Welch. HPA Docket No. 99-0001. 9/7/99.

Consent Decision as to Bobbie Jo Garrison. HPA Docket No. 99-0001. 9/7/99.

William R. Dick. HPA Docket No. 99-0011. 9/16/99.

Janet Bracalente, Thomas Bracalente, and Ronald Bracalente. HPA Docket No. 99-0027. 10/25/99.

Larry S. Allman and Joy Allman. HPA Docket No. 99-0004. 11/19/99.

Consent Decision as to Carl Dean Clark, Jr. HPA Docket No. 98-0013. 12/1/99.

PLANT QUARANTINE ACT

Consent Decision as to Tienda Mexicana II. P.Q. Docket No. 99-0039. 7/6/99.

Consent Decision as to Wu-Chu Trading Corp., d/b/a Tropical Wholesale Produce, Inc. P.Q. Docket No. 99-0046. 7/15/99.

Enriquez Produce, Inc. P.Q. Docket No. 99-0008. 8/4/99.

Consent Decision as to La Bodega, Inc. P.Q. Docket No. 99-0039. 8/9/99.

La Hacienda Brands, Inc. P.Q. Docket No. 99-0012. 8/16/99.

Consent Decision as to Long Van, d/b/a The Great Wall Oriental. P.Q. Docket No. 99-0048. 8/17/99.

J&R Mexican Bakery. P.Q. Docket No. 99-0030. 8/31/99.

Wal-Mart Stores, Inc. P.Q. Docket No. 98-0017. 9/2/99.

Consent Decision as to El Gallito. P.Q. Docket No. 99-0040. 9/14/99.

POULTRY PRODUCTS INSPECTION ACT

Shannondale Country Market and Bradley D. Lockwood. PPIA Docket No. 99-0004. 8/12/99.

Charles Barry Gashel, Fred M. Gashel, and Lee Gashel & Sons, Inc. PPIA Docket No. 99-0002. 9/23/99.

Roberto Morales Enterprises, Inc., d/b/a Casanova Meat Company, and Roberto Morales. PPIA Docket No. 00-0001. 12/30/99.

VETERINARY ACCREDITATION

Russell D. Bowers, d/b/a Colby Animal Clinic. V.A. 99-0001. 8/31/99.

AGRICULTURE DECISIONS

Volume 58

July - December 1999
Part Two (P&S)
Pages 934 - 990

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

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in AGRICULTURE DECISIONS.

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Direct all inquiries regarding this publication to: Editors, Agriculture Decisions, Hearing Clerk Unit, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-4443.

LIST OF DECISIONS REPORTED

JULY - DECEMBER 1999

PACKERS AND STOCKYARDS ACT

COURT DECISION

DEPARTMENTAL DECISIONS

DEFAULT DECISIONS

PACKERS AND STOCKYARDS ACT

COURT DECISION

IBP, INC. v. GLICKMAN.
No. 98-3104.
Decided August 13, 1999.

(Cite as 187 F.3d 974 (8th Cir.))

Packers and stockyards – Substantial evidence – Competition.

The United States Court of Appeals for the Eighth Circuit reversed the Judicial Officer's decision in which he found that a right of first refusal provision in petitioner's agreement with a group of feedlots violated the Packers and Stockyards Act because the provision had the effect or potential effect of suppressing or reducing competition. The Court found that the record did not contain substantial evidence to support the Judicial Officer's finding that the agreement had the effect or potential effect of reducing or suppressing competition.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Before BEAM and HANSEN, Circuit Judges, and MOODY,[1] District Judge.

BEAM, Circuit Judge.

IBP, a large meat packing company, appeals a Judicial Officer's (JO) decision finding a provision of its agreement with a group of feedlots to be a violation of the Packers and Stockyards Act (the Act). 7 U.S.C. § 192(a)-(b). The suspect provision is a right of first refusal, which the JO found to have the effect or potential effect of suppressing or reducing competition. As a result, the JO ordered IBP to cease and desist entering into or continuing any agreement "containing a right of first refusal which provides [that IBP] may obtain livestock by matching the highest previous bid." We reverse and vacate the order.

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[1]The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas, sitting by designation.

I. BACKGROUND

In January 1994, a group of Kansas feedlots, collectively known as the "Beef Marketing Group," (BMG) approached IBP with a proposal for the sale of livestock. The two entered into a "Beef Marketing Agreement" (the Agreement) that establishes terms and procedures for the sale of cattle which differ from traditional methods.

Under the Agreement, IBP makes an initial bid on a pen of BMG cattle. The initial bid is based upon the midpoint between the highest purchase price reported by the United States Department of Agriculture (USDA) in a given week in Kansas for at least 2,500 cattle and the highest price IBP paid for the same number of cattle in Kansas during the week (midpoint price hereafter referred to as the Kansas High Price). BMG members can then accept or reject the bid. If IBP's bid is rejected, then other cattle buyers bid. However, as long as IBP's initial bid is no less than "minus fifty," i.e. $0.50 per hundredweight less than the Kansas High Price, IBP has a right of first refusal on that pen of cattle. Therefore, once others have completed bidding, BMG member feedlots must offer the pen of cattle to IBP at the highest bid price. In the event that IBP elects to exercise the right of first refusal, then BMG members can go back to the high bidder in an attempt to get an increased bid. After all bidding is completed though, IBP may still obtain the pen of cattle by matching the highest bid.

Originally, there were nine BMG-affiliated feedlots that joined the Agreement. Two feedlots later opted-out of the Agreement. IBP also continued to buy cattle from other feedlots that were not affiliated with BMG and with whom IBP had no similar agreement.

In August 1995, the USDA[2] filed a complaint alleging that the Agreement violates section 192(a)-(b) of the Act.[3] A hearing was held before an

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[2]While the Deputy Administrator in the Packers and Stockyards Administration filed the complaint, for purposes of this opinion, we will refer to the complainant as the USDA.

[3]The Packers and Stockyards Act provides in pertinent part:

> 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

(continued...)

Administrative Law Judge (ALJ). At the hearing, the USDA first argued that the Agreement contained no benefit for IBP, and therefore granted the BMG members an undue or unreasonable preference or advantage (or subjected non-BMG members to undue or unreasonable prejudice or disadvantage) in violation of the Act. In response, IBP proved that there was, among other benefits, a valuable right of first refusal, whereupon the USDA challenged the right of first refusal as a violation of the Act. The ALJ concluded that there was no violation of the Act. The USDA appealed and a hearing was held before the JO acting as final deciding officer for the USDA.

The JO agreed with most of the ALJ's findings, and found that owners and operators of non-BMG feedlots were not harmed[4] by the Agreement and that the USDA had not proven that the Agreement caused injury to cattle producers. He conceded that IBP, on average, paid a *higher* price for cattle purchased under the terms of the Agreement. Furthermore, the JO found that the Agreement does not provide an *undue* or *unreasonable* preference or advantage to BMG members. Nevertheless, the JO found that IBP's right of first refusal under the Agreement, has the effect or potential effect of reducing competition because IBP does not have to participate in bidding after its initial bid, and can obtain a pen of cattle by matching, instead of exceeding, the highest bid. Based upon this finding, the JO concluded that the "right of first refusal obviates [IBP's] need to compete" and therefore violates the Act.

II. DISCUSSION

"The findings of the [JO] must be sustained by this court if supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Farrow v. USDA*, 760 F.2d 211, 213 (8th Cir. 1985) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951)). Thus, we review whether there is substantial evidence to support the JO's finding that IBP's right of first refusal has the effect or potential effect of

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[3](...continued)
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.

7 U.S.C. § 192 (a)-(b).

[4]The USDA even admitted that non-BMG feedlots continued to receive competitive prices despite the Agreement.

suppressing or reducing competition. *See id.* We consider first the actual effect and then the potential effect.

It is clear that the Agreement with its right of first refusal, has not had the actual effect of suppressing or reducing competition. IBP, "on average, paid a higher price for cattle purchased under the terms of the Beef Marketing Agreement than it did on other transactions" with other feedlots. Joint Appendix at 36 (opinion of the JO). The JO concluded that the USDA did not prove that the Agreement caused injury to non-BMG feedlots or cattle producers. There is also no claim that other packers were harmed as a result of the Agreement. Thus, there is no substantial evidence to support the notion that the right of first refusal actually suppressed or reduced competition.

The Act, however, "does not require the [USDA to] prove actual injury before a practice may be found unfair," and in violation of the Act. *Farrow*, 760 F.2d at 215. A potential violation can suffice. "'[T]he purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered.'" *Id.* (quoting *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1336-37 (9th Cir. 1980)). As earlier noted, the JO found that the right of first refusal has the potential effect of suppressing or reducing competition.

We have said that "a practice which is likely to reduce competition and prices paid to farmers for cattle *can be* found an unfair practice under the Act, and be a predicate for a cease and desist order." *Id.* at 214 (emphasis added); *see also id.* at 215 (finding "'[t]he lack of competition between buyers, with the attendant possible depression of producers' prices, was one of the evils at which the Packers and Stockyards Act was directed"') (quoting *Swift & Co. v. United States*, 393 F.2d 247, 254 (7th Cir. 1986)). However, we are also mindful that the purpose behind the Act "was not to so upset the traditional principles of freedom of contract," as to require an entirely level playing field for all. *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995) (finding that the Act does not statutorily create an entitlement to have the same type of contract as that offered to other independent growers); *see also Mahon v. Stowers*, 416 U.S. 100, 107-08 (1974) ("[T]here is no indication that, lurking within this intention to control deceptive and monopolistic practices in the packing industry, lies a further intention to guarantee persons who sell cattle to such packers a special favored position . . . . ").

The USDA argues that the mere potential suppression or reduction of competition violates the Act. Yet, the "'chief evil' at which [the Act] was aimed was '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.'" *Mahon*, 416 U.S. at 106 (emphasis added) (quoting *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922)). The statutory language requires

that the practice or device be unfairly or unjustly discriminatory and not merely discriminatory. *See* 7 U.S.C. § 192(a). Even the JO recognized that while the Agreement discriminates and gives an advantage or preference, the Agreement does not do so unduly, as required for a violation of the Act. We similarly conclude that the right of first refusal does not potentially suppress or reduce competition sufficient to be proscribed by the Act.

The USDA contends that the right of first refusal violates the Act because IBP does not have to participate in the bidding after they have made their initial bid. This is not an accurate characterization. Once a BMG member rejects the initial IBP bid, the bidding is open for all others. After the bidding is open to all, IBP must bid at least the same amount as the highest bidder in order to obtain the cattle. The bidding does not end there; the record shows that once IBP decides to exercise its right of first refusal, the feedlot-seller can then go back to the high bidder in an attempt to get an even higher price. When all is said and done, IBP can choose to match the highest bid, and thereby obtain the pen of cattle. This demonstrates that IBP does participate in the bidding process, even after the initial bid stage, and pays prices that are the result of the bidding process. The record demonstrates that the right of first refusal is an effort by IBP to have a more reliable and efficient method of obtaining a supply of cattle. "The [Act] was designed to promote efficiency, not frustrate it." *Jackson*, 53 F.3d at 1458.

Furthermore, in order to have the right of first refusal, IBP's initial bid must have been no less than $0.50 per hundred weight below the Kansas High Price. The USDA apparently would like the initial bid to not be considered for purposes of determining whether the right of first refusal provision violates the Act. However, IBP's initial bid is a condition precedent to the right of first refusal and cannot be disregarded. The presence of the initial bid at a fair market price, with the feedlots' attendant right to accept or reject the bid, essentially ensures that the potential for undue or arbitrary lowering of prices is eliminated. *Cf. Mahon*, 416 U.S. at 106, 94 S.Ct. 1626 (stating that the undue or arbitrary lowering of prices was the chief evil for which the Act was designed); *Bruhn's Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332, 1337 (8th Cir. 1971) (stating that the purpose of the Act is to assure that farmers and ranchers do not receive less than market value for their livestock). The USDA's complaint itself states that the Agreement "guarantee[s] a high price for livestock purchased from the [BMG]." So, whether the right of firs t refusal is considered in isolation, or together with the rest of the Agreement, there is no violation of the Act.

III. CONCLUSION

For the foregoing reasons, we reverse the decision of the USDA and vacate the cease and desist order.

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

In re: GEORGE O. DURFLINGER, JR.
P&S Docket No. D-97-0010.
Decision and Order filed September 8, 1999.

Failing to Pay for Livestock When Due - Issuing Checks With Insufficient Funds on Deposit - Cease and Desist Order.

Respondent failed to pay when due for livestock purchases and issued checks for livestock purchases which were returned by his bank for insufficient funds. It is no defense that the bank and/or the seller held the checks too long before cashing them.

Kimberly Hart, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), here referred to as the "Act." The Complaint, filed on January 22, 1997, alleges that Respondent George Durflinger failed to pay, when due, for livestock purchases and issued insufficient funds checks in payment for livestock purchases in wilful violation of sections 312(a) and 409 of the Act. In an Answer filed on February 21, 1997, Respondent denied that he violated the Act. A hearing was held before me on June 23, 1999, in Kansas City, Missouri. Complainant was represented by Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondent failed to appear at the hearing after being duly notified of the time and place of hearing. Complainant's exhibits are referred to as "CX" and the hearing transcript referred to as "Tr."

Findings of Fact

1. Respondent George O. Durflinger, Jr. is an individual whose mailing address is 1307 Bishop Drive, Kirksville, Missouri 65501.

2. Respondent is and, at all times material, was:

(a) Engaged in the business of 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.

3. On December 17, 1994, Respondent purchased $30,312.64 in livestock from Scotland County Livestock and tendered payment for that transaction with check #1961 which was returned by the bank for insufficient funds (Tr. 15-18; CX-3, 4).

4. On December 31, 1994, Respondent tendered to Scotland County an "IBP" check for $12,139.53 made payable to him and his personal check #1970 for $18,173.11 as payment of the $30,312.64 livestock debt (Tr. 16-18; CX-4). Respondent's check #1970 was returned by the bank for insufficient funds leaving a remaining balance of $18,173.11 (Tr. 16-18; CX-4).

5. On December 31, 1994, Respondent purchased an additional $12,130.43 in livestock from Scotland County. This increased the balance that he owed to Scotland County to $30,303.54. Respondent tendered his personal check #1971 for $12,140.43 to Scotland County on December 31, 1994, which was returned by the bank for insufficient funds (Tr. 18-19; CX-5).

6. As of November 7, 1995, several payments totaling $18,520.65 were credited to Respondent's unpaid livestock balance with Scotland County, which reduced his unpaid livestock debt to them to $11,782.92 (Tr. 22-23; CX-7).

7. On December 18, 1995, Respondent purchased additional livestock from Scotland County in the amount of $24,105.79 and tendered check #3636 written on the account of Linda McCleary in the amount of $24,105.79. This too was returned by the bank for insufficient funds (CX-6). Respondent subsequently paid Scotland County for the December 18, 1995, transaction. This reduced his livestock debt with Scotland County to $11,782.92 which remained his unpaid balance to this firm through the date of the hearing (Tr. 14; CX-3, 5).

8. Respondent also failed to pay when due for 15 livestock transactions from January 7, 1995, to September 1, 1995 (CX 8-22).

Discussion

Section 7 C.F.R. § 1.141(e) states in pertinent part:

> A respondent who, after being duly notified, fails to appear at the hearing without good cause shall be deemed . . . . to have admitted any facts which may be presented at the hearing. Such failure by the respondent [to appear at hearing] shall also constitute an admission of all the material allegations of fact contained in the complaint. . . .

Respondent, after being notified, failed to appear at the hearing without cause. Complainant presented its case at the hearing. Therefore, pursuant to 7 C.F.R. §

1.141(e), I deem Respondent to have admitted all facts presented at hearing and all material allegations of fact alleged in the Complaint.

The documentary and testimonial evidence overwhelmingly establishes that Respondent failed to pay livestock debt in the amount of $11,782.86 to Scotland County Livestock Market. This livestock debt has been past due and owing since December 1994. Respondent has made no attempt since November 1995 to reduce or eliminate this debt. Respondent issued four checks in payment for livestock purchases which were returned by his bank for insufficient funds. In addition, Respondent failed to pay, when due, for livestock purchases between January 7, 1995, and September 1, 1995.

Well-established case precedent holds that "the issuance of insufficient funds checks or drafts in payment for livestock whether or not the checks or drafts are later made good constitutes an unfair and deceptive trade practice in violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b)." *In re Robert L. Kleinpeter*, 50 Agric. Dec. 1754 (1991).

In addition, the failure to pay promptly and fully for the full purchase price of livestock constitutes an unfair and deceptive practice in wilful violation of sections 312(a) and 409 of the Act. 7 U.S.C. §§ 213(a), 228b.

Respondent's violations were wilful. "A violation is wilful for administrative law purposes if a respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements." *Butz v. Glover Livestock [Comm'n Co.]*, 411 U.S. 182 (1973); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied* 450 U.S. 997 [(1981)]. Respondent knew or should have known that he did not have sufficient funds in the account upon which the checks were drawn upon at the time that he tendered the checks in payment for his livestock purchases. Respondent, therefore, knew or should have known that he could not make full and prompt payment in accordance with the payment requirements of the Act at the time that he purchased the livestock.

The only defense asserted by Respondent for his failure to pay promptly and in full was that there were sufficient funds in the checking account when the checks were issued in payment for his livestock purchases but the bank and/or the seller held the checks for too long before cashing them (Answer). This defense lacks merit. It is Respondent's responsibility to ensure that there are sufficient funds in the applicable account as long as there are checks outstanding on that account.

In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476 (Feb. 8, 1991), *aff'd* 991 F.2d 803 (9th Cir. 1993), provides that the sanction is to be determined "by examining the nature of the violations in relation to the remedial purposes of the statute, along with all

relevant circumstances, giving appropriate weight to administrative recommendations." The Agency recommended that Respondent be ordered to cease and desist from failing to pay, failing to pay, when due, for livestock purchases and issuing insufficient funds checks in payment for livestock purchases; that Respondent's registration be suspended for a period of five years with the proviso that he would be allowed to work for another registrant or packer after the expiration of a 90-day suspension period; and that should Respondent pay the unpaid livestock debt in full, after 90 days, the suspension of his registration would be lifted (Tr. 44). I agree.

Factors to be considered are the gravity of the offense, the length of time the livestock debt has remained unpaid, and sanctions previously imposed in similar violations. Respondent's failures to pay fully and promptly for livestock purchases are serious violations. Prior administrative orders and letters of notice were sent to Respondent. He was named in two prior administrative orders for operating without an adequate bond and for custodial account violations (Tr. 45; CX-1).

Also relevant is that the Respondent's debt of approximately $11,000 remained unpaid over four years (Tr. 32-34). Respondent's failure to pay Scotland County Livestock caused financial pressure upon the firm (Tr. 37). Therefore, Respondent's failure to pay for these purchases harmed this livestock market.

Order

Respondent George O. Durflinger, Jr., his agents and employees, directly or 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 were drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for a period of five years. However, upon application to Packers and Stockyards Programs, a supplemental order may be issued terminating Respondent's suspension at any time after 90 days, upon demonstration by Respondent that the livestock sellers identified by the Complaint in this proceeding have been paid in full. Furthermore, this Order may be modified upon application to Packers and Stockyards Programs to permit Respondent's salaried employment by another registrant or a packer after the expiration of the 90-day period of suspension and upon demonstration of circumstances warranting modification of the order.

This decision shall become final without further proceedings 35 days after the date of service upon the Respondent, unless 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).

[This Decision and Order became final October 19, 1999.-Editor]

In re: LARRY F. WOOTON AND ROSWELL LIVESTOCK AUCTION SALES, INC.
P&S Docket No. D-97-0021.
Decision and Order filed October 29, 1999.

Failure to properly operate and maintain custodial account - Alter ego - Cease and desist order - Civil penalty.

Respondent Wooton is, and at all material times herein, was the *alter ego* of Respondent Roswell by virtue of his day-to-day management, direction and control of Respondent Roswell and by failure to deposit promptly in the custodial account. Judge Baker assessed a joint and several civil penalty against the Respondents and ordered them to cease and desist from violating the Act.

Kimberly D. Hart, 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.*), hereinafter referred to as the "Act." The Complaint, filed on May 13, 1997, alleges that Roswell Livestock Auction Sales, Inc. (hereinafter "Respondent Roswell"), under the direction, management and control of its president, manager and forty percent shareholder, Larry F. Wooton (hereinafter "Respondent Wooton"), failed to maintain and properly use its Custodial Account for Shippers Proceeds (hereinafter "custodial account"), thereby endangering the faithful and prompt accounting and payment of the portions due the owners or consignors of livestock in willful violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42).

The Complaint further alleges that deficiencies in the custodial account were due to the failure of Respondents to deposit in the custodial account, within the time prescribed by the regulations, an amount equal to the proceeds receivable

from the sale of consigned livestock, and due to the failure of Respondents to timely reimburse the custodial account for purchases made by the owners/officers of Respondent Roswell.

Respondents filed an Answer to the Complaint on July 11, 1997. In their Answer, Respondents admit the jurisdictional allegations of the Complaint but deny the other allegations and in defense state they have never failed to pay a consignor for livestock nor have they ever issued a check to a consignor that was returned for insufficient funds.

An oral hearing was held on April 7, 1999, in Albuquerque, New Mexico, before Administrative Law Judge Dorothea A. Baker. Complainant was represented by Kimberly D. Hart, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondents were represented by Larry Wooton in a *pro* se capacity. Throughout these Findings of Fact, Conclusions and Order, Complainant's exhibits will be referred to as "CX" and the hearing transcript will be referred to as "Tr."[1] The last brief herein was filed on August 17, 1999.

Pertinent Statutory and Regulatory Provisions

7 U.S.C. § 208 (Section 307 of the Act)

> (a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.
>
> (b) It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market. Such rules and regulations shall not prevent a registered market agency or dealer

[1]Respondents introduced no exhibits into evidence at the hearing.

from rendering service on other markets or in occasional and incidental off-market transactions. (7 U.S.C. § 208).

7 U.S.C. § 213 (Section 312 of the Act)

(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 a complaint is made to the Secretary of Agriculture by any person, or whenever the Secretary has reason to believe, that any stockyard, owner, market agency, or dealer is violating the provisions of subdivision (a), 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 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. (7 U.S.C. § 213).

9 C.F.R. § 201.42. Custodial Account for trust funds.

(a) *Payments for livestock are trust funds.* Each payment that a livestock buyer makes to a market agency selling on commission is a trust fund. Funds deposited in custodial accounts are also trust funds.

(b) *Custodial accounts for shippers' proceeds.* Every market agency engaged in selling livestock on a commission basis or agency basis shall establish and maintain a separate bank account designated as "Custodial Account for Shippers' Proceeds," or some similar identifying designation, to disclose that the depositor is acting as a fiduciary and that the funds in the account are trust funds.

(c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business banking day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimburse in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

(d) *Withdrawals from custodial accounts.* The custodial account for shippers' proceeds shall be drawn on only for payment of (1) net proceeds to the consignor or shipper, or to any person that the market agency knows is entitled to payment, (2) to pay lawful charges against the consignment of livestock which the market agency shall, in its capacity as agent, be required to pay, and (3) to obtain any sums due the market agency as compensation for its services.

(e) *Accounts and records.* Each market agency shall keep such accounts and records as will disclose at all times the handling of funds in such custodial accounts for shippers' proceeds. Accounts and records must at all times disclose the name of consignors and the amount due and payable to each from funds in the custodial account for shippers' proceeds.

(f) *Insured banks.* Such custodial accounts for shippers' proceeds must be established and maintained in banks whose deposits are insured by the Federal Deposit Insurance Corporation.

(g) *Certificates of deposit and/or savings accounts.* Funds in a custodial account for shippers' proceeds may be maintained in an interest-bearing savings account and/or invested in one or more certificates of deposit, to the extent that such deposit or investment does not impair the ability of the market agency to meet its obligations to its consignors. The savings account must be properly designated as part of the custodial account of the market agency in its fiduciary capacity as trustee of the custodial funds and maintained in the same bank as the custodial account. The certificates of deposit, as property of the custodial account, must be issued by the bank in which the custodial account is kept and must be made payable to the market agency in its fiduciary capacity as trustee of the custodial funds.

Findings of Fact

Respondents submitted no documentary evidence at the oral hearing. Premised upon the record as a whole and the evidence submitted by Complainant, the following Findings of Fact are appropriate and are supported by the evidence of record:

1. Roswell Livestock Auction Sales, Inc. (hereinafter "Respondent Roswell") is a corporation organized and existing under the laws of the State of New Mexico. Its mailing address is 900 N. Garden, Roswell, New Mexico 88201.

2. Respondent Roswell is and at all times material herein, was:

(a) Engaged in the business of conducting and operating the Roswell Livestock Auction Sales, Inc., a posted stockyard under the Act, hereinafter referred to as "Respondent Roswell";

(b) Engaged in the business of selling livestock in commerce on a commission basis for its own account and for the account of others; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. Larry F. Wooton (herein "Respondent Wooton") is an individual whose mailing address is 900 N. Garden, Roswell, New Mexico 88201.

4. Respondent Wooton is, and at all times material herein, was:

(a) President of Respondent Roswell;

(b) Manager of Respondent Roswell;

(c) Forty percent shareholder of Respondent Roswell;[2] and

(d) Responsible for the day-to-day management, direction, and control of Respondent Roswell.

5. Respondent Wooton, due to his day-to-day management, direction and control of Respondent Roswell, at all material times herein, is the *alter ego* of Respondent Roswell.

6. Respondents were notified in a certified letter from the Agency on November 26, 1985, of the results of a custodial account audit performed in October and November, 1985, which revealed a custodial account shortage of $282,739.35, insolvency in the amount of $206.529.46, and the need for a dealer bond for Respondent Roswell. (CX-6). The Respondents were advised to take immediate action to resolve the violations discovered during the audit. (CX-6; Tr. 20-21).

7. Respondents were notified by the Agency in a certified letter on January 29, 1991, of the results of a custodial audit performed in October, 1990, which revealed that the Respondents were using their custodial account to advance funds to unauthorized individuals in violation of the Act and regulations. (CX-3). The Respondents were informed that this continued practice would be considered as a misuse of the custodial account and could subject them to formal action by the Agency. The requirements of the Act and regulations were set forth in the letter and the Respondents were instructed to take immediate steps to correct the violations discovered. (CX-7; Tr. 22).

8. Respondents were notified in a certified letter from the Agency on April 25, 1995, of the results of a custodial account audit performed during the week of February 27, 1995, which revealed custodial account shortages on four different dates, caused by Respondent Roswell's failure to reimburse the custodial account for those purchases not paid for by the buyers within seven days from the date of the purchases; and due to its failure to reimburse the custodial account, in the manner prescribe by the Act and regulations for market support purchases and for purchases made by owners, officers and employees of Respondent Roswell. The Respondents were instructed to correct the violations discovered and to submit a written response outlining the corrective action to be undertaken. The Respondents were also advised of the requirements of the Act and of the regulations and placed on notice that any future custodial account violations would

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[2]At the time of hearing, Respondent Wooton had increased his stock ownership in Respondent Roswell from forty percent to fifty percent.

be considered as deliberate and willful. (CX-8; Tr. 23-24). Respondent Wooton submitted a written response to the Agency, on behalf of Respondent Roswell, outlining the corrective action to be undertaken and informing the Agency of its disagreement with the provisions of the Act and regulations governing the maintenance and operation of custodial accounts.

9. Mrs. Marlys Sahlin, an auditor with the Regional Office in Colorado, was assigned to conduct an audit of Respondent Roswell's custodial account in early November, 1995. (Tr. 25). Mrs. Sahlin contacted Respondent Wooton prior to initiating the custodial audit to schedule a mutually convenient time. Respondent Wooton and Mrs. Sahlin agreed that the audit would take place in early November, 1995, but was later changed to November 27, 1995, due to a request from Respondent Wooton that the earlier date be rescheduled. (Tr. 25).

10. Upon arrival at Respondents' place of business on November 27, 1995, Mrs. Sahlin initially spoke with Respondent Wooton, who assigned Cindy Wooton, the bookkeeper, the responsibility for providing Mrs. Sahlin with the records necessary for the custodial audit. (Tr. 29). Mrs. Sahlin requested access to Respondent Roswell's financial records, including bank statements, deposit slips, cancelled checks, check register and buyer invoices, in order to determine if the custodial account was being properly maintained pursuant to the requirements of the Act and of the regulations. (Tr. 30). The Respondents made all requested data available to Mrs. Sahlin and cooperated therewith.

11. Mrs. Sahlin chose three dates upon which to reconcile Respondents' custodial account and prepared reconciliation tables representing the analyses of the custodial account on those three dates. Mrs. Sahlin employed the same auditing process for all three reconciliation dates. (Tr. 45, 51). The first reconciliation date, October 31, 1995, was chosen by using the closest day to the date of the custodial audit for which a bank statement had been issued. (Tr. 33). The reconciliation, as of October 31, 1995, revealed that Respondents had a custodial shortage in the amount of $222,711.78.[3] (CX-9; Tr. 34). The custodial

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[3]Mrs. Sahlin explained that the original reconciliation analysis for October 31, 1995, contained an inadvertent calculation error in the total proceeds receivable figures and the custodial account shortage figure that was discovered during the course of preparation for hearing. (Tr. 68). Mrs. Sahlin found that she had inadvertently added the $90,032.82 in proceeds on hand into the total proceeds receivable figure which produced an incorrect total proceeds receivable figure of $649,382.21. (Tr. 39). Therefore, it was necessary to deduct the $90,032.82 from the total proceeds receivable figure and adjust the overall custodial account shortage as a result of the calculation error.

Complainant filed a motion seeking amendment of the Complaint to correct the calculation error (continued...)

shortage can be attributed to Respondents' failure to reimburse the custodial account for purchases not paid for by buyers within the time period required by the Act and regulations. Mrs. Sahlin described the documents utilized in order to prepare the schedule for the October 31, 1995, reconciliation. (CX-10-16; Tr. 31-44).

12. The second reconciliation date of November 8, 1995, was chosen by taking the next day after a consignment sale had taken place since Respondents should have reimbursed the custodial account for any purchases made by owners, officers or employees of the market. (Tr. 45). The second reconciliation, as of November 8, 1995, revealed a shortage in Respondents' custodial account in the amount of $236,053.95. (CX-17; Tr. 46). The custodial account shortage can be attributed to Respondents' failure to reimburse the custodial account for purchases not paid for by buyers within the time period required by the Act and regulations. Mrs. Sahlin described the documents utilized in preparing the schedule for the November 8, 1995, reconciliation. (CX-17-21; Tr. 46-50).

13. The third reconciliation date of November 24, 1995, was chosen by using a day closest to the custodial audit but the last day before Respondents' Monday and Tuesday sales. (Tr. 51). The third reconciliation, as of November 24, 1995, revealed a shortage in Respondents' custodial account in the amount of $51,795.96. The custodial shortage can be attributed to Respondents' failure to reimburse the custodial account for purchases not paid for by buyers within the time period required by the Act and regulations. Mrs. Sahlin described in detail the figures contained on the reconciliation table for November 24, 1995, as well as the documents she utilized to obtain these figures contained therein. (CX-22-27; Tr. 52-56).

14. Mrs. Sahlin spoke with Respondent Wooton concerning the results of the three different reconciliations. At that time, Respondent Wooton requested that a fourth reconciliation of Respondents' custodial account be conducted to prove that the account was in balance as of the later date. (Tr. 56). A fourth reconciliation was conducted, as of November 28, 1995, using the same methods and type of documents utilized in the three prior reconciliations. The initial

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[3](...continued)
which was granted by Administrative Law Judge Baker on April 5, 1999. The Amended Complaint contains the correct figure reflecting the total proceeds receivable of $559,351.39 versus the original total proceeds receivable figure of $649,382.21; and the correct figure reflecting the custodial account shortage of $222,711.78 versus the original custodial account shortage figure of $132,680.96. Those corrected figures are also included on the revised reconciliation table for October 31, 1995, which was admitted into evidence as CX-10.

findings were that Respondents' custodial account was short by approximately $996.00. Based on this, Mrs. Sahlin advised Respondents' bookkeeper to deposit that amount into the custodial account to correct the shortage. (Tr. 75-77). Mrs. Sahlin conducted an exit interview with Respondent Wooton in order to discuss the preliminary results of the custodial audit and the possibility of formal action by the Agency. (Tr. 61). Respondent Wooton responded to Mrs. Sahlin's exit interview by stating that he disagreed with the manner in which the regulations required him to maintain the custodial account. (Tr. 61).

15. Mrs. Sahlin returned to her office after completing the audit of Respondent Roswell's custodial account to organize the records photocopied, review preliminary findings, prepare drafts of the reconciliation tables and to discuss findings with her supervisor, Mr. Milton Hansen. In reviewing the audit documents, Mrs. Sahlin discovered a deposit contained on Respondents' November, 1995, bank statement for which there was no corresponding deposit slip. (Tr. 104). Mrs. Sahlin contacted the bookkeeper to question her about this particular deposit and the bookkeeper faxed a copy of the deposit slip, to Mrs. Sahlin. At that time, it was determined that the deposit was made on November 28, 1995 and therefore should have been taken into consideration in the November 28, 1995, reconciliation. (Tr. 104).

16. Once Mrs. Sahlin received the deposit slip, she determined that the deposit should be considered as a "deposit in transit" since it was deposited on November 28, 1995, but had not been posted to Respondents' account as of that date. (Tr. 104). Mrs. Sahlin testified that, upon taking this "deposit in transit" into account for the November 28, 1995, reconciliation, she further determined that Respondents' custodial account was not deficient but rather contained a positive balance. (Tr. 78). Mrs. Sahlin informed Respondent Wooton of the revised figures for the November 28, 1995, reconciliation which reflected a positive balance in the account versus a deficiency. (Tr. 78). The November 28, 1995, reconciliation was not alleged in the Complaint because it had been determined that there was no custodial account violation. (Tr. 63).

17. The aforesaid deficiencies were due, in part, to the failure of the corporate Respondent Roswell, under the direction, management, and control of Respondent Wooton, to deposit in its custodial account, within the time prescribed by section 201.42 of the regulations (9 C.F.R. § 201.42) an amount equal to the proceeds receivable from the sale of consigned livestock and for failure to reimburse the custodial account within the time prescribed for purchases by its owners, officers, and employees.

Discussion and Conclusions

The Complainant's brief correctly sets forth the position of the Department of Agriculture, and is herein adopted, in substantial part.

Respondent Wooton is, and at all material times herein, was the *alter ego* of Respondent Roswell during the period of October 31, 1995, through November 24, 1995, by virtue of his day-to-day management, direction and control of Respondent Roswell.

The administrative Complaint alleges that Respondent Roswell, under the direction, management and control of Respondent Wooton, willfully violated sections 307 and 312 of the Act and section 201.42 of the regulations by failing to properly maintain and operate its custodial account in accordance with the requirements set forth in the Act and the regulations. It also alleges that Respondent Wooton, as president, forty percent stock owner and manager of Respondent Roswell, is, and at all times material herein, was the *alter ego* of Respondent Roswell due to his day-to-day management, direction and control of Respondent Roswell. (CX-2; Tr. 134). Respondent Wooton filed an Answer on behalf of himself and Respondent Roswell in which they deny the *alter ego* allegation but admit that Respondent Wooton was president, manager and forty percent stock owner in Respondent Roswell during the relevant time period.

The facts of each case must establish the *alter ego* doctrine before the corporate veil can be pierced in order to sanction an individual who exercises such control of the corporation that it is an extension of the individual. Piercing the corporate veil allows the Department to hold not only the corporation liable for violations but also the individual who was in control of the corporation when the violations were committed. The *alter ego* doctrine can be established by showing:

> * * * the stockholders' disregard of the corporate entity made it a mere instrumentality for the transaction of their own affairs; that there is such unity of interest and ownership that the separate personalties of the corporation and owners no longer exist; and to adhere to the doctrine of corporate entity would promote injustice or protect fraud." *In re Syracuse Sales Co., Inc., Ben W. "Bill" Wood and John Knopp*, 52 Agric. Dec. 1511 (1993).

In short, the inquiry focuses on "the control of the corporation and the control must be active and substantial, though it need not be exclusive." *In re Wisner Sales Co., Inc. and James B. Feller*, 53 Agric. Dec. 1577 (1994). If the requirements are satisfied, "it is well settled that the corporate veil will be pierced when the failure

to do so would enable the corporate device to be used to circumvent a statute. *Bruhn's Freezer Meats v. United States Department of Agric.* 438 F.2d 1332, (8th Cir. 1971). *See also In re Sebastopol Meats Company, Inc.*, 28 Agric. Dec. 435 (1969). "It is the Secretary's policy to routinely 'pierce the corporate veil' and find that an *alter ego* situation exists when an individual is a stockholder of a respondent corporation so as to impose a sanction on the individual as well as on the corporation he owns." *In re Britton Bros. Inc. et al., 49 Agric. Dec.* 423 (1990).

Respondent Wooton testified to the following on cross-examination regarding his role and responsibilities in Respondent Roswell on a day-to-day basis:

Q Mr. Wooton, you're the president of Roswell Livestock; is that correct?

A Yes, ma'am.

Q And how long have you been president of Roswell Livestock?

A Every [sic] since it's inception in 1984.

Q Okay. And basically as president and I understand you're president and you're manager and supervisor?

A The buck stops here.

Q Okay. So, for example, what are your duties as president, officer, well, manager of the market?

A What are my duties?

Q Un-huh.

A **My duties are to make every decision that's made there that amounts to a hill of beans. That's my duty.** (Emphasis added)

Q So there are other stock owners in Roswell Livestock; right.

A I have two sons.

Q Okay. Do they have stock ownership?

A Since, since the time this complaint was filed one of my sons and partners has gone into some other things. I now own 50 percent of the business and I have two other sons still in with me there and they own 50 percent of the business.

Q Okay.

A Each one 25 percent.

* * * * *

Q Okay. What role do they play as stock owners in the corporation --

A Role they play?

Q I understand you say the buck stops with you, what do they do as stock owners?

A **They do what I tell them to do because I'm the biggest and I'm the smartest and I'm the man. And they do what I tell them to do and have been for 40 years.** (Emphasis added)

Q So basically would you say that the corporation is basically your business; would that be correct?

A **The buck stops here. Everything -- I claim full responsibility for everything that happens at Roswell Livestock Auction. If I have employees that make mistakes I take responsibility for it. If I have officer managers who makes mistakes I take responsibility for it. They're doing it the way I tell them to do it.** (Emphasis added).

Q Okay. So you make all the decisions, business, financial, everything, what's to be paid, how it gets paid?

A I'm not, I'm probably not as tough as I'm letting on like I am but I do want you to know and I want the court to know that anything that happens at Roswell Livestock Auction falls right here. (Tr. 112-114).

While Respondent Wooton was a forty percent stockholder during the relevant time period, he exercised the type of active and substantial control that would be more consistent with a 100 per cent stockholder. Respondent Wooton made it perfectly clear during his testimony that he alone is responsible for the business and financial decisions of Respondent Roswell, and its employees and stockholders act on his instructions in carrying out their respective job duties and responsibilities. Respondent Wooton has demonstrated by his testimony that he exercises active and substantial control of Respondent Roswell on a day-to-day basis and has done so since the inception of the corporation in 1984. The evidence establishes that Respondent Wooton completely dominates the corporate entity, Respondent Roswell, so as to negate its separate personality. Therefore, the facts of this case more than amply support the allegation that Respondent Wooton is, and at all times material herein, was the *alter ego* of Respondent Roswell during the violation period.

Since Respondent Wooton was the *alter ego* of Respondent Roswell during the violation period, he was the person responsible for the manner in which the custodial account was maintained and operated. Cindy Wooton, bookkeeper, followed his instructions regarding the maintenance and operation of the custodial account. These instructions would have included whether the custodial account would be reimbursed in a timely manner for the purchases not paid for by buyers within the time frame set forth in section 201.42 of the regulations.

Respondent Wooton, as *alter ego* of Respondent Roswell, was obligated to adhere to the requirements for the custodial account in the day-to-day management, control and direction of Respondent Roswell. In fact, Respondent Wooton admitted that he was aware, at the time of the alleged violations, of the regulations governing custodial accounts and that he received three prior notices that the Agency had concerns about the manner in which Respondent Roswell's custodial account was being maintained prior the initiation of the November, 1995, audit. (CX-6-8; Tr. 114-115). Despite three prior notices, Respondent Wooton made a conscious decision to operate Respondent Roswell's custodial account contrary to the requirements simply because he believed the regulatory requirements to be "unrealistic". (Tr. 120).

Mr. Wooton, in a way, summarized his view of the case when he testified:

> "Q Okay. As to the particular date do you dispute that there was a custodial shortage of your account?
>
> A No, ma'am, I do not dispute it.

Q Okay.

A I do not admit that the figure's right. I do not dispute it." (Tr. 119).

* * * * *

A -- do not dispute that there was a shortage or a discrepancy. I do not necessarily think that the figures were right.

Q Okay. Mr. Wooton, you've made it clear that you take issue with the manner in which the act and the regulations state your [sic] must maintain a custodial account?

A Yes, ma'am.

Q And you think it's unrealistic? Okay.

A I think it's, I think it's impossible, Ms. Hart.

Q Okay. But you do understand that the rules, that the statute and the regulations say what they say and that you're required --

A Yes, ma'am.

Q -- to abide by them?

A I've been reading them, I've been reading them since before you were born.

Q Okay. So you do understand that as a registrant you're responsible for abiding by the statutes and the regulations?

A Yes, ma'am I understand that. (Tr. 120).

* * * *

Q I understand. Now, Mr. Wooton, you do understand or do you understand that just because you may disagree with what the statute and the regulations state that that doesn't exempt you from being responsible or

being held accountable for the statute and the regulations for complying with them?

A Ms. Hart, I have already stated that I do not deny violated [sic] some sections of the P&S Act.

Q Right. And I --

A I do. I know what that act says. I've been reading it for years. I know what it says. I know, I know better than anybody else, including P&SA, how that thing needs to be handled.

Q Okay. But, so but it would be correct that you make, you make a decision as to whether or not you're going to strictly comply, to use just for example, strictly comply with all the provisions of the statute and the regulations?

A Yes, ma'am. Yes, ma'am. That's what you want me to say, I make the decision whether I'm going to comply or whether I'm not going to comply. (Tr. 127, 128).

The evidence sufficiently demonstrates that Respondent Roswell, under the direction, management and control of Respondent Wooton violated sections 307 and 312 of the Act and section 201.42 of the regulations by failing to properly maintain and operate its custodial account and that such violations, as determined by the Department of Agriculture and case precedent, constitute unfair and deceptive trade practices. This is the type of fact situation in which the Secretary has, in the past, pierced the corporate veil in order to reach those individuals who play a significant role in the commission of the violations. The facts of this case fully support a finding that Respondent Wooton is, and at all times material herein, was the *alter ego* of Respondent Roswell. Accordingly, it is appropriate to pierce the corporate veil of Respondent Roswell and hold Respondent Wooton, as *alter ego*, responsible, along with Respondent Roswell, for the violations committed by Respondent Roswell as alleged in the Complaint.

Respondent Roswell, under the direction, management and control of Respondent Wooton, during the period of October 31, 1995, through November 24, 1995, failed to maintain and properly use its custodial account, thereby endangering the faithful and prompt accounting and payment of the portions due the owners or consignors of livestock in that:

As of October 31, 1995, Respondents had $1,838,520.46 in outstanding checks drawn on their custodial account, and had, to offset those checks, cash in the account totaling $754,354.85, deposits in transit totaling $212,071.62, proceeds on hand totaling $90,032.82 and proceeds receivable totaling $559,351.39 resulting in a deficiency of $222,711.78 in funds available to pay shippers their proceeds.

Mrs. Sahlin provided detailed testimony of the custodial audit performed during the week of November 27, 1995, at Respondent Roswell's place of business and in particular the results of the first reconciliation performed as of October 31, 1995.

Mrs. Sahlin testified that she compiled the table for the October 31, 1995, reconciliation from the custodial account documents produced by the Respondents at the time of the audit. (Tr. 31-44). The reconciliation revealed that Respondents' custodial account had total debits in the amount of $1,615,808.68, which consisted of a bank statement balance of $754,354.85; deposits in transit in the amount of $212,071.62; cd's/savings designated as custodial funds in the amount of $0; proceeds on hand in the amount of $90,030.39; and proceeds receivable in the amount of $559,351.39. (CX-10; Tr. 36-42). The line items found on the debit side were defined in detail at the hearing by Mrs. Sahlin. (Tr. 36-44). According to Mrs. Sahlin, Respondents' custodial account had total credits in the amount of $1,838,520.46, of which there were $1,838,520.46 in outstanding checks, $0 for proceeds due shippers and $0 for expense items remaining in account, all of which were discussed in detail at the hearing. (CX-10; Tr. 36-42). After deducting the total credits from the total debits, there was a resulting deficiency of $222,711.78 in Respondents' custodial account. (CX-10; Tr. 35).[4]

Mrs. Sahlin described the documentation obtained from Respondents' records, which was the basis upon which the table for the October 31, 1995, reconciliation was compiled. (CX-10; Tr. 36-44). The pertinent documentation includes the custodial account bank statement dated October 31, 1995, a listing of the deposits in transit along with the deposit slips, and the outstanding check list which was prepared by Mrs. Sahlin after reviewing Respondents' check register and invoices. (Tr. 36-44). Mrs. Sahlin stated that, in the course of the audit, she reviewed Respondents' accounts receivable records, which consisted of buyer's invoices, deposit slips and the accounts receivable ledger, up to October 31, 1995, in an attempt to discover the reason for the custodial account shortage. (CX-16;

[4]Accepted accounting principles require that assets appear on the reconciliation table as a debit balance; and that liabilities appear on the reconciliation table as a credit balance.

Tr.-4244). She defined "accounts receivable" as those proceeds from the sale of livestock that were not collected or deposited or reimbursed to the custodial account by the firm within the time period required by the regulation. (Tr. 42). Mrs. Sahlin utilized the information contained in Respondent Roswell's records in compiling the table representing the accounts receivable as of October 31, 1995. Respondent Roswell had accounts receivable totaling $102,110.36, as of October 31, 1995, which was less than the custodial account shortage, thereby indicating that Respondents were failing to properly use their custodial account. (CX-16; Tr. 43). Mrs. Sahlin testified that the total accounts receivable figure is not contained on a reconciliation table because it represent funds for which the market should have already reimbursed the custodial account which is already included in the bank balance figure. (Tr. 43).

Respondents' deny that their custodial account was deficient, as of October 31, 1995, in the amount of $222,711.78 and specifically take issue with the Complainant amending the Complaint shortly before hearing to reflect a change in the original custodial shortage figure as of October 31, 1995. The original reconciliation table, as of October 31, 1995, created by Mrs. Sahlin reflected total credits of $1,705,839.50, total debits of $1,838,520.46 and a custodial account shortage in the amount of $132,680.96. These figures were the basis of the allegations contained in the administrative Complaint regarding the October 31, 1995, reconciliation. Mrs. Sahlin, in reviewing the reconciliation table and supporting documents in preparation for hearing, discovered a calculation error in the total proceeds receivable figure (credit item) and the overall custodial account shortage figure. (Tr. 39). She discovered at that time that she had inadvertently included the proceeds on hand figure of $90,030.82 into the proceeds receivable figure of $649,382.21 thereby making the total credit figure larger than it should have been and the resulting custodial shortage amount smaller than it should have been. (CX-10; Tr. 39).[5]

Mrs. Sahlin notified Complainant's counsel of the calculation error promptly and there was a Motion filed to Amend the Compliant. Respondents were notified of the calculation error and of Complainant's intent to seek an Amendment of the Complaint in accordance with section 1.137(a) of the Rules of Practice (7 C.F.R. § 1.137(a)). Section 1.137(a) of the Rules of Practice allows Complainant to request permission to Amend the Complaint with the Judge's permission after the filing of an Answer and prior to the decision being rendered by the Administrative

[5]See also the Amended Complaint which explains in detail the amendments to the October 31, 1995, reconciliation table.

