AGRICULTURE DECISIONS

Volume 63

July – December 2004

UNITED STATES DEPARTMENT
OF AGRICULTURE

AGRICULTURE DECISIONS

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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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Beginning in Volume 63 Jul. - Dec. (2004), the initial decisions (and selected miscellaneous orders) of the Administrative Law Judges will be published in *AGRICULTURE DECISIONS* in addition to the Appealed Decisions (if any) issued by the Judicial Officer in the same case.

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ERRATA

The following pages from the Subject Matter Index of the 63 Agric. Dec. Jan. - Jun. (2004) edition of Agriculture Decisions are republished here. We regret that reformatting of the pages during the publication process resulted in a shift of from one to five pages in the correct page numbers associated with the index term. The second volume of 63 Agric. Dec. (2004) will contain the corrected page numbers herein and those of the Jul. - Dec 2004 period. – Editor

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LAMERS DAIRY v. USDA.
Nos. 03-2308 & 03-2661.
Filed August 13, 2004.

(Cited as: 379 F.3d 466).

AMAA – Assessments, unpaid – De-pooling, option available to Class III handlers – Equal protection – Legitimate governmental interest to regulate – Breadth of regulatory scheme - Targeting of suspect class, when not – Price inversion.

Lamers challenged the Milk Marketing Order which allows members of a certain class of handlers (Class III) to "opt out" of the milk pooling plan while Class I handlers were required to pay assessment into the pool. During times of "price inversion," Class I handlers may have to pay a premium in addition to the standard Class I price. Lamers desired to avoid assessments on Class I milk purchases and withheld their assessments. The court cited with approval the Secretary's difference in treatment of the several classes of handlers as having a rational relationship to a legitimate governmental interest which is the orderly administration and adequate supply of the fluid milk market to establish parity prices to farmers. The court was highly deferential to the agency's rule making and application of those rules and affirmed the District court's ruling of a money judgment against Lamers.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUDGES**:** Before RIPPLE, ROVNER and DIANE P. WOOD, Circuit Judges.

OPINION

Lamers Dairy ("Lamers") sought an exemption from Milk Marketing Order No. 30, promulgated under the Agricultural

Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq*. After the Secretary of the United States Department of Agriculture ("the USDA") denied the petition in a final administrative order, Lamers sought review in the district court. The USDA counterclaimed for enforcement of the Secretary's decision and for a judgment against Lamers in an amount equal to the unpaid monetary assessments due under the terms of the marketing order. The district court granted summary judgment to the USDA on Lamers' complaint and on the USDA's counterclaim. It ordered further proceedings on the amount due. Subsequently, the district court denied a motion for reconsideration by Lamers and entered an amended judgment awarding the Government $ 850,931.26. Lamers appeals. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I
BACKGROUND

A. Facts

Lamers Dairy, a Wisconsin family-operated dairy, has as its principal business the handling and packaging of fluid milk. In this appeal, Lamers challenges aspects of the federal milk-marketing regulatory scheme. To understand the nature of Lamers' challenges, we must discuss briefly the dairy industry and the regulatory and market forces governing it.[1]

1. The Dairy Industry

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[1] For additional background discussions, upon which this opinion has relied substantially, see *Zuber v. Allen*, 396 U.S. 168, 172-74, 24 L. Ed. 2d 345, 90 S. Ct. 314 (1969); *Alto Dairy v. Veneman*, 336 F.3d 560, 562 (7th Cir. 2003); *Stew Leonard's v. Glickman*, 199 F.R.D. 48, 49-50 (D. Conn. 2001); and Alden C. Manchester & Don P. Blayney, *Milk Pricing in the United States*, Market & Trade Economics Div., Dep't of Agric., Agric. Info. Bull. No. 761 (Feb. 2001).

In the dairy industry, dairy farmers, also referred to as "producers, "produce and sell raw milk to "handlers." Handlers, in turn, prepare the milk product for resale to consumers or serve as intermediaries to those who do. Consumer dairy products, such as fluid milk beverages, ice cream and cheese, can all be produced from "Grade A" or "fluid grade" raw milk.[2] In the consumer market, however, milk beverages generally command a higher price than non-fluid products, which are known also as "manufactured dairy products." For this reason, the market into which dairy farmers sell their product more highly values (and pays a premium price for) Grade A milk ultimately used to produce beverage milk. This market premium based on end use creates an incentive among producers to divert their Grade A product to fluid milk handlers.[3] Were this incentive not controlled, lower market prices would result, harming milk production revenues.[4]

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[2] Grade B milk, on the other hand, which is subject to slightly less stringent sanitary standards, cannot be used to produce fluid milk beverages. In 1999, only about three percent of milk marketed failed to meet Grade A standards. *See* Manchester & Blayney, *supra* note 1, at 2.

[3] Prior to refrigeration, not all producers could pursue these premium prices. We have discussed previously the change to the market precipitated by refrigeration:

> If milk were perishable, as it was in the days before refrigerated storage and transportation, dairy farmers serving urban markets (where milk is more likely to be consumed in fluid form than made into cheese or butter) would get higher prices for their output than dairy farmers remote from cities, who being unable to ship their milk a long distance would perforce sell most of it to manufacturers of cheese and other dairy products. But when refrigerated storage and transportation arrived on the scene, it became feasible for the remote dairy farmers--Wisconsin dairy farmers, for example--to ship milk to cities in other states, pushing down the price of fluid milk there and so hurting the dairy farmers who were located near those cities.

[4] *See Alto Dairy*, 336 F.3d at 563 ("Such a diversion, what economists call 'arbitrage,' would undermine and, if uncontrolled, . . . reduce the incomes of dairy farmers as a group.").

Alto Dairy, 336 F.3d at 562. This change in the competitive environment provided an impetus for regulation. *See Id.* at 562-63.

The dairy industry also is characterized by daily and seasonal fluctuations in supply and demand. Consumer demand fluctuates significantly on a daily basis, primarily due to consumer buying patterns; milk production, on the other hand, is relatively constant on a daily basis. Conversely, milk production varies seasonally based on the animals' nutritional health. In fall and winter months, less milk is produced, but in spring and summer months, more milk is produced. To meet consumer demand in the winter, producers must maintain large herds; these same herds over-produce in the summer. Given milk's perishable quality, the supply must go to market at least every other day. Historically, handlers were thus able to obtain summer supplies at bargain prices.

2. The Regulatory Scheme

In the wake of the Great Depression, in an attempt to address these unique industry characteristics, Congress en-acted various provisions governing the dairy industry as part of the Agricultural Marketing Agreement Act of 1937 ("the AMAA"). A driving purpose of the AMAA was "to remove ruinous and self-defeating competition among the producers and permit all farmers to share the benefits of fluid milk profits according to the value of goods produced and services rendered." *Zuber v. Allen*, 396 U.S. 168, 180-81, 24 L. Ed. 2d 345, 90 S. Ct. 314 (1969). The AMAA, as amended, thus ensures that producers receive a uniform minimum price for their product, regardless of the end use to which it is put.

To accomplish this objective, the statute contains several mechanisms. First, it authorizes the Secretary to classify milk according to its end use and to establish minimum prices for each end-use classification. *See* 7 U.S.C. § 608c(5)(A). Second, it authorizes the Secretary to establish a uniform minimum price, termed the "blend price," based on a weighted average of all units of production of classes of milk sold to handlers associated with a

marketing area. *See Id.* Third, it requires handlers to pay producers the blend price, regardless of the end use to which the milk will be put. *See Id.* § 608c(5)(B). Fourth, it authorizes a method for adjustments in payments among handlers so that the final amount paid by each handler equals the value of the milk that handler has purchased, according to the minimum prices established. *See Id.* § 608c(5)(C). Overall, the provisions attempt to promote orderly milk-marketing by maintaining minimum prices for producers and limiting the competitive effects of excess supply of Grade A milk.

Although it protects producers, the AMAA regulates handlers only. Pursuant to the AMAA directives, the Secretary has classified milk into the following classes of utilization: Class I milk includes fluid milk processed and bottled as a beverage; Class II milk includes soft milk products such as cottage cheese, sour cream, yogurt and ice cream; Class III includes hard cheese and cream cheese; and Class IV includes raw milk used for butter and dry milk powder. As directed by the AMAA, the Secretary has established a uniform pricing scheme for each of these classes of milk, as well as the average blend price.[5] Handlers governed by milk-marketing orders must pay producers this uniform blend price. The process of blending the prices of the different classes of milk on a monthly basis has come to be known as "pooling."

This uniform minimum pricing is intended to reduce the incentive producers would have to divert all fluid milk to Class I handlers and, literally, to flood that market. As the system operates, dairy producers within a marketing area receive the guaranteed uniform blend price for their milk, regardless of the end use to which it is put. Because the uniform price is a weighted average, some handlers pay producers

[5] The minimum prices are derived from regulatory formulas, the exact intricacies of which are not relevant here. Speaking generally, Class III and Class IV prices are derived by surveying the retail price of products such as cheese and butter and then factoring out certain manufacturing costs. Class I prices are computed by adding appropriate location differentials to Class III and IV prices. *See* 7 C.F.R. § 1000.50. Because of this pricing system, it is sometimes said that Class III and IV handlers receive "make allowances" based on their manufacturing costs.

less for their milk than its market worth while other handlers pay more. Handlers who pay less to producers must make compensating payments into the producer settlement fund while handlers who pay more to producers may withdraw compensating payments from the fund.[6] Thus, within the regulatory scheme, handlers ultimately pay an amount equal to the utilization value of the milk they purchase.[7] This simplified example of the regulatory scheme by the district court for the District of Connecticut is helpful:

Suppose Handler A purchases 100 units of Class I (fluid) milk from Producer A at the minimum value of $ 3.00 per unit. Assume further that Handler B purchases 100 units of Class II (soft milk products) milk from Producer B at the minimum value of $ 2.00 per unit, and that Handler C purchases 100 units of Class III (hard milk products) milk from Producer C at $ 1.00 per unit. Assuming that this constitutes the entire milk market for a regulatory district, during this period the total price paid for milk is $ 600.00, making the average price per unit of milk $ 2.00. Thus, under the regulatory scheme, Producers A, B, and C all receive $ 200.00 for the milk they supplied, irrespective of the use to which it was put. However, Handler A must, in addition to the $ 200.00 that it must tender to Producer A, pay $ 100.00 into the settlement fund because the value of the milk it purchased exceeded the regulatory average price. Along the same vein, Handler C will receive $ 100.00 from the settlement fund because it will pay Producer C more than the milk it received was worth.

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[6] Compensating payments to and from the settlement fund are actually determined by more complicated formulas that account for the total value of the handler's milk utilization as well as various credits and adjustments for transportation, assembly and plant location.

[7] Outside the regulatory system, economic realities may require some handlers to pay out-of-pocket premiums to producers, over and above the uniform blend price, in order to acquire their milk supply. These out-of-pocket premiums are not taken into consideration in the calculation of amounts owed to the settlement fund. *See* Manchester & Blayney, *supra* note 1, at 7 ("The prices set are minimums--market conditions can and often do lead to prices higher than the minimums.").

Stew Leonard's v. Glickman, 199 F.R.D. 48, 50 (D. Conn. 2001). The system of compensating payments into and out of the settlement fund thereby fulfills the AMAA requirement that "the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed." 7 U.S.C. § 608c(5)(C).

The country is divided into regional milk-marketing areas, which are governed by different marketing orders. Milk Marketing Order No. 30 governs the Upper Midwest marketing area, including portions of Illinois, Iowa, Michigan, Minnesota, North Dakota, South Dakota and Wisconsin. As a Wisconsin dairy that bottles milk for fluid consumption, Lamers is subject to regulation under Milk Marketing Order No. 30 as a Class I handler.

3. Price Inversions

As discussed, Class I prices are generally higher than Class III prices. Thus, the blend price usually falls above the Class III price, and Class III handlers typically are entitled to withdraw compensating payments from the settlement fund after paying producers the blend price. However, occasionally, periods of "price inversion" occur,[8] in which Class III prices exceed Class I prices. Price inversions occur in part because of differences in how and when classes of milk are priced. Class I milk prices are set prospectively while Class III and IV

[8] The record in this case does not contain documentation of any periods of price inversion. However, throughout the litigation of this case, the USDA has addressed arguments regarding this occasional market occurrence. Furthermore, the Secretary of the USDA has issued statements recognizing the disruption to the regulatory scheme caused by price inversion. *See* Milk in the New England and Other Marketing Areas, Dep't of Agric., 64 Fed. Reg. 16,026, 16,102 (Apr. 2, 1999) ("The first problem is readily evident in class price relationships during the latter part of 1998. The frequent occurrence of price inversions during that period indicates that some alteration to both the proposed and current methods of computing and announcing Class I prices may be necessary."). This court may take judicial notice of reports of administrative bodies, *see Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998), and it is therefore appropriate for this court to consider the reality of this occasional market occurrence.

prices are set retrospectively, based on actual market prices during the pertinent time period. The USDA has explained:

> Class price inversion occurs when a markets's [sic] regulated price for milk used in manufacturing exceeds the Class I (fluid) milk price in a given month, and causes serious competitive inequities among dairy farmers and regulated handlers. Advanced pricing of Class I milk actually causes this situation when manufactured product prices are increasing rapidly.

Milk in the New England and Other Marketing Areas, Dep't of Agric., 64 Fed. Reg. 16,026, 16,102 (Apr. 2, 1999). Thus, price inversions occur during times of increased demand for manufactured products, primarily cheese.

Under Order No. 30, Class III handlers are not required to participate in the regulatory pooling. They may *either* join the pool or remain outside the minimum price structure. (This is true to some extent under other milk-marketing orders as well.) When Class III handlers withdraw from the pool, or "de-pool," they are not obligated to make compensating payments to the settlement fund. During times of price inversion, then, Class III handlers have an incentive to withdraw from the pool. The USDA has explained the effect of price inversions on the dairy industry:

> In the past when price inversions have occurred, the industry has contended with them by taking a loss on the milk that had to be pooled because of commitments to the Class I market, and by choosing not to pool large volumes of milk that normally would have been associated with Federal milk order pools. When . . . [price inversions occur], it places fluid milk processors and dairy farmers or cooperatives who service the Class I market at a competitive disadvantage relative to those who service the manufacturing milk market.
>
> Milk used in Class I in Federal order markets must be pooled, but milk for manufacturing is pooled voluntarily and will not be pooled if the returns from manufacturing exceed the blend price of the marketwide pool. Thus, an inequitable situation has developed where

milk for manufacturing is pooled only when associating it with a marketwide pool increases returns. *Id*.

When producers prefer to sell outside the pool due to higher manufacturing returns, Class I handlers may have to pay out-of-pocket premiums to attract their supply.

Thus, during times of price inversion, Class III handlers who de-pool may pay *less than* the Class III price. At the same time, Class I handlers inside the pool may be forced practically to pay *more than* the Class I price because of extra-regulatory premiums. In sum, the ability of Class III handlers to de-pool under Order No. 30 has negative economic consequences on Class I handlers who must remain within the pool.

B. Administrative and District Court Proceedings

In September 1999, Lamers stopped making required compensating payments into the settlement fund. Instead, Lamers filed an administrative petition with the USDA for exemption and/or modification of the provisions of Order No. 30. Lamers' petition alleged that Order No. 30 violated equal protection and contravened the AMAA by permitting "unfair trade practices." Lamers sought relief in the form of an order exempting it from pooling and from the obligation to make payments into the producer settlement fund. After an evidentiary hearing, an administrative law judge ("ALJ") sustained Order No. 30 and dismissed Lamers' petition. Lamers appealed to a USDA judicial officer. The judicial officer affirmed the ALJ. Lamers then brought an action in the district court, and the USDA counterclaimed for enforcement of the Secretary's decision.

The district court affirmed the Secretary. It determined that, as to Lamers' "unfair trade practices" claim, Lamers was attempting to sue under a non-existent right. As to Lamers' equal protection claim, the district court noted that the economic regulation was subject to rational basis scrutiny and concluded that the provisions of the regulatory scheme survived challenge under that standard. The district

court subsequently ordered Lamers to pay $ 850,931.26 to the settlement fund. Lamers timely appeals.

II

DISCUSSION

A. Standard of Review

We review de novo the district court's grant of summary judgment. *See Indiana Family & Soc. Servs. Admin. v. Thompson*, 286 F.3d 476, 479 (7th Cir. 2002). All facts are drawn and all inferences viewed in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

B. Equal Protection Claims

Lamers contends that the ability of Class III handlers to "de-pool," and its inability to do so, violates its right to equal protection of the law. When considering an equal protection claim, we first must ask whether the governmental action involves fundamental rights or targets a suspect class. *See, e.g., Eby-Brown Co., LLC v. Wisconsin Dep't of Agric.*, 295 F.3d 749, 754 (7th Cir. 2002). The distinction drawn by the Secretary between Class I and Class III handlers is based upon the end use to which these handlers put producer milk. It therefore clearly does not involve fundamental rights or target a suspect class and is merely an economic regulation. *See, e.g., Id.* Such an economic classification "is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993). The presumption applies not only to legislative actions, but also extends to administrative action. *See Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185-86, 80 L. Ed. 138, 56 S. Ct.

159 (1935); *see also Steffan v. Perry*, 309 U.S. App. D.C. 281, 41 F.3d 677, 685 (D.C. Cir. 1994).

We therefore review the Secretary's difference in treatment to determine whether there is a conceivably rational relationship to a legitimate interest. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-79, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980). Practically, our review must be highly deferential:

> Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

Beach Communications, 508 U.S. at 313. Governmental action only fails rational basis scrutiny if no sound reason for the action can be hypothesized. *See Northside Sanitary Landfill, Inc. v. City of Indianapolis*, 902 F.2d 521, 522 (7th Cir. 1990). Furthermore, a circumspect approach is especially appropriate in reviewing a challenge to the federal milk-marketing regime. *See Blair v. Freeman*, 125 U.S. App. D.C. 207, 370 F.2d 229, 232 (D.C. Cir. 1966) ("A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk-marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority."); *see also Zuber v. Allen*, 396 U.S. 168, 172, 24 L. Ed. 2d 345, 90 S. Ct. 314 (1969) (describing federal milk-marketing regime as a "labyrinth").

The USDA submits that the different treatment of Class I and Class III handlers is rationally based because of the purposes of regulation and the differing marketing conditions faced by fluid milk and cheese producers. We agree. The AMAA charges the Secretary of Agriculture with establishing and maintaining orderly marketing

conditions so as to establish parity prices to farmers. *See* 7 U.S.C. § 602(1). The Secretary also is charged with establishing and maintaining orderly marketing conditions so as to ensure an orderly flow of supply and thereby prevent unreasonably fluctuating prices. *See Id*. In order to achieve these legitimate marketing objectives, it is conceivably rational for the Secretary to treat Class I and Class III handlers differently with respect to pooling requirements.

In assessing the rationality of the Secretary's action, we must recall the relevant supply and demand characteristics of the market. As we have noted previously, the milk production industry is highly subject to seasonal fluctuations and characterized by excess supply. That excess cannot be stored by producers; it must be marketed. Fluid milk products less easily are stored and transported than milk in other forms. They are more perishable and thus more subject to the fluctuations in daily demand. They are generally more highly valued. These circumstances affect the market for producer milk in critical ways and thus provide a rational basis for different pooling requirements among fluid milk and manufacturing handlers. To maintain stability in the milk market, the Secretary reasonably can require that milk used to produce fluid products be pooled while exempting other handlers from obligatory pooling. Indeed, the AMAA is premised on obligatory pooling of Class I milk, so that all producers may partake of its economic benefits. *See Zuber*, 396 U.S. at 180-81 ("The plain thrust of the federal statute was to remove ruinous and self-defeating competition among the producers and permit all farmers to share the benefits of fluid milk profits according to the value of goods produced and services rendered.").

Next, we must keep in mind that "pooling" essentially requires handlers to pay out a uniform minimum price for their supply and is required, in part, to maintain prices for producers. *See Alto Dairy v. Veneman*, 336 F.3d 560, 563 (7th Cir. 2003) (describing milk-pricing system as means of "redistributing wealth from consumers to producers of milk"). Class I handlers' end use typically represents the "cream of the crop," or the highest end use of Grade A producer milk, and so Class I purchases in the pool generally raise the blend price. Class III handlers, however, can use lower-standard Grade B milk in

their products, and their purchases in the pool of higher-standard Grade A milk generally lower the blend price. It is relatively unsurprising, then, that the Secretary deems pooling by Class I handlers vital to the regulatory scheme but deems pooling by Class III handlers less essential, even though price inversions sometimes occur that disrupt normal marketing conditions.

Finally, we note that the history of the milk-marketing regime evidences primary concern with producer competition to make sales to the fluid milk market, not the manufacturing market. *See Zuber*, 396 U.S. at 180-81 (discussing AMAA purpose "to remove ruinous and self-defeating competition" among producers for sales in the fluid milk market); *see also Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 343, 81 L. Ed. 2d 270, 104 S. Ct. 2450 (1984) (discussing pooling requirements as means "to discourage destabilizing competition among producers for the more desirable fluid milk sales"); *United States v. Rock Royal Co-Op., Inc.*, 307 U.S. 533, 572, 83 L. Ed. 1446, 59 S. Ct. 993 (1939) (characterizing system of compensating payments under the settlement fund as "reasonably adapted" device "designed . . . to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened" the fluid milk market).[9] Given this driving concern over "ruinous and self-defeating" producer competition in the *fluid* milk market, *Zuber*, 396 U.S. at 180, it is not irrational for the Secretary to allow Class III de-pooling when market incentives are reversed and when sales to the manufacturing market become more attractive to producers.[10]

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[9] *Cf. Alto Dairy v. Veneman*, 336 F.3d 560, 563 (7th Cir. 2003) (describing system of uniform pricing as "price discrimination" and noting that price discrimination increases profits, "thus counteracting the alleged (though almost certainly spurious) tendency of dairy farmers to destroy their business by competing over vigorously").

[10] This conclusion is not affected by the fact that price inversion itself may be perceived of as a "disorderly marketing situation." Milk in the New England and Other Marketing Areas, Dep't of Agric., 64 Fed. Reg. at 16,103.

Lamers' challenge to the exemption of Class III handlers from pooling requirements is essentially one to the breadth of the regulatory regime, i.e., the Secretary's failure to require Class III handlers to make compensating payments to the settlement fund when price inversions occur. However, it is well-established that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" without creating an equal protection violation. *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489, 99 L. Ed. 563, 75 S. Ct. 461 (1955). As such, "scope-of-coverage provisions" are "virtually unreviewable" because the government "must be allowed leeway to approach a perceived problem incrementally." *Beach Communications*, 508 U.S. at 316.

Similarly, equal protection does not require a governmental entity to "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 487, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970). Indeed, "mere underinclusiveness is not fatal to the validity of a law under the Fifth Amendment's guarantee of equal protection." *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002) (internal quotation and citation omitted); *see also Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 275, 84 L. Ed. 744, 60 S. Ct. 523 (1940) ("If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." (internal quotation and citation omitted)). Furthermore, "broad legislative classification must be judged by reference to characteristics typical of the affected classes." *Califano v. Jobst*, 434 U.S. 47, 55, 54 L. Ed. 2d 228, 98 S. Ct. 95 (1977).

In light of these governing principles, it is clear that Congress and the Secretary can regulate based upon typical milk-marketing conditions without thereby violating equal protection. Here, Congress and the Secretary have chosen to address the perceived problem of excess milk supply in the dairy industry by requiring Class I handlers to pool all their supply while exempting other handlers from that same requirement, based on an assumption that Class I milk carries the highest market value. They have chosen, in effect, to address the

usual situation while not addressing the abnormal, aberrant situation in which Class I milk does not carry the highest market price. Such incremental regulation does not violate equal protection.[11] *See Beach Communications*, 508 U.S. at 316; *see also Brazil-Breashears v. Bilandic*, 53 F.3d 789, 793 (7th Cir. 1995) (noting that the Illinois Supreme Court could act incrementally in restricting judicial employees' political activities, while exempting sitting judges from that restriction, "regardless of the probability that the government will ever address the rest of the problem").

We recognize that the Secretary's exemption of Class III handlers from pooling requirements effectively gives them a competitive advantage. They may participate in pooling when it is beneficial and withdraw when it is not. *See* Milk in the New England and Other Marketing Areas, Dep't of Agric., 64 Fed. Reg. at 16,102. Thus, the Class III pooling exemption is economically harmful to Lamers and other Class I handlers (as well as to producers committed to dealing with them) who must suffer the effects of Class III de-pooling. That harm, however, does not rise to the level of "invidious discrimination." *Williamson*, 348 U.S. at 489. Therefore, it is not a harm we can redress. *See Dandridge*, 397 U.S. at 485 (noting that "in the area of economics and social welfare," a governmental entity does not violate equal protection "merely because the classifications made by its laws are imperfect," and further stating, "if the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'" (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 55 L. Ed. 369, 31 S. Ct. 337 (1911))); *see also Heller v. Doe*, 509 U.S. 312, 319, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993) ("Rational-basis review in equal protection analysis 'is not a license for courts to judge

[11] We note further that what Lamers seeks is exemption from the pooling requirement. *See* R.1 at 7. Presumably, Lamers seeks to "de-pool" when the Class I price is higher than the blend price, which is most of the time. Lamers would thereby avoid compensating payments while taking advantage of the controlled market prices. To permit all Class I handlers to so act would vitiate the regulatory scheme devised by Congress.

the wisdom, fairness, or logic of legislative choices.'" (quoting *Beach Communications*, 508 U.S. at 313)).

In cases involving economic and social regulation, so long as distinctions are conceivably rational, the recourse of a disadvantaged entity lies in the democratic process. [12] *See Beach Communications*, 508 U.S. at 314 ("'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979) (footnote omitted))); *see also Eby-Brown*, 295 F.3d at 754 (noting that improvident decisions "should be rectified through the democratic process and not the courts"). Lamers' equal protection claim based on the different pooling regulations governing Class I and Class III handlers must therefore fail.

We briefly address one additional issue under the rubric of equal protection analysis. Lamers submits that the failure of the regulations to account for certain out-of-pocket premiums it must pay to attract its supply violates its right to equal protection. Lamers' equal protection claim based on these premiums is fundamentally flawed because Lamers presents no *distinction* for this court to review. Specifically, Lamers has demonstrated no difference between it and any other

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[12] By way of example, we note that, in 1999, the Secretary responded to industry complaints about price inversions by adjusting the Class I advanced pricing procedure in an attempt to limit the price-inversion phenomenon:

> The advanced pricing procedure provided in this final decision results in a Class I price that is based on a more recent manufacturing use price, thus reducing (but not eliminating) the time lag that contributes to class price inversion . . . .
>
> . . . .
>
> . . . Reducing the time period for which Class I pricing is advanced should reduce the potential [of price inversions] considerably, allowing Class I handlers to compete more effectively with manufacturing plants for fluid milk. Milk in the New England and Other Marketing Areas, Dep't of Agric., 64 Fed. Reg. at 16,103.

handler as to the Secretary's treatment of these out-of-pocket premiums; the regulations simply do not take them into account.[13]

Even if we treat Lamers' complaint as somehow raising an equal protection claim, it fails. Although some handlers may be able to attract supply without paying such premiums, the Secretary's decision not to give any handler credit for such competitive costs does not thereby rise to an equal protection violation. *Cf. Eby-Brown*, 295 F.3d at 754-55 (determining that statute, which prohibited certain tobacco wholesalers from deducting "trade discounts" from costs but permitted other wholesalers to deduct such costs, did not violate equal protection). It is conceivably rational that accounting for such extra-regulatory costs of competition would hinder the objectives of the regulatory scheme, in that it would reduce payments to the settlement fund. Furthermore, as we have discussed, the Secretary is permitted to engage in incremental regulation. *See, e.g., Williamson*, 348 U.S. at 489 ("The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." (citation omitted)). Thus, the Secretary's treatment of premiums survives scrutiny.

C. "Unfair Trade Practices" Claim

Lamers argues that four aspects of Order No. 30 constitute "unfair trade practices" prohibited by 7 U.S.C. § 608c(7)(A): (1) the ability

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[13] Lamers argues distinction based on the AMAA requirement that "the *total sums paid* by each handler shall equal the value of the milk purchased by him at the prices fixed." 7 U.S.C. § 608c(5)(C) (emphasis added). Because the Secretary does not account for out-of-pocket premiums, the calculation of the "total sums paid" does not accurately reflect the cost of some handlers' supplies. In the case of handlers not obligated by market realities to pay such premiums, the Secretary's "total sums paid" calculation more accurately reflects the cost of their supply. This practical effect results: Handlers paying out-of-pocket premiums owe larger compensating payments to the settlement fund than they would owe if the Secretary took supply premiums into account.

of Class III handlers to de-pool; (2) the requirement that Class I handlers pay into the settlement fund when competing handlers dealing in both the fluid milk and the manufacturing markets may draw upon those funds; (3) the allowance of some manufacturing costs in the calculation of Class III and IV utilization prices; and (4) the ability of some processing plants to receive "kickbacks" for qualifying milk under the order.

Lamers' claim of "unfair trade practices" warrants only brief discussion, however, because, as the district court concluded, Lamers attempts to proceed under a non-existent statutory right. Under 7 U.S.C. § 608c(7)(A), the prohibition of "unfair methods of competition and unfair trade practices in the handling of" agricultural commodities is one of several "terms and conditions" that the Secretary may incorporate in orders issued under the AMAA.[14] It is not an independent statutory prohibition, and the Secretary is not required to include it in any order. Furthermore, the Secretary did not include the prohibition in Order No. 30. Therefore, Lamers lacks a statutory basis upon which to bring this claim.

Were it possible to construe Lamers' claim as an argument that the Secretary has advanced an unreasonable interpretation of the AMAA by enacting regulations that permit these allegedly "unfair trade practices," we first would be required to determine the appropriate level of deference that must be accorded the Secretary's interpretation of the AMAA, assuming that interpretation did not contravene statutory directives, and next would be required to determine whether the Secretary's interpretation represented a permissible construction

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[14] The relevant text of 7 U.S.C. § 608c(7) provides:

> In the case of the agricultural commodities and the products thereof specified . . . orders shall contain one or more of the following terms and conditions:
>
> (A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.
>
> . . .

under the appropriate level of deference.[15] *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). We need not decide this issue, however, because it is not possible to construe Lamers' arguments as reaching beyond a claim that the Secretary has failed to enforce an AMAA prohibition on "unfair trade practices."[16] *See* Appellant's Br. at 20 ("The USDA is not enforcing the specific prohibition contained in the AMAA as to unfair competition."); Appellant's Reply Br. at 14 ("The USDA is not administering the AMAA in such a manner as to avoid violating the specific prohibition contained in the AMAA as to unfair competition."). As noted, no such prohibition exists.

Conclusion

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[15] The USDA submits that Lamers must establish that its actions are "so arbitrary or patently inconsistent with congressional purposes as to exceed [the] statutory delegation of legislative authority." *See* Appellee's Br. at 33. It further submits that none of the complained-of practices are arbitrary or patently inconsistent with congressional purposes because each is related to the objective of stabilizing competition among farmers for sales in the fluid market: First, because Congress was concerned about competition among farmers competing in the fluid milk market and not in the cheese market, it is permissible for cheese processors to de-pool. Second, marketwide pooling expressly is authorized by 7 U.S.C. § 608c(5) and cannot be an unfair trade practice under that statute even though some handlers competing in the fluid market are entitled to draw payments from the fund in relation to their manufacturing purchases. Third, the manufacturing allowance is simply a factor used to compute the utilization price of Class III and Class IV raw milk. *See* 7 C.F.R. § 1000.50. Fourth, the arrangements between large processors and other plants enable additional plants to qualify for the order and constitute efficient systems of supply in the market. For these reasons, the USDA contends that the Secretary's decision to allow these practices withstands review. *See* Appellee's Br. at 32-35. We need not and do not decide these issues although we note that significant deference would be accorded the Secretary's interpretation of the statute it is charged with administering. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44, 81 L. Ed. 2d 694 (1984).

[16] We shall not make the argument for *Lamers*. *Cf. Franklin v. Gilmore*, 188 F.3d 877, 884 (7th Cir. 1999) (noting that plaintiff failed to make an argument excusing procedural default and declining to "make it for him"); *Stagman v. Ryan*, 176 F.3d 986, 995 n.2 (7th Cir. 1999) (declining to make admissibility arguments for plaintiff when on appeal plaintiff relied on evidence found inadmissible by the district court).

Lamers has not established an equal protection violation and cannot bring an "unfair trade practices" claim. For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

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MICHAEL FULLENKAMP, ET AL. v USDA.
383 F.3d 478.
Filed September 2, 2004.

(Cite as: 383 F.3d 478).

FSRIA – *Cheveron* deference -- Indexing, milk price – Milk income support -- Lump sum payment, retroactive – Monthly payments, prospective – Transition payments – Review, Standard of agency determinations.

The court favorably cited *Cheveron* (467 U.S. 837) regarding government agency determinations involved in the implementation of the Farm Security and Rural Investment Act of 2002 (FSRIA) holding that the *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."

United States Court of Appeals,
Sixth Circuit

JUDGES: Before: DAUGHTREY, GIBBONS, and COOK, Circuit Judges.

OPINION BY: MARTHA CRAIG DAUGHTREY

OPINION

The plaintiffs in this case are dairy farmers who annually produce over 2.4 million pounds of milk. They challenge the regulations promulgated by the defendant Secretary of Agriculture to implement

the federal Milk Income Loss Contract Program , 7 U.S.C. § 7982. When a producer signs a contract to join the program, it begins receiving monthly payments on the eligible milk it produces and, under the statute's transition rule, a lump-sum payment for eligible milk it produced between December 1, 2001, and the month before the contract was signed. The statute includes a limitation restricting the quantity of milk upon which payment can be made each fiscal year to 2.4 million pounds. The Department of Agriculture regulations under attack here apply the limitation to payments under the transition rule as well as to the monthly payments. The district court found that the statute did not unambiguously forbid the Secretary's interpretation of the statute and, moreover, that the Secretary's interpretation was reasonable. The court therefore denied the plaintiffs' motion for injunctive relief and granted the Secretary's motion to dismiss.

For the reasons set out below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 13, 2002, President Bush signed into law the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002), which, in § 1502, created an income support program for dairy farmers that provides for direct federal payments to milk producers when a specific statutorily-prescribed price index falls below a certain level. *See Id*. at § 1502, codified at 7 U.S.C. § 7982. In order to receive payments through the program, dairy farmers must enter into a contract with the Secretary of Agriculture. Once a dairy farmer has entered into a contract, the farmer is eligible for two categories of payments: (1) monthly payments on eligible production beginning the month the farmer enters into the contract and ending September 30, 2005, *see* 7 U.S.C. § 7982(g); and (2) a retroactive, lump-sum payment for production during the "transition" period

[*]The Federal Milk Income Loss Contact Program (7 U.S.C. § 7982) and appeals therefrom are not within the jurisdiction of the JO and OALJ, however it is suggested that the court's analysis regarding the *Chevron* deference is persuasive and relevant in consideration of USDA administrative determinations that are the within the jurisdiction of the JO and OALJ. - Editor

between December 2001 and the month in which the farmer enters the contract. *See* § 7982(h). The statute does not specify a month in which dairy farmers must enter contracts, just that the Secretary must offer such contracts from July 2002 until September 2005. *See* 7 U.S.C. § 7982(f).

Section 7982 reads, in pertinent part:

(b) Payments. The Secretary shall offer to enter into contracts with producers on a dairy farm located in a participating State under which the producers receive payments on eligible production.

. . . .

(d) Payment quantity.

(1) In general. Subject to paragraph (2), the payment quantity for a producer during the applicable month under this section shall be equal to the quantity of eligible production marketed by the producer during the month.

(2) Limitation. The payment quantity for all producers on a single dairy operation during the months of the applicable fiscal year for which the producers receive payments under subsection (b) shall not exceed 2,400,000 pounds. . . .

. . . .

(f) Signup. The Secretary shall offer to enter into contracts under this section during the period beginning on the date that is 60 days after the date of enactment of this Act [May 13, 2002], and ending on September 30, 2005.

. . . .

(h) Transition rule. In addition to any payment that is otherwise available under this section, if the producers on a dairy farm enter into a contract under this section, the Secretary shall make a payment in accordance with the formula specified in subsection (c) on the

quantity of eligible production of the producer marketed during the period beginning on December 1, 2001, and ending on the last day of the month preceding the month the producers on the dairy farm entered into the contract.

In October 2002, the Secretary of Agriculture issued regulations implementing the dairy assistance program. Under the regulations, the cap in § 7982(d)(2) limiting payment quantity to 2.4 million pounds of milk per year was made applicable to transition period payments under § 7982(h), as well as to the monthly payments for milk produced after a contract has been signed. *See* 7 C.F.R. § § 1430.207(b). In response, the plaintiffs filed this action, seeking a declaratory judgement that dairy producers who are entitled to payments during the transition period are entitled to a lump-sum payment on *all* the milk produced and marketed during the transition period, not just 2.4 million pounds a year. They requested an injunction compelling the Secretary to modify the regulations at 7 C.F.R. § 1430 to allow dairy producers uncapped transition payments.

The district court denied the plaintiffs' motion for injunctive relief and granted the Secretary's motion to dismiss the case.[1] With respect to the cap on transition payments, the court found that § 7982 does not unambiguously forbid the regulations from making transition payments subject to the cap and that the Secretary's regulation was permissible and reasonable. Applying *Chevron* deference, the court upheld the Secretary's determination that the cap applies to transition payments as well as prospective payments under the contract. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467

[1]The defendant's motion was styled a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment under Rule 56. The district court said it was granting the defendant's motion to dismiss, but also made clear that it was considering the case on the merits and not dismissing based on subject matter jurisdiction. It therefore appears that it was either a dismissal for failure to state a claim or a grant of summary judgment rather than a dismissal for lack of subject matter jurisdiction. Even if the dismissal were considered a dismissal for lack of subject matter jurisdiction, we can affirm a district court's judgment on any grounds supported by the record. *See Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 394 (6th Cir. 2002).

U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). This appeal followed.

ANALYSIS

I. Standard of Review

The parties agree that *Chevron*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778, governs this case.[2] Under *Chevron*, in reviewing an agency's interpretation of a statute it administers, we must first ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If, after "employing traditional tools of statutory construction," *Id.* at 843 n.9, we determine that Congress's intent is clear, then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *see also Barnhart v. Thomas*, 540 U.S. 20, 124 S. Ct. 376, 380, 157 L. Ed. 2d 333 (2003) (applying *Chevron*)

II. The Application of the Cap to Transition Payments

Both the plaintiffs and the defendant in this case argue that Congress spoke directly to the issue of whether the payment cap in § 7982(d)(2) applies to transition payments. Obviously, however, they

[2]*Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001). In 7 U.S.C. § 7991(c), Congress authorized the Secretary and Commodity Credit Corporation to promulgate appropriate regulations necessary to implement the chapter. It specified that those regulations were to be made without regard to notice and comment rule-making procedures. The regulations at issue in this case, final regulations made without prior notice and comment, were promulgated under the authority given to the Secretary in § 7991(c). *See* 67 Fed. Reg. 64454 (Oct. 18, 2002).

do not agree on what Congress said. The plaintiffs argue that Congress clearly intended that the cap *not* apply to transition payments and that the Secretary's regulations therefore violate the statute. The Secretary, on the other hand, contends that Congress clearly intended that *all* payments under § 7982 would be limited by the cap and that the Department's regulations are consistent with the statute. Both parties argue that the plain language of the statute, legislative history, and the structure and purpose of the statute support their positions.

1. Statutory Language

In statutory construction cases, "the first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450, 151 L. Ed. 2d 908, 122 S. Ct. 941 (2002) (citation omitted). The plaintiffs argue that the plain language of § 7982 unambiguously requires the Secretary to make transition payments without limitation. They point out that subsection (h) requires payment on eligible production and note that Congress did not limit the definition of "eligible production" in either subsection (a) or (h). They argue that if Congress had intended the cap to apply to transitional payments, it could have written the statute to say so in subsection (h) itself. As the Secretary points out, however, subsection (h) provides that payments shall be made according to the formula in subsection (c),[3] which incorporates the payment quantity in subsection (d), the subsection that includes the payment cap. Thus, according to this reading of the statute, the fact that subsection (h)

[3]Subsection (c), entitled "amount," provides as follows:

Payments to a producer under this section shall be calculated by multiplying (as determined by the Secretary)--

(1) the payment quantity for the producer during the applicable month established under subsection (d);

(2) the amount equal to--

(A) $16.94 per hundredweight; less

(B) the Class I milk price per hundredweight in Boston under the applicable Federal milk marketing order; by (3) 45 percent.

itself does not include a limitation on quantity is not determinative because the payment formula for which it provides incorporates the payment cap in subsection (d)(2).

By its terms, however, the payment cap in subsection (d)(2) applies only to "payments under subsection (b)." Thus, the central question in this case is whether transition payments are "payments under subsection (b)," the section of the statute that orders the Secretary to offer to enter into contracts with dairy farmers under which the farmers will receive payment for eligible milk production. The plaintiffs assert that transition payments are not payments under subsection (b). They maintain that § 7982 creates two similar but distinct programs that cover farmers during different periods - one, described in subsection (e), that covers farmers during the period after they sign contracts and another, described in subsection (h), that covers farmers for the period before they sign contracts - and that "payments under subsection (b)" refers to the payments under the first program, not the second. They argue that interpreting "payments under subsection (b)" to include both transition and monthly payments renders the phrase "subsection (b)" superfluous, since, under such an interpretation, the limitation could have been written to just read: "payments under this section." As the plaintiffs point out, however, citing to *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Goudy*, 777 F.2d 1122, 1127 (6th Cir. 1985), statutes should be read to give every word and clause effect. Citing to other canons of statutory interpretation, the plaintiffs also assert that the statute is remedial and should be construed liberally in favor of the beneficiaries.

In response, the Secretary asserts that transition payments are "payments under subsection (b)." She points out that dairy farmers receive transitional payments only if they sign contracts, as authorized in subsection (b). She further notes that in excepting payments under subsection (h) from the payments that start on the first day of the month in which the contract is signed, subsection (g)[4]

[4]Subsection (g), entitled "duration of contract," provides as follows:

(1) In general. Except as provided in paragraph (2) and subsection (h), any contract

(continued...)

contemplates that payments under subsection (h) are payments covered by the contract. She contends that if Congress had intended to limit the cap to the monthly contract payments, it would have made more sense to have the limit apply to "payments under subsections (e)-(g)," the subsections dealing with the monthly payments, rather than to "payments under subsection (b)," the subsection discussing the contracts in general. Furthermore, the Secretary questions whether the canons of statutory interpretation cited by the plaintiffs are relevant here, arguing that the program is not remedial and that the cap is an eligibility limitation rather than an exception. Finally, she contends that nothing in the structure or purpose of the statute suggests that Congress intended to create two separate programs or to distinguish between the retroactive transitional payments and the prospective monthly payments.

Focusing on the statutory language, we conclude that it is unclear whether the phrase "payments under subsection (b)" includes transition payments or not. As the defendant points out, transition payments are received only if the dairy farmers enter into contracts and, therefore, such payments can be seen to be payments under subsection (b). At the same time, as noted by the plaintiffs, this interpretation does render the phrase "subsection (b)" superfluous. Furthermore, when subsection (e) refers to "a payment under a contract under this section," it is referring to the monthly payments, thereby implying that transition payments are not considered payments under § 7982 contracts. In short, we conclude that although Congress may have had an intent regarding whether transition payments were "under subsection (b) ," that intent is not stated clearly in the language of the statute.

2. Legislative History, Structure, and Purpose

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[4](...continued)
entered into by producers on a dairy farm under this section shall cover eligible production marketed by the producers on the dairy farm during the period starting with the first day of [the] month the producers on the dairy farm enter into the contract and ending on September 30, 2005....

Neither the legislative history of the statute nor the parties' explanations of how their interpretations further the purpose of the statute sufficiently clarify the ambiguity in the statutory language. *See Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 157 L. Ed. 2d 1094, 124 S. Ct. 1236, 1248 (2004) (looking to text, structure, purpose, and history of Act to find it unambiguous); *United States v. Choice*, 201 F.3d 837, 841 (6th Cir. 2000) (explaining that the plain language of the statute is the starting point for statutory interpretation, but that the structure and language of the statute as a whole can aid in interpreting the plain meaning and that legislative history can be looked to if the statutory language is unclear).

Both parties are able to explain how their position fits into the overall structure of the statute and furthers the statute's purpose. The Secretary asserts that her interpretation of the statute gives the cap a meaningful role in the statute's operation, whereas the plaintiffs' interpretation would largely nullify the cap because large producers would be able to circumvent the cap by waiting until September 2005 to sign a contract and then receive "transitional payments" for the entire period between December 2001 and August 2005.

The plaintiffs object to this argument and to the district court's acceptance of it, asserting that the district court and Secretary have usurped the role of Congress and injected their own political viewpoints into a carefully-crafted congressional compromise. Furthermore, they argue, Congress intended for large producers to be able to avoid the production caps. They assert that the overall purpose of the program was to assist dairy farmers and that Congress wanted to cover all eligible production, but that it carefully constructed the program in a way that would force large farmers to wait until the end of the covered period if they wanted to receive payments on all their eligible production in order to refrain from encouraging large farmers to further increase production and in order to push costs of the program to later fiscal years.

Similarly, both parties cite legislative history that supports their positions. The plaintiffs claim that the transition payments in § 7982 serve as a replacement for the Northeast Dairy Compact, which did not have production caps. As the Secretary points out, however, the

Northeast Dairy Compact was not a federal assistance program but an agreement among Northeastern states to regulate prices. *See Organic Cow, LLC v. Ctr. for New England Dairy Compact Research*, 335 F.3d 66, 67-68 (2d Cir. 2003) (describing the Compact). As the Secretary further notes, previous programs supporting dairy farmers included payment caps or gave discretion to the Secretary, who then capped the amount of milk eligible for assistance. *See*, *e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L No. 105-277, § 1111(d), 112 Stat. 2681 (1998) (providing $ 200 million to provide assistance to dairy producers "in a manner determined by the Secretary"); Dairy Market Loss Assistance Program, 64 Fed. Reg. 24933 (May 10, 1999) (capping payment to 2.6 million pounds). Similarly, both milk assistance programs that were in the Farm Bill before it went to conference included caps. *See* H.R. 2646, 107th Cong. § 132 (2002) (as amended and passed by Senate) (capping payment at lesser of average quantity of milk in which farmer had interest during each of a specified three-year period or 8 million pounds). In addition, the conference report does not mention a difference between monthly and transition payments with regard to the payment cap, simply noting, in its description of the program, that: "Producers, on an operation-by-operation basis, may receive payments on no more than 2.4 million pounds of milk marketed per year. Retroactive payments will be made covering market losses due to low prices since December 1, 2001." H.R. Conf. Rep. No. 107-424 at 446 (2002), *reprinted in* 2002 U.S.C.C.A.N. 141, 171.

At the same time, the plaintiffs point out that some members of Congress, particularly Senators Leahy and Jeffords, indicated that they understood that the cap in § 7982 was to be applied to the monthly payments and not to transition payments. Senator Leahy, for example, in discussing the Farm Bill's conference report, noted that:

> The prospective "monthly" program which provides monthly payments . . . has a 2.4 million pound cap as set forth in (d). . . . This "limitations" language was inserted out of a concern that an uncapped program would lead to significant increases in production of milk. Also, there was a concern that

> farmers would reorganize in the future just to get higher payments under the national program.
>
> These concerns do not apply to the benefits paid out under subsection (h) because farmers would need time machines to go back in the past and increase their production or to change their legal structure retrospectively. Indeed, the amount of production covered by (h) is the amount of "eligible production" as defined in section [7982(a)(2)].
> 148 Cong. Rec. S4032 (May 8, 2002) (statement of Sen. Leahy).

In sum, looking at the statutory language, legislative history, and overall structure and purpose of the statute, we find the intention of Congress with regard to the application of the subsection (d)(2) cap to transition payments unclear.

3. Reasonableness

Under *Chevron*, if Congress has not spoken directly to the question at issue, the Secretary's interpretation of the statute will be upheld so long as it is reasonable. *See Smiley v. Citibank (S.D), N.A.*, 517 U.S. 735, 744-45, 135 L. Ed. 2d 25, 116 S. Ct. 1730 (1996) ("Since we have concluded that the Comptroller's regulation deserves deference, the question before us is not whether it represents the best interpretation of the statute, but whether it represents a reasonable one."); *see also Barnhart v. Thomas*, 124 S. Ct. at 382. In this instance, we conclude that the Secretary's interpretation of the statute is eminently reasonable. As discussed above, transition payments pursuant to subsection (h) could rationally be considered payments under subsection (b), because they are contingent upon the recipients signing contracts authorized under subsection (b). Furthermore, capping the transition payments along with the monthly payments creates a consistency throughout the program and ensures that the cap has a meaningful role in the statute.

CONCLUSION

For the reasons set out above, we find that the Secretary's construction of the statute was permissible, and we therefore AFFIRM the judgment of the district court in favor of the defendant.

R.J. REYNOLDS TOBACCO COMPANY; LORILLARD TOBACCO COMPANY; R. J. REYNOLDS SMOKE SHOP, INC., v. STATE OF CALIFORNIA.
No. 03-16535.
Filed September 28, 2004.

(Cite as 384 F.3d 1126).

AMAA[*] – Government speech – First Amendment – Compelled subsidy – Compelled speech – Freedom of association – Free Expression – Government purpose and activity, legitimate – Public health, government promotion of – Nexus, close, of government interests and methods.

Petitioners object to a surtax imposed by the State of California where the collected taxes are used to fund a public advertising campaign which not only delivers a public safety message about the dangers of the human consumption of tobacco, but includes a message that strongly suggests that tobacco company executives conspire and connive to "push" the use of tobacco onto a new generation of smokers and it also impugns the moral character of [the] industry, accusing it of hypocrisy, cynicism and duplicity. Petitioners seek relief from a state surtax on the sale of their product by requiring the state to have a close nexus between the excise tax and the means and methods of the state's advertising program.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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[*]The California Department of Health services program to discourage youthful smokers and appeals therefrom is not within the jurisdiction of the JO and OALJ, however many of the legal issues covered in the head notes above have strong relationships to per capita assessments collected on agricultural produce and livestock under protest in the various USDA programs administered under the Agriculture Marketing Agreement Act - Editor

Before: Betty Binns Fletcher, Stephen Trott and Raymond C. Fisher, Circuit Judges. Opinion by Judge Fisher; Dissent by Judge Trott.

OPINION

We deal here with a novel First Amendment claim. The appellants, three tobacco companies, claim that California violated their First Amendment rights by imposing a surtax on cigarettes and then using some of the proceeds of that surtax to pay for advertisements that criticize the tobacco industry. The tobacco companies argue that this is a case of compelled subsidization of speech prohibited by the First Amendment, analogous to *United States v. United Foods, Inc.*, 533 U.S. 405, 150 L. Ed. 2d 438, 121 S. Ct. 2334 (2001). California counters that the advertisements are government speech entirely immune from First Amendment attack.

The tobacco companies concede that (1) the imposition of the tax itself is not unconstitutional and (2) the message produced by the government's advertisements creates no First Amendment problem apart from its method of funding. Rather, they argue for an independent First Amendment violation based on the close nexus between the government advertising and the excise tax that funds it. We reject this argument as unsupported by the Constitution and Supreme Court precedent, and as so unlimited in principle as to threaten a wide range of legitimate government activity. We also reject the tobacco companies' claim that the advertisements violated their rights under the Seventh Amendment or the Due Process Clause. We thus affirm the district court.[1]

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[1]We note that the district court issued a particularly thoughtful, thorough and comprehensive opinion in this case, upon which we have substantially relied even though we do not adopt all of its reasoning.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In 1988, California voters approved Proposition 99, a statewide ballot initiative also known as the "Tobacco Tax and Health Protection Act of 1988." Cal. Rev. & Tax Code § § 30121-30130. The Act imposes the Cigarette and Tobacco Products Surtax ("the surtax"), a 25-cent per-pack surtax on all wholesale cigarette sales in California.

The revenue generated by the surtax is placed in the "Cigarette and Tobacco Products Surtax Fund." Twenty percent of taxes in the surtax fund is allocated to a "Health Education Account," funds from which are only "available for appropriation for programs for the prevention and reduction of tobacco use, primarily among children, through school and community health education programs." *Id.,* § 30122(b)(1).

In order to implement Proposition 99, the California Legislature directed the California Department of Health Services ("DHS") to establish "a program on tobacco use and health to reduce tobacco use in California by conducting health education interventions and behavior change programs at the state level, in the community, and other nonschool settings." Cal. Health & Safety Code § 104375(a). As part of this program, called the "Tobacco Control Program," the DHS is required to develop a media campaign designed to raise public awareness of the deleterious effects of smoking and to effect a reduction in tobacco use. *Id.,* § § 104375(b), (c), (e)(1) & (j); 104385(a); 104400. The Tobacco Control Program is funded entirely with money from the Health Education Account -- and thus, ultimately, exclusively from the proceeds of the surtax.

This case concerns certain advertisements the DHS produced as part of its Tobacco Control Program. According to the tobacco

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[2] Because this case comes before us on the state's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we accept as true all allegations in the tobacco companies' complaint.

companies, the DHS concluded soon after the establishment of the Tobacco Control Program that a media campaign focused solely on presenting the health risks of tobacco use would be of limited utility in reducing the incidence of smoking in California, because people tend to "tune out" advertising that simply explains the health risks involved with tobacco use. Thus, the DHS concluded that, in order to carry out its mandate to encourage Californians to modify and reduce their use of tobacco, it would be necessary to launch a campaign to "denormalize" smoking, by creating a climate in which smoking would seem less desirable and less socially acceptable.

One method used by the DHS in this campaign has been to portray the tobacco industry itself as deceptive and as an enemy of the public health, or, in the companies' words, to attack not "the desirability of a product but . . . the moral character of [the] industry, accusing it of hypocrisy, cynicism and duplicity." The district court described these advertisements as follows:

> A recent round of television commercials features an actor playing a public relations executive for the fictional cigarette brand "Hampton," detailing for viewers his unseemly methods for getting people to start smoking. The ads end with the tagline, "Do You Smell Smoke?," implicitly referencing both cigarette smoke and a smoke-and-mirrors marketing strategy. Another ad portrays tobacco executives discussing how to replace a customer base that is dying at the rate of 1,100 users a day. Some of the ads end with images of mock warning labels such as: "WARNING: The tobacco industry is not your friend."; or "WARNING: Some people will say anything to sell cigarettes." Several spots suggest that tobacco companies aggressively market to children. In one particularly striking television ad entitled "Rain," children in a schoolyard are shown looking up while cigarettes rain down on them from the sky. A voice-over states "We have to sell cigarettes to your kids. We need half a million new smokers a year just to stay in business. So we advertise near schools, at candy counters. We

> lower our prices. We have to. It's nothing personal. You understand." At the conclusion, the narrator says, "The tobacco industry: how low will they go to make a profit?"

R.J. Reynolds v. Bonta, 272 F. Supp. 2d 1085, 1089 (2003).

The district court also noted that each of the challenged advertisements is "identified as 'Sponsored by the California Department of Health Services.' " *Id.* The tobacco companies do not claim that these advertisements contain any affirmatively false statements.

That California itself is interested in the outcome of the campaign is made clear by the Legislature's finding that "smoking is the single most important source of preventable disease and premature death in California" and that preventing tobacco use by children and young adults is the "highest priority in disease prevention for the state of California." Cal. Health & Safety Code § 104350(a). The district court explained that "there is substantial evidence, including published medical studies, indicating that the Proposition 99 programs, and the media campaign in particular, have been successful in achieving their goals." *Bonta*, 272 F. Supp. 2d at 1088 n.5 (noting the following articles describing the success of California's campaign in reducing the incidence of smoking: C. Fichtenberg and S. Glantz, *Association of the California Tobacco Control Program with Declines in Cigarette Consumption and Mortality from Heart Disease*, NEW ENG. J. MED. 343:24, 1772-1777 (2000); M. Siegel, *Mass Media Antismoking Campaigns: A Powerful Tool for Health Promotion*, ANNALS OF INTERNAL MED., 129:2, 128-132 (1998); J.P. Pierce, et al., *Has the California Tobacco Control Program Reduced Smoking?,* JAMA 280:10, 893-899 (1998)).

The appellant tobacco companies here are R.J. Reynolds Tobacco Company; its wholly owned subsidiary R.J. Reynolds Smoke Shop, Inc.; and Lorillard Tobacco Company. R.J. Reynolds pays the surtax through sales from its smoke shop subsidiary; Lorillard pays the surtax in connection with certain of its research and marketing activities in California. These companies are not the most important

sources of revenue for the surtax, however. Because the surtax is imposed on distributors of cigarettes, most surtax payments are made not by cigarette manufacturers themselves, but by cigarette wholesalers. Nonetheless, because the tobacco companies sell or provide small quantities of cigarettes directly to smokers in California, they have paid and will in the future be required to pay the surtax. The tobacco companies here paid approximately $ 14,000 in surtax funds, thus contributing approximately $ 2,800 of the $ 25 million spent on the challenged ads. *Bonta*, 272 F. Supp. 2d at 1090.

The tobacco companies brought five causes of action against the state defendants ("the state" or "California") to the district court, seeking both injunctive and declaratory relief. They argued that the use of the surtax to fund the "anti-industry" advertisements violated the First Amendment, that the advertisements improperly stigmatized them in violation of the Fourteenth Amendment, that the advertisements interfered with their right to a jury trial under the Seventh and Fourteenth Amendments and that the advertisements violated the California Constitution.[3] The state moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court dismissed with prejudice all of the companies' federal constitutional claims, and the companies timely appealed.

DISCUSSION

I. First Amendment

We begin by addressing the scope of the First Amendment issue. The tobacco companies do not raise a First Amendment challenge to California's right to sponsor "anti-industry" advertisements. As their brief to this court puts it, "if the broadcasts were funded by general taxes rather than by a tax imposed exclusively on the tobacco industry, the anti-industry ads would raise no First Amendment issue." Nor do the companies argue that the surtax *itself* has interfered

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[3]This state law claim is not before us.

with their constitutional rights. *See, e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-29, 95 L. Ed. 2d 209, 107 S. Ct. 1722 (1987) (invalidating a statute that granted a tax exemption for religious, professional, trade and sports journals that did not apply to other journals); *Minneapolis Star & Tribune v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591-93, 75 L. Ed. 2d 295, 103 S. Ct. 1365 (1983) (invalidating a special tax on the press limited to only a few newspapers). Their claim is specific: they argue that using the money raised from an excise tax that targets the tobacco industry to pay for advertising that denigrates the industry violates their constitutional rights.

Before discussing the precedent upon which the tobacco companies rely, we note that this is a novel argument. At issue is neither the government's power to speak nor the government's power to tax. Chief Justice John Marshall famously stated that "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L. Ed. 579 (1819). According to the tobacco companies, however, this case involves neither an invalid exercise of the government's power to tax nor a claim that they have been destroyed by the government's speech. Rather, the companies claim a constitutional violation in the link between the excise tax and the government speech to which they object. By suggesting that certain taxpayers should be able to object to government speech whenever an excise tax is used to fund a message that particularly affects the group that pays the tax, the tobacco companies' argument would implicate a range of other programs. As we shall explain, we reject the "nexus" argument as applied to excise taxation. A mere link between an excise tax and a government-sponsored advertising campaign, absent a claim that either the tax or the advertising is unconstitutional, does not violate the First Amendment.

A. *United Foods*, the Compelled Speech Doctrine and Taxation

The tobacco companies rely in large part upon one case: *United States v. United Foods, Inc.*, 533 U.S. 405, 150 L. Ed. 2d 438, 121 S.

Ct. 2334 (2001).[4] We do not agree that *United Foods* controls. Rather, we conclude that the compelled speech cases, of which *United Foods* is one, do not apply where an excise tax is used to produce a message that indisputably comes from the government itself.

In *United Foods*, the Court considered a federal program created by the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101 *et seq*. As the Court described the program,

> The Act authorizes the Secretary of Agriculture to establish a Mushroom Council to pursue the statute's goals. Mushroom producers and importers, as defined by the statute, submit nominations from among their group to the Secretary, who then designates the Council membership. To fund its programs, the Act allows the Council to impose mandatory assessments upon handlers of fresh mushrooms in an amount not to exceed one cent per pound of mushrooms produced or imported. The assessments can be used for "projects of mushroom promotion, research, consumer information, and industry information." It is undisputed, though, that most moneys raised by the assessments are spent for generic advertising to promote mushroom sales.

533 U.S. at 408 (citations omitted).

The petitioner in that case was a mushroom producer that refused to pay its mandatory assessment. The Supreme Court described the question presented as "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." 533 U.S. at 410. Under the facts of *United Foods*, the Supreme Court held that the answer to that question was

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[4]The Supreme Court has recently granted certiorari in *Livestock Mktg. Ass'n v. USDA*, 335 F.3d 711 (8th Cir. 2003), *cert. granted sub nom. Veneman v. Livestock Mktg. Ass'n*, 158 L. Ed. 2d 962, 124 S. Ct. 2389, 72 U.S.L.W. 3725 (U.S. May 24, 2004) (No. 03-1164) and *Nebraska Cattlemen, Inc. v. Livestock Mktg. Ass'n*, 158 L. Ed. 2d 962, 124 S. Ct. 2390, 72 U.S.L.W. 3725 (U.S. May 24, 2004), involving the interaction between the compelled speech and government speech doctrines.

"no." The Court held that by requiring the mushroom producer to contribute to generic advertisements for mushroom sales to which it objected, the government had put "First Amendment values . . . at serious risk" by "compelling a discrete group of citizens to pay special subsidies for speech on the side that [the government] favors." *Id.* at 411.

Read broadly, and taken in isolation, this language might plausibly suggest that the tobacco companies have the right to object to the advertisements at issue here because they have paid "special subsidies" for the advertisements in the form of a tax that disproportionately affects them. Yet *United Foods* also makes clear that not every case in which the government mandates support for speech from a particular group necessarily creates a First Amendment violation. Most importantly, the Court specifically declined to address whether the same First Amendment analysis would apply to cases in which the speech produced was "government speech" that derived from the state itself and not the Mushroom Council. *See Id.* at 416 ("The Government argues the advertising here is government speech, and so immune from the scrutiny we would otherwise apply. As the government admits . . . however, this argument was not raised or addressed in the Court of Appeals.") (citations omitted). *United Foods* also carefully relied on the teaching of previous compelled speech cases to reach its holding about the contributions to the Mushroom Council. *Id.* In order to understand the impact of *United Foods*, therefore, we examine the origins and the purpose of the compelled speech doctrine.

[1] It has long been established that the First Amendment prohibits the government from compelling citizens to express beliefs that they do not hold. "The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977) (forbidding a state government from compelling motorists to display the message "Live Free or Die" on their license plates)*; see also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 87 L. Ed. 1628,

63 S. Ct. 1178 (1943) (preventing a state government from forcing children to salute the American flag when the children's religious beliefs forbade such behavior). These cases are not directly applicable here because there is no claim that the tobacco companies have been forced into expressing any position.

The Court extended this fundamental principle of freedom of expression to situations "involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." *United Foods*, 533 U.S. at 413. The first such case, *Abood v. Detroit Board of Education*, 431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977), involved a challenge by public school teachers to a collective bargaining agreement. The agreement required non-union members who were represented by the teachers union to pay a service fee equal to union dues. Some portions of this service fee were then used to pay "for political and ideological purposes unrelated to collective bargaining." *Id.* at 232. The Court held that this program violated the principle that "the freedom of an individual to associate for the purpose of advancing beliefs and ideas" is protected by the First Amendment. *Id.* at 233. Although the union could compel objectors to provide funds for purposes that were "germane" to "its duties as [a] collective-bargaining representative," it would violate basic principles of freedom of association to compel the financial support of objectors for ideological purposes unrelated to collective bargaining. *Id.* at 235. The Court revisited similar issues in *Keller v. State Bar of California*, 496 U.S. 1, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990), in which it invalidated a program in which mandatory dues to the California State Bar were used, over member's objections, to advance political and ideological causes to which some bar members did not subscribe. The Court held that the state bar could use compulsory membership dues to finance activities "germane" to the purposes for which the "compelled association and integrated bar [were] justified . . . the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13. It could not, however, order compulsory dues to be used to "fund activities of an ideological

nature which fell outside of those areas of activity." *Id.* at 14. *Abood* and *Keller* set forth the principles that were later applied -- with differing results -- in *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (1997), and in *United Foods* to programs in which the government compels agricultural producers to contribute to joint marketing programs. In *Glickman*, the Court rejected a First Amendment challenge to a regulatory program that required tree fruit growers to fund marketing campaigns as part of a broader regulation of the industry. The crucial distinction between *Glickman* and *United Foods* is that the mandatory assessment in *Glickman* was "ancillary to a more comprehensive program restricting market autonomy." *United Foods*, 533 U.S. at 411. We have explained the distinction between the two cases as follows: "If the generic advertising assessment is part of a 'comprehensive program' that 'displaces many aspects of independent business activity,' exempts the firms within its scope from the antitrust laws, and makes them 'part of a broader collective enterprise,' the assessment does not violate the First Amendment." *Delano Farms v. Cal. Table Grape Comm'n*, 318 F.3d 895, 898-99 (9th Cir. 2003). The program in *United Foods*, on the other hand, raised a constitutional problem because "if the program is, in the main, simply an assessment of independent and competing firms to pay for generic advertising, it does violate the First Amendment." *Id.* at 899. The *United Foods* rule protects against "making one entrepreneur finance advertising for the benefit of his competitors" when there is no broader regulatory interest at stake. 533 U.S. at 418 (Stevens, J., concurring).

Seen in this perspective, *United Foods* is a logical extension of a long line of cases that have protected both freedom of expression and freedom of association. *See United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989) (describing the "underlying rationale of the right to be free from compelled speech or association" as guiding the *Abood* line of cases).

Under *Wooley* and *Barnette*, the First Amendment does not permit the government to force citizens to express beliefs that are not their own. As an extension of this principle, under *Abood*, *Keller* and

United Foods, the First Amendment also does not permit the government to force citizens to contribute to a private association when the funds are used primarily to support expression from a certain viewpoint.[5] The First Amendment may, however, under *Abood* and *Glickman,* permit the government to compel contributions to an association's expression when that expression is germane to a broader regulatory scheme that compelled the association in the first place.[6]

[2] Nothing in *United Foods* suggests that the compelled speech doctrine applies to situations where the government imposes an excise tax on private citizens and then uses the money to speak in the name of the government itself. No court has held otherwise. *See NAACP v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("*Abood* has never been applied to the government, however; if it were, taxation would become impossible."). An otherwise valid tax for an otherwise valid

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[5]Read in this context, it is clear that *United Foods* relied on harm to expressive and associational freedoms in order to support its conclusion. *See* 533 U.S. at 413 ("It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles *set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity*.") (emphasis added). The Court emphasized that contributions to the Mushroom Council forced certain private parties to pay for the speech of other private parties -- a violation of both expressive and associative freedom. *Id*. at 416 (noting "the mandatory assessments imposed to require one group of private persons to pay for speech by others").

[6]Because *United Foods* is easily reconciled with previous Supreme Court precedent, we do not see a basis in *United Foods* for our dissenting colleague's view that, in distinguishing *Glickman*, the Court intended to untether the compelled speech doctrine from its expressive and associational moorings and create a new constitutional right to challenge all forms of targeted taxation. Nor does *United Foods* suggest that we should apply principles governing government suppression of private commercial speech, *see Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980), to this case -- in which the government has neither suppressed nor compelled speech, but has merely used an excise tax to fund a governmental message. Surely if the Court in *United Foods* had intended to create such broadly sweeping principles, it would have said so.

purpose ordinarily must bind even those who object to the government's objective. In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 229, 146 L. Ed. 2d 193, 120 S. Ct. 1346 (2000), the Court explained that:

It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.

[3] Put simply, the rationale of the *Abood* and *Keller* line of cases -- protecting freedom of expression and association -- does not apply to government speech when the government acts as both a taxing authority and as a speaker. Paying a tax, even an excise tax, does not create a compelled form of association. When the government acts as a speaker it may espouse views that directly contradict those of taxpayers without interfering with taxpayers' freedom of expression. In a democracy based on majority rule, such a conclusion is inescapable. "Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. . . . If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller*, 496 U.S. at 12-13. As we have said before, "simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist." *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000).

B. The California Regulation and Compelled Speech

The companies claim that their situation is unique because the DHS pays for its anti-industry ads exclusively from revenues raised ultimately through the surtax, which in turn is derived exclusively from sales of cigarette packages. They argue that imposing an excise tax on a particular industry and then earmarking the use of the tax funds for advertisements that criticize that industry suffices to make the companies similarly situated to the plaintiffs in the compelled speech cases.

There is a fundamental difference between the excise tax/spending regime at issue here and the compelled contributions to private associations that were at issue in *Abood*, *Keller* and *United Foods*. When a union, a state bar association or even a mushroom growers' association speaks, it represents only the interests of that particular entity. When California uses funds from the tobacco surtax to produce advertisements, it does so in the name of all of California's citizens. As the district court observed, "[The tobacco companies] are not seeking to prevent coerced participation in private association; rather, they are attempting to exercise a taxpayer's veto over speech by the government itself." *Bonta*, 272 F. Supp. 2d at 1100. That California has chosen to fund a valid public health message through a targeted excise tax does not mean that it is no longer speaking as the State of California.

The key issue is not the targeted nature of the tax but the degree of governmental control over the message. *See Livestock Mktg. Ass'n v. USDA*, 335 F.3d 711, 723 (8th Cir. 2003) (noting that "the greater the government's responsibility for, and control over, the speech in question, the greater the government's interest therein"). In the compelled speech cases cited by the companies, control over the content of the message produced had been delegated to an association "representative only of one segment of the population, with certain common interests." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring). The problem with the government forcing private citizens to contribute funds in those cases was that the funds were being used to support the speech of such segmented, specific

interests. Here there can be no doubt that the tobacco companies' funds are being used to speak on behalf of the people of California as a whole. Any coercion -- that is, the collection of funds used to produce a particular message -- is performed not in the name of a segment of the public, but of the state.

Indeed, a wide range of First Amendment cases differentiate between the government controlling the expenditure of its own revenue and the government sharing control with private or quasi-private parties. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 197, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991) (distinguishing situations where the government imposes a direct constraint on the use of its own money from situations "in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program"); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 399-400, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984) (same); *Widmar v. Vincent*, 454 U.S. 263, 268, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981) (establishing limited public forum doctrine and explaining that the First Amendment "forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place").

This is not to say that a state may avoid the limits of the First Amendment simply by labeling a compelled contribution a contribution to the government's own speech. As the Supreme Court has noted, a state law "determination that [an entity] is a 'government agency,' and therefore entitled to the treatment accorded a governor, a mayor, or a state tax commission, for instance, is not binding on us when such a determination is essential to the decision of a federal question." *Keller*, 496 U.S. at 11. The analysis may differ when the government nominally controls the production of advertisements, but as a practical matter has delegated control over the speech to a particular group that represents only one segment of the population. *See Frame*, 885 F.2d at 1133-34 (describing compelled contributions to a nominally government controlled "Cattleman's Board," where

the persons with actual control over the disbursement of funds were private individuals "whose primary or overriding purpose is to promote the welfare of the cattle producers" (quoting 7 U.S.C. § 2905(b)(4))); *see also Mich. Pork Producers Ass'n v. Veneman*, 348 F.3d 157, 161 (6th Cir. 2003) ("We conclude that the pork industry's extensive control over the Pork Act's promotional activities prevents their attribution to the government.").[7] But that situation is not present here. As the district court put it, "while in some cases the distinction between government speech and compelled allegiance may present 'difficult issues,' the analysis here is straightforward." *Bonta*, 272 F. Supp. 2d at 1100 (quoting *United Foods*, 533 U.S. at 417).

[4] In their complaint, the tobacco companies themselves allege that the director of the DHS, a government agency, is "ultimately responsible for the advertising challenged in this action." The DHS is acting expressly according to California law, which directs the DHS to implement a media campaign emphasizing "both preventing the initiation of tobacco use and quitting smoking . . . based on professional market research and surveys necessary to determine the most effective method of diminishing tobacco use among specified target populations." Cal. Health & Safety Code § 104375(e)(1). The

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[7]Thus, the dissent's claim that there is an "untenable distinction" between situations in which the government speaks for itself and situations where the government has effectively licensed control over speech to a private organization is misplaced. In similar cases, courts can (and often have) examined whether or not the government has delegated authority to a private body, such that a compelled subsidy is being used to support a private interest instead of a governmental one. *See, e.g.*, *Cochran v. Veneman*, 359 F.3d 263, 278 (3d. Cir. 2003) (finding First Amendment concerns where an agricultural act "seemed to really be special interest legislation on behalf of the industry's interest more . . . than the government's"). Indeed, this was what was at issue in the language the dissent quotes from the Third Circuit's decision in *Frame*; that court identified an improper "coerced nexus between the individual and . . . specific expressive activity" in a case where "the Cattlemen's Board seems to be an entity 'representative of one segment of the population, with certain common interests.' " *Frame*, 885 F.2d at 1132, 1133 (citing *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring)).

advertisements are also clearly identified as coming from the government itself and not from the tobacco companies, the tobacco industry or any other private party or group. *Cf. Frame*, 885 F.2d at 1133 n.11 (describing advertisements "without mention of the Secretary or the Department of Agriculture, thus failing to communicate that the advertisements are funded through a government program"). As noted above, all the contested advertisements expressly state that they are sponsored by the DHS. Plainly, in imposing the surtax and in producing the contested advertisements, California is acting on behalf of all of its citizens.[8]

Keller, 496 U.S. at 11, 13 (footnotes and citations omitted). Here, by contrast, the contested advertisements are unquestionably part of the "general government of the state."

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[8]As a point of comparison, it is worth citing those aspects of the organization of the State Bar of California upon which the Supreme Court relied to hold that its speech should not be classified as coming from the government itself:

> The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as "governmental agencies." Its principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors. Only lawyers admitted to practice in the State of California are members of the State Bar, and all 122,000 lawyers admitted to practice in the State must be members. [The State Bar] undoubtedly performs important and valuable services for the State by way of governance of the profession, but those services are essentially advisory in nature. The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, and it does not ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State Supreme Court. . . . The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing [the State Bar's] argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.

C. Excise Taxation, Government Speech and the First Amendment

In short, by being required to contribute to the DHS's advertisements, the tobacco companies have not been deprived of their freedom of expression or their freedom of association, which are the harms that the compelled speech cases protect against. The tobacco companies' claim goes to another kind of harm -- the harm caused by paying an excise tax used to fund government speech of which they understandably disapprove.

The tobacco companies concede that the state would not have violated the First Amendment had it imposed the same surtax on cigarette packs, commingled the proceeds of the surtax with the state's general fund and then used the general fund to produce precisely the same advertisements. Thus, the tobacco companies object only to the nexus between the excise tax and the advertisements. Federal courts have traditionally given great deference to a state's control over its financial affairs when faced with constitutional challenges. *See, e.g.*, *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973) (noting, in a challenge under the Equal Protection Clause, that "this Court has often admonished against such interferences with the State's fiscal policies"); *see also Welsch v. Likins*, 550 F.2d 1122, 1131-32 (8th Cir. 1977) ("No right of a state is entitled to greater respect by the federal courts than the state's right to determine how revenues should be raised and how and for what purposes public funds should be expended."). The Supreme Court has repeatedly emphasized that deference not warranted in other regulatory areas is warranted when it comes to the tax system. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547-548, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes. . . . ' In taxation, even more than in other fields, legislatures possess the greatest freedom in classification.' " (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88, 84 L. Ed. 590, 60 S. Ct. 406 (1940))). The tobacco companies can point to no case in which, when the state has the right both to impose the relevant tax and to

promulgate the relevant speech, the First Amendment mandates that a state arrange its budgetary categories so as to make the link between a tax and speech less direct.

The implication of the tobacco companies' argument is that industries subject to an excise tax are entitled to a special veto over government speech funded by the tax. Such a right, in turn, would suggest that excise taxes, especially those that earmark funds for particular purposes, are so unusual or improper that they should allow payors of those taxes to avoid the political process and use the courts to control government speech. This suggestion fundamentally misunderstands the history of taxation in the United States, because excise taxation targeted at particular goods or industries is not only common but predates the income tax. *See* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and *Excises*") (emphasis added); THE FEDERALIST NO. 12 (Alexander Hamilton) ("In America, far the greatest part of the national revenue is derived from taxes of the indirect kind, from imposts, and from excises."). One of the earliest Supreme Court cases upheld a uniform national excise tax on carriages. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 1 L. Ed. 556, 3 Dall. 171 (1796). And excise taxes are hardly unusual today. According to the Office of Management and Budget, the federal government collected approximately 67 billion dollars in excise taxes in 2002. *See* Office of Management and Budget, *Budget for Fiscal Year 2004, Summary Tables,* at *http://www.whitehouse.gov/omb/budget/fy2004/summarytables.html* (last visited Aug. 23, 2004).

[5] Nor is it a novel feature of American government to levy an excise tax on a particular industry and then use the proceeds of that tax in ways that regulate that industry. The nineteenth century Supreme Court upheld (albeit not against a First Amendment challenge) a federal tax statute that required distillers of alcohol to both pay an excise tax and pay the salaries of federal officers supervising the production of alcohol. *United States v. Singer*, 82 U.S. (15 Wall.) 111, 118-19, 122, 21 L. Ed. 49 (1872) (upholding an

act requiring distillers to " 'reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of . . . warehouses' "). Excise taxes levied in the name of public health have long been held constitutionally permissible, even when such taxation has put severe burdens on particular industries. *See McCray v. United States*, 195 U.S. 27, 63, 49 L. Ed. 78, 24 S. Ct. 769 (1904) (upholding, as an exercise of Congress's ability to protect public health, the constitutionality of an excise tax on artificially colored oleomargarine "although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine"); *Patton v. Brady*, 184 U.S. 608, 623, 46 L. Ed. 713, 22 S. Ct. 493 (1902) (upholding an excise tax on tobacco and noting that "it is no part of the function of a court to inquire into the reasonableness of the excise either as respects the amount or the property upon which it is imposed").

Today, a tax on heavy trucks and trailers is dedicated to a fund intended to improve highways. *See* 26 U.S.C. § 9503 (establishing a "Highway Trust Fund"); 26 U.S.C. § 4051 (imposing a retail tax on heavy trucks and trailers dedicated to the Highway Trust Fund). A tax on fishing equipment is dedicated to government action to preserve fisheries. *See* 26 U.S.C. § 9504(a) (establishing an "Aquatic Resources Trust Fund"); 26 U.S.C. § 4161 (imposing an excise tax on sport fishing equipment dedicated to the Aquatic Resources Trust Fund). Yet we would not conclude that the manufacturers of large trucks have a First Amendment right to veto government speech on highway safety, or that the makers of sonar fish finders have a First Amendment right to direct government speech on fishery management.

[6] There is thus a long history of excise taxation directed at particular industries in the name of public health and welfare. Despite this history, not one court has upheld a right of an industry to block otherwise legitimate government activity simply because the industry pays an excise tax. The tobacco companies offer no reason why they should be entitled to such unique treatment here.

Significantly, the tobacco companies have not offered any principle that could limit the consequences of sustaining their objection. Although the companies claim that they object only to the denigratory advertisements at issue here, they offer no principled basis for limiting their "nexus" theory to such advertisements alone. For example, the tobacco companies do not explain why, if their First Amendment rights have been violated solely because of a nexus between the surtax and the challenged advertisements, they would not also have a right to challenge the use of surtax funds for anti-tobacco education in the public schools to the extent that they disagreed with the state's educational message.

[7] Thus, if the tobacco companies were permitted to object to government speech simply because they pay an excise tax used to fund speech contrary to their interests, the result could be not only to reduce government's ability to disseminate ideas but also an explosion of litigation that could allow private interests to control public messages. There are numerous taxpayers who contribute disproportionately through excise taxes to government speech with which they disagree. If each were to have a similar right to challenge what it may deem government "propaganda," the government's ability to perform crucial educational and public health activities in the interests of all citizens would be hampered. *Cf. Downs*, 228 F.3d at 1015 (noting that if a First Amendment violation applied to government speech, "[the plaintiff] would be able to do to the government what the government could not do to [the plaintiff]: compel it to embrace a viewpoint.")

D. Other Limitations on Government Speech and the Power to Tax

At the risk of repetition, we emphasize that the tobacco companies do not argue that the government's speech itself is constitutionally impermissible; nor do they argue that the government has burdened their First Amendment rights through the exercise of its power to tax. Were the tobacco companies challenging a California restriction on

their ability to express their views, our analysis would be different. As the district court noted, there are already several recognized instances of constitutional limitations on government speech and "government is no more free to disregard constitutional and other legal norms when it speaks than when it acts." *Bonta*, 272 F. Supp. 2d at 1110. For example, there may be instances in which the government speaks in such a way as to make private speech difficult or impossible, or to interfere with some other constitutional right, which could raise First Amendment concerns. *See Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) ("The government may not speak so loudly as to make it impossible for other speakers to be heard by their audience. The government would then be preventing the speakers' access to that audience, and first amendment concerns would arise.").

Another limitation on government speech is found in the Establishment Clause. *See Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990) ("There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (emphasis in original). The dissent, quoting a passage often used by the tobacco companies in this litigation, invokes Thomas Jefferson's pronouncement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." P. Kurland & R. Lerner, eds., 5 THE FOUNDERS' CONSTITUTION 77 (1987). As the district court carefully explained,

The quoted statement is taken from Jefferson's Virginia Bill for Establishing Religious Freedom, a landmark anti-establishment measure declaring that 'no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever.' *Id*. It is perhaps significant that the statement arose in this context, since 'the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the

speech provisions.' *Lee v. Weisman*, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992). *Bonta*, 272 F. Supp. 2d at 1107 n.25.

Jefferson's comment was directed to a situation in which the government speech itself was improper, not to valid taxation used to fund valid governmental speech.

There are also strict limits on the government's ability to impose taxes that are "general law[s] singling out a disfavored group on the basis of speech content." *Rust*, 500 U.S. at 194; *see also Arkansas Writers' Project, Inc.*, 481 U.S. at 228-29.[9] A government tax designed to suppress the speech of a targeted group would raise serious First Amendment concerns.

[8] But these are issues not before us. On this record, we need not determine the metes and bounds of constitutionally permissible government speech; nor need we articulate abstract limits on the state's power to tax. We share our dissenting colleague's concern that the government not use its taxation power to suppress the free expression of disfavored groups, but the tobacco companies claim no suppression of ideas. The nexus between excise taxation and government speech is the only First Amendment argument they raise, and we limit ourselves to that issue alone. For the reasons set out above, we reject the companies' argument.

II. Seventh Amendment and Due Process Claims

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[9]Concerns about forced expression, repression of speech, improper taxation and interference with other constitutional rights could arise, for example, under the facts of *Summit Medical Center v. Riley*, 284 F. Supp. 2d 1350, 1353-54 (M.D. Ala. 2003), a case cited to us by the tobacco companies. In *Summit Medical*, it appears that the state of Alabama designed a program to suppress abortion clinics' ability to disseminate independent information, requiring the clinics to purchase from the state and then display information intended to dissuade women from obtaining abortions. The plaintiffs in *Summit Medical* challenged the burden this mandatory purchase-and-display program imposed upon their own expression, as well as its compulsory and discriminatory nature. *Id.* at 1354. We take no position on the correctness of the district court's decision in *Summit Medical*, but note that it confronted a factual situation very different from the one we consider here.

The tobacco companies also raise a novel claim under the Seventh Amendment. They note that they face litigation in state and federal courts. They argue that because the advertisements publicly disparage the reputation and character of the tobacco industry, their right to receive a jury trial under the Seventh Amendment has been infringed because potential future jurors in potential future trials could be biased by the advertising. They do not, however, allege that any actual trial in which they have participated was rendered unconstitutionally unfair by the challenged advertisements.

There are a number of problems with this argument. The companies cite only to cases involving a criminal defendant's Sixth Amendment right to jury trial in criminal cases or to interpretations of the procedural rules governing the federal courts, and not to any case suggesting that they have an independent Seventh or Fourteenth Amendment right to be free of disparaging state speech before a civil trial. Moreover, as the district court noted, the Seventh Amendment's guarantee of the right to a civil trial by jury does not apply to the states and was not incorporated into the Fourteenth Amendment. *See Dohany v. Rogers*, 281 U.S. 362, 369, 74 L. Ed. 904, 50 S. Ct. 299 (1930); *Walker v. Sauvinet*, 92 U.S. 90, 92, 23 L. Ed. 678 (1875). Therefore, whether parties may raise claims against state officials under 42 U.S.C. § 1983 for Seventh Amendment violations is questionable.

[9] We need not consider these issues, however. Even assuming that the tobacco companies may properly allege a violation of Seventh or Fourteenth Amendment rights due to juror bias created by these advertisements, the proper context for raising such issues is an actual jury trial where a court could consider whether real jurors actually have been biased. Allegations of juror bias are traditionally resolved by the court conducting the trial, not courts considering hypothetical future proceedings. *See Smith v. Phillips*, 455 U.S. 209, 217, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial

occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing [conducted by the trial court]."). None of the cases cited by the companies supports their asserted right to be free from negative publicity because *potential* jurors may be prejudiced in potential cases, and we are aware of no case that supports their claim that this court should enjoin certain speech in order to protect the alleged injury occurring in *another* court.

The tobacco companies do not allege the elements of stigmatization that would violate their due process rights. *Cf. Wisconsin v. Constantineau*, 400 U.S. 433, 436, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971) (establishing that stigma can change a person's legal status and therefore constitute a violation of due process). The companies cannot meet the requirements of the "stigma-plus" test established in *Paul v. Davis*, where the Supreme Court explained that in addition to reputational harm, a due process stigma claim must assert that a recognized liberty or property right, as secured by the due process clauses, has been violated. 424 U.S. 693, 701, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976); *see also WMX Techs., Inc. v. Miller*, 197 F.3d 367, 374 (9th Cir. 1999) ("Reputation, without more, is not a protected constitutional interest."). The companies assert that the alleged deprivation of their right to a fair jury trial is sufficient to meet the stigma-plus test. In essence, the companies are trying to bootstrap two arguments about reputational harm to create a single claim -- arguing that the reputational harm creates juror bias, and that the juror bias combined with reputational harm creates a constitutionally improper stigma. We reject such an attempt at bootstrapping. *See Paul*, 424 U.S. at 712 ("Petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause.").

CONCLUSION

For the reasons set forth above, we affirm the judgment of the district court.

AFFIRMED.

DISSENT: TROTT, Circuit Judge, Dissenting:

[10] To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.[10]
Thomas Jefferson

The atmospheric challenge in this case, which is one we often face, is to focus not on the overwhelming demerits of the underlying subject matter -- smoking -- but on the primary constitutional principle at issue: whether consistent with the First Amendment's right against government abridgement of freedom of speech -- which includes "the right to refrain from speaking at all"[11] -- a state can compel reluctant individuals and private entities directly and exclusively to pay for and to support a public interest message with which the entities disagree and which subjects them public scorn, obloquy, and even hatred. It would be a mistake in this principled context to become overly distracted by the medical, physical, personal, financial, and addictive havoc knowingly inflicted for profit upon the public by the tobacco industry; or to be influenced by the hundreds of thousands of premature, preventable, and horrible smoking deaths caused by cancer, emphysema, heart and lung disease, and stroke. There is little doubt that government, in its role as steward of the public's general welfare, can mount a vigorous public campaign against smoking and the tobacco industry, and that it can do so with *general* tax revenues and by way of "government speech;" but can government do so using this particular compulsory funding

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10 *See, e.g.*, *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 235 n. 31, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977). In the original case, this was footnote 1 in the dissent. - Editor.

11 *Wooley v. Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977). In the original case, this was footnote 2 in the dissent. - Editor.

mechanism? Today the target of government dislike is smoking, but tomorrow it will be something else, such as Alabama's imposition, in it's the Woman's Right to Know Act, of a fee applied to abortion providers for the production by the state of pro-childbirth materials which the providers did not wish to endorse, much less purchase. *See* Ala. Code § § 26-23A-1 to 13; *Summit Medical Center of Alabama, Inc. v. Riley*, 284 F. Supp. 2d 1350 (M.D. Alabama 2003). Who knows whose disfavored ox or whose industry or business or lifestyle will be the next to be fatally gored in this manner by a well-intentioned government.

Moreover, hanging over this controversy like a blinking yellow light in the constitutional sky is Chief Justice Marshall's timeless admonition in *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819), that "the power to tax is the power to destroy." This warning is not only memorable, but it reminds us that might, especially in the hands of government, does not always make right.

There appears no doubt that California's goal is to destroy the industry singled out for this targeted and exclusive tax. Although an earnest deputy attorney general denied this lethal purpose during oral argument, claiming that the Act's only purpose was to inform the public, her boss, the Attorney General of California William Lockyer, forthrightly said differently after the hearing. Attorney General Lockyer, who took the unusual step of attending the argument himself, is quoted by the Los Angeles Daily Journal as calling the tobacco companies "merchants of death" and agreed that the ad campaign aimed to put them out of business. He added that "the democratic process will provide a check on the use of taxes to fund such messages. Elected officials are responsible for appropriating the money . . . . If voters don't like the message, they can oust the messenger."[12] Query.

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[12]*Los Angeles Daily Journal*, Tuesday, May 11, 2004, "Court revisits anti-smoking ad campaign." In the original case, this was footnote 3 in the dissent. - Editor.

(continued...)

So this is the issue: can government, consistent with the First Amendment's right against the abridgment of free speech, create a public information program against an industry funded by a targeted excise tax imposed solely upon that industry and which is segregated in a special state health education account? Not surprisingly, in our system which values not just good goals but also the right process, the question here is not ends, but means.

DISCUSSION

First Amendment Claim

1. *Government and Compelled Speech*

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. It is axiomatic that "just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views . . . or from compelling certain individuals to pay subsidies for speech to which they object."[13] *United States v. United Foods*, 533 U.S. 405, 410, 150 L. Ed. 2d 438, 121 S. Ct. 2334 (2003). In *United Foods*, the latest in a series of compelled assessments cases, the Supreme Court held that government's forced assessments of mushroom producers, which funded advertisements promoting mushroom sales, violated the First Amendment. Relying primarily upon *United Foods*, appellants assert that California's targeted tax, which funds anti-industry

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[13]*W.Va. State Bd. of Educ. V. Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943) provides an often quoted passage regarding the extension of free speech protections to those who wish not to speak: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* At 642. In the original case, this was footnote 4 in the dissent. - Editor.

advertisements, violates their right against compelled financing of speech.

By labeling the anti-tobacco advertisements "government speech," the majority concludes that the targeted tax is clear of First Amendment concerns. I respectfully disagree. Though the Supreme Court has embraced the existence of a "government speech" doctrine in this general context, *United Foods*, 533 U.S. at 417, the Court has not provided a clear explanation of the reach or proper application of the doctrine. The appellants assert that the central question is the source of the funding for the particular speech, contending that a targeted tax on a particular group to fund speech opposed to by that group constitutes unconstitutional compelled speech. Ultimately, the State's argument that the First Amendment's protections against compelled speech can be avoided by finding that the speech is spoken by the government is at odds with the force and logic of controlling authority.

2. *Government Speech*

Focusing on the Supreme Court's brief reference to the government speech inquiry in *United Foods*, and the Court's discussion of government speech in other contexts, *see, e.g.*, *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 130 L. Ed. 2d 902, 115 S. Ct. 961 (1995), the State asserts that the government is free from First Amendment concerns "when the state is the speaker." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995).[14] Specifically,

[14]I note that the State also supports its position with general pronouncements made by the Court in its compelled assessments of speech cases indicating that the proper functioning of government requires the government to have control over the nature and content of its speech. *See, e.g.*, *Keller v. State Bar of California*, 496 U.S. 1, 12-13, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990) ("Government officials are expected as part of the democratic process to represent and espouse the views of a majority of their constituents. . . . If every citizen were to have a right to insist that no one paid by public funds to express a view with which he disagreed, debate over issues of great concern to

(continued...)

the State asserts that because the speech at issue is not explicitly attributed to appellants, the free speech concerns of traditional compelled speech cases, *see, e.g.*, *Wooley*, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428, are absent. Moreover, the state asserts that the source of the State's funding for its speech is irrelevant to the question of the constitutionality of the particular speech.

The State's arguments, however, are not consistent with the trajectory and force of the Supreme Court's recent compelled speech jurisprudence. Specifically, the State's framework ignores the central lesson of *United Foods*: in that case, the Supreme Court reigned in its previous pronouncements in *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 476, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (1997) that coerced government speech is akin to economic regulation and not entitled to First Amendment protection. *See Glickman*, 521 U.S. at 476. Instead, the *United Foods* Court propounded a broad constitutional protection against compelled contributions for commercial speech. *See United Foods*, 533 U.S. at 414. Indeed, applying *United Foods*, one court has held that the issue of government speech, which generally involves the state's power to control the *content* of its speech, is fundamentally different from the "government's authority to compel [plaintiffs] to support speech with which they personally disagree; such compulsion is a form of 'government interference with private speech.' " *Livestock Marketing Ass'n v. USDA*, 335 F.3d 711, 720 (8th Cir. 2003) (holding compelled contributions in beef promotion violated First Amendment) (certiorari granted in part by *Veneman v. Livestock Marketing Ass'n*, 158 L. Ed. 2d 962, 124 S. Ct. 2389 (U.S. May 24, 2004) and *Nebraska Cattlemen, Inc. v. Livestock Marketing Ass'n*, 158 L. Ed. 2d 962, 124 S. Ct. 2390 (U.S. May 24, 2004). As Justice Thomas stressed in concurrence, "any regulation that compels the funding of advertising

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[14](...continued)
the public would be limited to those in the private sector, and the process of government as we know it would be radically transformed.") In the original case, this was footnote 5 in the dissent. - Editor

must be subjected to the most stringent First Amendment scrutiny." *United Foods*, 533 U.S. at 419 (Thomas, J., concurring). Finally, the State's argument necessarily relies on an untenable distinction between government speech activities paid directly from the government treasury, or coordinated by traditional government agencies, and those that are coordinated by more complex regulatory organizations and schemes, even when such schemes are funded and run by the government. As one commentator has noted, "government speech cannot logically be made a function of the office of the person making the allocation decision. That approach would elevate form over substance and would enable the government to dictate the First Amendment result simply by manipulating the agency in the decision-making process." Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1430 (2001).

Accordingly, recognizing the principle expressed in *United Foods*, the appellants clearly have a First Amendment interest at stake that is not erased by pigeonholing the ads as "government speech." The question remains, however, whether the compelled speech does indeed violate appellants' free speech rights, an analysis that is governed by the Supreme Court's compelled speech line of cases, including *Abood*, *Keller*, *Glickman*, and *United Foods*.

3. *Compelled Speech*

Appellants rely on the string of cases, beginning with *Abood*, concerning compelled contributions to speech, and assert that there exists the fundamental principle that, under the First Amendment, a discrete group should not be specifically taxed to fund speech with which they disagree. Indeed, this proffered principle provides a coherent picture of the puzzle with which courts have been struggling. *See, e.g.*, *Summit Medical Ctr. of Ala. v. Riley*, 284 F. Supp. 2d 1350, 1360 (holding that state's imposition of "a *direct* fee assessment on a limited class of citizens -- abortion providers -- and using the revenue to advance speech in support of the State's favored policy position on abortion" intruded on abortion provider's free speech rights) (emphasis added); *United States v. Frame*, 885 F.2d 1119 (3d Cir.

1989) ("Where the government requires a *publicly identifiable group* to contribute to a fund earmarked for the dissemination of a particular message *associated with that group*, the government has directly focused its coercive power for expressive purposes.") (citation omitted) (emphasis added). The *United Foods* Court announced that the "question is whether the government may underwrite and sponsor speech with a certain viewpoint using *special subsidies* exacted from a designated class of person, some of whom object to the idea being advanced." *United Foods*, 533 U.S. at 410. And in *United Foods*, the Court answered: No. *Id.* at 411.