Law Judge. Complainant's attorney filed a Motion to Amend the Complaint with the Hearing Clerk's office on March 24, 1999, which was granted by the Administrative Law Judge on April 5, 1999.

The issue of the accuracy of the revised custodial account shortage figure for October 31, 1995, was discussed in detail in Mrs. Sahlin's cross-examination testimony. (Tr. 67-70). Respondents contends that the amendment of the custodial account shortage figure so close to the hearing was unfair to Respondents since they had been operating with the understanding that the shortage was $132,680.96 instead of the amended figure of $222,711.78. In particular, Respondents questioned Mrs. Sahlin as to why the calculation error was not discovered at the time of the audit in 1995, but rather prior to hearing in April, 1999. (Tr. 81). Mrs. Sahlin explained that the error occurred when she inadvertently included the proceeds on hand figure in the total proceeds receivable figure. Mrs. Sahlin acknowledged her calculation error but maintained the position that the auditing process was not flawed in any other way and that the remaining numbers contained in the October 31st, November 8th and November 24, 1995 reconciliation table were correct and a true representation of the custodial audit conducted in November, 1995. (Tr. 69).

Although Respondents assert that the revised figures contained in the October 31, 1995, reconciliation table are inaccurate, they presented no testimonial nor documentary evidence to rebut the Complainant's reconciliation figures for October 31, 1995. Even if Respondents were operating with the understanding that the custodial account shortage, as of October 31, 1995, was $132,680.96 until the week of March 24, 1999, they were notified in sufficient time to allow them to produce evidence from their own records to rebut Complainant's evidence. Respondents made a conscious decision not to avail themselves of the opportunity to review their own records and present rebuttal evidence to Complainant's evidence for the October 31, 1995, reconciliation at the oral hearing. Respondents' bare allegation that the reconciliation is inaccurate, without any accompanying proof, is insufficient to rebut Complainant's evidence that the custodial account shortage, as of October 31, 1995, was $222,711.78. Complainant's documentary and testimonial evidence fully meets the preponderance of the evidence standard for proving that Respondents' custodial account was deficient in the amount of $222,711.78 as of October 31, 1995, due to their failure to timely reimburse the custodial account for purchases made in accordance with the requirements of the Act and section 201.42 of the regulations. (CX-10, 15).

As of November 8, 1995, Respondents had outstanding checks drawn on its custodial account in the amount of $1,268,680.18, and had, to offset those checks, cash in its custodial account in the amount of $560,116.50, proceeds receivable in

the amount of $472,509.73, resulting in a deficiency of $236,053.95 in funds available to pay shippers their proceeds.

Mrs. Sahlin testified that once she discovered a custodial account shortage as of October 31, 1995, she chose a more current date upon which to reconcile Respondents' custodial account. (Tr. 46). The second reconciliation date was chosen by taking the next day after a sale had taken place since Respondent Roswell should have reimbursed the custodial account for any purchases made by owners, officers or employees of the market by that time. (Tr. 45). Mrs. Sahlin was granted access to the same type of records she had reviewed in the October 31, 1995, reconciliation. (Tr. 46).

The schedule of the custodial account reconciliation for November 8, 1995, was compiled from the documents produced by Respondents. Mrs. Sahlin's reconciliation revealed that Respondents' custodial account had total debits in the amount of $1,032,626.23, which consisted of a bank statement balance of $560,1160.50; deposits in transit in the amount of $0; cd's/savings designated as custodial funds in the amount of $0; proceeds on hand in the amount of $0; and proceeds receivable in the amount of $0. (CX-17; Tr. 46-50). The reconciliation also indicated that Respondents' custodial account had total credits in the amount of $1,268,680.18, which consisted of outstanding checks in the amount of $1,268,680.18; proceeds due shippers in the amount of $0; and expense items remaining in account in the amount of $0. (CX-17; Tr. 46-50). Deducting the total credits from the total debits resulted in the deficiency of $236,053.95 in Respondents' custodial account. (CX-17; Tr. 46).

The documentation obtained from Respondents' records, which formed the basis of the November 8, 1995, reconciliation schedule, was described by Mrs. Sahlin. (CX-17-20). The review of the accounts receivable indicated that, as of November 8, 1995, there was $105,538.79 in accounts receivable which had not been collected and/or reimbursed to the custodial account within the time required by the regulations. (CX-21). According to Mrs. Sahlin, the fact that the custodial account shortage was significantly greater than the uncollected accounts receivable was an indication that the shortage was due to an improper handling of the custodial account by the Respondents. (Tr. 49-50).

Respondents allege that the figures reflected on the November 8, 1995, reconciliation schedule are incorrect and challenge the accuracy of Mrs. Sahlin's auditing process. Respondents did not put forth any evidence to prove their allegation of inaccuracy for the November 8, 1995, reconciliation but rather assert that the figures are inaccurate according to their calculations. Respondents further state that if Mrs. Sahlin made a calculation error on the October 31st reconciliation, then she must have made mistakes on the other two reconciliations as well.

Respondent Wooton testified that "he did not dispute that there was a custodial shortage as of November 8th in particular but neither did he admit that Mrs. Sahlin's figures were correct." (Tr. 119). Mrs. Sahlin provided details as to the method utilized in arriving at the figures reflected in the November 8th reconciliation as well as the documentation utilized in obtaining those figures. (Tr. 46-49). Absent some specific evidence of inaccuracy by Respondents', the auditing process employed in reconciling Respondents' custodial account and the resulting figures contained on the November 8th reconciliation must be presumed to be correct.

As of November 24, 1995, Respondent Roswell had outstanding checks drawn on its custodial account in the amount of $1,277,869.03, and had, to offset those checks, cash in its custodial account in the amount of $865,439.28, deposits in transit in the amount of $25,860.07, resulting in a deficiency of $51,795.96 in funds available to pay shippers their net proceeds.

Mrs. Sahlin testified that she chose a third reconciliation date after discovering a custodial account shortage as of November 8, 1995. (Tr. 51). The third reconciliation date was chosen by taking the closest date to the week of her audit of Respondents' custodial account which was November 24, 1995. (Tr. 51). Mrs. Sahlin was granted access to the same type of records as she had reviewed in the October 31st and November 8th reconciliations. (Tr. 51). The documentation obtained from Respondents' records, which formed the basis of the November 24, 1995, reconciliation schedule, was described by Mrs. Sahlin. (CX-23-27; Tr. 52-56). The table of the custodial account reconciliation for November 24, 1995, was compiled from the documents produced by Respondents. Mrs. Sahlin's reconciliation revealed that Respondents' had total debits in the amount of $1,226,073.07, which consisted of a bank statement balance of $865,439.28; deposits in transit in the amount of $25,860.07, cd's/savings designated as custodial funds in the amount of $0; proceeds on hand in the amount of $0; and proceeds receivable in the amount of $0. (CX-17; Tr. 46-50). The reconciliation also revealed that the Respondents had total credits in the amount of $1,277,869.03, which consisted of outstanding checks in the amount of $1,277,869.03; proceeds due shippers in the amount of $0; and expense items remaining in account in the amount of $0. (CX-22; Tr. 52-56). Deducting the total credits from the total debits resulted in the deficiency of $51,795.03 in Respondents' custodial account as of November 24, 1995. (CX-22; Tr. 51-52).

Respondents allege that the figures reflected on the November 24, 1995, reconciliation schedule are incorrect and challenge the accuracy of Mrs. Sahlin's auditing process. Respondents did not put forth any evidence to prove their allegations of inaccuracy for the November 24, 1995, reconciliation but rather asset that the figures are inaccurate according to their calculations. Respondents further

state that if Mrs. Sahlin made a calculation error on the October 31st reconciliation, then she must have made mistakes on the other two reconciliations as well. Mrs. Sahlin provided details as to the method utilized in arriving at the figures reflected in the November 24th reconciliation as well as the documentation utilized in obtaining those figures. (Tr. 51-56). Absent some specific evidence of inaccuracy by Respondents', the auditing process employed in reconciling Respondents' custodial account and the resulting figures contained on the November 24th reconciliation must be presumed to be correct.

During the period of October 31, 1995 through November 24, 1995, Respondents failed to properly maintain and operate their custodial account by failing to reimburse the account for the purchases of owners, officers and employees by the next business day after the purchase of livestock when there were shortages in the custodial account.

Mrs. Sahlin provided testimony as to the manner in which Respondents failed to reimburse the custodial account in a timely manner for the purchases of owners and officers of Respondent Roswell while there were shortages in the custodial account from October 31, 1995, through November 24, 1995. The purchase invoices for the relevant time periods were reviewed to determine if there were any un-reimbursed purchases made by the owners, officers and employees of Respondent Roswell. (Tr. 58). Mrs. Sahlin documented five instances, between October 31, 1995 and November 24, 1995, in which Respondent Roswell failed to timely reimburse its custodial account for the purchases of owners and officers when these purchases were not paid for by the purchasers in accordance with the regulations while there was a shortage in the custodial account. (CX-28). Respondent Roswell failed to reimburse the custodial account for any of these five purchases despite its obligation to do so once the owners and officers failed to timely pay for their own purchases.

Three of the five purchases were made by an owner and officer of Respondent Roswell, Benny Wooton,[6] on behalf of "Bobcat" on October 10, 17, and 24, 1995, all of which were paid for by Benny Wooton on November 18, 1995, thereby making the buyer payments 25, 31 and 38 days late respectively. (CX-28- 29; Tr. 58). Another purchase was made by Craig Wooton, an owner and officer of Respondent Roswell on November 8, 1995, and paid for by Craig Wooton on November 28, 1995, thereby making the payment 20 days late. (CX-28, 30; Tr. 59). The last of the five purchases was made by Respondent Wooton, on behalf

[6]There is no evidence to indicate that Benny Wooton had any ownership interest in "Bobcat" at the time of the purchases.

of "Top of the World," a partnership in which he holds a thirty-three percent share. (Tr. 60, 110). The livestock was purchased on November 21, 1995, and paid for by Respondent Wooton on November 28, 1995, thereby making payment seven days late. (CX-28, 31; Tr. 60).

Respondents disagree with four of those five transactions being labeled by Complainant as purchases by owners and officers. Respondents assert that the purchases allegedly made by Benny Wooton should not have been attributed to him since Benny Wooton purchased the livestock on behalf of "Bobcat" and then paid for livestock when the purchaser could not pay due to bankruptcy. (Tr. 111). Respondent Wooton argues that those three transactions should not be viewed as purchases being made by Benny Wooton merely because he paid for the livestock with his own personal check. (Tr. 111).

Respondents admit that the purchase made by Craig Wooton was an owner and officer purchase that was not paid for by Craig Wooton on the next business day after purchase. (Tr. 110). In addition, Respondent Roswell failed to reimburse the custodial account immediately when the purchase was not paid for by the end of the next business day. (Tr. 59). Instead, Craig Wooton paid for his livestock purchases twenty days later. (CX-28, 30; Tr. 59). Respondents failed to timely reimburse the custodial account when Craig Wooton failed to pay for his livestock purchases in accordance with the requirements of the Act and regulations.

Mrs. Sahlin, on cross-examination, stated that she did not recall if the purchases were listed in Benny Wooton's name, but his name was listed on a receivables cash slip for the October 10, 1995, purchase. (Tr. 90). This is considered a purchase by Benny Wooton by virtue of the fact that he paid for the livestock with his own personal check rather than a check from the Respondent's custodial account which would have been indication of a reimbursement by Respondent Roswell. (Tr. 91). Mrs. Sahlin was justified, based on the information available, in classifying those purchases as ones being made by and paid for by Benny Wooton. It stands to reason that if the market was reimbursing the custodial account for purchases not paid for in a timely manner, it would have done so in the market's name and with the market's check and not with a personal check from an individual who is an owner and officer of the market.

Those purchases were appropriately attributed as being purchases made by and paid for by Benny Wooton, an individual who was an owner and officer of Respondent Wooton, at the time of the purchase and payment. Section 201.42 of the regulations states as follows:

> The market agency shall deposit in its custodial account before the close of the next business banking day (the next day on which banks are customarily

> open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency. 9 C.F.R. § 201.42.

Section 201.42 of the regulations requires that any purchases made by owners and officers be paid by the next business day after purchase or the market is obligated to reimburse the custodial account immediately for those purchases regardless of whether it has received payment from the purchaser. This is not what occurred. Instead, the Respondents failed to reimburse the custodial account when they did not receive payment for the livestock by the next business day. It was Benny Wooton who paid for the purchases with his own personal check up to thirty-one days after the purchases had taken place. (CX-30). The documentary and testimonial evidence supports Complainant's allegation that these were purchases made by owners and officers of Respondent Roswell and that Respondents failed to reimburse the custodial account in a timely fashion. Any argument to the contrary is not supported by the record.

Respondents also argue that the purchase made by Respondent Wooton on behalf of "Top of the World" should not be considered as a purchase made by an owner and officer of Respondent Roswell wherein payment by the purchaser or reimbursement by the market would have been required one business day after the purchase. (Tr. 110, 124-125). The basis for Respondents' argument is that Respondent Wooton has only a minor ownership interest in "Top of the World". (Tr. 124). Mrs. Sahlin testified that Respondent Wooton told her, during the investigation, that he purchased livestock under names such as "Top of the World," "Spirlock 7" and "Fred". (Tr. 60). Based on the information provided, Mrs. Sahlin appropriately classified the "Top of the World" purchase as being an owner and officer purchase, thereby requiring payment by the purchaser or reimbursement by the market by the next business day. (CX-28, 31). Respondent Wooton admitted in his testimony that "Top of the World" is a "partnership deal in which I'm a third partner." (Tr. 110). Respondent Wooton, an owner and officer of Respondent Roswell and one-third partner in "Top of the World" also admitted to purchasing

livestock on behalf of "Top of the World." (Tr. 110).

The testimonial and the documentary evidence support Complainant's allegations that this is an owner/officer purchase due to Respondent Wooton's ownership interest in "Top of the World." As such, Respondents were required to reimburse the custodial account not seven days after purchase, but rather one business day after the purchase had taken place if "Top of the World" did not pay for its purchase. 9 C.F.R. § 201.42. Respondents', admittedly, failed to adhere to the custodial account reimbursement requirements set forth in section 201.42 of regulations and failed to do so at a time when there was a significant shortage in the Respondents' custodial account as evidenced by the three reconciliations performed by Mrs. Sahlin.

There is more than sufficient evidence to support the Complainant's allegation that, Respondents, on five occasions, between October 10th, and November 20, 1995, failed to properly maintain their custodial account by failing to reimburse the custodial account for the purchases made by owners/officers of Respondent Roswell. All five purchases, mentioned above, should be viewed as owner/officer purchases and being so, payment was due from the purchaser on the next business day. Upon failure of those owners/officers to pay for their livestock purchases, Respondents were required to timely reimburse the custodial account and failed to do so. The documentary evidence shows that the length of time in which the purchases were unpaid were from seven to thirty-two days and there was no effort at all on Respondents' part to reimburse the custodial account during this time.

Mrs. Sahlin testified that, after conducting three reconciliations of Respondents' custodial account and discussing those preliminary results with Respondent Wooton, Respondent Wooton requested that she conduct yet another reconciliation as of November 28, 1995, because "he was sure that account would be balanced." (Tr. 56). The reconciliation conducted by Mrs. Sahlin, at Respondent Wooton's request, as of November 28, 1995, initially indicated a custodial shortage of approximately $996.00, that was later revised when Respondents produced a copy of a deposit in transit which, when later applied to the reconciliation, resulted in a positive balance in the custodial account.

There did not appear to be any custodial account violations as of November 28, 1995. (Tr. 104). Mrs. Sahlin testified that it was her understanding that the November 28, 1995, reconciliation was not alleged in the Complaint because it had been previously determined that there was no custodial account violation as of that date. (Tr. 63). The Agency did not allege that there was any kind of a deficiency in Respondents' custodial account as of November 28, 1995. (Tr. 63).

Respondents have willfully committed unfair and deceptive trade practices in violation of sections 307 and 312 of the Act (7 U.S.C. §§ 208, 213(a)) and section

201.42 of the regulations (9 C.F.R. § 201.42) as a result of their failure to properly maintain and operate the custodial account (thereby endangering the faithful and prompt accounting and payment of the portions due the owners or consignors of livestock). Respondents failed to maintain and properly use their custodial account by virtue of the fact that there was a custodial shortage in the amount of $222,711.78 as of October 31, 1995; a shortage in the amount of $236,053.95 as of November 4, 1995; and a shortage in the amount of $51,795.76 as of November 24, 1995. Respondents also failed to properly maintain and use their custodial account by virtue of the fact that Respondents failed to timely reimburse the custodial account for the purchases of owners/officers of Respondent Roswell at a time when there was already a shortage in the custodial account. The defenses raised by Respondents do not mitigate against the violations committed.

The court in *In re George County Stockyard, Inc., et al.*, 45 Agric. Dec. 2349 (1986) stated the following regarding custodial accounts:

> . . . the custodial account is a trust account which is a conduit for funds received for sale of consignor's livestock. When properly designated as required, such funds are protected from attachment by creditors and each consignor is further protected by the insurance coverage of the Federal Deposit Insurance Corporation (FDIC). *See also In re Danny Cobb and Crockett Livestock Sales Co., Inc.*, 48 Agric. Dec. 234 (1989).

"It has been long and consistently been held by the Secretary and the courts that the improper handling and use of the shippers' proceeds violates the integrity of the custodial account and the regulations promulgated to preserve it. Improper handling and use of the custodial account is plainly contrary to the Act and regulations." *In re George County Stockyard, Inc., et al., supra. See also In re Farmers and Ranchers Livestock Auction, Inc., et al.*, 45 Agric. Dec. 234 (1986); and *In re Arab Stock Yard, Inc. v. U.S. Department of Agriculture*, 582 F.2d 39 (5th Cir. 1978). The courts have also held that the failure of a market agency to handle its custodial account in accordance with section 201.42 of the regulations (9 C.F.R. § 201.42) is an unfair and deceptive trade practice because "shippers do not know that their money is being used to extend credit to buyers [or the market itself] and because the market agency is using trust money for their own purposes to extend credit to themselves and others." *In re Harry C. Hardy and Edith G. Hardy*, 33 Agric. Dec. 1383 (1974). *See also In re Finger Lakes Livestock Exchange, Inc., et al.*, 48 Agric. Dec. 390 (1989).

Respondents contend that the violations, if any, were not committed willfully because they never set out with the purpose of violating the Act and regulations.

(Tr. 115). Respondents would argue that the violations were the result of nothing more than mistakes that are bound to occur when dealing with the volume of business that Respondent Roswell does on a weekly basis. (Tr. 107-108). Well established case law dictates that a violation is willful for administrative law purposes if the Respondent intentionally does an act which is prohibited, irrespective of evil motive of reliance on erroneous advice, or acts with careless disregard of statutory requirements. *Butz v. Glover Livestock Commission Company, Inc.,* 411 U.S. 182 (1973); *American Fruit Purveyors, Inc. v. United States,* 450 U.S. 997 (1981); *Jeffrey L. Silverman v. Commodity Futures Trading Commission,* 549 F.2d 28 (7th Cir. 1977); *Goodman v. Benson,* 286 F. 2d 896 (7th Cir. 1961). Respondents knew or should have known that they were failing to maintain and properly use their custodial account during the period of October 31, 1995, through November 24, 1995, due to the fact the custodial account was short on three different occasions and Respondents admitted that they made a decision to handle their custodial account in a manner, for which they were on notice from the Agency, was directly contrary to the regulations. (CX-6-8; Tr. 115-116, 120, 122-123). In addition, the testimonial and documentary evidence does not support Respondents' contention that the custodial shortages were the result of mistakes on their part. Rather, it was Respondents' insistence on handling the custodial account in a manner which was known to be contrary to section 201.42 of the regulations that caused the substantial custodial shortages discovered by Mrs. Sahlin's audit in November, 1995. Therefore, Respondents have willfully violated the Act and regulations by their actions.

One of the Respondents' contentions is that the Complaint was issued because of faulty calculations, performed as part of an audit, by one of P&S employees. As a result, it is argued, two of the four weeks which were audited were in error: one week was calculated $90,032.82 long and the other $996.00 short. As for the alleged deficiency of $996.00 for the week of November 28, 1995, such deficiency, resulting from a mistake, was transferred to Respondents' account by a deposit already made and recorded on the bank statement. The Respondents note that they furnished any and all documents requested by the auditor which documents she had in her possession from November, 1995 to May, 1997, and the Complaint herein was issued using miscalculated figures.

Additionally, Respondents points out that shortly before the scheduled hearing on April 7, 1999, Complainant filed, and was granted, a motion to amend the figures contained in the original Complaint, thus taking Complainant four years to discover errors.

Respondents would show that this was the first Complaint filed against them in thirty-two years and they question the appropriateness of the requested

$35,000.00 penalty.

Respondents admits that "* * * a mistake was made, admitted and corrected 4 years ago." Respondent Wooton questions the amount of resources used by P&S in this matter and the excessiveness of the proposed $35,000.00 penalty. It is also specifically stated in Respondents' brief:

> Roswell Livestock Auction carries a $120,000 mandatory P&SA bond and also have a $600,000 line of credit at my bank, to cover any deficiencies. I have 31 years of experience and expertise in owning and operating livestock markets. I have sold over 3.5 million cattle and countless sheep and horses, and written checks to consignors in excess of 1.1 billion, and have never had a check returned insufficient. P&SA already knows all this, but contend it is all irrelevant. I was told at the hearing by P&SA attorney Kimberly Hart and her expert witness Gunnard Eskilsen, who is also an employee of P&SA, that every statement raised in the defense of Larry Wooton and Roswell Livestock Auction, was completely irrelevant. If all these credentials were unimportant to running a honest, successful business, I ask the court, What is left that is important?

Respondents have a $600,000.00 line of credit with their bank and monies can be transferred to checking accounts with a phone call. They believe this is more expedient than interest bearing savings accounts or certificates of deposit.

The defenses raised by Respondents are unsupported by evidence and the applicable case law and precedent and therefore do not mitigate against the violations committed by the Respondents. The first defense is a general challenge of the figures from the three reconciliations. Although Respondents generally dispute the figures from the three reconciliations performed by Mrs. Sahlin, they have failed to proffer any specific documentary evidence to rebut Complainant's evidence. Respondents failed to proffer any specific evidence to prove the exact extent of the alleged inaccuracy of the figures contained on the November 8th and November 24th reconciliation schedules but rather merely assert that the figures arrived at by Mrs. Sahlin are not correct according to their calculations and that, if she made a calculation error on the October 31st reconciliations, then she must have made mistakes on the other two reconciliations as well. (Tr. 119).

Respondent Wooton testified that "he did not dispute that there was a custodial shortage as of November 8th in particular but neither did he admit that Mrs. Sahlin's figures were correct." (Tr. 119). Mrs. Sahlin provided details as to how she arrived at the figures reflected in the November 8th and November 24th reconciliations as well as the documentation utilized in obtaining those figures.

(Tr. 45-56). According to Mrs. Sahlin, she felt confident that the auditing process employed in reconciling Respondents' custodial account and the resulting figures contained on the November 8th and November 24th reconciliations were correct and not flawed in any manner. (Tr. 69).

Complainant's evidence supports the accuracy of the methods utilized by Mrs. Sahlin in the auditing process as well as the resulting figures from the three reconciliations revealing significant custodial account shortages on all three dates in violation of the Act and regulations. Respondents' defense of alleged errors in the reconciliation schedules without benefit of specific evidence to prove the alleged inaccuracies is not sufficient to rebut the persuasive evidence submitted by Complainant proving violations of sections 307 and 312 of the Act and section 201.42 of the regulations. Respondents had full access to its own records, from which Mrs. Sahlin derived her reconciliation results, as well as Complainant's proposed exhibits. Respondents was also afforded ample opportunity to review those records in preparation for hearing in order to substantiate its allegations of inaccuracies. Respondents chose not to do so and presented absolutely no evidence at hearing other than its unsupported allegations. Those allegations without accompanying proof are insufficient to rebut the persuasive documentary and testimonial evidence submitted by Complainant at hearing.

The second defense raised by Respondents is that the number of days in which they may have failed to reimburse the custodial account for purchases made by owners/officers of Respondent Roswell is insignificant since the consignors were timely paid for their livestock. Respondents cannot create their own rules in operating and maintaining the custodial account, but rather must adhere to the applicable provisions of the Act and regulations. Respondents allowed owners/officers to purchase livestock from Respondent Roswell without prompt payment and then failed to reimburse the custodial account when that livestock debt was not promptly paid.

Respondents' failure to reimburse the custodial account in conformity with section 201.42 of the regulations is a serious violation. Section 201.42 of the regulations exists for the specific purpose of protecting consignors' proceeds and it is not permissible for a market agency to vary the payment and reimbursement requirements. Section 201.42 of the regulations makes it clear that payment for livestock purchases by owners/officers are due by the next business day and if payment is not received at that time, the market agency is required to reimburse the custodial account immediately, or by the next business day. It is obvious from Respondent Wooton's testimony that he wants to operate and maintain Respondent Roswell's custodial account in the manner that he finds convenient, regardless of the requirements set forth in the Act and regulations governing custodial accounts.

The third defense raised by Respondents is that the Agency is being unrealistic in requiring market agencies of their size to operate within the confines set forth by the provisions of the Act and regulations governing the maintenance of custodial accounts. (Tr. 108-109). Respondent Wooton admits that he, as president and manager of Respondent Roswell, is fully aware of the requirements for the maintenance and operation of the custodial account. (Tr. 115-116, 120, 122-123). Respondent Wooton has stated at the hearing that he does not agree with the requirements governing the maintenance of custodial accounts and therefore chooses to deviate from those requirements with which he finds unreasonable or unrealistic. (Tr. 108-109). Respondent Wooton testified to the following at the hearing.

Respondent Wooton:

> With us at Roswell Livestock Auction, with me in particular, I've never told, I've never told -- what you see is what you get. I make no excuses for the way I run my business. **There are some pretty good reasons as to why you can't run that size of a business and stay within the strict guidelines that P&S provides for a business that size to run it.** (Emphasis added)
>
> And, just quickly, if we run a million to two million dollar sale on Monday and we spend Tuesday and Wednesday trying to get the information of the purchase to the person that's going to pay for these cattle, 99 percent of these cattle are sold to an order buyer that doesn't pay for them, he buys them for somebody else that's going to pay for the cattle. We have to get that information to that person: . . . .
>
> If we're two days getting that information to him and he's two days making a check and putting it back in the mail and if it takes four days for us to get that letter we're out of compliance. We're out of compliance. We've either got to make a personal check to put in there or we've out of compliance with P&SA.
>
> I've said this all along for years and years that there needs to be a little bit more common sense used in these investigations. **It's virtually impossible to do this within the time frame that P&SA sets up for us to do it under. . .** (Emphasis added) (Tr. 108-109).

Respondent Wooton testified that he believes the responsibilities, as a market

agency, in the maintenance and operation of Respondent's Roswell's custodial account should be different from those set forth in the Act and regulations. (Tr. 121). According to Respondent Wooton, it is unnecessary to reimburse the custodial account with his own personal funds or with borrowed bank funds just to satisfy the requirements of the regulations if payment is expected from the livestock purchaser soon. (Tr. 122). As a result of the strong disagreement with the regulatory requirements, Respondent Wooton has made a conscious decision to maintain and operate Respondent Roswell's custodial account in a manner which he knew was directly contrary to the requirements of the Act and regulations. (Tr. 115-116, 120, 122-123, 128). There is little doubt that Respondent Wooton knew that his actions could constitute violations of the Act and regulations since he had been placed on notice on three prior occasions, as a result of prior audits, that the manner in which Respondent Roswell's custodial account was being maintained was problematic. (CX-6-8; Tr. 115). Yet, Respondents continued to maintain and operate the custodial account in the same manner with seemingly little regard for the consequences.

Respondent Wooton fails to understand that his disagreement with the requirements of the Act and regulations does not serve as sufficient justification for disregarding those requirements in operating Respondent Roswell's custodial account. Section 201.42 of the regulations (9 C.F.R. § 201.42) was enacted for the specific purpose of protecting the consignors of livestock by assuring that their sale proceeds would be adequately maintained by the market agencies and those market agencies are obligated to strictly adhere to those requirements without deviation. Neither the Act nor the regulations grant a market agency the freedom to pick and choose which rules and regulations it will adhere to in maintenance and use of a custodial account. What Respondents have done by their actions is to effectively lessen the protection afforded to the consignors of livestock by section 201.42 of the regulations by instituting their own system for handling their custodial account. In *In re Britton Bros. Inc. et al., 49 Agric. Dec.* 423 (1990) the Judicial Officer specifically noted:

* * * * *

> Interpretations of the Act which characterize failures to maintain [properly] custodial accounts, as being unfair trade practices are expressed in the following cases: *Daniels v. United States,* 242 F.2d 39, 41-42 (7th Cir.), *cert. denied,* 354 U.S. 939 (1957); *Roseth v. Bergland,* 636 F.2d 1224 (8th Cir. 1980); *Miller v. Butz,* 498 F.2d 1088, 1089 (5th Cir. 1974); *Hyatt v. United States,* 276 F.2d 308, 309-13 (10th Cir. 1960); *United States v.*

Donahue Bros., Inc., 59 F.2d 1019, 1020-23 (8th Cir. 1923); and *In re Powell*, 41 Agric. Dec. 1354, 1361 (1982).

* * * * *

This precedent reflects the care and concern Congress and the Department have displayed for the protection of the producers in food distribution systems. In this case, the system involves a major source of protein for human consumption and requires numerous complicated financial transactions and transfers of title. And, past failures of this system have required the imposition of market regulation so as to assure that the ranchers and cattle-raisers who bring their efforts to market, will be provided reward for their labors, in full, and in a prompt fashion.

Complainant's sanction witness, Gunnard Eskilsen, reiterated the Agency's position on Respondents' obligation to strictly adhere to the section 201.42 of the regulations without exception:

Q Okay. Now, you also heard Mr. Wooton testify earlier that he found it impossible to comply with the regulations because of the amount of business that he does and the short turnaround period which the regulations provide within which you must be paid or you have to reimburse the custodial, the custodial account. What is the agency's position as to that issue?

A The custodial account regulations are set for all market and we want adherence to all those regulations and there is no, no special thing allowed for this.

Q So is the agency's position that there are no exceptions?

A There are no exceptions. (Tr. 145, 146).

Q Okay. And what is the agency's position on Mr. Wooton's contention that he understands what the requirements are but he doesn't agree with them so he chooses what he wants to do about the statute and regulations?

A We feel that would be unfair because the other market agencies are

> under the same rules and a lot of them, most of them follow those rules, although sometimes there are some shortages and those are usually caused by financial failures. But the agency's position that all market agencies are required to follow the regulations. (Tr. 147-148).

The Act and the regulations set forth very specific guidelines on the maintenance and operation of custodial accounts and the Agency is charged with the responsibility of ensuring that market agencies conform to those guidelines. The fact that Respondents may disagree with those guidelines does not give them the right to disregard them. The regulations are reasonable and have been enacted to protect consignors' proceeds. Respondents are required to conform to the regulations that pertain to the maintenance and operation of their custodial account as long as they have the full force and effect of law. Therefore, Respondents' defense that the guidelines are unrealistic and unreasonable as a justification for not adhering to those guidelines is untenable and without merit. Such defense in no way rebuts Complainant's evidence that Respondents have violated the Act and the regulations by failing to operate their custodial account in accord with the applicable provisions.

Another defense raised by Respondents is the "no harm, no foul" defense which argues that the shortages, if any, found in the custodial account should be of no major concern to the Agency because their consignors were always paid in a timely manner and there were never any checks issued to consignors that were returned for insufficient funds by the bank during the relevant time period (Tr. 107) or the many years Respondents have done business. This argument is frequently raised by Respondents in defense of custodial account violations although the courts have consistently disregarded the argument as a valid defense to custodial account violations. The Agency and the courts have consistently held to the following position:

> The argument that there is no evidence of any particular shipper not being paid, is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Poof of a particular injury is not required. *See, Harry C. Daniels d/b/a Harry C. Daniels and Co. v. United States,* 242 F.2d 39 (7th Cir. 1957), *cert. denied,* 354 U.S. 939.

The courts have made it clear that the issue is whether Respondents have maintained and operated their custodial account in such a manner which created the potential for injury to consignors, regardless of whether actual injury has actually

occurred. The fact that Respondents caused no harm to consignors by issuing insufficient fund checks does not relieve Respondents from the responsibility for maintaining and operating their custodial account in strict conformity with the Act and regulations. (Tr. 138-139, 145). Respondents' defense does not change the nature of the violations committed which have nothing to do with the issuance of insufficient fund checks. Therefore, this defense lacks merit.

Another contention raised by Respondents is that their statutorily required bonds provide further assurance to the Department that consignors will be paid since the bonds are intended to cover unpaid livestock debt. (Tr. 93-98). While Respondent Wooton disagrees with Mrs. Sahlin as to the exact amount of bond coverage carried by Respondent Roswell, the Agency's records clearly indicate that Respondent Roswell carries a $110,000.00 clause 1 bond and a $10,000.00 clause 2 bond. (CX-1; Tr. 93-98). Respondents are of the opinion that the bonds exist to benefit unpaid livestock sellers, therefore, providing extra protection that consignors will be paid for their livestock. As was pointed out by Mrs. Sahlin, the bonds will only cover up to the limit of the bond amounts and should there be claim made against the bonds that exceed the bond limits, livestock sellers would not be paid in full for their livestock. (Tr. 103). More importantly, the fact that Respondents carry bonds, as required by statute, has nothing to do with their obligation to maintain and operate their custodial account in conformity with the Act and regulations.

The purpose of the regulations governing custodial accounts is to stop harm to the consignors in its incipiency instead of determining a course of action after the actual harm has occurred. The regulations governing bond coverage and the regulations governing maintenance and operation of custodial accounts are completely independent and there are varying goals to be achieved by these two regulatory provisions. Therefore, it is irrelevant that Respondents have bonds totaling $120,000.00 to cover non-payment of livestock debt since it has no bearing on whether Respondents have violated the Act and regulations by allowing a significant shortage in their custodial account to occur on three separate occasions as alleged in the Complaint. Accordingly, Respondents' "bond" defense is without merit and does not address the issue of the violations committed by Respondents by virtue of the custodial account shortages.

Complainant's evidence persuasively establishes that the Respondents violated sections 307 and 312 of the Act and section 201.42 of the regulations by failing to properly maintain and operate their custodial account which resulted in shortages in the custodial account on three separate occasions between October 31, 1995, and November 24, 1995. In addition, the remaining defenses raised by Respondents have absolutely no bearing on the issue of whether the violations occurred as

alleged nor do they serve as mitigating factors as has been demonstrated by applicable case law. The case law makes it clear that Respondents, as market agencies and registrants pursuant to the Act, are expected to strictly conform to the rules and regulations governing the maintenance and operation of custodial accounts without exception.

Departmental policy and testimony at the hearing indicates that the appropriate sanction for the willful violations committed by Respondents is the issuance of an order requiring Respondents to cease and desist from failing to maintain and operate their custodial account in any manner not in accordance with the Act and regulations and the imposition of a civil penalty in the amount of $35,000.00.

Complainant, through the testimony of Gunnard Eskilsen, has requested a finding that willful violations have occurred and for an order requiring Respondents to cease and desist from:

(1) Failing to deposit in their custodial account, within the time prescribed by section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

(2) Failing to otherwise maintain their custodial account in conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42); and

(3) Failing to reimburse the custodial account for owners' and officers' purchases within the time prescribed by section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)). (Tr. 135-136). Complainant has also requested that Respondent Wooton be found as the *alter ego* of Respondent Roswell and that both Respondents Roswell and Wooton be assessed a civil penalty jointly and severally in the amount of $35,000.00 as an appropriate sanction for the willful violations committed by the Respondents. (Tr. 136).

Mr. Eskilsen provided testimony regarding the Agency's position on sanction and the reasons for the recommended sanction. (Tr. 135-168). The purpose of the recommended sanction is to obtain compliance and deter Respondents and other registrants from committing unfair and deceptive trade practices similar to those which occurred in this case. (Tr. 136-137). Mr. Eskilsen explained that custodial account violations are considered as very serious because the Respondents act as a fiduciary for the consignors in handling their funds and must be relied upon to handle the custodial account properly. (Tr. 137). He also explained that it was the goal of the Agency to cease Respondents' violative activities before any consignor suffered a financial loss and there was a real possibility that, should Respondents continue handling the custodial account in the same manner, there would be an eventual loss of consignor's funds. (Tr. 138-140).

Section 312(b) of the Act (7 U.S.C. § 213 (b)) states in pertinent part:

> . . . (a) 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.

Since the Agency is seeking the imposition of a civil penalty, it must consider the three factors mandated by section 312 in reaching a decision as to the recommended civil penalty to be sought. Mr. Eskilsen testified that the Agency did consider those three factors in reaching a determination as to the recommended civil penalty that was specific to the Respondents' violations and financial considerations. (Tr. 138). In addition, the Agency also takes into consideration civil penalties assessed in cases with similar violations either by decision of the Secretary or by consent decision. (Tr. 154).

The first factor required by section 312(b) is the gravity of the offense. Mr. Eskilsen testified that the Respondents' custodial account was found to be short on three different dates in significant amounts and that shortages were due to the market's failure to reimburse the account for proceeds receivable over seven days old and for the purchases of market owners and officers. (Tr. 138). The frequency of the custodial shortages is an indication of an ongoing problem with Respondents that endangers consignors' funds regardless of whether any consignor has suffered loss at this point since the potential is there should Respondents continue to operate their custodial account in this manner. (Tr. 138-139). The Agency considers custodial account violations in this case to be serious because of the fiduciary relationship that Respondents hold with consignors' funds and because of the manner in which Respondents have disregarded their regulatory obligations as to the proper maintenance of the custodial account containing consignors' funds. (Tr. 137, 147). Mr, Eskilsen stressed that it is the Agency's responsibility to ensure that consignors' funds are being properly handled. (Tr. 148).

The second factor considered by the Agency is the size of Respondents' business. Mr. Eskilsen testified that Respondent Roswell is one of the largest market agencies in the State of New Mexico with current assets that exceed their current liabilities by $600,000.00 and a reported net profit income of $143,000.00. (CX-5; Tr. 139-140). Mr. Eskilsen reviewed Respondents' most recent annual report submitted to the Agency in May, 1998 for the figures referred to in his discussion of the size of Respondent Roswell. The Agency also considered the fact

that Respondent Roswell reported a new profit of $43,000.00 for the 1997 calendar year (CX-5; Tr. 141) and since Respondent Wooton is a majority stockholder in Respondent Roswell, he would directly benefit from those profits. Mr. Eskilsen stated that it was the Agency's opinion that it would not be hardship on either Respondent to pay the $35,000.00 civil penalty to appropriately address the severity of the violations. (Tr. 140). The third factor in section 312(b) is the effect of the penalty on the person's ability to continue in business. Mr. Eskilsen testified that the Agency's position is that the imposition of a $35,000.00 civil penalty should not have an adverse impact on Respondents' ability to continue in business based on its reported working capital and net profits from the most recent annual report on file with the Agency. (CX-5; Tr. 144).

Mr. Eskilsen further testified that there is an aggravating factor present in this case which the Agency took into consideration in fashioning a sanction recommendation. The aggravating factor is the three prior letters issued by the Agency to Respondents on November 26, 1985, January 29, 1991 and April 25, 1995, as a result of custodial audits. (CX-6-8). These letter were issued to put Respondents on notice that the Agency discovered violations during the course of prior custodial audits that needed to be addressed by the Respondents. (CX-6-8; Tr. 144). The letters informed Respondents of the requirements for the maintenance and operation of custodial accounts pursuant to section 201.42 of the regulations and of the possibility of future formal action by the Agency if the violations continued to occur. (Tr. 144-145).

Mr. Eskilsen stressed the point that Respondent Wooton understands what the Act and regulations require him to do in handling Respondent Roswell's custodial account but that he has chosen not to abide by those requirements. (Tr. 147). This is demonstrated by the fact that, despite the three prior letters of notice sent over the past ten years regarding proper maintenance of Respondents' custodial account, Mrs. Sahlin discovered shortages in the custodial account on three different dates during the audit in November, 1995. This is evidence that Respondents have no intention of altering their management activities to conform to the regulatory requirements despite being warned on several occasions to do so. These instances of custodial shortages are not isolated events but rather show a continuing pattern of Respondents' disregard for the Agency rules and regulations for custodial accounts. Respondents would have us to believe that "it does not set out to willfully violate the Act on a daily basis but that mistakes sometimes happen with a business of its size." (Tr. 107-108, 115). This argument is disingenuous especially when viewed in the context of Respondent Wooton's own admission that he understands what the regulations require of him in maintaining and operating Respondent Roswell's custodial account but chooses to handle the account

differently. (Tr. 115-116, 121-124, 128-129). An occasional mistake would not result in custodial shortages ranging from $51,000.00 to $236,000.00 between October 31, 1995, and November 24, 1995. These custodial shortages are not the result of inadvertent mistakes but rather the result of Respondents' disregard of the mandatory regulations that apply equally to Respondent Roswell as well as any other registered market agency handling consignors' funds. Mr. Eskilsen stated that the Agency's position is that there are no mitigating factors present in this case. The fact that there were no insufficient fund checks issued or complaints from consignors was irrelevant because it had nothing to do with Respondents' violations of the regulatory provisions governing custodial accounts. (Tr.145-148).

Mr. Eskilsen's sanction recommendation of a cease and desist order and the imposition of a $35,000.00 civil penalty is in full accord with the Department's sanction policy. It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the Administrative Agency and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the Respondents but to other potential violators as well. The basis for the Department's sanction policy is set forth at great length in numerous decisions. *In re Richard N. Garver,* 45 Agric. Dec. 1090, 1095 (1986); *In re Samuel Esposito,* 38 Agric. Dec. 613, 624-625 (1979); *In re Braxton M. Worsley,* 33 Agric. Dec. 1547, 1556-1571 (1974); and *In re James J. Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd, per curiam,* 498 F.2d 1088 (5th Cir. 1974). Great weight should be given to the Agency's recommendation as to sanction. *See, In re Worsley, supra,* 1567-1568 (1974).

All of the previously mentioned circumstances presented herein are strong support of Complainant's proposed sanction of a cease and desist order, and the imposition of a joint and several civil penalty in the amount of $35,000.00 against Respondent Roswell, the corporate entity, and Respondent Wooton as *alter ego* of Respondent Roswell at all times material herein.

I have carefully considered the arguments, contentions, motions and requests of the parties and, to the extent they are inconsistent with this decision, they are denied.

Order

Respondent Roswell Livestock Auction Sales, Inc. and Larry F. Wooton, their Agents and employees, directly or indirectly or through any corporate device shall cease and desist from:

1. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42); and

3. Failing to reimburse their "Custodial Account for Shippers' Proceeds" for owners' and officers' purchases within the time prescribed by section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)).

In accordance with section 312(b) (7 U.S.C. § 213(b)), Respondent Roswell Livestock Auction Sales, Inc. and Respondent Larry F. Wooton, as its *alter ego,* are hereby assessed a joint and several civil penalty in the amount of Thirty-Five Thousand Dollars ($35,000.00).

This Decision and Order shall become final and effective without further proceedings thirty-five days after service thereof unless it is appealed within thirty days to the Judicial Officer by a party to the proceeding as more fully set forth in the Rules of Practice and Procedure. 7 C.F.R. § 1.130 *et seq.*

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 15, 1999.-Editor]

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: NOLAN ULMER, d/b/a NU CATTLE AND NU CATTLE CO.
P&S Docket No. D-98-0035.
Decision and Order filed September 1, 1999.

Deborah Ben-David, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This disciplinary proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter, the P&S Act, by a complaint filed on August 26, 1998 by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection Packers and Stockyards Administration (GIPSA). The complaint alleges that Respondent wilfully violated the P&S Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*) by: (1) engaging in business without filing or maintaining an adequate bond, or its equivalent, after termination of a clearor bond; (2) issuing an insufficient funds check in payment for livestock purchases; (3) failing to pay the full purchase price for livestock purchases; and (4) failing to pay, when due, the full purchase price for livestock purchases. The complaint requests a finding that Respondent wilfully violated Sections 312(a) and 409 of the P&S Act (7 U.S.C. §§ 213(a), 228b) and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 102.30). The complaint requests an order that Respondent cease and desist from the violations found to exist and that he be suspended as a registrant under the P&S Act.

A copy of the complaint was served on Respondent on September 3, 1998. Respondent filed an answer to the complaint on October 16, 1996 in which he admits: (1) the jurisdictional allegations of Section I of the complaint; (2) that Respondent engaged in business without filing or maintaining an adequate bond, or its equivalent, after termination of a clearor bond; (3) that an insufficient funds check was issued in payment for Respondent's livestock purchases; (5) that Respondent failed to pay, when due, for its livestock purchases; and (6) that

$17,500.00 of the amounts alleged in the complaint remained unpaid.[1]

Respondent's answer 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 constitute a waiver of hearing, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Complainant moved for the issuance of a Decision and 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. Nolan Ulmer, hereinafter referred to as the Respondent, is an individual doing business as NU Cattle and NU Cattle Co., whose business mailing address is 16529 WCR 70, Greeley, Colorado 80631.

2. Respondent Ulmer 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 on a commission basis.

3. On August 5, 1993, Respondent's registration as a clearee operating as a dealer and as a market agency buying on commission was accepted. Respondent was operating under the clearor bond of Albers Cattle Co., Inc., Winser, Nebraska. On January 24, 1996, Respondent was sent, by certified mail, a termination of clearance letter stating that he was required to have a bond and that the bonding instrument maintained in connection with his registration would terminate on February 22, 1996. On March 1, 1996, the Grain Inspection, Packers and Stockyards Administration Denver regional office received a trust agreement from Gary Rasmussen d/b/a R.U. Cattle Company, Ault, Colorado which showed Respondent as a clearee. On December 16, 1996, the principal subsequently requested that the trust agreement be terminated. On December 27, 1996, Respondent was sent, by certified mail, a termination of clearance letter stating that the bonding instrument maintained in connection with his registration was terminating on January 15, 1997. During the period January through November 17, 1997, Respondent continued to operate without an adequate bond as required by the P&S Act and the regulations after the termination of the clearor bond.

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[1]Respondent, in its answer dated October 16, 1998, stated that the remaining balance of $17,500.00 "will be taken care of on Nov. 1, 1998, which was the agreement that was made."

4. Respondent, in connection with his operations subject to the P&S Act, on or about the date and in the transaction set forth below, issued a check in payment for livestock purchases which check was returned unpaid by the bank upon which it was drawn because Respondent did not have and maintain sufficient funds on deposit and available in the account upon which the check was drawn to pay the check when presented.

Purchase Date	Seller	# of Head	Amount of Check	Check Number	Returned Check Dates
11/07/97	Kathy Miller d/b/a KM Cattle	68	$34,508.57	#2549	12/04/97 12/09/97

5. Respondent, in connection with his operations subject to the P&S Act, on or about the date and in the transaction set forth below, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

Purchase Date	Seller	Amount Due	Payment Due Date	Amount Paid
11/07/97	Kathy Miller KM Cattle Co.	$34,508.57	11/10/97	$17,500.00[2]

6. As of May 26, 1998, $17,500.00 of the amount due from the transaction set forth in findings of fact 4 and 5 remains unpaid.[3]

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[2]On or about April 30, 1998, Gordi Ulmer, Respondent's father, paid Kathy M. Miller d/b/a KM Cattle, $17,500.00 on his son's behalf and signed a promissory note for the balance due payable November 1, 1998. Although the balance due is $17,008.57, Respondent's father signed a promissory note for $17,500.00.

[3]Respondent, in its answer dated October 16, 1998, stated that the remaining balance of $17,500.00 "will be taken care of on Nov.1, 1998, which was the agreement that was made."

Conclusions

By reason of Finding of fact 3, Respondent wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 (9 C.F.R. §§ 201.29, 201.30) of the Regulations.

By reason of Findings of fact 4 and 5, Respondent willfully violated sections 312(a) & 409 of the P&S Act (7 U.S.C. §§ 213(a) & 228b).

Order

Respondent, Nolan Ulmer, his agents and employees, directly or indirectly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall 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;
c. Failing to pay for the full purchase price of livestock; and
d. Operating without an adequate bond.

Respondent Nolan Ulmer is suspended as a registrant under the P&S Act for a period of 5 years. Provided, however, that upon application to the Packers and Stockyards Administration, GIPSA, a supplemental order may be issued terminating the suspension of the Respondent at any time after the expiration of the initial 90 days of the suspension term upon demonstration by the Respondent that the livestock seller identified by the complaint in this proceeding has 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 by another registrant or packer after the expiration of the initial 90 days of this suspension term upon demonstration of circumstances warranting modification of the order.

This decision shall become final and effective without further proceedings thirty–five (35) days after the date of 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 October 13, 1999.-Editor]

In re: E. I. WHITMIRE, d/b/a CALICO LIVESTOCK FARM.
P&S Docket No. D-99-0001.
Decision and Order filed November 3, 1999.

Kimberly D. Hart, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This disciplinary proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter the Act, by a complaint filed on October 5, 1998, by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration (GIPSA). The complaint alleges that Respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*) by: (1) issuing insufficient fund checks in payment for livestock purchases; (2) failing to pay, when due, for livestock purchases; and (3) failing to pay the full purchase price of livestock. The complaint requests a finding that Respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b). The complaint also requests an order that Respondent cease and desist from the violations found to exist and that Respondent be suspended as a registrant under the Act. A copy of the complaint was served on Respondent on October 15, 1998. Respondent filed an answer on November 5, 1998, in which he admits: (1) the jurisdictional allegations of Section I of the complaint; (2) that Respondent issued insufficient fund checks in payment for livestock purchases; (3) that Respondent failed to pay, when due, for livestock purchases; and (4) that Respondent failed to pay $12,656.56 in livestock purchases and that said amount remains unpaid.

Respondent's answer 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 constitute a waiver of hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Complainant moves for the issuance of a Decision and the following Decision and Order is issued without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. E. I. Whitmire is an individual doing business as Calico Livestock Farm, hereinafter referred to as Respondent Whitmire, whose mailing address is 2151

Greencrest Road, Gainesville, Georgia 30501.

2. The Respondent, at all times material herein, was engaged in the business of a dealer buying and selling livestock in commerce for his own account and as a market agency buying livestock on commission basis.

3. The Respondent, at all times material herein, was 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 on a commission basis.

4. Respondent Whitmire, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment issued checks 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 account upon which such checks were drawn to pay such checks when presented.

Purchase Date	Seller	# of Head	Amount of Check	Check Number
06/10/97	Lanier Farmers Livestock Corp.	22	$9,008.46	1234[1]
06/12/97	Calhoun Stockyard	29	7,166.50	1237[2]
06/19/97	Calhoun Stockyard	7	1,300.00	1246[3]

5. Respondent Whitmire, in connection with his operations subject to the Act, on or about the dates and in the transactions listed above in number 4, and in the transactions set forth below, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

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[1]Respondent Whitmire made a partial payment in the amount of $5,979.00 on 10/15/97 which was applied to this livestock debt thereby leaving a remaining amount due of $3,029.46.

[2]Respondent, Whitmire made two partial payments of $500.00 on 10/2/97 and $2,133.60 on 10/23/97 which was applied to this livestock debt thereby leaving a remaining amount due of $4,532.90.

[3]The check issued in payment for this transaction was $44.40 short of the total amount due. Respondent Whitmire has made no payments on this particular livestock debt.

Purchase Date	Seller	Amount Due	Payment Due Date	Payment Date
04/24/97	Calhoun Stockyard	$14,232.81	04/25/97	05/08/97[4]
06/03/97	Lanier Farmers Livestock	15,805.20	06/04/97	06/18/97[5]
06/11/97	Mid-Georgia Livestock Mkt.	9,296.79	06/12/97	06/26/97[6]
06/14/97	Abingdon Stockyard Exchange	7,457.85	06/16/97	07/05/97[7]
06/16/97	D & N Livestock Service	6,106.53	06/17/97	07/17/97[8]
06/17/97	Lanier Farmers Livestock	3,749.80	06/18/97[9]	

6. As of September 1, 1998, there remained unpaid a total of $12,656.56 for such livestock purchases.

Conclusions

By reason of Finding of Fact numbers 4, 5 and 6, Respondent has willfully violated sections 312(a) & 409 of the Act (7 U.S.C. §§ 213(a) & 228b).

Order

Respondent E.I. Whitmire, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks

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[4]The check tendered by Respondent Whitmire cleared on redeposit.

[5]The check tendered by Respondent Whitmire cleared on redeposit.

[6]The respondent paid $9,006.46 of the livestock amount due with check number 1236 and the remaining balance of $288.33 was paid by the Respondent by deductions from commission checks.

[7]The Respondent overpaid the livestock amount due by $1,117.30.

[8]The Respondent's livestock debt was paid by a third party.

[9]Respondent Whitmire has made no payment on this livestock debt.

were drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

Respondent E. I. Whitmire is hereby suspended as a registrant under the Act for a period of five (5) years. Provided, however, that upon application to Packers and Stockyards Programs a supplemental order may be issued terminating the suspension of the respondent at any time after 90 days upon demonstration by Respondent that the livestock sellers identified by the complaint in this proceeding have been paid in full and provided further, that this order may be modified upon application to Packers and Stockyards Programs to permit Respondent's salaried employment by another registrant or a packer after the expiration of the 90 day period of suspension and upon demonstration of circumstances warranting modification of the order.

This decision shall become final and effective without further proceedings thirty-five (35) days after the date of 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 of this decision shall be served upon the parties.

[This Decision and Order became final December 15, 1999.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

PACKERS AND STOCKYARDS ACT

Ogden Livestock Auction, Inc., Dean Barrow, Duane Bitton, Kent Spencer and Kirk Hansen. P&S Docket No. D-98-0014. 7/1/99.

Allen Clark, Inc., and Howard Foulkrod. P&S Docket No. D-98-0019. 7/22/99.

Ernest A. Douglas. P&S Docket No. D-98-0011. 8/3/99.

Melvin Kolb, Inc., Alma Kolb, and Dennis Kolb. P&S Docket No. D-99-0006. 11/9/99.

AGRICULTURE DECISIONS

Volume 58

July - December 1999
Part Three (PACA)
Pages 991 - 1160

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 1999

PERISHABLE AGRICULTURAL COMMODITIES ACT

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

ALLRED'S PRODUCE v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 98-60187.
Decided July 1, 1999.

(Cite as 178 F.3d 743 (5th Cir.))

Perishable agricultural commodities – Sanction – Willful, flagrant, and repeated violations – Selective enforcement – Due process – Notification requirement – Sanction testimony.

The United States Court of Appeals for the Fifth Circuit affirmed the Judicial Officer's decision in which he found that petitioner willfully, flagrantly, and repeatedly failed to make full payment promptly for perishable agricultural commodities, in violation of 7 U.S.C. § 499b(4) and revoked petitioner's PACA license. The Court rejected petitioner's contention that the sanction imposed by the Judicial Officer was arbitrary and capricious and found the sanction was allowable under the PACA and the facts of the case. The Court found that the Judicial Officer's findings that petitioner's violations were willful, flagrant, and repeated were not error or abuse of discretion. The Court stated that, even if petitioner's contention that it was the target of selective enforcement because petitioner was a small to mid-sized buyer was true, there was no legal rationale for vacating the Judicial Officer's order. Selective enforcement must be based upon an unjustifiable standard, such as race, religion, or other arbitrary classification to constitute a basis for vacating an order. The Court also rejected petitioner's three procedural challenges as lacking merit. First, the Court found that the ALJ did not improperly admit the introduction of new claims against the petitioner during the administrative hearing and that the sanction was based on the 86 violations of the PACA alleged in the complaint. Second, the Court rejected petitioner's contention that the Secretary was required by 7 U.S.C. § 499f(b) to give petitioner written notification prior to the investigation. The Court found that, since the investigation began prior to the enactment of the written notification requirement, the requirement could not act as a bar to the Secretary's actions in this case. Further, the investigation was triggered by trust notices and a reparation complaint filed against petitioner. Thus, even if the written notification requirement applied, these written complaints satisfied the requirement. Third, the Court rejected petitioner's challenge to the ALJ's decision to permit sanction testimony, stating that there is no evidence that either the ALJ or the Judicial Officer relied on the sanction testimony, and even if they did rely on the testimony, their reliance was not erroneous because the recommendation was consistent with the PACA and the regulations.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Before POLITZ, HIGGINBOTHAM and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Petitioner Allred's Produce ("Allred's") appeals a final order of the Secretary of Agriculture revoking its license under the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499s, for willful, repeated, and flagrant failure to make full payment promptly to various sellers of perishable agricultural commodities. Allred's contends that the Secretary's findings and sanction were arbitrary and capricious, that Allred's was singled out for selective enforcement, and that the Secretary failed to observe various procedural requirements under the PACA. For reasons that follow, the Secretary's order is affirmed.

I.

Before proceeding to the specific facts and issues of this case, it is useful to review the applicable statutory and regulatory framework. Congress enacted the PACA in 1930 "for the purpose of regulating the interstate business of shipping and handling perishable agricultural commodities such as fresh fruit and vegetables." *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2nd Cir. 1974). It was designed "to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct." *Zwick v. Freeman*, 373 F.2d 110, 116 (2nd Cir. 1967). To that end, the PACA establishes a strict licensing system with often severe sanctions for violations of its requirements.

Under the PACA, every dealer of perishable agricultural commodities is required to be licensed by the Secretary of Agriculture. 7 U.S.C. § 499c(a). These dealers are subject to a number of statutory requirements, the most basic of which is that they make "full payment promptly" for all purchases of perishable agricultural commodities. 7 U.S.C. § 499b(4). The Secretary has defined "full payment promptly" to mean "[p]ayment 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). Parties may agree to a different time limit, provided that they reduce such an agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. 7 C.F.R. § 46.2(aa)(11). The party claiming the existence of such an agreement has the burden of proof. *Id.*

The PACA authorizes stiff penalties for violation of the prompt payment requirement. Upon determining that any dealer has violated any of the PACA's statutory requirements, the Secretary may publish the facts and circumstances of the violation and suspend the license of the offender for up to 90 days. 7 U.S.C.

§ 499h(a). Moreover, if the violation is flagrant or repeated, the Secretary may revoke the license of the offender. *Id.* Alternatively, under the 1995 amendments to the PACA, the Secretary may impose a civil penalty not to exceed $2,000 per violation or $2,000 each day a violation continues. 7 U.S.C. § 499h(e).

II.

Allred's is a partnership formed in 1966, composed of Raymond M. Allred and his son, Ronald D. Allred. Its sole business is the purchase and sale of produce. Allred's has been licensed under the PACA continuously, without suspension or revocation, since 1977.

The PACA Branch of the United States Department of Agriculture ("PACA Branch") conducted three investigations of Allred's between 1994 and 1997. The first investigation was in 1994, and resulted in no formal complaint against Allred's. The second investigation, a compliance review, was in February 1996. It revealed that, during the period from May 1993 through February 1996, Allred's failed to make full payment promptly to 19 sellers for 86 lots of perishable agricultural commodities in the total amount of $336,153.40. Based on these findings, PACA Branch initiated a complaint against Allred's in July 1996. The third investigation, an audit to ascertain whether Allred's had brought its operation into compliance with the PACA prior to hearing, was in May 1997. The audit revealed that $149,329.66 of the original $336,153.40 remained unpaid. The audit further found that the firm's total interstate and foreign commerce past due debt had risen to $463,328.61, owed to 25 sellers for 125 lots of perishable agricultural commodities.

A hearing was conducted before an Administrative Law Judge ("ALJ") in June 1997. Additional testimony was taken during a telephone hearing in August 1997. The ALJ issued his decision from the bench at the close of the hearing. He found that Allred's Produce had failed to make full payment promptly to 19 sellers for 86 lots of perishable agricultural commodities in the amount of $336,153.40 during the period from May 1993 through February 1996. He further found that these violations were willful, repeated, and flagrant. Based on these findings, the ALJ revoked the firm's PACA license.

Allred's filed an administrative appeal of the ALJ's decision and order in September 1997. The Judicial Officer ("JO"), acting for the Secretary, issued a final decision and order in December 1997 adopting the ALJ's decision and adding several more conclusions. Allred's sought reconsideration, which the JO denied in February 1998. The JO did, however, stay his order pending the outcome of judicial review. This appeal followed.

III.

Judicial review of the decision of an administrative agency is narrow. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The decision will be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law...." 5 U.S.C. § 706(2)(A). An appellate court may not substitute its own judgment for that of the Secretary. *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 373 (5th Cir. 1980). The Secretary's decision may only be overturned if it is unwarranted in law or without justification in fact. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973). Likewise, judicial review of a sanction imposed under the PACA is extremely limited. *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1030 (5th Cir. 1982). "The choice of sanctions imposed by the Secretary of Agriculture, through his Judicial Officer, may not be overturned in the absence of a patent abuse of discretion." *American Fruit Purveyors*, 630 F.2d at 374.

Allred's challenges the Secretary's final order on the following six grounds: (1) the sanction awarded was arbitrary and capricious; (2) the findings and conclusions of the Secretary were arbitrary and capricious; (3) Allred's was singled out for selective enforcement; (4) the allowance of the introduction of new claims at the agency hearing was in excess of the agency's authority and without observance of procedure; (5) the revocation of Allred's license was without observance of procedure because the Secretary failed to establish that a written notice of a violation of the PACA had been received by the Secretary prior to commencement of PACA Branch's investigation; and (6) the allowance and consideration of certain questionable and unreliable evidence and testimony at the hearing was without observance of procedure. We find these arguments unpersuasive.

A.

Allred's first argues that the Secretary's decision to impose the sanction of license revocation was arbitrary and capricious under the attendant circumstances of the case and under the custom and practice of the industry. According to Allred's, no supplier of perishable agricultural commodities realistically expects to be paid according to terms, and it is not uncommon for suppliers to extend payment terms during and after transacting business to accommodate the buyer. Thus, Allred's states, the 10-day time limit established by the regulations is outdated and does not reflect the real world. Revocation of Allred's license would

therefore have no deterrent effect on other buyers of perishable agricultural commodities. Allred's also describes as abusive the Secretary's failure to consider outside factors militating against the imposition of sanctions, such as Allred's efforts to pay its suppliers and the fact that no supplier of Allred's desired Allred's to be forced out of business, and the Secretary's failure to consider imposition of monetary penalties as an alternative sanction. Finally, Allred's contends that the Secretary abused his discretion by failing to consider whether the purpose behind the sanction–deterrence of violative conduct and reducing the risk of loss to suppliers–would be accomplished through license revocation.

These arguments are unavailing. As noted above, we will not overturn the Secretary's choice of sanction absent a patent abuse of discretion. *American Fruit Purveyors*, 630 F.2d at 374. Our only consideration, therefore, is "whether, under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in [his] choice of remedy.'" *Glover Livestock*, 411 U.S. at 189 (quoting *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612, 66 S.Ct. 758, 90 L.Ed. 888 (1946)). We find that the Secretary's judgment in this case was both warranted in law and justified in fact. Where a violation of the PACA is "flagrant or repeated," the PACA by its own terms authorizes revocation of the violator's license. 7 U.S.C. § 499h(a). Here, the Secretary found that Allred's violations of the PACA were both flagrant and repeated. For reasons discussed below, we agree. Thus, the revocation of Allred's license was well within the Secretary's authority. We will not embark on a legislative analysis of the PACA's relevance to modern industry practice, nor will we reexamine the aggravating and mitigating evidence to determine whether we would have arrived at some lesser sanction. Those are not appropriate functions for an appellate court sitting in review of a final administrative order. It is enough that the sanction imposed by the Secretary was allowable under the PACA and the facts of this case.

B.

Allred's next challenges as arbitrary and capricious the Secretary's finding that its failures to pay were willful, repeated, and flagrant. Allred's points out that, at the time of the hearing, it had paid over 50 percent of the past due accounts that were the subject of the Secretary's complaint, and was in the process of paying all outstanding accounts under terms acceptable to its suppliers. According to Allred's, no suppliers were complaining about mistreatment or past due payments, and many suppliers were continuing to supply Allred's even though Allred's owed them money. Under these circumstances, Allred's contends, it cannot be said that the failures to pay were willful, repeated, or flagrant.

We disagree. Under the regulations, "full payment promptly" means payment within 10 days of the date on which the produce is accepted, or payment within the time specified in writing by prior agreement of the parties. 7 C.F.R. § 46.2(aa). Allred's does not deny that it failed on numerous occasions to make full payment promptly under this definition. Nor does Allred's dispute that, during a nearly three-year period from May 1993 through February 1996, it failed to make full payment promptly on 86 lots of perishable agricultural commodities in the total amount of $336,153.40. In light of these undisputed facts, we can find no error, and certainly no abuse of discretion, in the Secretary's finding that the violations were willful, repeated, and flagrant.

Violations are "repeated" under the PACA if they are not done simultaneously. *Reese Sales Company v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *Zwick v. Freeman*, 373 F.2d 110, *115* (2nd Cir. 1967). Here, the 86 violations were spread out over a period of two years and ten months. Violations are "willful" under the PACA "if the prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory authority." *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983). Similarly, whether violations are "flagrant" under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred. *See Reese*, 458 F.2d at 187; *Zwick*, 373 F.2d at 115. Here, Allred's violated the PACA 86 times over nearly three years for an amount totaling over $300,000. To describe these violations as anything other than "willful" and "flagrant" would be to render those terms meaningless. The Second Circuit expressed this point best in *Zwick*: "[I]t is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of [the PACA]. It would be hard to imagine clearer examples of 'flagrant' violations of the statute than were exemplified by petitioners' conduct." *Zwick*, 373 F.2d at 115.

C.

Allred's argues next that it was singled out for selective enforcement under the PACA's disciplinary provisions. Allred's asserts that most complaints and disciplinary actions under the PACA are maintained against small to mid-sized buyers rather than institutional buyers. Thus, Allred's asserts, the brunt of enforcement falls on the shoulders of the small to mid-sized buyer.

This argument fails on its face. Even taking all of Allred's allegations as true, we can find no legal rationale for vacating the Secretary's order. "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional

violation." *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). Rather, it must be shown that the selective enforcement "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* Allred's cites no authority, and we can find none, for the proposition that an otherwise culpable PACA violator is shielded from the consequences of his actions simply because the PACA is applied unevenly to non-institutional buyers. We agree with the Secretary that "[the] PACA does not need to be enforced everywhere to be enforced somewhere; and agency officials have broad discretion in deciding against whom to institute disciplinary proceedings."

D.

Allred's concludes with three challenges to the procedural validity of the ALJ's hearing. Each of these challenges lacks merit.

First, Allred's contends that the ALJ impermissibly allowed the introduction of "new claims" at the hearing. The "new claims" to which Allred's refers are the new violations uncovered by PACA Branch in its May 1997 audit of Allred's. Allred's argues that the admission of these new claims at the hearing without amendment of the complaint forced Allred's to respond to allegations without due process of law and substantially and irreparably injured its ability to present evidence to respond to the new claims.

We disagree. The final order of the Secretary makes clear that Allred's was sanctioned solely for the 86 violations alleged in the Secretary's original complaint, not for the additional violations uncovered in the May 1997 audit. The "new claims" evidence was actually nothing more than evidence of the current indebtedness of Allred's, which was relevant to the question of relief from license revocation. Under Department of Agriculture policy, a dealer who otherwise faces license revocation may escape that sanction if it can show "(i) that it has made full payment of the transactions alleged in the Complaint, and (ii) [that] such payment was not made by 'robbing Peter to pay Paul'." *In re S W F Produce Co.*, 54 Agric. Dec. 693, 700 (1995) (citing *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 629-42 (1989)). The May 1997 audit revealed that Allred's did not qualify for such a mitigation of sanction, and the so-called "new claims" evidence was admitted solely on that issue. Thus, the ALJ did not improperly admit evidence of new claims. Rather, he properly considered relevant evidence that Allred's did not qualify for relief from license revocation on the existing claims. The sanction itself was based solely on the 86 violations alleged in the original complaint.

Second, Allred's argues that the revocation of its license was without observance of procedure as required by law because there was no evidence that the

Secretary's investigation of Allred's was based on receipt by the Secretary of written notification of a violation of the PACA. Allred's notes that 7 U.S.C. § 499f(b) requires such written notification prior to commencement of an official investigation, and asserts that the Secretary failed to present evidence of such notification to justify the February 1996 compliance review that resulted in the complaint against Allred's.

This argument lacks basis both in law and in fact. The written notification requirement was added as part of the 1995 amendments to the PACA, more than a year after the initial investigation of Allred's began in 1994. The Secretary found, based on substantial record evidence, that the 1996 compliance review was a follow-up to the original 1994 investigation. We agree. As such, since the investigation began prior to the enactment of the written notification requirement, the requirement could not act as a bar to the Secretary's actions in this case. Moreover, the 1994 investigation was triggered by trust notices and a reparation complaint filed against Allred's. Thus, even if the written notification requirement did apply, these written complaints were sufficient to satisfy it.

Finally, Allred's challenges the ALJ's decision to admit the testimony of Joan Colson, the Secretary's representative, to make a sanction recommendation. Allred's contends that her testimony was entirely unsupported, undocumented, unsubstantiated, and unreliable, and that the admission of it was therefore without observance of procedure as required by law. Once again, we disagree. We note first that there is no reference to Ms. Colson's testimony in the ALJ's order, and that there is no evidence that either the ALJ or the Secretary relied on her testimony in imposing the sanction of license revocation. Additionally, we agree with the Secretary that Ms. Colson was a reliable witness with respect to the sanction recommendation, and that the sanction recommended and imposed was in accordance with the PACA. In sum, we find that the ALJ and the Secretary likely did not rely on Ms. Colson's testimony in imposing the sanction of license revocation, but even if they did, that reliance was not erroneous, because the recommendation was consistent with the PACA and the regulations.

IV.

We find that the Secretary's decision to revoke Allred's PACA license was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Therefore, the Secretary's Decision and Order is affirmed.

AFFIRMED.

TOLAR FARMS AND/OR TOLAR SALES, INC. v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 98-5456.
Filed July 30, 1999.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ON PETITION FOR REVIEW OF A FINAL DECISION OF THE UNITED STATES DEPARTMENT OF AGRICULTURE

Before TJOFLAT, DUBINA and CARNES, Circuit Judges.

BY THE COURT:

This case is **DISMISSED** for lack of jurisdiction because a petition for review was not filed in this Court within 60 days after the entry of the January 5, 1998, order. *See* Fed.R.App.P. 15(a); 28 U.S.C § 2344.

IRENE T. RUSSO d/b/a JAY BROKERS v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 99-4065.
Decided October 28, 1999.

(Cite as 199 F.3d 1323, 1999 WL 1024094 (2d Cir.))

Perishable agricultural commodities – Substantial evidence – Notification requirement – Retroactive application of statute.

The United States Court of Appeals for the Second Circuit concluded that the Judicial Officer's finding that petitioner was a joint venturer engaged in a fraudulent consignment scheme in violation of the PACA was supported by substantial evidence. The Court rejected petitioner's contention that the Secretary of Agriculture's failure to give written notice of the investigation violated 7 U.S.C. § 499f(c). The Court stated that the statutory notification requirement was not effective until after the Secretary expanded the investigation to include petitioner, and the Court found no basis for applying the statutory notification requirement retroactively. The Court rejected petitioner's contentions that the Department of Agriculture violated the Jencks Act, improper communications were made between a Department of Agriculture witness and other witnesses, and the ALJ was biased.

PRESENT: Hon. ROGER J. MINER, Hon. JOHN M. WALKER, JR., Hon. ROBERT A. KATZMANN, Circuit Judges.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the Secretary be and it hereby is AFFIRMED.

Petitioner *pro se* Irene Russo d/b/a Jay Brokers ("petitioner") petitions for review of a March 23, 1999 order of the Secretary of the Department of Agriculture (the "DOA") revoking petitioner's license under the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. §§ 499a-499s.

On appeal, petitioner raises the following arguments: (1) the Secretary's decision that petitioner committed wilful, repeated, and flagrant violations of section 2(4) of PACA was not supported by substantial evidence, (2) the Secretary's failure to give written notice of its investigation to petitioner violated section 6(c) of PACA, as amended, (3) the DOA committed violations of the Jencks Act, (4) improper communications were made between a DOA witness and other witnesses, and (5) the Administrative Law Judge (the "ALJ") was biased.

The Secretary's findings of fact must be upheld on review by this court if they are supported by substantial evidence. *See Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 91 (2d Cir. 1997). We have carefully reviewed the record and find that the Secretary's findings were amply supported by both documentary and testimonial evidence.

The basic structure of the fraudulent consignment scheme is not disputed. Joseph Russo, petitioner's husband, worked as a sales representative for Produce Distributors, Inc. ("PDI"), arranging consignment sales of produce. A28, 240, 385-86. PDI would represent to growers that a larger percentage of their produce had been dumped as spoiled or damaged than was the case, thereby under-representing the proceeds of its sale. PDI would then pocket the difference. A28, A55-56. The DOA presented evidence of 41 separate fraudulent transactions, and six "prototype" transactions were explored in detail at the hearing before the ALJ. A28-33, A57-66. PDI's financial records and canceled checks presented at the hearing showed that for each one of the fraudulent transactions, PDI would pay petitioner forty percent of its total profits, including the portion due to fraud. A112-29, 214-19. The financial records also showed that Joseph Russo's salary and PDI's expenses in listing him as an employee were deducted from the forty percent paid over to petitioner. A237-39. Petitioner actively participated in the fraudulent transactions, personally writing notes to several of the growers asking

them to accept less money for their produce than was actually collected by PDI. A142-44, 149-51, 154, 208-212. There was testimonial evidence from PDI's billing clerk, one of its salesmen and the son of its president, and PDI's certified public accountant that they believed PDI was involved in a joint venture with petitioner. A395-400, 408, 387-89. The investigator for the DOA testified that PDI kept files on each of the fraudulent transactions. The jacket of each file included the notation "J/V," which according to PDI's office manager, stood for "joint venture." Next to that notation on each file were the notations "Jay B," which stood for "Jay Brokers," and "Produce," which stood for PDI. Written next to the notation "Jay B" on each file folder was an amount equal to forty percent of the particular transaction, and an amount equal to sixty percent was written next to the notation "Produce." A137, 140-41, 228.

After reviewing the record, we find that the evidence against petitioner was not just substantial, but overwhelming. We therefore reject petitioner's first argument.

Petitioner's second argument is that the Secretary's failure to give written notification of its investigation to petitioner violated section 6(c) of PACA, 7 U.S.C. § 499f(c)(3). A notification requirement was added to the statute when PACA was amended pursuant to the Perishable Agricultural Commodities Act Amendments of 1995, effective November 15, 1995. Pub. L. No. 104-48, §§ 7(b), 109 Stat. 424, 428-29. The DOA initiated the investigation of PDI in May 1995, and expanded the investigation to include petitioner in June 1995, several months before the notification provision became effective. Given the strong presumption against the retroactive application of legislation, *see, e.g.*, *Henderson v. INS*, 157 F.3d 106, 129 (2d Cir. 1998), we see no reason to apply the amendment to section 6(c) retroactively. Statutes are not ordinarily afforded retroactive application unless "Congress has clearly manifested its intent to the contrary." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997). Therefore we find there was no violation of the notification requirement.

We have considered petitioner's other arguments and find them to be without merit.

The order of the Secretary is hereby AFFIRMED.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: H. SCHNELL & COMPANY, INC.
PACA Docket No. D-97-0024.
Decision and Order filed April 16, 1999.

Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Respondent failed to make full payment promptly to thirty-nine producer suppliers for perishable agricultural commodities. Judge Baker further found that such failure to pay constituted willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding was warranted.

Andrew Y. Stanton, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930 as amended, (7 U.S.C. § 499a et seq.), hereinafter sometimes referred to as the "PACA"; the regulations promulgated pursuant thereto, and the Rules of Practice governing formal adjudicatory administrative proceedings instituted by the Secretary (7 C.F.R. § 1.130 *et seq.*).

A Complaint was filed on May 29, 1997, alleging that the Respondent 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 during the period January 22, 1995 through April 14, 1996 and to 9 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 the course of interstate or foreign commerce during the periods September 17, 1995 through April 2, 1996.

The Complainant requested the sanction of a finding that Respondent committed willful, repeated and flagrant violations of section 2(4) of the PACA and a publication of that finding. Respondent filed an Answer, generally denying the allegations of the Complaint.

The case was assigned to me and a hearing date was scheduled for May 20, 1998. Prior thereto on March 17, 1998, the Complainant filed a Motion for a

Decision Without Hearing, to which Respondent filed no objection. Complainant requested a conference call to determine whether Respondent would be able to make full payment of its produce indebtedness and be in full compliance with the PACA by the date of the hearing, May 20, 1998. During said conference call it was revealed that as of that time the Respondent owed $1,557,776.93 to produce creditors for the transactions set forth in the Complaint and that Respondent had no expectation of making full payment by the date set for hearing in the matter.

On May 14, 1998, I issued a Decision Without Hearing and on May 14, 1998 the oral hearing scheduled to commence May 20, 1998 was cancelled. The Decision Without Hearing which I issued found that the Respondent had committed willful, flagrant or repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the findings were ordered published.

Pursuant to extension therefor the Respondent filed an appeal to the Judicial Officer: "* * * on the sole basis that the decision of Judge Baker was rendered without affording the Respondent an oral hearing at which the Complainant would be required to prove its case. Absent a hearing, the Respondent is denied due process because of the employment restrictions which would result from a finding that the Respondent had committed unlawful, flagrant and repeated violations of section 2(4) of the PACA."

By Order dated September 17, 1998, the Judicial Officer ordered: "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."

In response thereto, the Administrative Law Judge set a new hearing date for February 2, 1999, which occurred as scheduled. At that hearing, Complainant was represented by Andrew Y. Stanton, Esquire, Office of the General Counsel, Washington, D.C. and Respondent was represented by Paul T. Gentile, Esquire, Gentile and Dickler, 15 Maiden Lane, New York, New York 10038. Complainant called four witnesses and submitted evidence into the record. (EX 1-8). Respondent called no witnesses and did not submit any evidence. A transcript of the hearing was prepared. Both parties were given the opportunity to file briefs of proposed findings of fact, conclusions and an order, together with authorities in support thereof. The Complainant filed proposed corrections to the transcript and "Complainant's Proposed Findings of Fact, Conclusions and Order" on March 16, 1999.

The Respondent filed nothing, except a faxed notation to the Hearing Clerk on March 16, 1999, wherein it is set forth:

"Ms. Dawson:

Please be advised that the Respondent in the above referenced case waives presentation of a brief and reserves the right to respond to Complainant's brief.
Paul T. Gentile."

Thus, the Respondent has been given full opportunity for an oral hearing.
It is noted that the Respondent raised due process considerations by referencing the fact that employment sanctions might result from a finding that it engaged in willful, flagrant and repeated PACA violations. The question of whether certain persons were responsibly connected to Respondent was not an issue in this proceeding. Persons affiliated with Respondent whom the PACA Branch had determined to be responsibly connected to Respondent under 7 C.F.R. § 47.49 could have appealed such determinations by filing a Petition for Review, resulting in a hearing before an Administrative Law Judge (7 C.F.R. § 1.133(b)(2)). However, Petitions for Review were never filed in this matter. Thus persons affiliated with Respondent elected not to pursue the process available to them for the adjudication of their responsibly connected status.
During the hearing the Respondent indicated:

Judge Baker: * * * Do you wish to proceed with your case?

Mr. Gentile: No, your honor.

Judge Baker: Do you intend to present a case?

Mr. Gentile: No I don't. I am going to rely on the record and the deficiencies in the Complainant's case.

Judge Baker: Very well, Thank you * * *. (Tr. 106).

The reliance by the Respondent upon the deficiencies in the Complainant's case is ill advised and not sufficient to overcome the preponderance of the evidence which was adduced by the Complainant in support of its allegations. I have carefully considered Respondent's objections made at the oral hearing and have found them, in totality, to be wanting in persuasiveness. The Respondent objected to the evidence at the hearing upon various grounds such as incompetent evidence (Tr. 49); objections were made relating to hearsay (Tr. 61-63); questions were raised as to documentation relating to a lawsuit filed by the trust creditors of

Respondent (Tr. 84); objections were made to an affidavit as hearsay not subject to cross-examination (Tr. 91); and questions were raised relating to whether a reparation order was properly served. (Tr. 100).

The most weighty objection made by the Respondent with respect to the alleged deficiencies in the Complainant's case relates to counsel's statement set forth in the transcript (Tr. 66) as follows:

> Mr. Gentile: Of course I knew that was the issue, Your Honor. I think counsel again misses the point. The issue is the proof. I fully anticipated that the Complainant would come to this hearing with proof, acceptable, admissible, probative, material proof. A chart made up by an investigator based upon phone calls is not proof of payment. It is not acceptable.
>
> The hearing officer -- I mean the judicial officer, to my recollection, has never said that you can come to a hearing and present a chart through an investigator, and that suffices it to show what is unpaid at the time of the hearing. I don't believe he has ever said that. So I don't believe that is the law.
>
> That is the nature of the objection, not the other matters which counsel has alluded to. (Tr 66).

I have considered these various objections, as well as others, made by the Respondent and have found them sufficiently lacking in persuasiveness to the extent that they detract from the amount and quality of the proof adduced by the Complainant. Moreover, with respect to many of these matters, the question of whether or not these payments had been made and the extent thereof, was information available to the Respondent itself. Certainly, it was in a positon to dispute the evidence of the Complainant had Respondent believed such charts and other evidence were incorrect or were deficient. Respondent did not do so.

Accordingly, inasmuch as the Complainant's proposed findings of fact are adequately supported by the record, such findings of fact have, for the most part, been incorporated and are adopted herein.

Pertinent Statutory Provisions

1. Section 2(4) of the PACA (7 U.S.C. § 499b(4))

It shall be unlawful in or in connection with any transaction in interstate or

foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 5(c). However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act.

2. Section 8(a) of the PACA (7 U.S.C. § 499h(a))

AUTHORITY OF SECRETARY. Whenever (1) the Secretary determines, as provided in section 6, that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act, 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.

Findings of Fact

1. Respondent, H. Schnell & Company, Inc., is a corporation organized and existing under the laws of the State of New York. At the time of the transactions set forth in the Complaint, Respondent's business mailing address was 243 B NYC Terminal Market, Bronx, New York 10474. (CX 1). Respondent went out of business on March 18, 1996. (Tr. 97, 113).

2. Pursuant to the licensing provisions of the PACA, license number 680815 was issued to Respondent on November 2, 1967. This license automatically terminated on November 2, 1996, due to Respondent's failure to pay the required annual license renewal fee. (CX 1).

3. Complainant initiated an investigation of Respondent in May, 1996, based on numerous complaints received by Complainant's New Brunswick, New Jersey office indicating that Respondent had failed to pay for produce. (Tr. 16,19).

4. Gary Nefferdorf, a marketing specialist employed by Complainant's New Brunswick, New Jersey office, was assigned to conduct the investigation of Respondent. (Tr. 17). Mr. Nefferdorf carried out his investigation at Respondent's place of business from May 6, 1996 (Tr. 19), through approximately May 15, 1996. (Tr. 51). When Mr. Nefferdorf arrived at Respondent's place of business, the only person of authority present was Margaret Senzer, who identified herself as Respondent's office manager. (Tr. 19).

5. Mr. Nefferdorf served upon Ms. Senzer an April 30, 1996, letter from the Chief of the PACA Branch, stating that Mr. Nefferdorf was conducting an investigation of Respondent pursuant to allegations that Respondent had violated the prompt payment requirements of the PACA (CX 1a; Tr. 18-19).

6. Ms. Senzer provided Mr. Nefferdorf with an accounts' payable computer printout indicating Respondent's unpaid produce transactions. (CX 2; Tr. 19-21). From the information contained in this printout, Mr. Nefferdorf was able to obtain Respondent's file jackets containing records showing what Respondent owed to produce suppliers. (CX 4a-4ll, 6a-6h; Tr. 21).

7. Some of Respondent's records indicated that payment had been made on certain transactions through the issuance of checks. (Tr. 38). However, according to Ms. Senzer, many of the checks referred to in Respondent's records were never issued. (Tr. 38-39).

8. According to Respondent's records, as of May, 1996, Respondent had failed to make prompt payment and owed $2,435,869.17 to 39 sellers for purchases of 317 lots of perishable agricultural commodities in the course of interstate or foreign commerce during the period January 22, 1995, through April 14, 1996, and owed $1,103,343.19 to nine consignors consisting of net proceeds resulting from the sale of 41 lots of perishable agricultural commodities which Respondent received and accepted on consignment in the course of interstate or foreign commerce during the period September 17, 1995 through April 2, 1996. (CX 3, 5).

9. Mr. Nefferdorf informed Ms. Senzer and Respondent's attorney, Mr. Gentile, that he had determined that approximately $3,000,000.00 was past due and unpaid. (Tr. 50-52). Neither Ms. Senzer nor Mr. Gentile disputed Mr.

Nefferdorf's findings. (Tr. 50, 52).

10. After leaving Respondent's place of business, Mr. Nefferdorf contacted certain produce suppliers to obtain sworn statements regarding the interstate nature of their transactions with Respondent. (Tr. 53-54).

11. In May, 1998 and January, 1999, Mr. Nefferdorf conducted follow-up investigations to determine if Respondent's produce suppliers had received any payment of the amounts owed by Respondent. (Tr. 55). The investigations were done in preparation for the hearing that was scheduled for May 20, 1998, but postponed (Tr. 55), and the hearing that took place on February 2, 1999. (Tr. 55). Mr. Nefferdorf contacted the suppliers by telephone. (Tr. 55). During Mr. Nefferdorf's January, 1999 investigation, he was able to contact some of Respondent's unpaid produce suppliers (Tr. 56-57), and was informed that Respondent still owed $550,085.17 based on the transactions in the Complaint. (Tr. 58). Mr. Nefferdorf prepared a table setting forth the results of his January, 1999 telephone conversations with Respondent's produce suppliers. (CX 7).

12. At the time of the oral hearing, the evidence shows that Respondent owed at least $550,085.17 to produce suppliers. Had this not been so, Respondent could have shown otherwise. It did not do so.

Discussions and Conclusions

At the February 2, 1999, hearing in this matter, Complainant presented extensive evidence supporting the allegations in its Complaint that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA by failing to make full payment promptly to numerous sellers and consignors of perishable agricultural commodities.

Complainant'sinvestigator, Gary Nefferdorf, testified that he obtained evidence from Respondent's own records showing that Respondent had 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 during the period of January 22, 1995 through April 14, 1996, and 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 the course of interstate or foreign commerce during the period September 17, 1995 through April 2, 1996. Mr. Nefferdorf also testified that he conducted a follow-up investigation in January, 1999, immediately before the February 2, 1999, hearing, which determined that Respondent still owed at least $550,085.17 for the transactions in the Complaint.

Complainant also introduced testimony from witnesses, representing produce suppliers set forth in the Complaint, who testified about Respondent's failure to pay promptly and its harmful effect on their businesses. John Mangia, president of Bacchus Associates, Monmouth, New Jersey, stated that Respondent originally owed about $59,000.00 but eventually paid $8,000.00, leaving $51,000.00 currently owing. (Tr. 86). Mr. Mangia testified that Respondent's payment practices harmed his business. (Tr. 86). "You have to do at least $700-800,000.00 worth of business in order to recoup that kind of money. We work on an 8 percent commission." Alan Elkin, owner of Alanco Corp., Bronx, New York, testified that Respondent originally owed approximately $199,000.00 for produce purchases made in February and March, 1996. Mr. Elkin stated that Respondent paid $83,000.00 in July, 1996 (Tr. 113) and $86,000.00 in January, 1997 (Tr. 114), but never paid $30,625.20. (Tr. 115). Mr. Elkin testified that Respondent's late payment and failure to make payment helped put his company, out of business (Tr. 115-116). Annabel D. Arena, a director of Frank Donio, Inc., submitted an affidavit (CX 8) in which she stated that Respondent originally owed $51,300.00, made some payments and currently owes $39,400.00. Ms. Arena stated that Respondent damaged her firm in a number of ways: "It decreased our company's profits, effected [sic] our cash flow, and made it harder to maintain our pay schedule. Our vendors are paid from 7 to 21 days. No later than 21 days."

Respondent elected not to call any witnesses or submit any evidence or to submit post- hearing briefs. The only documents introduced into the record by Respondent are its Answer, which consists of a general denial, and an appeal to the Judicial Officer, claiming that the May 14, 1998, Decision Without Hearing denied Respondent due process.

Respondent's failures to make full payment promptly for produce constitute willful, flagrant and repeated violations of the PACA. *In re: Caito Produce Co.*, 48 Agric. Dec. 602 (1989). Although Respondent has offered no excuse for its failure to make full payment promptly, even if it had, no excuse would be acceptable. As stated by the Judicial Officer in *In re: Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996):

> 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 engage 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.

The appropriate sanction is a finding of the commission of willful, flagrant and repeated violations of section 2(4) of the PACA, and the publication thereof.

At the hearing, Complainant presented a witness, Basil W. Coale, Jr., senior marketing specialist with the PACA Branch, who gave testimony concerning Complainant's recommended sanction. Mr. Coale pointed out the severe harm that payment violations such as those committed by Respondent do to the perishable agricultural industry. (Tr. 77-78). Mr. Coale testified that, since Respondent does not currently have a PACA license, as it terminated in 1996, Complainant recommends the sanction of a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding. (Tr. 79). Mr. Coale stated that Complainant does not recommend a civil penalty in lieu of a finding of the commission of willful, flagrant and repeated violations, as, pursuant to the Judicial Officer's *Scamcorp* decision,[1] a civil penalty is not appropriate as long as a Respondent has not made full payment of its produce obligations and/or is not in compliance with the PACA as of the date of the hearing. (Tr. 79-80).

It is the policy of the Judicial Officer, first adopted in *In re: Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118 (1984), that a license revocation is the only possible sanction when a PACA licensee has failed to make payment in accordance with the PACA and owes more than a *de minimis* amount to produce sellers by the date of the hearing or, if no hearing is held, by the time the Answer was due. If a Respondent has made full payment and is in full compliance with the PACA by the date of the hearing (or the time the Answer is due if no hearing is held), a license suspension is ordered. Since the 1995 amendments to the PACA, a civil penalty may be ordered in lieu of a suspension or revocation (7 U.S.C. § 499h(e)) if the Respondent's financial condition is sufficiently strong (*Scamcorp, Inc., supra,* at 569 n. 20), although a civil penalty is not appropriate as long as a Respondent has not made full payment of its produce obligations and/or is not in compliance with the PACA as of the date of the hearing. This principle has recently been affirmed in two decisions of the U.S. Court of Appeals for the

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[1] *In re: Scamcorp, Inc., d/b/a Goodness Greeness,* 57 Agric. Dec. 527 (1998), where the Judicial Officer stated that, with regard to complaints alleging the failure to make full payment promptly under the PACA that are filed subsequent to the date of issuance of *Scamcorp,* if the respondent is not in full compliance with the PACA within 120 days after the complaint is served upon the respondent or the date of the hearing, whichever occurs first, the case will be treated as a "no pay" case, and revocation will be the appropriate sanction. *Id.* at 548-549, 562 n. 3. The complaint in this case was filed prior to the issuance of *Scamcorp.* The Judicial Officer further stated that a civil penalty is not an appropriate sanction in a "no pay" case. *Id.* at 570-571.

Second Circuit; *Havana Potatoes of New York Corporation and Havpo, Inc. v. United States,* 136 F.3d 89 (2d Cir. 1997) and *Kanowitz Fruit and Produce Co., Inc. v. United States of America,* No. 97-4224, U.S. App. Lexis 28025 (2d Cir. October 29, 1998.

As Respondent's PACA license has terminated, a finding of willful, flagrant and repeated violations of section 2(4) of the PACA and publication thereof is appropriate, rather than a license revocation.

In view of Respondent's failure to make full payment promptly of the amounts alleged in the Complaint and its failure to show compliance with the payment requirements of the PACA by the date of the hearing, the issuance of an order finding that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding are warranted.

Order

Respondent herein, H. Schnell & Company, Inc., is hereby found to have committed willful, flagrant and repeated violations of section 2(4) of the PACA.

This finding is ordered published.

This order shall become effective without further proceedings thirty-five (35) days after the service thereof upon the Respondent unless there is an appeal to the Judicial Officer within thirty (30) days after receiving service. (7 C.F.R. § 1.131, § 1.142, § 1.145, *et seq.*)

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 26, 1999.-Editor]

In re: KIRBY PRODUCE COMPANY, INC.
PACA Docket No. D-98-0002.
Decision and Order filed July 12, 1999.

Default — Admissions — Official notice — Failure to pay — Willful, flagrant, and repeated violations — License revocation.

The Judicial Officer affirmed Judge Hunt's (ALJ) Decision Without Hearing by Reason of Admissions in which the ALJ found that Respondent committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities and revoked Respondent's PACA license. The Judicial Officer held that the new "slow-pay/no-pay" policy articulated in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), applies to PACA disciplinary cases instituted after January 25, 1999, the date *In re Scamcorp, Inc., supra,* was published in *Agriculture Decisions*; therefore, the new policy was not applicable to the proceeding and if

Respondent paid all of its produce sellers by the date of the hearing, the case would be a "slow-pay" case. However, the Judicial Officer held that Respondent was not entitled to a hearing because Respondent's agreement to documents issued in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996), constituted an admission of the material allegations in the Complaint. Further, Respondent's request for a continuance of the hearing to enable Respondent to make full payment to its perishable agricultural commodities sellers before the hearing constitutes an admission that Respondent would not be able to make full payment in accordance with the PACA by the date of the hearing. The Judicial Officer stated that documents filed in United States courts that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings and held that the ALJ properly took official notice of documents issued in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996), in accord with the Administrative Procedure Act (5 U.S.C. § 556(e)) and the Rules of Practice (7 C.F.R. § 1.141(h)(6)). The Rules of Practice (7 C.F.R. § 1.145(i)) require the Judicial Officer to rule on appeals, upon the basis of, and after due consideration of, the record and any matter of which official notice is taken. The Judicial Officer stated that 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. The Judicial Officer also held that application of the default provisions of the Rules of Practice did not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the United States Constitution.

Jane McCavitt, for Complainant.
Paul T. Gentile, New York, New York, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, 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-.49) [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 20, 1997.

The Complaint alleges that: (1) during the period August 1995 through July 1996, Kirby Produce Company, Inc. [hereinafter Respondent], failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of perishable agricultural commodities in the total amount of $1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent, represented by Lynn Tarpy, Hagood, Tarpy & Cox, Knoxville, Tennessee, filed an Answer on November 12, 1997, in which Respondent generally denied the material allegations of the Complaint. However, Respondent's Answer contains a provision which appears to contradict the general denial and indicates that Respondent has not paid the 20 perishable agricultural commodities sellers identified in paragraph III of the Complaint, but rather made arrangements to pay the sellers, as follows:

> 3. The allegations of Paragraph III are denied. The Respondent would state that it has made arrangements to pay all twenty (20) sellers in full through a repayment plan approved by the United States District Court for the Eastern District of Tennessee Northern Division, Docket No.: 3:96-CV-526. The United States District Court has not only approved the repayment plan but has directed that particular payments be made. Said Court Orders supersede the action by the Secretary. Any enforcement action by the secretary which interferes with the Orders of the Court will be invalid and of no effect. The Secretary has previously received a copy of the original Order setting out the Plan.

Answer ¶ 3.