In answering the question, however, the Court was forced to distinguish another recent compelled speech case, *Glickman*, which was factually similar to *United Foods*, but where the Court had found that no First Amendment issues were raised by the forced subsidies. 521 U.S. at 460. In *Glickman*, the Court determined that "criticisms of generic advertising provide no basis for concluding that factually accurate advertising constitutes an abridgement of anybody's right to speak freely." *Id.* at 474. The *United Foods* Court distinguished *Glickman* by asserting that the program in *Glickman* "mandated assessments for speech [which] were ancillary to a more comprehensive program restricting marketing autonomy." *United Foods*, 533 U.S. at 411-12.

Thus, after distinguishing *Glickman*, and finding that First Amendment interests were at stake, the Court proceeded to apply the tenets established in *Abood* and *Keller*, which established the "germaneness test." *United Foods*, 533 U.S. 405, 150 L. Ed. 2d 438, 121 S. Ct. 2334. That test requires any coerced subsidized speech be germane to the larger purpose of the association at issue. *Abood*, 431 U.S. at 235 (holding that union can only finance speech not germane to collective bargaining with non-objecting members' funds); *Keller*,

496 U.S. at 13-14 (holding that state bar association can only compel payment for activities related to bar's purposes).[15]

Guided by *Glickman* and *United Foods*, and looking at the statutory scheme provided in the Act, it is clear that the tobacco companies are not similarly situated to the tree growers in *Glickman*, as they are not "bound together and required by statute to market their products according to cooperative rules" for purposes other than advertising or speech. *United Foods*, 533 U.S. at 412. Nor is the statutory scheme directly congruous with that in *United Foods*, as the ads in this case are a part of a larger regulatory scheme, and thus not clearly "a program where the principal object is speech itself." *Id.* at 415. Thus, the Act is different from both the statute analyzed in *United Foods* and the statute in *Glickman*. Moreover, the fact that the speech at issue involves, not the promotion of the relevant group's product, but the disparagement of the entire industry, only increases the difficulty of resolving this case.

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[15]I note that the district court's decision relied on the question of association and stressed the non-associational nature of the tobacco industry being taxed, thereby distinguishing the *Abood* line of cases. Those cases stressed that there exists "a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.' " *Glickman*, 521 U.S. at 471 (quoting *Abood*, 431 U.S. at 235). The district court found that because the appellants subject to the surtax were not members of a particular association, their free speech rights were not undermined by any compelled financing of speech made on behalf of that association. This finding is also supported by some of the Court's language in *United Foods*, where it noted that there is "a threshold inquiry . . . whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place." *United Foods*, 533 U.S. at 413. However, hinging the right to be free from compelled commercial speech on whether there is an associational interest at stake ignores the obvious fact of what the Court actually *did* in *United Foods*. Indeed, the Court not only found that the compelled subsidies constituted an unconstitutional infringement on the dissenting mushroom grower's speech rights, but it did so after expressly distinguishing *Glickman* on the grounds that there was no "regime of cooperation" as presented in *Glickman*. *Id.* at 415. Therefore, though the Court saves some of its associational rights rhetoric, the practical effect of its decision in *United Foods* is to unhinge its compelled speech analysis from the previously-pronounced requirement that there be an involuntary group membership. In the original case, this was footnote 6 in the dissent. - Editor

Given the unique nature of the question presented, proper review of the Act must acknowledge *United Foods*'s obvious retreat from *Glickman*, and the Court's pronouncement of broadened protection against compelled speech. In this regard, as the appellants assert, *United Foods* and the Court's previous compelled speech case law can be reconciled and understood by applying what *United Foods* explicitly stated: the First Amendment forbids certain compelled assessments from "a particular citizen, or a discrete group of citizens, to pay special subsidies for speech." 533 U.S. at 411.

As the Third Circuit recently explained, however, though a case may be properly characterized as a compelled speech case, "the Supreme Court . . . has left unresolved the standard for determining the validity of laws compelling commercial speech . . . ." *Cochran v. Veneman*, 359 F.3d 263, 277 (3rd Cir. 2004). In *Cochran*, the court also explained that there are several standards available which the courts may try to apply: 1) the lenient standard derived from commercial speech cases, *see, e.g.*, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980), or some adaptation of that commercial speech standard, *see, e.g.*, *Livestock Marketing*, 335 F.3d at 722-23; 2) the "germaneness test" of traditional compelled speech cases, *see, e.g.*, *Abood*, 431 U.S. at 235-36, and 3) the stringent standard of associational cases, *see, e.g.*, *United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989).

The speech and the funding mechanism in this case is questionable under whatever standard one uses. In *Central Hudson*, the Court held that commercial speech is to be evaluated using intermediate scrutiny. That is, 1) the state must "assert a substantial government interest;" 2) "the regulatory technique must be in proportion to that interest;" and 3) the incursion on commercial speech "must be designed carefully to achieve the State's goal." 447 U.S. at 564. Under this standard, though

never before applied to *compelled* commercial speech cases,[16] the speech regulation at issue, and the targeted tax placed on appellants, constitutes a disproportional and overly burdensome regulatory technique, thereby failing the second and third prongs of the *Central Hudson* test. Indeed, the speech in this case is exceptional in its difference from what the Court has previously encountered in its compelled commercial speech cases. Whereas previous cases generally involve promotional activity, *see, e.g.*, *Glickman*, 521 U.S. at 474; *United Foods*, 533 U.S. at 413-14, here, California is specifically targeting one discrete and largely disfavored group, forcing that group to meet the State's regulatory goals by directly financing speech designed to undermine that group's status and reputation. Though the State's goals may be strong and laudatory, the methods used seriously undermine the particular group's speech rights and seem disproportional to the goals to be achieved. Accordingly, the Act cannot survive *Central Hudson*'s intermediate scrutiny.

Moreover, as did the Sixth Circuit in *Michigan Pork Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003), I "find inapplicable to this case the relaxed scrutiny of commercial speech analysis . . . ." *Id.* at 163 (citing *Glickman*, 521 U.S. at 474 n.18 (questioning whether "the *Central Hudson* test, which involved commercial speech should govern a case involving the compelled funding of speech"). The speech in this case is materially different from the speech issuing from the private sector that we normally label as commercial.

Applying the "germaneness test" derived from *Abood* and its progeny, the compelled speech here would also fail. The Supreme

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[16]I note, in this regard, that the Supreme Court in *United Foods* refused to apply the *Central Hudson* test because the "Government itself [did] not rely upon *Central Hudson* to challenge the Court of Appeals' decision." 533 U.S. at 410. Accordingly, other courts have recognized that the *Central Hudson* test has never been applied by the Supreme Court to compelled assessment of commercial speech cases. *See Cochran*, 359 F.3d at 277. In the original case, this was footnote 7 in the dissent. - Editor

Court expressly applied this test in *United Foods*, and found that "the expression respondent [was] required to support [was] not germane to a purpose related to an association independent from the speech itself." *United Foods*, 533 U.S. at 415-16. Of course, as previously explained, there is no relevant association of tobacco companies for purposes of this analysis. As the Court stressed in *United Foods*, the question is not whether the State necessarily has a larger regulatory purpose justifying the speech, but whether there is a "cooperative marketing structure . . . to sustain an ancillary assessment" for speech. *Id*. Here, as in *United Foods*, there is no collective association to which the compelled assessments for speech is germane.

Finally, as in *Frame*, a pre-*Glickman* and pre-*United Foods* case, the Third Circuit applied the stringent associational rights standard of *Abood*, but upheld the constitutionality of the beef regulatory statute in question because of the compelling state interest involved. *Frame*, 885 F.2d at 1134. In refusing to extend *Frame*'s reach after *United Foods*, however, the same court held in *Cochran* that *United Foods* established that "promotional programs . . . seem really to be special interest legislation on behalf of the industry's interests more so than the government's[,]" and therefore constitute unconstitutional compelled speech for those dissenting from the promotions. 359 F.3d at 279.

What has survived from *Frame* is the principle that in the review of a compelled financing statute's intrusion into free speech rights, "it is relevant to consider 'the coerced nexus between the individual and the specific expressive activity.' " *Summit*, 284 F. Supp. 2d at 1360 (quoting *Frame*, 885 F.2d at 1119). Here, the nexus is vital: unlike a situation in which money is allocated from the general treasury fund, individuals who have specifically been targeted by the speech are forced to pay for the speech. *See Id*.

4. *Conclusion*

In sum, review under any of the available standards reveals that the compelled assessments in this case constitute an exceptional case of government intrusion on the right not to be compelled to finance speech. Indeed, the Act is designed to force one particularly disfavored group to fund speech directly undermining that group's reputation. Such state action offends the very essence of the First Amendment. *See e.g.*, *Sons of Confederate Veterans v. Comm'r of the Va. Dept. of Motor Vehicles*, 305 F.3d 241, 242 (4th Cir. 2002) ("The First Amendment was not written for the vast majority. . . . It belongs to the minority of one.") (Wilkinson, C.J., concurring in denial of rehearing en banc).

Moreover, the State can provide no limiting principle, no logical reason why, if the government is free to tax and speak in this manner against this group, it cannot do so against any other disfavored group or individual. *See Summit Medical Ctr. of Alabama*, 284 F. Supp. 2d, at 1361 (refusing to apply the district court's analysis in this case, and finding that Alabama's statute forcing abortion providers to pay for the state's informational materials infringes plaintiffs' First Amendment rights). Contrary to the Attorney General's claim that the democratic process will provide a check on the use of taxes to fund such messages, by removing the burden of the cost of this program from every taxpayer except the ones targeted, this tax becomes the ultimate cheap shot, one not fully subject to the considerations that normally attend the decision to require the public at large to pay for something. *See Board of Regents v. Southworth*, 529 U.S. 217, 229, 146 L. Ed. 2d 193, 120 S. Ct. 1346 (2000) (traditional political controls ensure responsible government).[17] Furthermore, the approach I take does not hinder or unduly burden the State's right or power to

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[17]In *Michigan Pork Producers Ass'n v. Veneman*, 348 F.3d 157 (6th Cir. 2003), one significant factor in the court's determination that the speech involved was not government speech was that the funding did not come from general tax revenues. *Id*. at 162. *See also Livestock Marketing Ass'n*, 335 F.3d at 720 (the flaw in the government speech argument is that the plaintiff's funds were identifiable as the funds used to finance the speech to which they objected). In the original case, this was footnote 8 in the dissent. - Editor

speak, and it does not interfere with the imposition of excise or other taxes.] It simply requires the government when doing so to stay within normal channels and to avoid First Amendment violations. Under the reasoning and force of the Supreme Court's compelled speech cases, particularly the Court's recent pronouncements in *United* Foods, I respectfully believe the majority's argument, although well presented and articulated in their opinion, is without merit.

AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISION

In re: UNIFIED WESTERN GROCERS, INC.; DEAN FOODS COMPANY OF CALIFORNIA, INC.; SAFEWAY, INC.; SWISS DAIRY; AND DAIRY INSTITUTE OF CALIFORNIA.
AMA Docket No. M-1131-1.
Decision and Order filed September 20, 2004.

AMA – Agricultural Marketing Agreement Act (AMAA) – Trade barrier – Secretary's duty to suspend or terminate order – Equal protection – Trade association standing – Secretary's authority to grant relief.

The Judicial Officer affirmed the decision by Administrative Law Judge Jill S. Clifton (ALJ) dismissing the Petition instituted under 7 U.S.C. § 608c(15)(A). The Judicial Officer concluded, since Dairy Institute of California was not a handler, it did not have standing to file a petition under 7 U.S.C. § 608c(15)(A). The Judicial Officer rejected the other Petitioners' contentions that the failure to grant them the same exemption from the Arizona-Las Vegas Milk Marketing Order (7 C.F.R. pt. 1131) as Congress granted to a handler at a plant operating in Clark County, Nevada (7 U.S.C. § 608c(11)(C)), violates: (1) the prohibition on trade barriers in 7 U.S.C. § 608c(5)(G); (2) the Secretary of Agriculture's duty in 7 U.S.C. § 608c(16)(A) to terminate provisions of marketing orders which obstruct or do not effectuate the declared policy of the Agricultural Marketing Agreement Act of 1937; and (3) the equal protection provisions of the Fifth Amendment to the United States Constitution.

Garrett B. Stevens and Nazima H. Razick, for Respondent.
Glen C. Hansen and Thomas S. Knox, Sacramento, California, for Petitioners and Interested Party to Which No Relief Can Be Granted.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Unified Western Grocers, Inc.; Dean Foods Company of California, Inc.; Safeway, Inc.; and Swiss Dairy [hereinafter Petitioners] and Dairy Institute of California instituted this proceeding by filing a "Petition for Declaratory Relief, Restitution, Permanent

Injunction" [hereinafter Petition] on August 24, 2001. Petitioners and Dairy Institute of California instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal order regulating the handling of milk in the Arizona-Las Vegas Marketing Area (7 C.F.R. pt. 1131) [hereinafter the Arizona-Las Vegas Milk Marketing Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

Petitioners and Dairy Institute of California seek: (1) a declaration that compensatory payments imposed on California handlers that shipped milk and milk products into Clark County, Nevada, since October 1, 1999, violate section 8c(5)(A) and (G) of the AMAA (7 U.S.C. § 608c(5)(A), (G)) and the Fifth Amendment to the Constitution of the United States; (2) a declaration that California handlers that ship milk into Clark County, Nevada, are exempt from complying with the pricing provisions of any federal milk marketing order; (3) a refund, with interest, of compensatory payments made by Petitioners for milk shipped into Clark County, Nevada, since October 1, 1999; and (4) a permanent injunction prohibiting the enforcement of the Arizona-Las Vegas Milk Marketing Order against California handlers who ship milk into Clark County, Nevada (Pet. at 14-15).

On October 18, 2001, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent],[1] filed "Respondent's Answer": (1) denying the material

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[1]Petitioners and Dairy Institute of California instituted this proceeding against Ann M. Veneman, in her capacity as Secretary of Agriculture, and James R. Daugherty, in his capacity as Market Administrator for the Arizona-Las Vegas Milk Marketing Order, who Petitioners and Dairy Institute of California refer to as "Respondents." However, this proceeding is an "in re" proceeding which does not formally include adverse parties. Black's Law Dictionary 796 (7th ed. 1999). Instead, this proceeding involves the matter of Petitioners' and Dairy Institute of California's rights and duties under the AMAA and the Arizona-Las Vegas Milk Marketing Order. The Administrator, Agricultural Marketing Service, United States Department of Agriculture, is the United States Department of Agriculture official responsible for

(continued...)

allegations in the Petition; (2) stating the Petition fails to state a claim upon which relief can be granted; and (3) stating there is no jurisdiction regarding allegations by Dairy Institute of California.

On February 5 and 6, 2002, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in Sacramento, California. Thomas S. Knox and Glen C. Hansen, Knox, Lemmon & Anapolsky, LLP, Sacramento, California, represented Petitioners and Dairy Institute of California. Gregory Cooper, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.[2]

On May 2, 2002, Petitioners and Dairy Institute of California filed "Petitioners' Opening Brief." On May 30, 2002, Respondent filed "Respondent's Proposed Findings of Fact, Conclusions of Law, and Brief in Support Thereof" [hereinafter Respondent's Brief]. On June 19, 2002, Petitioners and Dairy Institute of California filed "Petitioner's [sic] Reply Brief."

On December 12, 2002, the ALJ issued a "Decision" [hereinafter Initial Decision and Order] in which the ALJ denied the Petition (Initial Decision and Order at 15).

On January 27, 2003, Petitioners and Dairy Institute of California filed "Petitioners' Appeal to the Judicial Officer; Brief in Support Thereof" [hereinafter Petitioners' and Dairy Institute of California's Appeal Petition]. On March 7, 2003, Respondent filed "Respondent's Memorandum in Opposition to Petitioners' Appeal Petition to the Judicial Officer, and Respondent's Cross-Appeal" [hereinafter Respondent's Appeal Petition]. On March 27, 2003, Petitioners and

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[1](...continued)
responding to the Petition; hence, the Administrator, Agricultural Marketing Service, United States Department of Agriculture, is the Respondent in this proceeding. See section 900.52a of the Rules of Practice (7 C.F.R. § 900.52a).

[2]On May 20, 2002, Garrett B. Stevens, Office of the General Counsel, United States Department of Agriculture, Washington, DC, replaced Gregory Cooper as counsel for Respondent (Substitution of Respondent's Counsel). On February 11, 2003, Nazima H. Razick, Office of the General Counsel, United States Department of Agriculture, Washington, DC, entered an appearance as co-counsel on behalf of Respondent (Notice of Appearance).

Dairy Institute of California filed "Petitioners' Brief in Opposition to Respondents' [sic] Cross-Appeal." On April 2, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based on a careful consideration of the record, I agree with the ALJ's denial of the Petition. Therefore, with minor modifications, I adopt the ALJ's Initial Decision and Order as the final Decision and Order.

Petitioners' and Dairy Institute of California's exhibits are designated by "PX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER I—DECLARATION OF CONDITIONS AND POLICY

. . . .

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

. . . .

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity

. . . .

(5) Milk and its products; terms and conditions of orders

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

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. . . .

. . . .

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

. . . .

(11) Regional application

. . . .

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

The price of milk paid by a handler at a plant operating in Clark County, Nevada shall not be subject to any order issued under this section.

. . . .

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

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

President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. 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. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A)(i) Except as provided in clause (ii), the Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(ii) The Secretary may not terminate any order issued under this section for a commodity for which there is no Federal program established to support the price of such commodity

unless the Secretary gives notice of, and a statement of the reasons relied upon by the Secretary for, the proposed termination of such order to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives not later than 60 days before the date such order will be terminated.

7 U.S.C. §§ 602(4), 608c(5)(A), (G), (11)(C), (15), (16)(A).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER X—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MILK) DEPARTMENT OF AGRICULTURE

. . . .

PART 1000—GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS

. . . .

Subpart D—Rules Governing Order Provisions

§ 1000.26 Continuity and separability of provisions.

. . . .

(b) *Suspension or termination*. The Secretary shall suspend or terminate any or all of the provisions of the order whenever he/she finds that such provision(s) obstructs or does not tend to effectuate the declared policy of the Act. The order shall terminate whenever the provisions of the Act authorizing it cease to be in effect.

7 C.F.R. § 1000.26(b).

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

Decision Summary

Even though Congress exempted Anderson Dairy, the sole handler operating a plant in Clark County, Nevada, from the pricing requirements of Arizona-Las Vegas Milk Marketing Order,[3] the decision not to likewise exempt Petitioners on packaged fluid milk shipped from their California plants into Clark County, Nevada, during each month of the years 2000 and 2001, was in accordance with law.

Realignment of the Parties

Dairy Institute of California is not a handler; it is a trade association. Dairy Institute of California cannot be granted relief under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Nevertheless, Dairy Institute of California is not dismissed; instead, the parties are realigned to separate Dairy Institute of California from the four Petitioners to which relief could be granted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).[4] Dismissal of a trade association might be more appropriate in another case, and

[3] 7 U.S.C. § 608c(11)(C).

[4] See the ALJ's "Order Amending Case Caption" filed December 12, 2002.

realignment of the parties in this proceeding should not be regarded as precedent. Dairy Institute of California seeks the identical outcome for Petitioners that Petitioners seek for themselves and Dairy Institute of California has contributed to the very capable, professional presentation in support of the Petition.

Issue

Did the Market Administrator for the Arizona-Las Vegas Milk Marketing Order [hereinafter the Market Administrator] unlawfully deny Petitioners, on packaged fluid milk shipped from their California plants into Clark County, Nevada, an exemption from the Arizona-Las Vegas Milk Marketing Order's requirement to make payments to the producer-settlement fund and the administrative fund for each month of the years 2000 and 2001?

Findings of Fact

1. Effective January 1, 2000, Clark County, Nevada, was included in the Arizona-Las Vegas Milk Marketing Order (7 C.F.R. § 1131.2; 64 Fed. Reg. 70,867 (Dec. 17, 1999); Tr. 121-22).

2. Petitioners' plants are located in Los Angeles County, California, Orange County, California, and Riverside County, California (Tr. 9, 34).

3. Under the Arizona-Las Vegas Milk Marketing Order, each Petitioner is a partially regulated distributing plant that is subject to marketwide pooling of producer returns under the California Department of Food and Agriculture's milk classification and pricing program (7 C.F.R. § 1000.76; Tr. 27).

4. Each Petitioner is required to make payments to the Arizona-Las Vegas Milk Marketing Order producer-settlement fund (also called compensatory payments) on packaged fluid milk shipped into Clark County, Nevada, during only those months in which the California Department of Food and Agriculture's Class 1 price at the Petitioner's plant location is lower than the federal milk marketing

order Class I price at that same location (7 C.F.R. § 1000.76(c); Tr. 27, 29-30, 35-36).[5]

5. In months when the California Department of Food and Agriculture's Class 1 price at a Petitioner's plant location is higher than the federal milk marketing order Class I price at that same location, that Petitioner is not required to make payments to the producer-settlement fund.

6. The administrative fund monthly payments are calculated at $0.025 per hundredweight of milk.

7. During 2000 and 2001, Unified Western Grocers, Inc., located in Los Angeles County, California, paid the Market Administrator $19,087.85 for milk shipped into Clark County, Nevada. Unified Western Grocers, Inc.'s payments were comprised of $17,079.43 paid into the producer-settlement fund and $2,008.42 paid into the administrative fund. (PX 13; Tr. 109-13.)

8. During 2000 and 2001, Dean Foods Company of California, Inc., located in Orange County, California, paid the Market Administrator $192,842.36[6] for milk shipped into Clark County, Nevada. Dean Foods Company of California, Inc.'s payments were comprised of $172,083.13 paid into the producer-settlement fund and $20,759.23 paid into the administrative fund. (PX 12; Tr. 89-93.)

9. During 2000 and 2001, Safeway, Inc., located in Los Angeles County, California, paid the Market Administrator $106,303.22 for milk shipped into Clark County, Nevada. Safeway, Inc.'s payments were comprised of $96,039.22 paid into the producer-settlement fund and $10,264 paid into the administrative fund. (PX 16; Tr. 156-61.)

10. During 2000 and 2001, Swiss Dairy, located in Riverside County, California, paid the Market Administrator $51,126.14 for milk shipped into Clark County, Nevada. Swiss Dairy's payments

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[5]Federal milk marketing orders use the Roman numeral "I" when referring to Class I milk. The California Department of Food and Agriculture's classification system uses the Arabic numeral "1" when referring to Class 1 milk.

[6]The total is 2 cents less than that shown on PX 12 because of one penny discrepancy in the February 2000 total and one penny discrepancy in the October 2001 total.

were comprised of $44,633.73 paid into the producer-settlement fund and $6,492.41 paid into the administrative fund. (PX 9; Tr. 79-83.)

11. Making payments to the Arizona-Las Vegas Milk Marketing Order producer-settlement fund and administrative fund impacts each Petitioner's cost of purveying fluid milk to retail markets.

12. There are many variables in the cost of purveying fluid milk to retail markets, some of which are taken into account in federal milk marketing orders and some of which are not.

13. During 2000 and 2001, Anderson Dairy, the sole handler operating a plant in Clark County, Nevada, was exempt from the pricing requirements of the Arizona-Las Vegas Milk Marketing Order, including the requirement to make payments to the producer-settlement fund and the administrative fund, due to an Act of Congress (7 U.S.C. § 608c(11)(C); Tr. 38-41).

14. Anderson Dairy, the sole handler operating a plant in Clark County, Nevada, during 2000 and 2001, was, instead, regulated by the Nevada State Dairy Commission, as were handlers operating in some other parts of Nevada (Tr. 41).

15. Each Petitioner is in competition with Anderson Dairy in Clark County, Nevada, by virtue of selling in the same marketing area, although the extent to which that competition impacts any Petitioner is unclear (Tr. 144-45).

16. The Market Administrator's decision not to exempt Petitioners from the requirement to make payments to the producer-settlement fund and the administrative fund on milk shipped into Clark County, Nevada, was reasonable and rational and applied uniformly and consistently.

Discussion

Dr. William Schiek, an expert economist in milk marketing employed by Dairy Institute of California, testified that the minimum price Anderson Dairy is required to pay, set by the Nevada State Dairy Commission, is typically lower than the minimum price Petitioners are required to pay. In Dr. Schiek's opinion, that situation creates an unequal burden on Petitioners and constitutes an economic

barrier to Petitioners' shipment of Class I milk into Clark County, Nevada. (PX 1-PX 6; Tr. 41-50.)

Dr. Schiek acknowledged on cross-examination that his information about the "actual" price Anderson Dairy paid was based solely on the Nevada State Dairy Commission's minimum price requirement; that he had no knowledge whether Anderson Dairy paid higher than the minimum price, for example, paying an over-order premium (Tr. 60-61).

On cross-examination, Dr. Schiek acknowledged that, since January 2000, the payment obligations of partially regulated plants, such as those of Petitioners, are the same in all 11 federal milk marketing orders, not just the Arizona-Las Vegas Milk Marketing Order. Further, Dr. Schiek acknowledged there was a similar compensatory payment requirement under the prior federal milk marketing order that included Clark County, Nevada.[7] Dr. Schiek also acknowledged that he understood the need to protect the integrity of milk marketing orders by having a provision for compensatory payments. (Tr. 52-59.) Dr. Schiek expanded his explanation on re-direct examination, saying that the purpose of the entire compensatory payment system "is to essentially protect the ability of the federal government to maintain the market order and the way that would chiefly be undermined is if somebody with a -- could come in and undercut competitors who are subject to federal order rules by bringing milk in at a much, much lower cost or a lower price and disrupt competition in the marketplace." (Tr. 67.)

Dr. Schiek explained, given that Anderson Dairy is not required to pay the federal milk marketing order Class I price, there is an unequal playing field, and since the United States Department of Agriculture cannot regulate Anderson Dairy, the United States Department of Agriculture should not compel others to play on that field according to United States Department of Agriculture rules (Tr. 59).

Dr. Schiek explained on redirect examination that, on a level playing field, all handlers who are competing for Class I sales in the milk marketing area are subject to the same Class I pricing rules.

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[7]See the federal milk marketing order regulating the handling of milk in the Great Basin Marketing Area (7 C.F.R. pt. 1139 (1999)).

Since Anderson Dairy is exempt from the pricing provisions, the United States Department of Agriculture has no mechanism to enforce the pricing provisions on all the competitors who sell milk in Clark County, Nevada. Consequently, Dr. Schiek did not believe that enforcement of the compensatory payment system for shipments into Clark County, Nevada, from outside the marketing area served to level the playing field. (Tr. 67-68.)

Mr. William Alan Wise, an experienced milk market administrator who is expert in the field of milk marketing regulation, testified that the main purpose of milk marketing orders is to provide a framework for orderly marketing of milk products, principally through classified pricing and marketwide pooling. Classified pricing is pricing milk based on its ultimate use with different values for different uses. Normally, Class I milk, which is the subject of this proceeding, is higher-valued because it is fluid, more highly perishable. Mr. Wise explained that a partially regulated distributing plant (such as each of Petitioners' plants) is a plant with packaged fluid milk sales in the milk marketing area but not to an extent that it meets the qualifications to be fully regulated. (Tr. 122-23, 127-28.)

Mr. Wise was asked to explain the purpose of compensatory payments, such as Petitioners have pa*Id.* Mr. Wise testified, without compensatory payments, if inexpensive milk were sold in the milk marketing area, those sales would tend to reduce sales by fully regulated handlers, which would diminish the total value of the pool (producer-settlement fund), thereby reducing returns to producers (dairy farmers). He added, also, "it's a competitive equity issue with other fully regulated handlers." (Tr. 128.) Compensatory payments may be required whether or not the partially regulated distributing plant is in an area with a classified pricing and marketwide pooling milk classification system. Payments by a handler operating a partially regulated distributing plant are treated uniformly under every federal milk marketing order. (7 C.F.R. § 1000.76; Tr. 128-30.)

Mr. Wise explained that Arizona handlers, including three Maricopa County, Arizona, handlers, Safeway, Kroger, and Shamrock, which are in the same marketing area as Clark County, Nevada, and are also regulated under the Arizona-Las Vegas Milk

Marketing Order, ship milk into Clark County, Nevada. Also, handlers with plants located in Salt Lake City, Utah, which is in the Western Milk Marketing Area,[8] ship milk into Clark County, Nevada. These federal milk marketing order handlers pay the Class I price applicable at their plants regardless of where they sell their milk. The federal price at Maricopa County, Arizona, is higher than the federal price at Riverside County, California, and Los Angeles County, California. Thus, there would be potential economic disadvantage to the Maricopa County, Arizona, and Salt Lake City, Utah, handlers if Petitioners were somehow not required to pay compensatory payments when owed. (Tr. 131-32, 142-43.)

On cross-examination, Mr. Wise acknowledged that Petitioners face a unique situation in Clark County, Nevada, where a handler within a federal milk marketing area has been exempted from the pricing requirements of that federal milk marketing order. This exempt handler, Anderson Dairy, can be compared to handlers in milk marketing areas unregulated by a federal milk marketing order. (Tr. 138.) Anderson Dairy is regulated by the Nevada State Dairy Commission.

The Secretary of Agriculture is charged with implementing congressional policy to establish and maintain orderly marketing conditions for milk providing producers (dairy farmers) and consumers an orderly flow of milk to market, while avoiding unreasonable fluctuations in supplies and prices (7 U.S.C. § 602(4); Tr. 122-24). In order to implement congressional policy, the Secretary of Agriculture has established federal milk marketing orders which include pricing, payment, and pooling requirements. Compensatory payments help protect the integrity of the federal regulatory scheme. (Tr. 137-38.)

The Secretary of Agriculture cannot ensure a "level playing field" among competing handlers. There are too many constantly fluctuating variables, many of which are beyond the Secretary of Agriculture's control. Examples mentioned by Mr. Wise and Dr. Schiek that impact Petitioners and their competitors in Clark

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[8]See 7 C.F.R. pt. 1135.

County, Nevada, include the minimum prices established by the California Department of Food and Agriculture, the minimum prices established by the Nevada State Dairy Commission, and whether an over-order premium must be paid to obtain milk. California has a statewide pool; Nevada does not. Freight costs vary considerably, and there may be back haul issues and issues of other products being shipped with the packaged fluid milk. Fuel and other energy costs that must be met to keep packaged fluid milk fresh and to transport it are variable, and the peculiar circumstances of statewide and local marketing areas, including the Act of Congress that exempted Anderson Dairy from the pricing requirements of the Arizona-Las Vegas Milk Marketing Order -- these myriad factors all affect the costs of purveying fluid milk to retail markets.

Pricing differentials are sometimes unfavorable to Petitioners but are sometimes favorable (7 C.F.R. § 1000.52). In months when the California Department of Food and Agriculture's Class 1 price at a Petitioner's plant location is higher than the federal milk marketing order Class I price at that same location, that Petitioner pays no compensatory payments. Federal milk marketing order prices vary by location. As shown by Respondent's Brief, Petitioners benefit when they ship their packaged fluid milk into Arizona, because the federal milk marketing order price at Phoenix, Arizona, under the 1A pricing is $.25 higher than the federal milk marketing order price at Los Angeles County, California, and $.35 higher than the federal milk marketing order price at Riverside County, California. Hence, Petitioners can make the required compensatory payments and still have a price advantage over the competing federal milk marketing order handlers in Phoenix, Arizona. (7 C.F.R. § 1000.52; Tr. 131-32; Respondent's Brief at 12-13.) Respondent argues this price advantage, even during months that Petitioners are required to make compensatory payments, demonstrates that the compensatory payment provisions are not the cause of Petitioners' complaints, but rather, the federal milk marketing order prices under option 1A for pricing Class I milk at various locations (*i.e.*, Las Vegas, Nevada, as compared to Los Angeles County, California, or Riverside County,

California) ordered by Congress are the cause of Petitioners' complaints (7 U.S.C. § 7253(c) note; Respondent's Brief at 5-7).

The Secretary of Agriculture has not chosen to match the congressionally established exemption for a handler located at a plant in Clark County, Nevada, by extending a similar exemption to handlers whose plants are located elsewhere and who ship milk into Clark County, Nevada. The Secretary of Agriculture has chosen instead to apply the regulatory scheme uniformly, without exception beyond one mandate by Congress (7 U.S.C. § 608c(11)(C)). I find the Secretary of Agriculture's choice reasonable. The Arizona-Las Vegas Milk Marketing Order provides no exemption for handlers who ship milk into Clark County, Nevada, just as it provides no exemption for handlers who ship milk into any other part of the area covered by the Arizona-Las Vegas Milk Marketing Order.

Conclusions of Law

1. Petitioners have the burden of proof in any proceeding instituted pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Petitioners have failed to meet the burden of proof in this proceeding.

2. The Secretary of Agriculture is charged with implementing congressional policy to establish and maintain orderly marketing conditions for milk providing producers (dairy farmers) and consumers an orderly flow of milk to market, while avoiding unreasonable fluctuations in supplies and prices (7 U.S.C. § 602(4); Tr. 122-24).

3. Payments by handlers operating partially regulated distributing plants are treated uniformly under every federal milk marketing order (7 C.F.R. § 1000.76; Tr. 130).

4. There are many constantly fluctuating variables affecting the costs of purveying fluid milk to retail markets. The Secretary of Agriculture has discretionary authority to choose inaction on any variable, and inaction is entirely reasonable when presented with Anderson Dairy's exemption by Act of Congress.

5. The Secretary of Agriculture is required neither by section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)) nor by section

8c(16)(A) of the AMAA (7 U.S.C. § 608c(16)(A)) to grant the relief requested by Petitioners.

6. The Market Administrator's decision not to exempt Petitioners from the requirement that they make payments to the producer-settlement fund (also called compensatory payments) on fluid milk shipped into Clark County, Nevada, was in accordance with law, had a rational basis, promoted uniform application of milk marketing order pricing requirements, was applied consistently, was reasonable, was neither arbitrary nor capricious, and is entitled to deference.

7. The Market Administrator's decision not to exempt Petitioners from the requirement that they make payments to the administrative fund on fluid milk shipped into Clark County, Nevada, was in accordance with law, had a rational basis, promoted uniform application of milk marketing order pricing requirements, was applied consistently, was reasonable, was neither arbitrary nor capricious, and is entitled to deference.

8. Petitioners' producer-settlement fund payments and administrative fund payments may be refunded only when collection of the payments is not in accordance with law.

9. The collection of producer-settlement fund payments and administrative fund payments from Petitioners was in accordance with law; thus, Petitioners' request for refund of producer-settlement fund payments and administrative fund payments, and for interest on those payments, must be denied.

10. The collection of producer-settlement fund payments and administrative fund payments from Petitioners was in accordance with law; thus, Petitioners' request for declaratory and injunctive relief must be denied.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioners' and Dairy Institute of California's Appeal Petition

Petitioners and Dairy Institute of California raise five issues in their appeal petition. First, Petitioners and Dairy Institute of

California contend the ALJ erroneously concluded Respondent did not violate section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)). Petitioners and Dairy Institute of California assert the requirement that Petitioners make payments to the Arizona-Las Vegas Milk Marketing Order producer-settlement and administrative funds, while one local handler is exempt from making such payments, creates a trade barrier prohibited by section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)). (Petitioners' and Dairy Institute of California's Appeal Pet. at 4-5, 13-17.)

I find the ALJ correctly concluded Respondent did not violate section 8c(5)(G) the AMAA (7 U.S.C. § 608c(5)(G)). Section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)) provides that no marketing agreement or order applicable to milk or milk products in any marketing area shall prohibit or limit the marketing in that area of any milk or milk product produced in another area in the United States. Courts have held that section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)) is intended to prevent the Secretary of Agriculture from establishing trade barriers to the marketing in one area of milk or milk products produced in another area.[9] The Secretary of Agriculture did not establish a trade barrier to the marketing of Petitioners' milk in the area covered by the Arizona-Las Vegas Milk Marketing Order. The Secretary of Agriculture applies the regulatory scheme embodied in the Arizona-Las Vegas Milk Marketing Order uniformly without exception beyond one congressional mandate for Anderson Dairy. The Arizona-Las Vegas Milk Marketing Order provides no exemption for handlers who ship milk into Clark County, Nevada, or any other part of the area covered by the Arizona-Las Vegas Milk Marketing Order. Rather, Congress provided that the price of milk paid by a handler at a plant operating

[9] *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 379 (1964); *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76, 91-97 (1962); *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 19-20 (D.C. Cir. 1979); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 313 (3d Cir. 1968).

within Clark County, Nevada, shall not be subject to any marketing order issued under section 8c of the AMAA (7 U.S.C. § 608c).[10]

Moreover, even if I were to find the requirement that Petitioners make payments to the Arizona-Las Vegas Milk Marketing Order producer-settlement and administrative funds, while one local handler is exempt from making such payments, is a trade barrier established by the Secretary of Agriculture (which I do not so find), I would conclude that section 8c(11)(C) of the AMAA (7 U.S.C. § 608c(11)(C)) constitutes an exception to the prohibition on the establishment of trade barriers.

Further still, I find the purported unequal playing field was not created by the congressional exemption of Anderson Dairy in section 8c(11)(C) of the AMAA (7 U.S.C. § 608c(11)(C)). Instead, the unequal playing field was caused by the congressionally-mandated 1A pricing, which Petitioners and Dairy Institute of California do not challenge.

While Congress exempted Anderson Dairy from federal milk marketing order pricing requirements effective October 1, 1999, the actual federal milk marketing order reform provisions and the new federal milk marketing order prices did not become effective until January 2000, because of an injunction against the Secretary of Agriculture. During October, November, and December 1999, the extant 32 federal milk marketing orders and the extant federal milk marketing order prices remained in effect. (Tr. 121.) The extant federal milk marketing order price at Las Vegas, Nevada, was $.45 more than the extant federal milk marketing order price at Los Angeles County, California (PX 1 at cols. 2, 4).[11] Similarly, under the extant federal milk marketing order prices, the federal milk marketing order price at Las Vegas, Nevada, was $.35 more than the federal milk marketing order price at Riverside County, California (PX 3 at

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[10]7 U.S.C. § 608c(11)(C).

[11]While the total price may change each month, the difference in prices between these two locations never changes because the differentials are constant numbers (Tr. 23).

cols. 2, 4). Beginning January 1, 2000, when the new 1A pricing of the federal milk marketing order reform became effective, the federal milk marketing order price at Las Vegas, Nevada, was $.10 less than the federal milk marketing order price at Los Angeles County, California, and the same as the federal milk marketing order price at Riverside County, California (PX 1 at cols. 2, 4, PX 3 at cols. 2, 4). Hence, the changes to pricing mandated by Congress created an immediate new $.55 price differential for a Los Angeles County, California, handler distributing milk into Clark County, Nevada, versus a federally-regulated handler operating a plant in Clark County, Nevada. Similarly, there was an immediate $.35 price differential for milk distributed in Clark County, Nevada, by handlers operating plants located in Riverside County, California (PX 3 at cols. 2, 4).

These price differentials for Petitioners had nothing to do with the congressional exemption of Anderson Dairy from federal milk marketing order pricing requirements in October 1999.[12] The price disadvantages would have occurred even if Anderson Dairy had remained fully regulated under the extant federal milk marketing order. Similarly, these price differentials had nothing to do with the compensatory payment provisions, which did not change between the extant federal milk marketing order that included Clark County, Nevada,[13] and those of the Arizona-Las Vegas Milk Marketing Order. In the 3 months prior to federal milk marketing order reform, the federal milk marketing order price at Los Angeles County, California, was significantly below the California Department of Food and Agriculture price at Los Angeles County, California (PX 1 at cols. 3, 4); thus, virtually eliminating the possibility of imposed compensatory payments. The new congressionally-mandated federal milk marketing order 1A prices approximated the California Department of Food and Agriculture prices; thus increasing the likelihood of imposed compensatory payments on California handlers

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[12]7 U.S.C. § 608c(11)(C).

[13]See the federal milk marketing order regulating the handling of milk in the Great Basin Marketing Area (7 C.F.R. pt. 1139 (1999)).

distributing milk in Clark County, Nevada (PX 1 at cols. 3, 4 (after January 1, 2000)). The same analysis holds true for Riverside County, California, handlers distributing milk in Clark County, Nevada (PX 3 at cols. 3, 4). Petitioners and Dairy Institute of California concede Congress mandated the new 1A pricing, which they do not challenge (Tr. 59-60) even though 1A pricing brings possibly-imposed compensatory payments. Hence, the compensatory payments, and a large portion of the price differentials, are caused by matters outside of the scope of this proceeding.

Second, Petitioners and Dairy Institute of California contend the ALJ applied section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)) erroneously when she analyzed whether the Secretary of Agriculture could ensure that all milk marketing costs were the same for all competing handlers in a specific market; but, then, erroneously concluded, since the Secretary of Agriculture cannot control all milk marketing cost variables, the Secretary of Agriculture is excused from eliminating trade barriers which violate section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)) (Petitioners' and Dairy Institute of California's Appeal Pet. at 5, 17-19).

The ALJ states the Secretary of Agriculture cannot ensure a level playing field among competing handlers because of constantly fluctuating factors beyond the Secretary of Agriculture's control, that affect the cost of purveying milk to retail markets (Initial Decision and Order at 11-12). The ALJ states the Secretary of Agriculture may choose not to address the congressional exemption of Anderson Dairy from the pricing provisions of federal milk marketing orders, as follows:

Conclusions of Law

. . . .

5. There are many variables, in constant flux, that affect the costs of getting fluid milk onto retail shelves. The Secretary may, in her discretion, choose not to address with any action a variable such as Anderson Dairy's exemption by an Act of Congress, and it was reasonable for her to take no action.

Initial Decision and Order at 14.

However, the ALJ does not state, as Petitioners and Dairy Institute of California assert, that the Secretary of Agriculture's inability to control all factors affecting the cost of purveying milk to retail markets excuses the Secretary of Agriculture from eliminating trade barriers which violate section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)).

I agree with the ALJ that the Secretary of Agriculture cannot control all the factors which affect the cost of purveying fluid milk to retail markets. I also agree with Petitioners' and Dairy Institute of California's argument that the Secretary of Agriculture's inability to control all the factors that affect the cost of purveying fluid milk to retail markets does not somehow excuse the Secretary of Agriculture from eliminating trade barriers which violate section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)). However, for the reasons set forth in this Decision and Order, *supra*, I agree with the ALJ's conclusion that the Secretary of Agriculture's decision not to exempt Petitioners from the Arizona-Las Vegas Milk Marketing Order does not violate section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)).

Third, Petitioners and Dairy Institute of California contend the ALJ erroneously held Respondent did not violate section 8c(16)(A) of the AMAA (7 U.S.C. § 608c(16)(A)). Petitioners and Dairy Institute of California contend, under section 8c(16)(A) of the AMAA (7 U.S.C. § 608c(16)(A)) and 7 C.F.R. § 1000.26(b), the Secretary of Agriculture has a mandatory duty to terminate or suspend provisions of federal milk marketing orders that obstruct the declared purposes of the AMAA. Petitioners and Dairy Institute of California contend the Arizona-Las Vegas Milk Marketing Order obstructs the purposes of the AMAA because it creates a trade barrier to the shipment of milk into Clark County, Nevada, from California, in violation of section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)). (Petitioners' and Dairy Institute of California's Appeal Pet. at 5, 19-21.)

As an initial matter, for the reasons set forth in this Decision and Order, *supra*, I conclude that the Arizona-Las Vegas Milk Marketing Order does not violate section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)). Further, in October 1999, Congress specifically

amended section 8c(11)(C) of the AMAA (7 U.S.C. § 608c(11)(C)) to provide that the price of milk paid by a handler at a plant operating in Clark County, Nevada, shall not be subject to any federal milk marketing order. At the time of this amendment, all federal milk marketing orders included producer-settlement fund provisions. Nevertheless, while Congress exempted Anderson Dairy from the pricing provisions of federal milk marketing orders, Congress did not legislate any change or exception to the producer-settlement fund provisions in any federal milk marketing order. Congress' failure to legislate any change to federal milk marketing orders, while at the same time exempting Anderson Dairy from pricing provisions of federal milk marketing orders, establishes that producer-settlement fund provisions do not obstruct the declared purposes of the AMAA.

Moreover, the final rule for federal milk marketing order reform, which included producer-settlement fund provisions, was published on September 1, 1999, to be effective October 1, 1999 (64 Fed. Reg. 47,897-48,201). However, the United States District Court for the District of Columbia enjoined the implementation of the final rule. (Tr. 121.) Effective November 29, 1999, Congress enacted the Consolidated Appropriations Act[14] precluding any challenge to producer-settlement fund provisions in the final rule, other than on constitutional grounds, and requiring the final milk marketing order rule, as published in the Federal Register (with exceptions not relevant to this proceeding), to become effective and to be implemented by the Secretary of Agriculture beginning January 1, 2000.

The Consolidated Appropriations Act leaves the Secretary of Agriculture no discretion concerning the imposition of the producer-settlement requirement. The final rule includes Clark County, Nevada, in the definition of the "Arizona-Las Vegas marketing area"[15] and contains the producer-settlement fund

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[14]See 7 U.S.C. § 7253 note.

[15]See 7 C.F.R. § 1131.2.

provisions which Petitioners and Dairy Institute of California now challenge.[16]

Fourth, Petitioners and Dairy Institute of California contend the ALJ erroneously rejected their equal protection claim. Petitioners and Dairy Institute of California assert the Secretary of Agriculture's refusal to grant Petitioners the same exemption as mandated by Congress for Anderson Dairy violates the equal protection provisions of the Fifth Amendment to the Constitution of the United States (Petitioners' and Dairy Institute of California's Appeal Pet. at 6, 21-24).

Equal protection "ensures that all similarly situated persons are treated similarly under the law."[17] However, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[18] A regulatory classification "is accorded a strong presumption of validity" with the burden being "on the one attacking the legislative arrangement to negative every conceivable basis which might support it."[19]

Petitioner has not met this burden. The Secretary of Agriculture applies the regulatory scheme embodied in the Arizona-Las Vegas Milk Marketing Order uniformly, without exception beyond one congressionally-mandated exception for Anderson Dairy. The Arizona-Las Vegas Milk Marketing Order provides no exemption for handlers, such as Petitioners, who ship milk into Clark County, Nevada, or any other part of the area covered by the Arizona-Las Vegas Milk Marketing Order. Moreover, as discussed in this

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[16]See 7 C.F.R. §§ 1131.70-.71.

[17]*Vermont Assembly of Home Health Agencies, Inc. v. Shalala,* 18 F. Supp.2d 355, 363 (D. Vt. 1998).

[18]*FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993).

[19]*Heller v. Doe,* 509 U.S. 312, 319-20 (1993).

Decision and Order, *supra*, the Consolidated Appropriations Act leaves the Secretary of Agriculture no discretion concerning the imposition of the producer-settlement requirement. The final rule, which the Consolidated Appropriations Act requires the Secretary of Agriculture to implement, includes Clark County, Nevada, in the definition of the "Arizona-Las Vegas marketing area"[20] and contains the producer-settlement fund provisions which Petitioners and Dairy Institute of California now challenge.[21]

Congress provided that the price of milk paid by a handler at a plant operating within Clark County, Nevada, shall not be subject to any marketing order issued under section 8c of the AMAA (7 U.S.C. § 608c).[22] When reviewing a statute under the equal protection clause of the Fifth Amendment to the Constitution of the United States, the test to be applied is whether the statute is rationally related to a legitimate government interest. In making this determination, the court must apply a standard that is extremely deferential to the statutory classifications enacted by Congress.[23] The judge "may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations."[24] The party challenging the legislation "must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[25] "All that is needed for this court to uphold the . . . [classification] scheme is to find that there are 'plausible,' 'arguable,' or 'conceivable' reasons

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[20]See note 15.

[21]See note 16.

[22]7 U.S.C. § 608c(11)(C).

[23]*City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

[24]*City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976).

[25]*Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

which may have been the basis for the distinction."[26] Moreover, it is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision."[27] Hence, the statute passes constitutional muster under the equal protection clause, unless Petitioners and Dairy Institute of California prove there is no plausible reason Congress could have considered for excluding a plant operating in Clark County, Nevada, from the pricing requirements of federal milk marketing orders.

In the instant proceeding, the exemption in section 8c(11)(C) of the AMAA (7 U.S.C. § 608c(11)(C)) passes constitutional muster. Under the federal order reform package from the fall of 1999, the Class I federal milk marketing order price applicable to Clark County, Nevada, would rise significantly. Yet, the Secretary of Agriculture, at all times, chose to keep Clark County, Nevada, and any plants operating in Clark County, Nevada, in the new Arizona-Las Vegas Milk Marketing Order, regardless of whether the 1B milk pricing or the 1A milk pricing structure was adopted.

The House, Senate, and Conference Reports are silent as to the rationale for the exemption for Anderson Dairy, the only fluid milk processor in Clark County, Nevada (Tr. 133). Petitioners and Dairy Institute of California agree that Anderson Dairy procures its milk in Nevada and there is more milk available in Nevada than Anderson Dairy needs to supply to the Clark County, Nevada, market (Tr. 60-61). Since the ultimate purpose of federal milk marketing orders is the orderly marketing of milk to assure an adequate supply of fluid milk to market (7 U.S.C. § 602(4); Tr. 122), Congress might well have determined that no price increase was necessary for the plant operating in Clark County, Nevada, in order to continue to assure an adequate supply of fluid milk to Clark County, Nevada. Therefore, the exemption would be a rational solution clearly adequate to meet the applicable equal protection test. Hence, the exemption in section 8c(11)(C) of the AMAA (7 U.S.C. § 608c(11)(C)) does not violate

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[26] *Brandwein v. California Bd. of Osteopathic Examiners*, 708 F.2d 1466, 1472 (9th Cir. 1983).

[27] *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980).

the equal protection clause of the Fifth Amendment to the Constitution of the United States.

Fifth, Petitioners and Dairy Institute of California contend the ALJ erroneously denied standing to Dairy Institute of California (Petitioners' and Dairy Institute of California's Appeal Pet. at 6, 24-25).

The ALJ concluded, since Dairy Institute of California is not a handler, it cannot obtain relief under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Consequently, the ALJ realigned the parties to separate Dairy Institute of California from the four Petitioners to which relief could be granted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). (Initial Decision and Order at 2; Order Amending Case Caption.)

I agree with the ALJ. Dairy Institute of California is not a handler; it is a trade association representing dairy processors in California, including Petitioners (Tr. 6). Section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) states *any handler subject to an order* may file a petition with the Secretary of Agriculture for modification of, or exemption from, the order. Moreover, section 900.52(a) of the Rules of Practice (7 C.F.R. § 900.52(a)) states *any handler* desiring to complain that a marketing order is not in accordance with law may file a petition. Section 900.51(i) of the Rules of Practice (7 C.F.R. § 900.51(i)) defines the term *handler*, as follows:

> **§ 900.51 Definitions.**
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> . . . .
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> (i) The term *handler* means 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).

Neither the AMAA nor the Rules of Practice defines the term *subject to* or identifies the persons who are subject to an order and may therefore file a petition pursuant to section 8c(15)(A) of the

AMAA (7 U.S.C. § 608c(15)(A)). The term *subject to* has no well-defined meaning and the meaning of the term must be determined from the context in which it is used.[28] Courts have found the common and ordinary meaning of the term *subject to* in various contexts includes "bound by"; "controlled by"; "governed or affected by"; "obligated in law"; "placed under the authority of"; "regulated by"; and "under the control, power, or dominion of."[29]

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[28] *White v. Hopkins*, 51 F.2d 159, 163 (5th Cir. 1931); *United States v. North Pacific Ry. Co.*, 54 F. Supp. 843, 844 (D. Minn. 1944); *Del Rio Land, Inc. v. Haumont*, 514 P.2d 1003, 1005 (Az. 1973); *Bulger v. McCourt*, 138 N.W.2d 18, 22 (Neb. 1965).

[29] *Shell Oil Co. v. Manley Oil*, 124 F.2d 714, 716 (7th Cir.) (in a deed made "subject to" coal rights, the term "subject to" was used in its ordinary sense, i.e., "subordinate to, servient to, or limited by"), *cert. denied*, 316 U.S. 690 (1942); *Texaco v. Pigott*, 235 F. Supp. 458, 463 (S.D. Miss. 1964) (in a deed which states that the purchaser takes property "subject to" the oil and gas lease thereon, the words "subject to" mean "subservient to" or "limited by"); *In re Estate of Kraft*, 186 N.W.2d 628, 631-32 (Iowa 1971) (in a will that states "subject to the foregoing," the term "subject to" means "subordinate to"); *State v. Willburn*, 426 P.2d 626, 630 (Haw. 1967) (when construing the term "subject to" in a statute, it is well established that the term "subject to" may mean "limited by," "subordinate to," or "regulated by"); *Bulger v. McCourt*, 138 N.W.2d 18, 22 (Neb. 1965) (the term "subject to" is an expression of qualification and generally means "subordinate to, subservient to, or affected by"); *Turner v. Kansas City*, 191 S.W.2d 612, 615 (Mo. 1946) (the term "subject to state constitution and laws" means "placed under authority and dominion of such constitution and laws"); *Homan v. Employers Reinsurance Corp.*, 136 S.W.2d 289, 298 (Mo. 1940) (in a reinsurance contract, the term "subject to" all general and special terms and conditions of policies and endorsements means "bound, obligated, or controlled by"); *State v. Tilley*, 288 N.W. 521, 523 (Neb. 1939) (the term "subject to" in a law authorizing sums to be expended by the Attorney General "subject to" the approval of the state engineer, the term "subject to" means "dependent upon; limited by; and under the control, power, or dominion of"); *Van Duyn v. H.S. Chase & Co.*, 128 N.W. 300, 301 (Iowa 1910) (the term "subject to" in a deed means "under the control, power, or dominion of; subordinate to"); *Eslinger v. Pratt*, 46 P. 763, 766 (Utah 1896) (in a statute which reads "the chiefs shall have power, under such rules as the board may establish," the word "under" means "subject to"); *Lydig Construction, Inc. v. Rainier National Bank*, 697 P.2d 1019, 1022 (Ct. App. Wash. 1985) (the words "subject to"ordinarily denote "subordinate to, subservient to, or limited by"); *State Revenue Comm'n v. Columbus Bank & Trust Co.*, 178 S.E. 463, 464 (Ct. App. Ga. 1935) (the term "subject to" has been variously defined by courts and lexicographers as "made liable, subordinate, subservient, subject to the evils of, regulated by, brought under the control or action of, limited by, or affected by");

(continued...)

Dairy Institute of California is not bound by, controlled by, governed or affected by, obligated by, placed under the authority of, regulated by, or under the control, power, or dominion of the Arizona-Las Vegas Milk Marketing Order. Further, the record does not establish that Dairy Institute of California is a person to whom the Arizona-Las Vegas Milk Marketing Order is sought to be made applicable. Therefore, Dairy Institute of California is not a handler under the Arizona-Las Vegas Milk Marketing Order and does not have standing to file a petition under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).[30]

Respondent's Appeal Petition

Respondent raises one issue in his appeal petition. Respondent contends the ALJ erroneously concluded the Secretary of Agriculture has authority to grant the relief requested by Petitioners (Respondent's Appeal Pet. at 12).

The ALJ concluded the Secretary of Agriculture could grant the relief requested by Petitioners, as follows:

Conclusions of Law

. . . .

2. The Secretary of Agriculture has the authority to grant the relief requested by the Four Petitioners, despite Congress having enacted into positive law those portions of the federal

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[29](...continued)
Sanitary Appliance Co. v. French, 58 S.W.2d 159, 163 (Ct. Civ. App. Tx. 1933) (where a contract between principal and an agent prohibited the agent from selling competitor's product and the contract between the agent and subagent was "subject to" the terms of the contract between the principal and agent, the term "subject to" means "bound by").

[30]*In re Kent Cheese Co., Inc.*, 43 Agric. Dec. 34, 36-37 (1984); *In re M&R Tomato Distributors, Inc.*, 41 Agric. Dec. 33 (1982); *In re Sequoia Orange Co.*, 40 Agric. Dec. 1908 (1981). See generally, *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984); *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985).

order reform applicable to the Four Petitioners' claims. 7 U.S.C. § 608c(15)(A).

Initial Decision and Order at 13.

Section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) requires the Secretary of Agriculture to rule on petitions filed by handlers for exemption from or modification of an order. The Secretary of Agriculture may only grant relief requested by a handler when she finds that the order or any provision of the order or any obligation imposed in connection with the order is not in accordance with law.

In the instant proceeding, Congress exempted Anderson Dairy from the pricing provisions of federal milk marketing orders.[31] Further, effective November 29, 1999, Congress enacted the Consolidated Appropriations Act[32] requiring the final milk marketing order rule, as published in the Federal Register (with exceptions not relevant to this proceeding), to become effective and to be implemented by the Secretary of Agriculture beginning January 1, 2000.

The Consolidated Appropriations Act leaves the Secretary of Agriculture no discretion concerning the imposition of the producer-settlement requirement. The final rule includes Clark County, Nevada, in the definition of the "Arizona-Las Vegas marketing area"[33] and contains the producer-settlement fund provisions which Petitioners and Dairy Institute of California now challenge.[34] Therefore, the Secretary of Agriculture cannot lawfully grant the relief requested by Petitioners and Dairy Institute of California, and I omit from this Decision and Order the ALJ's conclusion of law that indicates otherwise.

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[31]7 U.S.C. § 608c(11)(C).

[32]7 U.S.C. § 7253 note.

[33]See note 15.

[34]See note 16.

Petitioners' and Dairy Institute of California's Request That the Judicial Officer Take Official Notice of April 19, 2002, Hearing Transcript

On March 27, 2003, Petitioners and Dairy Institute of California requested that I take official notice of the transcript of an April 19, 2002, hearing in a rulemaking proceeding involving proposed amendments to the Pacific Northwest Marketing Area (7 C.F.R. pt. 1124) and the Western Marketing Area (7 C.F.R. pt 1135) (Petitioners' Brief in Opposition to Respondents' Cross-Appeal at 6 n.5). Respondent did not file any response to Petitioners' and Dairy Institute of California's request. Therefore, pursuant to section 900.60(d)(7) of the Rules of Practice (7 C.F.R. § 900.60(d)(7)), I take official notice of the transcript of the April 19, 2002, hearing in a rulemaking proceeding involving proposed amendments to the Pacific Northwest Marketing Area (7 C.F.R. pt. 1124) and the Western Marketing Area (7 C.F.R. pt. 1135).

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

ORDER

1. Petitioners' and Dairy Institute of California's Petition is denied.

2. This Order shall become effective on the day after service of this Order on Petitioners and Dairy Institute of California.

RIGHT TO JUDICIAL REVIEW

Petitioners and Dairy Institute of California have the right to obtain review of this Order in any district court of the United States in which Petitioners and Dairy Institute of California are inhabitants or have their principal places of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of

the bill of complaint to the Secretary of Agriculture. 7 U.S.C. § 608c(15)(B). The date of entry of this Order is September 20, 2004.

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ANIMAL QUARANTINE ACT

DEPARTMENTAL DECISION

In re: EDDIE ROBINSON SQUIRES.
A.Q. Docket No. 02-0005.
Decision and Order.
Filed August 9, 2004.

A.Q. – Failure to file answer – Waiver of right to hearing – Default – Knowledge of law presumed – Constructive notice – Selective prosecution – Effect of repeal on existing liabilities – Current compliance as defense – Familial duties as defense – Ability to pay civil penalty – Civil penalty.

The Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's Default Decision finding that Respondent violated 21 U.S.C. §§ 111 and 120 (repealed 2002) and 9 C.F.R. pts. 71 and 78 (1999) when he moved cattle and swine interstate without required identification and documents and failed to keep records. The Judicial Officer rejected Respondent's contention that his lack of actual knowledge of 21 U.S.C. §§ 111 and 120 (repealed 2002) and 9 C.F.R. pts. 71 and 78 (1999) is a defense to the violations. The Judicial Officer stated Respondent is presumed to know the law and publication of the regulations in the Federal Register constructively notifies Respondent of the regulations. The Judicial Officer held that Respondent failed to prove that he was the target of selective enforcement. Citing the general savings statute (1 U.S.C. § 109), the Judicial Officer rejected Respondent's contention that no action could be brought against him for his 1997 and 1998 violations of 21 U.S.C. §§ 111 and 120 (repealed 2002) because those provisions of law were repealed by the Farm Security and Rural Investment Act of 2002 effective May 13, 2002. The Judicial Officer also stated that Respondent's cessation of activities resulting in his violations is not a defense to past violations. The Judicial Officer further rejected Respondent's contention that his substantial familial responsibilities are a defense to his violations. Finally, the Judicial Officer found that, while the inability to pay a civil penalty is a mitigating circumstance in animal quarantine cases, the Respondent has the burden of proving an inability to pay and Respondent failed to meet his burden of proof.

James A. Booth for Complainant.
Respondent, Pro se.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on March 21, 2002. Complainant instituted the proceeding under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111 (repealed 2002));[1] sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120 (repealed 2002));[2] regulations issued under the Act of February 2, 1903, and the Act of May 29, 1884 (9 C.F.R. pts. 71, 78 (1999)) [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].

Complainant alleges that on or about November 20, 1997, April 30, 1998, June 4, 1998, August 13, 1998, August 20, 1998, August 24, 1998, August 27, 1998, September 3, 1998, September 10, 1998, October 22, 1998, and November 12, 1998, Eddie Robinson Squires [hereinafter Respondent] moved livestock interstate in violation of section 2 of the Act of February 2, 1903 (21 U.S.C. § 111 (repealed 2002)), sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120 (repealed 2002)), and the Regulations (Compl. ¶¶ II-XXXVIII).

The Hearing Clerk served Respondent with the Complaint and a service letter on July 28, 2003.[3] Respondent 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)). The Hearing Clerk

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[1]At all times material to this proceeding, the Act of February 2, 1903, as amended [hereinafter the Act of February 2, 1903], was in effect; however, effective May 13, 2002, the Farm Security and Rural Investment Act of 2002 repealed section 2 of the Act of February 2, 1903 (Pub. L. No. 107-171, § 10418(a)(7), 116 Stat. 134, 507 (2002)).

[2]At all times material to this proceeding, the Act of May 29, 1884, as amended [hereinafter the Act of May 29, 1884], was in effect; however, effective May 13, 2002, the Farm Security and Rural Investment Act of 2002 repealed sections 4 and 5 of the Act of May 29, 1884 (Pub. L. No. 107-171, § 10418(a)(8), 116 Stat. 134, 508 (2002)).

[3]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 4770.

sent Respondent a letter dated August 19, 2003, informing him that an answer to the Complaint had not been received within the time required in the Rules of Practice.

On March 8, 2004, 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." The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order and a service letter on March 12, 2004.[4] On March 29, 2004, Respondent filed objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order.

On April 8, 2004, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a "Default Decision and Order" [hereinafter Initial Decision and Order]: (1) concluding that Respondent violated section 2 of the Act of February 2, 1903 (21 U.S.C. § 111 (repealed 2002)), sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120 (repealed 2002)), and the Regulations as alleged in the Complaint; and (2) assessing Respondent a $3,175 civil penalty (Initial Decision and Order at 8-9).

On May 6, 2004, Respondent appealed to the Judicial Officer. On June 1, 2004, Complainant filed "Complainant's Brief in Support of His Response to Respondent's Appeal to the Secretary from the Decision of the Administrative Law Judge and Complainant's Brief in Support of His Cross Appeal." On June 23, 2004, Respondent filed a response to Complainant's cross-appeal. On June 28, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order, except for the amount of the civil penalty the ALJ assessed against Respondent. Therefore, except for the amount of the civil penalty assessed against Respondent and

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[4]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 7764.

minor modifications, 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 conclusions of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

21 U.S.C.:

TITLE 21—FOOD AND DRUGS

. . . .

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

. . . .

SUBCHAPTER III—PREVENTION OF INTRODUCTION AND SPREAD OF CONTAGION

§ 111. Regulations to prevent contagious diseases

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

§ 120. Regulation of exportation and transportation of infected livestock and live poultry

In order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuropneumonia, foot-and-mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other livestock and/or live poultry, and to prevent the spread of such diseases, he is authorized and directed from time to time to establish such rules and regulations concerning the exportation and transportation of livestock and/or live poultry from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory, and into and through the District of Columbia and to foreign countries as he may deem necessary, and all such rules and regulations shall have the force of law.

§ 122. Offenses; penalty

Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

21 U.S.C. §§ 111, 120, 122 (repealed 2002).

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note.

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties–*. . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(xi) Civil penalty for a violation of the Act of February 2, 1903 (commonly known as the Cattle Contagious Disease Act), codified at 21 U.S.C. 122, has a maximum of $1,100.

7 C.F.R. § 3.91(a), (b)(2)(xi).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

. . . .

SUBCHAPTER C—INTERSTATE TRANSPORTATION OF ANIMALS (INCLUDING POULTRY) AND ANIMAL PRODUCTS

. . . .

PART 71—GENERAL PROVISIONS

. . . .

§ 71.18 Individual identification of certain cattle 2 years of age or over for movement in interstate commerce.

(a) No cattle 2 years of age or over, except steers and spayed heifers and cattle of any age which are being moved interstate during the course of normal ranching operations without change of ownership to another premises owned, leased, or rented by the same individual as provided in §§ 78.9(a)(3)(ii), 78.9(b)(3)(iv), and 78.9(c)(3)(iv) of this chapter, shall be moved in interstate commerce other than in accordance with the requirements of this section. Any movement in interstate commerce of any cattle shall also comply with the other applicable provisions in this part and other parts of this subchapter.

(1) When permitted under such other provisions, cattle subject to this section:

(i) May be moved in interstate commerce from any point to any destination, if such cattle, when moved in interstate commerce, are identified by a Department-approved backtag affixed a few inches from the midline and just behind the shoulder of the animal, or by such other means approved by the Administrator, upon request in specific cases, and if except as provided in paragraph (a)(5) of this section such cattle when moved interstate are accompanied by a statement signed by the owner or shipper of the cattle, or other document stating: (A) The point from which the animals are moved interstate; (B) the destination of the animals; (C) the number of animals covered by the statement, or other document; (D) the name and address of the owner at the time of the movement; (E) the name and address of the previous owner if ownership changed within four months prior to the movement of the cattle; (F) the name and address of the shipper; and (G) the identifying numbers of the backtags or other approved identification applied: *Provided*, That identification numbers are not required to be recorded on such statement or document for cattle moved from a stockyard posted under the provisions of the Packers and Stockyard Act, 1921, as amended (7 U.S.C. 181 *et seq.*),

directly to a recognized slaughtering establishment as defined in § 78.1 of this chapter[.]

. . . .

(3) Each person who ships, transports, or otherwise causes the cattle to be moved in interstate commerce is responsible for the identification of the cattle as required by this section.

§ 71.19 Identification of swine in interstate commerce.

(a)(1) Except as provided in paragraph (c) of this section, no swine may be sold, transported, received for transportation, or offered for sale or transportation, in interstate commerce, unless each swine is identified at whichever of the following comes first:

(i) The point of first commingling of the swine in interstate commerce with swine from any other source[.]

. . . .

(3) Each person who buys or sells, for his or her own account or as the agent of the buyer or seller, transports, receives for transportation, offers for sale or transportation, or otherwise handles swine in interstate commerce, is responsible for the identification of swine as provided by this section.

(b) Means of swine identification approved by the Administrator are:

(1) Official eartags, when used on any swine;

(2) United States Department of Agriculture backtags, when used on swine moving to slaughter;

(3) Official swine tattoos, when used on swine moving to slaughter, when the use of the official swine tattoo has been requested by a user or the State animal health official, and the Administrator authorizes its use in writing based on a determination that the tattoo will be retained and visible on the carcass of the swine after slaughter, so as to provide identification of the swine;

(4) Tattoos of at least 4-characters when used on swine moving to slaughter, except sows and boars as provided in § 78.33 of this chapter;

(5) Ear notching when used on any swine, if the ear notching has been recorded in the book of record of a pure-bred registry association;

(6) Tattoos on the ear or inner flank of any swine, if the tattoos have been recorded in the book of record of a swine registry association; and

(7) For slaughter swine and feeder swine, an eartag or tattoo bearing the premises identification number assigned by the State animal health official to the premises on which the swine originated.

. . . .

(e)(1) Each person who buys or sells, for his or her own account or as the agent of the buyer or seller, transports, receives for transportation, offers for sale or transportation, or otherwise handles swine in interstate commerce, must keep records relating to the transfer of ownership, shipment, or handling of the swine, such as yarding receipts, sale tickets, invoices, and waybills upon which is recorded:

(i) all serial numbers and other approved means of identification appearing on the swine that are necessary to identify it to the person from whom it was purchased or otherwise obtained; and

(ii) the street address, including city and state, or township, county, and state, and the telephone number, if available, of the person from whom the swine were purchased or otherwise obtained.

(2) Each person required to keep records under this paragraph must maintain the records at his/her or its place of business for at least 2 years after the person has sold or otherwise disposed of the swine to another person, and for such further period as the Administrator may require by written notice to the person, for the purposes of any investigation or action involving the swine identified in the records. The person shall make the records available for inspection and copying during ordinary business hours (8 a.m. to 5:30 p.m., Monday through Friday) by any authorized employee of the

United States Department of Agriculture, upon that employee's request and presentation of his or her official credentials.

PART 78—BRUCELLOSIS

. . . .

SUBPART B—RESTRICTIONS ON INTERSTATE MOVEMENT OF CATTLE BECAUSE OF BRUCELLOSIS

. . . .

§ 78.9 Cattle from herds not known to be affected.

Male cattle which are not test eligible and are from herds not known to be affected may be moved interstate without further restrictions. Female cattle which are not test eligible and are from herds not known to be affected may be moved interstate only in accordance with § 78.10 of this part and this section. Test-eligible cattle which are not brucellosis exposed and are from herds not known to be affected may be moved interstate only in accordance with § 78.10 and as follows:

(a) *Class Free States/areas.* Test-eligible cattle which originate in Class Free States or areas, are not brucellosis exposed, and are from a herd not known to be affected may be moved interstate from Class Free States or areas only as specified below:

. . . .

(3) *Movement other than in accordance with paragraphs (a)(1) and (a)(2) of this section.* Such cattle may be moved interstate other than in accordance with paragraphs (a)(1) and (2) of this section only if:

. . . .

(iii) Such cattle are moved interstate accompanied by a certificate which states, in addition to the items specified in § 78.1, that the cattle originated in a Class Free State or area.

SUBPART D—RESTRICTIONS ON INTERSTATE MOVEMENT OF SWINE BECAUSE OF BRUCELLOSIS

§ 78.30 General restrictions.

. . . .

(b) Each person who causes the movement of swine in interstate commerce is responsible for the identification of the swine as required by this subpart. No such person shall remove or tamper with or cause the removal of or tampering with an identification tattoo or approved swine identification tag required in this subpart except at the time of slaughter, or as may be authorized by the Administrator upon request in specific cases and under such conditions as the Administrator may impose to ensure continuing identification.

§ 78.31 Brucellosis reactor swine.

. . . .

(b) *Identification.* Brucellosis reactor swine shall be individually identified by attaching to the left ear a metal tag bearing a serial number and the inscription, "U.S. Reactor," or a metal tag bearing a serial number designated by the State animal health official for identifying brucellosis reactors.

(c) *Permit.* Brucellosis reactor swine shall be accompanied to destination by a permit.

. . . .

(e) *Segregation en route.* Brucellosis reactor swine shall not be moved interstate in any means of conveyance containing animals which are not brucellosis reactors unless all the animals in the shipment are for immediate slaughter, or unless the brucellosis reactor swine are kept separate from other animals by a partition securely affixed to the sides of the means of conveyance.

§ 78.33 Sows and boars.

(a) Sows and boars may be moved in interstate commerce for slaughter or for sale for slaughter if they are identified in accordance with § 71.19 of this chapter either:

(1) Before being moved in interstate commerce and before being mixed with swine from any other source; or

(2) After being moved in interstate commerce but before being mixed with swine from any other source only if they have been moved directly from their herd of origin to:

(i) A recognized slaughtering establishment; or

(ii) A stockyard, market agency, or dealer operating under the Packers and Stockyards Act, as amended (7 U.S.C. 181 *et seq.*).

(b) Sows and boars may be moved in interstate commerce for breeding only if they are identified in accordance with § 71.19 of this chapter before being moved in interstate commerce and before being mixed with swine from any other source, and the sows and boars either:

(1) Are from a validated brucellosis-free herd or a validated brucellosis-free State and are accompanied by a certificate that states, in addition to the items specified in § 78.1, that the swine originated in a validated brucellosis-free herd or a validated brucellosis-free State; or

(2) Have tested negative to an official test conducted within 30 days prior to interstate movement and are accompanied by a certificate that states, in addition to the items specified in § 78.1, the dates and results of the official tests.

(c) Sows and boars may be moved in interstate commerce for purposes other than slaughter or breeding without restriction under this subpart if they are identified in accordance with § 71.19 of this chapter.

9 C.F.R. § 71.18(a)(1)(i), (a)(3), .19(a)(1)(i), (a)(3), (b), (e)(1)-(2); 78.9(a)(3)(iii), .30(b), .31(b)-(c), (e), .33 (1999) (footnotes omitted).

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

Statement of the Case

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 in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as Findings of Fact. 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. Respondent is an individual with a mailing address of 600 Raintree Drive, Matthews, North Carolina 28105.

2. On or about November 20, 1997, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved approximately two cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

3. On or about November 20, 1997, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved approximately two test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

4. On or about November 20, 1997, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved approximately 11 swine interstate from Stallings, North Carolina, to York, South

Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

5. On or about November 20, 1997, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved approximately 11 swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

6. On or about November 20, 1997, Respondent, in violation of 9 C.F.R. § 71.19(e)(1) and (e)(2) (1999), moved approximately 11 swine interstate from Stallings, North Carolina, to York, South Carolina, for sale without keeping records related to such swine.

7. On or about November 20, 1997, Respondent, in violation of 9 C.F.R. § 78.31(b), (c), and (e) (1999), moved one brucellosis reactor swine interstate from Stallings, North Carolina, to York, South Carolina.

8. On or about April 30, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved approximately seven cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

9. On or about April 30, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved approximately seven test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

10. On or about June 4, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved approximately nine cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

11.On or about June 4, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved approximately nine test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

12.On or about June 4, 1998, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved approximately nine swine interstate from Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

13.On or about June 4, 1998, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved approximately nine swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

14.On or about August 13, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved approximately four cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

15.On or about August 13, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved approximately four test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

16.On or about August 13, 1998, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved approximately 11 swine interstate from Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

17.On or about August 13, 1998, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved approximately 11 swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before

being moved interstate and before being mixed with swine from any other source.

18.On or about August 20, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved approximately three cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

19.On or about August 20, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved approximately three test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

20.On or about August 20, 1998, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved approximately five swine interstate from Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

21.On or about August 20, 1998, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved approximately five swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

22.On or about August 24, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved approximately five cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

23.On or about August 24, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved approximately five test-eligible cattle interstate from Stallings, North Carolina, to York,

South Carolina, without such cattle being accompanied by a certificate, as required.

24.On or about August 24, 1998, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved approximately five swine interstate from Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

25.On or about August 24, 1998, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved approximately five swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

26.On or about August 27, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved at least two cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

27.On or about August 27, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved at least two test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

28.On or about September 3, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved at least three cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

29.On or about September 3, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved at least three test-eligible cattle interstate from Stallings, North Carolina, to York, South

Carolina, without such cattle being accompanied by a certificate, as required.

30. On or about September 10, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved at least two cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

31. On or about September 10, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved at least two test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

32. On or about September 10, 1998, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved at least five swine interstate from Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

33. On or about September 10, 1998, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved at least five swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

34. On or about October 22, 1998, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved at least five swine interstate from Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

35. On or about October 22, 1998, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved at least five swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

36.On or about October 22, 1998, Respondent, in violation of 9 C.F.R. § 71.19(e)(1) and (e)(2) (1999), moved approximately seven swine interstate from Stallings, North Carolina, to York, South Carolina, for sale without keeping records related to such swine.

37.On or about November 12, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved at least six cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

38.On or about November 12, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved at least six test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

Conclusions of Law

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

2. By reason of the Findings of Fact, during the approximately 1-year period from November 20, 1997, through November 12, 1998, Respondent violated section 2 of the Act of February 2, 1903 (21 U.S.C. § 111 (repealed 2002)); sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120 (repealed 2002)); and the Regulations.

3. As shown in the Findings of Fact, during the approximately 1-year period from November 20, 1997, through November 12, 1998, Respondent's violations occurred on approximately 11 days involving at least 43 cattle and at least 53 swine.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's Appeal Petition

Respondent raises six issues in his appeal petition. First, Respondent asserts "[he] did not know that [he] was doing anything wrong" (Respondent's Appeal Pet. at 1).

Section 2 of the Act of February 2, 1903 (21 U.S.C. § 111 (repealed 2002)), and sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120 (repealed 2002)), are published in the United States Statutes at Large, and Respondent is presumed to know the law.[5] Moreover, the Regulations are published in the *Federal Register*; thereby, constructively notifying Respondent of the requirements for the interstate movement of cattle and swine.[6] Therefore, Respondent's lack of actual knowledge that "[he] was doing [something] wrong" is not a defense to Respondent's violations of section 2 of the Act of February 2, 1903 (21 U.S.C. § 111 (repealed 2002)), sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120 (repealed 2002)), and the Regulations.

Second, Respondent contends "[a]ll of the other local farmers were doing the same thing" (Respondent's Appeal Pet. at 1). I infer Respondent contends that all of the other farmers in Stallings, North Carolina, were committing the same violations as Respondent and Complainant did not institute disciplinary administrative proceedings against these other violators.

Even if I found that all farmers in Stallings, North Carolina, committed the same violations as Respondent and disciplinary proceedings had not been instituted against them, I would not dismiss the Complaint. Agency officials have broad discretion in deciding

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[5]*See Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925); *Johnston v. Iowa Dep't of Human Servs.*, 932 F.2d 1247, 1249-50 (8th Cir. 1991).

[6]*See FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *United States v. Tijerina*, 407 F.2d 349, 354 n.12 (10th Cir.), *cert. denied*, 396 U.S. 867, and *cert. denied*, 396 U.S. 843 (1969); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

against whom to institute disciplinary proceedings. Even if Respondent could show that he was singled out for a disciplinary action, such selection would be lawful so long as the administrative determination to selectively enforce the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations was not arbitrary.[7] Respondent has no right to have the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations go unenforced against him, even if Respondent can demonstrate that "all of the other local farmers" violated the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations and no disciplinary proceedings have been instituted against them. The Act of February 2, 1903, the Act of May 29, 1884, and the Regulations do not need to be enforced everywhere to be enforced somewhere.

Sometimes enforcement of a valid law can be a means of violating constitutional rights by invidious discrimination and courts have, under the doctrine of selective enforcement, dismissed cases or taken other action if a defendant (Respondent in this proceeding) proves that the prosecutor (Complainant in this proceeding) singled out a respondent because of membership in a protected group or exercise of a constitutionally protected right.[8]

The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.[9] Respondent bears the burden of proving that he is the target of selective enforcement. One claiming selective enforcement must demonstrate that the enforcement policy had a discriminatory effect and that it was

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[7] *See FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251-52 (1967); *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413-14 (1958) (per curiam); *In re Robert Houriet*, 58 Agric. Dec. 306, 313 (1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 278-79 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1908 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *reprinted in* 58 Agric. Dec. 991, *cert. denied*, 528 U.S. 1021 (1999); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1385 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

[8] *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

[9] *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

motivated by a discriminatory purpose.[10] In order to prove a selective enforcement claim, Respondent must show one of two sets of circumstances. Respondent must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.[11] Respondent has not shown that he is a member of a protected group, that no disciplinary proceeding would be instituted against others in a similar situation that are not members of the protected group, or that the instant proceeding was initiated with discriminatory intent. In the alternative, Respondent must show: (1) he exercised a protected right; (2) Complainant's stake in the exercise of that protected right; (3) the unreasonableness of Complainant's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Respondent for exercise of the protected right.[12] Respondent has not shown, or even alleged, any of these circumstances.

Third, Respondent asserts he cannot be found to have violated the Act of February 2, 1903, or the Act of May 29, 1884, because Congress repealed those acts in 2002 (Respondent's Appeal Pet. at 1).

The Farm Security and Rural Investment Act of 2002 repealed section 2 of the Act of February 2, 1903, and sections 4 and 5 of the Act of May 29, 1884, effective May 13, 2002.[13] Respondent committed violations of the Act of February 2, 1903, and the Act of May 29, 1884, in 1997 and 1998, when both acts were still in effect.

The general savings statute provides, as follows:

§ 109. Repeal of statutes as affecting existing liabilities

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[10] *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982).

[11] *See Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

[12] *Id.*

[13] See notes 1 and 2.

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109.

The Farm Security and Rural Investment Act of 2002 does not expressly provide for release or extinguishment of liability for violations of the Act of February 2, 1903, or the Act of May 29, 1884. As a result, Respondent's acts prior to the effective date of the repeal supports a conclusion that he violated section 2 of the Act of February 2, 1903, and sections 4 and 5 of the Act of May 29, 1884.[14]

Fourth, Respondent asserts, after he was informed of his violations of the Regulations, he stopped selling livestock (Respondent's Appeal Pet. at 1).

As an initial matter, Respondent's violations were not premised upon his sale of livestock, but, instead, upon his interstate movement of livestock. Nonetheless, I infer Respondent asserts that he has ceased the activities which gave rise to his violations of the Regulations. Respondent's cessation of the activities resulting in his

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[14] *Pipefitters Local Union No. 562 v. United States,* 407 U.S. 385, 432-42 (1972); *United States v. Jackson*, 835 F.2d 1195, 1196 (7th Cir. 1988).

violations of the Regulations is not a defense to his past violations of the Regulations.[15]

Fifth, Respondent asserts 7 days a week from 6:00 a.m. to 11:00 p.m., he provides care to his daughter who has cerebral palsy and his mother who has lost a leg (Respondent's Appeal Pet. at 1-2).

Respondent's apparent dedication to his mother's and daughter's care is commendable, and I sympathize with the burden Respondent bears. However, even if I were to find that Respondent provides significant care to his disabled daughter and his disabled mother, Respondent's familial responsibilities are neither defenses to his violations of the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations, nor mitigating circumstances to be considered when determining the amount of the civil penalty to be assessed against Respondent.

Sixth, Respondent contends he cannot pay a civil penalty (Respondent's Appeal Pet. at 2).

A violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be assessed in animal quarantine cases and plant quarantine cases; however, the burden is on the respondents in animal quarantine cases and plant quarantine cases to prove, by producing documentation, the lack of ability to pay the civil penalty.[16]

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[15]*See In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997) (stating neither the respondent's disposal of animals nor the respondent's intention to terminate her license is a defense to the respondent's violations of the Animal Welfare Act, as amended, or the regulations and standards issued under the Animal Welfare Act, as amended); *In re Dora Hampton*, 56 Agric. Dec. 301, 320 (1997) (stating the respondent's intention to dispose of her animals is not a defense to the respondent's violations of the Animal Welfare Act, as amended, or the regulations and standards issued under the Animal Welfare Act, as amended).

[16]*In re Herminia Ruiz Cisneros*, 60 Agric. Dec. 610, 634-35 (2001); *In re Rafael Dominguez*, 60 Agric. Dec. 199, 208-09 (2001); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 197-98 (2001); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 912-13 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and
(continued...)

Respondent has failed to produce any documentation supporting his assertion that he cannot pay a civil penalty, and Respondent's undocumented assertion that he lacks the ability to pay the civil penalty falls far short of the proof necessary to establish an inability to pay the civil penalty.[17]

Complainant's Cross-Appeal

Complainant raises one issue in Complainant's Cross-Appeal. Complainant contends the ALJ's assessment of a $3,175 civil penalty against Respondent is error and Respondent should be assessed an $18,500 civil penalty.

Respondent is deemed by his failure to file an answer to have admitted that, during the period November 20, 1997, through November 12, 1998, he moved at least 43 cattle and at least 53 swine

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[16](...continued)
Remand Order).

[17]*In re Herminia Ruiz Cisneros*, 60 Agric. Dec. 610, 635 (2001) (holding the undocumented assertion by the respondent that she was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Rafael Dominguez*, 60 Agric. Dec. 199, 209 (2001) (holding the undocumented assertion by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 198 (2001) (holding undocumented assertions by the respondent that she was unable to pay the civil penalty fall far short of the proof necessary to establish inability to pay); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919-20 (1998) (holding undocumented assertions by the respondent that he was unable to pay the civil penalty fall far short of the proof necessary to establish inability to pay); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 913 (1998) (holding undocumented assertions by the respondent that he was unable to pay the civil penalty fall far short of the proof necessary to establish inability to pay); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).

interstate, in violation of the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations.

A sanction by an administrative agency must be warranted in law and justified in fact.[18] The Secretary of Agriculture has authority to assess a civil penalty not exceeding $1,100 for each violation of the Regulations.[19] I find Respondent committed at least 126 violations of the Regulations[20] and Respondent could be assessed a $138,600 civil

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[18]*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 La Fortuna Tienda*, 58 Agric. Dec. 833, 842 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 206 (1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec.291, 297 (1999); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1571 (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*, 526 U.S. 1098 (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).

[19]21 U.S.C. § 122 (repealed 2002); 28 U.S.C. § 2461 note; 7 C.F.R. § 3.91(b)(2)(xi).

[20]I find each animal that Respondent moved interstate without the required identification constitutes a separate violation of the Regulations. Respondent moved interstate at least 95 animals without required identification. I find each required
(continued...)

penalty. Therefore, assessment of an $18,500 civil penalty against Respondent for violations of the Regulations is warranted in law.

Moreover, the assessment of an $18,500 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):

> [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.

The Act of February 2, 1903, the Act of May 29, 1884, and the Regulations are designed to prevent the interstate spread of animal diseases. The success of the program designed to protect United States agriculture by preventing the interstate spread of animal diseases is dependent upon compliance with the Regulations by

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[20](...continued)
document Respondent failed to have accompany the interstate movement of cattle and swine constitutes a separate violation of the Regulations. Respondent failed to have 21 required documents accompany the interstate movement of cattle and swine. In addition: Respondent committed seven violations of 9 C.F.R. §§ 78.30(b) and 78.33 (1999) by moving swine interstate for slaughter or for sale for slaughter without the required identification; Respondent committed two violations of 9 C.F.R. § 71.19(e)(1) and (2) (1999) by failing to keep and maintain records related to the interstate movement of swine; and Respondent committed one violation of 9 C.F.R. § 78.31(e) (1999) by failing to segregate a brucellosis reactor swine moved interstate with animals that are not brucellosis reactor animals.

persons such as Respondent. Respondent's violations of the Regulations directly thwart the remedial purposes of the Act of February 2, 1903, the Act of May 29, 1884, 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 civil penalty of $1,100 for each of Respondent's violations. Instead, Complainant seeks a civil penalty of approximately $146.82 for each of Respondent's violations of the Regulations. However, Complainant states that an $18,500 civil penalty will serve the remedial purposes of the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations and deter Respondent and other similarly situated persons from future violations of the successor statute to the Act of February 2, 1903, and the Act of May 29, 1884,[21] and the Regulations.[22] Civil penalties assessed by the Secretary of Agriculture are not designed to punish persons who are found to have violated the Regulations. Instead, civil penalties are designed to deter future violations by persons found to have violated the Regulations and other potential violators.

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

ORDER

Respondent is assessed an $18,500 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

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[21]Animal Health Protection Act (7 U.S.C.A. §§ 8301-8320 (West Supp. 2004)).

[22]Despite the repeal of section 2 of the Act of February 2, 1903, and sections 4 and 5 of the Act of May 29, 1884, the Regulations remain in effect (7 U.S.C.A. § 8317 (West Supp. 2004)).

Minneapolis, Minnesota 55403

Payment of the civil penalty shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to A.Q. Docket No. 02-0005.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: ERIC JOHN DROGOSCH, AN INDIVIDUAL, d/b/a ANIMAL ADVENTURES AMERICA.
AWA Docket No. 04-0014.
Decision and Order.
Filed October 28, 2004.

AWA – Animal Welfare Act – Failure to file answer – Waiver of right to hearing – Default – Correction of violations – Cease and desist order – License revocation.

The Judicial Officer affirmed the Default Decision issued by Administrative Law Judge Victor W. Palmer: (1) finding Respondent violated the regulations and standards issued under the Animal Welfare Act (Regulations and Standards) as alleged in the Complaint; (2) ordering Respondent to cease and desist from violating the Regulations and Standards; and (3) revoking Respondent's Animal Welfare Act license. The Judicial Officer deemed Respondent's failure to file a timely answer an admission of the allegations in the Complaint and a waiver of hearing (7 C.F.R. §§ 1.136(c), .139). The Judicial Officer held Respondent's subsequent correction of his violations neither eliminated Respondent's violations of the Regulations and Standards nor constituted a meritorious basis for denying Complainant's Motion for Default Decision. The Judicial Officer agreed with Respondent's contention that revocation of his Animal Welfare Act license is a severe sanction, but the Judicial Officer held revocation was warranted in law and justified in fact. The Judicial Officer rejected Complainant's contention that Respondent's appeal was late-filed and that the Judicial Officer had no jurisdiction to hear Respondent's appeal.

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

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding

by filing a "Complaint" on March 15, 2004. Complainant instituted the 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].

Complainant alleges Eric John Drogosch, an individual, d/b/a Animal Adventures America [hereinafter Respondent], willfully violated the Regulations and Standards (Compl. ¶¶ 7-20).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on March 25, 2004.[1] Respondent failed to file an answer to 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)). The Hearing Clerk sent Respondent a letter dated April 20, 2004, informing Respondent of his failure to file a timely answer to the Complaint.

On April 30, 2004, 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" [hereinafter Motion for Default Decision] and a proposed "Decision and Order by Reason of Admission of Facts" [hereinafter Proposed Default Decision]. On May 6, 2004, the Hearing Clerk served Respondent with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[2] On May 27, 2004, Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[3]

On July 28, 2004, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Victor W.

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[1]United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0236.

[2]United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0489.

[3]Letter from Eric Drogosch to the Secretary, United States Department Agriculture, dated May 21, 2004.

Palmer [hereinafter the ALJ] issued a "Decision and Order by Reason of Admission of Facts" [hereinafter Initial Decision and Order]: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) revoking Respondent's Animal Welfare Act license (Initial Decision and Order at 6-10).

On October 8, 2004, Respondent appealed to, and requested oral argument before, the Judicial Officer. On October 19, 2004, Complainant filed "Complainant's Response to Respondent's Petition for Appeal." On October 21, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Respondent's request for oral argument before the Judicial Officer, which, pursuant to section 1.145(d) of the Rules of Practice (7 C.F.R. § 1.145(d)), the Judicial Officer may grant, refuse, or limit, is refused, because Complainant and Respondent have thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful review of the record, I agree with the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor substantive changes, the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

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—

. . . .

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

§ 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. The Secretary shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected. The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

§ 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. . . .

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 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(h), 2146(a), 2149(a)-(c), 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.

. . . .

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

PART 2—REGULATIONS

. . . .

SUBPART 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[.]

. . . .

(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[.]

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

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

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

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the

regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

SUBPART I—MISCELLANEOUS

. . . .

§ 2.126 Access and inspection of records and property.

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

(1) To enter its place of business;

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

(3) To make copies of the records;

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

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

§ 2.131 Handling of animals.

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

. . . .

(b)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

. . . .

(c)(1) Animals shall be exhibited only for periods of time and under conditions consistent with their good health and well-being.

PART 3—STANDARDS

. . . .

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

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

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

. . . .

§ 3.127 Facilities, outdoor.

. . . .

(b) *Shelter from inclement weather.* Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

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

(d) *Perimeter fence.* On or after May 17, 2000, all outdoor housing facilities (*i.e.*, facilities not entirely indoors) must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out. Fences less than 8 feet high for potentially dangerous animals, such as, but not limited to, large felines (*e.g.*, lions, tigers, leopards, cougars, etc.), bears, wolves, rhinoceros, and elephants, or less than 6 feet high for other animals must be approved in writing by the Administrator. The fence must be constructed so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility. It must be of sufficient distance from the outside of the primary enclosure to prevent physical contact between animals inside the enclosure and animals or persons outside the perimeter fence. Such fences less than 3 feet in distance from the primary enclosure must be approved in writing by the Administrator. A perimeter fence is not required:

(1) Where the outside walls of the primary enclosure are made of sturdy, durable material, which may include certain types of concrete, wood, plastic, metal, or glass, and are high enough and constructed in a manner that restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(2) Where the outdoor housing facility is protected by an effective natural barrier that restricts the animals to the facility and restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(3) Where appropriate alternative security measures are employed and the Administrator gives written approval; or

(4) For traveling facilities where appropriate alternative security measures are employed; or

(5) Where the outdoor housing facility houses only farm animals, such as, but not limited to, cows, sheep, goats, pigs, horses (for regulated purposes), or donkeys, and the facility has in place effective and customary containment and security measures.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 3.132 Employees.

A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

9 C.F.R. §§ 1.1; 2.40(a)(1), (b)(1), .75(b)(1), .100(a), .126(a), .131(a)(1), (b)(1), (c)(1); 3.125(a), .127(b)-(d), .132.

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

Statement of Case

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 prescribed time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation in the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to

section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. 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. Respondent Eric John Drogosch is an individual, doing business as Animal Adventures America, whose business mailing address is 8199 CR 310, Terrell, Texas 75160.

2. At all times material to this proceeding, Respondent was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations. Between November 2001 and November 9, 2003, Respondent held Animal Welfare Act license number 74-C-0536, which Animal Welfare Act license was cancelled and had not been reinstated as of the issuance of the Complaint.

3. Respondent has a small business, with approximately 10 exotic animals, including tigers, leopards, and lions. The gravity of the violations alleged in the Complaint is great. These violations include repeated instances in which Respondent: (a) failed to allow inspectors access to his animals, premises, and records; (b) failed to provide minimally adequate housing to animals; and (c) failed to handle tigers carefully and in compliance with the Regulations and Standards (which failure resulted in injuries to a child). Respondent has continually failed to comply with the Regulations and Standards, after having been repeatedly advised of deficiencies. Respondent was previously cited in June 2001 for exhibiting animals without a valid Animal Welfare Act license.

4. On September 30, 2003, Respondent failed to employ a full-time attending veterinarian or a part-time attending veterinarian under formal arrangements that include a written program of veterinary care.

5. On September 30, 2003, Respondent failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, including adequate enclosures and a secure perimeter fence.

6. On September 30, 2003, Respondent failed to make, keep, and maintain records that fully and correctly disclose information concerning animals in Respondent's possession or under Respondent's control or disposed of by Respondent.

7. On February 2, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance.

8. On August 15, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance.

9. On August 16, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance.

10. On August 28, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance.

11. On June 8, 2002, Respondent failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm.

12. On June 8, 2002, Respondent failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, Respondent exhibited a tiger to four children without any barrier or distance.

13. On June 8, 2002, Respondent failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the

animals and the general viewing public so as to assure the safety of animals and the public. Specifically, Respondent exhibited a tiger to a child without any barrier or distance.

14. On June 8, 2002, Respondent exhibited animals under conditions that were inconsistent with the animals' well-being. Specifically, Respondent exhibited a tiger cub to the public outside of any enclosures and allowed the public to excessively handle the young animal.

15. Respondent failed to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142), as follows:

a. On September 30, 2003, Respondent failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, Respondent failed to construct a perimeter fence around the enclosure.

b. On August 28, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair damaged metal siding in the lion enclosure.

c. On August 30, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair damaged metal siding in the lion enclosure.

d. On August 28 and August 30, 2002, Respondent failed to provide four adult tigers housed outdoors with appropriate natural or artificial shelter.

e. On August 28 and August 30, 2002, Respondent failed to have a sufficient number of adequately trained employees to carry out the level of husbandry practices and care required by the Regulations and Standards.

f. On February 12, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them.