On December 4, 1997, Paul T. Gentile, Gentile & Dickler, New York, New York, filed an appearance on behalf of Respondent in substitution for Ms. Tarpy, and Respondent filed an Amended Answer denying the material allegations of the Complaint and deleting those provisions of the Answer that appear to contradict Respondent's denial of the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the ALJ] scheduled a hearing to commence in Knoxville, Tennessee, on January 13, 1999 (Summary of Telephone Conference; Notice of Hearing). On November 12, 1998, Respondent filed a motion to continue the hearing until Respondent has made full payment to all perishable agricultural commodities sellers, pursuant to an Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996) (Letter dated November 10, 1998, from Paul T. Gentile to the ALJ). On November 16, 1998, the ALJ denied Respondent's motion to continue the hearing (Order Denying Motion to Continue Hearing).

On December 4, 1998, Complainant filed Request for Official Notice requesting that the ALJ take official notice of the Order, the list of Respondent's creditors, and a Marketing Agreement issued in *Brown's Produce v. Kirby Produce Co., supra*; Motion for Decision Without Hearing by Reason of Admissions

[hereinafter Motion for Default Decision]; and a proposed Decision Without Hearing by Reason of Admissions [hereinafter Proposed Default Decision]. Complainant contends in Complainant's Motion for Default Decision that Respondent and its creditors consented to the Order issued in *Brown's Produce v. Kirby Produce Co., supra*, and that Respondent's agreement to the issuance of the Order and the attached list of creditors constitutes an admission of the material allegations of the Complaint (Motion for Default Decision at 2-3).

On December 29, 1998, Respondent filed Objection and Opposition to Motion for Decision Without Hearing by Reason of Admission stating that Complainant cannot use the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co., supra*, as an admission to the Complaint and that Respondent is entitled to a hearing.

On December 31, 1998, the ALJ issued Order Canceling Hearing and Decision Without Hearing by Reason of Admissions [hereinafter Initial Decision and Order], pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), in which the ALJ: (1) found that Respondent and its creditors consented to the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co., supra*; (2) found that Respondent's agreement to the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co., supra*, and attachments to the Order constitutes an admission of the material allegations of the Complaint; (3) found that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate and foreign commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,602,736.15; (4) concluded that Respondent's failures to make full payment promptly to the 19 perishable agricultural commodities sellers constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) revoked Respondent's PACA license (Initial Decision and Order at 2-4).

On March 3, 1999, Respondent filed Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Admissions; on March 24, 1999, Complainant filed Response to Respondent's Motion for Reconsideration; on April 1, 1999, Respondent filed Motion to Permit Reply to Complainant's Response to Respondent's Motion for Reconsideration and The Reply to Complainant's Response; and on April 7, 1999, the ALJ filed Order Denying Motion for Reconsideration.

On May 28, 1999, Respondent appealed to the Judicial Officer; on June 17, 1999, Complainant filed Complainant's Response to Respondent's Appeal Petition; and on June 18, 1999, the Hearing Clerk transmitted the record of the proceeding

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)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusion of law, as restated.

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

. . . .

§ 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

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted[.]

7 C.F.R. § 46.2(aa)(5).

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

Findings of Fact

1. The mailing address of Respondent, Kirby Produce, Company, Inc., is P.O. Box 6808, Knoxville, Tennessee 37914-0808. Respondent's business address is 2124 Forest Avenue, Knoxville, Tennessee 37916.

2. Pursuant to the licensing provisions of the PACA, Respondent was issued license number 931573 on August 3, 1993. Respondent renewed its license annually, and Respondent is next subject to renewal on or before August 3, 1999.

3. As more fully set forth in paragraph III of the Complaint, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,602,736.15.[1] As of December 2, 1998, $1,215,723.99 remained past due and unpaid, with $387,012.16

[1]The Complaint alleges that, during the period August 1995 through July 1996, Respondent failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of fruits and vegetables in the total amount of $1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III). Complainant withdrew the allegation in paragraph III of the Complaint that Respondent failed to make payment, totaling $7,123.30, to Douberly Farms, Newberry, Florida, for two lots of watermelons, in violation of the PACA (Motion for Default Decision at 3).

paid late.[2]

Conclusion of Law

Respondent's failures to make full payment promptly with respect to the 204 transactions referenced in Finding of Fact No. 3, *supra*, constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in its Appeal Petition. First, Respondent contends that full payment of Respondent's perishable agricultural commodities sellers by the date of the hearing would render this case a "slow-pay" case (Appeal Pet. at 3).

I agree with Respondent's contention that if Respondent paid all of its produce sellers by the date of the hearing, this case would be a "slow-pay" case.

PACA requires *full payment promptly*, and commission merchants, dealers, and brokers are required to be in compliance with the payment provisions of the PACA at all times. The Judicial Officer's former policy, which was adopted in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), and is applicable to this proceeding, had been to revoke the license of any PACA licensee who failed to pay in accordance with the PACA and owed more than a *de minimis* amount to produce sellers by the date of the hearing or, if no hearing was held, by the time the answer was due. Cases in which a respondent had failed to pay by the date of the hearing were referred to as "no-pay" cases. License revocation could be avoided and the suspension of a license of a PACA licensee who failed to pay in accordance with the PACA would be ordered if a PACA violator made full payment by the date of the hearing (or, if no hearing was held, by the time the answer was due) and was in full compliance with the PACA by the date of the hearing. Cases in which a respondent had paid and was in full compliance with the PACA by the time of the hearing were referred to as "slow-pay" cases. The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), by requiring that a respondent's present compliance not involve credit agreements for more than 30 days.

In *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), I changed the Judicial

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[2]December 3, 1998, Declaration of John W. Wood, Senior Marketing Specialist, PACA Branch, Agricultural Marketing Service, United States Department of Agriculture.

Officer's "slow-pay"/"no-pay" policy.[3] However, the new policy applies to PACA disciplinary cases instituted after January 25, 1999, the date *In re Scamcorp, Inc., supra*, was published in *Agriculture Decisions*, or after personal notice of *In re Scamcorp, Inc., supra*, served on a respondent, whichever occurs first. The instant proceeding was instituted before January 25, 1999, and Complainant does not allege that Respondent was given personal notice of *In re Scamcorp, Inc., supra.*

Second, Respondent contends that it is entitled to a hearing to prove that prior to the hearing, it has paid its perishable agricultural commodities sellers.

I disagree with Respondent's contention that it is entitled to a hearing, and I find no basis for setting aside the ALJ's Initial Decision and Order and remanding the case to the ALJ for a hearing.

Respondent denied the material allegations of the Complaint in its Amended Complaint, and the ALJ scheduled a hearing to commence on January 13, 1999 (Summary of Telephone Conference; Notice of Hearing). However, on November 12, 1998, Respondent moved to continue the hearing until such time as Respondent has made full payment to its perishable agricultural commodities sellers, as follows:

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[3]The new "slow-pay/"no-pay" policy is as follows: In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "slow-pay" case. In any "slow-pay" case in which the PACA licensee is shown to have violated the payment provisions of the PACA, a civil penalty will be assessed against the PACA licensee or the license of the PACA licensee will be suspended.

Full compliance requires not only that a respondent have paid all produce sellers in accordance with the PACA, but also, in accordance with *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), that a respondent have no credit agreements with produce sellers for more than 30 days.

Administrative Law Judge James W. Hunt
U.S. Department of Agriculture
Office of Administrative Law Judge
14th & Independence Avenue, S.W.
Room 1081 - South Building
Washington, D.C. 20250-9200

Re: In re: Kirby Produce Company, Inc.
PACA Docket No. D-98-0002

Dear Judge Hunt:

In March, 1996 certain produce creditors of the above referenced Respondent, Kirby Produce Company, Inc. ("Kirby") commenced action against Kirby in the United States District Court for the Eastern District of Tennessee entitled Brown's Produce, et al. v. Kirby Produce Company, et al. under case number 3:96 CV526. The action was brought by the plaintiffs in order to seek redress under Section 5(c) of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499(e)(c) [sic] for unpaid produce transactions.

After due deliberation, and the consent of all PACA trust creditors and the Respondent, U.S. District Court Judge Leon Jordan issued an order which provided for the orderly liquidation of the Respondent's assets and the eventual payment of all trust creditors. (See attached order dated June 25, 1996.) Thereafter the Respondent has been in compliance with Judge Jordan's order and has made periodic payments.

On September 8, 1998 you issued an order directing that a hearing be held on January 13, 1999 in Knoxville, Tennessee. The purpose of this letter is to make motion for an adjournment of the hearing until that time when the Respondent has made full payment to all trust creditors pursuant to Judge Jordan's order. As you are aware, the payment of all produce debt prior to the hearing substantially reduces the potential sanction which may be imposed upon the Respondent. Failure to grant this motion for adjournment will frustrate the order of Judge Jordan and prejudice Respondent's position at the time of the hearing.

Thank you for your consideration of this motion for adjournment.

Very truly yours,
/s/
Paul T. Gentile

Letter dated November 10, 1998, from Paul T. Gentile to the ALJ.

Respondent attached a copy of the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co., supra*, to its motion to continue the scheduled hearing.

United States District Court Judge Leon Jordan's Order states, as follows:

> Upon agreement of the parties, representations of counsel, and for good cause shown, the Court finds:
>
> 1. The Plaintiffs and all other similarly situated creditors are or may be produce creditors of the Defendants under Section 5(c) of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499e(c), and have not been paid for produce in the amounts to be determined under the claims procedures set forth herein.
>
> 2. The Defendants, Randy W. Kirby and Clifton S. Kirby are the officers and directors of Kirby who directed its day to day operations. Kirby Produce Company is and remains a corporation incorporated under the laws of the State of Tennessee whose Charter has not been dissolved or revoked, either voluntarily or by administrative action.
>
> 3. All the parties recognize and agree that Kirby and the Defendants do not have enough produce related assets on which to impose a statutory trust to guarantee immediate and full payment to all PACA creditors. The Defendants, corporately and individually, do not have enough assets to pay all the Defendants [sic] in full. There is approximately $2,300,000.00 owed to PACA and non-PACA creditors of Kirby. In order to insure that those produce related assets upon which a statutorily imposed trust exists are used only to pay those creditors under 7 U.S.C. § 499e(c), a claims procedure is to be set up to insure that payment. Said claims procedure will be incorporated into this Order.

4. It is in the best interest of the Perishable Agricultural Commodities Act, Plaintiffs, all PACA creditors, and all other creditors of the Defendants that this Agreement be entered into.

Therefore, it is ORDERED, ADJUDGED AND DECREED that:

1. Judgment shall be entered against the Defendants for the benefit of and on behalf of each and every creditor of the Defendant [sic] in the amount to be determined through the claims procedure set forth below.

. . . .

8. A list of all creditors, both PACA and non-PACA, of the Defendants are [sic] attached hereto as Exhibit B. Included with the name of the Creditor is the Creditor's address and the amount which the Defendant's records show is owed to that Creditor as of May 29, 1996.

9. Unless the claims procedure shows otherwise, all Creditors for purposes of distributions under the 2nd, 3rd and 4th funds shall be presumed to be entitled to the amounts shown on Exhibit B for their payment.

The ALJ took official notice of the Order and the list of Respondent's creditors attached to the Order and found that Respondent's agreement to the Order and the list of Respondent's creditors attached to the Order constitutes an admission of the material allegations of the Complaint (Initial Decision and Order at 2).[4]

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[4]The list of Respondent's creditors attached to United States District Court Judge Leon Jordan's Order lists 19 of the 20 perishable agricultural commodities sellers identified in paragraph III of the Complaint and indicates that Respondent owes those 19 perishable agricultural commodities sellers amounts that are similar to or identical to the amounts that are alleged in paragraph III of the Complaint as past due, as follows:

Seller	Complaint	Order
Apio Produce Sales	$ 800.00	$ 800.00
Watten Distributing Co.	882.00	882.00

(continued...)

Official notice is authorized by the Administrative Procedure Act and the Rules of Practice. The Administrative Procedure Act provides, as follows:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (e) . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show to the contrary.

5 U.S.C. § 556(e).

Sections 1.141(h)(6) and 1.145(i) of the Rules of Practice provide, as follows:

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[4](...continued)

Rawls Brokerage	1,795.00	2,145.00
Gordon Tantum, Inc.	303,243.75	306,261.60
Fagerberg Produce Co., Inc.	2,043.75	2,043.75
Appalachian Apple, Inc.	82,595.50	82,595.50
Stanley Orchard Sales, Inc.	14,223.00	6,510.50
Juniper Tomato Growers, Inc.	33,504.25	24,504.25
Langlade Potato Dist., Inc.	21,072.50	21,072.50
Apple Action Fruit Sales, Inc.	618,499.50	642,301.75
Castellini Company	4,053.00	4,053.00
Belle Harvest Sales, Inc.	22,763.70	22,763.70
Sound Commodities, Inc.	57,000.10	57,000.10
Pride Packing Company	1,176.00	1,470.00
Northern Fruit Company, Inc.	839.00	839.00
Weis-Buy Services, Inc.	266,039.45	261,113.45
Basin Produce Corp.	57,766.00	57,766.00
M & E Produce Co., Inc.	112,678.85	112,678.85
C.H. Robinson Co.	1,760.80	1,760.80
	$1,602,736.15	$1,608,561.75

The only perishable agricultural commodities seller that is listed in paragraph III of the Complaint and is not on the list of Respondent's creditors in Exhibit B attached to the Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co., supra*, is Douberly Farms. Complainant withdrew the allegation in paragraph III of the Complaint that Respondent failed to make payment, totaling $7,123.30, to Douberly Farms, Newberry, Florida, for two lots of watermelons, in violation of the PACA (Motion for Default Decision at 3).

§ 1.141 Procedure for hearing.

. . . .

(h) *Evidence*. . . .

. . . .

(6) *Official notice.* Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

. . . .

§ 1.145 Appeal to Judicial Officer.

. . . .

(i) *Decision of the judicial officer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal.

7 C.F.R. §§ 1.141(h)(6), .145(i).

Federal courts may take judicial notice of proceedings in other courts if those proceedings have a direct relation to matters at issue.[5] Therefore, under section

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[5]*Conforti v. United States*, 74 F.3d 838, 840 (8th Cir.), *cert. denied*, 519 U.S. 807 (1996); *Duckett v. Godinez*, 67 F.3d 734, 741 (9th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); *United States v. Hope*, 906 F.2d 254, 260-61 n.1 (7th Cir. 1990), *cert. denied*, 499 U.S. 983 (1991); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987); *E.I. du Pont de Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986); *Coney v. Smith*, 738 F.2d 1199, 1200 (11th Cir. 1984) (per curiam); *Hart v. Commissioner*, 730 (continued...)

1.141(h)(6) of the Rules of Practice (7 C.F.R. § 1.141(h)(6)) an administrative law judge presiding over a PACA disciplinary proceeding may take official notice of proceedings in a United States district court that have a direct relation to the PACA disciplinary proceeding. Moreover, under section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)) the Judicial Officer shall rule on any appeal on the basis of, and after due consideration of, any matter of which official notice is taken, as well as the record of the proceeding. Documents filed in United States court proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings.[6]

On rare occasions default decisions have been set aside for good cause shown or where the complainant did not object.[7] However, a decision without hearing,

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[5](...continued)
F.2d 1206, 1207-08 n.4 (8th Cir. 1984) (per curiam); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983); *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir.), *cert. denied*, 449 U.S. 996 (1980); *St. Louis Baptist Temple v. Federal Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979); *Granader v. Public Bank*, 417 F.2d 75, 82-83 (6th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 48 n.20 (3d Cir. 1947).

[6]*In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 893 (1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609 (1993); *In re Allsweet Produce Co.*, 51 Agric. Dec. 1455, 1457 n.1 (1992); *In re Magnolia Fruit & Produce Co.*, 49 Agric. Dec. 1156, 1158 (1990), *aff'd*, 930 F.2d 916 (5th Cir. 1991) (Table), *printed in* 50 Agric. Dec. 854 (1991); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 627 (1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 612, 615 (1987); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 175-76 (1987); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 731 (1986); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1587 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987), *remanded*, 47 Agric. Dec. 1486 (1988), *final decision*, 48 Agric. Dec. 595 (1989).

[7]*See In re H. Schnell & Co.*, 57 Agric. Dec. ___ (Sept. 17, 1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the United States Constitution); *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) (Remand Order) (setting aside the default decision because service of the complaint (continued...)

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,[8] and Respondent has shown no basis for setting aside the Initial Decision and Order.

Respondent's agreement with the Order and list of creditors issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co., supra*, constitutes an admission that Respondent owes $1,608,561.75 to the 19 perishableagriculturalcommodities sellers which Complainant alleges Respondent has failed to pay promptly and in full.[9] Further, on November 12, 1998, Respondent filed a motion to continue the hearing scheduled to commence on January 13, 1999, to enable Respondent to make full payment to its perishable agricultural commodities sellers prior to the hearing and convert the case from a "no-pay" to a "slow-pay" case (Letter dated November 10, 1998, from Paul T. Gentile to the ALJ). Respondent's request for a continuance of the hearing to

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[7](...continued)
by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

[8]*See, e.g., In re Tolar Farms*, 56 Agric. Dec. 1865, 1877-78 (1997) (stating that in view of the respondents' answer and the respondents' promissory notes evidencing failure to make prompt payment, there is no material issue of fact that warrants holding a hearing), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997) (stating that in view of the 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 the respondent's bankruptcy documents, shows that the respondent has failed to make full payment exceeding a *de minimis* amount), *appeal dismissed*, No. 95-70906 (9th Cir. Nov. 8, 1996); *In re National Produce Co., Inc.*, 53 Agric. Dec. 1622, 1626 (1994) (stating that the administrative law judge correctly held that a hearing was not required where the record, including the respondent's bankruptcy documents, shows that the respondent failed to make full payment exceeding a *de minimis* amount).

[9]See note 1.

enable Respondent to make full payment to its perishable agricultural commodities sellers before the hearing constitutes an admission that Respondent would not be able to make full payment in accordance with the PACA by January 13, 1999, the date of the hearing.

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.[10] In view of Respondent's agreement to the Order and the attached list of creditors issued in *Brown's Produce v. Kirby Produce Co., supra*, there is no material issue of fact that warrants holding a hearing. Moreover, it is not necessary to show that the undisputed facts prove all the allegations in the Complaint.[11] The same order would be issued in this case unless the proven violations are *de minimis*.[12]

Respondent failed to make full payment of the agreed purchase prices promptly to 19 sellers for 204 lots of perishable agricultural commodities in the total amount

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[10]*H. Schnell & Company, Inc.*, 57 Agric. Dec. ___, slip op. at 8 (Sept. 17, 1998) (Remand Order).

[11]The Complaint alleges that Respondent failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of perishable agricultural commodities in the total amount of $1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III). Complainant withdrew the allegation in paragraph III of the Complaint that Respondent failed to make payment to Douberly Farms and now alleges that Respondent failed to make full payment to 19 perishable agricultural commodities sellers (Motion for Default Decision at 3). Respondent's agreement to the Order and the list of creditors issued in *Brown's Produce v. Kirby Produce Co., supra*, constitutes an admission that it owes these same 19 sellers $1,608,561.75. Respondent admits in the Order and the list of creditors attached to the Order that it owes the same amount as alleged in paragraph III of the Complaint to 12 of these sellers: Apio Produce Sales; Watten Distributing Company; Fagerberg Produce Company, Inc.; Appalachian Apple, Inc.; Langlade Potato Dist., Inc.; Castellini Company; Belle Harvest Sales, Inc.; Sound Commodities, Inc.; Northern Fruit Company, Inc.; Basin Produce Corp.; M & E Produce Co., Inc.; and C.H. Robinson Co. Respondent admits in the Order and the list of creditors issued in *Brown's Produce v. Kirby Produce Co., supra*, that it owes more than the amounts alleged in paragraph III of the Complaint to 4 of these sellers: Rawls Brokerage; Gordon Tantum, Inc.; Apple Action Fruit Sales, Inc.; and Pride Packing Company. Respondent admits in the Order and the list of creditors issued in *Brown's Produce v. Kirby Produce Co., supra*, that it owes $7,712.50 less than the amount alleged in paragraph III of the Complaint ($14,223) to Stanley Orchard Sales, Inc.; it owes $9,000 less than the amount alleged in paragraph III of the Complaint ($33,504.25) to Juniper Tomato Growers, Inc.; and it owes $4,926 less than the amount alleged in paragraph III of the Complaint ($266,039.45) to Weis-Buy Services, Inc.

[12]*In re Tolar Farms*, 56 Agric. Dec. 1865, 1878 (1997), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894-95 (1997); *In re Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81 (1984) (Ruling on Certified Question); *In re Fava & Co.*, 46 Agric. Dec. 79 (1984) (Ruling on Certified Question).

of $1,602,736.15, which Respondent had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period August 1995 through April 1996, a period of 9 months.

Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.[13]

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[13]*See, e.g., Allred's Produce v. United States Dep't of Agric.*, ___ F.3d ___ (5th Cir. July 1, 1999) (stating that violations are repeated under the PACA if they are not done simultaneously and whether violations are flagrant under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred; holding that 86 violations over nearly 3 years for an amount totaling over $300,000 were willful and flagrant); *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of *repeated*); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over $135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981) (describing 20 violations of the payment provisions of the PACA as flagrant); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving $19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than $250,000), *cert. denied*, 389 U.S. 835 (1967); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (concluding that the respondent's failure to pay 19 sellers $713,638.10 for 578 lots of perishable agricultural commodities, during the period of May 1995 through November 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998) (concluding that the respondent's failure to pay 35 sellers $634,791.13 for 165 transactions involving perishable agricultural commodities, during the period of April 1993 through June 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997) (holding that the respondents' failure to pay 7 sellers $192,089.03 for 46 lots of perishable agricultural commodities, during the period of July 1995 through September 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917 (1997) (concluding that the respondent's failure to pay 18 sellers $206,850.69 for 62 lots of perishable agricultural commodities, during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 1575 (1999); *In re Five Star Food*

(continued...)

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.[14] Willfulness is reflected by

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[13](...continued)
Distributors, Inc., 56 Agric. Dec. 880 (1997) (concluding that the respondent's failure to pay 14 sellers $238,374.08 for 174 lots of perishable agricultural commodities, during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers $1,960,958.74 for 345 lots of perishable agricultural commodities, during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers $101,577.50 for 23 lots of perishable agricultural commodities, during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) (concluding that respondent Andershock's Fruitland, Inc.'s failure to pay 11 sellers $245,873.41 for 113 lots of perishable agricultural commodities, during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re James Metcalf*, 1 Agric. Dec. 716 (1942) (holding that the failure to pay for 134 crates of berries and purporting to pay for the berries with bad checks constitutes a flagrant violation of section 2 of the PACA); *In re Harry T. Silverfarb*, 1 Agric. Dec. 637 (1942) (concluding that the respondent's failure to pay for 3 shipments of perishable agricultural commodities constitutes flagrant and repeated violations of section 2 of the PACA); *In re Sol Junsberg*, 1 Agric. Dec. 540 (1942) (concluding that the respondent's failure to pay for 3 carloads of apples and one carload of potatoes constitutes repeated violations of the PACA).

[14]*See, e.g., Allred's Produce v. United States Dep't of Agric.*, ___ F.3d ___ (5th Cir. July 1, 1999); *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 Sunland Packing House Co.*, 58 Agric. Dec. ___, slip op. at 70 (Feb. 17, 1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 33 (Sept. 30, 1998); *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), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 1575 (1999); *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's 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, (continued...)

Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.[15] Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of $1,602,736.15 for 204 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period August 1995 through April 1996.

Respondent knew, or should have known, that it could not make prompt

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[14](...continued)
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.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

[15]*See Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 94 (2d Cir. 1997); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827-28 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1906-07 (1997), *aff'd*, ___ F.3d ___ (5th Cir. July 1, 1999); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879-80 (1997), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53 (1989).

payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued, over a 9-month period, to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not have sufficient capitalization; and consequently, could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful.[16]

Accordingly, the Initial Decision and Order was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the United States Constitution.[17]

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[16]*See In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 829 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1907 (1997), *aff'd*, ___ F.3d ___ (5th Cir. July 1, 1999); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1880-81 (1997), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

[17]*See 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*, 519 U.S. 913 (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

(continued...)

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

Order

Respondent's PACA license is revoked, effective 65 days after service of this Order on Respondent.

In re: KIRBY PRODUCE COMPANY, INC.
PACA Docket No. D-98-0002.
Order Denying Petition for Reconsideration filed October 4, 1999.

Petition for reconsideration — Admissions — Default — Failure to pay by date of hearing.

The Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer found that Respondent's November 12, 1998, motion to continue the hearing to enable Respondent to make full payment to its perishable agricultural commodities sellers prior to the hearing and convert the case from a "no-pay" to a "slow-pay" case, constitutes an admission that Respondent would not be able to make full payment in accordance with the PACA by the date of the hearing. The Judicial Officer also found that based on Respondent's November 12, 1998, admission, no issue of material fact exists regarding full payment to Respondent's perishable agricultural commodities sellers by the date of the hearing and no hearing is required.

Jane McCavitt, for Complainant.
Paul T. Gentile, New York, New York, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, 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.

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[17](...continued)
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).

§§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.49) [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 20, 1997.

The Complaint alleges that: (1) during the period August 1995 through July 1996, Kirby Produce Company, Inc. [hereinafter Respondent], failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of perishable agricultural commodities in the total amount of $1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent, represented by Lynn Tarpy, Hagood, Tarpy & Cox, Knoxville, Tennessee, filed an Answer on November 12, 1997, in which Respondent generally denied the material allegations of the Complaint. However, Respondent's Answer contains a provision which appears to contradict the general denial and indicates that Respondent has not paid the 20 perishable agricultural commodities sellers identified in paragraph III of the Complaint, but rather made arrangements to pay the sellers, as follows:

> 3. The allegations of Paragraph III are denied. The Respondent would state that it has made arrangements to pay all twenty (20) sellers in full through a repayment plan approved by the United States District Court for the Eastern District of Tennessee Northern Division, Docket No.: 3:96-CV-526. The United States District Court has not only approved the repayment plan but has directed that particular payments be made. Said Court Orders supersede the action by the Secretary. Any enforcement action by the secretary which interferes with the Orders of the Court will be invalid and of no effect. The Secretary has previously received a copy of the original Order setting out the Plan.

Answer ¶ 3.

On December 4, 1997, Paul T. Gentile, Gentile & Dickler, New York, New York, filed an appearance on behalf of Respondent in substitution for Ms. Tarpy, and Respondent filed an Amended Answer denying the material allegations of the Complaint and deleting those provisions of the Answer that appear to contradict Respondent's denial of the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the ALJ] scheduled a hearing to commence in Knoxville, Tennessee, on January 13, 1999 (Summary of Telephone Conference; Notice of Hearing). On November 12, 1998, Respondent filed a motion to continue the hearing until Respondent has made full payment to all perishable agricultural commodities sellers, pursuant to an Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996) (Letter dated November 10, 1998, from Paul T. Gentile to the ALJ). On November 16, 1998, the ALJ denied Respondent's motion to continue the hearing (Order Denying Motion to Continue Hearing).

On December 4, 1998, Complainant filed: (1) Request for Official Notice requesting that the ALJ take official notice of the Order, the list of Respondent's creditors, and a Marketing Agreement issued in *Brown's Produce v. Kirby Produce Co., supra*; (2) Motion for Decision Without Hearing by Reason of Admissions [hereinafter Motion for Default Decision]; and (3) a proposed Decision Without Hearing by Reason of Admissions. Complainant contends in Complainant's Motion for Default Decision that Respondent and its creditors consented to the Order issued in *Brown's Produce v. Kirby Produce Co., supra*, and that Respondent's agreement to the issuance of the Order and the attached list of creditors constitutes an admission of the material allegations of the Complaint (Motion for Default Decision at 2-3).

On December 29, 1998, Respondent filed Objection and Opposition to Motion for Decision Without Hearing by Reason of Admission, stating that Complainant cannot use the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co., supra*, as an admission to the Complaint and that Respondent is entitled to a hearing.

On December 31, 1998, the ALJ issued Order Canceling Hearing and Decision Without Hearing by Reason of Admissions [hereinafter Initial Decision and Order], pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), in which the ALJ: (1) found that Respondent and its creditors consented to the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co., supra*; (2) found that Respondent's agreement to the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co., supra*, and attachments to the Order constitutes an admission of the material allegations of the Complaint; (3) found that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate and foreign commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total

amount of $1,602,736.15; (4) concluded that Respondent's failures to make full payment promptly to the 19 perishable agricultural commodities sellers constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) revoked Respondent's PACA license (Initial Decision and Order at 2-4).

On March 3, 1999, Respondent filed Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Admissions; on March 24, 1999, Complainant filed Response to Respondent's Motion for Reconsideration; on April 1, 1999, Respondent filed Motion to Permit Reply to Complainant's Response to Respondent's Motion for Reconsideration and The Reply to Complainant's Response; and on April 7, 1999, the ALJ filed Order Denying Motion for Reconsideration.

On May 28, 1999, Respondent appealed to the Judicial Officer; on June 17, 1999, Complainant filed Complainant's Response to Respondent's Appeal Petition; and on June 18, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

On July 12, 1999, I issued a Decision and Order: (1) finding that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,602,736.15; (2) finding that, as of December 2, 1998, $1,215,723.99 remained past due and unpaid, with $387,012.16 paid late; (3) concluding that Respondent's failures to make full payment promptly with respect to the 204 transactions constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) revoking Respondent's PACA license. *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. ___, slip op. at 7-8, 26 (July 12, 1999).

On August 19, 1999, Respondent filed a petition for reconsideration of the July 12, 1999, Decision and Order; on September 30, 1999, Complainant filed Complainant's Response to Respondent's Petition for Reconsideration; and on October 1, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the July 12, 1999, Decision and Order.

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

. . . .

§ 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

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the

day on which the produce is accepted[.]

7 C.F.R. § 46.2(aa)(5).

Respondent raises two issues in Respondent's Petition for Reconsideration.

First, Respondent contends that I erred in finding that Respondent's request for a continuance of the scheduled hearing, to enable Respondent to make full payment to its perishable agricultural commodities sellers before the hearing, constitutes an admission that Respondent would not be able to make full payment in accordance with the PACA by the date of the hearing (Respondent's Pet. for Recons. at 2).

I disagree with Respondent's contention that I erred in finding that Respondent admitted that it would not be able to make full payment to its perishable agricultural commodities sellers by the date of the hearing.

Respondent's November 12, 1998, motion to continue the hearing until such time as Respondent has made full payment to its perishable agricultural commodities sellers states, as follows:

> Administrative Law Judge James W. Hunt
> U.S. Department of Agriculture
> Office of Administrative Law Judge
> 14th & Independence Avenue, S.W.
> Room 1081 - South Building
> Washington, D.C. 20250-9200
>
> Re: In re: Kirby Produce Company, Inc.
> PACA Docket No. D-98-0002
>
> Dear Judge Hunt:
>
> In March, 1996 certain produce creditors of the above referenced Respondent, Kirby Produce Company, Inc. ("Kirby") commenced action against Kirby in the United States District Court for the Eastern District of Tennessee entitled Brown's Produce, et al. v. Kirby Produce Company, et al. under case number 3:96 CV526. The action was brought by the plaintiffs in order to seek redress under Section 5(c) of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499(e)(c) [sic] for unpaid produce transactions.
>
> After due deliberation, and the consent of all PACA trust creditors and the Respondent, U.S. District Court Judge Leon Jordan issued an order

which provided for the orderly liquidation of the Respondent's assets and the eventual payment of all trust creditors. (See attached order dated June 25, 1996.) Thereafter the Respondent has been in compliance with Judge Jordan's order and has made periodic payments.

On September 8, 1998 you issued an order directing that a hearing be held on January 13, 1999 in Knoxville, Tennessee. The purpose of this letter is to make motion for an adjournment of the hearing until that time when the Respondent has made full payment to all trust creditors pursuant to Judge Jordan's order. As you are aware, the payment of all produce debt prior to the hearing substantially reduces the potential sanction which may be imposed upon the Respondent. Failure to grant this motion for adjournment will frustrate the order of Judge Jordan and prejudice Respondent's position at the time of the hearing.

Thank you for your consideration of this motion for adjournment.

Very truly yours,
/s/
Paul T. Gentile

Letter dated November 10, 1998, from Paul T. Gentile to the ALJ.

I have again carefully reviewed Respondent's November 12, 1998, motion, and I again find that Respondent's motion to continue the hearing scheduled to commence on January 13, 1999, to enable Respondent to make full payment to its perishable agricultural commodities sellers prior to the hearing and convert the case from a "no-pay" to a "slow-pay" case, constitutes an admission that Respondent would not be able to make full payment in accordance with the PACA by January 13, 1999, the date of the hearing.

Second, Respondent contends that my conclusion that there is no material issue of fact that warrants holding a hearing, is error (Respondent's Pet. for Recons. at 2-3). Specifically, Respondent contends that "full payment has been made prior to the hearing date" and that Complainant disputes this material fact; thus, there is an issue of material fact and Respondent is entitled to a hearing to prove that it has made full payment to its perishable agricultural commodities sellers (Respondent's Pet. for Recons. at 3).

As fully explicated in *In re Kirby Produce Company, Inc., supra*, I find that Respondent's November 12, 1998, motion for a continuance constitutes Respondent's admission that it would not be able to make full payment in

accordance with the PACA by January 13, 1999, the date of the hearing. Based on Respondent's November 12, 1998, admission, I find that no issue of material fact exists regarding full payment to Respondent's perishable agricultural commodities sellers by the date of the hearing and no hearing is required.

For the foregoing reasons and the reasons set forth in *In re Kirby Produce Company, Inc., supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.[1] Respondent's Petition for Reconsideration was timely filed and automatically stayed the July 12, 1999, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed July 12, 1999, is reinstated, with allowance for time passed.

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

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[1]*In re James E. Stephens*, 58 Agric. Dec. ___, slip op. at 11 (June 18, 1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. ___, slip op. at 9 (May 25, 1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. ___, slip op. at 7 (May 6, 1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. ___, slip op. at 8 (Mar. 23, 1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. ___, slip op. at 24 (Mar. 15, 1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 7 (Mar. 9, 1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. 1284, 1299 (1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *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 (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 (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.*, 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.).

Order

Respondent's PACA license is revoked, effective 65 days after service of this Order on Respondent.

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.
In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES, AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.
Decision and Order on Remand as to JSG Trading Corp. filed November 29, 1999.

Commercial bribery — Fair dealing — Rebuttable presumption — License revocation — Willful, flagrant, and repeated violations.

The Judicial Officer found that JSG Trading Corp. (Respondent) violated section 2(4) of the PACA. On March 2, 1998, the Judicial Officer issued a decision in which he applied a *per se* test to determine whether Respondent engaged in commercial bribery when it made payments to two purchasing agents who, at the time of the payments, were buying tomatoes from Respondent on behalf of their respective principals. The Judicial Officer concluded that, since Respondent's payments to the purchasing agents were more than *de minimis*, Respondent had engaged in commercial bribery, in violation of section 2(4) of the PACA. *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), *remanded*, 176 F.3d 536 (D.C. Cir. 1999). Respondent filed a petition for judicial review. The United States Court of Appeals for the District of Columbia Circuit granted Respondent's petition for review and remanded the case to the Judicial Officer, instructing the Judicial Officer either to explain the justification for using a *per se* test to determine whether Respondent violated section 2(4) of the PACA or to abandon the *per se* test and apply traditional definitions of commercial bribery to determine whether Respondent violated section 2(4) of the PACA. *JSG Trading Corp. v. United States Dep't of Agric.*, 176 F.3d 536 (D.C. Cir. 1999). On remand, the Judicial Officer abandoned the *per se* test, found that Respondent had engaged in activities that fell within the traditional definitions of commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric., supra*, and revoked Respondent's PACA license. Specifically, the Judicial Officer found that the record contained substantial evidence that: (1) Respondent made payments to Mr. Gentile, a purchasing agent for L&P, one of Respondent's produce customers, and Mr. Lomoriello, a purchasing agent for American Banana, one of Respondent's produce customers; (2) the value of Respondent's payments to Mr. Gentile was more than *de minimis* and the value of Respondent's payments to Mr. Lomoriello was more than *de minimis*; (3) Respondent made at least some of the payments to Mr. Gentile to induce Mr. Gentile to purchase produce from Respondent and Respondent made payments to Mr. Lomoriello to induce Mr. Lomoriello to purchase produce from Respondent; and (4) the principals at L&P were not fully aware of all of the

payments made by Respondent to Mr. Gentile and the principals at American Banana were not fully aware of the payments made by Respondent to Mr. Lomoriello. The Judicial Officer found that the evidence introduced by Complainant raised a rebuttable presumption that Respondent had violated section 2(4) of the PACA and that Respondent did not introduce evidence sufficient to rebut the presumption.

Andrew Y. Stanton, for Complainant.
Richard M. Adler, Washington, DC, for Respondent.
Initial decision issued by Edwin S. Bernstein, 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 the disciplinary proceeding captioned PACA Docket No. D-94-0508 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); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) by filing a Complaint on November 8, 1993.[1]

On April 8, 1994, Complainant filed an Amended Complaint alleging that JSG Trading Corp. [hereinafter Respondent] willfully, flagrantly, and repeatedly violated section 2(4) of the PACA.[2] Specifically, the Amended Complaint alleges that: (1) during the period from January 3, 1992, through February 24, 1993, Respondent, G&T, and Mr. Gentile engaged in a scheme in which Respondent made payments to G&T, under the direction, management, and control of Mr. Gentile, to induce G&T to purchase tomatoes from Respondent on behalf of L&P Fruit Corp. [hereinafter L&P]; and (2) during the period from December 15, 1992, through February 24, 1993, Respondent and Mr. Lomoriello engaged in a scheme whereby Respondent made payments to Mr. Lomoriello to induce him to purchase tomatoes from Respondent on behalf of American Banana Co., Inc. [hereinafter American Banana]. The Amended Complaint requests revocation of

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[1]PACA Docket No. D-94-0526 is a related disciplinary proceeding which has been concluded and forms no part of this Decision and Order on Remand as to JSG Trading Corp.

[2]The Amended Complaint also alleges that Gloria and Tony Enterprises, d/b/a G&T Enterprises [hereinafter G&T], Anthony Gentile, and Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA. However, as this Decision and Order on Remand as to JSG Trading Corp. relates to Respondent, I limit the references to allegations against, responses by, and filings by G&T and Messrs. Gentile and Lomoriello to those necessary to describe the status of this proceeding as it relates to Respondent.

Respondent's PACA license. Respondent filed an answer denying the material allegations in the Complaint and the Amended Complaint.

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] presided over a 15-day hearing in New York, New York. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], Washington, DC, represented Complainant. Mark C.H. Mandell, Annandale, New Jersey, represented Respondent.[3] Subsequent to the hearing, Complainant and Respondent filed post-hearing briefs.

On June 17, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which, *inter alia*, the ALJ: (1) found that payments by Respondent to Messrs. Gentile and Lomoriello constituted commercial bribery; (2) found that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA; and (3) revoked Respondent's PACA license.

On September 23, 1997, Respondent appealed to the Judicial Officer. On November 7, 1997, Complainant filed Complainant's Response to Appeal Petitions,[4] and on November 13, 1997, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

On March 2, 1998, I issued a Decision and Order as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile [hereinafter Decision and Order] in which I adopted the Initial Decision and Order as the final Decision and Order. *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), *remanded*, 176 F.3d 536 (D.C. Cir. 1999).

On April 28, 1998, Respondent filed a petition for reconsideration of the March 2, 1998, Decision and Order; on May 14, 1998, Complainant filed a reply to Respondent's petition for reconsideration; and on May 19, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the Decision and Order issued March 2, 1998.

On June 1, 1998, I denied Respondent's petition for reconsideration. *In re JSG Trading Corp.*, 57 Agric. Dec. 710 (1998) (Order Denying Pet. for Recons. as to

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[3]On July 11, 1997, Mr. John V. Esposito and Mr. Mel Cottone of the Law Offices of Cottone & Esposito, Hilton Head Island, South Carolina, entered an appearance on behalf of Respondent. Subsequently, Richard M. Adler of O'Connor & Hannan, LLP, Washington, DC, entered an appearance on behalf of Respondent.

[4]On February 2, 1998, Complainant filed an amended version of Complainant's Response to Appeal Petitions, which corrects incorrect transcript citations in Complainant's Response to Appeal Petitions, filed November 7, 1997.

JSG Trading Corp.); and on July 30, 1998, I issued a stay of the order revoking Respondent's PACA license, pending judicial review. *In re JSG Trading Corp.*, 57 Agric. Dec. 1715 (1998) (Stay Order as to JSG Trading Corp.).

Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit challenging the revocation of its PACA license. The Court granted Respondent's petition for review, stating, as follows:

> In this petition for review, JSG challenges the revocation of its license, alleging that the Judicial Officer was proceeding from an incorrect legal premise, namely, that *any* payment by a produce dealer to a purchasing agent above a *de minimis* level constitutes "commercial bribery" in violation of § 2(4) of PACA. JSG argues that this *per se* standard represents a marked departure from agency precedent, and that the case should be remanded for factual findings in accordance with the correct legal standard.
>
> We agree that, in adopting a *per se* standard to measure commercial bribery, the Judicial Officer departed from well established precedent without adequate justification. We therefore remand the case to the agency, so that it may either attempt to justify its creation of a new, *per se* standard or make explicit factual findings pursuant to established law.

JSG Trading Corp. v. United States Dep't of Agric., 176 F.3d 536, 537 (D.C. Cir. 1999).

On August 2, 1999, Respondent filed Motion to Dismiss and for Entry of Judgment; or, in the Alternative, Petition for Reopening the Hearing and Record to Take Further Evidence [hereinafter Motion to Dismiss]. On September 13, 1999, Complainant, filed Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment [hereinafter Complainant's Response], in which Complainant opposes Respondent's Motion to Dismiss and requests that I issue a decision and order on remand, finding that Respondent violated section 2(4) of the PACA and revoking Respondent's PACA license. On October 20, 1999, Respondent filed Respondent JSG Trading Corp.'s Reply to Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment [hereinafter Respondent's Reply]; and on November 4, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Dismiss and Complainant's request for the issuance of a decision and order on remand.

Respondent contends that the Complaint must be dismissed because the *per se*

standard to measure commercial bribery cannot be justified and Complainant cannot prevail under the traditional test for commercial bribery as described in *JSG Trading Corp. v. United States Dep't of Agric., supra* (Respondent's Motion to Dismiss at 2).

I disagree with Respondent's contention that the Complaint must be dismissed. While I abandon the *per se* standard to measure commercial bribery, I find that the record establishes that Respondent engaged in activity that falls within the traditional definitions of commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric., supra*. Therefore, I issue this Decision and Order on Remand as to JSG Trading Corp., in which I conclude that Respondent violated section 2(4) of the PACA.[5]

Complainant's exhibits are designated by "CX," Respondent's, G&T's, and Mr. Gentile's exhibits are designated by "RX," Mr. Lomoriello's exhibits are designated by "RL," and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISION AND REGULATION

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with

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[5]Simultaneously with this Decision and Order on Remand as to JSG Trading Corp., I am filing a Ruling Denying JSG Trading Corp.'s Motion to Dismiss.

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.

7 U.S.C. § 499b(4) (Supp. III 1997).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

. . . .

DUTIES OF LICENSEES

§ 46.26 Duties of licensees.

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

7 C.F.R. § 46.26.

Introduction

The issue presented is whether a series of payments by Respondent to purchasing agents of two separate produce buyers, L&P and American Banana, at a time when those purchasing agents were buying tomatoes from Respondent on behalf of their respective principals, constitute willful, flagrant, and repeated violations of section 2(4) of the PACA.

Section 2(4) of the PACA prohibits commission merchants, dealers, and brokers from failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity received in interstate or foreign commerce. While section 2(4) of the PACA does not expressly prohibit payments by produce dealers to purchasing agents or employees of that dealer's produce buyers, the Judicial Officer held in *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992), that activity that falls within the traditional definitions of commercial bribery constitutes a violation of section 2(4) of the PACA. Since the issuance of *Goodman*, the produce industry has been on notice that activity that falls within the traditional definitions of commercial bribery is prohibited by the PACA.

In *Goodman* and *Tipco*, produce dealers paid purchasing agents of supermarket chains 25 cents for each box of produce purchased from the produce dealers. The supermarket chains had no knowledge of this arrangement. The Judicial Officer

found these actions willful, flagrant, and repeated violations of section 2(4) of the PACA and revoked the produce dealers' PACA licenses, explaining:

> Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying
>
> > . . . interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him.' It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. 'No matter what the character of the competitors' goods, as far as quality is concerned and in the matter of price, such an organization will find it extremely difficult, if not impossible, to sell, the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy . . .' 2 Callman, *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3d ed. 1968).

In re Sid Goodman & Co., supra, 49 Agric. Dec. at 1185-86; *In re Tipco, Inc., supra*, 50 Agric. Dec. at 884-85 (*citing In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-29 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979)).

The Judicial Officer expressed concern that commercial bribery by one firm in a market will inevitably lead to commercial bribery by many firms, in an effort to compete, as follows:

> Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

In re Sid Goodman & Co., supra, 49 Agric. Dec. at 1186; *In re Tipco, Inc., supra*, 50 Agric. Dec. at 885 (*citing In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1043 (1986), *remanded*, 820 F.2d 1103 (9th Cir. 1987), *reprinted in* 51 Agric. Dec. 619 (1992)).

The Judicial Officer provided the following guidelines:

> The totality of the history of the PACA supports a conclusion that members of the produce industry have an obligation to deal fairly with one another--a duty to only deal with one another at arm's length. Included within this obligation is the positive duty to refrain from corrupting an employee of a person with whom it is dealing, *e.g.*, each PACA licensee is obligated to avoid offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of his employer. On the other hand, if the employee seeks a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer, could only make payments with the customer's permission, and, even then, would risk violating PACA with anything more than a *de minimis* payment (e.g., more than a pen, calendar or lighter).

In re Tipco, Inc., supra, 50 Agric. Dec. at 882-83 (footnotes and citations omitted).

Based on these guidelines in *Tipco*, I applied a *per se* test to determine whether Respondent engaged in commercial bribery when Respondent made a series of payments to Mr. Gentile, a purchasing agent for L&P, and Mr. Lomoriello, a purchasing agent for American Banana. I concluded that, since Respondent's payments to the purchasing agents were more than *de minimis*, Respondent had engaged in commercial bribery, in violation of section 2(4) of the PACA. *In re JSG Trading Corp., supra*, 57 Agric. Dec. at 659. The United States Court of Appeals for the District of Columbia Circuit admonished that Judicial Officer's guidelines in *Tipco* are dicta and, at most, establish a risk of a PACA violation. The Court found that traditional definitions of commercial bribery, adopted in *Goodman* and *Tipco*, require both a finding that a payment or offer of payment is made to induce a purchasing agent to buy from the dealer and a finding that the payment is made surreptitiously, without the knowledge of the purchasing agent's principal. *JSG Trading Corp. v. United States Dep't of Agric., supra*, 176 F.3d at 542. The Court instructed that the broad language in section 2(4) of the PACA does not bind the Secretary of Agriculture to traditional definitions of commercial bribery, but that departure from the use of traditional definitions of commercial bribery requires justification, which I did not provide in *In re JSG Trading Corp., supra.*

The United States Court of Appeals for the District of Columbia Circuit remanded the case to me, requiring me either to explain the justification for using a *per se* test to determine whether Respondent violated section 2(4) of the PACA or to abandon the *per se* test and apply traditional definitions of commercial bribery to determine whether Respondent violated section 2(4) of the PACA. Moreover, the Court stated that several of the gifts given to Mr. Gentile by Mr. Goodman arguably could be promotional allowances in connection with the promotion of Respondent's product, which are specifically permitted under the Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter the PACAA-1995],[6] and that any explanation for the justification for employing a *per se* test for commercial bribery must be made in conjunction with those amendments. *JSG Trading Corp. v. United States Dep't of Agric., supra*, 176 F.3d at 546-47.

I used the term "commercial bribery" in *In re JSG Trading Corp., supra*, in an effort to describe Respondent's activities. However, my use of the term "commercial bribery" has resulted in the application of the vast jurisprudence related to commercial bribery to the PACA. Since the enactment of the PACA in 1930, only three PACA disciplinary cases[7] have been appealed to the Judicial Officer that concern activities which the Judicial Officer has described as "commercial bribery." The PACA does not specifically prohibit commercial bribery, but rather prohibits commission merchants, dealers, and brokers from failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving perishable agricultural commodities received in interstate or foreign commerce.