Specifically, Respondent failed to repair and/or replace the siding and roof of the tiger enclosure so that it contained the four animals securely and safely.

g. On February 12, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair and/or replace the door and bottom of the lion enclosure.

h. On February 12, 2002, Respondent failed to provide a suitable method to rapidly eliminate excess water. Specifically, Respondent failed to eliminate standing water in the tiger enclosure.

Conclusions of Law

1 . On September 30, 2003, Respondent failed to employ a full-time attending veterinarian or a part-time attending veterinarian under formal arrangements that include a written program of veterinary care, in willful violation of section 2.40(a)(1) of the Regulations and Standards (9 C.F.R. § 2.40(a)(1)).

2. On September 30, 2003, Respondent failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, including adequate enclosures and a secure perimeter fence, in willful violation of section 2.40(b)(1) of the Regulations and Standards (9 C.F.R. § 2.40(b)(1)).

3. On September 30, 2003, Respondent failed to make, keep, and maintain records that fully and correctly disclose information concerning animals in Respondent's possession or under Respondent's control or disposed of by Respondent, in willful violation of section 2.75(b)(1) of the Regulations and Standards (9 C.F.R. § 2.75(b)(1)).

4. On February 2, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance, in willful violation of section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)).

5. On August 15, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance, in willful violation of section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)).

6. On August 16, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance, in willful violation of section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)).

7. On August 28, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance, in willful violation of section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)).

8. On June 8, 2002, Respondent failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of section 2.131(a)(1) of the Regulations and Standards (9 C.F.R. § 2.131(a)(1)).

9. On June 8, 2002, Respondent failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, Respondent exhibited a tiger to four children without any barrier or distance, in willful violation of section 2.131(b)(1) of the Regulations and Standards (9 C.F.R. § 2.131(b)(1)).

10. On June 8, 2002, Respondent failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, Respondent exhibited a tiger to a child without any barrier or distance, in willful violation of section

2.131(b)(1) of the Regulations and Standards (9 C.F.R. § 2.131(b)(1)).

11.On June 8, 2002, Respondent exhibited animals under conditions that were inconsistent with the animals' well-being. Specifically, Respondent exhibited a tiger cub to the public outside of any enclosures and allowed the public to excessively handle the young animal, in willful violation of section 2.131(c)(1) of the Regulations and Standards (9 C.F.R. § 2.131(c)(1)).

12.Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142), by failing to comply with the general facilities standards (9 C.F.R. § 3.125), as follows:

a. On August 28, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair damaged metal siding in the lion enclosure, in willful violation of section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

b. On August 30, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair damaged metal siding in the lion enclosure, in willful violation of section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

c. On February 12, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair and/or replace the siding and roof of the tiger enclosure so that it contained the four animals securely and safely, in willful violation of section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

d. On February 12, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair and/or replace the door and

bottom of the lion enclosure, in willful violation of section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

13.Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142), by failing to comply with the outdoor facilities standards (9 C.F.R. § 3.127), as follows:

a. On August 28 and August 30, 2002, Respondent failed to provide four adult tigers housed outdoors with appropriate natural or artificial shelter, in willful violation of section 3.127(b) of the Regulations and Standards (9 C.F.R. § 3.127(b)).

b. On February 12, 2002, Respondent failed to provide a suitable method to rapidly eliminate excess water. Specifically, Respondent failed to eliminate standing water in the tiger enclosure, in willful violation of section 3.127(c) of the Regulations and Standards (9 C.F.R. § 3.127(c)).

c. On September 30, 2003, Respondent failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, Respondent failed to construct a perimeter fence around the enclosure, in willful violation of section 3.127(d) of the Regulations and Standards (9 C.F.R. § 3.127(d)).

14.Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142), by failing to comply with the animal health and husbandry standards (9 C.F.R. § 3.132), as follows:

a. On August 28 and August 30, 2002, Respondent failed to have a sufficient number of adequately trained employees to carry out the level of husbandry practices and care required by the Regulations and Standards, in willful violation of section 3.132 of the Regulations and Standards (9 C.F.R. § 3.132).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's Appeal Petition

Respondent raises two issues in his Petition of Appeal [hereinafter Appeal Petition]. First, Respondent asserts the ALJ's findings of fact relate to a facility that Respondent previously owned, and Respondent currently owns a facility which complies with the Animal Welfare Act and the Regulations and Standards (Appeal Pet. at first and second unnumbered pages).

Respondent, by his failure to file a timely answer to the Complaint, is deemed to have admitted the violations of the Regulations and Standards alleged in the Complaint.[4] Respondent's subsequent correction of those violations neither eliminates Respondent's violations of the Regulations and Standards[5] nor constitutes a meritorious basis for denying Complainant's Motion for Default Decision.[6] Therefore, even if I found that, subsequent to Respondent's violations of the Regulations and Standards,

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[4]7 C.F.R. § 1.136(c).

[5]*In re Dennis Hill*, 63 Agric. Dec. ___, slip op. at 70-71 (Oct. 8, 2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (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*, 173 F.3d 422 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *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*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206) (Table), printed in 58 Agric. Dec. 85 (1999); *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)).

[6]*In re Dennis Hill*, 63 Agric. Dec. ___, slip op. at 70-71 (Oct. 8, 2004).

Respondent corrected the violations, I would not find the ALJ's Initial Decision and Order error.

Second, Respondent contends the revocation of his Animal Welfare Act license is a severe sanction (Appeal Pet. at second unnumbered page).

I agree with Respondent's contention that revocation of his Animal Welfare Act license is a severe sanction. However, I do not find the ALJ's revocation of Respondent's Animal Welfare Act license error.

A sanction by an administrative agency must be warranted in law and justified in fact.[7] The Animal Welfare Act explicitly authorizes

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[7]*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 Jeanne and Steve Charter*, 59 Agric. Dec. 650 (2000), *aff'd*, 230 F. Supp.2d 1121 (D. Mont. 2002), *appeal docketed*, No. 02-36140 (9th Cir. Dec. 16, 2002); *In re La Fortuna Tienda*, 58 Agric. Dec. 833, 842 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 186 (1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 291, 297 (1999); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1571 (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*, 526 U.S. 1098 (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).

(continued...)

the Secretary of Agriculture to revoke an exhibitor's Animal Welfare Act license if the exhibitor has violated or is violating the Animal Welfare Act.[8] Respondent was licensed as an exhibitor at the time he violated the Regulations and Standards. Therefore, the ALJ's revocation of Respondent's Animal Welfare Act license is warranted in law.[9]

Moreover, the ALJ's revocation of Respondent's Animal Welfare Act license is justified by the facts. Respondent is deemed to have admitted committing approximately 21 willful violations of the Regulations and Standards. Many of Respondent's violations are serious violations that could have affected the health and well-being of Respondent's animals. Moreover, an exhibitor's failure to allow Animal and Plant Health Inspection Service officials to enter his place of business to conduct inspections, in willful violation of section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)), is extremely serious because it thwarts the Secretary of Agriculture's ability to monitor the exhibitor's compliance with the Animal Welfare Act and the Regulations and Standards and severely undermines the Secretary of Agriculture's ability to enforce the Animal Welfare Act and the Regulations and Standards.

The United States Department of Agriculture's 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

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[7](...continued)

[8]7 U.S.C. § 2149(a)).

[9]The Secretary of Agriculture also has authority under section 21 of the Animal Welfare Act (7 U.S.C. § 2151) to disqualify a person from becoming licensed. I discuss my reasons for affirming the ALJ's revocation of Respondent's Animal Welfare Act license, rather than imposing a disqualification, in this Decision and Order, *infra*.

> 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.*, 50 Agric. Dec. at 497.

Complainant seeks revocation of Respondent's Animal Welfare Act license and a cease and desist order (Complainant's Motion for Default Decision at 1). After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the remedial purposes of the Animal Welfare Act and the recommendations of the administrative officials, I conclude that a cease and desist order and revocation of Respondent's Animal Welfare Act license are appropriate and necessary to ensure Respondent's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

Complainant's Response to Respondent's Appeal Petition

Complainant contends Respondent's Appeal Petition was late-filed, the ALJ's Initial Decision and Order became final on October 8, 2004, and the Judicial Officer has no jurisdiction to hear Respondent's appeal (Complainant's Response to Respondent's Petition for Appeal at 2-3).

The Hearing Clerk served Respondent with the ALJ's Initial Decision and Order on August 10, 2004.[10] Respondent had 30 days

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[10]United States Postal Service Domestic Return Receipt for Article Number 7003 2260 0005 5721 4448.

(continued...)

after the date of service within which to file an appeal petition with the Hearing Clerk.[11] On September 3, 2004, before time for filing his appeal petition had expired, Respondent requested an extension of time within which to file an appeal petition.[12] On September 8, 2004, I extended the time for filing Respondent's appeal petition to October 8, 2004.[13] On October 8, 2004, at 4:29 p.m., Respondent filed a timely appeal petition.[14] Therefore, I reject Complainant's contentions that Respondent's Appeal Petition was late-filed, that the ALJ's Initial Decision and Order became final on October 8, 2004, and that I have no jurisdiction to hear Respondent's appeal.

Revocation of Respondent's Animal Welfare Act License

Complainant alleged, and Respondent is deemed to have admitted, that he held Animal Welfare Act license number 74-C-0536 between November 2001 and November 9, 2003. Animal Welfare Act license number 74-C-0536 was "cancelled" and, as of the date Complainant issued the Complaint, March 12, 2004, Animal Welfare Act license number 74-C-0536 had not been "reinstated." (Compl. ¶ 1.) Based on the limited record before me, I infer that Animal Welfare Act license number 74-C-0536 was valid during the period that Respondent violated the Regulations and Standards, that sometime after November 8, 2003, Respondent's Animal Welfare Act license number 74-C-0536 was cancelled but that it could have been reinstated, and that, at the time the ALJ issued the Initial Decision and Order on July 28, 2004, Animal Welfare Act license number 74-C-0536 was not val*Id.*

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[10](...continued)

[11]7 C.F.R. § 1.145(a).

[12]Letter from Eric John Drogosch to Joyce Dawson, Hearing Clerk, filed September 3, 2004.

[13]Informal Order filed by the Judicial Officer on September 8, 2004.

[14]Respondent's Appeal Petition at first unnumbered page.

In *In re David M. Zimmerman,* 57 Agric. Dec. 1038, 1067-71 (1998), I held the appropriate sanction to be imposed against a former licensee whose Animal Welfare Act license would be revoked for a violation of the Regulations and Standards but for the violator's being unlicenced at the time the sanction is imposed, is disqualification from becoming licensed. I based this holding on a narrow reading of section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)) and the common meaning of the words *revoke* and *revocation*, which I fully explicated in *Zimmerman*.[15] I overrule this holding in *Zimmerman* for two reasons. First, the licensing provisions of the Regulations and Standards[16] explicitly provide for revocation of an Animal Welfare Act license, but I cannot locate any reference to disqualification of a current or former licensee from becoming licensed. Second, despite the common definitions of *revoke* and *revocation*,[17] numerous courts have upheld revocation of licenses that are not valid at the time of revocation.[18] Therefore, I conclude, if a person holds a valid Animal Welfare Act license at the time he or she violates the Animal Welfare Act or the Regulations and Standards, the Secretary of Agriculture is

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[15]*See In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1068-71 (1998).

[16]See 9 C.F.R. §§ 2.1-.12.

[17]*See In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1069 n.25 (1998).

[18]*Patel v. Kansas State Bd. of Healing Arts*, 920 P.2d 477, 480 (Kan. Ct. App. 1996) (stating cancellation of a license during the pendency of a disciplinary proceeding did not divest the board of jurisdiction to revoke the cancelled license); *Colorado State Bd. of Medical Examiners v. Boyle*, 924 P.2d 1113, 1116 (Colo. Ct. App. 1996) (holding the board had jurisdiction to revoke a lapsed license to practice medicine), *cert. denied*, 520 U.S. 1104 (1997); *Nicoletti v. State Bd. of Vehicle Manufacturers, Dealers and Salespersons*, 706 A.2d 891, 894 (Pa. Commw. Ct. 1998) (holding, since the licensee maintained a property interest in a lapsed salesperson's license and a suspended dealer's license, the board had jurisdiction to revoke the lapsed salesperson's license and the suspended dealer's license); *Marmorstein v. New York State Liquor Authority*, 144 N.Y.S.2d 275, 277-78 (N.Y. Sup. Ct. 1955) (stating the fact that a license had already been surrendered did not bar the board from revoking the license after a hearing); *American Employers' Ins. Co. v. Radzeweluk*, 4 N.Y.S.2d 74, 75, (N.Y. Sup. Ct. 1938) (stating the fact that a license had already been surrendered did not exonerate defendants from a previous violation nor prevent the subsequent revocation of the license because of such previous violation).

authorized by section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)) to revoke that violator's Animal Welfare Act license even if the violator's Animal Welfare Act license is cancelled prior to revocation.

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 Regulations and Standards.

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

2. Respondent's Animal Welfare Act license (Animal Welfare Act license number 74-C-0536) is revoked.

The Animal Welfare Act license revocation provisions of this Order shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of the Order. Respondent must seek judicial review within 60 days after entry of the Order.[19] The date of entry of the Order is October 28, 2004.

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[19] 7 U.S.C. § 2149(c).

FEDERAL CROP INSURANCE ACT

COURT DECISION

HARLAN ANDERSON v. USDA.
Case No. 04-2971 ADM/AJB.
Filed November 23, 2004.

(Cite as: 2004 U.S. Dist. LEXIS 23623).

FCIA – NAD -- APA – Quality loss payment – Final determination, lack of.

Farmer (Anderson) sought quality loss payments (QLP) on a partially failed alpha crop. A decision reached by the National Appeals Division (NAD) determined that the farmer was due compensation under the Federal crop insurance program (denying the Farm Service Agency's interpretation of quality loss measurement techniques), but did not receive evidence on the total quantity of the loss. The court held that under APA, the agency had not rendered a final determination as to the quantity and remanded the matter to the agency as to the quantity issue. Citing *Kleisser v. US* ["]Agencies need to have the initial opportunity to resolve contested issues to: (1) avoid premature interruption of the agency process, (2) allow the agency to "develop the necessary factual backgrounds, (3) give the agency the first chance to exercise its discretion, (4) properly defer to the agency's expertise, (5) provide the agency with an opportunity to discover and correct its own errors, and (6) deter the deliberate flouting of administrative processes . . .["]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JUDGE: ANN D. MONTGOMERY, U.S. DISTRICT JUDGE.
MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On November 10, 2004, oral argument before the undersigned United States District Judge was heard on the Motion for Summary Judgment [Docket No. 10] of the Farm Service Agency of the United States Department of Agriculture ("FSA" or "Defendant"). In his Complaint [Docket No. 1], Harlan Anderson ("Anderson" or "Plaintiff") alleges Defendant failed to comply with a National Appeals Division (NAD) Hearing Officer's decision that Plaintiff is

entitled to $ 61,948.82 in Quality Loss Payments (QLP)[*] for his 2002 alfalfa crop. Defendant contends Plaintiff's complaint should be dismissed on summary judgment for lack of jurisdiction and failure to exhaust administrative remedies. Alternatively, Defendant argues the matter should be remanded to the NAD to determine the amount owed to Plaintiff. For the reasons set forth below, Defendant's motion is granted in part and denied in part. This matter is remanded to the NAD Hearing Officer to resolve the disputed payment yield and payment rate issues and to determine the amount of QLP payments to which Plaintiff is entitled.

II. BACKGROUND[1]

The Wright County Farm Service Agency Committee ("COC") first considered Anderson's application for QLP payments for his 2002 alfalfa crop on August 15, 2003. Administrative Record ("Record") at 13 [Docket No. 13]. In an August 29, 2003 letter, the COC denied QLP payments based on a finding that "the [Relative Feed Value (RFV)] tests ... were not load specific and therefore could not be tied to specific quality." *Id.* at 50. Anderson requested a review of this decision but the COC advised his claim was not reviewable. *Id.* at 14.

In a September 4, 2003 letter, Anderson wrote the NAD requesting a ruling on the appealability of his claim. *Id.* The NAD responded by letter dated October 23, 2003 granting Anderson a right to appeal. *Id.* at 78. The letter recited that Anderson was protesting the Agency's method of determining quality, the per ton assigned losses and the yield determination, and confirmed that the FSA's decision to deny him QLP benefits was appealable. *Id.*

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[*]Cases involving appeals from farm service agency determinations of quality loss payments under the Federal Crop Insurance Program are not within the jurisdiction of the OALJ, however the court's analysis of determination as to what portion of the agency's determination is not ripe is relevant - Editor.

[1]For purposes of the instant Motion, the facts are viewed in the light most favorable to Plaintiff, the nonmovant. See Ludwig v. Anderson, 54 F.3d 465, 470 (8th Cir. 1995).

On October 28, 2003, Anderson filed a hearing request form appealing the FSA's August 29, 2003 decision. *Id.* at 46. In preparation for the hearing, each party stated its position on the contested issue of whether Anderson was entitled to QLP payments. The FSA maintained that Anderson was precluded from receiving QLP payments because he failed to "submit approved lab analysis showing quality factors specific for the affected quality." *Id.* at 3. Conversely, Anderson claimed the USDA information sheets indicate he was to use the crop insurance price election and need only test a portion of his crop, rather than each individual bail. *Id.* at 74.

In a January 6, 2004 decision, the NAD Hearing Officer determined "that FSA was in error in its method of assessing the scope of Appellant's 2002 Alfalfa loss" and held that Anderson was entitled to QLP benefits. *Id.* at 58. The Hearing Officer found the FSA denied QLP benefits based on the erroneous belief that RFV testing results must be load specific so they could be tied to a specific quantity of alfalfa. *Id.* at 60-61. Although this procedure is required to determine QLP payments for grain, the NAD Hearing Officer noted that the quality of alfalfa may be determined by testing the aggregate cuttings of a crop rather than individual loads. *Id.* at 61. In concluding, the Hearing Officer found: "The Agency's determination is erroneous to the extent that it is not based upon all of the pertinent information available. Equity demands a thorough vetting of this case." *Id.*

On February 3, 2004, Anderson inquired by letter whether the NAD had adopted his calculations that he was entitled to $ 61,948.82 in QLP payments. *Id.* at 83, 133. Although he sought clarification of the amount owed to him, Anderson wrote he "was not requesting a review" of the hearing officer's decision. *Id.* at 133. Nevertheless, the NAD construed the letter as an appeal to the NAD Director. *Id.* at 11. However, on February 9, 2004, the NAD corrected the notice, stating Anderson "has not requested a Director Review . . . ." *Id.* at 135.

In a February 12, 2004 letter to Anderson, the FSA Executive Director for Wright County explained how the FSA intended to implement the NAD Hearing Officer's determination. (Ex. re. Mot. for Summ. J. by FSA [Docket No. 12] Ex. A). The letter acknowledged that, per NAD direction, Anderson was entitled to QLP

payments but it also stated that the NAD Hearing Officer's ruling did not address how to determine the payment yield or payment rate. *Id.* As a result, these factors were determined according to State Office (STO) directive. *Id.* Using this methodology, the FSA calculated the QLP payment to be $ 14,169.58, which was paid to Anderson. *Id.* The letter also extended "standard appeal rights" to Anderson. *Id.* It is the FSA's position that this payment determination is not part of the current case record, as the NAD hearing officer's ruling only concerned whether Anderson was entitled to QLP benefits, not what amount was appropriate. The FSA asserts the amount owed to Anderson raises a separate appealable issue not raised in the context of this lawsuit.

Under 7 C.F.R. § 11.9(a), a claimant has 30 days and an agency has 15 days to appeal a NAD hearing officer's determination to the director of the NAD. Neither party sought appeal at this stage. As part of a May 25, 2004 mediation with the FSA, Anderson sent a letter indicating that he saw no reason to appeal a judgment he believed to be in his favor and asked the FSA to pay him the contested QLP benefits. May 14, 2004 letter (Ex. re. Mot. for Summ. J. by FSA [Docket No. 12] Ex. B). He contends the NAD opinion is the Agency's final determination. On June 7, 2004, NAD concluded the appeal. Record at 99. On June 16, 2004, Anderson filed the instant complaint.

III. DISCUSSION

A. Standard of Review

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall issue "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323,

91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). On a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party. *Ludwig v. Anderson*, 54 F.3d 465, 470 (8th Cir. 1995). The nonmoving party may not "rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995).

Judicial review of an NAD Hearing Officer's decision is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § § 701-06. *See Lane v. United States Department of Agriculture*, 120 F.3d 106, 108-09 (8th Cir. 1997). The APA states that an agency's decision, including its actions, findings and conclusions, should not be overturned unless it is unsupported by substantial evidence, or if it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. See 5 U.S.C. § 706(2); *United States v. Snoring Relief Labs, Inc*., 210 F.3d 1081, 1085 (9th Cir. 2000). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).

B. Amount of QLP Payments

Under the APA, a plaintiff must exhaust his administrative remedies before appealing an adverse agency decision to a federal court. 7 U.S.C. § 6912(e). In the instant matter, both parties agree that an NAD Hearing Officer's determination may constitute a final decision for the purposes of APA. 7 C.F.R. § 11.2(a). However, the FSA contends that Anderson initiated an optional appeal to the Director of the NAD when he sent his February 3, 2004 letter. The letter sought clarification as to whether the NAD Hearing Officer had adopted his proposed award of $ 61,948.82 as the amount of QLP owed to him. The FSA argues Anderson then failed to pursue this appeal and thereby failed to exhaust all available administrative remedies. Anderson claims that he had no intent to appeal a judgment in his favor and simply wanted clarification as to the amount of the award. A review of the record supports Anderson's contention.

Anderson's February 3, 2004 letter to the NAD explicitly states that "he was not requesting a review . . . ." Record at 133. Although NAD initially construed Anderson's letter as a request for NAD Director review of the Hearing Officer's determination, the agency quickly retracted this position, stating that Anderson "has not requested a Director Review . . . ." *Id.* at 135. Based on Anderson's letter and NAD's response, it cannot be said that Anderson initiated an optional, director-level review. As a result, the Hearing Officer's determination is a final decision eligible for judicial review under the APA.

The FSA next contends this Court lacks jurisdiction to require the agency to pay $ 61,948.82 in QLP benefits to Anderson. The FSA argues that the APA is a limited waiver of sovereign immunity that excludes monetary relief and thus precludes Anderson's requested remedy. Anderson claims he merely seeks judicial enforcement, rather than judicial review, of the Agency's final decision.

A review of the record reveals it would be premature for the Court to consider this issue at the present time. Although the NAD Hearing Officer's decision affirmatively resolved the threshold issue of whether Anderson was entitled to QLP payments, it did not determine the amount to which Anderson was entitled or set forth a methodology for calculating the award. The record indicates the Hearing Officer, as well as both the FSA and Anderson, was aware these integral issues were before him on appeal. In the decision, the Hearing Officer identified the purpose of Anderson's appeal as follows:

[Anderson] takes issue with the Agency's assessment of the scope of his 2002 CLP alfalfa loss . . . . He maintains that had he been afforded [an] opportunity, he would have been able to establish a linkage between specific quality-test results and specific quantities of alfalfa, thereby establishing quality losses. He indicates that the COC erroneously applied the standards of grain-quality measurement to the alfalfa-quality measurement in denying 2002 QLP benefits . . . . Moreover, he disagrees with the quantity assigned as the basis of his 2002 alfalfa loss.

Id. at 58. The Hearing Officer's decision acknowledged that payment rate and payment yield, two disputed factors that are

necessary to calculate the amount of QLP payments owed Anderson, were before him on appeal.

Anderson argues that his calculations of $ 61,948.82 in QLP benefits owed to him were before the Hearing Officer and were implicitly adopted in the final order. The FSA's position, espoused in its February 12, 2004 letter, is the Hearing Officer's determination did not address the amount owed Anderson or the appropriate method for calculating payment yield or payment rate. A review of the Hearing Officer's decision supports the FSA's position. Rather than establishing payment yield, payment rate or the amount of QLP payments owed Anderson, the decision concludes by stating, "the Agency's determination is erroneous to the extent that it is not based upon all of the pertinent information available. Equity demands a thorough vetting of this case." *Id*. at 61. This language indicates the Hearing Officer did not decide the remaining contested issues.

It is axiomatic that judicial review is inappropriate in cases where the issue has not yet been addressed by the agency. Agencies need to have the initial opportunity to resolve contested issues to:

> "(1) avoid premature interruption of the agency process," (2) allow the agency to "develop the necessary factual backgrounds," (3) give the agency the "first chance to exercise its discretion, (4) properly defer to the agency's expertise, (5) provide the agency with an opportunity "to discover and correct its own errors," and (6) deter the "deliberate flouting of administrative processes . . .

Kleisser v. United States Forest Serv., 183 F.3d 196, 200-01 (3rd Cir. 1999) (quoting *McKart v. United States*, 395 U.S. 185, 194-95, 23 L. Ed. 2d 194, 89 S. Ct. 1657 (1969)). Determining the precise amount of QLP payments owed Anderson based on payment yield and payment rate calculations implicates policy questions and is an issue that requires the FSA's agency expertise. The narrow role of judicial review under the APA is to examine the administrative record and determine whether the agency's decision meets the "arbitrary and capricious" standard. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Until the agency has reached an issue and decided it, this Court lacks a

yardstick to measure whether the decision is arbitrary and capricious. As a result, this matter will be remanded to the NAD to determine payment yield and payment rate issues and to calculate the amount of QLP benefits to which Anderson is entitled.

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendant's Motion for Summary Judgment [Docket No. 10] is GRANTED in part and DENIED in part,

2. The matter is REMANDED to the NAD Hearing Officer to determine payment yield and payment rate issues and to calculate the appropriate amount of QLP payments,

3. Plaintiff's Complaint [Docket No. 1] is hereby DISMISSED WITHOUT PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

———————

HORSE PROTECTION ACT

COURT DECISION

ROBERT McCLOY, JR. v. USDA.
No. 03-1485.
Filed October 4, 2004.

(Cite as:125 S. Ct. 38)

HPA – Sored horse – "Allowing" the entry or showing – "Allowing - plus" distinguished.

SUPREME COURT OF THE UNITED STATES

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

_____

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: BEVERLY BURGESS, AN INDIVIDUAL, GROOVER STABLES, AN UNINCORPORATED ASSOCIATION; WINSTON T. GROOVER, JR., ALSO KNOWN AS WINKY GROOVER, AN INDIVIDUAL.
HPA Docket No. 01-0008.
Filed April 21, 2004.

HPA – Horse protection – Entry – Unilaterally sore – Scar rule – Preponderance of the evidence – Burden of proof – Past recollection recorded – Weight of the evidence – Substantial evidence – Civil penalty – Disqualification.

Donald A. Tracy, Esq,, for Complainant.
Brenda S. Bramlett, Esq. for Respondent
Decision *and Order issued by Victor W. Palmer, Administrative Law Judge.*

Decision and Order

This is an administrative disciplinary proceeding that the Administrator of the Animal and Plant Health Inspection Service initiated by filing a Complaint on November 6, 2000, that charges the Respondents with violating the Horse Protection Act (15 U.S.C.§1821-1831; "The Act"). Specifically, Respondent Winston T. Groover, Jr., also known as Winky Groover, a professional horse trainer who does business as Groover Stables is alleged to have violated the Act by transporting and exhibiting the Tennessee Walking Horse "Stocks Clutch FCR" while the horse was "sore" within the meaning of the Act. Respondent Beverly Burgess who owns Stocks Clutch FCR, is alleged to have violated the Act by allowing Respondent Groover to exhibit her horse at the horse show while it was sore.

Respondents filed their Answer to the Complaint on December 21, 2002, in which they denied violating the Act. An evidentiary hearing

was held on June 26-27, 2002, before Administrative Law Judge Dorothea A. Baker. Complainant was represented by Donald A. Tracy, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C.. Respondents were represented by Brenda S. Bramlett, Esq., Bramlett and Durard, Shelbyville, TN. The hearing was recorded and exhibits were received in evidence from both Complainant and Respondent. Transcript references are designated by "Tr."

Complainant's Exhibits are designated by "CX". Respondents' Exhibits are designated by RX."

Subsequent to the hearing, Judge Baker retired and is not available to issue the decision and order in this proceeding. It was initially reassigned to another Administrative Law Judge who is also presently unavailable. It was thereupon reassigned to me. When this case was first reassigned, Respondent filed a Motion for a New Trial that was considered and denied by Order entered on October 15, 2003. The denial of the Motion was based on Section 1.144(d) of the controlling Rules of Practice which provides that: A... (1) in case of the absence of the Judge or the Judge's inability to act, the powers and duties to be performed by the Judge under these rules of practice in connection with any assigned proceeding may, without abatement of the proceeding unless otherwise directed by the Chief Judge, be assigned to any other Judge."

Under the most recent briefing schedule, the time for filing briefs concluded on March 12, 2004. Upon consideration of the record evidence and the briefs and arguments by the parties, I have decided that Respondent Groover violated the Act by exhibiting a horse while the horse was sore and that a civil penalty should be assessed against him in the amount of $2,200.

Furthermore, Respondent Groover should be disqualified for one year from horse industry activities as provided in the Act.. I have also decided that under the standard for determining whether a horse owner has "allowed" a sore horse to be exhibited that applies in the

Sixth Circuit where an appeal of this proceeding would lie, the charges against Respondent Burgess should be dismissed.

The findings of fact, conclusions and the discussion that follow specify and explain the reasons for the attached order. In reaching these findings and conclusions, I have fully considered the briefs, motions and arguments by the parties and, if not adopted or incorporated within these findings and conclusions, they have been rejected as not in accord with the relevant and material facts in evidence or controlling law.

Finding of Facts

1) Respondent Winston T. Groover, Jr., is the sole proprietor of Groover Stables, whose mailing address is Post Office Box 1435, Shelbyville, Tennessee 37162 (Answer, para 1).

2) Respondent Winston T. Groover, Jr., also known as Winky Groover, is an individual whose mailing address is Post Office Box 1435, Shelbyville, Tennessee 37162 (Answer, para 2).

3) Respondent Beverly Burgess is an individual whose mailing address is 351 Highway , 82 East, Bell Buckle, Tennessee 37020. At all times material herein, Respondent Beverly Burgess was the owner of the horse known as "Stocks Clutch FCR" (Answer, para 3).

4) On or about July 7, 2000, Respondent Winston T. Groover, Jr., transported Stocks Clutch FCR to the Cornersville Lions Club 54th Annual Horse Show for the purpose of showing and exhibiting the horse as entry number 43 in class number 20 (Answer, para 4).

5) The United States Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) assigned personnel to monitor the Cornersville Show. They included Dr. David Smith and Dr. Sylvia Taylor, employed by APHIS as Veterinary Medical Officers (VMOs); and Michael Nottingham, employed by APHIS as an Investigator (Tr. Vol. 1, pages 18-22 and 50).

6) The duties of the VMOs at the horse show were to look out for and "write up" "sored" horses and to make sure the "Designated Qualified Persons" (DQPs) employed by the organization certified by APHIS to manage the horse show, were doing an effective role of enforcing the Horse Protection Act. (Tr. Vol 1, page 44).

7) The VMOs followed the practice of asking to examine the second and third place horse post show. The DQPs examined all first place horses (Tr. Vol 1, page 44).

8) On July 7, 2000, Stocks Clutch FCR, upon being exhibited at the Cornersville Show, was designated by the Horse Show as the second place horse in its Class and for that reason was examined post show by Dr. David Smith (CX 5).

9) Dr. Smith did not have any present recollection of the horse or his examination of it on July 7, 2000, when he testified at the hearing on June 26, 2002. The horse show had taken place on the night of July 7, 2000, and Dr. Smith prepared his affidavit the next morning based on his notes and his memory from the night before. He no longer had the notes when he testified at the hearing and his reading of his affidavit did not refresh his recollection. His testimony about the horse's condition when he examined it consists entirely of his affidavit (CX 5) and APHIS Form 7077 (CX 4), which he helped prepare (Tr. Vol. 1, pages 45-48)

10) Dr. Smith observed, as set forth in his affidavit, that:

> A... the horse was slow to lead as the custodian walked it. When I examined the horse's forefeet, I found an area painful to palpation along the lateral aspect of the left forefoot just above the coronary band. The pain was indicated as the horse tried to pull its foot away each time I applied gentle pressure with the ball of my thumb to this location. It was consistent and repeatable. I indicated the position of the painful area in the drawings at the bottom of APHIS Form 7077 corresponding to this case. The palmar aspect of the left fore pastern had many deep folds, corrugations and nodular areas consistent with a

scar rule violation. Although the skin in this area was pigmented, I could see reddening and swelling consistent with a scar rule violation. I found reddened, swollen corrugations on the palmar aspect of the right foot."

11) After his examination of Stocks Clutch FCR, Dr. Smith asked Dr. Sylvia Taylor to examine the horse. Dr. Smith did not tell Dr. Taylor what he had found and did not observe her examination. (CX 5, page 2).

12) At the hearing on June 26, 2002, Dr. Sylvia Taylor also did not have a present memory nor could her recollection be refreshed respecting her examination of Stocks Clutch FCR on July 7, 2000. (Tr. Vol 1, pages 162-163).

13) Dr. Taylor prepared her affidavit at 11: 20 p.m. on July 7, 2000, shortly after the end of the show and her examination of Stocks Clutch FCR (CX 6, page 3 and Tr. Vol 1, page 164). Dr. Taylor also contemporaneously helped prepare APHIS Form 1077 (CX 4).

14) Dr. Taylor recorded in her affidavit that:

"On July 7, at approximately 8:50 p.m., Dr. Smith examined a black stallion, Stocks Clutch, entry 43, in Class 20, after placing 2nd. I observed that the horse walked and completed a turn around the cone normally, but as it went straight after the turn it was reluctant to go and the rein was pulled tight to continue leading it. I observed Dr. Smith approach the left side of the horse and lift the foot and palpate it in the customary manner.

I noticed that the horse flinched its shoulder and neck muscles and shifted its weight while he palpated the left pastern, but I did not observe whether this response was consistently localized to palpation of any particular part of the pastern, other than that it was not the posterior pastern. He then palpated the right pastern, and I did not see a similar response.

> Dr. Smith then asked me to examine the horse. I observed the horse walk and turn again. It walked and turned around the corner normally, but as it left the turn it was reluctant to lead and the custodian had to pull the horse along on a tight rein. I approached the horse on the left, established contact and began palpating the left posterior pastern. I noticed that there was very pronounced, severe scarring of the skin of the posterior pastern. There were thickened ropes of hairless skin medial and lateral to the pasterior midline, bulging into even thicker, hard corrugations and oval nodules along the medial-posterior aspect. This epithelial tissue was non- uniformly thickened and could not be flattened or smoothed out. Grooves and cracks on the lateral and midline area above the pocket were reddened. When I palpated the lateral and anterio-lateral pastern, the horse attempted to withdraw its foot and I could feel its shoulder and neck muscles tighten and pull away. I obtain(ed) this response consistently and repeatedly three times, always when palpating that same spot."
>
> When I palpated the right posterior pastern, I observed that it was also very scarred. There were non-uniformly thick cords of epithelial tissue with hairloss, that also could not be flattened or smoothed out, some of which were also reddened. I noticed the horse flinched and twitched several times while I palpated the posterior pastern over these scars, but the response was not localizable to a particular area. I then palpated the anterior right pastern and did not detect a pain response."

15) In the professional opinions of both Dr. Smith and Dr. Taylor, the horse was both unilaterally sore and in violation of the scar rule. In the professional opinion of each of them, the horse was sore due to the use of chemical and/or mechanical means in violation of the Act and was in violation of the scar rule regulations then in effect. (CX 5 and CX 6)

16) Dr. Smith and Dr. Taylor wrote up the horse for being in violation and completed APHIS Form 7077, Summary of Alleged Violations (CX 4).

17) The VMOs testified they do not write up a horse as being in violation unless they both agree that the horse is sore and in violation of the Act (Tr. Vol 1, pages 136 & 168).

18) After the examination by the VMOs, the Horse Show's "Designated Qualified Persons", Charles Thomas and Andy Messick, examined the horse.

19) A Designated Qualified Person (DQP) is a "person meeting the requirements of paragraph 11.7 of the Horse Protection Regulations." who is delegated authority under Section 4 of the Act to detect horses which are "sore" (Respondents' Exhibit 7, RX 7, page 30). The National Horse Show Commissioner's DQP program which employs Mr. Thomas and Mr. Messick as DQPs, is certified by the Department of Agriculture (Tr. Vol 1, pages 86 and 228). The training of DQPs is akin to that of VMOs in that they attend annual training programs together that are given by APHIS. (Tr. Vol 1, page 87). Mr. Thomas and Mr. Messick are both highly qualified and experienced DQPs, but neither is a veterinarian as are the likewise highly qualified and experienced VMOs. The duties of DQPs are not full time; Mr. Messick is principally employed as an attorney and Mr. Thomas is retired. (Tr. Vol 2, pages 3 & 29-30).

20) After the examinations by the VMOs, Mr. Messick was the first DQP to examine Stocks Clutch FCR. After reviewing his exam sheet, Mr. Messick had a present recollection of his examination of the horse some two years before the hearing (Tr. Vol 2, page 10). He was the same DQP who had passed the horse for exhibition and showing based on his pre- show inspection in which he found the horse met the industry standards. (Tr. Vol 2, pages 10-16). He did not watch the VMOs examine the horse post show (Tr. Vol 2, page 17).

Mr. Messick's post show examination of the horse was about 5-10 minutes after its examination by the VMOs. He testified that as was the case pre-show, the horse still had soft, uniformly thickened tissue and he didn't get any withdrawal response on his palpation on the left or right foot (Tr. Vol 2, page 19). He did not observe swelling or

redness of the posterior pastern of either foot. (Tr. Vol 2, pages 19-20).

21) Mr. Thomas next examined the horse. He and Mr. Messick were asked to do so by Respondent Groover who told them that the VMOs "had taken information on him in the scar rule." Since Andy Messick was the first one to check the horse pre-show, he also checked him first post show. (Tr. Vol 2, page 37). Mr. Thomas' predominant concern appeared to be whether the horse was in violation of the scar rule. He didn't believe it was, "He did have some raised places... but they were soft and pliable. That's what we were ---- in our training, what we were required ---- as long as they were soft, we could take our thumb and stretch them and flatten them out or press them and they flatten out, and they were only in the back. Nothing though, around the edge." (Tr. Vol 2, page 39).

22) In Mr. Thomas' opinion, the horse was not in violation of the scar rule and he did not find abnormal reactions when he palpated the horse's front pasterns. (Tr. Vol 2, page 40).

23) At 10:40 a.m, DST, on July 7, 2000, apparently two hours subsequent to the examinations of Stocks Clutch FCR by the VMOs, the horse was examined by Dr. Randall T. Baker. Dr. Baker is a Veterinarian in private practice for 25 years who is licensed in Tennessee and is a member of the American Association of Equine Practitioners (RX 13 and Tr. Vol 1, pages 298 and 305-306). At the hearing, Dr. Baker had present recollection of his examination which was videotaped and requested by Respondents. (Tr. Vol 1, page 309). He did not find the horse's front pasterns to be sore and believed the scars on the pasterns of each pastern did not violate the scar rule (Tr. Vol 1, pages 311- 321). Although he found some hair loss and thickened epithelial tissue on both posterior pasterns, Dr. Baker concluded that the scar rule was not violated because when he put his palm on the back of the horse's foot, he didn't have excess tissue coming out from there and the tissue was pliable and not real firm granulation type tissue; it would spread around and cleave under his thumb (Tr. Vol 1, pages 321-322). He saw no evidence of scarring or

redness on either the left or right posterior pasterns. (Tr. Vol 1, page 324).

24) Respondent Beverly Burgess testified, and Respondent Winston Groover corroborated, that prior to July 7, 2000, and on several occasions Ms. Burgess instructed the trainer of her horse, Stocks Clutch FCR, not to "sore" the horse or perform any act which would cause it to be noncompliant with the Horse Protection Act (Tr. Vol 2, pages 57-58 and 92). She further testified that she visited Groover's Stable two or three times a week to assure herself that her horse was not sore or in violation of the scar rule (Tr. Vol 2, page 54).

Mrs. Burgess did not exhibit, assist in preparing for show, enter or transport Stocks Clutch FCR to the Cornersville Horse Show on July 7, 2000 (Tr. Vol 2, pages 50-51).

25) Respondent Beverly Burgess watched the VMOs inspect her horse and in her opinion Dr. Taylor " was not a horse person" because she appeared to have trouble picking up the horse's foot and went at it in an awkward way (Tr. Vol 2, page 52). Respondents also presented testimony from Mr. Lonnie Messick, the Executive Vice-President and DQP coordinator for the National Horse Show Commission, and DQP Andy Messick's father, that he had once seen Dr. Taylor hold a horse's foot in an improper manner that caused it to jerk its foot away from her (Tr. Vol 1, pages 223, 227, 266 and 271-273). However, he further testified that he had been with Dr. Taylor at other horse shows and she seemed competent (Tr. Vol 1, page 273).

26) Respondent Winston Groover has been a professional horse trainer since 1975. He has attended DQP clinics and read various publications on determining whether a horse is in compliance with the Act. He testified that he transported, entered and showed Stocks Clutch FCR on July 7, 2000, at the Cornerville Horse Show where it was awarded 2nd place in Class 20 (Tr. Vol 2, pages 91-95). No evidence has been entered and no argument has been made to show any prior violations of the Act by Mr. Groover.

The Act and The Scar Rule

A. The Act

The Act defines the term "sore" as:

> (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
>
> (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
>
> (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
>
> (D) any other substance or devise has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the state in which such treatment was given.

15 U.S.C. § 1821.

The Act prohibits the following conduct respecting a "sore" horse:

. . .

> (2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is "sore", (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is "sore", (C) selling,

> auctioning or offering for sale, in any horse sale or auction, any horse which is "sore" and (D) allowing any activity described in clause (A), (B) or (C) respecting a horse which is "sore" by the owner of such horse, ...

15 U.S.C. § 1824(2).

The Act provides that a horse is presumed to be "sore" in the following circumstances:

> . . .
>
> (d)...(5) In any civil or criminal action to enforce this "Act" or any regulation under this "Act" a horse shall be presumed to be a horse which is "sore" if it manifested abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs

15 U.S.C. § 1825 (d)(5)

The Act provides for civil penalties and disqualification from various horse industry activities as follows:

> . . .
>
> (b) (1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,0001 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such civil penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses,

ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

. . .

(e) In addition to any fine, imprisonment or civil penalty authorized

1 Pursuant to the Federal Civil Penalties Adjustment Act of 1990, the penalty has been adjusted for inflation to $2,200. 7 C.F.R § 3.91 (b) (2) vii. under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. 1825 (b)(1) and (e).

The Act authorizes the Secretary to issue rules and regulations as he deems necessary to carry out the provision of this chapter.

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter. 15 U.S.C. § 1828.

B. The Scar Rule

The Scar Rule as published by APHIS, on April 27, 1979, in 44 Fed. Reg. 25, 172, provides:

The scar rule applies to all horses born on or after October 1, 1975. Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be "sore" and are subject to all prohibitions of section 5 of the Act. The scar rule criteria are as follows:

> (a) The anterior and anterior-lateral surfaces of the fore pasterns (external surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.
>
> (b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or "pocket" may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

9 C.F.R. § 11.3.

Conclusions

1. The horse "Stocks Clutch FCR" was a "sore" horse when it was exhibited by Respondents Winston T. Groover, Jr. and Groover Stables, on July 7, 2000, as entry 43 in class number 20 in the Cornersville Horse Show.

2. Respondent Winston Groover should be assessed a civil penalty of $2,200 and made Subject to a one year disqualification from horse industry activities as provided in the Act.

3. Respondent Beverly Burgess, the owner of the horse "Stocks Clutch FCR", is not found to have allowed the showing of the horse while it was sore under the standards specified by the Sixth Circuit where an appeal of the case would lie.

4. The case against Respondent Beverly Burgess should be dismissed.

Discussion

(1) The horse was sore when exhibited

Two competent, highly qualified veterinarians employed by the Department of Agriculture inspected Stocks Clutch FCR after it was awarded second place in its class at the Cornersville Horse Show on the night of July 7, 2000. The veterinarians each examined the horse separately and independently. Each independently concluded that the horse was sore. It was only because both agreed on their findings that the owner and trainer were charged with violating the Act. Neither VMO can be said to have any reason to have made a false or frivolous accusation. The accusation that one of them, Dr. Sylvia Taylor, "was not a horse person" and did not know how to handle a horse's feet is patently absurd. Dr. Taylor has been a veterinarian since 1986 and for some ten years, her exclusive duties for APHIS concerned enforcement of the Horse Protection Act. The only witness offered in corroboration of the charge made by Respondent Beverly Burgess, admitted on cross examination that Dr. Taylor was indeed competent. Dr. Taylor and Dr. Smith, the other APHIS Veterinarian who found the horse to be sore, were in fact considered by APHIS to possess such special competence in this field that another veterinarian was with them at the horse show for their training.

Dr. Taylor and Dr. Smith found the horse to be sore on two separate bases.

First, they each found an area painful to palpation along the lateral aspect of the left forefoot. The horse pulled its foot away from the VMOs each time thumb pressure was applied to palpate this area. Each VMO palpated the area repeatedly and the horse's pain response was constant.

Second, both VMOs observed scars on the posterior of both of the horse's front pasterns which each VMO found to be in the violation of the Scar Rule. In an attempt to make the Scar Rule generally understandable to all who inspect Tennessee Walking Horses for evidence of soring, APHIS has issued various publications

illustrating its proper application. RX 2 is one of them. It was used as an aid in the cross examination of Drs. Smith and Taylor. Pages 16 and 17 of the exhibit show horse pasterns that have ridges and furrows present that do not appear to be "uniformly thickened" as required for a horse not to be considered "sore" under the Scar Rule.

However, the caption beneath Figure 11 A on page 16 of RX 2 states, "if these can be smoothed out with the thumbs (see fig. 8) these would not be violations." And here lies the whole of Respondents' defense.

Both of the DQPs and Dr. Baker who examined the horse subsequent to the VMOs, believed that the horse's scars came within these exemptions. Each of them testified that the scars were pliable and could be flattened. But to be considered "flattened" and therefore the "uniformly thickened epithelial tissue" that may be allowed under the Scar Rule, all bumps, grooves, and ridges must, as shown in Figure 8 on page 13 of RX 2, completely disappear when outward pressure is being applied to the site by an examiner's two thumbs. Apparently, the DQPs and the private veterinarian were using a less exacting standard.

Moreover, since the DQPs had not spoken to the VMOs before their examination, they erroneously thought the violation was confined to the Scar Rule. This probably led them to concentrate their examinations of the horse's pasterns to the scarred posterior areas and to not fully palpate the horse's left anterior pastern where the VMOs had elicited pain responses.

Additionally, when Dr. Randall examined the horse some two hours later, the pain in the left anterior pastern may have by then sufficiently subsided so as to be no longer detectable. It has repeatedly been found that DQP examinations have less probative value and are entitled to less credence than examinations by veterinarians employed by the United States Department of Agriculture. *In re: Larry E. Edwards, et al*, 49 Agric. Dec. 188, 200 (1990). So too, a later examination by a private veterinarian is not

given as much weight as the more immediate examination by two USDA veterinarians. Id, at 200-201.

For these reasons, I have concluded that Stocks Clutch, FCR was a sore horse when it was exhibited in the horse show.

(2) Respondent Groover should be assessed a $2,200.00 civil penalty and disqualified for one year.

The act provides for the assessment of a civil penalty of up to $2,200.00 for each violation of its provisions and authorizes disqualification from participating in specified horse industry activities for not less than one year for the first violation and not less than five years for any subsequent violation. 15 U.S.C. §1825 (b) and (e).

When determining the appropriate civil penalty and whether to impose disqualification, the Act requires consideration of the following factors (15 U.S.C. § 1825(b)(1)):

> ... all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business and such other matters as justice may require.