"Congress enacted PACA in 1930 in an effort to assure business integrity in an industry thought to be unusually prone to fraud and unfair practices." *JSG Trading Corp. v. United States Dep't of Agric., supra*, 176 F.3d at 537 (*quoting Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C.

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[6]Section 9(b)(3) of the PACAA-1995 amends section 2(4) of the PACA by adding the following sentence at the end of section 2(4) of the PACA: "However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act." Section 9(a) of the PACAA-1995 amends the PACA by adding a new section 1(b)(13), which reads, as follows: "(13) The term 'collateral fees and expenses' means any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity."

[7]*In re JSG Trading Corp., supra; In re Tipco, Inc., supra;* and *In re Sid Goodman & Co., supra.*

Cir. 1987)). Rather than use a term, such as "commercial bribery," to describe an activity that constitutes a violation of section 2(4) of the PACA, the focus should be on whether the scrutinized activity constitutes a failure to deal fairly, which is required by the PACA. *In re Tipco, Inc., supra*, 50 Agric. Dec. at 882. Any activity by an entity subject to the PACA that the Secretary of Agriculture finds is a failure to deal fairly can constitute a violation of section 2(4) of the PACA.

I find that activity that falls within the traditional definitions of commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric., supra*, constitutes a failure to deal fairly and is a violation of section 2(4) of the PACA. That is, each commission merchant, dealer, and broker has an obligation under section 2(4) of the PACA to avoid making or offering a payment to a purchasing agent to encourage that agent to purchase produce from the commission merchant, dealer, or broker on behalf of the agent's principal or employer, without fully informing the purchasing agent's principal or employer of the offer or payment.

Proof that: (1) a commission merchant, dealer, or broker made a payment to or offered to pay a purchasing agent; (2) the value of the payment or offer was more than *de minimis*; (3) the payment or offer was intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; and (4) the purchasing agent's principal or employer was not fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent, raises the rebuttable presumption that the commission merchant, dealer, or broker making the payment or offer violated section 2(4) of the PACA.

The commission merchant, dealer, or broker may rebut the presumption by showing that: (1) the commission merchant, dealer, or broker did not make a payment to or offer to pay a purchasing agent; (2) the value of the payment or offer was *de minimis*; (3) the payment or offer was not intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; or (4) the purchasing agent's principal or employer was fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent.

I have carefully reviewed the record in light of *JSG Trading Corp. v. United States Dep't of Agric., supra*, and find that the record supports a conclusion that Respondent violated section 2(4) of the PACA. Specifically, the record contains substantial evidence that: (1) Respondent made payments to Mr. Gentile, a purchasing agent for L&P, one of Respondent's produce customers, and Mr. Lomoriello, a purchasing agent for American Banana, one of Respondent's produce customers; (2) the value of Respondent's payments to Mr. Gentile was more than *de minimis* and the value of Respondent's payments to Mr. Lomoriello

was more than *de minimis*; (3) Respondent made at least some of the payments to Mr. Gentile to induce Mr. Gentile to purchase produce from Respondent and Respondent made payments to Mr. Lomoriello to induce Mr. Lomoriello to purchase produce from Respondent; and (4) the principals at L&P were not fully aware of all of the payments made by Respondent to Mr. Gentile and the principals at American Banana were not fully aware of the payments made by Respondent to Mr. Lomoriello. Respondent, Messrs. Gentile and Lomoriello, and G&T introduced evidence to show that the payments to Messrs. Gentile and Lomoriello were not intended to induce Messrs. Gentile and Lomoriello to purchase produce from Respondent and that the principals at L&P knew of the payments to Mr. Gentile and the principals at American Banana knew of the payments to Mr. Lomoriello. The evidence introduced by Respondent, Messrs. Gentile and Lomoriello, and G&T falls far short of rebutting Complainant's evidence that Respondent violated section 2(4) of the PACA.[8]

Findings of Fact

1. Respondent, JSG Trading Corp., is a corporation organized and existing under the laws of the State of New Jersey. Respondent's business mailing address is PACA Hosing Building, Suite A, 33 Newman Springs Road, Tinton Falls, New Jersey 07724. PACA license number 880547 was issued to Respondent on January 19, 1988. This license has been renewed annually. Since January 1992, Steve Goodman has been president, treasurer, and a holder of 75 per centum of the stock of Respondent and his wife, Jill Goodman, has been vice-president, secretary, and a holder of 25 per centum of the stock of Respondent. Prior to January 1992, Jill Goodman was the sole officer and shareholder of Respondent. (CX 1B.)

2. Mr. Goodman began Respondent in 1988 (Tr. 2154). As of February 1993, Respondent had $36,000,000 in annual sales and employed six or seven produce buyers (Tr. 77). All of the buyers had joint account arrangements with Respondent by which they earn a percentage of the profits derived from their sales (Tr. 2080-81). Mr. Goodman is Respondent's only tomato buyer and seller (Tr. 77). Mr. Goodman earns 50 per centum of the profits derived from his sales (Tr. 2079). Tomato transactions constitute about 40 per centum of Respondent's

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[8]I abandon the *per se* test, which I employed in *In re JSG Trading Corp., supra*, to determine whether Respondent violated section 2(4) of the PACA. Therefore, I do not explain in this Decision and Order on Remand as to JSG Trading Corp. the justification for my use, in *In re JSG Trading Corp., supra*, of a *per se* test to determine whether Respondent engaged in commercial bribery.

business (Tr. 78).

3. Anthony Gentile, is an individual whose business mailing address is 119 Third Avenue, Hadley, New York 12835. Mr. Gentile is not licensed under the PACA, but, at all times material to this proceeding, was operating subject to the PACA. (Answer of Respondent Anthony Gentile to Amended Complaint ¶ 5.)

4. Gloria and Tony Enterprises, d/b/a G&T Enterprises, is a corporation organized and existing under the laws of the State of New York. G&T's business mailing address is 119 Third Avenue, Hadley, New York 12835. PACA license number 890233 was issued to G&T on November 14, 1988. (Answer of Respondent Gloria and Tony Enterprises to Amended Complaint ¶ 4.) This license expired on November 11, 1990, when G&T advised that it had ceased operation subject to the PACA and failed to pay the required annual renewal fee (CX 1). Gloria Gentile, Mr. Gentile's wife, owns 100 per centum of G&T's stock (CX 1). At all times material to this proceeding, G&T was operating subject to the PACA under the direction, management, and control of Mr. Gentile (Tr. 2948). G&T was formed for tax purposes (Tr. 448, 2829, 2948, 3216).

5. Mr. Gentile became involved in the tomato business when he was a boy and developed great expertise in buying and selling tomatoes (Tr. 2160-61). Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman, managed the sales operation, and was the tomato buyer at L&P, a produce dealer located at the Hunts Point Market in Bronx, New York (Tr. 442). Mr. Gentile had a joint account arrangement with L&P, and Mr. Gentile would share profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Joint account arrangements are very common in the New York produce industry (Tr. 446, 2894). During the period in which Mr. Gentile was the head salesman for L&P, he was "on the walk," a term used at the Hunts Point Market, which means that he was a salesman who was present on the street (Tr. 2170). While Mr. Gentile was buying tomatoes for L&P, he was considered by many at the Hunts Point Market to be the person with the most knowledge and influence in that market regarding tomatoes (Tr. 2160-61).

6. During 1986, Mr. Gentile began to establish a relationship with Mr. Goodman, who was then working for another produce dealer (Tr. 2154-55). Mr. Gentile taught Mr. Goodman the tomato business (Tr. 2930). Mr. Goodman soon sold a large volume of tomatoes to L&P through Mr. Gentile (Tr. 2170-71).

7. Mr. Gentile left "the walk" late in 1990 or early in 1991 because he became ill (Tr. 2909). However, from that time through the date of the hearing, Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446). After Mr. Gentile left "the walk," he continued to be compensated on a joint account basis, but at a reduced rate of 15 per centum of the profits and losses (Tr.

447).

8. Dirtbag Trucking Corporation [hereinafter Dirtbag] was a corporation which was formed in 1989 when Mr. Goodman decided to enter the trucking business (Tr. 2089-90). In November 1989, Mr. Goodman and Mr. Gentile each were issued 75 shares of Dirtbag's stock (RX 2; Tr. 2102-03). In January 1991, Mr. Goodman and Mr. Gentile each loaned Dirtbag $40,000 to enable Dirtbag to purchase two trucks (RX 4 and 5; Tr. 2121, 2780). In return for the loans, Messrs. Goodman and Gentile each obtained a security interest in Dirtbag's assets. The security agreements required Dirtbag to repay the loans by August 18, 1994 (RX 4 and 5). However, Dirtbag never repaid the loans (Tr. 2130, 2499). Dirtbag never had its own office, but was operated from Respondent's office (Tr. 2047). Dirtbag always had a cash flow problem. Respondent advanced money to Dirtbag on a number of occasions (CX 55 at 1-3; Tr. 2049), often paying Dirtbag's creditors directly (Tr. 1585). Dirtbag was never a very profitable company (Tr. 1564, 2495-96). In fact, Mr. Goodman called Dirtbag "a loser" (Tr. 2149). Mr. Goodman became very disgusted with Dirtbag because it was not making money, and he sold Dirtbag's trucks (Tr. 2050). The last truck was sold in 1994 (Tr. 2498).

9. In approximately January 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to Mrs. Gentile (RX 2; Tr. 2827). On February 20, 1991, Mrs. Gentile entered into a written agreement to sell her 75 shares of Dirtbag stock to Mr. Goodman for $80,000 (RX 3; Tr. 2926). The agreement provides that the stock would be placed in escrow with Respondent's attorney, Mr. Mandell, and that Mr. Goodman would pay $25,000 per year to Mrs. Gentile in monthly installments for the next 2 years. After each $25,000 payment, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The agreement also provides that the final payment of $30,000 would be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final $30,000, Mr. Gentile's $40,000 loan to Dirtbag would be released or assigned to Mr. Goodman. (RX 3.) Mrs. Gentile was paid the $80,000 by either Mr. Goodman or Respondent, and she authorized three releases of 25 shares of stock each on December 30, 1991, February 14, 1993, and February 2, 1994 (RX 3 at 3-3b; Tr. 2942-43).

10. Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., is an individual whose business mailing address is 219 Eden Road, Stamford, Connecticut 06907 (Letter from Albert Lomoriello to Ms. Favors, filed November 29, 1993; Tr. 1244-45). Mr. Lomoriello is not licensed under the PACA, but, at all times material to this proceeding, was operating subject to the PACA.

11. In approximately December 1991, Mr. Lomoriello became employed by American Banana, a produce firm located at the Hunts Point Market (Tr. 1256).

Demetrius Contos, American Banana's vice-president, wanted Mr. Lomoriello to expand American Banana's business (Tr. 313-16). Mr. Lomoriello was to receive 40 per centum of the profits on the produce that he purchased and to be liable for 40 per centum of the losses (Tr. 1245-46). Mr. Lomoriello purchased tomatoes from Respondent for American Banana (Tr. 1263).

12. In approximately January 1993, USDA received a telephone complaint about Respondent (Tr. 69, 81). The caller said that Mr. Goodman had been making payments to Mr. Gentile while Mr. Gentile was buying for L&P (Tr. 84). Ms. Joan Colson, an auditor for the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, and Mr. David Nielson, a PACA Branch employee under Ms. Colson's supervision, were assigned to audit Respondent for Complainant (Tr. 69-70). On February 25, 1993, Ms. Colson and Mr. Nielson met with Mr. Goodman, who provided Respondent's records (Tr. 78).

13. Respondent maintains a file jacket for each produce transaction. The file number on the jacket includes a two-letter prefix which corresponds to the buyer's initials. All documents related to the transaction are filed in the jacket and information regarding the transaction is recorded on the front and back portions of the file jacket. (Tr. 80.)

14. Ms. Colson and Mr. Nielson examined Respondent's file jackets relating to Respondent's sales to L&P and found 81 file jackets that raised questions about improper payments (CX 8-CX 42; Tr. 109). All 81 of these file jackets concern sales of tomatoes to L&P by Mr. Goodman and the numbers on each of these file jackets are prefixed "SG" for "Steve Goodman" (Tr. 80). Each file jacket has handwritten notations on its front and back covers and contains documents pertinent to the transactions to which the file jacket relates (Tr. 80, 131-32). These file jackets also contain a total of 35 checks or check skirts showing payments from Respondent to "A. Gentile" (Tr. 111-13). The reverse side of the checks are endorsed "A. Gentile, payable to JSG Trading" (Tr. 122). These endorsements were actually written by Marsha Levine, Respondent's bookkeeper (Tr. 1705).

15. The top portion of the back cover of each of the 81 file jackets show revenues from the produce transactions to which the file jacket relates and the bottom portion of the back cover of each of the 81 file jackets show expenses related to the produce transactions to which the file jacket relates. The expenses sections list checks issued to "A. Gentile." The notations regarding these checks correspond to actual checks payable to "A. Gentile" or the check skirts applicable to checks payable to "A. Gentile" which were found in the file jackets. (Tr. 127-30.)

16. At first, Mr. Goodman told Ms. Colson and Mr. Nielson that "A. Gentile" was a fictitious name and that he (Mr. Goodman) would give receipts to

Ms. Levine for various functions, such as having his car washed, and she would expense them to the files using the name, or notation, "A. Gentile" (Tr. 129, 1038-39). Mr. Goodman later admitted that "A. Gentile" was the name of a person, but insisted that "L&P" or any name, even that of Ms. Colson, could be substituted for "A. Gentile" (Tr. 1039). Mr. Goodman stated that Respondent utilized "A. Gentile," a person's name, on the checks to enable Ms. Levine to endorse and redeposit the checks (Tr. 1039).

17. Mr. Goodman told Ms. Colson that the use of checks to "A. Gentile," which were redeposited into Respondent's account, was his method of keeping track of, or making up, losses that he incurred from sales to L&P. Mr. Goodman also told Ms. Colson that if a file contained checks to Mr. Gentile that were not redeposited into Respondent's account, that money was for services that Mr. Gentile had provided to him. (Tr. 242.)

18. Some of the file jackets reflecting Respondent's sales to L&P contain a slip of paper on which the check to "A. Gentile" is noted (e.g., CX 13B at 8; Tr. 137). Ms. Levine told Ms. Colson and Mr. Nielson that she wrote this information to indicate Respondent's expense for the file jacket (Tr. 137).

19. Ms. Colson prepared a table reflecting the numbers of Respondent's files that she randomly selected, the numbers of the checks issued by Respondent that they contain, and the total amounts that each file shows as payments to "A. Gentile" (CX 7; Tr. 110).

20. When asked by Ms. Colson about notations written in the corners of the backs of file jackets, such as "Tony $2.00" (CX 13B at 1; Tr. 132-33), Mr. Goodman stated that he makes many notes on his file jackets (Tr. 132-33). With respect to each of these files, the number of boxes of tomatoes in the load multiplied by the amount noted on the back of the file jacket associated with the name "Tony" equals the amount of money shown on the file jacket as an expense relating to "A. Gentile" (Tr. 145-46).

21. Respondent maintains a Closed File Journal (CX 53). Each week, after one of Respondent's files was closed, Ms. Levine would summarize that file's information in the journal (Tr. 226). The "Open SC" column refers to "open split commissions" (Tr. 226). Mr. Goodman stated that the "Open SC" column reflects what he paid to someone who provided a service to him (Tr. 227). All of the references to payments to "A. Gentile" in Respondent's file jackets are noted in Respondent's Closed File Journal under the "Open SC" column corresponding to the date that the transaction occurred (Tr. 228). The relationships between payments to "A. Gentile" recorded in the file jackets and the listings in the "Open SC" column in Respondent's Closed File Journal are set forth in a table prepared by Ms. Colson (CX 52; Tr. 228-35).

22. Respondent also maintains a General Ledger Chart of Accounts (CX 6; Tr. 106-07). This computer-generated record lists accounts contained in Respondent's general ledger, the number assigned to each account, and a description of the account (Tr. 107). Account number 108 is "LOANS & EXCHANGES" (CX 6). This account records loans made by Respondent (Tr. 2053-54).

23. Respondent also maintains a General Ledger Journal Entry Edit Report (CX 13A at 3; Tr. 146). This computer-generated document describes how Respondent's financial transactions are maintained in Respondent's general ledger (Tr. 1765). Respondent's General Ledger Journal Entry Edit Report reflects that Ms. Levine recorded 16 of the 35 checks made payable to "A. Gentile" in Respondent's loans and exchanges account as "L/E Tony" (CX 13A at 3, CX 14A at 3, CX 17A at 3, CX 28A at 3, CX 29A at 3, CX 30A at 3, CX 31A at 3, CX 32A at 3, CX 33A at 3, CX 34A at 3, CX 35A at 3, CX 36A at 3, CX 37A at 3, CX 38A at 3, CX 39A at 3, and CX 42A at 3).

24. Ms. Colson obtained a spreadsheet from Ms. Levine or from Respondent's accountant, Mr. Daily, which details the 1992 transactions in Respondent's loans and exchanges account (CX 55 at 1-3; Tr. 158, 1605). The spreadsheet contains 13 columns, reflecting various individuals or firms to whom Respondent had loaned money (Tr. 2054-56). The eight "A. Gentile" checks issued in 1992 which are described in the General Ledger Journal Entry Edit Report as "L/E Tony" and a $38,475.30 boat payment to Midlantic Bank, are noted in the column headed "L&P," and reflect a reduction of Mr. Gentile's debt payable to Respondent (CX 55 at 1-3; Tr. 161, 215-16).

25. Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about Respondent's loans and exchanges account and the spreadsheet that reflected that account (CX 55 at 1-3). Ms. Colson took notes during that conversation (CX 76). Mr. Daily told Ms. Colson that "L/E" in Respondent's records refers to Respondent's loans and exchanges account and "Tony" refers to Mr. Gentile (CX 76; Tr. 149-50). Mr. Daily stated that Mr. Gentile had a loan with Respondent (CX 76; Tr. 158) and that Mr. Daily included the amounts of the checks for "L/E Tony" in the spreadsheet under the column headed "L&P" (CX 76; Tr. 160, 1617-21). On April 1, 1993, Ms. Colson requested Mr. Daily to provide an audit trail for the spreadsheet (CX 77; Tr. 159). Mr. Daily enclosed this information in a May 13, 1993, letter (CX 75). The audit trail restates the information contained in the spreadsheet (CX 55 at 4-6; Tr. 166).

26. Respondent maintains an Accounts Receivable Aged Analysis Report, a computer-generated report showing the status of Respondent's accounts receivable for its customers on a monthly basis (CX 51; Tr. 252). The report

indicates that when L&P was rebilled for a product (such as on CX 25B at 1, where L&P was rebilled from $5,001.35 to $3,251.75), the rebilled price would be noted in the Accounts Receivable Aged Analysis Report for L&P, and a credit memo would be issued canceling L&P's accounts receivable for the original price (CX 51 at 117; Tr. 254). None of the 16 "A. Gentile" checks found by Ms. Colson that are referenced in the General Ledger Journal Entry Edit Report as "L/E Tony" are listed in Respondent's Accounts Receivable Aged Analysis Report (Tr. 258). All of the remaining 19 "A. Gentile" checks found by Ms. Colson (such as on CX 25B at 1 for $129.60), are listed in the Accounts Receivable Aged Analysis Report for L&P, with the amount of the check noted as a "customer charge" and the check itself noted as "payment received" (Tr. 256-57).

27. Respondent's General Ledger Journal Entry Edit Reports for 1992 and 1993 show that Respondent issued checks as payments to Mr. Gentile (Tr. 171-93). These checks are described in the General Ledger Journal Entry Edit Reports as follows: check number 3941 for $467.59 as "Steve's Loan, Tony's Boat" (CX 54 at 1-2); check number 1847 for $38,475.30 as "L/E Tony" (CX 54 at 3-5); check number 3899 for $806.51 as "Steve's Loan Tony's Car" (CX 54 at 6-9); check number 3975 for $806.51 as "Steve's Loan Tony's Car" (CX 54 at 10-14); check number 4051 for $800 as "L/E Dirtbag for Tony's Car" (CX 54 at 14-17); and check number 2151 for $3,317 as "Steve's Loan Tony's Watch" (CX 54 at 18). Respondent's General Ledger Journal Entry Edit Reports also show Respondent's payment of $6,400 as "L/E Tony" (CX 54 at 19).

28. Respondent's records show that Respondent's check number 1847, dated June 5, 1992, was issued to Midlantic National Bank for $38,475.30 (CX 54 at 3; Tr. 182). Midlantic National Bank's records reveal that this check was in payment for a boat loan owed by Mr. Goodman (CX 73; Tr. 186). The boat was a Trojan model that Mr. Goodman had purchased in 1987 for approximately $45,000 to $50,000 (Tr. 2791). Beginning in November or December 1990, Mr. Goodman allowed Mr. Gentile to use the boat with the understanding that Mr. Gentile would pay for the boat's maintenance (Tr. 2791). In August 1992, Mr. Goodman sold the boat, then titled to Mr. Goodman's wife, Jill, to Mr. Gentile for $10,000 (CX 57). The boat needed work but was described by Mrs. Gentile as "nicely laid out" (Tr. 2930). Mr. Gentile told Louis Beni, secretary-treasurer of L&P, that he was getting a very good price for the boat (Tr. 2888).

29. Respondent's records contain check numbers 3899 and 3975 issued to Mercedes-Benz Credit Corporation and check number 4051 issued to Dirtbag for "L/E Dirtbag for Tony's Car" (CX 54 at 6, 10, 14-15; Tr. 198). Documents obtained from Mercedes-Benz Credit Corporation show that a new 1990 Mercedes 300 SEL was leased to Mr. Gentile on May 11, 1990, for 48 months, with monthly

payments of $798.99, for a total of $38,351.52 (CX 56 at 3-5; Tr. 198-99). Although a corporate resolution was prepared by Dirtbag and signed by Mr. Goodman and Mr. Gentile, which authorized Mr. Gentile to lease the car on behalf of Dirtbag (CX 56 at 2), the documents reflecting the lease do not mention Dirtbag. When Mr. Goodman presented the leased Mercedes to Mr. Gentile, Mr. Goodman placed a large red ribbon on it (Tr. 2828, 2838-39). Mr. Beni knew that Mr. Gentile obtained the Mercedes through Dirtbag (Tr. 2883, 2901).

30. Respondent's check number 2151, dated July 28, 1992, for $3,317, was issued to a jewelry store in payment for a Rolex watch which Mr. Goodman gave to Mr. Gentile. Mr. Goodman testified that the watch was a gift. (RX 40; Tr. 2478-80.) Mr. Beni knew about Mr. Goodman's gift of the watch to Mr. Gentile (Tr. 2835-36).

31. Respondent's payroll records for 1992 show that Mrs. Gentile received wages (CX 50 at 1-2; Tr. 265-66). Two of the check stubs for these payments to Mrs. Gentile contain the letters "comm" which refers to "commission" (CX 50 at 3-12; Tr. 268).

32. After Ms. Colson left Respondent's premises and returned to Washington, DC, she found that several of Respondent's file jackets relating to sales to L&P contain statements from G&T (CX 44A at 4, CX 45A at 4, CX 46 at 4, CX 47A at 4, CX 48A at 4, CX 49A at 3; Tr. 271). Two of the file jackets containing statements from G&T also contain adding machine tapes (CX 44B at 20, CX 46 at 5) which reflect amounts that correspond to the total of the packages noted in the G&T statements multiplied by 5 cents per package (Tr. 272-83). File jacket number SG 4222 in which a G&T statement was found shows a payment to "A. Gentile" which corresponds to the total on the adding machine tape (CX 44B at 1-2; Tr. 281). The "A. Gentile" notation also corresponds to the amount of the check payable to Mrs. Gentile found in the file and the amount noted in Respondent's payroll records as wages paid to Mrs. Gentile (CX 44A at 1, CX 50 at 1; Tr. 281-82). Many of Respondent's file jackets, reflecting sales to L&P, contain a notation "Tony 5¢" (Tr. 282). The file jacket numbers containing the notations "Tony 5¢" are the same numbers as those in G&T's statements (Tr. 283). The checks to Mrs. Gentile and their relationships to the files noted in G&T's statements are listed in a table prepared by Ms. Colson (CX 43).

33. Respondent's records also contain 22 file jackets concerning Respondent's sales of tomatoes to American Banana which have notations on the backs of the file jackets similar to those reflecting sales to L&P (CX 63A-CX 69A; Tr. 549-51). The notations indicate that payments per box were made to "Al" as well as to "HPT" or "Hunts Point Produce" in an amount equal to the amount of the notation multiplied by the number of boxes sold to American Banana. The file

jackets contain seven of Respondent's checks totaling $9,733.45 made payable to Hunts Point Produce Co. (CX 63A at 1, CX 64A at 1, CX 65A at 1, CX 66A at 1, CX 67A at 1, CX 68A at 1, CX 69A at 4; Tr. 550, 553-54).

34. These 22 file jackets also contain several invoices from Hunts Point Produce Co. to Respondent in amounts that correspond to the amounts of the checks issued to Hunts Point Produce Co. The Hunts Point Produce Co. invoices contain Respondent's file numbers which correspond to the file numbers that were written on checks payable to Hunts Point Produce Co. or check skirts applicable to checks payable to Hunts Point Produce Co. that were found in the file jackets (CX 63B at 3-4, CX 63C at 4-5, CX 64B at 3-4, CX 64C at 3-4, CX 65B at 4-5, CX 65C at 4-5, CX 65D at 4-5, CX 65E at 3-4, CX 65F at 3-4, CX 65G at 3-4, CX 66B at 4-5, CX 66C at 4-5, CX 66D at 3-4, CX 67B at 3-4, CX 67C at 3-4, CX 67D at 4-5, CX 68B at 6-7, CX 68C at 4-5, CX 68D at 4-5, CX 68E at 4-5, CX 69A at 4-5; Tr. 554-59). Ms. Colson prepared a table that summarizes this information (CX 62).

35. Ms. Colson recognized that the address of Hunts Point Produce Co. was also Mr. Lomoriello's address (Tr. 559-60). In answer to Ms. Colson's question as to why Mr. Lomoriello was receiving money from Respondent, Mr. Goodman replied that Mr. Lomoriello gave inside information to Mr. Goodman and performed various tasks for him at the Hunts Point Market (Tr. 559-60).

36. Respondent's Closed File Journal, under the "Open SC" column, reflects the amounts of the checks written by Respondent to Hunts Point Produce Co. (CX 53; Tr. 604-05). Ms. Colson prepared a table showing the references in Respondent's Closed File Journal for the payments to Hunts Point Produce Co. (CX 71; Tr. 629-30).

37. Ms. Colson and another PACA official interviewed Mr. Contos, American Banana's vice-president. Mr. Contos stated that Mr. Lomoriello was compensated by receiving 40 per centum of the profits on his transactions (Tr. 607). Mr. Contos stated that if Mr. Lomoriello was receiving payments from Respondent for produce sold to American Banana, he (Mr. Contos) expected Mr. Lomoriello to repay American Banana 60 per centum of the money that he had received from Respondent (Tr. 607).

38. Ms. Colson and her associate, Mr. Summers, also interviewed Patrick Prisco, L&P's president (Tr. 637). Mr. Prisco was unaware that Respondent's payments to Mr. Gentile were being recorded in Respondent's files associated with Respondent's sales to L&P (Tr. 458-64).

Discussion of the Evidence

I. Respondent's Payments to Mr. Gentile.

Complainant has provided extensive evidence that in 1992 and early 1993, Respondent made a series of payments and transferred items of value to Mr. Gentile either directly, or through his wife, Gloria Gentile, or through G&T, a corporation owned by Mrs. Gentile and established only for tax purposes (Tr. 448, 2829, 2948, 3216). At the time that these payments were made, Mr. Gentile was buying tomatoes from Respondent for L&P (Tr. 2170-71).

Respondent's payments to and transfer of items of value to Mr. Gentile included: (1) the use of a boat and eventual purchase of that boat at a price substantially below its value; (2) a gift of a Mercedes automobile; (3) a gift of a Rolex watch; (4) payments to Mr. Gentile through Mrs. Gentile; and (5) 35 checks issued to Mr. Gentile. Each of these payments and items had a value that was more than *de minimis*.

A. The Boat, The Mercedes, and The Rolex Watch.

Complainant did not introduce sufficient evidence to prove that: (1) Respondent's allowing Mr. Gentile to use a boat or sale of the boat at a price below its value was designed to induce Mr. Gentile to purchase tomatoes from Respondent; (2) Respondent's gift of a Mercedes to Mr. Gentile was designed to induce Mr. Gentile to purchase tomatoes from Respondent; or (3) Respondent's gift of a Rolex watch to Mr. Gentile was designed to induce Mr. Gentile to purchase tomatoes from Respondent. Further, I find that Mr. Beni, a principal of L&P, knew of the sale of the boat at a price below its value, knew of the gift of the Mercedes, and knew of the gift of the Rolex watch. Thus, I do not find that Respondent's allowing Mr. Gentile use of the boat, Respondent's sale of the boat to Mr. Gentile for a price below its value, Respondent's gift of the Mercedes, or Respondent's gift of the Rolex watch constitute violations of section 2(4) of the PACA.

B. Respondent's Payments to Mrs. Gentile.

Respondent's payroll records for 1992 indicate that Mrs. Gentile received wages from Respondent (CX 50 at 1-2; Tr. 265-66). Two of the check stubs relating to checks issued to Mrs. Gentile indicate that the checks were written for "comm" which Ms. Levine stated refers to "commission" (CX 50 at 3-12; Tr. 268).

Ms. Levine explained that Mrs. Gentile was paid for providing services to Respondent as an informant (Tr. 270-71).

The amounts of the checks to Mrs. Gentile relate to deductions of 5 cents for each box of tomatoes sold by Respondent to L&P. In several of Respondent's file jackets relating to sales to L&P, Ms. Colson found what appeared to be statements from G&T (CX 44A at 4, CX 45A at 4, CX 46 at 4, CX 47A at 4, CX 48A at 4, CX 49A at 3; Tr. 271). In two of the file jackets that contain G&T statements, Ms. Colson found adding machine tapes (CX 44B at 20, CX 46 at 5) that seemed to add packages, corresponding to the number of packages noted in the G&T statements, and multiply the total number of packages by 5 cents per package (Tr. 272-83). Ms. Colson also noticed that file jacket number SG 4222 in which a G&T statement was found shows a payment to "A. Gentile" which corresponds to the amount on the adding machine tape (CX 44B at 1-2; Tr. 281). The amounts of the "A. Gentile" payments shown on the file jackets also correspond to the amounts of checks to Mrs. Gentile noted in Respondent's payroll records (Tr. 281-82). Ms. Colson further noticed that many of Respondent's file jackets, reflecting sales to L&P, contain a notation "Tony 5¢" (Tr. 282). The file jackets containing the notations "Tony 5¢" have the same numbers as those on the statements of G&T (CX 44B at 1-2; Tr. 283).

After Ms. Colson presented this evidence at the hearing, Ms. Levine provided a completely different explanation for the checks payable to Mrs. Gentile. According to Ms. Levine, Mr. Goodman ordered Respondent's employees to write "Tony 5¢" on every L&P file jacket to pay Mrs. Gentile for Mr. Goodman's purchase of her stock in Dirtbag (Tr. 1715).

However, Respondent's claim that the checks to Mrs. Gentile were for her Dirtbag stock is inconsistent with the fact that the checks are listed in Respondent's payroll records as wages and the fact that two of the check stubs indicate that the checks issued to pay Mrs. Gentile were for commissions. At the hearing, Ms. Levine stated that noting the checks to Mrs. Gentile on Respondent's payroll records was an error (Tr. 1941). However, this explanation was never given to Ms. Colson. This alleged error also came as a complete surprise to Mr. Daily, who testified that he had sent 1099 tax forms to Mrs. Gentile in 1991 and 1992, based upon his assumption that she was a salaried employee of Respondent (Tr. 1541-42, 1595). In mid-1993, after Mr. Daily submitted Respondent's tax return for 1992, he was told by Ms. Levine that Mrs. Gentile was not an employee (Tr. 1561-62). Ms. Levine testified that when Mr. Daily heard this, he "went through the roof" because the 1099 tax forms had been improperly issued (Tr. 1940). Mr. Daily then was requested to file an amended personal tax return for Mr. Goodman, which he did just before the hearing (Tr. 1601-02).

Ms. Levine's contention that she erred in noting Mrs. Gentile's "wages" in Respondent's payroll records is further contradicted by her testimony that, as of late 1992, before she allegedly learned of her error in treating the payments to Mrs. Gentile as wages, Ms. Levine was aware that Mr. Lomoriello could not be entered in Respondent's books as a wage earning employee, or else Respondent would be required to send a 1099 tax form to Mr. Lomoriello (Tr. 1965).

The record does contain evidence that 75 shares of Dirtbag stock were transferred by Mrs. Gentile to Mr. Goodman. In early 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to Mrs. Gentile (RX 2 at 7-9a; Tr. 2827), and on February 20, 1991, Mrs. Gentile agreed in writing to sell the 75 shares to Mr. Goodman for $80,000 (RX 3 at 1; Tr. 2926). The agreement (RX 3 at 1) provided that the stock would be placed in escrow with Respondent's attorney and that Mr. Goodman would pay $25,000 per year to Mrs. Gentile in monthly installments for the next 2 years. After the payment of each $25,000, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The final payment of $30,000 was to be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final $30,000, Mr. Gentile's $40,000 loan to Dirtbag would be released or assigned to Mr. Goodman. Mrs. Gentile authorized three releases of 25 shares of stock each on December 30, 1991, February 14, 1993, and February 2, 1994 (RX 3 at 3-3b; Tr. 2942-43).

As the United States Court of Appeals for the District of Columbia Circuit states in *JSG Trading Corp. v. United States Dep't of Agric., supra*, 176 F.3d at 540, neither Complainant nor Respondent offered a valuation expert regarding the value of Dirtbag. However, there was considerable testimony from Mr. Daily, Ms. Levine, and Mr. Goodman attesting to Dirtbag's constant financial problems (Tr. 1564, 1984-85, 2049, 2148-49, 2495-96). Mr. Gentile had only loaned Dirtbag $40,000 and had invested approximately $7,000 in a new truck (Tr. 2782-83). Respondent's payments, therefore, would have included a profit of approximately $33,000.

Mr. Goodman acknowledged that, if Respondent sold more tomatoes to L&P during the period that the 5 cents per box deductions were to be made, Mrs. Gentile would receive the $80,000 more quickly (Tr. 2495). Mr. Gentile, thus, had an incentive to purchase as many of Respondent's tomatoes as possible.

I find that Complainant introduced substantial evidence to show that Respondent's payment to Mrs. Gentile, by deducting 5 cents for each box of tomatoes that Mr. Gentile purchased on behalf of L&P, was intended to induce Mr. Gentile to buy tomatoes from Respondent. Respondent's evidence that these payments were for Mrs. Gentile's services or for Dirtbag stock is not credible and

does not rebut the evidence that Respondent's payments were intended to induce Mr. Gentile to purchase tomatoes from Respondent.

C. Respondent's Payment to G&T.

On January 30, 1992, Respondent issued a check made payable to G&T in the amount of $5,600 (RX 34). Ms. Levine contended this check was in payment for services rendered by Mrs. Gentile to Respondent and Mr. Goodman, although Ms. Levine never knew what kind of services these were (Tr. 2042-43). Mrs. Gentile said the $5,600 was for checking out tomato fields in Florida, where she and Mr. Gentile had their winter home (Tr. 2911). However, Mrs. Gentile admitted that she and Mr. Goodman never had any written agreement as to exactly what she would do and how much she would be paid (Tr. 2932-34). No documentation was ever provided to justify the $5,600 payment.

I find that Complainant introduced substantial evidence to show that Respondent's payment of $5,600 to Mrs. Gentile was intended to induce Mr. Gentile to buy tomatoes from Respondent. Respondent's evidence that the $5,600 payment was for Mrs. Gentile's services is not credible and does not rebut the evidence that Respondent's payment was intended to induce Mr. Gentile to purchase tomatoes from Respondent.

D. The 35 Checks to "A. Gentile."

Respondent's payments to Mr. Gentile also include 35 checks, totaling $62,535.60 (CX 7), which Respondent issued to "A. Gentile." Respondent refers to these checks as "circular checks" because they were redeposited to Respondent's bank account. However, Respondent's records show that the 35 checks were treated as if Mr. Goodman was sharing his profit with Mr. Gentile. Further, 16 of the checks were shown in Respondent's records as reducing the debt that Mr. Gentile owed to Respondent.

The 35 checks to "A. Gentile" were found in file jackets that Ms. Colson examined (CX 8-CX 42; Tr. 109-13). All of the file jackets concern sales of tomatoes by Respondent to L&P. Mr. Goodman represented Respondent in all of the transactions since all of the file numbers contain the prefix "SG" (Tr. 80). Each file jacket contains handwritten notations and supporting documents (CX 8-CX 42; Tr. 132). The reverse sides of the 35 checks contain the endorsement "A. Gentile, payable to JSG Trading," which Ms. Levine wrote (Tr. 122, 1705). Some of the file jackets also contain a slip of paper on which the payment to "A. Gentile" is noted (CX 13B at 8; Tr. 137). Ms. Levine told Ms. Colson that she recorded this

information to indicate Respondent's expenses for the file jacket (Tr. 137).

The top portion of the back cover of each of the 81 file jackets show revenues from the produce transactions to which the file jacket relates and the bottom portion of the back cover of each of the 81 file jackets show expenses related to the produce transactions to which the file jacket relates (Tr. 127). The revenues sections show the amounts that Respondent's customer was billed for the produce and how much the customer paid (Tr. 127-28). The expenses sections show from whom Respondent purchased the produce, the date of purchase, the seller's invoice number, the date that Respondent made payment, Respondent's check number, and the amount of the check. The expenses sections also show incidental expenses, such as freight. The expenses sections for the files in question show payments to "A. Gentile" in the same amounts as the checks to "A. Gentile" found by Ms. Colson (Tr. 128-30).

When Ms. Colson asked Mr. Goodman what "A. Gentile" listed on the file jackets meant, Mr. Goodman was evasive. At first, he stated that he would give Ms. Levine receipts for various functions, such as having his car washed, and she would expense them to the files and that "A. Gentile" was a fictitious name (Tr. 129, 1038-39). He later admitted that "A. Gentile" was the name of a person, but insisted that "L&P" or any name, even that of Ms. Colson, could be substituted for "A. Gentile" (Tr. 1039).

Mr. Goodman told Ms. Colson that the checks payable to "A. Gentile," which were deposited into Respondent's account, were his way of keeping track of, and making up, losses that he incurred from sales to L&P and that if checks payable to Mr. Gentile were not deposited into Respondent's account, they were for services that Mr. Gentile had provided to him (Tr. 242).

Ms. Colson asked Mr. Goodman about notations written in the corners on the back of the 35 file jackets (CX 13B at 1; Tr. 132-33). Mr. Goodman again was evasive, stating that he made many notes on his file jackets (Tr. 132-33). The number of boxes of tomatoes in the load, multiplied by the amount noted on the back of the file jacket, associated with the name "Tony" equals the amount on the file jacket shown as an expense to "A. Gentile" (Tr. 145-46).

1. The 35 Checks Were Treated as a Profit Split Between Mr. Goodman and Mr. Gentile and 16 of the Checks Were Treated as a Reduction of the Debt Which Mr. Gentile Owed to Respondent.

Respondent's records show that the 35 "A. Gentile" checks obtained by Ms. Colson were treated as a profit split between Mr. Goodman and Mr. Gentile.

Further, 16 of the 35 checks were shown in Respondent's records as reducing the debt owed by Mr. Gentile to Respondent.

Respondent's Closed File Journal contains a column entitled "Open SC" which refers to "open split commissions." At the end of each week, Ms. Levine would reduce Mr. Goodman's profit by the amounts set forth in the "A. Gentile" checks (Tr. 1890-97). All 35 of the "A. Gentile" checks were noted in Respondent's Closed File Journal under the "Open SC" column corresponding to the dates of the transactions (Tr. 228-29). This evidence establishes that Respondent was treating these 35 checks to "A. Gentile" as a sharing of Mr. Goodman's profit.

Further, Ms. Colson found that 16 of the 35 checks were treated in Respondent's records as payments to reduce a debt that Mr. Gentile owed to Respondent. In Respondent's General Ledger Journal Entry Edit Report (CX 13A at 3; Tr. 146), a computer-generated document that reflects how Respondent's financial transactions are recorded in Respondent's general ledger (Tr. 1765), Ms. Colson found that the 16 checks were entered into one of Respondent's accounts described as "L/E Tony" (CX 13A at 3, CX 14A at 3, CX 17A at 3, CX 28A at 3, CX 29A at 3, CX 30A at 3, CX 31A at 3, CX 32A at 3, CX 33A at 3, CX 34A at 3, CX 35A at 3, CX 36A at 3, CX 37A at 3, CX 38A at 3, CX 39A at 3, and CX 42A at 3). The number of the account under which the 16 checks were entered is "108," which is identified in Respondent's General Ledger Chart of Accounts as loans and exchanges (CX 6).

During Ms. Colson's investigation, she obtained a spreadsheet from Ms. Levine or from Mr. Daily detailing the 1992 transactions in Respondent's loans and exchanges account (CX 55 at 1-3; Tr. 158, 1605). The spreadsheet contains 13 columns reflecting various individuals or firms to whom Respondent had loaned money (Tr. 2054-56). One of these columns is entitled "L&P" (Tr. 160-01, 1617-21). Ms. Colson found that the eight checks issued in 1992 to "A. Gentile" described in the General Ledger Journal Entry Edit Report as "L/E Tony" and the $38,475.30 boat payment to Midlantic Bank, are noted in the 1992 spreadsheet as a reduction of Mr. Gentile's debt payable to Respondent (CX 55 at 1-3; Tr. 161, 215-16).

Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about Respondent's loans and exchanges account and the spreadsheet that reflects the account (CX 55 at 1-3). Ms. Colson took notes during this conversation (CX 76). Mr. Daily stated that with respect to "L/E Tony," "L/E" referred to Respondent's loans and exchanges account and "Tony" referred to Mr. Gentile (CX 76; Tr. 149-50). Mr. Daily told Ms. Colson that Mr. Gentile had a loan payable to Respondent (CX 76; Tr. 158). The references to "L/E Tony" contained in Respondent's general ledger were set forth in the column in the spreadsheet under the heading

"L&P" (CX 76). Mr. Daily also provided an audit trail which supported the information contained in the spreadsheet (CX 55 at 4-6; Tr. 166).

At the hearing, Mr. Daily claimed that when Ms. Colson asked him what "L/E Tony" meant, he told her "these entries look like there's a loan to Tony, but that I would have to look into it" (Tr. 1520). However, Ms. Colson's notes of their March 11, 1993, telephone conversation indicate that Mr. Daily unambiguously stated that the "L/E" reference designated a loan to Mr. Gentile. The notes read: "Q. If the check stub denotes 'L/E Tony' then this would be a loan to Mr. Gentile and show up under L&P on the L/E schedule. - That's correct." (CX 76.)

Mr. Daily also testified at the hearing that, after Ms. Colson's investigation, he spoke with Ms. Levine about the "L/E Tony" references and he decided to remove them from the "L&P" column in the spreadsheet (Tr. 1532, 1656-57). However, Mr. Daily never informed Complainant that the information contained in the spreadsheet or in the audit trail would be changed to remove the "L/E Tony" references from the "L&P" column (Tr. 634-35, 1657), nor did Respondent ever make available or submit into evidence a revised version of the spreadsheet reflecting these alleged changes (Tr. 1660). I, therefore, conclude that Mr. Daily treated the "L/E Tony" references as reductions of debts that Mr. Gentile owed to Respondent.

It is clear that 16 of the 35 "A. Gentile" checks were treated by Respondent as reductions of Mr. Gentile's debt payable to Respondent. The other 19 checks also constitute a sharing of Mr. Goodman's profits on the sales of tomatoes to L&P. I find that Complainant introduced substantial evidence to establish that Respondent issued each of these checks to induce Mr. Gentile to purchase tomatoes from Respondent.

2. Respondent's Contention that the Checks Payable to "A. Gentile" Were Issued to Adjust L&P's "Clips" is Not Credible.

Respondent contends that the checks were not issued to induce Mr. Gentile to purchase tomatoes from Respondent. Specifically, Respondent contends that the checks payable to "A. Gentile" relate to an arrangement with L&P regarding "clips." Ms. Levine testified that the checks payable to "A. Gentile" were used by Respondent as part of a system to adjust L&P's files because of L&P's "clipping" of Respondent's invoices. A "clip" would result in L&P paying less than Respondent's invoice price. Ms. Levine testified as follows:

[BY MR. MANDELL:]

Q. Would you tell us what clips are in your understanding.

[BY MS. LEVINE:]

A. Okay.

Q. With regard to L&P.

A. Yes. As I understand it what was happening was he would -- they would make let's say or how can I explain it. They would take some money off -- they would underpay us on one invoice and then Mr. Goodman would add that onto a different file and we were keeping track like that. This is how we had set up the system. What we were doing we were taking a check and now this was one. This was a check that we were making up a clip.

So we cut the check but we re-deposited it. We kept the money. We just kept track. We had a journal that we kept track. We had a list that we were keeping track of clips of how much L&P owed us. Usually they owed us and that is why we were doing it like this.

Q. Miss Levine, why were you doing this with checks?

A. Well, because Mr. Goodman wanted to keep a record. This way if we ever had any problem we could always say well these are the checks that we had. On this particular file we made up $320. This way we always had a check and we kept them and they came to us in our bank statement and we always were able to find them. We said we had this check, this check, this check, this check and this is how much they totaled up.

Tr. 1705-06.

Ms. Levine stated that when one of Respondent's customers had a problem with a load and "clips" an invoice and Respondent did not object to the "clip," Respondent would rebill the customer at a lower price (Tr. 249-50, 2063-64).

However, Ms. Levine's attempt to explain how the alleged "clip" system was maintained is not credible. She claimed that she maintained a journal to record L&P's clips balance, that a first journal had been thrown away, and that a second

journal became wet when Respondent's basement was flooded early in 1995 (Tr. 1706, 1793-95). She testified that she tried to reconstruct the second journal by copying its figures into another journal because Mr. Mandell, Respondent's attorney, said the information was needed, but she was unable to reconstruct the second journal (Tr. 1772). However, Ms. Levine did not show the alleged second journal to Ms. Colson in February 1993, before it was allegedly damaged by the flood, even though she was served with a demand letter to provide relevant records (Tr. 1798). Further, Ms. Levine did not retain the remains of the journal allegedly damaged by the flood even though the Complaint in this matter had been filed, and she had been told by Respondent's attorney that such a journal would be important evidence (Tr. 1772, 1803-08). Ms. Levine testified that, in attempting to reconstruct the damaged second journal, she began with the most recent clip balance allegedly still owed by L&P, $10,092.65, and worked backward in time (RX 20 at 27; Tr. 1808-09). Ms. Levine stated that the most recent clip balance was provided to her on a piece of paper by Mr. Goodman; however, that piece of paper was never provided at the hearing (Tr. 1809-13). Without any tangible written evidence that Respondent maintained such a balance, either in a journal or other written record, the "clips" explanation simply is not believable.

The credibility of this alleged arrangement is further weakened by the inability of either Mr. Goodman or Ms. Levine to explain its operation with any clarity. Mr. Goodman testified:

[BY MR. STANTON:]

Q. Well, this file, [CX] 13[B at 1], indicates a $3200 circular check to A. Gentile under the expenses portion of the file[,] correct?

[BY MR. GOODMAN:]

A. Okay.

Q. It looks like from the file jacket, that this $3200 which you say is equal to the amount of the make-up, correct; is that basically your understanding of how this worked?

A. Pretty close to it, yes.

Q. That this $3200 is being taken away from your commissions?

A. Yes.

Q. Well, if that's the case, then how does this --

A. Wait a minute, excuse me. Marsha Levine needs to explain to you the pluses and adds to my commissions. I'm not going to testify to that because I get confused myself sometimes and she was up here and she explained it to you and she can do a much more accurate job of explaining it than I can.

Tr. 2804.

Mr. Goodman's lack of specific knowledge of how "clips" worked is inconsistent with his meticulous style of record keeping. He testified:

I knew there was some sort of list that she was keeping, but again I knew of no journals. A few times I saw like those yellow pieces of paper. I knew she was keeping some kind of record, and I knew because one time we spoke about it, and she said what happens when I come off of this page. I said to her when the page is done throw it away, because we are not looking to keep a balance from day one that we always had our files. If we ever wanted to go back to find out a figure, we could just take all of the files from whatever, add them up and there is the total add them up and subtract the pluses and minuses.

Tr. 2181.

Ms. Levine also was unable to explain how the system worked. When asked how an "A. Gentile" check that was redeposited into Respondent's account could have affected the balance owed between Respondent and L&P, she was unable to give an adequate explanation. Finally, Mr. Mandell objected on the ground that the questions seemed to "confuse the witness":

[BY MR. STANTON:]

Q. Let's see. How about GS4300. Was that just a make up?

[BY MS. LEVINE:]

A. Yes. That is just a make up.

Q. That is a make up for what 3120?

A. Yes, that is correct.

Q. Now and it is noted in your table [(RX 20)] at page 22 where you have minus 3120?

A. That is correct.

Q. That means that the amount of money that L&P owed JSG at that point was reduced by 3120?

A. That is correct.

Q. So JSG in this particular transaction gained an extra 3120 from L&P in some fashion?

A. Yes.

Q. Now --

A. It is not that we gained. We got back money that they had ---

Q. That had lost on other ---

A. Right.

Q. Now if you look at this file jacket [(CX 14)], it indicates at the bottom an A. Gentile circular check for 3120 [(CX 14B at 1)].

A. Yes.

Q. And that is under expenses for that particular file.

A. That is correct.

Q. So it looks like it increased the expenses of JSG on that file.

A. Yes.

Q. Now this is what the problem is for me. If this is supposed to be a make up which results in more money coming to JSG from L&P on this particular file, why does it look like on this file that less money the 31[2]0 less money is coming to JSG on this file?

A. Well what I would do is that check somewhere got redeposited probably on another file somewhere on that file we made more money than we were supposed to.

Q. On the other file?

A. Wherever file I wrote, there is no way for me to tell what file I deposited that check on.

Q. The circular check?

A. Yes. I had to redeposit it somewhere.

Q. Okay. So that would balance out the circular check.

A. That would increase -- yes.

Q. The circular check didn't really mean anything anyway because it resulted in no gain or loss.

A. That is right.

Q. So by balancing out the circular check, you might decrease the amount of expenses to JSG overall by 3120 by adding the amount of the circular check somewhere on another file jacket; right?

A. When I deposited it, it increased our sales I guess you would say.

Q. The revenues or sales right.

A. Yes.

Q. By 3120 so that would balance out this 3120 negative amount on this file [(CX 14)].

A. That is correct.

Q. But that still wouldn't result in any kind of overall increase to JSG making up for previous loans by L&P would it?

A. We were just getting back the money we were supposed to get.

Q. But if this is a make up, you are supposed to be getting extra money to decrease the loan balance of L&P; isn't that right?

MR. MANDELL: I am going to object because the question seems to confuse the witness.

Tr. 3129-32.

The credibility of this arrangement is also seriously compromised by Mr. Goodman's admitted alteration of documents in anticipation of the hearing. When the hearing reconvened on March 19, 1996, Respondent introduced into evidence copies of hundreds of Respondent's file jackets to assist Ms. Levine in explaining how L&P's alleged clip balance was maintained (RX 53). Included among these file jackets were many in which certain amounts were shown as being deducted from L&P's clip balance by means of the notation "clip." Ms. Levine testified how these file jackets reflected the ongoing nature of Respondent's arrangement with L&P.

However, upon cross-examination of Ms. Levine, it became clear that the word "clip," on at least 12 of these file jackets (SG 4131, 4152, 4211, 4242, 4273, 4314, 4399, 4718, 4876, 5115, 5128, and 5145), had been added after Ms. Colson's investigation. Mr. Goodman later admitted that he personally wrote the word "clip" on the file jackets during the hearing process:

BY MR. MANDELL:

Q. First of all Mr. Goodman, you were of course present during Miss Levine's testimony and you were reviewing documents with me from RX-53 and some of Complainant's exhibits which show the word clip that appear in some documents and not in others. Can you tell us anything about that?

[BY MR. GOODMAN:]

A. Yes. I wrote the word clip.

Q. When did you do it and why did you do it. I realize it is a compound question.

A. Okay. It was done I believe sometime during the hearing process when we knew we needed this compilation made up and I told Marsha to gather up all of the files or no I take that back. It goes back before the hearing and I gathered up all of the filings, I had seen all of the files and I ---

JUDGE BERNSTEIN: In preparing for the hearing?

THE WITNESS: In preparing for the hearing.

JUDGE BERNSTEIN: Okay.

THE WITNESS: And there were just -- I was shuffling these same files into so many different categories that it was just getting lost, confused and ridiculous. So I took the files that were clipped files, I wrote on the files not changing anything the word clip. So this way as I shuffled them around, I could always keep them in piles. I tried to get files that were shared loads that involved clips. So I had files that belonged in two different places. So by writing that, I could always keep track of what was what.

BY MR. MANDELL:

Q. Now Mr. Goodman, did you write anything else on the files?

A. No.

Tr. 3168-70.

Mr. Goodman thus admitted that he altered documents prior to the hearing which his counsel intended to move into evidence. Furthermore, Mr. Goodman did not admit to these alterations until the matter was raised during Ms. Levine's cross-examination. These admitted alterations not only undercut Respondent's

contentions with respect to the alleged "clip" arrangements with L&P, but they also detract from Respondent's credibility in general.

I also found unbelievable Mr. Goodman's testimony as to why 5 cents per box was utilized as a "clip." Mr. Goodman answered his lawyer's questions about that as follows:

[BY MR. MANDELL:]

Q. All right. I understand about the length of time but who arrived at the five cents per box out of your commission. Why not 10. Why not 20. Why not some other figure, do you remember?

[BY MR. GOODMAN:]

A. No, I don't as a matter of fact.

Q. Huh?

A. I don't remember. I don't know how that came about.

Q. Pardon.

A. Well first off I know that I wouldn't have wanted to make it too high because I wouldn't want it to have affected my bonus all that much but the difference between a nickel and a dime really doesn't matter. I just think it just came about. It was simple and easy.

Q. Didn't have anything to do with the prior situation where you were trying to make up Tony's clips did it?

A. You know it was easy to -- the one nice thing about the nickel for the clips was like I told you whenever we tried to make a half we got wacked back. So a nickel always sailed through pretty easily. Maybe that had something to do with it. It just made sense. It was just something we were [sic] used and we just kept on going with it.

Tr. 2591-92.

Mr. Goodman's explanation as to why L&P's officials had no written record of the "clips" also defies credibility. He stated:

. . . Neither Pat Prisco nor Tony Gentile on a file by file basis ever sat there and went over it file by file as far as where we added or subtracted -- well, they always knew their deductions, but they didn't keep track of how I got my money back because he knew I was keeping track and also you just couldn't do it. You had to be very cautious -- not cautious, wrong word.

Tr. 2372.

And to the same effect, Mr. Goodman answered:

[BY MR. MANDELL:]

Q. Did you have any conversations with anyone at L&P about the $3 make-up?

[BY MR. GOODMAN:]

A. Well, not specifically on a file by file basis, but Pat Prisco and I had many conversations about the clips, and the pluses and the minuses and the deductions and so forth like that. He was well aware of what we were doing.

I'm not going to say I spoke to Patty on a weekly basis because I did not. Tony Gentile had full control of L&P's tomato business. Tony and I certainly spoke about it often. We fought like cats and dogs about it and again, Pat Prisco and I had many conversations.

Patty, on occasion, although he never asked me, "Well, how much is it today, how much is it tomorrow, you know, where's my balance," but he knew how hard the deductions were, the clips were.

As a matter of fact Patty, one day we were talking and he sad [sic], "Steve, I know exactly what you're doing, nobody could get the kind of adjustments on clean files, no inspections, that you and Tony worked out without me knowing that I'm giving it back to you someplace else," we had that conversation many times.

Tr. 2269-70.

I find that Respondent's evidence that these payments to Mr. Gentile were designed to adjust L&P's "clips" is not credible and does not rebut the evidence that Respondent's payments were intended to induce Mr. Gentile to buy tomatoes from Respondent.

E. Principals at L&P Were Unaware of Respondent's Payments.

Mr. Prisco, the president of L&P, testified that he did not know that Mr. Gentile received payments from Respondent based on the number of boxes of tomatoes that Mr. Gentile purchased from Respondent, as follows:

[BY MR. STANTON:]

[Q]. The Complainant, PACA, has made many allegations regarding the relationship between Tony Gentile and JSG and one of the allegations is that during that period, JSG was paying Tony Gentile a certain amount per box on boxes of tomatoes which JSG sold to L&P.

This is an allegation that's being made in this case. Are you aware that this allegation is being made?

[BY MR. PRISCO:]

A. Yes, I am.

Q. And, as evidence of this allegation, the PACA Complainant, has submitted into evidence in this proceeding numerous copies of JSG file jackets regarding sales to L&P, and I'd like you to turn to Complainant's Exhibit Number 8, page 1, 8(b), page 1.

Mr. Prisco, this document, as well as many others, has been submitted into evidence as a copy of a JSG file jacket reflecting sales to L&P during 1992 and early 1993.

Now, one of the things Complainant has alleged is that handwritten notations on the bottom corner were indications of payments per box regarding sales made to L&P by JSG that were actually going to Tony Gentile.

Now, assuming these allegations are true, were you ever aware that there were these notations on the file jacket, first of all?

A. First of all, the first time I saw them was a couple of months ago, so I couldn't possibly be aware of it.

Q. But certainly during 1992 and 1993 you weren't aware of them?

A. No, I would have no – you know, I wouldn't be able to see this.

Q. Assuming it's true and that these notations do indicate that payments were being made on these files per box basis to Tony Gentile, were you aware that such payments were made, if, in fact, it's true?

A. No.

Q. And I'm talking about during the time of the transactions during 1992 and 1993?

A. No.

. . . .

Q. Turn to Exhibit 13(b), page 1, do you see that? . . . .

A. Okay.

. . . .

BY MR. STANTON:

Q. It's been alleged that the notations in the area on the corner of that circle, indicate a certain payment to A. Gentile. If that's true, were you aware of that?

A. No.

Q. It's also been alleged that the payment to A. Gentile in this particular file, took place by means of reducing a debt that Tony Gentile owed to JSG

and that allegedly is reflected by Exhibit 13(a), Page 3, which is the first document you were looking at.

A. Okay.

Q. If that is true, did you know about that?

A. No.

Q. Now, if any of your employees at L&P knew about that arrangement at the time, 1992 through 1993, would that have come to your attention?

A. Certainly.

Q. Did it come to your attention at all?

A. No.

. . . .

Q. Take a look at page one of 44(b).

A. I'm familiar with that check, $1,239.

Q. And it's been alleged that that check resulted from a per box payment reflected by the Tony, five cent notation on the file jacket that ultimately resulted in a $1,239 check to Gloria Gentile.

Now, the per box payment was on boxes of tomatoes sold by JSG to L&P. Now, if that were true, is that something that – an arrangement that you would know about?

A. Is it something, I would know about?

Q. Right, or did know about?

A. It was something that I did not know – if it were true, I did not know about it.

Q. And, if anyone at L&P would have known about such arrangement, would they have informed you during 1992?

A. They certainly would have.

. . . .

Q. And, its been alleged and testified to by Ms. Colson, that everyone of these entries reflects a particular load of tomatoes sold by JSG to L&P, and it's also been alleged that the quantity involved in each of these loads, as listed in the fifth column from the left, is the basis for a five cents per box payment, which led to that check to Gloria Gentile.

Now, would you have been aware, assuming it's true; would you been [sic] aware of the existence of this Gloria and Tony Enterprises statement to JSG?

A. No.

Q. If anybody at L&P had been aware of it would they have brought it to you [sic] attention?

A. Yes.

Tr. 457-58, 462-64, 501-04.

In addition, Mr. Prisco signed a sworn statement in which he stated that G&T was not authorized to receive payments from L&P's produce suppliers and that he was not aware of any payments to Mr. Gentile or G&T by L&P's produce suppliers, as follows:

I Patrick Prisco, president of L&P Fruit Corp., state that:

1) Gloria and Tony Enterprises is a joint venture with L&P Fruit and as such has the authority to purchase tomatoes on behalf of L&P Fruit Corp.
2) Gloria and Tony Enterprises was not authorized to receive any compensation from L&P Fruit Corp.'s suppliers on behalf of L&P Fruit Corp.
3) Prior to March 25th 1993, I was unaware of any payments made to

> Mr. Gentile or Gloria and Tony Enterprises by any suppliers in connection with L&P Fruit Corp.[']s purchases. I am aware of payments made to Mr. Gentile or Gloria and Tony Enterprises by companies dealing with L&P Fruit Corp. that were unrelated to produce purchases.

CX-4.

I find that Complainant introduced substantial evidence to establish that the principals at L&P were not aware that Respondent made payments to Mr. and Mrs. Gentile and G&T. Mr. Goodman testified that Mr. Prisco generally knew of the "clips" (Tr. 2269-70, 2372). However, as discussed in this Decision and Order on Remand as to JSG Trading Corp., *supra*, Mr. Goodman's testimony regarding "clips" is not credible, and Respondent did not offer evidence to show that the principals at L&P were aware of each payment to Mr. and Mrs. Gentile and G&T. Respondent's evidence that the principals at L&P knew of the payments is not sufficient to rebut Complainant's evidence that the principals at L&P were not fully aware of Respondent's payments to Mr. and Mrs. Gentile and G&T.

II. Respondent's Payments to Mr. Lomoriello.

Mr. Lomoriello was employed as a purchasing agent by American Banana in December 1991 and left its employ in 1993 (Tr. 315). From December 1992 through February 1993, Respondent issued seven checks to Mr. Lomoriello totaling $9,733.45. I find that $9,733.45 is not *de minimis*.

Respondent and Mr. Lomoriello claim that these checks were not issued to induce Mr. Lomoriello to purchase tomatoes from Respondent, but rather were issued for Mr. Lomoriello's services not involving American Banana. However, the record does not reveal what specifically Mr. Lomoriello did for Mr. Goodman or Respondent to earn $9,733.45. Mr. Goodman testified that he began to ask Mr. Lomoriello to do things for him at the Hunts Point Market (Tr. 2192). However, Mr. Goodman admitted that there was never any written agreement setting forth what Mr. Lomoriello would do and the payments that he would receive (Tr. 2193).

Ms. Colson found 22 file jackets that relate to Respondent's sales of tomatoes to American Banana which contain notations that are similar to those on the backs of file jackets reflecting sales to L&P (CX 63-69; Tr. 550-51). The notations indicate that payments per box were being made to "Al," "HPT," or "Hunts Point Produce" in an amount equivalent to the amount of the notation multiplied by the number of boxes sold to American Banana. Ms. Colson found Hunts Point Produce Co. invoices in the file jackets for amounts corresponding to the payments

to "Al," "HPT," or "Hunts Point Produce" listed on the file jackets. She also found seven of Respondent's checks totaling $9,733.45, made payable to Hunts Point Produce Co. (CX 63A at 1, CX 64A at 1, CX 65A at 1, CX 66A at 1, CX 67A at 1, CX 68A at 1, CX 69A at 4). The amounts on the Hunts Point Produce Co. invoices also correspond to the amounts of the checks made payable to Hunts Point Produce Co. and the Hunts Point Produce Co. invoices contain Respondent's file numbers which correspond to the file numbers written on the checks payable to Hunts Point Produce Co. or written on the check skirts applicable to checks payable to Hunts Point Produce Co. (CX 63B at 3-4, CX 63C at 4-5, CX 64B at 3-4, CX 64C at 3-4, CX 65B at 4-5, CX 65C at 4-5, CX 65D at 4-5, CX 65E at 3-4, CX 65F at 3-4, CX 65G at 3-4, CX 66B at 4-5, CX 66C at 4-5, CX 66D at 3-4, CX 67B at 3-4, CX 67C at 3-4, CX 67D at 4-5, CX 68B at 6-7, CX 68C at 4-5, CX 68D at 4-5, CX 68E at 4-5, CX 69A at 4-5). Examination of these invoices reveals that only the earliest Hunts Point Produce Co. invoice, dated December 14, 1992, states how much money per box was being paid to Mr. Lomoriello (CX 63B at 4). When Ms. Colson examined Respondent's Closed File Journal, she found the amounts of the checks written by Respondent to Hunts Point Produce Co. listed in the "Open SC" column (CX 52; Tr. 604-05).

Ms. Levine testified that Mr. Goodman asked her to pay Mr. Lomoriello, although she did not know what services Mr. Lomoriello was rendering to Respondent (Tr. 1962). Ms. Levine said that she asked Mr. Lomoriello for some blank invoices that she could prepare to show that Mr. Lomoriello was not Respondent's employee (Tr. 1962, 1965). After she received the invoices and was told by Mr. Goodman what amounts to pay, Ms. Levine noted the payments to Mr. Lomoriello on American Banana files and completed a Hunts Point Produce Co. invoice to reflect the amounts to be paid to Mr. Lomoriello (Tr. 1968).

Although Ms. Levine claims that her actions were not done in furtherance of recording payments for buying tomatoes from Respondent, she stated that Mr. Lomoriello was quite upset when he received the December 14, 1992, invoice (CX 63B at 4), since it appeared to him as if he was receiving a "kickback." She testified:

> When Al received this, he was slightly upset and he told me I should never send him an invoice like this again because it looks like I'm getting a kickback. Those were his -- actually he didn't say it as nicely as that, but I won't say what he said.

Tr. 1969.

Ms. Levine communicated Mr. Lomoriello's comments to Mr. Goodman (Tr.

2036). After being made aware that Mr. Lomoriello was upset that Respondent's payments to him were documented in a way that suggested that the payments were kickbacks, Respondent did not stop making payments to Mr. Lomoriello (Tr. 2037), but made the nature of the payments less obvious by not stating on the invoices how much per box each file was being charged (Tr. 2037).

Respondent and Mr. Lomoriello have not provided any credible evidence of what services Mr. Lomoriello performed for the money that he was paid by Respondent. Ms. Colson testified that in the course of her investigation, on March 11, 1993, when she asked to see Mr. Lomoriello's records, Mr. Lomoriello stated they were at his home and that he would provide them to her on the following day (Tr. 608-09). However, on the following day, when Ms. Colson met with Mr. Lomoriello, the only records that he produced were two deposit tickets (CX 70), supposedly reflecting his deposit of the funds received from Respondent (Tr. 630-31).

However, at the hearing, Mr. Lomoriello disclosed what he alleged were notes that he had written in 1992 and 1993 in response to Mr. Goodman's requests for his assistance (RL 19-25; Tr. 1179-81). These notes appear to be on paper containing an American Banana letterhead. Mr. Lomoriello explained: "RL – RL-20 is a piece of paper that Mimi Contos, American Banana has a pile of American Banana letterhead on the side of the copy machine that when you write notes to people it would be done on his letterhead. . . ." (Tr. 1180).

Mr. Lomoriello said that the notes were in the back of his file cabinet at his home, and he did not provide them to Ms. Colson in March 1993 because he did not find them until early 1995 (Tr. 1194-95, 1202). Upon cross-examination, Mr. Lomoriello stated that he obtained the American Banana stationery on which the notes were written (RL 19-25) from the desk of American Banana's bookkeeper, Carlos Valencia:

> [BY MR. STANTON:]
>
> Q. The documents -- the blank documents on which you wrote the notes, RL-19 through RL-25, you obtained them from American Banana, right?
>
> [BY MR. LOMORIELLO:]
>
> A. The blank documents, that's American Banana stuff, yeah -- yes.
>
> Q. Now, explain again where you -- actually in American Banana you

obtained them from?

A. Carlos keeps them on his desk. You have to ask him, he gives you the papers and you -- there are [sic] pretty tight in that office there so you got to ask for a pencil and he keeps everything locked up that he feels is worth any kind of money whatsoever and you got to ask for a piece of paper most of the time to do things.

Tr. 1196-97.

The question arose as to why American Banana's letterhead in RL 19-25 was completely different from American Banana's letterhead found on notes in Respondent's files (CX 65G at 7; CX 66B at 14). Mr. Lomoriello suggested that American Banana had stationery with different letterheads and stated that Carlos Valencia would know about American Banana stationery (Tr. 1225-28).

However, Mr. Valencia testified that the letterhead used for the alleged notes (RL 19-25) was identical to the letterhead used for American Banana's invoices (e.g., RL 1) and the only letterhead that American Banana used for correspondence was the letterhead on notes found in Respondent's files (CX 65G at 7; CX 66B at 14).

BY MR. LOMORIELLO:

Q. The letterhead on RL-19 and the letterhead on CX 65(g), page 7, they are a little different aren't they, Mr. Valencia?

[BY MR. VALENCIA:]

A. Yes, very much, yes.

Q. But both of these letterheads --

JUDGE BERNSTEIN: Wait, wait. Is the letterhead in RL-19 an American Banana Company letterhead that's been used by American Banana?

THE WITNESS: No.

JUDGE BERNSTEIN: Have you ever seen that letterhead in RL-19 before?

THE WITNESS: Yes.

JUDGE BERNSTEIN: Can you explain about it?

THE WITNESS: I seen this on the invoice that we sent to the customers.

. . . .

JUDGE BERNSTEIN: And, you've seen that -- let me see if I can understand your answer. That letterhead was used by American Banana, as I understand your answer?

THE WITNESS: It's been used on the statements that we send out to the customers. It is the headlines of the statements.

Tr. 1485-86.

When Mr. Lomoriello asked Mr. Valencia whether he kept a folder with photocopy paper containing American Banana's letterheads on his desk, as Mr. Lomoriello had testified earlier, Mr. Valencia vociferously denied that any paper with such letterheads were ever left outside his locked filing cabinet (Tr. 1490-92).

Upon examining one of American Banana's invoices (RL 1) and Mr. Lomoriello's exhibits (RL 19-25), Mr. Valencia concluded that the purported American Banana letterhead could have been created by simply placing a piece of white paper over all but the letterhead of a typical American Banana invoice and copying the document in a copier (Tr. 1493-94). I conclude that is exactly what occurred -- that Mr. Lomoriello manufactured this evidence to support his contention that the payments that he received from Respondent were not kickbacks.

Respondent also introduced into evidence other file jackets (RX 50 at 1-3 (SG 5206), RX 50 at 4-6 (SG 5176), RX 50 at 7-9 (SG 5175), RX 50 at 10-13 (SG 5298), RX 50 at 14-16 (SG 5304), RX 50 at 17-19 (SG 5476), RX 50 at 20-22 (SG 5480) and RX 50 at 23-25 (SG 5521)) which contain handwritten notations on the flaps allegedly referring to tasks performed by Mr. Lomoriello for Respondent in 1992 and 1993. However, I strongly suspect that the writings on the flaps of these file jackets were made after the transactions ended, as they appear in a different color ink than the other writings on the backs of the file jackets (Tr. 3006-34). Further, the reference to "Al" in (RX 50 at 18) (SG 5476) appears to be an attempt to write Mr. Lomoriello's name over an existing notation to make it appear as if

Mr. Lomoriello was involved in the transaction (Tr. 3036). Considering the other evidence of falsification and alteration of documents, it is not unlikely that these file jacket flaps allegedly containing notes by Mr. Goodman involving Mr. Lomoriello were also altered in anticipation of the hearing. I, therefore, find this evidence to be unreliable.

Mr. Goodman and Mr. Lomoriello testified that the payments were for various services that Mr. Lomoriello performed for Respondent in other matters. Yet there was no reliable evidence that the payments to Mr. Lomoriello were charged to any other files associated with his alleged services. Given the meticulous nature of Mr. Goodman's notations of expenses on associated files, it is also unbelievable that these payments would be randomly charged to files totally unrelated to Mr. Lomoriello's alleged services. I, therefore, conclude that Respondent made these payments to Mr. Lomoriello totaling $9,733.45 to induce Mr. Lomoriello to purchase tomatoes from Respondent.

Mr. Contos, the vice-president of American Banana, testified that he did not know that Mr. Lomoriello received payments from Respondent based on the number of boxes of tomatoes that Mr. Lomoriello purchased from Respondent, as follows:

> [BY MR. STANTON:]
>
> Q. Now, Mr. Contos, assume for the sake of argument that Complainant's allegations are true and JSG was, in fact, paying Al Lomoriello or Hunts Point Produce a certain amount per box on boxes of tomatoes which JSG sold to American Banana.
>
> If we assume that these allegations are true, were you aware of this business arrangement?
>
> [BY MR. CONTOS:]
>
> A. No, sir.
>
> Q. Now, would you have been made aware of this type of business arrangement if anybody else at American Banana knew about it?
>
> A. No.
>
> Q. You wouldn't have been made aware – I mean, I'm not asking if you

were made aware of it, but if anybody else employed by American Banana knew about it, would they have told you?

A. Yes, but nobody told me anything about that, nobody knew, as far as I'm concerned, nobody mentioned to me that he was getting that money from JSG. I don't know.

Q. What's the name of the President of American Banana?

A. Alfred Allega.

Q. Alfred Allega, A-l-l-e-g-a?

A. He's my partner, yes, A-l-l-e-g-a, but he had nothing to do because we have two places, one is outside. We have three partners, I take care of Hunts Point Market inside the market and my other two partners, they take care of Fort Wayne and Hunts Point. I have two warehouses and I take this place, you know Hunts Point, and my partners got nothing to do with this.

In other words, it's the same company, but we run separately, you know, those two places. I'm running Hunts Point Market inside and they're running the other places.

Q. With regard to business dealings at Hunts Point that American Banana had with Al Lomoriello, who was – in your company, who was in charge of supervising that relationship?

A. I was.

Q. You were?

A. Yeah, like I told you before, I was taking care of Hunts Point and Al Lomoriello was with me. He had nothing to do with the other place outside the market, because like I explained to you, we have two places, one inside the market, Hunts Point and one outside.

. . . .

BY MR. LOMORIELLO:

. . . .

Q. Do you remember the day Ms. Colson came to American Banana, the lady sitting over there?

A. Yes.

Q. She came in, she asked to speak to you and you went to your office and closed the door and you spoke for a while with her?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. Can you tell me what she told you that day, can you tell the Court what she told you that day?

A. She told me that she was looking for something and she was looking to see the records, that she wanted to know –

. . . .

THE WITNESS: Yes, she came over and she was looking for the papers to see how come he was getting commission from JSG and she wanted to know what's happening and I didn't know anything about that Mr. Lomoriello was getting commission from JSG, which I didn't know and she wanted to find out and I told her, I don't know.

Tr. 322-24, 415-16.

I find that Complainant introduced substantial evidence to establish that the principals at American Banana were not aware that Respondent made payments to Mr. Lomoriello. Respondent's evidence that the principals at American Banana knew of the payments is not sufficient to rebut Complainant's evidence that the principals at American Banana were not fully aware of Respondent's payments to Mr. Lomoriello.

III. *Quid Pro Quo* Agreement.

Respondent contends that *JSG Trading Corp. v. United States Dep't of Agric., supra*, makes clear that, in order to meet the traditional test for commercial bribery, Complainant must establish the existence of a specific *quid pro quo* agreement attached to the giving of the alleged consideration (Respondent's Motion to Dismiss at 4, 6; Respondent's Reply at 4).

However, I agree with Complainant's position (Complainant's Response at 16) that *JSG v. United States Dep't of Agric., supra*, does not require proof of the existence of a written or oral agreement between the parties alleged to have violated section 2(4) of the PACA, in order to meet the traditional test for commercial bribery. Instead, the Court indicates that the traditional test for commercial bribery typically contains only two elements, intent to induce and secrecy:

> It is clear that the test for commercial bribery employed by the agency in *Goodman* and *Tipco* requires a finding of both intent to induce and secrecy. These requirements are not surprising, given that commercial bribery statutes typically contain at least these two elements. *See, e.g.*, N.Y. PENAL LAW §§ 180.00, 180.03 (McKinney 1999) ("A person is guilty of commercial bribing . . . when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with the intent to influence his conduct in relation to his employer's or principal's affairs."); 720 ILL. COMP. STAT. ANN. 5/29A-1 (West 1998) ("A person commits commercial bribery when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."); *see also* 2 Rudolph Callman, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 12.01, at 1 n.0.50; § 12.01, at 8-9 (4th ed. 1996 & Supp. 1999); BLACK'S LAW DICTIONARY 270 (6th ed. 1990) (defining commercial bribery as "[a] form of corrupt and unfair trade practice in which an employee accepts a gratuity to act against the best interests of his employer").
>
> . . . .
>
> Even assuming that Mr. Goodman's gifts to Mr. Gentile were made not out of pure friendship, but rather in an effort to curry favor with

> Mr. Gentile, it is not immediately obvious how the marketplace is disturbed–or how Mr. Goodman is violating any implied duty under the PACA–if Mr. Gentile's employer is aware of the gifts, and there is no specific *quid pro quo* agreement between Mr. Goodman and Mr. Gentile. . . . In other words, without a finding of secrecy and intent to induce, there appears to be nothing to distinguish an illegal bribe from a simple promotional gift.

JSG Trading Corp. v. United States Dep't of Agric., *supra*, 176 F.3d at 542-43, 545.

Thus, I do not find that proof of a specific written or oral agreement between Respondent and Mr. Gentile or Respondent and Mr. Lomoriello is prerequisite to my finding that Respondent violated section 2(4) of the PACA.

Even if I found that the elements of traditional commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, include the existence of a *quid pro quo* agreement, I would find that Respondent engaged in activity that meets the traditional test for commercial bribery. Complainant did not introduce evidence of a specific written or oral agreement between Respondent and Mr. Gentile or between Respondent and Mr. Lomoriello, in which the parties agreed that, in exchange for payments from Respondent, Mr. Gentile and/or Mr. Lomoriello would purchase tomatoes from Respondent rather than Respondent's competitors. However, Complainant introduced substantial evidence that Respondent made a series of payments to Messrs. Gentile and Lomoriello to induce Messrs. Gentile and Lomoriello to purchase tomatoes from Respondent and substantial evidence that the principals at L&P were not aware of all of Respondent's payments to Mr. Gentile and the principals at American Banana were not aware of Respondent's payments to Mr. Lomoriello. Moreover, Complainant introduced substantial evidence that many of these payments were directly dependent on the number of boxes of tomatoes that Messrs. Gentile and Lomoriello purchased from Respondent. Based on these facts, I infer that Respondent and Mr. Gentile and Respondent and Mr. Lomoriello had *quid pro quo* agreements in which, in exchange for Respondent's payments, Messrs. Gentile and Lomoriello agreed to purchase tomatoes from Respondent.

IV. Collateral Fees and Expenses.

Respondent contends that *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, requires that I consider Respondent's payments to Messrs. Gentile and Lomoriello in light of the PACAA-1995, which allows the good faith offer,

solicitation, payment, or receipt of collateral fees and expenses. Respondent asserts that there is nothing in the record that demonstrates that Respondent's payments were other than collateral fees and expenses made in good faith. (Respondent's Motion to Dismiss at 12.)

I disagree with Respondent's contention that *JSG Trading Corp. v. United States Dep't of Agric., supra*, requires me to consider whether Respondent's payments to Messrs. Gentile and Lomoriello were good faith collateral fees and expenses paid in accordance with the PACA.

The Court states that "[s]everal of the gifts given to Mr. Gentile by Mr. Goodman arguably could be considered 'promotional allowances' made in good faith (*i.e.*, not in secret), and in connection with the marketing of JSG's product." The Court instructed that, "[o]n remand, the agency must explain its justification, if it has one, for employing a *per se* test for commercial bribery, and it must do so in conjunction with the 1995 amendment to PACA. The agency is free, of course, to abandon the *per se* approach, and apply the traditional commercial bribery test employed in *Goodman* and *Tipco*." *JSG Trading Corp. v. United States Dep't of Agric., supra*, 176 F.3d at 546.

Since I abandon the *per se* test for commercial bribery, the Court's instruction that I explain the justification for the *per se* test for commercial bribery, in conjunction with the provision of the PACAA-1995 that allows the good faith payment of collateral fees and expenses, does not apply to this Decision and Order on Remand as to JSG Trading Corp. Moreover, as fully explicated in this Decision and Order on Remand as to JSG Trading Corp., *supra*, I find Respondent made payments to induce Messrs. Gentile and Lomoriello to purchase tomatoes from Respondent and that the principals at L&P were not fully aware of all of Respondent's payments to Mr. Gentile and the principals at American Banana were not fully aware of Respondent's payments to Mr. Lomoriello (*i.e.*, Respondent's payments were not "made in good faith" and therefore could not have been good faith payments of collateral fees and expenses allowed under the PACAA-1995).

V. Messrs. Gentile and Lomoriello Were Not Partners or Independent Brokers.

Respondent contends that Messrs. Gentile and Lomoriello were partners in limited joint venture arrangements with L&P and American Banana, respectively. Respondent contends that, as a matter of law, Respondent's payments to Messrs. Gentile and Lomoriello could not constitute an activity that falls within the traditional definitions of commercial bribery because knowledge of payment to one partner must be attributed to the other partners and such payments could not be

considered secret. Alternatively, Respondent asserts that Messrs. Gentile and Lomoriello were independent brokers and that payments to independent brokers are permissible under the PACA. (Respondent's Reply at 15-19.)

Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman, managed the sales operation, and was the tomato buyer at L&P (Tr. 442). Mr. Gentile had a joint account arrangement with L&P, in accordance with which Mr. Gentile shared profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Mr. Gentile became ill in late 1990 or early 1991 and from that time through the date of the hearing, Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446, 2909). L&P continued to compensate Mr. Gentile on a joint account basis, but at a reduced rate of 15 per centum of the profits and losses (Tr. 447).

Mr. Gentile described himself as being employed by L&P (Tr. 2819). Mr. Prisco, the president of L&P, described Mr. Gentile as an employee of L&P and stated that L&P uses joint account arrangements with salespersons because the joint account arrangement gives a salesperson an incentive to work hard (Tr. 442-47). Mr. Beni, the secretary-treasurer of L&P, testified that Mr. Gentile was a salesperson for L&P and that L&P paid Mr. Gentile a salary for his fruit sales and had a joint account arrangement with Mr. Gentile with respect to his tomato sales (Tr. 2890, 2892-93). Mr. Beni testified that joint account arrangements are used because they give people "an incentive to sell more stuff" (Tr. 2893). Mr. Beni testified that his partner at L&P was in charge of the office, and when asked who his partner was, Mr. Beni identified his partner as Mr. Prisco (Tr. 2890-91).

Mr. Lomoriello became employed by American Banana in approximately December 1991 (Tr. 1256). Mr. Lomoriello had a joint account arrangement with American Banana in accordance with which Mr. Lomoriello shared profits and losses with American Banana on the produce that he purchased (Tr. 1245-46).

Mr. Contos, American Banana's vice-president, described Mr. Lomoriello as working for American Banana as a night salesperson and described himself as supervising Mr. Lomoriello (Tr. 314, 323). While Mr. Lomoriello characterized himself as an independent contractor, who sold services to American Banana (Tr. 1244), and a partner (Tr. 1277-78), he also described his duties at American Banana, which description supports Mr. Contos' view that Mr. Lomoriello was a salesperson working for American Banana (Tr. 1258-66). Mr. Contos testified that the president of American Banana was Alfred Allega and testified that he (Mr. Contos) had two partners. Mr. Contos identified Mr. Allega as one of those partners, but did not identify the other partner. (Tr. 323-24.)

A partnership is an association of two or more persons to carry on business for

a profit.[9] An essential element of partnership is sharing of profit and losses[10] and sharing of profits and losses generally constitutes prima face evidence of the existence of a partnership.[11] However, the fact that an individual shares profits and losses is not dispositive of partnership status[12] and whether partnership status exists turns on several factors, including the intention of the parties that they be partners, sharing in profits and losses, exercising joint control over the business, making capital investment, and possessing an ownership interest in the partnership.[13]

The party alleging the existence of a partnership bears the burden of proof on the issue.[14] The record does not support a finding that Mr. Gentile was a partner with L&P or the principals at L&P or a finding that Mr. Lomoriello was a partner

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[9]*Bickhardt v. Ratner*, 871 F. Supp. 613, 620 (S.D.N.Y. 1994).

[10]*ACLI Government Securities, Inc. v. Rhoades*, 813 F. Supp. 255, 257 (S.D.N.Y.), *aff'd*, 14 F.3d 591 (2d Cir. 1993); *Steinbeck v. Gerosa*, 175 N.Y.S.2d 1, 13 (N.Y.), *appeal dismissed*, 358 U.S. 39 (1958); *Scharf v. Crosby*, 502 N.Y.S.2d 891, 892 (N.Y. App. Div. 1986) (mem.); *Missan v. Schoenfeld*, 465 N.Y.S.2d 706, 711-12 (N.Y. App. Div. 1983); *Bennett v. Pierce Industries, Inc.*, 281 N.Y.S.2d 674, 676 (N.Y. App. Div. 1967) (per curiam); *Reynolds v. Searle*, 174 N.Y.S. 137, 138 (N.Y. App. Div. 1919).

[11]*Kellogg v. Kellogg*, 564 N.Y.S.2d 631, 633 (N.Y. App. Div. 1991); *Missan v. Schoenfeld*, 465 N.Y.S.2d 706, 712 (N.Y. App. Div. 1983).

[12]*Martin v. Peyton*, 246 N.Y. 213, 128 (N.Y. 1927); *Kellogg v. Kellogg*, 564 N.Y.S.2d 631, 633 (N.Y. App. Div. 1991); *Blaustein v. Lazar Borck & Mensch*, 555 N.Y.S.2d 776, 777 (N.Y. App. Div. 1990) (mem.); *Boyarsky v. Froccaro*, 516 N.Y.S.2d 775, 777 (N.Y. App. Div. 1987) (mem); *Missan v. Schoenfeld*, 465 N.Y.S.2d 706, 712 (N.Y. App. Div. 1983); *Ramirez v. Goldberg*, 439 N.Y.S.2d 959, 961 (N.Y. App. Div. 1981); *Barschi v. Euben*, 426 N.Y.S.2d 802 (N.Y. App. Div.) (mem.), *appeal denied*, 433 N.Y.S.2d 1027 (N.Y. 1980).

[13]*Bickhardt v. Ratner*, 871 F. Supp. 613, 620 (S.D.N.Y. 1994); *ACLI Government Securities, Inc. v. Rhoades*, 813 F. Supp. 255, 256 (S.D.N.Y.), *aff'd*, 14 F.3d 591 (2d Cir. 1993); *Televideo Systems, Inc. v. Mayer*, 139 F.R.D. 42, 48 (S.D.N.Y. 1991) (mem.); *Kyle v. Brenton*, 584 N.Y.S.2d 698, 699 (N.Y. App. Div. 1992) (mem.); *Blaustein v. Lazar Borck & Mensch*, 555 N.Y.S.2d 776, 777 (N.Y. App. Div. 1990) (mem.); *Farmer v. State Tax Commission of New York*, 535 N.Y.S.2d 453, 455-56 (N.Y. App. Div. 1988); *Brodsky v. Stadlen*, 526 N.Y.S.2d 478, 479 (N.Y. App. Div. 1988) (mem.); *Alleva v. Alleva Dairy*, 514 N.Y.S.2d 422, 423 (N.Y. App. Div. 1987); *M.I.F. Securities Co. v. R.C. Stamm & Co.*, 463 N.Y.S.2d 771, 774 (N.Y. App. Div.), *aff'd*, 471 N.Y.S.2d 84 (1983).

[14]*Televideo Systems, Inc. v. Mayer*, 139 F.R.D. 42, 48 (S.D.N.Y. 1991) (mem.); *Blaustein v. Lazar Borck & Mensch*, 555 N.Y.S.2d 776, 777 (N.Y. App. Div. 1990) (mem.); *Ramirez v. Goldberg*, 439 N.Y.S.2d 959, 961 (N.Y. App. Div. 1981); *Moscatelli v. Nordstrom*, 337 N.Y.S.2d 575, 576 (N.Y. App. Div. 1972) (mem).

with American Banana or the principals at American Banana. Instead, the record establishes that the joint account arrangements that Messrs. Gentile and Lomoriello had with L&P and American Banana, respectively, were merely methods by which L&P and American Banana compensated Messrs. Gentile and Lomoriello, respectively, for services. I find that Mr. Gentile was a purchasing agent working for a principal, L&P, and that Mr. Lomoriello was a purchasing agent working for a principal, American Banana.

Conclusion of Law

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA.

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

Order

JSG Trading Corp.'s PACA license is revoked, effective 61 days after service of this Order on JSG Trading Corp.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

J&J PRODUCE CO., INC. v. WEIS-BUY SERVICES, INC.
PACA Docket No. R-99-0103.
Decision and Order filed October 13, 1999.

Interstate Commerce – Present where both parties are located within a state, but shipment is outside the state.

Acceptance – By unloading of produce.

Rejection – Prohibited following acceptance.

Refusal to Accept Rejection – Impermissible except where rejection is ineffective.

Damages – Failure to render prompt and proper accounting precluded the award of damages as to shipment containing some misbranded tomatoes, and some tomatoes which were the wrong brand and color.

Complainant and Respondent contracted for the sale of a load of gassed green tomatoes of a specific brand and color. The invoices stated shipment was to be to the same address as Respondent's address within the state where they were grown. However, evidence showed that Complainant knew that the tomatoes were being shipped out of the state. It was held that there was interstate commerce. A federal inspection at destination showed that some of the tomatoes were misbranded, some were the wrong brand and some were shipped with the wrong color. All of these failings were held to constitute breaches of contract by Complainant. The tomatoes were unloaded prior to inspection, and Respondent, after seeing the results of the inspection, notified Complainant that the load was being rejected. Complainant refused to accept the rejection. Respondent's attempted rejection was held to be illegal and ineffective. Complainant's refusal to accept the rejection amounted merely to notice that the rejection was not deemed to be effective, and that Complainant would not accede to it in such manner as to constitute a modification of the contract. Respondent did not render a prompt and proper accounting, and no alternative method of assessing damages could be found.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Michael J. Keaton, Glen Ellyn, IL, 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 $13,824.65 in

connection with a transaction in interstate commerce involving a shipment of tomatoes.

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. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement. Complainant did not file a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, J & J Produce Co., Inc., is a corporation whose address is 6796 Lantana Road, Lake Worth, Florida.

2. Respondent, Weis-Buy Services, Inc., is a corporation whose address is 6225 Presidential Court, Suite D, Fort Myers, Florida. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about March 20, 1998, Complainant agreed to sell to Respondent one truck load, consisting of 20 pallets, of 85 percent U. S. No. 1 or better "Cat's Meow" brand, gassed green tomatoes, to ship with 3½ to 4 color, on an f.o.b. basis. The load was purchased under two purchase orders: 15209 called for 480 cartons of extra large size, and 480 cartons of large size; 15208 called for 400 cartons of extra large size, 160 cartons of large size, and 80 cartons of medium size. At time of shipment on March 24, 1998, Complainant contacted Respondent and asked if the order could be filled out with No. 2 tomatoes since the grower was short on the tomatoes that had been ordered. Respondent replied that only the tomatoes ordered, with proper color, would do.

4. On March 24, 1998, Complainant shipped from loading point in Homestead, Florida, to Respondent's customer in Dayton, Ohio, one load consisting of 480 cartons of extra large tomatoes at $10.35; 480 cartons of large tomatoes at $8.35; 321 cartons of extra large tomatoes at $10.35; 80 cartons of large tomatoes at $8.35; and 138 cartons of medium tomatoes at $6.35, or a total of 1499 cartons for $13,842.65, f.o.b. Included on the load were 1,099 cartons of "Cats Meow" brand tomatoes which were labeled "vine ripe," and 400 cartons of "Sun Coast" brand tomatoes.

5. Following arrival at the place of business of Respondent's customer in Dayton, Ohio, the tomatoes were federally inspected following unloading. The certificate showed that the inspection took place on March 26, 1998, at 11:30 a.m., and revealed the following in relevant part:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	66 to 67 °F	Tomatoes	"Cat's Meow" brand, Vine Ripe	FL	USDA Florida (236, 20610)	1,099 Cartons	Y
B	66 to 67 °F	Tomatoes	"Sun Coast" (6x7 or 6x6) Each lot: 25 Lbs Net Wt.	FL	(USDA FL 137 X C Wil)	400 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	04	%	00	%	00	%	Abnormal Coloring	A. Average approximately 25% green to breakers, 20% turning to pink. 50% light red to red.
	05	%	01	%	00	%	Bruising	
	03	%	00	%	00	%	Sunken Discolored Areas	
	00	%	00	%		%	Soft	
	-1	%	-1	%	-1	%	Decay	A. R
	13	%	02	%	01	%	Checksum	
B	02	%	00	%	00	%	Abnormal coloring	B. Average approximately 5% green to breakers, 35% turning to pink, 60% light red to red.
	04	%	01	%	00	%	Bruising	Net weight ranges 24.00 to 27.75, average 25.18 pounds per carton.

01	% 00	% 00	% Sunken Discolored Areas
00	% 00	% 00	% Soft
-1	% -1	% -1	% Decay
08	% 02	% 01	% Checksum

GRADE: Each lot: Meets marked weight.

REMARKS: Restricted to condition and net weight only at applicant's request.

6. Within a few hours after the inspection was completed Respondent's customer notified Respondent that the tomatoes were being rejected, and Respondent also notified Complainant that the tomatoes were being rejected. Complainant responded by a faxed message at 6:00 p.m. on the same day that it would not accept the rejection.

7. The formal complaint was filed on October 13, 1998, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant seeks to recover the purchase price of the load of tomatoes. Respondent raised several defenses to Complainant's action.

First, Respondent alleges that the Secretary does not have jurisdiction over this matter because the tomatoes were sold to Respondent in Florida, and that there was, therefore, no interstate commerce. Respondent points to Complainant's invoices covering the two lots of tomatoes that made up the shipment. These invoices show the tomatoes as sold to Respondent at its address in Fort Myers, Florida, and also show the same information under the words: "SHIP TO." However, it is certain that the tomatoes were shipped from Florida to Ohio, and that Complainant alleges that it knew of the Ohio destination.[1] This is sufficient to show interstate commerce.[2]

Second, respondent alleges that the tomatoes shipped were the wrong color, and

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[1]Complainant alleges in the sworn complaint that "Complainant shipped . . . to Respondent's customer in the State of Florida . . . ." Respondent alleges in the sworn answer that the parties agreed that the color would be "3½ to 4 upon shipping in order to make 4½ to 5 upon arrival." If the contemplated place of arrival was Respondent's place of business within the State of Florida this increase in color could not have been expected.

[2]See *L. E. Rand Co., Inc. v Shur-Gain, Inc.*, 24 Agric. Dec. 499 (1965).

that some were labeled "vine ripe," although the contract called for gassed green tomatoes. At least part of this allegation is admitted by Complainant. Complainant stated in a letter to Respondent on March 26, 1998, immediately after receiving notice of rejection from Respondent, that: "The shipper ran out of lids - yet filled the order with "gassed" tomatoes." As Respondent points out, this amounted to the misbranding of a portion of the tomatoes. It also constituted a breach of the contract between the parties.