As pointed out, *In re: Bennett*, 55 Agric Dec 176, 188 (1996): As a result of the Scar Rule, the soring seen today... is far more subtle..."

Therefore, even though the soring of Stocks Clutch FCR may appear less severe than the sored horses described in past cases, it is notable because it occurred while the horse was under the control of an experienced, knowledgeable horse trainer. As such, Mr. Groover was required to know the limitations the Act presently places on his training practices for a horse he exhibits not to be found in violation of the Act. Unless a professional horse trainer such as Mr. Groover is

held strictly accountable for any horse in his care that is found to have been exhibited while sore, the Act is without meaning.

A sanction must necessarily be assessed against Mr. Groover that will serve as a meaningful deterrent against his employment of excessive training techniques in the future. No one but Mr. Groover was responsible for the soring of the horse. Stocks Clutch FCR was in his care for about a year before the show. (Tr. Vol 2, page 54).

Respondents admit that it was Mr. Groover who entered and exhibited the horse and all responsibility for the condition was his alone and that Respondent Burgess was in no sense responsible (Respondents' Brief, page 2, 1st sentence of 3rd paragraph). It is therefore found that all culpability for the horse being found "sore" rests with Mr. Groover.

For the reasons previously stated, whenever an experienced, knowledgeable, trainer exhibits a "sored" horse, it must be found that his conduct, absent a credible and meaningful excuse or explanation, is in every respect egregious. Respondent has not contested his ability to pay the $2,200.00 civil penalty authorized under Act for a horse soring violation and that is the appropriate civil penalty to be assessed in these circumstances.

The Act also authorizes the disqualification for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Complainant seeks the imposition of a one year disqualification. This will affect Mr. Groover's ability to engage in business. But again, in order to have a meaningful deterrent against employing excessive training techniques in the future, I have concluded that his disqualification for one year is needed and appropriate.

(3) and (4) The Complaint as against Respondent Beverly Burgess should be dismissed.

Any appeal of this case will lie in the Sixth Circuit. The controlling law in the Sixth Circuit on whether a horse owner can be held to have "allowed" a sore horse to be shown is set forth in *Baird v United States Department of Agriculture*, 39 F. 3d 131 (6th Cir. 1994). The Sixth Circuit in *Baird*, 39 F. 3d, at 136, reviewed the Eighth Circuit's decision in *Burton v. United States Department of Agriculture*, 683 F. 2d 280 (8th Cir. 1982). Baird agreed with Burton that 15 U.S.C. § 1824 (2) (D) did not impose a strict liability standard on owners for the actions of their trainers. But instead of the hard-and-fast, three-prong test set forth in Burton for determining whether an owner "allowed" his or her horse to be exhibited or shown while "sore", the Sixth Circuit elucidated a somewhat different standard for the determination, 39 F. 3d, at 137:

In our view, the government must, as an initial matter, make out a prima facie case of a § 1824 (2) (D) violation. It may do so by establishing (1) ownership; (2) showing, exhibition or entry; and (3) soreness. If the government establishes a prima facie case, the owner may then offer evidence that he took an affirmative step in an effort to prevent the soring that occurred. Assuming the owner presents such evidence and the evidence is justifiably credited, it is up to the government then to prove that the admonition the owner directed to his trainers concerning the soring of horses constituted merely a pretext or a self-serving ruse designed to mask what is actually conduct violative of § 1824.

In applying this standard, *Baird*, 39 F 3d, at 138, held that upon an owner testifying he directed his trainers not to sore his horses, the government must offer evidence to contradict him so as to establish pretext. It is not enough for the government to assert that the testimony was self-serving and less than truthful. At a minimum, Complainant must offer some evidence in contradiction of this testimony by the owner. In the instant case, no contradicting evidence was introduced by Complainant.

Complainant has also asked that instead of following *Baird*, we apply a contrary interpretation of an owner's liability by the District of Columbia Circuit where an appeal could also lie. That Circuit has

held that an owner may be liable for the actions of her trainer irrespective of her testifying that she instructed the trainer not to "sore" her horse. *Crawford v. U.S. Department of Agriculture*, 50 F. 3d 46, 51 (DC Cir 1995).

However, only Respondents and not Complainant can appeal a final decision in this proceeding. It is absurd to suggest that Respondents would choose to file an appeal in the District of Columbia Circuit instead of the Sixth Circuit where they reside. What Complainant really suggests is that the Secretary follow a policy of non-acquiescence to the Sixth Circuit decision.

To do so, might well provoke that Circuit's outrage upon the case's appeal; the kind of outrage that ensued in the face of the HHS policy of non-acquiescence to Ninth Circuit precedents. *See*, Richard J. Pierce, Jr., Sidney A. Shapiro, and Paul R. Verkuil, Administrative Law and Process, 393-97 (3d ed. 1999)

For the various reasons discussed, Respondent Beverly Burgess cannot be found to have "allowed" her horse to be shown while sore under the standards applicable in the Sixth Circuit. The Complaint as against her should be dismissed. The following Order is therefore issued.

ORDER

On this 21st day of April 2004, the following ORDER is herewith issued:

1. Respondent Winston T. Groover, Jr., is assessed a civil penalty of $2,200. The civil monetary penalty shall be paid by cashier's check(s) or money order(s), made payable to order of the Treasurer of the United States, marked with HPA Docket No. 01-0008, deposited with a commercial delivery service such as Fedex or UPS, for receipt by Donald A. Tracy, Esq., Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue SW,

Room 2325D, South Building Stop 1417 Washington, D.C. 20250-1417

2. Respondent Winston T. Groover, Jr., is disqualified for one year from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction.

3. The Complaint in respect to Respondent Beverly Burgess is dismissed with prejudice.

The deadline for receipt of the civil monetary penalty shall be, and the effective date of the disqualification shall be, and this Decision and Order shall become final and effective one day after the time for filing an appeal from this Decision and Order has expired without an appeal having been filed.

_____

In re: BEVERLY BURGESS, AN INDIVIDUAL; GROOVER STABLES, AN UNINCORPORATED ASSOCIATION; AND WINSTON T. GROOVER, JR., a/k/a WINKY GROOVER, AN INDIVIDUAL.
HPA Docket No. 01-0008.
Decision and Order as to Winston T. Groover, Jr.
Filed November 15, 2004.

HPA – Horse protection – Entry – Unilaterally sore – Scar rule – Preponderance of the evidence – Burden of proof – Past recollection recorded – Weight of the evidence – Substantial evidence – Civil penalty – Disqualification.

The Judicial Officer affirmed the decision by Administrative Law Judge Victor W. Palmer concluding that Winston T. Groover, Jr., exhibited Stocks Clutch FCR in a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(A). The Judicial Officer assessed Respondent a $2,200 civil penalty and disqualified Respondent from participating in horse shows, horse exhibitions, horse sales, and horse auctions for 1 year. The Judicial Officer rejected Respondent's contention that Complainant failed to prove by a preponderance of the evidence that Stocks Clutch FCR was sore when exhibited. The Judicial Officer found past recollection recorded in the form of affidavits and APHIS Form 7077 reliable, probative, and substantial evidence. The Judicial Officer further stated, while Respondent presented competent

evidence in support of his position that Stocks Clutch FCR was not sore when exhibited, he gave more weight to Complainant's evidence.

Donald A. Tracy, for Complainant.
Brenda S. Bramlett, for Respondents.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on November 6, 2000. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) on or about July 7, 2000, Respondent Groover Stables and Respondent Winston T. Groover, Jr., transported a horse known as "Stocks Clutch FCR" to the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, while the horse was sore, for the purpose of showing or exhibiting Stocks Clutch FCR in that show, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)); (2) on July 7, 2000, Respondent Groover Stables and Respondent Winston T. Groover, Jr., exhibited Stocks Clutch FCR as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, while Stocks Clutch FCR was sore, in violation of section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)); and (3) on or about July 7, 2000, Respondent Beverly Burgess allowed Respondent Groover Stables and Respondent Winston T. Groover, Jr., to exhibit Stocks Clutch FCR as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, while Stocks Clutch

FCR was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶¶ 5-7).

On December 21, 2000, Beverly Burgess, Groover Stables, and Winston T. Groover, Jr. [hereinafter Respondents], filed an "Answer" denying the material allegations of the Complaint (Answer ¶¶ 6-8).

On June 26 and 27, 2002, Administrative Law Judge Dorothea A. Baker presided at a hearing in Shelbyville, Tennessee. Donald A. Tracy, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Brenda S. Bramlett, Bramlett & Durard, Shelbyville, Tennessee, represented Respondents.

On November 15, 2002, Complainant filed "Complainant's Proposed Findings, Conclusions, Order, and Brief." On February 20, 2004, Respondents filed "Respondents' Proposed Findings, Conclusions of Law, Brief and Order."

On April 21, 2004, Administrative Law Judge Victor W. Palmer[1] [hereinafter the ALJ] issued a "Decision and Order" [hereinafter Initial Decision and Order]: (1) concluding that on July 7, 2000, Respondent Winston T. Groover, Jr., and Respondent Groover Stables exhibited Stocks Clutch FCR as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, while Stocks Clutch FCR was sore, in violation of section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)); (2) dismissing the Complaint against Respondent Beverly Burgess; (3) assessing Respondent Winston T. Groover, Jr., a $2,200 civil penalty; and (4) disqualifying Respondent Winston T. Groover, Jr., from showing, exhibiting, or entering any horse and

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[1]Administrative Law Judge Dorothea A. Baker retired from federal service effective January 1, 2003. On January 10, 2003, former Chief Administrative Law Judge James W. Hunt reassigned this proceeding to himself (Notice of Case Reassignment). On July 15, 2003, former Chief Administrative Law Judge James W. Hunt, who retired from federal service effective August 1, 2003, reassigned this proceeding to Administrative Law Judge Leslie B. Holt (Order). On March 10, 2004, Chief Administrative Law Judge Marc R. Hillson reassigned this proceeding to Administrative Law Judge Victor W. Palmer (Order).

from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction for 1 year (Initial Decision and Order at 12-13, 19).

On June 28, 2004, Respondent Winston T. Groover, Jr., appealed to the Judicial Officer. On July 16, 2004, Complainant filed "Complainant's Opposition to Respondents' [sic] Appeal of Decision and Order." On July 20, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor modifications, the Initial Decision and Order as the final Decision and Order as to Winston T. Groover, Jr.[2] Additional conclusions by the Judicial Officer follow the ALJ's discussion as restated.

Complainant's exhibits are designated by "CX." Respondents' exhibits are designated by "RX." The transcript is divided into two volumes, one volume for each day of the 2-day hearing. Each volume begins with page 1 and is sequentially numbered. References to "Tr. Vol. I" are to the volume of the transcript that relates to the June 26, 2002, segment of the hearing. References to "Tr. Vol. II" are to the volume of the transcript that relates to the June 27, 2002, segment of the hearing.

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[2]The Initial Decision and Order relates to Respondent Beverly Burgess, Respondent Groover Stables, and Respondent Winston T. Groover, Jr. Only Respondent Winston T. Groover, Jr., appealed the ALJ's Initial Decision and Order. Therefore, in accordance with section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the ALJ's Initial Decision and Order became final and effective as to Respondent Beverly Burgess and Respondent Groover Stables 35 days after the Hearing Clerk served them with the ALJ's Initial Decision and Order. The Hearing Clerk served Respondent Beverly Burgess and Respondent Groover Stables with the Initial Decision and Order on April 26, 2004 (United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0003 5453 1228), and the Initial Decision and Order became final as to Respondent Beverly Burgess and Respondent Groover Stables on May 31, 2004. Therefore, this decision and order only relates to Respondent Winston T. Groover, Jr.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that–

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1822. Congressional statement of findings

The Congress finds and declares that–

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1823. Horse shows and exhibitions

(a) Disqualification of horses

The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

. . . .

(c) Appointment of inspectors; manner of inspections

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise

inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

§ 1824. Unlawful acts

The following conduct is prohibited:

(1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered, sold, auctioned, or offered for sale, in any horse show, horse exhibition, horse sale, or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by a common or contract carrier or an employee thereof in the usual course of the carrier's business or the employee's employment unless the carrier or employee has reason to believe that such horse is sore.

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity

described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by

simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or

auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1823(a), (c), 1824(1)-(2), 1825(b)(1)-(2), (c), 1828.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations

and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION

ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930

[19 U.S.C. 1202 *et seq.*], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 *et seq.*], or the Social Security Act [42 U.S.C. 301 *et seq.*], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

28 U.S.C. § 2461 note.

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*– . . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(vii) Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. 1825(b)(1), has a maximum of $2,200.

7 C.F.R. § 3.91(a), (b)(2)(vii).

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 11—HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the

plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected in a standard dictionary, such as "Webster's."

. . . .

Designated Qualified Person or DQP means a person meeting the requirements specified in § 11.7 of this part who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale, or horse auction under section 4 of the Act to detect of diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

. . . .

Sore when used to describe a horse means:

(1) An irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(2) Any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(3) Any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(4) Any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise

moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

. . . .

§ 11.3 Scar rule.

The scar rule applies to all horses born on or after October 1, 1975. Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be "sore" and are subject to all prohibitions of section 5 of the Act. The scar rule criteria are as follows:

(a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.

(b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or "pocket" may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

9 C.F.R. §§ 11.1, .3 (footnote omitted).

ADMINISTRATIVE LAW JUDGE'S

INITIAL DECISION AND ORDER

(AS RESTATED)

Decision Summary

Upon consideration of the record evidence and the briefs and arguments by the parties, I decide Respondent Winston T. Groover, Jr., violated the Horse Protection Act by exhibiting Stocks Clutch FCR while the horse was sore and that a $2,200 civil penalty should be assessed against him. Moreover, Respondent Winston T. Groover, Jr., should be disqualified for 1 year from horse industry activities as provided in the Horse Protection Act. The findings of fact, conclusions of law, and discussion that follow explain the reasons for the Order. In reaching these findings and conclusions, I have fully considered the briefs, motions, and arguments by the parties and, if not adopted or incorporated within the findings of fact and conclusions of law, they have been rejected as not in accord with the relevant and material facts in evidence or controlling law.

Findings of Fact

1. Respondent Winston T. Groover, Jr., also known as Winky Groover, is an individual whose mailing address is Post Office Box 1435, Shelbyville, Tennessee 37162. At all times material to this proceeding, Respondent Winston T. Groover, Jr., was the sole proprietor of Respondent Groover Stables. (Answer ¶¶ 1-2.)

2. Respondent Beverly Burgess is an individual whose mailing address is 351 Highway 82 East, Bell Buckle, Tennessee 37020. At all times material to this proceeding, Respondent Beverly Burgess was the owner of a horse known as "Stocks Clutch FCR." (Answer ¶ 3.)

3. On or about July 7, 2000, Respondent Winston T. Groover, Jr., transported Stocks Clutch FCR to the Cornersville Lions Club 54th Annual Horse Show, in Cornersville, Tennessee, for the purpose of showing or exhibiting the horse as entry number 43 in class number 20 (Answer ¶ 4).

4. The United States Department of Agriculture, Animal and Plant Health Inspection Service, assigned personnel to monitor the Cornersville Lions Club 54th Annual Horse Show. They included Dr. David Smith and Dr. Sylvia Taylor, employed by the Animal and Plant Health Inspection Service as veterinary medical officers, and Michael Nottingham, employed by the Animal and Plant Health Inspection Service as an investigator. (Tr. Vol. I at 18-22, 50; CX 5 at 1, CX 6 at 1.)

5. The duties of the veterinary medical officers at the Cornersville Lions Club 54th Annual Horse Show were to detect sore horses, to document any findings of sore horses, and to ensure the Designated Qualified Persons employed by the organization certified by the Animal and Plant Health Inspection Service to manage the Cornersville Lions Club 54th Annual Horse Show, were effectively enforcing the Horse Protection Act (Tr. Vol. I at 44).

6. The veterinary medical officers examined the second and third place horses post show. The Designated Qualified Persons examined all first place horses. (Tr. Vol. I at 43-44.)

7. On July 7, 2000, Stocks Clutch FCR, after being exhibited at the Cornersville Lions Club 54th Annual Horse Show by Respondent Winston T. Groover, Jr., was designated by the horse

show as the second place horse in its class and for that reason was examined post show by Dr. David Smith (CX 5).

8. Dr. Smith did not have any present recollection of Stocks Clutch FCR or his examination of the horse on July 7, 2000, when he testified at the hearing on June 26, 2002. The Cornersville Lions Club 54th Annual Horse Show had taken place on the night of July 7, 2000, and Dr. Smith prepared his affidavit the next morning based on his notes and his memory from the night before. He no longer had the notes when he testified at the hearing and his reading of his affidavit did not refresh his recollection. Dr. Smith's testimony about Stocks Clutch FCR's condition when he examined the horse consists entirely of his affidavit (CX 5) and APHIS Form 7077 (CX 4), which he helped prepare. (Tr. Vol. I at 45-48.)

9. Dr. Smith observed, as set forth in his affidavit (CX 5 at 1), that:

> . . . [T]he horse was slow to lead as the custodian walked it. When I examined the horse's forefeet I found an area painful to palpation along the lateral aspect of the left forefoot just above the coronary band. The pain was indicated as the horse tried to pull its foot away each time I applied gentle pressure with the ball of my thumb to this location. It was consistent and repeatable. I indicated the position of the painful area in the drawings at the bottom of the APHIS Form 7077 corresponding to this case. The palmar aspect of the left fore pastern had many deep folds, corrugations, and nodular areas consistent with a scar rule violation. Although the skin in this area was pigmented, I could see reddening and swelling consistent with a scar rule violation. I found reddened, swollen corrugations on the palmar aspect of the right forefoot.

10. After his examination of Stocks Clutch FCR, Dr. Smith asked Dr. Taylor to examine the horse. Dr. Smith did not tell Dr. Taylor what he had found and did not observe her examination. (CX 5 at 2.)

11. At the hearing on June 26, 2002, Dr. Taylor did not have a present memory, and her recollection could not be refreshed, respecting her examination of Stocks Clutch FCR on July 7, 2000 (Tr. Vol. I at 162-63).

12. Dr. Taylor prepared her affidavit at 11:50 p.m., on July 7, 2000, shortly after the end of the Cornersville Lions Club 54th Annual Horse Show and her examination of Stocks Clutch FCR. Dr. Taylor also contemporaneously helped prepare APHIS Form 7077. (CX 4, CX 6 at 3; Tr. Vol. I at 164.)

13. Dr. Taylor recorded in her affidavit (CX 6 at 1-2) that:

> On July 7, at approximately 8:50 PM, Dr. Smith examined a black stallion, Stocks Clutch, entry 43, in Class 20, after placing 2nd. I observed that the horse walked and completed a turn around the cone normally, but as it went straight after the turn it was reluctant to go and the rein was pulled taut to continue leading it. I observed Dr. Smith approach the left side of the horse and lift the foot and palpate it in the customary manner. I noticed that the horse flinched its shoulder and neck muscles and shifted its weight while he palpated the left pastern, but I did not observe whether this response was consistently localized to palpation of any particular part of the pastern, other than that it was not the posterior pastern. He then palpated the right pastern, and I did not see a similar response. Dr. Smith then asked me to examine the horse.
>
> I observed the horse walk and turn again. It walked and turned around the cone normally, but as it left the turn it was

reluctant to lead and the custodian had to pull the horse along on a tight rein. I approached the horse on the left, established contact and began palpating the left posterior pastern. I noticed that there was very pronounced, severe scarring of the skin of the posterior pastern. There were thickened ropes of hairless skin medial and lateral to the posterior midline, bulging into even thicker, hard corrugations and oval nodules along the medial-posterior aspect. This epithelial tissue was non-uniformly thickened and could not be flattened or smoothed out. Grooves and cracks on the lateral and midline area above the pocket were reddened. When I palpated the lateral and anterio-lateral pastern, the horse attempted to withdraw its foot and I could feel its shoulder and neck muscles tighten and pull away. I obtain this response consistently and repeatedly three times, always when palpating that same spot.

When I palpated the right posterior pastern, I observed that it was also very scarred. There were non-uniformly thick cords of epithelial tissue with hairloss, that also could not be flattened or smoothed, some of which were also reddened. I noticed that the horse flinched and twitched several times while I palpated the posterior pastern over these scars, but the response was not consistently localizable to a particular area. I then palpated the anterior right pastern and did not detect a pain response.

14. In the professional opinions of both Dr. Smith and Dr. Taylor, Stocks Clutch FCR was both unilaterally sore and in violation of the scar rule. In the professional opinion of both Dr. Smith and Dr. Taylor, Stocks Clutch FCR was sore due to the use of chemical and/or mechanical means, in violation of the Horse Protection Act. (CX 5, CX 6.)

15.Dr. Smith and Dr. Taylor documented Stocks Clutch FCR as being in violation of the Horse Protection Act and completed APHIS Form 7077, Summary of Alleged Violations (CX 4).

16.Dr. Smith and Dr. Taylor testified they do not document a horse as being in violation of the Horse Protection Act unless they both agree that the horse is sore and in violation of the Horse Protection Act (Tr. Vol. I at 136, 168).

17.After the examination by Dr. Smith and Dr. Taylor, the Horse Show's Designated Qualified Persons, Charles Thomas and Andy Messick, examined Stocks Clutch FCR (Tr. Vol. II at 17-18, 36-38).

18.A Designated Qualified Person is a person meeting the requirements in section 11.7 of the Horse Protection Regulations (9 C.F.R. § 11.7), who is delegated authority under section 4 of the Horse Protection Act (15 U.S.C. § 1823) to detect horses which are sore (RX 7 at 30). The National Horse Show Commission's Designated Qualified Person program, which employs Mr. Thomas and Mr. Messick as Designated Qualified Persons, is certified by the United States Department of Agriculture (Tr. Vol. I at 86, 228). The training of Designated Qualified Persons is akin to that of United States Department of Agriculture veterinary medical officers in that they attend annual training programs together that are given by the Animal and Plant Health Inspection Service (Tr. Vol. I at 86-87). Mr. Thomas and Mr. Messick are both highly qualified and experienced Designated Qualified Persons, but neither is a veterinarian as are the likewise highly qualified and experienced Animal and Plant Health Inspection Service veterinary medical officers. The duties of Designated Qualified Persons are not full time; Mr. Messick is principally employed as an attorney and Mr. Thomas is retired (Tr. Vol. II at 3, 29-30).

19.After the examinations by the veterinary medical officers, Mr. Messick was the first Designated Qualified Person to examine Stocks Clutch FCR. After reviewing his examination sheet, Mr. Messick had a present recollection of his examination of Stocks

Clutch FCR some 2 years before the hearing. Mr. Messick was the same Designated Qualified Person who had passed Stocks Clutch FCR for exhibition and showing based on his pre-show inspection in which he found the horse met the industry standards. Mr. Messick did not watch the veterinary medical officers examine Stocks Clutch FCR post show. Mr. Messick's post show examination of Stocks Clutch FCR occurred approximately 5 or 10 minutes after the examinations by Dr. Smith and Dr. Taylor. Mr. Messick testified that, as was the case pre-show, the horse still had soft, uniformly thickened tissue and he did not get any withdrawal response on his palpation on the left or right foot. Mr. Messick did not observe swelling or redness of the posterior pastern of either foot. (Tr. Vol. II at 8-20; RX 8, RX 12.)

20.Mr. Thomas next examined Stocks Clutch FCR. Mr. Thomas and Mr. Messick were asked to do so by Respondent Winston T. Groover, Jr., who told them that Dr. Smith and Dr. Taylor had "taken information on him on the scar rule." Since Andy Messick was the first one to check Stocks Clutch FCR pre-show, he also checked the horse first post show. (Tr. Vol. II at 37.) Mr. Thomas' predominant concern appeared to be whether Stocks Clutch FCR was in violation of the scar rule. He did not believe it was, "He did have some raised places... but they were soft and pliable. That's what we were -- in our training, what we were required -- as long as they were soft, we could take our thumb and stretch them and flatten them out or press them and they flatten out, and they were only in the back. Nothing though, around the edge." (Tr. Vol. II at 39.)

21.In Mr. Thomas' opinion, Stocks Clutch FCR was not in violation of the scar rule and he did not find abnormal reactions when he palpated the horse's front pasterns (Tr. Vol. II at 40; RX 10, RX 11).

22.At 10:40 p.m., on July 7, 2000, approximately 2 hours after the examinations of Stocks Clutch FCR by the veterinary medical officers, Dr. Randall T. Baker examined the horse. Dr. Baker is a veterinarian in private practice for 25 years who is licensed in Tennessee and is a member of the American Association of Equine

Practitioners. (RX 13; Tr. Vol. I at 297-98, 305-06.) At the hearing, Dr. Baker had present recollection of his examination of Stocks Clutch FCR which was videotaped and requested by Respondents. Dr. Baker did not find Stocks Clutch FCR's front pasterns to be sore and believed the scars on the pasterns did not violate the scar rule. Although he found some hair loss and thickened epithelial tissue on both posterior pasterns, Dr. Baker concluded that the scar rule was not violated because when he put his palm on the back of Stocks Clutch FCR's foot, he did not have excess tissue coming out from there and the tissue was pliable and not real firm granulation type tissue; it would spread around and cleave under his thumb. Dr. Baker saw no evidence of scarring or redness on either the left or right posterior pasterns. (Tr. Vol. I at 309-27.)

23. Respondent Beverly Burgess watched Dr. Smith and Dr. Taylor inspect Stocks Clutch FCR and in her opinion Dr. Taylor "was not 'a horse person'" because she appeared to have trouble picking up the horse's foot and went at it in an awkward way (Tr. Vol. II at 52). Respondents also presented testimony from Mr. Lonnie Messick, the executive vice president and Designated Qualified Person coordinator for the National Horse Show Commission, and Designated Qualified Person Andy Messick's father, that he had once seen Dr. Taylor hold a horse's foot in an improper manner that caused the horse to jerk its foot away from her. However, he further testified that he had been with Dr. Taylor at other horse shows and she seemed competent. (Tr. Vol. I at 223, 227, 265-66, 271-73.)

24. Respondent Winston T. Groover, Jr., has been a professional horse trainer since 1975. He has attended Designated Qualified Person clinics and read various publications on determining whether a horse is in compliance with the Horse Protection Act. Respondent Winston T. Groover, Jr., testified that on July 7, 2000, he transported Stocks Clutch FCR to the Cornersville Lions Club 54th Annual Horse Show, entered Stocks Clutch FCR in the Cornersville Lions Club 54th Annual Horse Show, and exhibited Stocks Clutch FCR at the Cornersville Lions Club 54th Annual Horse Show, where the horse

was awarded second place in class number 20. (Tr. Vol. II at 91-95.) No evidence has been entered and no argument has been made to show any prior violations of the Horse Protection Act by Respondent Winston T. Groover, Jr.

Conclusions of Law

1. Stocks Clutch FCR was a sore horse when exhibited by Respondent Winston T. Groover, Jr., on July 7, 2000, as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee. On July 7, 2000, Respondent Winston T. Groover, Jr., violated section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)) when he exhibited Stocks Clutch FCR as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee.

2. Respondent Winston T. Groover, Jr., should be assessed a civil penalty of $2,200 and made subject to a 1-year disqualification from horse industry activities, as provided in the Horse Protection Act.

Discussion

Stocks Clutch FCR Was Sore When Exhibited

Two competent, experienced, highly qualified veterinary medical officers employed by the United States Department of Agriculture inspected Stocks Clutch FCR after the horse was awarded second place in class number 20 at the Cornersville Lions Club 54th Annual

Horse Show, Cornersville, Tennessee, on July 7, 2000. The veterinary medical officers each examined Stocks Clutch FCR separately and independently. Each independently concluded that Stocks Clutch FCR was sore. Only after the two veterinary medical officers agreed on their findings was Respondent Winston T. Groover, Jr., the trainer of Stocks Clutch FCR, charged with violating the Horse Protection Act. Neither veterinary medical officer can be said to have any reason to have made a false or frivolous accusation. The accusation that one of them, Dr. Taylor, was not "a horse person" and did not know how to handle a horse's feet is not supported by the record. Dr. Taylor has been a veterinarian since 1986 and for some 12 years, her exclusive duties for the Animal and Plant Health Inspection Service concerned enforcement of the Horse Protection Act. The only witness offered in corroboration of the charge made by Respondent Beverly Burgess, admitted on cross-examination that Dr. Taylor was indeed competent. Dr. Taylor and Dr. Smith, the other Animal and Plant Health Inspection Service veterinary medical officer who found Stocks Clutch FCR sore, were considered by the Animal and Plant Health Inspection Service to possess such special competence in this field that another veterinarian was with them at the horse show for training.

Dr. Taylor and Dr. Smith found Stocks Clutch FCR to be sore on two separate bases. First, they each found an area painful to palpation along the lateral aspect of the left forefoot. Stocks Clutch FCR pulled his foot away from the veterinary medical officers each time thumb pressure was applied to palpate this area. Each veterinary medical officer palpated the area repeatedly and the horse's pain response was consistent and repeatable.

Second, both veterinary medical officers observed scars on the posterior of both of Stocks Clutch FCR's front pasterns which each veterinary medical officer found to be in the violation of the scar rule. In an attempt to make the scar rule generally understandable to all who inspect Tennessee Walking Horses for evidence of soring, the Animal and Plant Health Inspection Service has issued various publications illustrating its proper application. Respondents' Exhibit

2 is one of those publications. It was used as an aid in the cross-examinations of Dr. Smith and Dr. Taylor. Pages 16 and 17 of Respondents' Exhibit 2 show horse pasterns that have ridges and furrows present that do not appear to be "uniformly thickened" as required for a horse not to be considered sore under the scar rule. However, the caption beneath figure 11A on page 16 of Respondents' Exhibit 2 states, "[i]f these can be smoothed out with the thumbs (see fig. 8), these would not be violations." And here lies the whole of Respondent Winston T. Groover, Jr.'s defense.

Both of the Designated Qualified Persons and Dr. Baker who examined Stocks Clutch FCR subsequent to the veterinary medical officers, believed the horse's scars came within these exemptions. Each of them testified that the scars were pliable and could be flattened. But to be considered "flattened" and therefore the "uniformly thickened epithelial tissue" that may be allowed under the scar rule, all bumps, grooves, and ridges must, as shown in figure 8 on page 13 of Respondents' Exhibit 2, completely disappear when outward pressure is being applied to the site by an examiner's two thumbs. Apparently, the Designated Qualified Persons and the private veterinarian were using a less exacting standard.

Moreover, since the Designated Qualified Persons had not spoken to the veterinary medical officers before their examinations, they erroneously thought the violation was confined to the scar rule. This mistaken belief probably led the Designated Qualified Persons to concentrate their examinations of Stocks Clutch FCR's pasterns to the scarred posterior areas and to not fully palpate the horse's left anterior pastern where the veterinary medical officers had elicited pain responses.

Additionally, when Dr. Baker examined Stocks Clutch FCR some 2 hours later, the pain in the left anterior pastern may have by then sufficiently subsided so as to be no longer detectable.

Designated Qualified Person examinations generally have less probative value and are entitled to less credence than examinations by veterinary medical officers employed by the United States

Department of Agriculture. Similarly, a later examination by a private veterinarian is not given as much weight as the more immediate examination by two United States Department of Agriculture veterinarians.[3]

For these reasons, I conclude Stocks Clutch FCR was sore when Respondent Winston T. Groover, Jr., exhibited the horse in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, on July 7, 2000.

Respondent Winston T. Groover, Jr., Should be Assessed

A $2,200 Civil Penalty and Disqualified for 1 Year

The Horse Protection Act provides for the assessment of a civil penalty of up to $2,200 for each violation of its provisions and authorizes disqualification from participating in specified horse industry activities for not less than 1 year for the first violation and not less than 5 years for any subsequent violation.[4]

When determining the appropriate civil penalty, the Horse Protection Act requires consideration of all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.[5]

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[3] *In re Larry E. Edwards*, 49 Agric. Dec. 188, 200 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992).

[4] 15 U.S.C. § 1825(b)-(c); 28 U.S.C. § 2461 note; 7 C.F.R. § 3.91(b)(2)(vii).

[5] 15 U.S.C. § 1825(b)(1).

As pointed out in *In re Kim Bennett*, 55 Agric. Dec. 176, 188 (1996), "[a]s a result of the Scar Rule, the soring that is seen today . . . is far more subtle. . . ." Therefore, even though the soring of Stocks Clutch FCR may appear less severe than the sored horses described in past cases, it is notable because it occurred while the horse was under the control of an experienced, knowledgeable horse trainer. As such, Respondent Winston T. Groover, Jr., was required to know the limitations the Horse Protection Act presently places on his training practices for a horse he exhibits not to be found in violation of the Horse Protection Act. Unless a professional horse trainer, such as Respondent Winston T. Groover, Jr., is held strictly accountable for any horse in his care that is found to have been exhibited while sore, the Horse Protection Act is without meaning.

A sanction must necessarily be assessed against Respondent Winston T. Groover, Jr., that will serve as a meaningful deterrent against his employment of excessive training techniques in the future. No one but Respondent Winston T. Groover, Jr., was responsible for the soring of the horse. Stocks Clutch FCR was in his care for about a year before the show (Tr. Vol. II at 54). Respondents admit Respondent Winston T. Groover, Jr., entered and exhibited Stocks Clutch FCR and all responsibility for Stocks Clutch FCR's condition was Respondent Winston T. Groover, Jr.'s alone (Respondents' Proposed Findings, Conclusions of Law, Brief and Order at 2). I therefore find all culpability for Stocks Clutch FCR being sore rests with Respondent Winston T. Groover, Jr.

For the reasons previously stated, whenever an experienced, knowledgeable, trainer exhibits a sored horse, it must be found that his conduct, absent a credible and meaningful excuse or explanation, is in every respect egregious. Respondent Winston T. Groover, Jr., has not contested his ability to pay the $2,200 civil penalty authorized under the Horse Protection Act for a horse soring violation and that is the appropriate civil penalty to be assessed in these circumstances.

The Horse Protection Act also authorizes the disqualification for not less than 1 year for the first violation and not less than 5 years for any subsequent violation. Complainant seeks the imposition of a

1 year disqualification. In order to have a meaningful deterrent against employing excessive training techniques in the future, I conclude Respondent Winston T. Groover, Jr.'s disqualification for 1 year is necessary and appropriate.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Winston T. Groover, Jr., raises five issues in "Respondent's Appeal of Decision and Order; and Memorandum of Points and Authorities in Support of Respondent's Appeal" [hereinafter Appeal Petition]. First, Respondent Winston T. Groover, Jr., asserts the ALJ erroneously concluded that "a presumption of soreness was created based upon a finding of unilateral soreness" (Appeal Pet. at 2).

Respondent Winston T. Groover, Jr., does not cite, and I cannot locate, any finding, conclusion, or statement in the Initial Decision and Order indicating that the ALJ concluded that "a presumption of soreness was created based upon a finding of unilateral soreness." Therefore, I reject Respondent Winston T. Groover, Jr.'s assertion that the ALJ erroneously concluded that "a presumption of soreness was created based upon a finding of unilateral soreness."

Second, Respondent Winston T. Groover, Jr., contends Complainant failed to prove by a preponderance of the evidence that Stocks Clutch FCR was sore when Respondent Winston T. Groover, Jr., exhibited the horse as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, on July 7, 2000. Respondent Winston T. Groover, Jr., contends Complainant's case is based solely on past recorded findings of Dr. Smith and Dr. Taylor neither of whom had any present recollection of their July 7, 2000, examinations of Stocks Clutch FCR during the hearing. Respondent Winston T. Groover, Jr., contends,

while past recollection recorded is admissible in administrative proceedings and can constitute substantial evidence to support factual findings, it must be reliable. Respondent Winston T. Groover, Jr., contends Dr. Smith's and Dr. Taylor's affidavits (CX 5, CX 6) are not reliable because they are not accurate and fresh and APHIS Form 7077 (CX 4) is not reliable because it is not accurate. (Appeal Pet. at 2-8.)

The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act,[6] and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard.[7] The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence.[8] Dr. Smith and Dr. Taylor testified

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[6]5 U.S.C. § 556(d).

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

[8]*In re Robert B. McCloy*, 61 Agric. Dec. 173, 195 n.6 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38, 2004 WL 91959 (2004); *In re William J. Reinhart*, 60 Agric. Dec. 241, 258 n.7 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (continued...)

that, at the time of the hearing, they had no independent recollection of their examinations of Stocks Clutch FCR (Tr. Vol. I at 45-48, 162-63). Dr. Smith's affidavit, Dr. Taylor's affidavit, and APHIS Form 7077 (CX 4-CX 6) are Dr. Smith's and Dr. Taylor's past recorded recollections of their examinations of Stocks Clutch FCR.

Dr. Smith completed his affidavit approximately 12 hours after he examined Stocks Clutch FCR. Dr. Smith based his affidavit on notes he had taken the night of the examination and his memory of the examination. Dr. Smith testified that, when he wrote his affidavit, he had a fresh recollection of his examination of Stocks Clutch FCR. (Tr. Vol. I at 46-48; CX 5 at 2.) Dr. Taylor testified she completed her affidavit approximately 3 hours after her examination of Stocks Clutch FCR (Tr. Vol. I at 163-64; CX 6 at 3).

Respondent Winston T. Groover, Jr., asserts the time between Dr. Smith's examination of Stocks Clutch FCR and the preparation of his affidavit and the time between Dr. Taylor's examination of Stocks Clutch FCR and the preparation of her affidavit do not, by themselves, establish that Dr. Smith's affidavit and Dr. Taylor's affidavit lacked "freshness." However, Respondent Winston T. Groover, Jr., also asserts the limited written information available to refresh Dr. Smith's recollection and Dr. Taylor's recollection when they prepared their affidavits and the numerous horses Dr. Smith and Dr. Taylor examined after they examined Stocks Clutch FCR and before they prepared their affidavits affected the "freshness" of their affidavits.

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[8](...continued)
(1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

I agree with Respondent Winston T. Groover, Jr.'s assertion that the 12 hours between Dr. Smith's examination of Stocks Clutch FCR and the preparation of his affidavit and the 3 hours between Dr. Taylor's examination of Stocks Clutch FCR and the preparation of her affidavit do not establish that Dr. Smith's and Dr. Taylor's affidavits lack "freshness."

I find the time between Dr. Smith's examination of Stocks Clutch FCR and the completion of his affidavit and the time between Dr. Taylor's examination of Stocks Clutch FCR and the completion of her affidavit are short, and I presume many, if not most, affiants would have a fresh recollection of significant events that occurred 3 and even 12 hours prior to the preparation of an affidavit. The likelihood of a fresh recollection of events would be enhanced by an affiant's access to writings prepared almost contemporaneously with the events that are the subject of an affidavit. When he prepared his affidavit, Dr. Smith had access to, and relied on, notes he prepared almost contemporaneously with his examination of Stocks Clutch FCR. Moreover, the likelihood of a fresh recollection of events would be enhanced by an affiant's intense focus on the events that are the subject of an affidavit during the occurrence of those events. Here, the very purpose of Dr. Smith's and Dr. Taylor's presence at the Cornersville Lions Club 54th Annual Horse Show was to detect sore horses and to document any findings of sore horses. I find nothing in the record supporting Respondent Winston T. Groover, Jr.'s contention that Dr. Smith did not have a fresh recollection of his examination of Stocks Clutch FCR when he prepared his affidavit, and I find nothing in the record supporting Respondent Winston T. Groover, Jr.'s contention that Dr. Taylor did not have a fresh recollection of her examination of Stocks Clutch FCR when she prepared her affidavit.

The United States Department of Agriculture has long held that past recollection recorded is reliable, probative, and substantial evidence and fulfills the requirements of the Administrative Procedure Act (5 U.S.C. § 556(d)), if made while the events recorded

were fresh in the witness' mind.[9] Affidavits and APHIS 7077 Forms, such as those prepared by Dr. Smith and Dr. Taylor, are regularly made as to all of the horses which are found to be sore and are kept in the ordinary course of the United States Department of Agriculture's business. There is no exclusionary rule applicable to proceedings conducted in accordance with the Rules of Practice which prevents their receipt as evidence, and they have been regularly received in Horse Protection Act cases. Dr. Smith's affidavit, Dr. Taylor's affidavit, and APHIS Form 7077 (CX 4-CX 6) were properly received as evidence. In fact, I would attach more weight to these affidavits and APHIS Form 7077, prepared on the day of the event and the day after the event, than to the testimony given almost 2 years after the event.

Respondent Winston T. Groover, Jr., also contends Dr. Smith's affidavit, Dr. Taylor's affidavit, and APHIS Form 7077 are unreliable because they are not accurate. Specifically, Respondent Winston T. Groover, Jr., contends Dr. Smith's affidavit is unreliable because it states he examined Stocks Clutch FCR "[a]t about 9:40 p.m." (CX 5 at 1) (Appeal Pet. at 5). The record supports a finding that Dr. Smith examined Stocks Clutch FCR at approximately 8:40 or 8:50 p.m. Dr. Smith testified that the reference in his affidavit to 9:40 p.m., is a typographical error and that he "should have typed an eight instead of a nine" (Tr. Vol. I at 50-51, 110-11). I disagree with Respondent

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[9]*In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 869 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 822 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Gary R. Edwards*, 54 Agric. Dec. 348, 351-52 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 284 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1300 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1264 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1236 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1182 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 313 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 289 (1993); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1942 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983).

Winston T. Groover, Jr.'s contention that Dr. Smith's affidavit is unreliable based on a single typographical error regarding the time of Dr. Smith's examination of Stocks Clutch FCR.

Respondent Winston T. Groover, Jr., suggests that APHIS Form 7077 (CX 4) is unreliable because neither Dr. Smith nor Dr. Taylor could identify which one of them marked item 29, indicating that Stocks Clutch FCR was sore, or which one of them marked item 30, indicating that Stocks Clutch FCR was not in compliance with the scar rule (Appeal Pet. at 5-6). I reject Respondent Winston T. Groover, Jr.'s suggestion that APHIS Form 7077 (CX 4) is unreliable because Dr. Smith and Dr. Taylor did not remember which of them marked item 29 and item 30. Both Dr. Smith and Dr. Taylor signed APHIS Form 7077 (CX 4) indicating that the form accurately reflected their findings that Stocks Clutch FCR was sore and was not in compliance with the scar rule (Tr. Vol. I at 54-55, 165).

Respondent Winston T. Groover, Jr., also contends Dr. Smith's affidavit, Dr. Taylor's affidavit, and APHIS Form 7077 are unreliable because Dr. Smith's affidavit and Dr. Taylor's affidavit contain an abundance of information that is not contained on APHIS Form 7077 (CX 4), which was completed "more or less contemporaneously with [Stocks Clutch FCR's] examination" (Appeal Pet. at 6-7).

I agree that Dr. Smith's and Dr. Taylor's affidavits contain detailed descriptions of their examinations of Stocks Clutch FCR, whereas APHIS Form 7077, item 31, mainly illustrates Dr. Smith's and Dr. Taylor's findings. However, I reject Respondent Winston T. Groover, Jr.'s contention that this discrepancy establishes that Dr. Smith's affidavit, Dr. Taylor's affidavit, and APHIS Form 7077 are unreliable. I infer this discrepancy is the product of the nature of an affidavit, which is a declaration of facts, and the nature of item 31 on APHIS Form 7077, which commands the examiner to "illustrate where the horse is sore" (CX 4 at item 31). The only invitation to narrative on APHIS Form 7077 is a notation between item 21 and item 22, which states: "Note for narrative continuation of any item, use reverse side of form. Cite item number referred to." Dr. Smith and Dr. Taylor were not required to, and did not, provide a narrative

description of their examinations of Stocks Clutch FCR on the reverse side of APHIS Form 7077 (CX 4).

Third, Respondent Winston T. Groover, Jr., contends Dr. Smith and Dr. Taylor did not establish the extent of their experience under the Horse Protection Act (Appeal Pet. at 7-8).

The ALJ found Dr. Smith and Dr. Taylor to be competent, experienced, highly qualified veterinary medical officers (Initial Decision and Order at 7, 13). The record supports the ALJ's findings. Dr. Smith received a veterinary degree from Colorado State University in 1988. After graduation from veterinary medical school, Dr. Smith was a equine practitioner for approximately 6 months. In 1989, the United States Department of Agriculture hired Dr. Smith, but it was not until 1997, when he joined the Animal and Plant Health Inspection Service's Animal Care staff, that Dr. Smith began examining horses to determine compliance with the Horse Protection Act. During the period 1997 to July 7, 2000, Dr. Smith attended a 2-day Horse Protection Act training course every year, and, when he initially began working in the Horse Protection Act program, he worked with veterinarians who had Horse Protection Act program experience. During the period 1997 to July 7, 2000, Dr. Smith attended between 5 and 7 horse shows each year and in each show he examined between 15 and 30 horses to determine whether they were sore. During the period 1997 to July 7, 2000, approximately 5 to 10 percent of Dr. Smith's time as a United States Department of Agriculture employee was related to the examination of horses for violations of the Horse Protection Act. (Tr. Vol. I at 35-38, 80.)

Dr. Taylor received a veterinary degree from the University of Georgia in 1986. After graduation from veterinary medical school, Dr. Taylor was in avian practice. She was subsequently employed by the United States Department of Agriculture and began examining horses to determine compliance with the Horse Protection Act in 1988. During the entire period 1988 to July 7, 2000, Dr. Taylor attended numerous Horse Protection Act training courses and workshops. During the period 1988 to July 7, 2000, Dr. Taylor

attended between 30 and 50 horse shows and examined approximately 1,000 horses to determine whether they were sore. (Tr. Vol. I at 159-62, 171-72.) Respondent Winston T. Groover, Jr., correctly points out that on cross-examination, Dr. Taylor was less certain about the number of horses she examined for compliance with the Horse Protection Act than she was on direct examination (Appeal Pet. at 8). However, I find Dr. Taylor's uncertainty relates not to the approximate total number of horses she examined during the period 1988 to July 7, 2000, but to the year-by-year number of examinations, which were the subject of Respondent Winston T. Groover, Jr.'s counsel's questions (Tr. Vol. I at 177-81).

Based on the record before me, I agree with the ALJ's finding that Dr. Smith and Dr. Taylor are experienced, competent, highly qualified veterinary medical officers.

I give Dr. Smith's affidavit (CX 5), Dr. Taylor's affidavit (CX 6), and APHIS Form 7077 (CX 4) great weight, and I conclude Complainant proved by a preponderance of the evidence that on July 7, 2000, Respondent Winston T. Groover, Jr., violated section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)) when he exhibited Stocks Clutch FCR as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, while the horse was sore.

Fourth, Respondent Winston T. Groover, Jr., contends he presented credible, reliable, and probative evidence that establishes that Stocks Clutch FCR was not sore on July 7, 2000, when Respondent Winston T. Groover, Jr., exhibited the horse as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show (Appeal Pet. at 8-10).

I find Respondent Winston T. Groover, Jr., presented competent evidence in support of his position that Stocks Clutch FCR was not sore when he exhibited Stocks Clutch FCR as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show on July 7, 2000. However, based upon a careful consideration of the record, I agree with the ALJ that Charles Thomas', Andy

Messick's, and Dr. Baker's results of examinations of Stocks Clutch FCR have less probative value, are less credible, are less reliable, and are entitled to less weight than Dr. Smith's and Dr. Taylor's results of examinations of Stocks Clutch FCR.[10]

Fifth, Respondent Winston T. Groover, Jr., asserts the ALJ erroneously based upon speculation his finding that Designated Qualified Person Charles Thomas' predominant concern appeared to be whether Stocks Clutch FCR was in violation of the scar rule (Appeal Pet. at 9).

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[10]While the record in each case must be examined to determine the weight to be given examinations by Designated Qualified Persons, private veterinarians, and United States Department of Agriculture veterinary medical officers, generally little weight is given to examinations by Designated Qualified Persons and private veterinarians as compared to examinations by qualified, experienced, disinterested United States Department of Agriculture veterinary medical officers. *See In re C.M. Oppenheimer*, 54 Agric. Dec. 221, 268 (1995) (stating the Judicial Officer gives little weight to the examinations by Designated Qualified Persons, compared to the weight the Judicial Officer gives to the examinations by United States Department of Agriculture veterinarians because Designated Qualified Persons are generally laymen, their examinations are short and cursory, and they frequently do not understand the meaning of the term *sore*, as defined by the Horse Protection Act); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 340 (1992) (stating the opinion of laymen, even that of a Designated Qualified Person, is insufficient to outweigh the credible testimony of an Animal and Plant Health Inspection Service veterinarian), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman*, 50 Agric. Dec. 602, 610 (1991) (finding the testimony of two Animal and Plant Health Inspection Service veterinarians more credible, expert, and trustworthy than that given by the Designated Qualified Person, other owners, trainers, and a private veterinarian who examined the horse over an hour after it was shown); *In re Larry E. Edwards*, 49 Agric. Dec. 188, 200 (1990) (stating Designated Qualified Person examinations have repeatedly been found less probative than United States Department of Agriculture examinations and the Judicial Officer has accorded less credence to Designated Qualified Person examinations), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992).

An administrative law judge's findings must be supported by substantial evidence–not mere speculation, intuition, or conjecture.[11] "Substantial evidence" is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[12]

The ALJ found "Mr. Thomas' predominant concern appeared to be whether the horse was in violation of the scar rule."[13] I carefully reviewed Charles Thomas' testimony (Tr. Vol. II at 29-49) and Charles Thomas' description of his July 7, 2000, examination of Stocks Clutch FCR (RX 10, RX 11). I find the record contains substantial evidence that Designated Qualified Person Charles Thomas' predominate concern appears to be whether Stocks Clutch FCR was in violation of the scar rule. Therefore, I reject Respondent Winston T. Groover, Jr.'s contention that the ALJ's finding of fact regarding Charles Thomas' predominant concern is based upon mere speculation.

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

ORDER

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[11]5 U.S.C. § 556(d); *Richardson v. Secretary of HHS*, 735 F.2d 962, 964 (6th Cir. 1984) (per curiam); *Cowart v. Schweiker*, 662 F.2d 731, 736 (11th Cir. 1981); *O'Banner v. Secretary of HEW*, 587 F.2d 321, 323 (6th Cir. 1978); *Dionne v. Heckler*, 585 F. Supp. 1055, 1060 (D. Me. 1984).

[12]*Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Lee v. NLRB*, 325 F.3d 749, 754 (6th Cir. 2003); *Wright v. Massanari*, 321 F.3d 611, 614 (6th Cir. 2003); *NLRB v. V & S Schuler Engineering, Inc.*, 309 F.3d 362, 372 (6th Cir. 2002); *Van Dyke v. NTSB*, 286 F.3d 594, 597 (D.C. Cir. 2002); *JSG Trading Corp. v. Department of Agric.*, 235 F.3d 608, 611 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); *Corrections Corp. of America v. NLRB*, 234 F.3d 1321, 1323 (D.C. Cir. 2000); *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1410 (6th Cir. 1995).

[13]Findings of Fact number 21 (Initial Decision and Order at 8).

1. Respondent Winston T. Groover, Jr., is assessed a $2,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Donald A. Tracy
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building, Stop 1417
Washington, DC 20250-1417

Respondent Winston T. Groover, Jr.'s payment of the civil penalty shall be forwarded to, and received by, Mr. Tracy within 60 days after service of this Order on Respondent Winston T. Groover, Jr. Respondent Winston T. Groover, Jr., shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 01-0008.

2. Respondent Winston T. Groover, Jr., is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or

horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent Winston T. Groover, Jr., shall become effective on the 60th day after service of this Order on Respondent Winston T. Groover, Jr.

RIGHT TO JUDICIAL REVIEW

Respondent Winston T. Groover, Jr., has the right to obtain review of the Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent Winston T. Groover, Jr., must file a notice of appeal in such court within 30 days from the date of the Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[14] The date of the Order is November 15, 2004.

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[14] 15 U.S.C. § 1825(b)(2), (c).

SUGAR MARKETING ACT

COURT DECISION

HOLLY SUGAR CORPORATION, et al., USDA.
Civil Action No. 03-1739 (RBW).
Filed September 15, 2004.

(Cite as: 335 F. Supp. 2d 100).

SMA –FSRIA – *Chevron* deference – Sovereign immunity – Unjust enrichment, when not.

The court determined that the Commodity Credit Corporation (CCC) erred in its interpretation of the sugar loan program administered by CCC under the Farm Security and Rural Investment Act (FSRIA). The court outlined the two step analysis pursuant to *Chevron,* but concluded that the full *Cheveron* analysis was unnecessary because Congress provided explicit guidance on the administration of the Fair Act.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

DISPOSITION: Plaintiffs' and Defendants' respective motions to dismiss both granted in part and denied in part.

JUDGES: REGGIE B. WALTON, United States District Judge

OPINION: MEMORANDUM OPINION

The plaintiffs are challenging the defendants' interpretation of § 163 of the Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 935, ("FAIR Act" or "1996 Act"), as amended by § 1401(c)(2) of the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 187 ("FSRI Act" or "2000 Act"), codified as amended at 7 U.S.C. § 7283, as applied to loans made by the Commodity Credit Corporation ("CCC") to sugar producers. Amended Complaint for Declaratory Judgment,

Restitution and Injunctive Relief ("Compl.") PP 1-6. Currently before this Court are (1) the Defendant's Motion to Dismiss ("Def.'s Mot.") and (2) the Plaintiffs' Motion for Summary Judgment and Opposition to Defendant's Motion to Dismiss ("Pls.' Opp'n"). For the following reasons, this Court grants in part and denies in part the plaintiffs' motion for summary judgment and grants in part and denies in part the defendants' motion to dismiss.

I. Background.

Beginning in the 1940s and continuing to the present, Congress has provided loan assistance to farmers to "support" the prices of agriculture commodities.[1] See Agricultural Act of 1949, Pub. L. No. 81-439, 63 Stat. 1051; Defendant's Statement of Points and Authorities in Support of Her Motion to Dismiss ("Def.'s Mem.") at 2-3. The United States Department of Agriculture ("USDA"), through the CCC, makes these loans to, among others, sugar producers in order to support the price of sugar.[2] See 7 U.S.C. § § 7272, 7991(a). In 1988, the CCC promulgated a regulation that established a uniform policy for assessing interest on such loans. The regulation provided that the interest rate that the CCC would charge on agricultural loans would be the same rate the United States Treasury charged the CCC to borrow the funds to finance the loans, which was the formula in effect on October 1, 1995. See 7 C.F.R. § 1405.1 (1989). This regulation, which has since been amended, was promulgated based upon the CCC's interpretation of 15 U.S.C. § § 714b(l) and 714c(a), (d),

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[1]Congress has provided loan support for agricultural commodities, and in particular sugar, by making non-recourse loans. 7 U.S.C. § 7272(e). With regard to related sugar commodities, these loans require sugar producers to provide sugar as collateral, see 7 C.F.R. § 1435.103(a)(3), as a condition for receiving the loans. In the event of a loan default, the CCC has no legal recourse to require repayment, but it can sell the sugar submitted as collateral on the open market. 7 C.F.R. § 1435.105. The purpose of such loans are to help stabilize, support and protect farm income and prices and for the "maintenance of balanced and adequate supplies of agricultural commodities . . . ." 15 U.S.C. § 714.

[2]Specifically, the CCC provides loans to processors of domestically grown sugarcane and sugar beats, which are being collectively referred to by the Court as "sugar" and the loans to such processors as "sugar loans." 7 U.S.C. § 7272(a), (b).

provisions which list the general and specific powers of the CCC. Def.'s Mem. at 4-5. Under § 714b(l), the CCC "may make such loans and advances of its funds as are necessary in the conduct of its business." And pursuant to § 714c, the CCC is required to "support the prices of agricultural commodities through loans, purchases, payments, and other operations" and "remove and dispose of or aid in the removal or disposition of surplus agricultural commodities." 15 U.S.C. § 714c(a), (d).

However, in 1996, Congress passed the FAIR Act. Under this Act, Congress mandated that the CCC set interest rates for loans, including loans to sugar producers, at a rate equal to the rate it cost the CCC to borrow the funds from the United States Treasury, plus an additional 100 basis points, or one percent. 7 U.S.C. § 7283(a); § 163 of the 1996 Act. The provisions specifically stated: "Notwithstanding any other provision of law, the monthly Commodity Credit Corporation interest rate applicable to loans provided for agricultural commodities by the Corporation shall be 100 basis points greater than the rate determined under the applicable interest rate formula in effect on October 1, 1995." 7 U.S.C. § 7283(a). The CCC amended its regulations to reflect this Congressionally mandated change. See 7 C.F.R. § 1405.1 (1997).

In 2002, Congress again amended the loan program with the adoption of the FSRI Act, Pub. L. No. 107-171, 116 Stat. 187 (codified at 7 U.S.C. § 7283) ("2002 Act"). The 2002 Act added the following subsection to 7 U.S.C. § 7283: "(b) Sugar -- For purposes of this section, raw cane sugar, refined beet sugar, and in-process sugar eligible for a loan under section 7272 of this title shall not be considered an agricultural commodity." 7 U.S.C. § 7283(b) (emphasis added). The 2002 Act did not alter subsection (a) of § 7283, which requires that 100 basis points be added to the interest rate on the loans, nor did the 2002 Act alter the ability of sugar producers to secure agricultural commodity loans under 7 U.S.C. § 7272 (discussing loan program for sugar). The amendment simply exempted sugar from the 100 basis point requirement. The 2002 Act

also added the following, a no net cost provision, to 7 U.S.C. § 7272:

> (g)(1) IN GENERAL - Subject to subsection (e)(3), to the maximum extent practicable, the Secretary shall operate the [loan] program established under this section at no cost to the Federal Government by avoiding the forfeiture of sugar to the Commodity Credit Corporation.

7 U.S.C. § 7272(g)(1).

Despite this more recent amendment of § 7283(b), the CCC and the USDA concluded that the legislation did not mandate a new interest formula for sugar, but merely lifted the requirement of the 100 basis point premium, and thus they could charge whatever interest rate they deemed appropriate. The CCC published its reasoning in the Federal Register:

The 2002 Act eliminates the requirement that CCC add 1 percentage point to the interest rate as calculated by the procedure in place in 1996 but does not establish a sugar loan interest rate. CCC has decided to use the rates required for other commodity loans.

67 Fed. Reg. 54,927 (Aug. 26, 2002). Based upon this reasoning, the CCC has continued to charge an additional one percent on sugar loans.

II. The Parties' Arguments

The plaintiffs have filed a four count complaint challenging the defendants' continued assessment of an additional one percent on sugar loans despite the 2002 Act. Specifically, the plaintiffs allege that the defendants' actions (1) violate the express terms of the 2002 Act; (2) are arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A); (3) result in unjust enrichment to the United States; and (4) amount to an unconstitutional tax. Compl. PP 48, 51, 61, 67. Thus, the plaintiffs seek (1) a declaratory judgment that the defendants' actions violate

the 2002 Act and the Constitution; (2) an injunction prohibiting the defendants from continuing to charge the additional one percent on sugar loans; and (3) an order directing the defendants to pay restitution to the plaintiffs in an amount equal to the amount the defendants have been unjustly enriched through the collection of the additional one percent interest assessment. Compl. PP A., B., C.

The defendants have moved to dismiss the amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Specifically, the defendants argue that the plaintiffs' APA claim must fail because there is no ambiguity in the statute at issue. Def.'s Mem. at 11. The defendants note that the 2002 Act removed sugar from the definition of "agricultural commodity," which they opine left the CCC free of any requirement to use a particular formula for setting interest rates on sugar loans. *Id.* at 11-12. Thus, the defendants posit that the CCC has the authority to charge whatever interest rate it deems appropriate so long as the interest rate is consistent with the CCC's general and specific powers listed in 15 U.S.C. § § 714b(j), (k); 714c(a), (d). *Id.* Therefore, the defendants contend that this Court must give deference to the agency's decision as required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). *Id.* at 14. The defendants further argue that the additional one percentage point interest fee is not a tax under the Constitution as the plaintiffs contend, but rather, is a permissible fee associated with the loan process. *Id.* at 14-17. Finally, the defendants assert that the plaintiffs' claim of unjust enrichment cannot survive their motion to dismiss because (1) the plaintiffs do not assert that the loan agreement has been breached and (2) the government is shielded from recovery on this claim by the doctrine of sovereign immunity. *Id.* at 17-18.

The plaintiffs have moved for summary judgment pursuant to Rule 56(a). Pls.' Opp'n at . The plaintiffs contend that the CCC's interpretation of the 2002 Act is contrary to the plain language of the Act and should, therefore, not be given Chevron deference. *Id.* at 25. The plaintiffs opine that Congress placed the sugar exemption in the same statutory provision that mandates the additional one percent

interest charge in order to specifically exempt sugar from that additional one percent requirement, thereby reducing the interest rate charged on sugar loans. *Id.* The plaintiffs argue that this reading is supported by the plain language of the statute and application of basic cannons of statutory construction. *Id.* at 26. The plaintiffs further argue that the legislative history supports their reading of the statute. *Id.* at 26-27. They also state that the additional one percent interest charge is an unconstitutional tax because it is a payment that "is arbitrary and was created solely for a public purpose." *Id.* at 37. Finally, the plaintiffs posit that the CCC is being unjustly enriched by the assessment because it has illegally collected payments from the plaintiffs. *Id.* at 39. Therefore, the plaintiffs claim that they are entitled to restitution in an amount equal to the amount the CCC has been unjustly enriched. *Id.* at 39-40.

III. Standards of Review

(A) Motion to Dismiss Under Rule 12(b)(1)

Under Rule 12(b)(1), which governs motions to dismiss for lack of subject matter jurisdiction, "the plaintiff bears the burden of persuasion to establish subject matter jurisdiction by a preponderance of the evidence." Pitney Bowes, Inc. v. United States Postal Serv., 27 F. Supp. 2d 15, 18 (D.D.C. 1998). In reviewing such a motion, this Court must accept as true all the factual allegations contained in the complaint. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993). Additionally, in deciding a Rule 12(b)(1) motion, it is well established in this Circuit that a court is not limited to the allegations in the complaint, but may also consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case. *See EEOC v. St. Francis Xavier Parochial Sch.*, 326 U.S. App. D.C. 67, 117 F.3d 621, 624-25 n.3 (D.C. Cir. 1997); *Herbert v. Nat'l Academy of Sciences.*, 297 U.S. App. D.C. 406, 974 F.2d 192, 197 (D.C. Cir. 1992); *Haase v. Sessions*, 266 U.S. App. D.C. 325, 835 F.2d 902, 906 (D.C. Cir. 1987); Grand Lodge of *Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 14 (D.D.C. 2001).

(B) Motion to Dismiss Under Rule 12(b)(6)

On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), this Court must construe the allegations and facts in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the facts alleged. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *Barr v. Clinton*, 361 U.S. App. D.C. 472, 370 F.3d 1196, 1199 (D.C. Cir. 2004) (citing *Kowal v. MCI Communications Corp*., 305 U.S. App. D.C. 60, 16 F.3d 1271, 1276 (D.C. Cir. 1994)). However, the Court need not accept asserted inferences or conclusory allegations that are unsupported by the facts set forth in the complaint. *Kowal*, 16 F.3d at 1276. In deciding whether to dismiss a claim under Rule 12(b)(6), the Court can only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference into the complaint, and matters about which the Court may take judicial notice. *St. Francis*, 117 F.3d at 624-25. The Court will dismiss a claim pursuant to Rule 12(b)(6) only if the defendant can demonstrate "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.

(C) Motion for Summary Judgment Under Rule 56(a)

This Court will grant a motion for summary judgment under Rule 56(c) if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits or declarations, if any, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, this Court must view the evidence in the light most favorable to the non-moving party. *Bayer v. United States Dep't of Treasury*, 294 U.S. App. D.C. 44, 956 F.2d 330, 333 (D.C. Cir. 1992).

(D) *Chevron* Deference

Under the APA, 5 U.S.C. § 706(2)(A), this Court may vacate a decision by the USDA only if the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." This standard is highly deferential to the agency. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). *Chevron* deference applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp*., 533 U.S. 218, 226-27, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001); *see also Robert Wood Johnson Univ. Hosp. v. Thompson,* 297 F.3d 273, 281 (3d Cir. 2002). The Court is required to apply a two-step analysis pursuant to *Chevron*. First, "if the statute speaks clearly 'to the precise question at issue,'[the Court] 'must give effect to the unambiguously expressed intent of Congress.'" *Barnhart v. Walton*, 535 U.S. 212, 217-18, 152 L. Ed. 2d 330, 122 S. Ct. 1265 (2002) (quoting *Chevron*, 467 U.S. at 842-43). Second, where the statute is "silent or ambiguous with respect to the specific issue," courts must sustain the agency decision if it is based on a "permissible construction" of the statute. *Chevron,* 467 U.S. at 843. A court does not need to reach this second step, however, if "employing traditional tools of statutory construction, [it] ascertains that Congress had an intention on the precise question at issue . . . ." *Id*. at 843 n.9.

III. Legal Analysis

(A) Is the USDA's Decision Entitled to Chevron Deference?

This Court agrees with the parties' position that the plain language of the statute clearly and unambiguously indicates Congress' intent, therefore, this Court need not address *Chevron*'s second-prong. Def.'s Mem. at 11; Pls.' Opp'n at 25. The defendants contend that the 2002 Act only removed sugar from the definition of "agricultural commodity" for the limited purpose of 7 U.S.C. § 7283. Def.'s Mem. at 11. Thus, by removing sugar from that section, the defendants opine that Congress' intent was to give the CCC authority to utilize any formula it deemed appropriate in determining the loan rate for

sugar, so long as it was within the scope of the CCC's general and specific powers. *Id.* at 12. The plaintiffs contend, however, that by removing sugar from the definition of "agricultural commodity," Congress intended for sugar to be treated differently than other agricultural commodities. Pls.' Mem. at 26. Thus, according to the plaintiffs, the additional one percent that the CCC continues to charge on sugar loans is clearly contrary to the current version of § 7283(b) as doing so renders the 2002 amendments meaningless. *Id.* Furthermore, the plaintiffs opine that it is clear from the legislative history of the amendments that Congress intended for the interest rate on sugar loans to be reduced. *Id.* at 26-27.

In determining whether *Chevron* deference should be accorded agency action, this Court must first determine, by "employing traditional tools of statutory construction," whether "Congress had an intention on the precise question at issue . . . ." *Chevron*, 467 U.S. at 843 n.9. "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *United States v. Goldenberg*, 168 U.S. 95, 102-03, 42 L. Ed. 394, 18 S. Ct. 3 (1897). "It is an elementary principle of statutory construction that, in construing a statute, [this Court] must give meaning to all the words in the statute." *Lewis v. Barnhart*, 285 F.3d 1329, 1332 (11th Cir. 2002) (per curiam) (citations omitted) (emphasis in original). "When the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms." *Lamie v. United States Trustee*, 157 L. Ed. 2d 1024, 540 U.S. 526, 124 S. Ct. 1023 (2004). Thus, in such situations, "resort to legislative history is not appropriate in construing the plain statutory language." *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 2004 U.S. App. LEXIS 18231, No. 03-7128, 2004 WL 1906880, at *4 (D.C. Cir. 2004). However, when examining the plain meaning of the statute, the Court must not interpret the statute in such a manner that renders another part of that statute or another statute superfluous. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35, 156 L. Ed. 2d 18, 123 S. Ct. 2041 (2003). Furthermore, when faced with both a specific and general provision, this Court should interpret

the provisions so that the specific statute controls. *Edmond v. United States*, 520 U.S. 651, 657, 137 L. Ed. 2d 917, 117 S. Ct. 1573 (1997). If the plain meaning of the statute leads to an "absurd or futile result[], however, [the Supreme] Court has looked beyond the words to the purpose of the act." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400, 15 L. Ed. 2d 827, 86 S. Ct. 852 (1966) (quoting *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940)). The District of Columbia Circuit has held that "literal interpretation need not rise to the level of 'absurdity' before recourse is taken to the legislative history, . . . [but] there must be evidence that Congress meant something other than what it literally said before a court can depart from plain meaning." *Engine Mfrs. Ass'n v. EPA*, 319 U.S. App. D.C. 12, 88 F.3d 1075, 1088 (D.C. Cir. 1996).

In this case, the Court need not reach the second *Chevron* question because it concludes, as both parties do, albeit from different perspectives, that the Congress' intent is clear. Without question, 7 U.S.C. § 7283(a) limits the CCC's authority to set interest rates for loans on agricultural commodities. This provision clearly requires that the interest rate on such loans be one percent greater than the rate charged to the CCC by the United States Treasury to borrow the funds to finance the loans. Thus, the section mandated a one percent increase above the rate that the CCC charges on all agricultural commodity loans pursuant to the pre-existing formula. Prior to the 2002 Act, this one percent add on undoubtedly applied also to loans for sugar commodities. However, pursuant to the 2002 Act, as codified in 7 U.S.C. § 7283(a)-(b), sugar loans are expressly exempted from the imposition of the one percentage point increase. The 2002 Act did not in any other way affect the ability of sugar producers to seek loan assistance through the CCC, the Act simply altered the interest rate for such assistance. By specifically mandating that the increase would no longer apply to sugar, Congress clearly intended for the interest rate for sugar loans to be decreased by one percent. To conclude otherwise would render meaningless Congress' unambiguous amendment contained in the 2002 Act.

The CCC maintains, however, that because Congress did not specifically state what the interest rate for sugar should be, but rather only indicated what it should not be, Congress gave the CCC authorization to charge any rate it deemed appropriate so long as that rate is in line with the CCC's general and specific powers codified at 15 U.S.C. § § 714b(l) and 714c(a), (d). Def.'s Mem. at 11-12. Thus, pursuant to these statutory powers, the CCC argues that it is permitted to charge the additional one percent over the rate charged to it by the United States Treasury. *Id*. Despite the CCC's creative argument, Congress' intent was clear--the interest rate on sugar is now exempt from the additional one percent interest rate increase and thus, the rate is decreased by one percent. Thus, when reduced by one percent, the net effect of the 2002 Amendment is that the interest loan rate for sugar is the amount calculated by using the interest rate formula in effect on October 1, 1995, or the same rate that the CCC pays to the United States Treasury to borrow the fund to finance the loans. If this Court were to conclude that the CCC could impose the additional one percent pursuant to its statutory powers set forth in 15 U.S.C. § § 714b(l) and c(a), (d), despite Congress' mandate otherwise, it would be interpreting the statute in such a way that would give no effect to 7 U.S.C. § 7283(b) as now drafted, thus making it superfluous, which this Court cannot do. *See Dastar Corp*., 539 U.S. at 35. Furthermore, even if this Court could conclude that the CCC's statutory powers under 15 U.S.C. § § 714b(l) and 714c(a), (d) permit the CCC to set interest rates, these powers are clearly not specific to the precise issue presented to the Court here, i.e., whether the CCC may charge an additional one percent where 7 U.S.C. § 7283 clearly indicates otherwise. Thus, this Court cannot read the general statutory provision governing the CCC's powers as trumping the more specific

and clear interest provision of 7 U.S.C. § 7283.[3] *See Edmond*, 520 U.S. at 657.

For the foregoing reasons, the CCC's decision to charge an additional one percent on sugar loans is contrary to the clear language of the 2002 Act, as codified in 7 U.S.C. § 7283.[4] Therefore, this Court affords no deference to the agency's interpretation of the 2002 amendment and it must grant the plaintiffs' motion for summary judgment with respect to counts one and two of the amendment complaint and deny the defendants' motion to dismiss these two counts.[5]

(B) Can the Plaintiffs Maintain Their Claim for Unjust Enrichment Against the Government?

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[3]The defendants also rely on the 2002 Act's no net cost provision as support for its contention that the CCC has the ability to charge whatever interest rate it deems appropriate so long as the rate is within the scope of the CCC's statutory powers codified at 15 U.S.C. § § 714b(l) and 714c(a), (d). Def.'s Mem. at 13. However, the defendants' argument has no merit since it is clear that 7 U.S.C. § 7283 speaks directly and specifically to the issue in dispute--the rate which the CCC can charge to fund sugar loans--while the no net cost provision, 7 U.S.C. § 7272(g)(1), is merely a general provision requiring that the CCC strive to operate the loan existence program, "to the maximum extent practicable[,] . . . at no cost to the Federal Government." *See Edmond*, 520 U.S. at 657.

[4] While this Court need not engage in a review of the legislative history to reach this conclusion, the legislative history on point provides further support for this Court's holding. See S. Rep. No. 107-117, at 100 (2001) (stating that the 2002 Act "reduces the CCC interest rate on sugar loans by 100 basis points"); H.R. Rep. No. 107-191, pt. I at 89 (2001) (noting that the 2002 Act "reduces the CCC interest rate on price support loans"); To Review the Implementation of the 2002 Farm Bill: Hearing Before the Senate Committee on Agriculture, Nutrition, and Forestry, 108th Cong. at 20 (2003) (statement of Senator Conrad) (discussing the repeal of the interest rate "surcharge" and concluding: "now why ever would we have repealed it if we did not intend for that to actually be implemented?")

[5] Because the Court concludes that the defendants' actions were contrary to the plain language of the statute, it will not address the plaintiffs' claim that the additional one percent was an unconstitutional tax.

In count three of the amended complaint, the plaintiffs contend that the additional one percent assessment has resulted in the defendants being unjustly enriched. Compl. P 58. Thus, the plaintiffs seek restitution in the amount equal to the amount the defendants have allegedly been unjustly enriched. Compl. P C. The defendants have moved to dismiss this count of the amended complaint because they claim that the doctrine of sovereign immunity bars the claim. Def.'s Mem. at 18. Additionally, the defendants, by directing this Court to *Albrecht v. Comm. on Emple. Bens. of the Fed. Reserve Emple. Bens. Sys*., 360 U.S. App. D.C. 47, 357 F.3d 62 (D.C. Cir. 2004), appear to argue that unjust enrichment in not an appropriate claim when there is an express contract, i.e., the loan agreements, that specifically addresses the question at issue, i.e., the interest rate payable on the loans. Defendants' Notice of Supplemental Authority. Assuming, without deciding, that sovereign immunity has been waived, this Court is compelled to grant the defendants' motion to dismiss.

"'The doctrine of unjust enrichment has at all times been fundamentally equitable in nature, notwithstanding its long association with the law of contracts.'" *Health Care Serv. Corp. v. Mylan Labs, Inc*. (*In re Lorazepam & Clorasepate Antitrust Litig*.), 295 F. Supp. 2d 30, 50 (D.D.C. 2003) (quoting *BCCI Holdings (Luxembourg) Societe Anonyme v. Khalil*, 56 F. Supp. 2d 14, 64 (D.D.C. 1999)). In order to state a claim for unjust enrichment, the plaintiffs "must establish that: (1) they conferred a legally cognizable benefit upon [the] defendants; (2) [the] defendants possessed an appreciation or knowledge of the benefit; and (3) [the] defendants accepted or retained the benefit under inequitable circumstances." *Id. (citing International Brotherhood of Teamsters, etc. v. Association of Flight Attendants*, 274 U.S. App. D.C. 370, 864 F.2d 173, 177 (D.C. Cir. 1988). "'To qualify for an award of restitution under the theory [of unjust enrichment], [the plaintiffs] must show that [they] conferred a benefit (usually money) on [the defendants] under circumstances in which it would be unjust or inequitable for [the defendants] to retain the benefit.'" *Id*. at 50-51 (quoting *BCCI Holdings (Luxembourg) Societe Anonyme v. Khalil*, 56 F. Supp. 2d

14, 64-65 (D.D.C. 1999) (citations omitted)). However, "there can be no claim for unjust enrichment when an express contract exists between the parties." *Albrecht v. Committee on Employee Benefits,* 360 U.S. App. D.C. 47, 357 F.3d 62, 69 (D.C. Cir. 2004) (citing *Schiff v. AARP*, 697 A.2d 1193, 1194 & n. 2 (D.C.1997)); see *Seafarers Welfare Plan v. Philip Morris*, 27 F. Supp. 2d 623, 635-36 (D. Md. 1998).

The District of Columbia Circuit discussed the implications of an existing contract on an unjust enrichment claim in *Albrech*t, 357 F.3d at 62. There, the plaintiffs alleged, inter alia, that the Board of Governors of the Federal Reserve System had been unjustly enriched and sought "the return of [the] mandatory contributions that [the plaintiffs] made into a defined-benefit pension plan after actuaries determined the plan was well-funded." *Id.* at 64. When discussing the unjust enrichment claim, the District of Columbia Circuit held, relying on *Schiff*, 697 A.2d at 1194, that "there can be no claim for unjust enrichment when an express contract exists between the parties." *Id.* at 69 (citing *Schiff*, 697 A.2d at 1194). Thus, because the pension plan governed the various aspects of the relationship between the parties, and nothing in that contract required the defendants to make refunds to employees if the plan had a surplus, "any 'enrichment' the [defendants] would enjoy if the [plaintiffs] receives surplus funds could not possibly be unjust." *Id.* at 69.

Here, the plaintiffs were under legal obligations, arising from the loan agreements, to pay the interest rates designated in those agreements. The plaintiffs do not allege that the contracts have been breached or should be voided or that some other "quasi-contract" existed. Thus, the plaintiffs in this case are in the same position as the plaintiffs in *Albrecht.* See *Id.* And accordingly, because an express contract exists, the plaintiffs claim for unjust enrichment has no legal foundation as there can be no such actionable claim since the controversy is covered by an express contract.[6] *See Albrecht*, 357 F.3d

[6]This result might seem harsh, since this Court has previously concluded that the interest rates designated in the loan agreements were greater than permitted by law. Had

(continued...)

at 69. Therefore, the defendants' motion to dismiss count three of the amended complaint must be granted.[7]

IV. Conclusion

For the foregoing reasons, this Court concludes that the defendants' additional one percent interest rate assessment on the sugar loans made to the plaintiffs is contrary to the express language of the 2002 Act and is "arbitrary, capricious, . . . or otherwise not in accordance with law" and therefore a violation of the APA, 5 U.S.C. § 706(2)(A). Thus, the plaintiffs are entitled to judgment as a matter of law on counts one and two of their amended complaint.[8]

(...continued)

the plaintiffs, for example, sought to void the loan agreements, *see, e.g., American Airlines v. Austin*, 75 F.3d 1535, 1538 (Fed. Cir. 1996) ("generally, a provision in a government contract that violates or conflicts with a federal statute is invalid or vo*Id.*"), a quasi-contract might be implied to exist, which would provide a basis for an unjust enrichment claim. *See, e.g., United States ex rel. Modern Elec., Inc. v. Ideal Elec. Sec. Co.*, 317 U.S. App. D.C. 145, 81 F.3d 240, 247 (D.C. Cir. 1996) ("unjust enrichment . . . rests on a contract implied in law, that is, on the principle of quasi-contract"). However, no such claim was made in this case. Furthermore, had the plaintiffs sought injunctive relief, they might have been relieved by the Court from making payments on the loans when the case was first filed. Finally, this Court notes that the plaintiffs' claim for a refund of any overpayments under the loan agreements may still be actionable in the Court of Federal Claims. See 28 U.S.C. § 1491(a)(1); *see, e.g., Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1578 (Fed. Cir. 1996) ("the Tucker Act provides jurisdiction to recover the sums exacted illegally by the [Immigration and Naturalization] Service due to its misinterpretation or misapplication of statutes . . . ."); *Unisys Corp. v. United States*, 48 Fed. Cl. 451, 455 (Fed. Cl. 2001) (holding that the government was required to refund quarterly contingency payment to the plaintiff that were made in excess of the contracted amount).

[7] Because this Court concludes that the plaintiffs have failed to state a claim upon which relief can be granted with respect to the unjust enrichment claim, it will not address the defendants' arguments that the claim is barred by the doctrine of sovereign immunity.

[8] As noted earlier, because this Court has concluded that the defendants' actions violate both the express terms of the 2002 Act and the APA, 5 U.S.C. § 706(2)(A), it need not reach the issue raised in Count Four of the amended complaint--whether the interest rate amounted to an unconstitutional tax.

Furthermore, because an express contract defined the terms of the sugar loans, including the payable interest rate, the third count of the amended complaint--their claim for unjust enrichment--must be rejected as a matter of law.

SO ORDERED this day of 15th day of September, 2004.[9]

ORDER

Upon consideration of the Defendants' Motion to Dismiss and the Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the defendants' motion to dismiss counts one and two of the complaint is **DENIED** and the plaintiffs' motion for summary judgment on these counts is **GRANTED.** It is further

ORDERED that defendants' motion to dismiss count three of the complaint is **GRANTED** and the plaintiffs' motion for summary judgment on this count is **DENIED.**

SO ORDERED this 15th day of September, 2004.

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[9] An Order consistent with the Court's ruling accompanies this Memorandum Opinion.

SUGAR MARKETING ACT

DEPARTMENTAL DECISION

In re: SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE.
SMA Docket No. 03-0001.
Filed July 21, 2004.

SMA – Sugar beets – Adjustment to allocation – Opened sugar beet processing factory – Substantial quality losses on stored sugar beets – Credibility determinations – Statutory construction – Ordinary meaning of words – "Opened" defined – ALJ's lack of authority to rule statute unconstitutional – Due process – Regulatory taking.

Steven A. Adduci, Gina L. Allery, David A. Bieging, and Peter D. LeJeune, for Petitioner.
Phillip L. Fraas and Karen M. Johnson, for Intervenors.
Jefrey Kahn, for CCC.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

In this decision, I deny the Petition of Southern Minnesota Beet Sugar Cooperative ("SMBSC" or "Petitioner") to overturn the decision of the Executive Vice-President of the Commodity Credit Corporation (CCC). I find that the actions of the CCC were totally in accord with the express language of the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 (Act)(7 U.S.C. §1359ii). I thus find that SMBSC is not entitled to an increase of 1.25 percent in their allocation for either opening a new sugar beet processing factory or for sustaining substantial quality losses on stored sugar beets during the 1999 crop year.

Procedural Background

This proceeding arose with SMBSC's filing of a Petition for Review of several determinations made by the Executive Vice-President of the CCC on January 23, 2003. SMBSC sought review of

the October 21, 2002 beet sugar marketing allotment allocations made by the CCC. After reconsideration of two requests for adjustments by the Petitioner, the CCC rejected both requests. The CCC filed its Answer on February 13, 2003, along with a certified copy of the record upon which the Executive Vice- President based his reconsidered determination, pursuant to the Sugar Marketing Allotment Program Rules of Practice (Rules), Rule 5. The CCC also submitted, with the Answer, a list of parties who would be "affected" by these proceedings.[1]

As per Rule 5(d), the Hearing Clerk served the petition and answer upon each of the identified affected parties. Seven affected parties—American Crystal Sugar Company, Imperial Sugars Corporation, Michigan Sugar Company, Minn-Dak Farmers Cooperative, Monitor Sugar Company, Western Sugar Cooperative, and Amalgamated Sugar Company--elected to intervene.

Since this was a case of first impression on this subject, then presiding Administrative Law Judge Jill Clifton[2] ordered the submission of briefs concerning how the hearing should be conducted. Both the CCC and Intervenors contended that there should be no oral hearing at all, and that my review should be solely based on the administrative record, with no need for additional testimony or submissions of further documentary evidence. Petitioners, on the other hand, contended that the statute required a *de novo* hearing. While the absence of contested material facts would not have left me any reason to conduct an oral hearing, I concluded that a hearing would be appropriate to allow Petitioner to present facts concerning its positions as to whether it had "opened a new factory" and whether it had "sustained substantial quality losses on stored sugar beets" in crop year1999 as contemplated by the Act. I restricted the hearing to the development of these facts only, and announced

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[1]As discussed in more detail, *infra,* beet sugar allotments are a "zero-sum" situation, in that any increase in allotment to any beet sugar processor means a corresponding reduction in allotments of all other processors.

[2]The case was subsequently assigned to me on July 31, 2003.

that I would not hear testimony on legislative intent and other non-factual issues.

I held a hearing in Washington, D.C. on November 10, 12 and 13, 2003.

Statutory and Regulatory Background

The federal government has regulated sugar beets, along with other commodities, for many years. The degree of regulation has varied widely over time, based on a variety of circumstances. Thus, in 1996, Congress enacted the Agricultural Marketing Transition Act, P.L. 104-127, also known as the "Freedom to Farm Act," which removed the previous sugar marketing allotments that had limited the sale of beet sugar, and other commodities. Then, in 2002, Congress largely reversed itself by passing the Farm Security and Rural Investment Act, 7 U.S.C. § 1359 *et seq*. This Act required the Secretary to once again establish allotments for the processing of beet sugar, based on the average weighted quantity of beet sugar produced by a given processor during the 1998 to 2000 crop years. At issue here are the provisions allowing for adjustments to these weighted averages. The Act provides for four basic types of adjustments:

CHAPTER 35 - AGRICULTURAL ADJUSTMENT ACT OF 1938

1359dd. Allocation of marketing allotments.
(D) Adjustments
(i) In general
The Secretary shall adjust the weighted average quantity of beet sugar produced by a beet sugar processor during the 1998 through 2000 crop years under subparagraph (C) if the Secretary determines that the processor -
(I) during the 1996 through 2000 crop years, opened a sugar beet processing factory;
(II) during the 1998 through 2000 crop years, closed a sugar beet processing factory;

(III) during the 1998 through 2000 crop years, constructed a molasses desugarization facility; or

(IV) during the 1998 through 2000 crop years, suffered substantial quality losses on sugar beets stored during any such crop year.

(ii) Quantity

The quantity of beet sugar produced by a beet sugar processor under subparagraph (C) shall be -

(I) in the case of a processor that opened a sugar beet processing factory, increased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each sugar beet processing factory that is opened by the processor;

(II) in the case of a processor that closed a sugar beet processing factory, decreased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each sugar beet processing factory that is closed by the processor;

(III) in the case of a processor that constructed a molasses desugarization facility, increased by 0.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each molasses desugarization facility that is constructed by the processor; and

(IV) in the case of a processor that suffered substantial quality losses on stored sugar beets, increased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph).

7 U.S.C. §1359dd(b)(2)(D).

The CCC was directed to promulgate regulations implementing the statute under a very restrictive time frame. These regulations are not at issue here. Neither the statute nor the regulations define what is meant by "opened" or "closed" with respect to a beet sugar facility, nor is there any specific guidance in the statute or regulations on the implementation of the "substantial quality losses" provision.

Nor is there much in the way of legislative history. While I base my decision primarily on the unambiguous language of the statute, I also discuss below, in the alternative, the snippet of legislative history, in the form of a statement by Senator Conrad, which appears to be the sole discussion on the record by Congress respecting the beet sugar allocation adjustment provisions. Senator Conrad, who cosponsored this provision, stated:

> The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future. This is an amendment that enjoys widespread support within the sugar beet industry. Producers in that industry recall, as I do, the very difficult and contentious period just a few years ago when the Department of Agriculture last attempted to establish beet sugar allotments with very little direction in the law.
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> . . .
>
> That experience left us all believing that there must be a better way, that we should seek a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. On that basis, I urged members of the industry to work together to see if they could agree on a reasonable formula.
>
> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based

> on each processor's weighted-average production during the years 1998 through 2000 with authority for the Secretary of Agriculture to make adjustments in the formula if an individual processor experienced disaster related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets.

107th Cong., 148 Cong. Rec. 10, p. S514 (Feb. 8, 2002).

The Facts

Petitioner is a beet sugar processing cooperative that was formed in 1972. It currently consists of 585 farmer/shareholders in Minnesota. The cooperative is located in Renville, Minnesota and currently employs approximately 275 year-round and 450 seasonal workers. Tr. I, 319-320.[3]

In 1999, Petitioner borrowed approximately $100,000,000 and engaged in extensive renovations of its beet sugar processing facilities. Tr. I, 193-195. At the hearing, SMBSC detailed the scope and magnitude of the construction project, which it termed Vision 2000. Tr. I, 32-86, CX 1, 5, 8, 9, 10, 12-22, 25, 41.[4] SMBSC states that substantial portions of the old facility were demolished, and that in effect, the extensive nature of renovations is equivalent to the opening of a new facility, as referred to in the Act. As a result of all this construction, SMBSC states that its design capacity for processing sugar beets into sugar is more than double the capacity of the factory as it previously existed on the same site. *See,* SMBSC Reply Brief at 22. SMBSC undoubtedly significantly modernized and increased the capacity of its Renville facility. Likewise, there was considerable testimony that many of the other intervenor beet sugar entities also undertook significant and highly costly—though not as

[3]Tr. I refers to the transcript for the first day of the hearing, and Tr. II and Tr. III refer to the transcripts for the second and third days of the hearing.

[4]Petitioner's exhibits are designated by CX, Intervenors by IX, and CCC's by GX.

costly over as short a period as Petitioner—modifications and improvements to their processing plants. Thus, Kevin Price of American Crystal—the largest beet sugar processor--testified to two major expansions totaling over $130,000,000 during the period from 1996-2000. Tr. II, 32-46. Inder Mathur, President of Western Sugar Corporation testified to a $22.5 million expansion project. Tr. II, 120-123. Victor Krabbenhoft, the Chairman of the Board of Minn-Dak, testified to a $93,000,000 expansion. Tr. II, 170-1, 179. The process of extracting sugar from the sugar beet is complicated, time-consuming and expensive. It presents difficult material handling problems in a harsh climate. It is complicated by a perishable raw material that is delivered in the fall of the year (usually after a frost to enhance sugar content) to begin what is called the "beet slicing campaign." The raw as-received sugar beets degrade if not processed by the time the springtime warm weather arrives. Once the sugar beets are converted to a intermediate product of thick, syrupy liquid ("thick juice" or "in-process sugar"), the time constraints on further processing are less intense, other than to finish the process before the next year's crop of sugar beets start arriving again. The beet end of the factory is normally shut down for lack of raw product between slicing campaigns. The sugar end of the overall process consists of a year-round concentration and crystallization process. With the aid of intermediate product storage tanks, processing of the thick juice may proceed at a slower daily rate than operations at the beet end part of the factory.

Shortly after regulations were issued implementing the 2002 Act, the CCC sent out a survey to all sugar beet processors. This Beet Processor Allotment Production History Adjustment Survey (Certified Administrative Record of the Commodity Credit Corporation (CR) 004-005) contained four questions concerning the four adjustments that were available under the Act. While Petitioner did state that it had suffered a loss more than 20% above normal on stored sugar beets during the 1999 and 2000 crop years, it answered "No" to the question

Did your company start processing sugar beets at a new processing facility in the period, October 1, 1996, through September 30, 2001?
Petitioner testified that they did not realize that this was an official survey, since it was not on a printed form or on letterhead, and that they simply made a mistake in filling out this form. John Richmond, the President and CEO of Petitioner testified that the fact that the survey's wording did not exactly track the regulations made them "unsure of what to do." Tr. I at135.
Mr. Richmond also testified that the sugar beet processing portion of the factory was rebuilt in essentially one off-season, between March and September of 1999. By reconstructing a plant " . . . so that it was now two or three times bigger than it was before, I believe means that we reopened the plant and we constructed a new plant simultaneously." *Id.* at 140. "[W]hat we did was demolish the beet end of a factory, and rebuild that factory and add another factory at the same time. We did not permanently terminate the operation at that factory. We essentially rebuilt that factory and right with it, built another factory at the same time." *Id.* at 142. Shortly after this statement that Petitioner essentially had two factories on the same site where it previously had one, apparently as a result of the degree of expansion in processing capability, Mr. Richmond engaged in this short colloquy with government counsel:

MR. KAHN: And you have never had more than one factory, have you, on that site?

MR. RICHMOND: There has only ever been one sugar factory.

Id. at 143.

Petitioner also introduced evidence, for comparison purposes, of the reopening of a facility that had been idle for two decades in Moses Lake, Washington. Tr. I, 95-99. This Pacific Northwest, or PNW, facility did receive an adjustment for opening a sugar factory. While there was some testimony indicating that portions of the infrastructure from the factory that had sat idle for twenty years still existed in a usable condition, other testimony showed that a significant portion of the facility's equipment had been cannibalized, Tr. II at 236-7.

There was no dispute that the CCC had found that Petitioner had incurred a quality loss on stored sugar beets in crop year 2000 that entitled them to a favorable 1.25% adjustment in their allotment. At the hearing, there was a good deal of evidence presented as to whether Petitioner was entitled to a second such adjustment for substantial losses on stored sugar beets allegedly suffered during crop year 1999. Petitioner testified that it suffered substantial quality losses on stored sugar beets because of a major boiler failure, which resulted in the work at the factory slowing down. The boiler failure, combined with abnormally warm weather, caused the quality of the beets, and the resulting output of sugar, to significantly deteriorate. Tr. I at 144-5. There was considerable testimony as to whether losses that were triggered by an equipment failure even qualified as "substantial quality losses" under the statute. The term has not been defined by the CCC either through regulation or other guidance.

Mr. Richmond testified that the "straight house" recovery method was an appropriate approach to determining the relative performance of beet sugar factories, and that a 20 percent loss in sugar production calculated according to this method was an appropriate measure of substantiality. E.g., Tr. I at 117-8. He further testified that in order to establish a baseline to determine the extent of the loss, it was appropriate to use a standard of recovering a minimum of 75 percent of the sugar in the harvested sugar beets. He stated that, applying this methodology, the recovery average for 1999 was well below the ten-year average recovery percentage.

Intervenors strongly contested Petitioner's methodology and results. They argued that the 75 percent standard for evaluating straight house recovery was inappropriate and unsubstantiated, and testified that if it was the appropriate standard, then a number of other companies would have been similarly entitled to an allocation adjustment. Tr. II at 22-26, 124, 157, 204, 237, IX 29. They also contended that the statutory term "quality losses" was not meant to cover every type of loss that could occur in the processing of sugar beets, and that equipment problems such as boiler failure constitute a

"non-quality" loss not intended to be covered by the statutory adjustment of allocation.

All parties acknowledge, as they must, that the beet sugar allotment program is a "zero-sum" game—that is, any increase in one processor's allotment results in a decrease in the amount of the allotments of the other beet sugar processors. Every year the Secretary estimates the amount of sugar that will be consumed in the United States, along with projected domestic production and imports, and establishes an overall allotment quantity, which is allocated according to a statutory formula between sugar derived from sugar beets and sugar derived from sugar cane. Thus, the total amount of sugar to be processed by the beet sugar industry is a fixed amount, subject to some periodic interim adjustments. Thus, an allotment increase of 1.25% for one processor would result in a reduction of a total of 1.25% in the cumulative allocations of the other processors, resulting in zero net gain or loss to all the processors combined.

DISCUSSION

I. Petitioner is Not Entitled to an Adjustment for Opening a Sugar Beet Processing Factory

I affirm the Commodity Credit Corporation's denial of Petitioner's request for an adjustment of 1.25% in their sugar beet allocation for opening a sugar beet processing factory. I find that the language in the Act is clear and unambiguous that substantial expansions, modifications and/or modernizations of a factory are not equivalent to the opening of a factory. Further, the legislative history supports the interpretation of the statute made by the CCC. And to the extent there is any ambiguity as to the meaning of "opened" I find that the CCC's interpretation is both reasonable and entitled to deference. I also find that the CCC's actions in granting Pacific Northwest an adjustment for opening a factory in Moses Lake, Washington are not inconsistent with their actions regarding Petitioner in this matter.

In its Request for Reconsideration of Allocation of Sugar Marketing Allotments by the Executive Vice President of CCC, dated October 9, 2002, SMSBC states:

> "Beginning in crop year 1998, SMSBC substantially re-built and expanded it processing facility, resulting in what is essentially a new sugar beet processing factory on the same site and partially using existing buildings. Nearly every major unit operation in the facility was replaced or substantially modified."

(C.R. 010)

SMSBC then refers to this re-building and/or expansion as an "essentially new factory." *Id.* In the Brief of SMSBC Concerning Suggested Procedural Matters, Petitioner states that it:

> "reconstructed and reconfigured its Renville, Minnesota sugar beet processing factory thus creating a new sugar beet processing factory on the same site. The new factory increased production capacity and enhanced efficiency and productivity thereby driving down the costs of production."