The Uniform Commercial Code, section 2 - 601, provides that ". . . if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole . . . ." This is known as the perfect tender doctrine, and we have applied it in these proceedings.[3] The notice of rejection was timely, and if the rejection had been otherwise effective Complainant could not have refused to accept it. However the rejection was not effective, because it was illegal. Leaving aside the question of whether Complainant's invoices demonstrate sale and delivery inside the state of Florida (strenuously advocated by Respondent), and therefore an acceptance of the load in Florida, it is clear that the load was, at the very least, accepted when it was unloaded prior to inspection in Dayton, Ohio.[4] Any rejection after acceptance is a rejection without reasonable cause, and illegal under the Department's Regulations,[5] as well as impermissible under the Uniform Commercial Code.[6]

The only context in which a refusal to accept a rejection has any meaning is

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[3]See *Harvey Kaiser, Inc. v. Kay Packing Company*, 52 Agric. Dec. 762 (1993) where there was a tender of cabbage in wooden boxes when the contract excluded wooden boxes.

[4]See 7 C.F.R. § 46.2(dd)(1). See also *M. J. Duer & Co., Inc. v. The J. F. Sanson & Sons Co. and C. H. Robinson Co.*, 49 Agric. Dec. 620 (1990); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109 (1971). *Charles P. Tatt Fruit Co. v. Mac's Produce*, 9 Agric. Dec. 802 (1950).

[5]7 C.F.R. 46.2(bb)(4). See *Phoenix Vegetable Distributors v. Randy Wilson, Co.*, 55 Agric. Dec. 1345 (1996).

[6]U.C.C. § 2 - 607(2). Although Respondent did not allege revocation of acceptance, it is doubtful whether Respondent could overcome the hurdle that requires that the non-conformity substantially impair the value of the goods accepted. See U.C.C. § 2 - 608(1).

when the rejection is ineffective.[7] In such a case it merely signals the buyer that the seller does not deem the rejection to be effective, and will not accede to it in such a manner as to constitute a modification of the contract. Here, whatever Complainant's intention, this was its only effect.

Since the tomatoes were accepted, Respondent became liable for their contract price, less any damages resulting from any proven breach of the contract. We have already stated that Complainant has admitted the breach constituted by the misbranding of some of the tomatoes as vine ripe when they were in fact gassed green tomatoes. Respondent also contends that there was a breach by a failure to supply the correct brand and by a failure to supply the proper color. Respondent's Jack Goldstein gave two sworn affidavits concerning the terms agreed to when the tomatoes were ordered. In a letter to this Department that was included as a part of the Department's Report of Investigation Mr. Goldstein identified the person with whom he negotiated as Brian. This was presumably Complainant's sales manager Brian Rayfield. However, although there were several unsworn letters from Brian Rayfield included in the Report of Investigation, there was no sworn statement by Mr. Rayfield submitted in evidence. Generally speaking, statements not under oath, even though in evidence as exhibits to the Department's Report of Investigation, are not given as much weight as affidavit testimony.[8] We have accepted Respondent's contention that the contracted brand was "Cat's Meow," and, therefore, there was clearly a breach as to brand as to 400 of the cartons of tomatoes. We have also accepted Respondent's representation that the tomatoes were to ship with 3½ to 4 color, and the federal inspection shows that there was a

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[7]In *Cal/Mex Distributors, Inc. v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1113 (1987), we pointed out that "[i]n the context of the vast majority of rejection situations, the use of terminology referring to an 'acceptance of a rejection' is both superfluous and meaningless. We have held many times that a seller has a positive legal duty to accept any rejection that is effective, even if the rejection is substantively wrongful. *Yokoyama Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535 (1982); *Produce Brokers & Distributors v. Monsour's*, 36 Agric. Dec. 2022 (1977); *Bruce Church, Inc. v. Tested Best Foods Div.*, 28 Agric. Dec. 377 91969). The only situation in which a seller can refuse to 'accept a rejection' in the sense of refusing to take possession of 'rejected goods' is where the rejection is ineffective. *Dew-Gro, Inc. a/t/a Central West Produce v. First National Supermarkets, Inc.*, 42 Agric. Dec. [2020] (1983). This is, of course, the necessary result in the case of an ineffective rejection because an ineffective rejection has the same legal consequences as an acceptance, and legal title is not reinvested in the seller. As White and Summers state, in such a case, 'even if the goods are nonconforming, the parties will be treated as though no rejection has occurred.' White and Summers, Uniform Commercial Code, Sec. 8-3, p.265 (1972)."

[8]*Empire Foods, Inc. v. Fir Grove Farm*, 16 Agric. Dec. 202 (1957); *Anonymous*, 8 Agric. Dec. 598 (1949).

breach as to some of the tomatoes in regard to color.

Since Respondent accepted the tomatoes it became liable to Complainant for the purchase price thereof, less damages resulting from the breaches of contract. As to accepted goods, the Uniform Commercial Code, section 2-714(2), provides that:

> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

The value of the goods accepted may be shown by the results of a prompt and proper resale. Respondent moved the subject tomatoes to H. R. Bushman and Son Corp. in St. Louis, Missouri for resale. Without commenting on the propriety of moving the tomatoes to a distant market, we note that Bushman did not render a proper accounting. The accounting lumps the tomatoes together under the three sizes, and reports an average price for each size. Thus there is no break down of the sales by lot. More important was the failure to state the dates on which sales were completed. The accounting itself is dated May 8, 1998, or six weeks after delivery of the tomatoes to their original destination. There is no way for us to say that the resale of the tomatoes was prompt. In the absence of a prompt and proper accounting we frequently use the percentage of condition defects as a means of assessing damages. However, the subject tomatoes did not arrive at destination with excessive condition defects. We have consulted Market News Reports for several locations with some proximity to Dayton, Ohio, in an effort to assess damages by a reported difference in price for tomatoes from Florida that showed different color. However, we were unable to find any quotations that were relevant. We are forced to conclude that Respondent has not shown any damages resulting from any of the breaches of contract. Accordingly, Respondent is liable to Complainant for the full contract price of the tomatoes, or $13,824.65. 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.[9] 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.[10] 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, $13,824.65, with interest thereon at the rate of 10% per annum from April 1, 1998, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

J&C ENTERPRISES, INC. v. HOMELAND PRODUCE.
PACA Docket No. R-99-0130.
Decision and Order filed November 1, 1999.

Damages

Returned check bank fees awarded as consequential damages.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

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[9]*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).

[10]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).

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 $5,375.00 in connection with five trucklots of mixed fruits and vegetables 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 in the amount claimed but not specifying the amount for which it admits liability.

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 did not file any additional evidence. Neither party filed a brief.

Findings of Fact

1. Complainant, J & C Enterprises, Inc. ("J&C"), is a corporation whose post office address is 1221 North Venetian Way, Miami, Florida 33139. At the time of the transactions involved herein, J&C was licensed under the Act.

2. Respondent, Homeland Produce ("Homeland"), is a corporation whose post office address is 10660 Wireway #209, Dallas, Texas 75220. At the time of the transactions involved herein, Homeland was licensed under the Act.

3. On or about December 19, 1997, through January 27, 1998, J&C sold to Homeland, and shipped from loading point in the state of Florida, to Homeland in Dallas, Texas, five trucklots of mixed fruits and vegetables, as follows:

INVOICE NUMBER	SHIP DATE	QUANTITY/COMMODITY	INVOICE AMOUNT	INVOICE BALANCE
063218	12/19/97	48 CTNS. MXD VEG	$1,414.00	$ 95.00
063614	01/02/98	95 CTNS. MXD VEG	$1,475.00	$1,475.00
063983	01/13/98	53 CTNS MXD FRT & VEG	$1,281.00	$1,281.00
064260	01/20/98	62 CTNS MXD VEG	$1,269.00	$1,269.00

064507	01/27/98	70 CTNS MXD VEG	$1,205.00	$1,205.00
			TOTAL	**$5,325.00**

4. Homeland attempted to make the following payments however all of the checks were returned for insufficient funds:

- ◆ $310.00 toward an unspecified invoice with check number 2514;
- ◆ $581.00 toward invoice 063983 with check number 2516;
- ◆ $941.00 toward invoice 064507 with check number 1257; and
- ◆ $1,069.00 toward invoice 064260 with check number 1962.

5. In addition to the invoice balance of $5,325.00, J&C is claiming bank charges of $50.00, or $10.00 per check, for the returned checks (J&C made two attempts to deposit check number 1962), thereby bringing the total amount claimed to $5,375.00.

6. An informal complaint was filed on March 30, 1998, which is within nine months from when the cause of action accrued.

Conclusions

Complainant J&C brings this action to recover the unpaid balance of the agreed purchase prices for five trucklots of mixed fruits and vegetables sold to Respondent Homeland. J&C states that Homeland accepted the products, but that it has since paid only $1,319.00, thereby leaving invoice balances due totaling $5,325.00. As the proponent of this claim, J&C has the burden of proving its allegations by a preponderance of the evidence.[1] In this regard, J&C attached to the formal complaint copies of its invoices billing Homeland for the mixed fruits and vegetables, along with copies of signed bills of lading evidencing receipt by the carrier of each of the five shipments.[2]

In its unverified answer, Respondent Homeland does not deny receipt and acceptance of the five trucklots of mixed fruits and vegetables, but states merely that the amount due J&C is less than the amount claimed. A buyer who accepts produce becomes liable to the seller for the agreed purchase price thereof, less any

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[1]*Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893 (1987); *W.W. Rodgers & Sons v. California Produce Distributors, Inc.*, 34 Agric. Dec. 914 (1975); *New York Trade Association v. Sidney Sandler*, 32 Agric. Dec. 702 (1973).

[2]See Formal Complaint Exhibits 2, 2A, 3, 3C, 4, 4B, 5, 5C, 6, and 6A.

damages resulting from any breach of contract by the seller.[3] The burden of proof to show a breach and damages rests upon the buyer. In this regard, Homeland alleges that some of the products received were not in accordance with the contract requirements, however Homeland did not submit any evidence to support this allegation. Consequently, in the absence of proof of a breach of contract by J&C, we find that Homeland remains liable to J&C for the unpaid balance of the agreed purchase prices for the five trucklots of mixed fruits and vegetables received and accepted, totaling $5,325.00. J&C also submitted receipts showing that it incurred $50.00 in bank charges for the insufficient fund checks remitted by Homeland. We find that Homeland is entitled to reimbursement for the bank charges as consequential damages. This brings the amount due J&C from Homeland to $5,375.00.

Respondent Homeland's failure to pay Complainant J&C $5,375.00 is a violation of section 2 of the Act for which reparation should be awarded to J&C. 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 also include interest.[4] Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest.[5] Complainant J&C in this action paid $300.00 to file its formal complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent Homeland shall pay Complainant J&C as reparation $5,375.00, with interest thereon at the rate of 10% per annum from March 1, 1998, until paid, plus $300.00 for handling fees.

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[3] *Norden Fruit Co., Inc. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987).

[4] *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[5] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Copies of this Order shall be served upon the parties.

BIG APPLE PINEAPPLE CORPORATION v. FASHION FRUIT COMPANY AND/OR CHOICE SEAFOOD, INC.
PACA Docket No. R-99-0128.
Decision and Order filed December 16, 1999.

Evidence – Admissibility of taped phone conversation.
Agency – Liability of other party to agent's disclosed or partially disclosed principal.
Agency – Liability of agent to principal.
Handling Fee – Joint and several liability.

Federal statute making it illegal to intercept phone calls, and making intercepted messages inadmissable in evidence, has an exception for conversations taped by a party to the conversation. It was not proven that the law of Florida made such recordings illegal, or that, if it did, it was applicable to the facts of the case, or should take precedence over federal law as to admissibility. An agent who acted on behalf of a disclosed or partially disclosed principal subjected the other party to liability to the same extent as if the principal had conducted the transaction. Where the other party bought produce from the principal through the agent, and paid the agent who was not authorized to receive payment, and such payment was over the objection of the principal, the other party was liable to the principal for the full value of the produce. The agent who took payment, and did not forward it to its principal, was liable jointly and severally with the purchaser to the principal for the amount received from the purchaser. Such agent was also not entitled to brokerage fees where it acted without authority in accepting payment for the produce. Where two respondents both violated the Act they were held jointly and severally liable for the handling fee.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $22,211.75 in connection with two transactions in foreign commerce involving pineapples.

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. Fashion Fruit Company filed an answer denying liability to Complainant, and Choice Seafood, Inc. defaulted in the filing of an answer.

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. 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, and Respondent Fashion Fruit Company filed an answering statement. Complainant filed a statement in reply. Both Complainant and Respondent Fashion Fruit Company filed briefs.

Findings of Fact

1. Complainant, Big Apple Pineapple Corporation, is a corporation whose address is 316 East 53 Street, New York, New York.

2. Respondent, Fashion Fruit Company (hereafter sometimes Fashion), is a corporation whose address is P. O. Box 800204, Aventura, Florida. At the time of the transactions involved herein this Respondent was licensed under the Act.

3. Respondent, Choice Seafood Inc. (hereafter sometimes Choice), is a corporation whose address is 1471 S.W. 30th Avenue, Suite 5, Deerfield Beach, Florida. At the time of the transactions involved herein this Respondent was not licensed under the Act, but was operating subject to license.

4. Sometime prior to April 19, 1998, Complainant, acting through its president, Joseph S. Natoli, enlisted the services of Choice (which acted through its representative Joseph F. Colozza) to sell, on Complainant's behalf, two loads of pineapples which were to be imported from the Dominican Republic. Joseph F. Colozza represented to Complainant that Publix Supermarkets, Win Dixie, and Flemming Companies were going to purchase the pineapples, however, Colozza, acting for Choice, secured the agreement of Fashion (which acted through its representative Isaac Rosenberg) to purchase the two loads of pineapples on a price after sale basis.

5. Prior to the delivery of the two loads Fashion learned that Choice was acting as agent for a New York firm in regard to the sale of the pineapples. Upon delivery of the first of the two loads on April 24, 1998, it was agreed between Choice and Fashion that the pineapples should be handled by Fashion on a consignment basis. Also on April 24, 1998, Complainant informed Fashion that the lowest acceptable return on the pineapples would be $10.25 per case. Thereafter Natoli talked to Rosenberg frequently, and let Rosenberg know that payment was expected direct to Complainant.

6. On May 18, and 20, 1998, Complainant invoiced Fashion showing both

"price after sale," and a price based on its calculation of market price. The invoices, which were numbered 7684 and 7689, had the notation: "'Special Instructions' Submit payment to: Big Apple Pineapple Corp." On May 26, 1999, Rosenberg informed Natoli that he intended to send the accountings, and all proceeds from the sale of the pineapples, to Choice. On June 3, 1998, Complainant's Joseph Natoli, under a Big Apple Pineapple Corp. letterhead, sent a letter to Isaac Rosenberg at Fashion Fruit Company. The letter stated, in relevant part, as follows:

> Please be advised that all proceeds and accounting from the goods shipped to Fashion Fruit (Invoice No's. 7684/7689 are to be paid to Big Apple Pineapple Corp. directly. Choice Sea Food and or Mr. Joseph Colozza are absolutely not authorized to receive the proceeds. Any such action on your part or that of Fashion Fruit of sending the proceeds else where, will result in Big Apple Pineapple Corp. proceeding with legal action against your firm.

On June 16, 1998, Fashion paid Choice $4,182.15 as the purported net proceeds from the sale of both containers of pineapples.

7. The formal complaint was filed on September 22, 1998, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant submitted as an exhibit to its formal complaint a copy of a tape recording of conversations between Complainant's Joseph S. Natoli and Respondent Fashion's Isaac Rosenberg. Respondent Fashion has strenuously objected to this recording being considered as evidence in this proceeding. In furtherance of this objection Fashion's attorney has contended that the making of the recording was a violation of both federal and Florida law. As to federal law, Fashion's attorney cited 18 U.S.C. 2511, and 2515, and quoted selectively from each section. Section 2511 makes it illegal to intercept any wire, oral, or electronic communication, and section 2515 provides that illegally intercepted matter cannot be received in evidence in federal proceedings. However, Fashion's attorney did not include in his quotation of section 2511 any part of paragraph (2). Paragraph (2), which is broken down into many subparagraphs, lists all the exceptions whereby interceptions of electronic communications will not be considered illegal. One of these subparagraphs to paragraph (2) is very pertinent to the issue being considered:

> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.[1]

We conclude on the basis of this subparagraph that the interceptions of the phone conversations by Mr. Natoli were not violations of federal law since Mr. Natoli was a party to the conversations which he taped, and because the interceptions have not been shown to have been for the purpose of the violation of the Constitution or laws of the United States or of any state.

Fashion's attorney also quotes selectively from Florida law, and contends that Mr. Natoli violated that law as well.[2] However, we are unable to place any confidence in this selective quotation, or in the interpretation made of Florida law. Moreover, there has been no showing that the taping took place in Florida, and we assume that it took place in New York where Mr. Natoli's business is located. If it were contended that Florida law was nevertheless violated because one of the parties to the conversation was located in Florida, no citation has been made to any authority supporting this proposition. In addition, it has not been shown that a violation of the Florida statute should cause us to exclude the tape from evidence in this proceeding.[3] We conclude that Fashion has not shown that Florida law was violated by the taping of the conversations, or that, if it was, such has any relevancy to this proceeding.

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[1]18 U.S.C. 2511(2)(d).

[2]We are not suggesting that Fashion's attorney failed to disclose that the quotations were incomplete. However, we are surprised that the very relevant subparagraph (d) of the federal statute was omitted from the quotation, no doubt through oversight.

[3]See *U.S. v. D'Antoni*, 874 F2d 1214 (7th Cir. 1989), where defendants in a federal criminal trial argued that because a taped conversation was obtained in violation of state law it should not be admissible in federal court. The tape was admissible under the federal statute because the intercepting person was a party to the conversation, and the court held that federal standards governed the admissibility of the evidence. See also *By-Prod Corp. v. Armen-Bering Co.*, 668 F.2d 956 (7th Cir. 1982), a civil trial, where the court stated "a desire to make an accurate record of a conversation to which you are a party is a lawful purpose under the statute even if you want to use the recording in evidence."

In spite of our conclusions set forth above, we have not relied on the tape submitted by Complainant. There are several reasons for this. First, the tape is of poor quality and substantial portions of it are unintelligible. Second, there are numerous gaps in the tape which apparently represent erasures. Perhaps erasures were made to exclude irrelevant parts, and enable relevant parts to be more readily found. However, there is no testimony from the person who made the tape to explain these concerns.[4] Third, apparently not only entire conversations have been removed, but portions of the relevant conversations that are left have been removed also. Fourth, there was no sworn statement submitted from the person who made the recording that the tape had not been tampered with, and that it truly represented the conversations recorded. Fifth, the relevant matters which Complainant seeks to establish by means of the tape are adequately established by other evidence.

The Findings of Fact are based upon our careful analysis of the evidence of record exclusive of the tape recording. Some additional matters are worthy of mention. There are no early invoices from Choice to Fashion, only a late invoice dated June 16, 1998, covering both containers and stating the amount of the net proceeds as dictated to Choice by Fashion, namely $1,753.20 on the first container, and $2,428.95 on the second container. There is no document in writing that relates to the initiation of the transactions between Choice and Fashion except an ambiguous Ap. 23, 1998 letter. That letter, addressed to Isaac Rosenberg, states as follows:

> A COMPANY IN NEW YORK HAS ASKED US TO SEE IF THERE IS A MARKET FOR THEIR "ALL NATURAL PINEAPPLES', GROWN IN THE DOMINICAN REPUBLIC. THERE (sic) SAMPLES SEEM PRETTY GOOD ALL # 5's.
>
> WE HAVE PRESENTED THEM TO SOME OF OUR CUSTOMERS AND THE RESPONSE HAS BEEN GOOD. WOULD YOU HANDLE THE NEXT FEW LOADS, TO VEVERIFY (sic) THE SIZES, QUALITY, AND PACKAGING, ETC. THE FIRST LOAD HAS ARRIVED IN MIAMI IT SHOULD CLEAR U.S. CUSTOMS BY TOMORROW. CALL ME IF (illegible). YOU MIGHT EVEN HAVE A FEW CUSTOMERS OF YOUR OWN. LET ME KNOW, THERE COULD BE SOME LONG

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[4]The proper way to submit a legally made tape recording in evidence would be to submit the entire tape, together with a transcript of the relevant portions of relevant conversations. The submission should be accompanied by a sworn statement from the person who made the recording that it has not been tampered with, and truly represents the conversations recorded. The original must be made available, upon request, to the other party to the proceeding for expert analysis.

TERM BUSINESS TO BE DONE IF THE PRODUCT IS ALL THAT IT IS REPRESENTED AS BEING. I LOOK FORWARD TO HEARING FROM YOU.

SINCERELY,

JOSEPH F. COLOZZA

After Mr. Rosenberg was first contacted by this Department with notice of the informal complaint, he replied in a letter dated June 22, 1998. In this letter he stated that "[w]e, Fashion Fruit, had a written agreement with Choice Seafood to sell the load and to remit all the documents and funds directly to them." The above quoted letter is as close as the record comes to supplying the "written agreement." Clearly it falls far short of the description made by Mr. Rosenberg. If a written agreement, answering to the description made above by Rosenberg, between Fashion and Choice ever existed, it was never submitted in evidence.

Mr. Colozza replied, on July 20, 1998, to the inquiry of this Department about his involvement in the transactions. Although when Colozza made a statement much later at the request of Fashion his description of the transaction was more in keeping with Fashion's view of the transactions, the July 20, 1998, response was far more vague:

> In response to your letter of July 7, 1998, please be advised that Choice Seafood, having been asked by the Big Apple Pineapple Co. to sell its fresh pineapple, asked the Fashion Fruit Co. to evaluate and verify what was to be sent to us.
>
> We secured customers based upon the product samples we received. However, after Fashion Fruit received the product, it informed us that the sizes of the pineapples were much smaller than represented. This presented problems not only with our customers but for all sales. It was then agreed to sell the product at the "after sale price". This was the case not only with the first container but the second as well. . . .
>
> . . .

We conclude that Choice acted as Complainant's broker, and that while Complainant may have initially been an undisclosed principal, it became a partially disclosed principal prior to the delivery of the first load, and soon thereafter became a fully disclosed principal. We explicitly reject the contention that Choice ever purchased from Complainant, or that Fashion purchased from Choice. The

record shows that Fashion was made amply aware at an early stage of the transactions, certainly well before the payment to Choice, of Complainant's ownership of the goods. An agent acting on behalf of a disclosed or partially disclosed principal subjects the other party to liability to the principal to the same extent as if the principal had conducted the transaction.[5] There has been no showing that Complainant authorized Choice to collect and remit on behalf of Complainant. The payment which was made by Fashion to Choice was wrongful as against Complainant.[6] Choice's solicitation of the payment was wrongful as against its principal and forfeits any claim to a brokerage fee. Choice's retention of the payment received is also wrongful, and a violation of section 2 of the Act for which it is liable to Complainant.

Respondent Fashion did not issue a detailed accounting, but did supply sufficient data from which a detailed accounting can be constructed. The summary accounting issued by Fashion relative to the first load (Complainant's invoice No. 7684; Lot No. 8841) shows total sales of $5,142.00; expenses as cooling - $633.10, trucking - $1,347.50, misc. - $394.00, and commission - $514.20; net proceeds are shown as $2,253.20. However, the net proceeds actually paid to Choice on this load were $1,753.20. We are unable to discern the reason for the difference. The summary accounting issued by Fashion relative to the second load (Complainant's invoice No. 7689; Lot No. 2589) shows total sales of $5,066.00; expenses as cooling - $722.00, freight - $824.00, trucking - $85.05, commission - $506.60; net proceeds are shown as $2,928.35. However, the net proceeds actually paid to Choice on this load were $2,428.95. Again, we are unable to discern the reason for the difference.

Our constructed accounting for the two loads, based on invoices supplied by Fashion, appears below:

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[5]See W. Seavey, *Handbook of the Law of Agency*, §108, p. 195-96, (1964). See also *Produce Services & Procurement, Inc. v. Mark J. Vestal, d/b/a Western Pacific Produce*, 55 Agric. Dec. 1284 (1996).

[6]See *Alexander Marketing v. Gram & Sons, Inc. and/or Harry Caito Produce Co.*, 30 Agric. Dec. 439 (1971).

Inv. 7684; Lot 8841

Shipping Dt.	Inv. No.	Customer	Quantity	Price	Extension
4/27	34065	JJ Produce Co., Bronx, N.Y.	60 5ct.	$10.00	$ 600.00
4/27	34075	Culinary Specialty, Mountainside, N.J.	64 5ct.	8.00	512.00
			50 7ct.	8.00	400.00
4/27	34076	Cooseman Atlanta, Forest Park, GA	50 6ct.	4.00	200.00
4/27	34077	Cooseman New York, Bronx, N.Y.	225 (75 6ct., 75 7ct., 75 8ct.)	5.52	1,242.00
4/30	34088	JJ Produce Co., Bronx, N.Y.	61 6ct.	10.00	610.00
			82 7ct.	8.00	656.00
5/13	35033	Four Seasons Produce, Denver, PA	5 8ct.	10.00	50.00
			597		$4,270.00

Invoice No. 7689; Lot 2589:

4/30	34088	JJ Produce Co., Bronx, N.Y.	59 6ct	$10.00	$ 690.00
			38 7ct.	8.00	304.00
5/2	35002	Oriole Kosher	40 8ct.	8.00	320.00
5/2	35005	Culinary Specialty, Mountainside, N.J.	46 5ct.	9.00	414.00
			78 6ct.	9.00	702.00
5/2	35003	Four Seasons Produce, Denver, PA	20 6ct.	10.00	200.00
			20 7ct.	10.00	200.00

5/13	35033	Four Seasons Produce, Denver, PA	60 7ct.	10.00	600.00
			55 8ct.	10.00	550.00
5/13	35036	Crystal Valley Food, Miami, FL	9 (6 7ct., 3 8ct.)	9.00	81.00
5/14	35051	Cooseman Atlanta, Forest Park, GA	120 8ct.	.75	90.00
6/7	35050	Ambrosia Farms, Pompano, FL	217 (mix of 7 & 8's)	3.00	651.00
			762		$4,802.00

We thus arrive at three conflicting accountings; Fashion's summary accounting, our constructed accounting based on Fashion's invoices and statement of expenses, and the net proceeds actually paid by Fashion. These may be summarized as follows:

Fashion's summary acct.	Constructed acct.	Actual payment
First load:		
Gross sales: $5,142.00	$4,270.00	
Expenses: 2,888.60	2,888.60	
Net Proc.: $2,253.40	$1,381.40	$1,753.20
Second load:		
Gross sales: $5,066.00	$4,802.00	
Expenses: 2,137.65	2,137.65	
Net Proc.: 2,928.35	$2,664.25	$2,428.95

These inconsistencies are compounded when we consider the question of the number of cartons sold. Isaac Rosenberg stated that 275 cartons from the first load and 453 boxes from the second load were sent at Joe Natoli's direction to Natoli's customers, although 286 boxes from the 453 were returned. Rosenberg also stated

that these cartons were presumably re-billed by Complainant.[7] Rosenberg thus seeks to explain a failure to account for 275 cartons from the first load and 167 cartons from the second load. We would be disposed to countenance this failure to account for these cartons because Complainant, though the allegation was made early in the proceeding and repeated, never responded directly to it.[8] This would mean that Fashion had 699 cartons from the first load, and 1,037 cartons from the second load for which to account. However, the accounting which we constructed from the invoices supplied by Fashion show that only 597 cartons from the first load, and 762 cartons from the second load were sold.

Fashion submitted "Daily Inventory Control" sheets as to each load showing the number of cartons of each size sent under each invoice number. In further support of its contention that 275 cartons from the first load, and 473 cartons (initially) from the second load were sent to Complainant's customers, Fashion tagged certain invoice numbers with a "BA" to indicate that those pineapples were sent to Complainant's (Big Apple's) customers. Invoices representing 268 cartons were so tagged as to the first load, and invoices representing 806 cartons were so tagged as to the second load. Obviously Fashion's tagging is incorrect, since the number tagged would not leave sufficient cartons to cover the sales billed out by Fashion. A clear instance of this erroneous tagging is invoice 34088 which included 61 cartons of size 6's and 82 cartons of size 7's from the first load, and 59 cartons of size 6's and 38 cartons of size 7's from the second load, for a total of each size of 120 cartons. Fashion issued one invoice to JJ Produce Co. as to these 240 cartons. Only the cartons from the second load are tagged with a "BA." We conclude that Fashion has failed to prove that any cartons were shipped to Complainant's customers. Fashion must be held accountable for all the pineapples shipped to it.

Fashion alleged that when the first load arrived, it was inspected, and it was "found that the pineapples were not certified organic, were not all size 5, and had

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[7]Rosenberg claims that Fashion did not invoice any of the pineapples sent to Complainant's customers. (Answering statement, paragraph 8.) Mr. Rosenberg's exact words were: "Further, some of the pineapples, marked as "BA" on exhibits 2 and 12, were sent to Big Apples' customers per Joe Natoli's instructions. The pineapples sent to Big Apples' were not invoiced by Fashion Fruit at Natoli's instructions."

[8]Complainant made an implicit response by claiming reparation for all of the pineapples on both of the loads which it shipped to Fashion.

defects."[9] There does not appear to have been any representation by Complainant that the pineapples were going to be "certified" as organic. Indeed, one wonders who the certifying authority would be in such a case. Even if we accept the allegation that the size was not as represented, the sales of the pineapples fail to show any consistent difference as to price that is related to the size of the pineapples. The quality allegation is insupportable since Fashion did not secure a neutral inspection. However, Fashion did perform an in-house inspection, at least as to the second load, because a report of that inspection was submitted as an exhibit to Fashion's answering statement. That report states, in relevant part, as follows: "Color - fruit green to turning, few yellow; tops good green; tops full; occas. bruise; slty loose pack; slty irr size; sugar 10.5 to 13.5; no leakers; CUT GOOD; sound fruit but not as full of pack as last shipment." This description, from Fashion's own in-house inspector, denotes a good load of pineapples. As to the condition of the first load, Fashion had the burden of proving that it was defective in some way, and has not met that burden. We will assume that it too was a good load of pineapples.

We now arrive at the necessity of computing the correct amount which Fashion should have remitted to Complainant. If we had market reports for pineapples from the Dominican Republic, or for pineapples that we knew to be similar, we would use those reports. However, only a relatively small number of pineapples were imported from the Dominican Republic during the period in question, and we do not have any reports that we feel comfortable using. Therefore we will use the average of the higher sale amounts that were realized by Fashion. The lower sale figures, i.e., the $4.00 and $5.52 sales on the first load, and the $3.00 and $.75 sales on the second load will be excluded from our computation of an average sale price, and the cartons represented by these figures will be brought into our constructed accounting at our computed average price, as will the cartons for which Fashion did not account.

As to the first load Fashion's invoices show 126 cartons sold at $10.00 per carton and 196 cartons sold at $8.00 per carton, or an average price of $8.60, or a total for the 322 cartons of $2,768.00. The remaining 652 cartons were either unaccounted for, or sold at low prices without sufficient justification. These 652 cartons had a value, at $8.60 per carton, of $5,607.00. We conclude that the gross

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[9]Colozza, who represented the intermediary Choice, represented in an affidavit attached to Fashion's answering statement that Natoli had stated that the pineapples were "high quality organic pineapples," and "were of uniform size 5." Colozza does not say that they were to be certified as organic.

proceeds of the first load should have been $8,375.00. Fashion claimed as expenses cooling in the amount of $633.10 which we will allow; Trucking in the amount of $1,347.50 which we will allow; and "Misc." in the amount of $394.00. Without further description this amount must be disallowed. Fashion's claimed ten percent commission of $514.20 should be increased to $837.50. The total allowable expenses on the first load are $2,818.10. This amount deducted from the gross proceeds leaves $5,556.90 as the net proceeds which should have been paid by Fashion to Complainant on the first load.

As to the second load Fashion's invoices show 214 cartons sold at $10.00, 133 cartons sold at $9.00, and 78 cartons sold at $8.00, or an average sale price of $9.32, or $3,961.00. The remaining 779 cartons were either unaccounted for, or sold at low prices without sufficient justification. These 779 cartons had a value, at $9.32 per carton, of $7,260.28. We conclude that the gross proceeds of the second load should have been $11,221.28. Fashion claimed as expenses cooling in the amount of $722.00, which we will allow; Freight in the amount of 824.00, and trucking in the amount of $85.05, or 909.05, which we will allow. Fashion's claimed ten percent commission of $506.60 should be increased to $1,122.13. The total allowable expenses on the second load are $2,753.18. This amount deducted from the gross proceeds leaves $8,468.10 as the net proceeds which should have been paid by Fashion to Complainant on the second load.

The total which we have found owing from Respondent Fashion to Complainant is $14,025.00. Respondent Choice is liable to Complainant for $4,182.15 of such amount jointly and severally with Fashion. The failure of Respondents to pay these amounts to Complainant 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

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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).

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. Respondents are liable for this fee jointly and severally.

Order

Within 30 days from the date of this order Respondents shall pay to complainant, jointly and severally, as reparation, $4,182.15, with interest thereon at the rate of 10% per annum from July 1, 1998, until paid, plus the amount of $300.00.

Within 30 days from the date of this order Respondent Fashion shall pay to Complainant as reparation $9,842.85, with interest thereon at the rate of 10% per annum from July 1, 1998, until paid.

Copies of this order shall be served upon the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: KANOWITZ FRUIT AND PRODUCE CO., INC.
PACA Docket No. D-95-0504.
Order Lifting Stay filed July 13, 1999.

Jane McCavitt, for Complainant.
Sherylee F. Bauer, New York, New York, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On March 21, 1997, I issued a Decision and Order: (1) concluding that Kanowitz Fruit and Produce Co., Inc. [hereinafter Respondent], committed willful, flagrant, and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) revoking Respondent's PACA license. *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 917 (1997). On May 7, 1997, Respondent filed a petition for reconsideration, and on June 5, 1997, I issued an Order Denying Petition for Reconsideration. *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 942 (1997) (Order Denying Pet. for Recons.).

On June 25, 1997, Respondent filed a Motion to Stay Order requesting a stay of the Order in *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 917 (1997), based on Respondent's then contemplated petition for judicial review, and on June 25, 1997, I granted Respondent's Motion to Stay Order. *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 958 (1997) (Stay Order).

Respondent filed a petition for review of the Order issued in *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 917 (1997), and on October 29, 1998, the United States Court of Appeals for the Second Circuit denied Respondent's petition for review. *Kanowitz Fruit & Produce Co., Inc. v. United States*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998). Respondent filed a petition for a writ of certiorari, which the Supreme Court of the United States denied on May 3, 1999. *Kanowitz Fruit & Produce Co., Inc. v. United States*, 119 S.Ct. 1575 (1999).

On June 8, 1999, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Motion to Lift Stay Order; on July 6, 1999, Respondent filed Opposition to the Motion to Lift the Stay; and on July 8, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay Order.

Respondent states that it has been in compliance with the payment provisions of the PACA since Administrative Law Judge Edwin S. Bernstein issued a bench decision in this proceeding on May 7, 1996; revocation of Respondent's PACA license would only cause harm to Mr. Kanowitz' family and the families of Respondent's employees; and Respondent is willing to pay a fine and post a bond, as well as security, to give the United States Department of Agriculture assurance that Respondent is fiscally responsible. Respondent requests that I review the facts of the case and impose a sanction other than revocation or suspension of Respondent's PACA license. (Opposition to the Motion to Lift the Stay.)

Respondent's contentions that it has been in compliance with the PACA since May 7, 1996, that Mr. Kanowitz' family and the families of Respondent's employees will be harmed by the revocation of Respondent's PACA license, and that it is willing to pay a fine and post a bond, as well as security, are not relevant to the issue of whether to grant or deny Complainant's Motion to Lift Stay Order. Moreover, I carefully reviewed the record in this proceeding prior to the issuance of the Decision and Order and again prior to the issuance of the Order Denying Petition for Reconsideration. Therefore, Respondent's request that I review the facts of this proceeding is denied. Further still, I thoroughly addressed the reasons for the revocation of Respondent's PACA license in the Decision and Order and the Order Denying Petition for Reconsideration, and based on the reasons fully explicated in *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 917 (1997), and *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 942 (1997) (Order Denying Pet. for Recons.), Respondent's request that I impose a sanction other than revocation of Respondent's PACA license is denied.

I issued the Stay Order in *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 958 (1997) (Stay Order), in accordance with 5 U.S.C. § 705, to postpone the effective date of the Order issued in *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 917 (1997), pending judicial review. Respondent does not contend that it is seeking further judicial review. I find that proceedings for judicial review are concluded and the time for filing further requests for judicial review has expired. Therefore, Complainant's Motion to Lift Stay Order is granted, the Stay Order issued on June 25, 1997, *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 958 (1997) (Stay Order), is lifted, and the Order issued in *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 917 (1997), is effective, as follows:

Order

Respondent has committed willful, flagrant, and repeated violations of section

2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's PACA license is revoked, effective 30 days after service of this Order on Respondent.

In re: HAVANA POTATOES OF NEW YORK CORP., AND HAVPO, INC.
PACA Docket No. D-94-0560.
Order Lifting Stay filed July 15, 1999.

Andrew Y. Stanton, for Complainant.
Tab K. Rosenfeld, New York, New York, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On November 15, 1996, I issued a Decision and Order: (1) concluding that Havana Potatoes of New York Corp. and Havpo, Inc. [hereinafter Respondents], committed willful, flagrant, and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) revoking Respondents' PACA licenses. *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996). On January 2, 1997, Respondents filed a petition for reconsideration, and on February 4, 1997, I issued an Order Denying Petition for Reconsideration. *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017 (1997) (Order Denying Pet. for Recons.).

On February 20, 1997, Respondents filed a request for a stay of the Order in *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996), pending proceedings for judicial review, and on February 20, 1997, I granted Respondents' request for a stay. *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1029 (1997) (Stay Order).

Respondents filed a petition for review of the Order issued in *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996), and on December 19, 1997, the United States Court of Appeals for the Second Circuit denied Respondents' petition for review. *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89 (2d Cir. 1997).

On June 10, 1999, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a Motion to Lift Stay Order, which was served on Respondents on June 16, 1999.[1] Respondents failed to file a timely response to Complainant's Motion to Lift Stay Order, and on July 14, 1999, the Hearing Clerk

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[1]See Domestic Return Receipt for Article Number P093174842.

transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay Order.

I issued the Stay Order in *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1029 (1997) (Stay Order), in accordance with 5 U.S.C. § 705, to postpone the effective date of the Order issued in *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996), pending judicial review. I find that proceedings for judicial review are concluded and the time for filing further requests for judicial review has expired. Therefore, Complainant's Motion to Lift Stay Order is granted, the Stay Order issued on February 20, 1997, *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1029 (1997) (Stay Order), is lifted, and the Order issued in *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996), is effective, as follows:

Order

1. Respondent Havana Potatoes of New York Corp.'s PACA license is revoked, effective, *nunc pro tunc*, March 19, 1998.[2]

2. Respondent Havpo, Inc.'s, PACA license is revoked, effective, *nunc pro tunc*, March 19, 1998.[3]

3. The facts and circumstances set forth in *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996), shall be published.

In re: TOLAR FARMS AND/OR TOLAR SALES, INC.
PACA Docket No. D-96-0530.
Order Lifting Stay filed November 16, 1999.

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

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[2]Complainant inadvertently notified Respondents that their PACA licenses were revoked effective March 19, 1998 (Mot. to Lift Stay at 1).

[3]See note 2.

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 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 September 28, 1998, Respondents filed a request for a stay of the order in *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997), pending the outcome of proceedings for judicial review, and on September 30, 1998, I granted Respondents' request for a stay. *In re Tolar Farms*, 57 Agric. Dec. 1721 (1998) (Order Granting Stay).

Respondents filed an appeal with the United States Court of Appeals for the Eleventh Circuit, and on July 30, 1999, the Court dismissed Respondents' appeal. *Tolar Farms v. United States Dep't of Agric.*, No. 98-5456 (11th Cir. July 30, 1999). On October 15, 1999, the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a Motion to Lift Stay Order; on November 12, 1999, Respondents filed a response to Complainant's Motion to Lift Stay Order; and on November 15, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay Order.

Respondents indicate that their November 12, 1999, filing is a timely response to Complainant's Motion to Lift Stay Order. I disagree with Respondents' contention that they have filed a timely response to Complainant's Motion to Lift Stay Order. Section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] provides that a response to a motion must be filed within 20 days after service, as follows:

§ 1.143 Motions and requests.

. . . .

(d) *Response to motions and requests.* Within 20 days after service of any written motion or request, or within such shorter or longer period as may be fixed by the Judge or the Judicial Officer, an opposing party may file a response to the motion or request. The other party shall have no right to reply to the response; however, the Judge or the Judicial Officer, in their discretion, may order that a reply be filed.

7 C.F.R. § 1.143(d).

Section 1.147(c)(2) of the Rules of Practice (7 C.F.R. § 1.147(c)(2)) provides that any document or paper, other than one specified in 7 C.F.R. § 1.147(c)(1) and written questions for a deposition, as provided in 7 C.F.R. § 1.148(d)(2), shall be deemed to be received by any party to the proceeding, other than the Secretary or agent thereof, on the date of mailing by ordinary mail. A motion to lift a stay order is not one of the documents or papers specified in 7 C.F.R. § 1.147(c)(1). Thus, Respondents' response to Complainant's Motion to Lift Stay Order was required to be filed with the Hearing Clerk within 20 days after the date the Hearing Clerk mailed Respondents, by ordinary mail, Complainant's Motion to Lift Stay Order. The record reveals that on October 15, 1999, the Hearing Clerk mailed Respondents, by ordinary mail, Complainant's Motion to Lift Stay Order (Letter, dated October 15, 1999, from Trible Greaves to Mr. Robert Tolar, Tolar Farms, and/or Tolar Sales, Inc.). Thus, Respondents were required to file their response to Complainant's Motion to Lift Stay Order with the Hearing Clerk no later than November 4, 1999, and Respondents' November 12, 1999, filing is too late to be considered.

Moreover, even if Respondents' response to Complainant's Motion to Lift Stay Order had been timely filed and could be considered, Respondents' response sets forth no meritorious basis for denying Complainant's Motion to Lift Stay Order. Respondents merely indicate in their response to Complainant's Motion to Lift Stay Order that the United States Court of Appeals for the Eleventh Circuit did not examine Respondents' "paper work," but, rather, dismissed Respondents' appeal for lack of jurisdiction, and Respondents request information regarding "where to send the paper work."

I issued the Stay Order in *In re Tolar Farms*, 57 Agric. Dec. 1721 (1998) (Order Granting Stay), in accordance with 5 U.S.C. § 705, to postpone the effective date of the Order issued in *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997), pending the outcome of proceedings for judicial review. I find that proceedings for judicial review are concluded and the time for filing further requests for judicial review has expired. Therefore, Complainant's Motion to Lift Stay Order is granted, the Stay Order issued on September 30, 1998, *In re Tolar Farms*, 57 Agric. Dec. 1721 (1998) (Order Granting Stay), is lifted, and the Order issued in *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997), is effective, as follows:

Order

Respondents have committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances set

forth in the November 6, 1997, Decision and Order shall be published, effective 65 days after service of this Order on Respondents.

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.
Ruling Denying Complainant's Motion for Leave to Respond filed November 19, 1999.

Andrew Y. Stanton, for Complainant.
Robert M. Adler, Washington, DC, for Respondent.
Ruling issued by William G. Jenson, Judicial Officer.

On August 2, 1999, JSG Trading Corp. [hereinafter Respondent] filed Motion to Dismiss and for Entry of Judgment; or, in the Alternative, Petition for Reopening the Hearing and Record to Take Further Evidence. On September 13, 1999, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Response to JSG's Motion to Dismiss and For Entry of Judgment. On October 20, 1999, Respondent filed Respondent JSG Trading Corp.'s Reply to Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment; on October 27, 1999, Complainant filed Complainant's Motion for Leave to File Response to Respondent JSG's Reply to Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment [hereinafter Motion for Leave to Respond]; on November 3, 1999, Respondent filed Respondent JSG Trading Corp.'s Opposition to Complainant's Motion for Leave to File Response to Respondent JSG's Reply to Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment; and on November 4, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion for Leave to Respond.

I find that Complainant and Respondent have thoroughly briefed the issues in this proceeding, and at this time, I find no need for additional submissions by the parties. Therefore, Complainant's Motion for Leave to Respond is denied.

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.
In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES, AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.
Ruling Denying JSG Trading Corp.'s Motion to Take the Deposition of Anthony Gentile filed November 19, 1999.

Andrew Y. Stanton, for Complainant.
Robert M. Adler, Washington, DC, for Respondent JSG Trading Corp.
Ruling issued by William G. Jenson, Judicial Officer.

On August 2, 1999, JSG Trading Corp. [hereinafter Respondent] filed JSG's Motion to Take the Deposition of Anthony Gentile for the Purpose of Perpetuating His Testimony [hereinafter Motion to Take Deposition]. On August 13, 1999, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Response to JSG's Motion to Take the Deposition of Anthony Gentile and Petition to Reopen the Hearing, in which Complainant opposes, *inter alia*, Respondent's Motion to Take Deposition. On August 25, 1999, Respondent filed Respondent JSG Trading Corp.'s Reply to Complainant's Response to JSG's Motion to Take the Deposition of Anthony Gentile and Petition to Reopen the Hearing. On November 4, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Take Deposition.

Section 1.148 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes provides that a deposition may be taken for the purpose of eliciting testimony which might not be available at the time of hearing, as follows:

§ 1.148 Depositions.

(a) *Motion for taking deposition.* Upon the motion of a party to the proceeding, the Judge may, at any time after the filing of the complaint, order the taking of testimony by deposition. The Motion shall be in writing, shall be filed with the Hearing Clerk, and shall set forth:

. . . .

(4) The reasons why such deposition should be taken, which shall be solely for the purpose of eliciting testimony which otherwise might not be available at the time of hearing, for uses as provided in paragraph (g) of this section.

(b) *Judge's order for taking deposition.* (1) If the Judge finds that the testimony may not be otherwise available at the hearing, the taking of the deposition may be ordered. . . .

. . . .

(g) *Use of deposition.* A deposition ordered and taken in accordance with the provisions of this section may be used in a proceeding under these rules if the Judge finds that the evidence is otherwise admissible and (1) that the witness is dead; (2) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; (3) that the party offering the deposition has endeavored to procure the attendance of the witness by subpoena, but has been unable to do so; or (4) that such exceptional circumstances exist as to make it desirable, in the interests of justice, to allow the deposition to be used. If the party upon whose motion the deposition was taken refuses to offer it in evidence, any other party may offer the deposition or any part thereof in evidence. If only part of a deposition is offered in evidence by a party, an adverse party may require the introduction of any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

7 C.F.R. § 1.148(a)(4), (b)(1), (g).

The 15-day hearing in this proceeding concluded March 19, 1996. Today, I simultaneously issue this Ruling Denying JSG Trading Corp.'s Motion to Take the Deposition of Anthony Gentile and deny a separate petition filed by Respondent to reopen the hearing and the record. Consequently, the hearing is concluded, leaving no hearing at which a deposition could be introduced, and thus no basis upon which to grant Respondent's Motion to Take Deposition.

Moreover, since Mr. Gentile testified during the 15-day hearing,[1] even if I had granted Respondent's petition to reopen the hearing and the record, there would still be no basis for granting Respondent's Motion to Take Deposition.

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[1]See the transcript at 2817-42.

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.
Ruling Denying JSG Trading Corp.'s Petition to Reopen the Hearing and Record filed November 19, 1999.

Andrew Y. Stanton, for Complainant.
Robert M. Adler, Washington, DC, for Respondent JSG Trading Corp.
Ruling issued by William G. Jenson, Judicial Officer.

On August 2, 1999, JSG Trading Corp. [hereinafter Respondent] filed Motion to Dismiss and for Entry of Judgment; or, in the Alternative, Petition for Reopening the Hearing and Record to Take Further Evidence [hereinafter Petition to Reopen]. On August 13, 1999, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Response to JSG's Motion to Take the Deposition of Anthony Gentile and Petition to Reopen the Hearing, in which Complainant opposes, *inter alia*, Respondent's request to reopen the hearing and the record. On August 25, 1999, Respondent filed Respondent JSG Trading Corp.'s Reply to Complainant's Response to JSG's Motion to Take the Deposition of Anthony Gentile and Petition to Reopen the Hearing [hereinafter Respondent's Reply]. On November 4, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Petition to Reopen.

Section 1.146(a)(2) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes provides that a petition to reopen a hearing to take further evidence must show that the evidence to be adduced is not merely cumulative and must set forth a reason why the evidence was not adduced at the hearing, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite. . . .*
> (2) *Petition to reopen hearing.* A petition to reopen a hearing to take

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

7 C.F.R. § 1.146(a)(2).

Respondent asserts that if its motion to dismiss and for entry of judgment is denied and the *per se* test for commercial bribery is abandoned, then the hearing and the record must be reopened to allow the parties to present evidence concerning whether Respondent engaged in commercial bribery using the standards in *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992), and *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992) (Pet. to Reopen at 3, 13; Respondent's Reply at 1-8).

I disagree with Respondent. A review of the transcript of the 15-day hearing and the thousands of pages of exhibits, which were introduced at the hearing, reveals that both Complainant and Respondent were fully aware of *In re Tipco, Inc., supra*, and *In re Sid Goodman & Co., supra*, during this proceeding; that both Complainant and Respondent had ample opportunity to present evidence regarding whether Respondent engaged in commercial bribery using the test in *In re Tipco, Inc., supra*, and *In re Sid Goodman & Co., supra*; and that both Complainant and Respondent presented evidence supporting their respective positions concerning whether Respondent engaged in commercial bribery using the test in *In re Tipco, Inc., supra*, and *In re Sid Goodman & Co., supra.*

I find that further evidence regarding whether Respondent engaged in commercial bribery using the test in *In re Tipco, Inc., supra*, and *In re Sid Goodman & Co., supra*,would be merely cumulative and Respondent has shown no good reason why any evidence that it did not adduce at the hearing regarding this issue was not adduced at the hearing. Therefore, Respondent's request to reopen the hearing and the record is denied.

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.
In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES, AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.
Ruling Denying JSG Trading Corp.'s Motion to Dismiss filed November 29, 1999.

Andrew Y. Stanton, for Complainant.
Robert M. Adler, Washington, DC, for Respondent.
Ruling issued by William G. Jenson, Judicial Officer.

On August 2, 1999, JSG Trading Corp. [hereinafter Respondent] filed Motion to Dismiss and for Entry of Judgment; or, in the Alternative, Petition for Reopening the Hearing and Record to Take Further Evidence [hereinafter Motion to Dismiss]. On September 13, 1999, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment, in which Complainant opposes Respondent's Motion to Dismiss and requests that I issue a decision and order on remand, finding that Respondent violated the Perishable Agricultural Commodities Act, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and revoking Respondent's PACA license. On October 20, 1999, Respondent filed Respondent JSG Trading Corp.'s Reply to Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment; and on November 4, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Dismiss and Complainant's request for the issuance of a decision and order on remand.

In *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), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), I concluded that Respondent violated section 2(4) of the PACA and revoked Respondent's PACA license, based on my finding that Respondent made a series of payments to purchasing agents of produce buyers, at a time when those purchasing agents were buying tomatoes from Respondent on behalf of their respective principals. Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit challenging the revocation of its PACA license.

The Court granted Respondent's petition for review and remanded the case to me with instructions either to explain the justification for the use of a *per se* test to determine whether Respondent violated section 2(4) of the PACA or to abandon the *per se* test and apply traditional definitions of commercial bribery to determine whether Respondent violated section 2(4) of the PACA. *JSG Trading Corp. v. United States Dep't of Agric.*, 176 F.3d 536 (D.C. Cir. 1999).

Respondent contends that the Complaint must be dismissed because the *per se* standard to measure commercial bribery cannot be justified and Complainant cannot prevail under the traditional test for commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric., supra* (Respondent's Motion to Dismiss at 2).

I disagree with Respondent's contention that the Complaint must be dismissed. Simultaneously with this Ruling Denying JSG Trading Corp.'s Motion to Dismiss, I am filing a Decision and Order on Remand as to JSG Trading Corp., in which I abandon the *per se* standard to determine whether Respondent violated section 2(4) of the PACA, I find that the record establishes that Respondent engaged in activities that fall within the traditional definitions of commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric., supra*, and I explain the basis for my conclusion on remand that Respondent violated section 2(4) of the PACA.

Therefore, Respondent's Motion to Dismiss is denied.

Ta-De DISTRIBUTING COMPANY, INC. v. R.S. HANLINE & CO., INC.
PACA Docket No. R-99-0052.
Order on Reconsideration filed September 13, 1999.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Order issued by William G. Jenson, 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 June 1, 1999, awarding reparation to Complainant against Respondent in the amount of $23,316.65, with interest, plus the amount of $300. The order was served upon the parties, and Complainant filed a timely Petition for Reconsideration.

Complainant asserts that the amount of damages awarded was calculated incorrectly, and that Complainant should have been awarded $28,635.45. The basis stated for Complainant's claim is that the May 2, 1997, Clarification of the October 28, 1996 Suspension Agreement on Fresh Tomatoes from Mexico was misinterpreted. Complainant asserts that the Clarification states: "The percentage of defective tomatoes is the percentage identified with condition defects on the federal inspection certificate."[1] Although the language of Complainant's petition is garbled, it appears that what Complainant intends to claim is that the Clarification allows reimbursement based only on the percentage of tomatoes found by federal inspection to be defective, and not on the basis of the percentage lost in repacking.

Complainant attached to its Petition, as an exhibit, a sheet of paper entitled "Guide to U.S. Department of Commerce May 2, 1997 Clarification." The provenance of this document is not stated, and it was not introduced in evidence in the record herein. Nevertheless, it does not support the position taken by Complainant herein, although, Complainant's position might be supported by an analogy drawn from the document. It states that only expenses associated with defective tomatoes may be reimbursed, and defines "defective tomatoes" as those disclosed by a federal inspection to be defective. However, Respondent was not allowed any expenses resulting form the reworking the tomatoes in our decision of June 1, 1999, because such expenses were not proven.

In any event, we cannot grant Complainant's Petition on the basis of a

[1]The quoted words are not from the Clarification, but from the document attached as an exhibit to Complainant's petition.

document of unknown provenance which is not in evidence. Complainant knew early on that the basis of Respondent's claim was a modified contract that allowed handling under Commerce Department rules. Complainant could have submitted evidence as to the pertinent rules, and how they should be interpreted, but did not do so. The document submitted by Complainant might have originated anywhere. It may be the opinion of some trade group as to how the Clarification is to be interpreted. On the other hand, the Clarification itself states that the receiver may "reject the quantity of tomatoes lost during the salvaging process." After allowance for the evident aberrant meaning assigned by the Department of Commerce to the term "reject," this is precisely what we allowed in our decision. This is not to say that the interpretation offered by Complainant might not be the correct interpretation. We only find that Complainant has not proven its contention in this case.

Complainant's Petition is denied without service thereof on the Respondent. The reparation awarded by our order of June 1, 1999, shall be paid within thirty days of the date of this order.

Copies of this order shall be served upon the parties.

REGAL MARKETING, INC. v. ALL AMERICAN FARMS, INC.
PACA Docket No. R-99-0108.
Order Granting Motion to Dismiss filed November 10, 1999.

Jurisdiction – Commodities Covered by the Act – Chestnuts Not Covered.

The Act defines "perishable agricultural commodity" as fresh fruits and fresh vegetables of every kind and character, and the Regulations state that "fresh fruits and fresh vegetables" include all produce in fresh form generally considered as perishable fruits and vegetables. The popular conception of what is a fresh fruit and vegetable has always been the standard by which determinations have been made as to what commodities are covered by the Act, and not the botanical definition. Chestnuts are considered nuts, and are not covered by the Act.

George S. Whitten, Presiding Officer.
Deborah S. Martin, Boca Raton, FL, for Complainant.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

This a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). Complainant filed a timely complaint in which it alleges that it sold and shipped to Respondent 200 bags of

fresh chestnuts, and that Respondent failed to pay for the chestnuts. Complainant also alleged that chestnuts are a perishable agricultural commodity.

Following service of the formal complaint Respondent filed a motion to dismiss on the ground that chestnuts are not a perishable agricultural commodity, and cited an early case so holding. Complainant, in response to the motion, filed copies of letters written by the Division during the informal stages of this proceeding. The first of these letters, dated January 27, 1999, stated that a determination had been made that chestnuts are not a perishable agricultural commodity, and the second letter, from the same official and dated January 29, 1999, states that after further discussion the determination had been made that chestnuts are a perishable agricultural commodity.

Chestnuts are a rather unique nut, and are known to be moderately perishable in their fresh state. In an article on chestnuts, by Paul Vossen, posted on the web site for the University of California, Small Farm Center,[1] it is pointed out that:

> The chestnut is a grain growing on a tree. The nut contains about 40 percent carbohydrate, about 40 percent water, 5 to 10 percent protein, and less than 5 percent oil. It is similar to other starchy foods such as potatoes or rice and other grains.

In addition, Mr. Vossen states:

> Chestnuts should be treated more like apples in storage than like other tree nuts. They must be cooled to 32°F as soon as possible. Chestnuts dry out even at high humidity, so protective packaging is needed. Mold inhibiting fungicides and controlled atmosphere storage would most likely improve chestnut quality in long term storage.

In view of these facts it is not hard to understand why chestnuts would be thought to fall within the category of perishable agricultural commodities. However, perishability is not the major consideration when making the determination of what commodities are subject to the Act. There are several covered commodities that have considerable shelf life, such as potatoes and garlic. The Act defines "perishable agricultural commodity" as meaning:

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[1] http://www.sfc.usdavis.edu.

> any of the following, whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character; . . .[2]

The Regulations state:

> "Fresh fruits and fresh vegetables" include all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but does not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character.[3]

The key phrase in the quoted section of the Regulations is "generally considered as perishable fruits and vegetables." A review of the early cases defining "perishable agricultural commodities" shows that no consideration has ever been given to the broad botanical definition that might be accorded to the term "fruit," but rather to the general, or popular, conception of what falls within the category of fruits and vegetables. Thus peanuts, pecans and coconuts were early excluded from the category.[4] And chestnuts have twice been found to not fall within the category.[5] This conforms with the common definition of "nut":

> 1. the dry, one-seeded fruit of any of various trees or bushes, consisting of a kernel, often edible, in a hard and woody or tough and leathery shell, more or less separable from the seed itself: walnuts, pecans, chestnuts,

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[2] 7 U.S.C. § 499a(4).

[3] 7 C.F.R. § 46.2(u). The preceding paragraph defines "produce" as "any perishable agricultural commodity, as defined in paragraph (4) of the first section of the Act." Thus the use of the term "produce" by the Regulations adds nothing to our understanding of the meaning of "fresh fruits and vegetables."

[4] *T.A. Mason v. D.O. Lucas and Son*, 18 Agric. Dec. 835 (1959); *Kelso Produce v. Creech Produce*, 16 Agric. Dec. 773 (1957); and *The Arnold Fruit Company v. Holly Brothers*, 10 Agric. Dec. 885 (1951).

[5] *J. Stein & Son v. Magnelli's Fruit & Produce*, 14 Agric. Dec. 782 (1955); and *Philadelphia Produce Credit & Collection Bureau v. Angelo J. Frushon*, 8 Agric. Dec. 1055 (1949).

acorns, etc. are all *nuts*.[6]

We conclude that chestnuts are not a perishable agricultural commodity, and therefore we have no jurisdiction over Complainant's claim for reparation. The complaint should be dismissed.

Order

The complaint is dismissed.
Copies of this order shall be served upon the parties.

GEORGE L. POWELL AND JERALD POWELL, d/b/a POWELL FARMS v. GEORGIA SWEETS BRAND, INC., AND DEL MONTE FRESH PRODUCE, N.A., INC.
PACA Docket No. R-99-0035.
Order of Dismissal filed November 16, 1999.

Election of Remedies - Administrative Forum.

When a claimant is before the Secretary of Agriculture as Complainant in a reparation matter and is also a claimant before a state administrative tribunal, a determination of whether the state administrative tribunal is a "court of competent jurisdiction", which is a factor in determining if an election of remedies is required, must be made based on these factors:

An administrative tribunal can be found to be a court of competent jurisdiction when:
(A) the administrative tribunal has authority over the parties and can render a decision on the merits that would be *res judicata* of the factual issues presented in the reparation case; and/or
(B) the administrative tribunal has the authority to issue an enforceable monetary judgment based upon a breach of a contractual duty.

If the administrative tribunal is determined to be a court of competent jurisdiction, the remaining factors of an election of remedies become relevant. If the administrative tribunal is determined not to be a court of competent jurisdiction, an election of remedies is not required.

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[6]The World Publishing Company, Webster's New World Dictionary of the American Language, College Edition, (1966).

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Complainant seeks a reparation award from the Respondents in the amount of $391,369.00 in connection with multiple trucklots of onions shipped and sold in interstate commerce in accordance with a grower's agent agreement.

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 Respondents. Respondent Del Monte Fresh Produce, N.A., Inc., hereinafter Del Monte Fresh, filed an answer thereto denying liability to Complainant, raising several affirmative defenses and requesting an oral hearing. Respondent Georgia Sweets Brand, Inc., hereinafter GSB, also filed an answer denying liability to Complainant, raising affirmative defenses, and asserting that it is due a refund from Complainant. The answer further states that the subject matter of this complaint is also the subject of a civil action brought by Respondent GSB against Complainant in state court. Respondent GSB also requests a stay of the reparation matter until the civil matter is concluded. Respondent Del Monte Fresh filed a brief in Opposition to GSB's Motion for Stay. There has been no ruling made on GSB's Motion.[1]

Since the amount sought in the formal complaint is over $30,000.00 and an oral hearing was requested, the parties were given the opportunity to request deposition orders from the Presiding Officer. The parties continued with discovery in the civil action as they sought depositions and documents in this reparation proceeding.

In June 1999, the Complainant and Respondent Del Monte Fresh reached a settlement agreement providing, *inter alia,* for the dismissal of the complaint against Del Monte Fresh in this matter. An Order of Dismissal as to Respondent Del Monte Fresh was issued on June 22, 1999.

In July of 1999, the Presiding Officer became aware of the fact that Complainant had filed a claim against the bond of GSB before the Georgia Department of Agriculture. The Presiding Officer required Complainant to provide evidence that the Georgia bond action had been dismissed or why the bond action does not require that an election of remedies be made. If that information was not provided, the reparation matter would be dismissed.

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[1]This Order of Dismissal renders a ruling on the Motion for Stay moot.

In its first response,[2] Complainant asserts four reasons why the bond action does not raise an election of remedies issue:

> (1) the bond action is not pending before either a state or federal court;
> (2) the bond action arises under an agreement between parties who are not parties to the reparation matter;
> (3) the agreement that gives rise to the bond action does not form the basis of Complainant's allegations in the reparation action; and
> (4) the bond action does not raise direct issues of liability under federal law and does not allege violations of the PACA.

Complainant indicated that an election of remedies is only required when there is a reparation claim and a claim in federal or state court pending on the same transactions. Under this theory, the Georgia Department of Agriculture is not a court, and an election is not required. Further, the two Complainants who have reparation complaints pending against GSB will have to share in a recovery on the bond, the maximum of which is only $150,000.00. The amount sought in the reparation forum would be reduced according to the amount recovered in the bond proceeding. This, Complainant asserts, would ensure that both Complainants will be fully compensated.

After indicating that its correspondence contains many unsupported allegations and was not sufficient to show why an election was not required, the Presiding Officer gave Complainant an additional opportunity to address the issues. In its second response, Complainant cites case law as support for its assertion that an administrative forum is not a court. Complainant therefore asserts that to require an election in this case would be contrary to case precedent. Further, Complainant argues that because the remedies under the PACA:

> are intended to supplement and not replace remedies available at common law or statute, to the extent those common law are statutory remedies will not provide a remedy, no election should be required.

Any amount recovered under the Georgia bond proceeding would be credited to the amount alleged due in the reparation complaints.

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[2]A response was provided by Attorney R. Jason Read, who stated that he is now co-counsel for Complainant along with Attorney J. Michael Hall. Although counsel Read has not filed a Notice of Appearance in this matter, the arguments raised by counsel Read will be addressed.

Respondent GSB was given 20 days to respond to the arguments presented by Complainant. Respondent indicated that Complainant's bond action pertains to the same 1997 onion crop that is the subject of the pending reparation action. It also stated that Complainant has filed a counterclaim, that is not compulsory, against GSB in the state court action. Respondent argues that multiple proceedings:

(1) multiply legal fees and costs,
(2) unnecessarily tie up judicial and administrative resources, and
(3) create the possibility of inconsistent results.

Lastly, Respondent asserts that the complaint filed by Heath Farms in reparation case R-99-0036 was untimely filed. For these reasons, Respondent requests that the reparation action be dismissed, to allow the state proceedings to continue.

Counsel for the parties advised the Presiding Officer that a preliminary hearing before the Georgia State Department of Agriculture in the bond proceeding was scheduled for October 7, 1999. On October 5, 1999, counsel were advised that a decision would not be issued in this matter before the hearing date and that counsel should take appropriate action in light of that information.

Discussion

Section 5(b) of the PACA requires that a claimant before the Secretary choose the forum in which it will seek a remedy.

> (b) Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies. [7 U.S.C. § 499e(b)]

The issues to be considered in determining whether an election of remedies has been made were accurately listed in Complainant's first response to the Department, citing *Han Yang Trade Co., Inc., etc. v. A.F. & Sons Produce, Inc.*, 52 Agric. Dec. 765, 766 (1993):

(1) Whether the state or federal court is a court of competent jurisdiction;
(2) Whether the same parties are involved in the PACA action and the state or federal court action;
(3) Whether the same transactions are involved in the PACA action and the

state or federal action; and,
(4) Whether the PACA claimant is not before the state or federal court because of filing a compulsory counterclaim.

The reference to the state civil court proceedings made by Respondent GSB in its answer to the complaint does not raise an election of remedies problem.[3] The civil court matter is not the subject of our inquiry. The counterclaim filed by Complainant Powell Farms in the state civil court proceeding is considered to be compulsory, as that term is defined in the Federal Rules of Civil Procedure, Rule 13(a). Therefore Complainant's counterclaim filed in the state civil court proceeding does not require Complainant to make an election.

The Complainant must choose, or elect, between the claims that it initiated in different forums, *i.e.*, the reparation claim before the Secretary and the claim against the bond of GSB before the Georgia State Department of Agriculture. Complainant has provided very little information about the nature of the bond proceeding in Georgia. But the Department has learned that the Proof of Claim filed by Complainant Powell Farms was filed on March 3, 1998.[4]

The four elements of determining whether an election of remedies is necessary here will be addressed, beginning with the most straightforward issues. (1) It is clear from the Proof of Claim Form filed with the Georgia Department of Agriculture that the same parties are involved in the reparation action and the state action. The "other parties" alluded to in Complainant's correspondence are not named as parties on the Proof of Claim. (2) Even without having the entire filing made before the Georgia Department of Agriculture,sufficient information appears on the Proof of Claim to determine that the same transactions that are the subject of the bond claim are involved in the reparation action. The exact same amount claimed due in the reparation complaint is claimed due on the Proof of Claim. (3) As determined previously, Complainant Powell is not before the Georgia Department of Agriculture because of the filing of a compulsory counterclaim.

The remaining issue is whether the Georgia Department of Agriculture is a court of competent jurisdiction. Complainant argues vigorously that the Georgia

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[3]Complainant's co-counsel J. Michael Hall submitted a response to Respondent GSB's correspondence of October 4, 1999, that raised, *inter alia*, Complainant's counterclaim in the state court proceeding. Further response from Complainant was not invited, therefore, Attorney Hall's submission of October 15, 1999 was not considered in reaching a decision in this matter.

[4]This was over two weeks before the Powell Farms informal complaint was filed with the Department on March 30, 1998.

Department of Agriculture is not a court at all. Complainant relies on the authority found in *Homestead Tomato Packing Co., Inc. v. Terrific Tomato Brokers, Inc., a/t/a Terrific Tomatoes,* 46 Agric. Dec. 640 (1985). In *Homestead*, it was determined that an election of remedies was not required because the state proceeding was before an administrative agency, and not a court. And again citing *Han Yung*, counsel asserts that there must first be a court, before the issue of competent jurisdiction becomes relevant.

The only case that is cited by Complainant that addresses a proceeding before an administrative forum is the *Homestead* case; the others concern matters pending in a federal or state court. To the extent that this decision is inconsistent with the *Homestead* case, that case is specifically overruled.

For Complainant to challenge the use of the word "court" to describe a state administrative forum that will render a decision on the bond in Georgia seems incongruous to Complainant recognizing the jurisdiction of this "court", *i.e.,* the Department's administrative forum, over its reparation claim. Complainant, although given an opportunity to do so, does not bring the distinction it raises into focus. Therefore, we will provide a substantive and rational basis upon which to review Complainant's position and the conclusion stated in the *Homestead* case.

The word "court" has many meanings. We posit that the word "court" as it is used in Section 5(b) of the PACA, makes reference to a "tribunal". Therefore, the phrase in question means "a tribunal of competent jurisdiction". Black's Law Dictionary defines "court of competent jurisdiction" as "one having power and authority of law at the time of acting to do the particular act. One having jurisdiction under the Constitution and/or laws to determine the question in controversy." BLACK'S LAW DICTIONARY, pg. 319 (5th Ed. 1979). Unquestionably, the Secretary of Agriculture has been granted the authority under the PACA to adjudicate claims of breach of contract and other violations of the statute involving the sale and distribution of fresh and frozen fruits and vegetables in commerce. The Secretary regulates the perishable commodity industry through its licensing program. Based on a review of the Georgia Code, the bond that Complainant has filed a claim against is required for Respondent to receive a license to deal in agricultural products in the state of Georgia. This appears to be a part of the regulatory scheme in Georgia. The Georgia Code also authorizes the Commissioner of Agriculture to hear and adjudicate claims filed against the bond of a dealer in agricultural products, and, as is the case with the authority of the Secretary, the Commissioner of Agriculture can issue an order of monetary liability against the principal and the surety.

Looking to the case precedent cited by Complainant, *Han Yang* provides another definition of a "court of competent jurisdiction", which is that "[a] court

is one of competent jurisdiction if it can issue an enforceable award in money damages based upon a breach of a contractual duty which runs against a party to the suit." 52 Agric. Dec. at 769. Complainant does not challenge that definition. Both the administrative forum provided by the Secretary of Agriculture and the administrative forum provided by the Georgia Department of Agriculture, through its Commissioner, have the authority to impose enforceable monetary judgments against those who owe money to produce sellers.

The breach of contractual duty that forms the basis of the bond action appears to be that by failing to pay for produce, Respondent has breached the conditions of the bonding agreement. However, failing to pay for produce is also a breach of contractual duty that violates the PACA. The fact that the bond claim action does not cite to the PACA is irrelevant; the underlying issue is whether the Respondent has wrongfully failed to pay Complainant for its onions in breach of their grower's agent agreement. *M. S. Thigpen Produce Co. v. The Park River Growers*, 48 Agric. Dec. 695, 698-99 (1989).

Counsel for the parties, by indicating that the Commissioner of Agriculture in Georgia had scheduled a preliminary hearing in the bond matter, sheds additional light on the type of proceeding that has been initiated. There is apparently a process by which GSB can, as in other civil matters, present defenses to the claim filed by Complainant at a preliminary hearing. The result may be, if GSB prevails on the issues raised at the hearing, that the claim is dismissed. This presents a depiction of a fairly structured and somewhat formal procedure, where the facts of the claim against the bond (the onion contract, the terms thereof, when payment was due, etc.) will be presented to the Commissioner for decision. Whatever decision is reached in the bond proceeding, it appears that the decision would be rendered after a full review of the merits of the parties' claim which would be *res judicata* of the issues before the Secretary, *i.e.*, Did Respondent GSB fail to pay Complainant in accordance with the terms of its contract, resulting in a debt owed Complainant? Applying the foregoing analysis, is it determined that the Georgia Department of Agriculture constitutes a "court of competent jurisdiction" as contemplated by Section 5(b) of the PACA.

The analysis utilized in this case is the analysis to be followed in future cases. Accordingly, where a reparation claimant is also the claimant in an action in a state administrative forum, the determination of whether an election of remedies is required will be done on a case-by-case basis. The fact that the "other" forum is administrative is not dispositive of the election issue. The four issues cited in the *Han Yung* decision are certainly still applicable. However, the first issue, that of "competent jurisdiction", will require that the nature of the administrative proceeding in the "other" forum be examined. The issues to be considered in

determining if an election of remedies is required are supplemented as follows:

(1) Whether the state or federal court is a court of competent jurisdiction, **provided that, an administrative tribunal can be found to be a court of competent jurisdiction when:**

(A) the administrative tribunal has authority over the parties and can render a decision on the merits that would be *res judicata* of the factual issues presented in the reparation case; and/or

(B) the administrative tribunal has the authority to issue an enforceable monetary judgment based upon a breach of a contractual duty;

(2) Whether the same parties are involved in the PACA action and the state or federal court action;

(3) Whether the same transactions are involved in the PACA action and the state or federal action; and,

(4) Whether the PACA claimant is not before the state or federal court because of filing a compulsory counterclaim.

Thus, the finding of the *Homestead* case, *i.e.*, that the PACA does not prohibit an action in an administrative forum and a reparation action before the Secretary from proceeding concurrently because the administrative forum is not a court, is specifically overruled. Determinations of election of remedy questions will be resolved by the Department by considering the factors listed above.

Additionally, Complainant raises the issue of inability to recover the full amount of its claim in the bond proceeding since recovery is limited to the $150,000.00 bond amount as a reason to allow the reparation matter to proceed along with the bond matter. Double recovery will be avoided, Complainant asserts, because the reparation amount sought will be reduced dollar-for-dollar by the amount recovered on the bond. In determining if an election of remedies is required, neither the PACA nor the case law indicate that whether full reparation can be obtained in the other forum is an issue to be considered. That issue has not been considered in this case. The fact of the matter is that multiple litigation of the same facts and inconsistent decisions is a potential result of Complainant proceeding both before the Georgia Department of Agriculture and the U.S. Department of Agriculture.

Conclusion

Complainant has not provided the Department any basis upon which to find that the initiation of the bond proceeding before the Georgia Department of Agriculture does not require an election of remedies, nor has Complainant provided evidence that the bond proceeding has been dismissed. The first letter to Complainant indicated that if the information was not provided, the complaint against Georgia Sweets Brand, Inc., designated as R-99-0035 would be dismissed. It has been determined that Complainant has failed to provide evidence that an election is not required here, and has also failed to provide evidence that the bond claim has been dismissed. Therefore, it is determined that Complainant has made its election by continuing its bond proceeding before the Georgia Department of Agriculture.

Order

Complainant has elected to pursue its remedy before the Georgia Department of Agriculture in a claim against the bond of Respondent Georgia Sweets Brand, Inc.

Therefore, the complaint against Georgia Sweets Brand, Inc., is hereby dismissed.

Copies of this Order shall be served upon the parties.

ALVIN HEATH, d/b/a HEATH FARMS v. GEORGIA SWEETS BRAND, INC., AND DEL MONTE FRESH PRODUCE, N.A., INC.
PACA Docket No. R-99-0036.
Order of Dismissal filed November 16, 1999.

Election of Remedies - Administrative Forum.

When a claimant is before the Secretary of Agriculture as Complainant in a reparation matter and is also a claimant before a state administrative tribunal, a determination of whether the state administrative tribunal is a "court of competent jurisdiction", which is a factor in determining if an election of remedies is required, must be made based on these factors:

An administrative tribunal can be found to be a court of competent jurisdiction when:
(A) the administrative tribunal has authority over the parties and can render a decision on the merits that would be *res judicata* of the factual issues presented in the reparation case; and/or
(B) the administrative tribunal has the authority to issue an enforceable monetary judgment based upon a breach of a contractual duty.

If the administrative tribunal is determined to be a court of competent jurisdiction, the remaining factors of an election of remedies become relevant. If the administrative tribunal is determined not to be a court of competent jurisdiction, an election of remedies is not required.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Complainant seeks a reparation award from the Respondents in the amount of $193,217.80 in connection with multiple trucklots of onions shipped and sold in interstate commerce in accordance with a grower's agent agreement.

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 Respondents. Respondent Del Monte Fresh Produce, N.A., Inc., hereinafter Del Monte Fresh, filed an answer thereto denying liability to Complainant, raising several affirmative defenses and requesting an oral hearing. Respondent Georgia Sweets Brand, Inc., hereinafter GSB, also filed an answer denying liability to Complainant, raising affirmative defenses, and asserting that it is due a refund from Complainant. The answer further states that the subject matter of this complaint is also the subject of a civil action brought by Respondent GSB against Complainant in state court. Respondent GSB also requests a stay of the reparation matter until the civil matter is concluded. Respondent Del Monte Fresh filed a brief in Opposition to GSB's Motion for Stay. There has been no ruling made on GSB's Motion.[1]

Since the amount sought in the formal complaint is over $30,000.00 and an oral hearing was requested, the parties were given the opportunity to request deposition orders from the Presiding Officer. The parties continued with discovery in the civil action as they sought depositions and documents in this reparation proceeding.

In June 1999, the Complainant and Respondent Del Monte Fresh reached a settlement agreement providing, *inter alia,* for the dismissal of the complaint against Del Monte Fresh in this matter. An Order of Dismissal as to Respondent Del Monte Fresh was issued on June 22, 1999.

In July of 1999, the Presiding Officer became aware of the fact that Complainant had filed a claim against the bond of GSB before the Georgia Department of Agriculture. The Presiding Officer required Complainant to

[1]This Order of Dismissal renders a ruling on the Motion for Stay moot.

provide evidence that the Georgia bond action had been dismissed or why the bond action does not require that an election of remedies be made. If that information was not provided, the reparation matter would be dismissed.

In its first response,[2] Complainant asserts four reasons why the bond action does not raise an election of remedies issue:

> (1) the bond action is not pending before either a state or federal court;
> (2) the bond action arises under an agreement between parties who are not parties to the reparation matter;
> (3) the agreement that gives rise to the bond action does not form the basis of Complainant's allegations in the reparation action; and
> (4) the bond action does not raise direct issues of liability under federal law and does not allege violations of the PACA.

Complainant indicated that an election of remedies is only required when there is a reparation claim and a claim in federal or state court pending on the same transactions. Under this theory, the Georgia Department of Agriculture is not a court, and an election is not required. Further, the two Complainants who have reparations pending against GSB will have to share in a recovery on the bond, the maximum of which is only $150,000.00. The amount sought in the reparation forum would be reduced according to the amount recovered in the bond proceeding. This, Complainant asserts, would ensure that both Complainants will be fully compensated.

After indicating that its correspondence contains many unsupported allegations and was not sufficient to show why an election was not required, the Presiding Officer gave Complainant an additional opportunity to address the issues. In its second response, Complainant cites case law as support for its assertion that an administrative forum is not a court. Complainant therefore asserts that to require an election in this case would be contrary to case precedent. Further, Complainant argues that because the remedies under the PACA:

> are intended to supplement and not replace remedies available at common law or statute, to the extent those common law or statutory remedies will not provide a remedy, no election should be required.

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[2]A response was provided by Attorney R. Jason Read, who stated that he is now co-counsel for Complainant along with Attorney J. Michael Hall. Although counsel Read has not filed a Notice of Appearance in this matter, the arguments raised by counsel Read will be addressed.

Any amount recovered under the Georgia bond proceeding would be credited to the amount alleged due in the reparation complaint.

Respondent GSB was given 20 days to respond to the arguments presented by Complainant. Respondent indicated that Complainant's bond action pertains to the same 1997 onion crop that is the subject of the two pending reparation actions. It also stated that Complainant has filed a counterclaim, that is not compulsory, against GSB in the state court action. Respondent argues that multiple proceedings:

(1) multiply legal fees and costs,
(2) unnecessarily tie up judicial and administrative resources, and
(3) create the possibility of inconsistent results.

Lastly, Respondent asserts that the complaint filed by Heath Farms in reparation case R-99-0036 was untimely filed. For these reasons, Respondent requests that the reparation action be dismissed, to allow the state proceedings to continue.

Counsel for the parties advised the Presiding Officer that a preliminary hearing before the Georgia State Department of Agriculture in the bond proceedings was scheduled for October 7, 1999. On October 5, 1999, counsel were advised that a decision would not be issued in this matter before the hearing date and that counsel should take appropriate action in light of that information.

Discussion

We will address the timeliness issue raised by Respondent GSB first. Respondent asserts that Complainant Heath Farms' formal complaint was not timely filed, and cites to the Department's Report of Investigation which states that, "[t]he formal complaint was received on July 20, 1998. The alleged transactions occurred on or about May 4, 1997 through June 6, 1997." Contrary to Respondent's belief, it is the filing of the informal complaint that tolls the nine month statute of limitations in reparation cases. *E. Potato Dealers of Maine v. Commodity Marketing Co.*, 36 Agric. Dec. 2017 (1977). The informal complaint in this reparation case was filed on April 6, 1998. The PACA requires that a claim in a reparation case be filed within nine months from when the cause of action accrued. To determine when the cause of action accrued, we must determine when payment was due. The last date upon which Respondent made sales from the onions held in cold storage, based on the records in the Report of Investigation, was on or about, October 27, 1997. The filing of the informal complaint by Heath Farms on April 6, 1998, is well within nine months from when the cause of action

accrued, regardless of the definition of prompt payment that is applicable to the contract.[3] Therefore, the complaint cannot be dismissed as untimely filed.

Now, we will resolve the election of remedies issue. Section 5(b) of the PACA requires that a claimant before the Secretary choose the forum in which it will seek a remedy.

> (b) Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies. [7 U.S.C. § 499e(b)]

The issues to be considered in determining whether an election of remedies has been made were accurately listed in Complainant's first response to the Department, citing *Han Yang Trade Co., Inc., etc. v. A.F. & Sons Produce, Inc.*, 52 Agric. Dec. 765, 766 (1993).

> (1) Whether the state or federal court is a court of competent jurisdiction;
> (2) Whether the same parties are involved in the PACA action and the state or federal court action;
> (3) Whether the same transactions are involved in the PACA action and the state or federal action; and,
> (4) Whether the PACA claimant is not before the state or federal court because of filing a compulsory counterclaim.

The reference to the state civil court proceedings made by Respondent GSB in its answer to the complaint does not raise an election of remedies problem.[4] The civil court matter is not the subject of our inquiry. The counterclaim filed by Complainant Heath Farms in the state civil court proceeding is considered to be

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[3]In its complaint, Complainant cites to the definitions of *prompt payment* in the regulations at 7 CFR §§ 46.2(aa)(5) and 46.2(aa)(10), which provide for payment within 10 days and 20 days, respectively. As stated above, the informal complaint was timely filed regardless of the definition of *prompt payment* determined to be applicable to the onion contract.

[4]Complainant's co-counsel J. Michael Hall submitted a response to Respondent GSB's correspondence of October 4, 1999, that raised, *inter alia*, Complainant's counterclaim in the state court proceeding. Further response from Complainant was not invited, therefore, Attorney Hall's submission of October 15, 1999 will not be considered in reaching a decision in this matter.

compulsory, as that term is defined in the Federal Rules of Civil Procedure, Rule 13(a). Therefore Complainant's counterclaims filed in the state civil court proceeding does not require Complainant to make an election.

The Complainant must to choose, or elect, between the claims that it initiated in different forums, *i.e.,* the reparation claim before the Secretary and the claim against the bond of GSB before the Georgia State Department of Agriculture. Complainant has provided very little information about the nature of the bond proceeding in Georgia. But the Department has learned that the Proof of Claim filed by Complainant Powell Farms was filed on March 3, 1998.[5]

The four elements of determining whether an election of remedies is necessary here will be addressed, beginning with the most straightforward issues. (1) It is clear from the Proof of Claim Form filed with the Georgia Department of Agriculture that the same parties are involved in the reparation action and the state action. The "other parties" alluded to in Complainant's correspondence are not named as parties on the Proof of Claim. (2) Even without having the entire filing made before the Georgia Department of Agriculture,sufficient information appears on the Proof of Claim to determine that the same transactions that are the subject of the bond claim are involved in the reparation action. (3) As alluded to previously, Complainant Powell is not before the Georgia Department of Agriculture because of the filing of a compulsory counterclaim.

The remaining issue is whether the Georgia Department of Agriculture is a court of competent jurisdiction. Complainant argues vigorously that the Georgia Department of Agriculture is not a court at all. Complainant relies on the authority found in *Homestead Tomato Packing Co., Inc. v. Terrific Tomato Brokers, Inc., a/t/a Terrific Tomatoes,* 46 Agric. Dec. 640 (1985). In *Homestead,* it was determined that an election of remedies was not required because the state proceeding was before an administrative agency, and not a court. And again citing *Han Yung,* counsel asserts that there must first be a court, before the issue of competent jurisdiction becomes relevant.

The only case that is cited by Complainant that addresses a proceeding before an administrative forum is the *Homestead* case; the others concern matters pending in a federal or state court. To the extent that this decision is inconsistent with the *Homestead* case, that case is specifically overruled.

For Complainant to challenge the use of the word "court" to describe a state

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[5]It is assumed that the Proof of Claim filed by Heath Farms was filed on or about the same date since both Complainant Powell Farms and Complainant Heath Farms are represented by the same counsel, and co-counsel Read has presented the same arguments on behalf of both Complainants.

administrative forum that will render a decision on the bond in Georgia seems incongruous to Complainant recognizing the jurisdiction of this "court", *i.e.,* the Department's administrative forum, over its reparation claim. Complainant, although given an opportunity to do so, does not bring the distinction it raises into focus. Therefore, we will provide a substantive and rational basis upon which to review Complainant's position and the conclusion stated in the *Homestead* case.

The word "court" has many meanings. We posit that the word "court" as it is used in Section 5(b) of the PACA, makes reference to a "tribunal". Therefore, the phrase in question means "a tribunal of competent jurisdiction". Black's Law Dictionary defines "court of competent jurisdiction" as "one having power and authority of law at the time of acting to do the particular act. One having jurisdiction under the Constitution and/or laws to determine the question in controversy." BLACK'S LAW DICTIONARY, pg. 319 (5th Ed. 1979). Unquestionably, the Secretary of Agriculture has been granted the authority under the PACA to adjudicate claims of breach of contract and other violations of the statute involving the sale and distribution of fresh and frozen fruits and vegetables in commerce. The Secretary regulates the perishable commodity industry through its licensing program. Based on a review of the Georgia Code, the bond that Complainant has filed a claim against is required for Respondent to receive a license to deal in agricultural products in the state of Georgia. This appears to be a part of the regulatory scheme in Georgia. The Georgia Code also authorizes the Commissioner of Agriculture to hear and adjudicate claims filed against the bond of a dealer in agricultural products, and, as is the case with the authority of the Secretary, the Commissioner of Agriculture can issue an order of monetary liability against the principal and the surety.

Looking to the case precedent cited by Complainant, *Han Yang* provides another definition of a "court of competent jurisdiction", which is that "[a] court is one of competent jurisdiction if it can issue an enforceable award in money damages based upon a breach of a contractual duty which runs against a party to the suit." 52 Agric. Dec. at 769. Complainant does not challenge that definition. Both the administrative forum provided by the Secretary of Agriculture and the administrative forum provided by the Georgia Department of Agriculture, through its Commissioner, have the authority to impose enforceable monetary judgments against those who owe money to produce sellers.

The breach of contractual duty that forms the basis of the bond action appears to be that by failing to pay for produce, Respondent has breached the conditions of the bonding agreement. However, failing to pay for produce is also a breach of contractual duty that violates the PACA. The fact that the bond claim action does not cite to the PACA is irrelevant; the underlying issue is whether the Respondent

has wrongfully failed to pay Complainant for its onions in breach of their grower's agent agreement. *M.S. Thigpen Produce Co. v. The Park River Growers,* 48 Agric. Dec. 695, 698-99 (1989).

Counsel for the parties, by indicating that the Commissioner of Agriculture in Georgia had scheduled a preliminary hearing in the bond matter, sheds additional light on the type of proceeding that has been initiated. There is apparently a process by which GSB can, as in other civil matters, present defenses to the claim filed by Complainant at a preliminary hearing. The result may be, if GSB prevails on the issues raised at the hearing, that the claim is dismissed. This presents a depiction of a fairly structured and somewhat formal procedure, where the facts of the claim against the bond (the onion contract, the terms thereof, when payment was due, etc.) will be presented to the Commissioner for decision. Whatever decision is reached in the bond proceeding, it appears that the decision would be rendered after a full review of the merits of the parties claims which would be *res judicata* of the issues before the Secretary, *i.e.,* Did Respondent GSB fail to pay Complainant in accordance with the terms of its contract, resulting in a debt owed Complainant? Applying the foregoing analysis, it is determined that the Georgia Department of Agriculture constitutes a "court of competent jurisdiction" as contemplated by Section 5(b) of the PACA.

The analysis utilized in this case is the analysis to be followed in future cases. Accordingly, where a reparation claimant is also the claimant in an action in a state administrative forum, the determination of whether an election of remedies is required will be done on a case-by-case basis. The fact that the "other" forum is administrative is not dispositive of the election issue. The four issues cited in the *Han Yung* decision are certainly still applicable. However, the first issue, that of "competent jurisdiction", will require that the nature of the administrative proceeding in the "other" forum be examined. The issues to be considered in determining if an election of remedies is required are supplemented as follows:

(1) Whether the state or federal court is a court of competent jurisdiction, **provided that, an administrative tribunal can be found to be a court of competent jurisdiction when:**

(A) the administrative tribunal has authority over the parties and can render a decision on the merits that would be *res judicata* of the factual issues presented in the reparation case; and/or

(B) the administrative tribunal has the authority to issue an enforceable monetary judgment based upon a breach of a contractual duty;

(2) Whether the same parties are involved in the PACA action and the state or federal court action;
(3) Whether the same transactions are involved in the PACA action and the state or federal action; and,
(4) Whether the PACA claimant is not before the state or federal court because of filing a compulsory counterclaim.

Thus, the finding of the *Homestead* case, *i.e.*, that the PACA does not prohibit an action in an administrative forum and a reparation action before the Secretary from proceeding concurrently because the administrative forum is not a court, is specifically overruled. Determinations of election of remedy questions will be resolved by the Department by considering the factors listed above.

Additionally, Complainant raises the issue of inability to recover the full amount of its claim in the bond proceeding since recovery is limited to the $150,000.00 bond amount as a reason to allow the reparation matter to proceed along with the bond matter. Double recovery will be avoided, Complainant asserts, because the reparation amount sought will be reduced dollar-for-dollar by the amount recovered on the bond. In determining if an election of remedies is required, neither the PACA nor the case law indicate that whether full recovery can be obtained in the "other" forum is an issue to be considered. That issue has not been considered in this case. The fact of the matter is that multiple litigation of the same facts and inconsistent decisions is a potential result of Complainant proceeding both before the Georgia Department of Agriculture and the U.S. Department of Agriculture.

Conclusion

Complainant has not provided the Department any basis upon which to find that the initiation of the bond proceeding before the Georgia Department of Agriculture does not require an election of remedies, nor has Complainant provided evidence that the bond proceeding has been dismissed. The first letter to Complainant indicated that if the information was not provided, the complaint against Georgia Sweets Brand, Inc., designated as R-99-0036 would be dismissed. It has been determined that Complainant has failed to provide evidence that an election is not required here, and has also failed to provide evidence that the bond claim has been dismissed. Therefore, it is determined that Complainant has made its election by continuing its bond proceeding before the Georgia Department of Agriculture.

Order

Complainant has elected to pursue its remedy before the Georgia Department of Agriculture in a claim against the bond of Respondent Georgia Sweets Brand, Inc.

Therefore, the complaint against Georgia Sweets Brand, Inc., is hereby dismissed.

Copies of this Order shall be served upon the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: VALLEY IMPORT, INC.
PACA Docket No. D-98-0028.
Decision and Order filed March 18, 1999.

Imani Ellis-Cheek, 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 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, 1998, 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 21, 1997 through March 3, 1998, Respondent purchased, received and accepted, in interstate commerce from 27 sellers, 176 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 $1,107,568.95.

A copy of the Complaint was served upon Respondent on October 22, 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, Valley Import, Inc., was a corporation organized and existed under the laws of the State of Texas. Its business mailing address was 1 Val-Mex Drive, Hidalgo, Texas 78557. Its mailing address was P.O. Drawer W, Hidalgo, Texas 78557.

2. At all times material herein, Respondent was licensed under the provisions of PACA. License number 9500481 was issued to Respondent on October 7, 1994. This license was next subject to renewal on October 7, 1998. Valley Import, Inc. ceased business in February 1998.

3. As more fully set forth in paragraph 3 of the Complaint, during the period of December 21, 1997 through March 3, 1998, Respondent purchased, received and accepted, in interstate commerce from 27 sellers, 176 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 $1,107,568.95.

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 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 hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final August 19, 1999.-Editor]

In re: ALEJANDRO M. RAMIREZ, d/b/a ALEX PRODUCE.
PACA Docket No. D-99-0010.
Decision and Order filed September 28, 1999.

Deborah Ben-David, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the Act, instituted by a complaint filed on June 1, 1999, 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 March 1996 through November 1997, Alejandro M. Ramirez, d/b/a Alex Produce, (hereinafter Respondent) failed to make full payment promptly to 41 sellers of the agreed purchase prices in the total amount of $458,916.21 for 954 transactions of perishable agricultural commodities he had purchased, received or accepted in interstate commerce or in contemplation of interstate commerce.

A copy of the complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is an individual with a business mailing address of 210 W. McKinley Street, Calexico, California, 92231.

2. At all times material herein, Respondent was either licensed or operating subject to license under the provisions of the Act. License number 870007 was issued to Respondent on October 3, 1986. This license terminated on October 3, 1997, pursuant to section 4(a) of the Act (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, during March 1996 through November 1997, Respondent failed to make full payment promptly to 41 sellers of the agreed purchase prices in the total amount of $458,916.21 for

954 transactions of perishable agricultural commodities he had purchased, received or accepted in interstate commerce or in contemplation of interstate commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact Number 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 Act (7 U.S.C. § 499b(4)). This finding is hereby ordered published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies shall be served on the parties.

[This Decision and Order became final November 16, 1999.-Editor]

In re: AN PRODUCE CORP.
PACA Docket No. D-99-0015.
Decision and Order filed November 17, 1999.

Andrew Y. Stanton, for Complainant.
Sang Chin Yom, New York, NY, for Respondent.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), instituted by a complaint filed on July 30, 1999, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States

Department of Agriculture.

The complaint alleged that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period June 1998 through October 1998, by failing to make full payment promptly to 11 sellers of the agreed purchase prices in the total amount of $278,287 for 37 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce. The complaint requested that the Administrative Law Judge issue a finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA and order such finding published.

A copy of the complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon the motion of Complainant for the issuance of a Decision Without Hearing by Reason of Default, 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. An Produce Corp. (hereinafter "Respondent"), is a corporation organized and existing under the laws of the State of New York. Its business mailing address is 31-01 Starr Avenue, Long Island City, New York 11101.

2. At all times material herein, Respondent was licensed under the PACA. License number 970914 was issued to Respondent on February 24, 1997. This license terminated on February 24, 1999, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), upon Respondent's failure to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, Respondent, during the period June 1998 through October 1998, failed to make full payment promptly to 11 sellers of the agreed purchase prices in the total amount of $278,287 for 37 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce.

Conclusions

Respondent's actions, as set forth in Finding of Fact 3 above, constitute willful, flagrant and repeated violations of section 2(4) of the PACA, for which the Order below is issued.

Order

Respondent is hereby found to have committed willful, flagrant and repeated violations of section 2(4) of the PACA.

This Order 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 Without Hearing by Reason of Default will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 29, 1999.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

Greenridge Fruit, Inc. PACA Docket No. D-98-0026. 4/15/99.

Bagwell Farms Produce Co., Inc. PACA Docket No. D-98-0019. 8/16/99.

Dole Bakersfield, Inc., a/t/a Dole Fresh Fruit. PACA Docket No. D-00-0004. 11/19/99.