Brief of SMSBC Concerning Suggested Procedural Matters, p. 4. Petitioner is thus essentially arguing that by significantly improving efficiency and expanding its capacity, it has "opened" a new factory.

Congress obviously could have chosen to reward a beet sugar processor for expanding significantly in size. By limiting the 1.25% allocation increase to companies that "opened" a factory, however, Congress did not make the choice urged by Petitioner. That choice being made, it is not the role of the CCC nor the undersigned to second guess Congress. That Congress chose a different course after earlier passing the Freedom to Farm Act, and that Petitioner might have made business decisions in reliance on the earlier Act does not give the CCC any ground to implement the current Act in a manner contrary to its express terms. Moreover, the record indicates that

farm bills have a limited life and that those regulated by these bills have learned to expect periodic changes of greater or lesser significance. As I read it, the statute simply does not make any provision for adjusting a beet sugar processor's allotment simply because it has increased its processing capacity, even if the increase was substantial. Indeed, granting allocation adjustments for increasing capacity would, based on the evidence presented by several of the intervenors, potentially result in a number of adjustments in allocation, which would all have to come out of the same total allotment. And imposing a rule that arguably doubling capacity is the equivalent of opening a factory, while any lesser number would not get such an allocation would likely be viewed as arbitrary, particularly given the clear meaning of "opened" in this context. Congress was certainly familiar with the potential for a processing facility to expand, and they appear to have decided to limit the granting of the 1.25 % increase in allotment to processors who "opened" a factory rather than include those who expanded a presently existing one.

Alternatively, Petitioner has contended that it effectively demolished its old factory—although the company never ceased operating other than in the normal off-season for this industry—and built **two** new factories in its place. Tr. I at 139, 162. On the other hand, Petitioner seems to recognize, as Mr. Richmond testified, that there really is just one beet sugar processing factory in Renville, albeit a significantly larger and probably more efficient one than the pre-expansion factory. The legal argument that Petitioner effectively demolished its old factory and opened two new ones on the same location is less than compelling. Petitioner argues in its Post-Hearing Brief that "The entire beet end of the facility was demolished and reconstructed . . . " (p. 17) and that the beet end of a facility is the "factory." *Id.*, at 21. Yet Petitioner also goes on to argue in its Reply Brief that it should not suffer the downward adjustment of 1.25% that the statute mandates for a beet sugar processor who has "closed" a sugar beet processing factory. Yet if a factory is demolished, it is a difficult to conceive of it not being closed. In fact, Petitioner's approach would logically mandate that the CCC deem a factory "closed" if it reduced capacity by 50%, since that would appear to be

the converse of accepting the argument that the doubling of capacity is "opening" an additional factory. And contending that the "beet end" and the "sugar end" are two different factories, and that therefore there are now two factories where there once was one seems little more than a bootstrap approach to arguing that allegedly doubling the potential capacity to process sugar beets is the same as opening a new factory.

I also find it significant, but not controlling, that in response to a survey conducted by the CCC, Petitioner indicated that it had not opened a new beet sugar processing facility during the time period that would trigger the increased allotment. Although Petitioner through testimony and argument indicates that this was a mistake, and that the form was confusing because it did not track the language of the statute and that it did not appear to be an official survey, it is apparent that at the time of the survey Petitioner considered its extensive renovation of its facility just that, and not the opening of a new facility.

Even if I were to find that the statutory language was ambiguous, which I do not, the legislative history would be of no help to Petitioner. Senator Conrad pointed out that the 2002 Act was designed to create " . . . a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry." The amorphous standard suggested by Petitioner which would require the CCC to determine that "opening" a facility includes expanding a facility's capacity more than an unspecified amount (and suggests that a facility must be found to have "closed" if capacity has diminished by a likewise unspecified amount) provides neither certainty nor predictability and does not seem to comport with the objectives mentioned by Senator Conrad.

Petitioner also contends that "[a] conservative and common sense reading" (Opening Brief, p. 23) of Senator Conrad's statement that the Secretary of Agriculture had the authority to make adjustments to allotments " . . . if an individual processor experienced disaster-related losses during that period or opened or closed a processing

facility or increased processing capacity through improved technology to extract more sugar from beets" means that a processor who increases processing capacity through improved technology is entitled to an adjustment to its allocation. However, reading Senator Conrad's statement in conjunction with the four bases for allowing allocation adjustments provided in the Act, it is evident that the phrase concerning "increased processing capacity through improved technology to extract more sugar from beets" refers not to an increase in beet slicing capacity or a modernization of technology but rather to the allotment increase for molasses desugarization. Looking at Senator Conrad's comments in context, it is apparent he is making a reference to each of the four types of adjustments—opening a facility, closing a facility, disaster-related losses and construction of a molasses desugarization facility. Further, the phrase in question refers to technologies to "extract more sugar from beets." Increasing the capacity of a factory, as Petitioner did with the Renville facility, does not increase the amount of sugar they can extract from beets, but primarily allows them to process more beets. Thus, Senator Conrad's statement, which basically constitutes the legislative history for these provisions, does not support Petitioner's position.

I find that even if the language concerning whether a factory was "opened" was subject to multiple interpretations and the legislative history was not dispositive, the CCC would be entitled to some deference in its interpretation of these provisions. While the Act provides for a hearing as to whether the provisions on the adjusting of allotments have been correctly applied, it could not have intended to have the administrative law judge interpret the statute as if the CCC had never acted. While the hearing in this type of case may be *de novo* with respect to adducing material facts that are at issue, the judge is not supposed to substitute his expertise for the CCC, which is charged with administering the Act, including the promulgation of regulations. While I will not go so far as to say that I must give the CCC the full deference accorded in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), because that holding specifically seems to apply to federal judicial review of final agency actions while this matter is obviously still before the USDA, I find that some deference must be given to the Executive Vice-

President of CCC's Initial Determination of Petitioner's appeal [Reconsidered on December 12, 2000] as the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). This is the

> " . . . contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 396, 408. . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

Udall, 380 U.S. at 17.

Here, the CCC's interpretation of the "opened" provision is reasonable and consistent with the Act, and would be entitled to deference had I needed to reach that issue.

Finally, the CCC's handling of the Pacific Northwest allocation is not inconsistent with the Act and with their handling of Petitioner's allocation. The Renville facility was never closed during the period of its expansion, other than during the normal off-season for the beet end of the facility. The Moses Lake facility for which Pacific Northwest was awarded an allocation for "opening" a sugar beet processing facility had been closed for a full twenty years. That it was a closed facility for twenty years is manifest—most of the old equipment had been removed from the site. There had been no sugar beet processing at that location from 1978 until Pacific Northwest opened a processing facility at the same site in 1998. Tr. I at 95-98. The two situations are simply not analogous.

2. **Petitioner is Not Entitled to a Second Adjustment for Substantial Quality Losses on Stored Sugar Beets**

I affirm the CCC's denial of a 1.25% adjustment for quality losses on stored sugar beets for the 1999 crop year. I find that the clear, unambiguous language of the Act only allows a single quality loss adjustment for sugar beets during the three crop years (1998-2000) that are used to calculate the base allotment, and that the CCC had already allowed such an adjustment for the 2000 crop year. Further, the legislative history offers no help to Petitioner's interpretation. To the extent that there is any ambiguity in the statute, the interpretation of the CCC is reasonable and would be entitled to deference.

Section 359d(b)(2)(D)(i)(IV) of the Act provides for an adjustment if the Secretary determines that the processor, "during the 1998 through 2000 crop years, suffered substantial quality losses on sugar beets stored **during any such crop year**." (Emphasis added.) (7 U.S.C. § 1359dd(b)(2)(D)(i)(IV).) Petitioner contends that it is entitled to a second adjustment for the 1999 crop year, in addition to the quality loss adjustment that it received for the 2000 crop year, while CCC contended that it was immaterial and irrelevant whether SMSBC suffered a second substantial quality loss in the 1999 crop year. The CCC and Intervenors contend that in order to properly apply the statutory provision, CCC never had to decide the issue of whether SMSBC had suffered substantial loss in the 1999 crop year since the substantial quality loss during the 2000 crop year was a sufficient basis for CCC to make the single adjustment permitted under the statute.

The CCC interpretation is in accord with the clear and unambiguous language of the Act. There are four different adjustments allowed under the Act, and three of them—for opening or closing a factory, and for constructing a molasses desugarization facility, apply to **each** opening, closing, or construction. In contrast, the adjustment for substantial quality losses on sugar beets stored during any such crop year from 1998 to 2000 does not specify that the adjustment applies to each such loss. The rules of statutory construction require the presumption that Congress' word choices are intentional, and that where Congress uses one word—each—in describing three of the adjustments, while not using that word to apply to the fourth adjustment, then it must have had a purpose in so

doing. Where Congress includes particular language in one section of a statute, but omits it in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 25 (1997). Where Congress provided that an adjustment be made for each opening, closing or construction in subparagraphs (D)(ii)(I), (II), and (III) and chose a different approach to (D)(ii)(IV), the only proper conclusion is that Congress did not want the same standard to apply.

Once again, even if I found that I needed to look to the legislative history, I see nothing that would support Petitioner's interpretation. The legislative history does not address whether Congress intended there to be one, two or three adjustments based on sustaining quality losses. While all parties agree that the purpose of the Act's adjustment provisions were "to provide a predictable, transparent, and equitable formula," Senator Conrad's statements shed no light, one way or the other, as to how this particular adjustment is to be applied. Thus, if I needed to look to the legislative history, I would next determine whether the CCC's position was reasonable, under the deference standard that I discussed above.

The CCC's position that a processor would only be entitled to a single adjustment for quality losses, even it could show quality losses for more than one of the covered crop years, is reasonable and would be entitled to deference. Since I have already held that this interpretation is the proper reading of the clear terms of the statute, and the only one that gives meaning to each of the terms used by Congress in the adjustment provisions, there is little more to say on the matter.

A considerable portion of the hearing was devoted to testimony and exhibits as to what Congress meant by "substantial quality losses on stored sugar beets." Because I affirm the CCC's determination that the Act only allows for one quality loss adjustment, and because the CCC has already awarded Petitioner such an adjustment for the 2000 crop year, I do not find it necessary to make any determination as to whether Petitioner showed that it has suffered such losses during

the 1999 crop year, and what standards would apply to make such a determination. Whether the loss must be directly related to the beets themselves, or whether such a loss can be the result of equipment failure, whether the straight house method is the appropriate method to determine the extent of losses, etc., are not for me to initially determine. If the Act made provision for more than one quality loss adjustment, I would have to remand the matter to the CCC for an initial determination as to what standards would apply in making such a determination.

3. **Petitioner's Due Process, Regulatory Taking and Significant Impact Claims Provide No Basis for Overturning the CCC's Decision**

Petitioner has alleged (Opening Brief, pp. 13-14) that its due process rights were violated by the CCC's lack of a "thorough and proper investigation" of Petitioner's request that the CCC reconsider its initial allotment allocation decision; that denying it the requested allocation adjustments would amount to a regulatory taking; and that the impact of a denial of the requested allocations would be significant and discriminatory.

An administrative law judge's jurisdiction to rule on constitutional claims is limited. We clearly cannot declare an Act of Congress unconstitutional, nor can we invalidate an Agency regulation. "[G]enerally an administrative tribunal has no authority to declare unconstitutional a statute that it administers." *In re Jerry Goetz* , 61 Agric. Dec. 282, 287 (2002). However, we are charged with assuring that parties receive due process in their hearings.

Petitioner has received ample due process. The principal due process contention raised by Petitioner appears to be that on reconsideration, the Executive Vice President of the CCC did not conduct a hearing. Aside from the lack of requirement in the Act or the regulations that a reconsideration request entitles Petitioner to a hearing before the CCC, the fact is that Petitioner received an in-person hearing before me and had a full opportunity to adduce the facts that would support its claim for additional allotments.

Petitioner's regulatory taking and unfair impact arguments are essentially disagreements with Congress' legislative decisions in crafting the Act. Since I have sustained the CCC's interpretations as totally consistent with the statute, and since I have no authority to alter or overrule the statutory scheme authorized by Congress, I find no basis for reversing the determination of the CCC.

Findings and Conclusions

1. Petitioner, during the years 1996-2000, engaged in a significant modernization and expansion of the beet sugar processing facility in Renville, Minnesota.

2. Petitioner's significant modernization and expansion did not constitute opening a new beet sugar processing factory.

3. Petitioner was not entitled to a 1.25% increase in its allocation for opening a sugar beet processing factory.

4. Petitioner received a 1.25% increase in its allocation as a result of suffering substantial quality losses on stored sugar beets during the 2000 crop year.

5. Under the Act, no processor is entitled to more than one adjustment for substantial quality losses on stored sugar beets during the 1998 through 2000 crop years.

6. Petitioner was not entitled to a 1.25% increase in its allocation for suffering substantial quality losses on stored beets during the 1999 crop year.

7. Petitioner was not denied due process during the course of these proceedings.

Conclusion and Order

The determinations made by the Executive Vice-President of the CCC on January 23, 2003 denying Petitioner's request for additional

allotments under the Act are sustained. The Petition for Review is DENIED.

This decision shall become final 25 days after service on the Executive Vice-President of the CCC, unless a party or an intervenor files an appeal petition to the Judicial Officer pursuant to Rule 11.

Copies hereof shall be served upon the parties.

GENERAL

MISCELLANEOUS ORDERS

In re: DARVIN WILKES.
AMAA Docket No. 02-0007.
Order Dismissing Case.
Filed September 10, 2004.

Robert Ertman, for Complainant.
Respondent, Pro se.
Order *Dismissing Case issued by Marc R. Hillson, Chief Administrative Law Judge.*

Complainant's Motion to Dismiss is **GRANTED.** Accordingly, this case is **DISMISSED**.

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION, AND BOGHOSIAN RAISIN PACKING CO., INC., A CALIFORNIA CORPORATION.
2003 AMA Docket No. F&V 989-7.
Order Granting Petition for Reconsideration.
Filed December 7, 2004.

AMAA – Agricultural Marketing Agreement Act – Raisin order – Terms and conditions in marketing orders – Dismissal with prejudice.

The Judicial Officer granted Respondent's petition to reconsider one sentence in *In re Lion Raisins, Inc.*, 63 Agric. Dec. ___ (Oct. 19, 2004). The Judicial Officer concluded that the sentence erroneously states that the Agricultural Marketing Agreement Act of 1937, as amended, requires that each agricultural commodity marketing order contain an inspection requirement. The Judicial Officer amended the sentence to reflect that 7 U.S.C. § 608c(6) provides that each agricultural commodity marketing order, other than milk marketing orders, contain one or more

of the terms and conditions in 7 U.S.C. § 608c(6)(A)-(J), and that one of the terms and conditions, which is set forth in 7 U.S.C. § 608c(6)(F), is an inspection requirement.

Colleen A. Carroll, for Respondent.
Brian C. Leighton, and Howard A. Sagaser, for Petitioners.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Lion Raisins, Inc., a California corporation, and Boghosian Raisin Packing Co., Inc., a California corporation [hereinafter Petitioners], instituted this proceeding by filing a petition[1] on September 10, 2003. Petitioners instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; 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) [hereinafter the Rules of Practice]. Petitioners request modification of the Raisin Order.

On October 10, 2003, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a "Motion to Dismiss Petition." Respondent contends the petition should be dismissed with prejudice because the Petition does not meet the requirements in section 900.52(b)(1)-(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)-(4)) (Mot. to Dismiss Pet.). On November 7, 2003, Petitioner Lion Raisins, Inc., filed "Petitioner Lion Raisins, Inc.'s Opposition to Respondent's Motion to Dismiss Petition," and on December 3, 2003, Petitioner Boghosian

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[1]Petitioners entitle their Petition "Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Eliminate as Mandatory the Use of the USDA's Processed Products Inspection Branch Services for All Incoming and Outgoing Raisins, as Currently Required by 7 C.F.R. §§ 989.58 & 989.59, and to Exempt Petitioner from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins and/or any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Petition].

Raisin Packing Co., Inc., filed "Petitioner Boghosian Raisin Packing Co., Inc.'s Opposition to Respondent's Motion to Dismiss Petition."

On July 15, 2004, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an "Order Dismissing Petition with Prejudice" in which the ALJ concluded the Petition did not state a legally cognizable claim (Order Dismissing Pet. with Prejudice at 4).

On August 13, 2004, Petitioners appealed the ALJ's Order Dismissing Petition with Prejudice to the Judicial Officer. On August 27, 2004, Respondent filed "Respondent's Response to Petition for Appeal Filed by Petitioners Lion Raisins, Inc., and Boghosian Raisin Packing Co., Inc." On September 7, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision, and on October 19, 2004, I issued a Decision and Order affirming the ALJ's July 15, 2004, Order Dismissing Petition with Prejudice.[2]

On October 20, 2004, Respondent filed "Complainant's [sic] Petition for Reconsideration of Decision of the Judicial Officer" [hereinafter Petition for Reconsideration]. On November 8, 2004, Petitioner Lion Raisins, Inc., filed "Petitioner Lion Raisins' Opposition to Complainant's [sic] Petition for Reconsideration of Decision of the Judicial Officer." On December 2, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition for Reconsideration.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

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[2] *In re Lion Raisins, Inc.*, 63 Agric. Dec. ___ (Oct. 19, 2004).

TITLE—7 AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity

. . . .

(6) Other commodities; terms and conditions of orders

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

. . . .

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

. . . .

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

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

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. 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. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 U.S.C. § 608c(6)(F), (15).

CONCLUSION BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent seeks reconsideration of the following sentence in the October 19, 2004, Decision and Order because, Respondent contends, the sentence erroneously conveys that the AMAA mandates that marketing orders contain an inspection requirement:

> However, section 8c(6)(F) of the AMAA (7 U.S.C. § 608c(6)(F)) requires that each agricultural commodity marketing order, other than milk marketing orders, contain a term requiring the inspection of the agricultural commodity subject to the marketing order.

In re Lion Raisins, Inc., 63 Agric. Dec. ___, slip op. at 15 (Oct. 19, 2004).

Although Petitioner Lion Raisins, Inc., opposes Respondent's Petition for Reconsideration, Petitioner Lion Raisins, Inc., agrees with Respondent's contention that the AMAA does not require that each agricultural commodity marketing order contain an inspection requirement.[3] I agree with Respondent and Petitioner Lion Raisins, Inc., that section 8c(6) of the AMAA (7 U.S.C. § 608c(6)) does not require that each agricultural commodity marketing order contain a term requiring the inspection of the agricultural commodity that is the subject of the marketing order. Therefore, I conclude the above-quoted sentence in *In re Lion Raisins, Inc.*, 63 Agric. Dec. ___, slip op. at 15 (Oct. 19, 2004), is error, and I hereby amend the sentence to read, as follows:

> However, section 8c(6) of the AMAA (7 U.S.C. § 608c(6)) provides that each agricultural commodity marketing order, other than milk marketing orders, contain one or more of the terms and conditions set forth in section 8c(6)(A)-(J) of the AMAA (7 U.S.C. § 608c(6)(A)-(J)). One of the terms or conditions in section 8c(6) of the AMAA (7 U.S.C. § 608c(6)) is an inspection requirement, which is set forth in section 8c(6)(F) of the AMAA (7 U.S.C. § 608c(6)(F)).

This amendment of the October 19, 2004, Decision and Order does not affect the disposition of the proceeding; except that, the effective date of the Order is the date stated in the Order in this Order Granting Petition for Reconsideration. Therefore, for the foregoing reason and the reasons set forth in *In re Lion Raisins, Inc.*, 63 Agric. Dec. ___ (Oct. 19, 2004), the following Order should be issued.

ORDER

1. Petitioners' Petition, filed September 10, 2003, is dismissed with prejudice.

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[3]Petitioner Lion Raisins, Inc., states "Petitioner Lion recognizes that a marketing order is not *required* to have an inspection requirement." (Petitioner Lion Raisins' Opposition to Complainant's [sic] Petition for Reconsideration of Decision of the Judicial Officer at 2 (emphasis in original).)

2. This Order shall become effective on the day after service on Petitioners.

RIGHT TO JUDICIAL REVIEW

Petitioners have the right to obtain review of this Order in any district court of the United States in which district Petitioners are inhabitants or have their principal places of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture.[4] The date of entry of this Order is December 7, 2004.

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In re: VEGA NUNEZ.
A.Q. Docket No. 03-0002.
Order Denying Late Appeal filed September 8, 2004.

AQ – Animal Health Protection Act – Late appeal.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer concluded he had no jurisdiction to hear Respondent's appeal filed on the day Administrative Law Judge Jill S. Clifton's decision became final.

James A. Booth for Complainant.
Respondent, Pro se.
Decision and Order by Reason of Admission of Facts issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a

[4]See 7 U.S.C. § 608c(15)(B).

"Complaint" on November 7, 2002. Complainant instituted the proceeding under the Animal Health Protection Act (7 U.S.C.A. §§ 8301-8320 (West Supp. 2004)); regulations issued under the Animal Health Protection Act (9 C.F.R. pt. 94) [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 (2002)) [hereinafter the Rules of Practice].

Complainant alleges that on or about January 17, 2001, Vega Nunez [hereinafter Respondent] imported approximately 4 pounds of meat sausage from Germany into the United States at Chicago, Illinois, in violation of 9 C.F.R. § 94.11(a), (b), and (c) because the meat product did not comply with the requirements necessary for such meat to be imported into the United States (Compl. ¶ II).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on November 14, 2002.[1] Respondent filed an answer to the Complaint on December 9, 2002.

On March 23, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139 (2002)), Complainant filed a "Motion for Adoption of Proposed Default Decision and Order" and a "Proposed Default Decision and Order." The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order and a service letter on April 3, 2004.[2] On April 13, 2004, Respondent filed objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order.

On May 10, 2004, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139 (2002)), Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a "Decision and Order by Reason of Admission of Facts": (1) concluding that Respondent violated the

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[1]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 2905.

[2]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 7849.

Animal Health Protection Act and the Regulations, as alleged in the Complaint; and (2) assessing Respondent a $50 civil penalty (Decision and Order by Reason of Admission of Facts at 4).

On May 24, 2004, the Hearing Clerk served Respondent with the ALJ's Decision and Order by Reason of Admission of Facts.[3] On June 28, 2004, Respondent appealed to the Judicial Officer. Complainant failed to file a response to Respondent's appeal petition, and on September 2, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

The record establishes that the Hearing Clerk served Respondent with the ALJ's Decision and Order by Reason of Admission of Facts on May 24, 2004.[4] Section 1.145(a) of the Rules of Practice provides that an administrative law judge's decision must be appealed to the Judicial Officer within 30 days after service, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a) (2002).

Therefore, Respondent was required to file her appeal petition with the Hearing Clerk no later than June 23, 2004. Respondent did

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[3]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0003 5453 1952.

[4]See note 3.

not file her appeal petition with the Hearing Clerk until June 28, 2004.

The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.[5] The ALJ's Decision and Order by Reason of

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[5]*In re Ross Blackstock*, 63 Agric. Dec. ___ (July 13, 2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); *In re David McCauley*, 63 Agric. Dec. ___ (July 12, 2004) (dismissing the respondent's appeal petition filed 1 month 26 days after the administrative law judge's decision became final); *In re Belinda Atherton*, 62 Agric. Dec. ___ (Oct. 20, 2003) (dismissing the respondent's appeal petition filed the day the administrative law judge's decision and order became final); *In re Samuel K. Angel*, 61 Agric. Dec. 275 (2002) (dismissing the respondent's appeal petition filed 3 days after the administrative law judge's decision and order became final); *In re Paul Eugenio*, 60 Agric. Dec. 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision and order became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the administrative law judge's decision and order became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the administrative law judge's decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the administrative law judge's decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the administrative law judge's decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the administrative law judge's decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the administrative law judge's decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the administrative law judge's decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the administrative law judge's decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the administrative law judge's decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the administrative law judge's decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision and order became final and effective); *In re Newark Produce*

(continued...)

[5](...continued)
Distributors, Inc., 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the administrative law judge's decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the administrative law judge's decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the administrative law judge's decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the administrative law judge's decision and order becomes final); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the administrative law judge's decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the administrative law judge's decision and order became final, but not filed until 4 days after the administrative law judge's decision and order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the administrative law judge's decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating
(continued...)

Admission of Facts became final on June 28, 2004,[6] the day Respondent filed an appeal petition. Therefore, I have no jurisdiction to hear Respondent's appeal.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides, as follows:

> **Rule 4. Appeal as of Right—When Taken**
>
> **(a) Appeal in a Civil Case.**
>
> (1) **Time for Filing a Notice of Appeal.**
>
> (A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.[7]

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[5](...continued)
it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the administrative law judge's decision).

[6]7 C.F.R. § 1.139 (2002); Decision and Order by Reason of Admission of Facts at 5.

[7]*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating since the court of appeals properly held petitioner's notice of appeal from the decision (continued...)

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an administrative law judge's decision has become final. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.[8] The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's

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[7](...continued)
on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (stating under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (stating the filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (stating Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989) (stating the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding pro se does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (stating the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

[8]Fed. R. App. P. 4(a)(5).

filing an appeal petition after the ALJ's Decision and Order by Reason of Admission of Facts became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[9]

Accordingly, Respondent's appeal petition must be denied, since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under section 1.139 of the Rules of Practice (7 C.F.R. § 1.139 (2002)), "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal."

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

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[9] *Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

ORDER

Respondent's appeal petition, filed June 28, 2004, is denied. Administrative Law Judge Jill S. Clifton's Decision and Order by Reason of Admission of Facts, filed May 10, 2004, is the final decision in this proceeding.

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In re: PENINSULA LABORATORIES, INC.
A.Q. Docket No. 05-0003.
Order Dismissing Case.
Filed December 3, 2004.

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
Order Dismissing Case issued by Marc R. Hillson, Administrative Law Judge.

Complainant's Motion to Withdraw Complaint is **GRANTED.** Accordingly, this case is **DISMISSED.**

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In re: ROBERT FRANZEN.
AWA Docket No. 04-0003.
Dismissal.
Filed August 6, 2004.

Donald Brittenham, Jr., for Complainant.
Respondent, Pro se.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

As the parties have reached a settlement in this matter, Complainant's Request for Dismissal is **GRANTED.**

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In re: JOHN F. CUNEO, JR., THE HAWTHORN CORPORATION, THOMAS M. THOMPSON, JAMES G.ZAJICEK, JOHN N. CAUDILL, III, JOHN N. CAUDILL, JR., WALKER BROTHER'S CIRCUS, INC., AND DAVID A. CREECH.
AWA Docket No. 03-0023.
Ruling Extending Deadline.
Filed August 13, 2004.

Bernadette Juarez for Complainant.
Benjamin W. Boley, Vincent J. Calatriano, & Derek L. Shafer for Respondent.
Ruling by Chief Administrative Law Judge, Marc. R. Hillson.

Ruling Extending Compliance Deadline in Consent Decision Pending Rulings on Emergency Motion to Compel Enforcement and Motion to Vacate The Consent Decision and Order

On March 12, 2004, I signed a consent decision resolving litigation between Complainant and Respondents Cuneo and The Hawthorn Corporation. The Decision imposed a number of obligations on both Respondents and the Complainant, principally including the payment of a $200,000 civil penalty, and an agreement for the parties to "work cooperatively" to effectuate the donation, by Respondents, of all sixteen of their elephants, by August 15, 2004. The Consent Decision provided that if Respondents failed to donate their elephants by the August 15 deadline, their license under the Animal Welfare Act "shall be revoked immediately, without further procedure."

On July 22, Respondents filed an Emergency Motion seeking to compel enforcement of the consent decision, and/or to stay or otherwise extend the August 15 deadline for donation. In this motion, Respondents contended that Complainant was not living up to its obligations under the Consent Decision. Respondent contended, among other things, that Complainant had obstructed the donation process rather than working cooperatively to effectuate the donations,

that Complainant had delayed responding to numerous phone calls and letters regarding elephant placement, that Complainant disapproved a number of potential donation recipients without giving timely or adequate reason for the disapprovals, that Complainant was trying to steer the donations to two organizations that Respondent did not want to utilize, even though Complainant had earlier indicated there were 29 potential donees, and that Complainant after signing the Consent Decision essentially changed the rules for donee qualification.

On August 6, Complainant filed a response which contended that I lacked jurisdiction to grant Respondents' Motion, which it treated as a unilateral motion to modify the consent decision. Complainant did not address any of Respondent's contentions concerning its conduct during the period between (and to some extent before) the signing of the Consent Decision and the filing of the Emergency Motion. Complainant principally cited *In re Far West Meats*, 55 Agric. Dec. 1033 (1996), where the Judicial Officer indicated that an administrative law judge had no jurisdiction to modify a consent decision unless all parties to the decision so requested. The response did not address the authority of an administrative law judge to take measures to enforce the terms of a consent decision.

On August 10, Respondents filed a Motion to Vacate the Consent Decision and Order, contending that the Consent Decision was fraudulently induced, was predicated upon a unilateral mistake, and was based on an illusory promise by Complainant.

Recognizing that prompt action was necessary, I conducted a conference call on the afternoon of August 12 with counsel for all three parties to the Consent Decision. During this call, in addition to expanding on the legal arguments made in the motions and response, counsel for Complainant indicated that Complainant had significant disputes concerning the numerous factual allegations made by Respondents in the Emergency Motion, many of which were discussed in greater detail during the conference call.

I conclude that an administrative law judge does have the jurisdiction to determine whether the parties to a consent decision are performing their duties under the decision, and to take actions to assure that the obligations agreed to by the parties to a decision are in fact being honored. If a party to such a decision contends that another party is not complying with the terms of the agreement, the allegedly compliant party must have some recourse. In this case, if Respondent had no means of assuring compliance by Complainant with the obligations imposed upon it by the Consent Decision, it must, according to Complainant, submit to an immediate revocation of its exhibitor's license, which could only be reviewed in Federal district court. While this portion of the Consent Decision raises a question of whether the parties are by contract attempting to impose jurisdiction on the Federal courts rather than exhausting administrative remedies, the fact is that Respondent filed the Emergency Motion over three weeks before the August 15 compliance date in the Consent Decision, before the Federal courts would have jurisdiction in an event. At the time of filing, and continuing through the date of this Ruling, there is no one other than a USDA administrative law judge who would appear to have any jurisdiction concerning issues of compliance with the Decision.

This holding is not inconsistent with *Far West Meats*. In holding that an alj could not modify a Consent Decision unless both parties to the decision agreed, the Judicial Officer did not speak to whether an alj had jurisdiction to resolve issues as to whether one or more of the parties to such a decision were complying with the obligations imposed on it by the decision, or whether the alj could compel a party to comply with the obligations to which it agreed. While the Emergency Motion does seek modification of the August 15 compliance date, it is only in the context of the request to compel enforcement of obligations under the Decision that Complainant has allegedly not complied with. If I have jurisdiction to grant the Emergency Motion, then it stands to reason that I can stay the August 15 compliance date to hold a hearing or review other written evidence to allow me to determine if the Motion should be granted. Staying a portion of the Decision to allow determination of these issues is not a

"modification" of the Decision, just a necessary delay while I hear the evidence and make my ruling.

Similarly, it is within my jurisdiction to take evidence to determine whether I should grant Respondents' Motion to Vacate the Consent Judgment and Order. At this point, Complainant has not filed a response to this Motion, which was only filed three days ago. The Judicial Officer in *Far West Meats* specifically ruled that an administrative law judge has the authority to vacate a consent decision under "extraordinary circumstances" which would include "an examination of circumstances under which the Consent Decision was entered," and whether there was no "genuine assent" to the agreement due to such factors as fraud or duress. *Id*., at 1054-6. Respondents contend that these extraordinary circumstances are present here. Since Complainant is entitled to respond to these contentions and since I have to possibly hold a hearing or otherwise take evidence to determine whether or not vacation of the Decision is appropriate, I have an independent basis to stay the August 15 compliance date until I can make my determination.

Next steps—Complainant is directed to file a response to Respondents' Motion to Vacate by August 25. I will schedule a conference call with the parties in the next two weeks to determine what further proceedings, including an evidentiary hearing, would be appropriate to resolve the issues presented by these two motions, and to schedule such a hearing, if necessary. Until I rule on the two pending motions, I am staying the August 15 compliance date in paragraph 3 of the Order contained in the Consent Decision.

I direct the Hearing Clerk to serve this Ruling by facsimile.

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In re: SANDRA RIVERS AND DARRELL RIVERS, d/b/a CHI CHI PUPPY PALACE.
AWA Docket No. 02-0011.
Order Dismissing Case.

Filed August 23, 2004.

Robert Ertman, for Complainant.
Respondent, Pro se.
Order Dismissing Case by Marc R. Hillson, Chief Administrative Law Judge.

Complainant's Motion to Dismiss the above-captioned matter is GRANTED.

Accordingly, this case is **DISMISSED.**

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In re: HONEY CREEK, INC., d/b/a ARBUCKLE WIDERNESS.
AWA Docket No. 00-0009.
Order Dismissing Case.
Filed September 7, 2004.

Robert Ertman, for Complainant.
Respondent, Pro se.
Order issued by Marc R. Hillson, Chief, Administrative Law Judge.

Complainant's Motion to Dismiss is **GRANTED.** Accordingly, this case is **DISMISSED.**

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In re: LLOYD WARREN, JR., d/b/a QUALITY CARE KENNEL.
AWA Docket No. 04-0019.
Order Dismissing Case.
Filed October 26, 2004.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Complainant's Motion to Withdraw the Complaint is **GRANTED.** It is hereby ordered that the Complaint, filed herein on June 29, 2004, be withdrawn.

Accordingly, this case is **DISMISSED.**

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In re: MARTINE COLETTE, WILDLIFE WAYSTATION, AND ROBERT H. LORSCH.
AWA Docket No. 03-0034.
Ruling Denying Motion.
Filed November 9, 2004.

Colleen Carroll for Complainant.
David S. Krantz , Marilyn Barrett, Rosemarie Lewis, Matt Yeager for Respondent.
Ruling by Chief Administrative Law Judge, Marc R. Hillson.

Ruling Denying Motion For More Definite Statement of the Second Amended Complaint and Denying Motion to Strike Six Paragraphs of the Amended Complaint; Ruling Denying Motion to Strike Reply

Following my granting of an earlier Motion for a More Definite Statement on February 12, 2004, Complainant filed a Second Amended Complaint on March 15, 2004. On April 19, 2004, Respondents filed Answers to the Second Amended Complaint, a Motion for a More Definite Statement of the Second Amended Complaint, and a Motion to Strike Portions of Complainant's Second Amended Complaint. After Complainant responded to these motions, the Hearing Clerk invited Respondents to file a Reply, even though a reply is not authorized under the Rules of Procedure. Respondents filed a Reply, Complainant moved to strike the Reply, and Respondents filed a Response to Complainant's Motion to Strike. Respondents also requested that I hold a hearing on their Motions.

I have reviewed the Second Amended Complaint and am satisfied that it contains a level of detail that was not present in the initial Complaint. While certain individual paragraphs could have been crafted to provide more detail as to particular alleged violations, Respondents have been put on notice, consistent with the Rules of Practice, as to the nature and circumstances of the violations alleged by Complainant. Combined with the prehearing exchange that I normally order in the months preceeding the hearing, which would require Complainant to provide Respondents with copies of all proposed witnesses, a list of anticipated witnesses, and a summary of witness testimony, I am satisfied that there is no need for a further More Definite Statement.

In moving that I strike potions of Complainant's Second Amended Complaint, Respondents are asking me to look beyond the plain language of an earlier agreement between the parties, contending that an unwritten agreement between the parties bars Complainant from proceeding with prosecution of alleged violations that occurred before the Consent Decision and Order was signed by Judge Clifton. Nothing on the face of the Consent Decision and Order indicates that possible violations occurring before the date of signing are barred. If the parties mutually agreed to bar such actions, they were perfectly capable of negotiating a clause in their agreement to reflect this. Both parties submitted documentation justifying their understanding, or lack thereof, as to the resolution of possible claims predating the initial agreement, but I have no need to examine these documents. Examination of these documents would only be necessary if there was some ambiguity in the agreement at issue. Here, the agreement simply does not address the issue of uncited alleged violations that occurred before the agreement's execution, and I see no need to look any further. The Motion to Strike is denied. Although the Hearing Clerk's office was in error in inviting the filing of a Reply, I deny the Motion to Strike as no harm was done, and there was no prejudice to any party caused by the additional filing.

In re: JOHN F. CUNEO, JR., AN INDIVIDUAL; THE HAWTHORN CORPORATION, AN ILLINOIS CORPORATION; THOMAS M. THOMPSON, AN INDIVIDUAL; JAMES G. ZAJICEK, AN INDIVIDUAL; JOHN N. CAUDILL, III, AN INDIVIDUAL; JOHN N. CAUDILL, JR., AN INDIVIDUAL; WALKER BROTHER'S CIRCUS, INC., A FLORIDA CORPORATION; AND DAVID A. CREECH, AN INDIVIDUAL.
AWA Docket No. 03-0023.
Order Dismissing Complainant's Appeal Petition as to John F. Cuneo, Jr., and The Hawthorn Corporation.
Filed November 22, 2004.

AWA – Animal Welfare Act – Interlocutory appeal.

The Judicial Officer dismissed Complainant's interlocutory appeal from a ruling by Chief Administrative Law Judge Marc R. Hillson on the ground that interlocutory appeals are not permitted under the Rules of Practice.

Colleen A. Carroll and Bernadette R. Juarez, for Complainant.
Vincent J. Colatriano, Derek L. Shaffer, and Michael Weitzner, for Respondents.
Ruling Extending Compliance Deadline in Consent Decision Pending Rulings on Emergency Motion to Compel Enforcement and Motion to Vacate the Consent Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

On March 12, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] issued a "Consent Decision and Order as to Respondents John F. Cuneo, Jr., and The Hawthorn Corporation" [hereinafter Consent Decision].[1] On July 22, 2004, John F. Cuneo, Jr., and The Hawthorn Corporation [hereinafter

[1]*In re John F. Cuneo, Jr.* (Consent Decision as to John F. Cuneo, Jr., and The Hawthorn Corporation), 63 Agric. Dec. ___ (Mar. 12, 2004).

Respondents] filed a motion to compel enforcement of the Consent Decision and on August 10, 2004, Respondents filed a motion to vacate the Consent Decision.

On August 13, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] issued a "Ruling Extending Compliance Deadline in Consent Decision Pending Rulings on Emergency Motion to Compel Enforcement and Motion to Vacate the Consent Decision and Order" [hereinafter Ruling Extending Compliance Deadline].

On August 26, 2004, Complainant appealed to the Judicial Officer seeking an order vacating the Chief ALJ's Ruling Extending Compliance Deadline. On September 21, 2004, Respondents filed a response to Complainant's appeal petition and requested oral argument before the Judicial Officer. On October 8, 2004, Complainant filed a response to Respondents' request for oral argument before the Judicial Officer. On October 18, 2004, Complainant filed a "Notice of Correction to Complainant's Appeal Petition." On November 8, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Respondents' request for oral argument before the Judicial Officer, which, pursuant to 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], the Judicial Officer may grant, refuse, or limit,[2] is refused because Complainant and Respondents have thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

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[2]See 7 C.F.R. § 1.145(d).

Based upon a careful consideration of the record, I find the Chief ALJ's Ruling Extending Compliance Deadline is not a *decision* as defined in the Rules of Practice, which provides for appeal of an administrative law judge's decision to the Judicial Officer. Therefore, the Chief ALJ's Ruling Extending Compliance Deadline cannot be appealed to the Judicial Officer.

Section 1.145(a) of the Rules of Practice limits the time during which a party may file an appeal to a 30-day period after receiving service of an administrative law judge's written decision, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after the issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

The Rules of Practice define the word *decision* as follows:

> **1.132 Definitions.**
>
> As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:
>
> . . . .

> *Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and
>
> (2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

The Chief ALJ's Ruling Extending Compliance Deadline is not an initial decision in the instant proceeding in accordance with the provisions of 5 U.S.C. §§ 556 and 557, and the Rules of Practice do not permit interlocutory appeals.[3] Therefore, Complainant's appeal of the Chief ALJ's Ruling Extending Compliance Deadline must be rejected as premature.

Complainant acknowledges that, under section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)), a party may appeal an administrative law judge's decision to the Judicial Officer and that the Chief ALJ's Ruling Extending Compliance Deadline is not a *decision* as that term is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132). Nonetheless, Complainant states he filed the appeal petition because he disagrees with the Chief ALJ's Ruling Extending Compliance Deadline and the Chief ALJ's Ruling

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[3] *In re Lion Raisins, Inc.*, 63 Agric. Dec. ___, slip op. at 4 (July 28, 2004) (Order Dismissing Appeal as to Al Lion, Jr., Dan Lion, and Jeff Lion); *In re Velasam Veal Connection*, 55 Agric. Dec. 300, 304 (1996) (Order Dismissing Appeal); *In re L.P. Feuerstein*, 48 Agric. Dec. 896 (1989) (Order Dismissing Appeal); *In re Landmark Beef Processors, Inc.*, 43 Agric. Dec. 1541 (1984) (Order Dismissing Appeal); *In re Orie S. LeaVell*, 40 Agric. Dec. 783 (1980) (Order Dismissing Appeal by Respondent Spencer Livestock, Inc.).

Extending Compliance Deadline deprives Complainant of rights. (Complainant's Appeal Pet. at first unnumbered page n.1.) However, neither Complainant's disagreement with the Chief ALJ's Ruling Extending Compliance Deadline nor the alleged deprivation of Complainant's rights constitutes a basis for my consideration of Complainant's appeal petition filed prior to Complainant's having received service of the Chief ALJ's decision. Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that a party who disagrees with a ruling or who alleges deprivation of rights may appeal to the Judicial Officer *after* receiving service of the administrative law judge's decision.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) and (B) of the Federal Rules of Appellate Procedure provides, as follows:

> **Rule 4. Appeal as of Right—When Taken**
>
> **(a) Appeal in a Civil Case.**
>
> **(1) Time for Filing a Notice of Appeal.**
>
> (A) In a civil case, . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.
>
> (B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

Fed. R. App. P. 4(a)(1)(A)-(B).

The notes of the Advisory Committee on Rules regarding a 1979 amendment to Rule 4(a)(1) make clear that Rule 4(a)(1) is specifically designed to prevent premature as well as late appeals, as follows:

> . . . .
>
> The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "o[f]." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. . . .[4]

Notes of Advisory Committee on Rules—1979 Amendment.

Accordingly, Complainant's appeal of the Chief ALJ's Ruling Extending Compliance Deadline must be dismissed, since the Rules of Practice do not permit interlocutory appeals.

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

ORDER

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[4] *Accord Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam) (notice of appeal filed while timely motion to alter or amend judgment was pending in district court was absolute nullity and could not confer jurisdiction on court of appeals); *Willhauck v. Halpin*, 919 F.2d 788, 792 (1st Cir. 1990) (premature notice of appeal is a complete nullity); *Mondrow v. Fountain House*, 867 F.2d 798, 799-800 (3d Cir. 1989) (appellate court had no jurisdiction to hear appeal during pendency of motion for new trial timely filed in trial court).

Complainant's interlocutory appeal filed August 26, 2004, is dismissed. The proceeding is remanded to the Chief ALJ for further proceedings in accordance with the Rules of Practice.

In re: DENNIS HILL, AN INDIVIDUAL, d/b/a WHITE TIGER FOUNDATION; AND WILLOW HILL CENTER FOR RARE & ENDANGERED SPECIES, LLC, AN INDIANA DOMESTIC LIMITED LIABILITY COMPANY, d/b/a HILL'S EXOTICS.
AWA Docket No. 04-0012.
Order Denying Petition for Reconsideration.
Filed November 30, 2004.

AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Judicial officer authority to determine merits of objections – Reliance on erroneous hearing clerk's letter – Timely response not mere formality.

The Judicial Officer rejected Respondents' contention that only an administrative law judge has authority under 7 C.F.R. § 1.139 to determine whether a respondent has filed meritorious objections to a complainant's motion for adoption of a proposed default decision. The Judicial Officer also rejected Respondents' contentions that the Judicial Officer erroneously defaulted Respondents, erroneously held that Respondents' reliance on the Hearing Clerk's letter dated April 27, 2004, was misplaced, and erroneously used formalities and clerical errors to default Respondents.

Bernadette R. Juarez, for Complainant.
M. Michael Stephenson, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on March 4, 2004. Complainant

instituted the 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].

Complainant alleges Dennis Hill, d/b/a White Tiger Foundation, and Willow Hill Center for Rare & Endangered Species, LLC, d/b/a Hill's Exotics [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards.[1]

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and a service letter on March 15, 2004.[2] Respondents were required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to answer the Complaint within 20 days after service. On March 26, 2004, Respondents requested an additional 30 days within which to file an answer.[3] On March 30, 2004, Chief Administrative Law Judge Marc R. Hillson extended the time for filing Respondents' answer to May 5, 2004.[4]

On April 23, 2004, Complainant filed an "Amended Complaint." On April 27, 2004, Respondents filed an "Answer" in which Respondents deny the material allegations of the Complaint. The

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[1]Complaint.

[2]United States Postal Service Domestic Return Receipts for Article Number 7003 0500 0000 1056 0083 and Article Number 7003 0500 0000 1056 0090.

[3]Request for Extension of Time to Respond to Complaint.

[4]Extension of Time.

Hearing Clerk sent Respondents a letter dated April 27, 2004, stating "Respondents' Amended Answer To Amended Complaint, has been received and filed in the above-captioned proceeding." On April 30, 2004, the Hearing Clerk served Respondents with the Amended Complaint.[5] Respondents failed to file a response to the Amended 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 June 3, 2004, 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" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Dennis Hill and Willow Hill Center for Rare & Endangered Species, LLC, By Reason of Admission of Facts" [hereinafter Proposed Default Decision]. On June 7, 2004, the Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[6] On June 15, 2004, and June 23, 2004, Respondents filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[7]

On July 13, 2004, during a teleconference with counsel for Respondents and counsel for Complainant, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] denied Complainant's Motion for Default Decision and provided Respondents until August 2, 2004,

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[5]United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0458.

[6]United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0656.

[7]Objection to Motion for Adoption of Proposed Decision and Order, filed June 15, 2004, and Supplemental Objection to Motion for Adoption of Proposed Decision and Order, filed June 23, 2004.

to file a response to the Amended Complaint.[8] On August 3, 2004, Respondents filed "Answer to Amended Complaint."

On August 27, 2004, Complainant appealed the ALJ's denial of Complainant's Motion for Default Decision to the Judicial Officer.[9] On September 15, 2004, Respondents filed "Response in Opposition to Complainant's Appeal Petition." On September 22, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On October 8, 2004, I issued a Decision and Order reversing the ALJ's July 13, 2004, denial of Complainant's Motion for Default Decision and concluding Respondents violated the Animal Welfare Act and the Regulations and Standards as alleged in the Amended Complaint.[10]

On October 27, 2004, Respondents filed "Respondents' Motion to Reconsider" the October 8, 2004, Decision and Order and a request for oral argument before the Judicial Officer. On November 16, 2004, Complainant filed "Complainant's Response to Respondents' Motion to Reconsider" and "Complainant's Response to Respondents' Request for Oral Argument." On November 19, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for rulings on Respondents' Motion to Reconsider and Respondents' request for oral argument before the Judicial Officer.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondents' Request for Oral Argument

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[8]Notice of Hearing and Exchange Deadlines at 1, filed by the ALJ on July 14, 2004.

[9]Complainant's Appeal Petition.

[10]*In re Dennis Hill*, 63 Agric. Dec. ___ (Oct. 8, 2004).

Respondents' request for oral argument before the Judicial Officer, which, pursuant to section 1.145(d) of the Rules of Practice (7 C.F.R. § 1.145(d)), the Judicial Officer may grant, refuse, or limit, is refused because Complainant and Respondents have thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

Respondents' Motion to Reconsider

Respondents raise five issues in Respondents' Motion to Reconsider the October 8, 2004, Decision and Order. First, Respondents contend only an administrative law judge has authority under section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) to determine whether a respondent has filed meritorious objections to a complainant's motion for adoption of a proposed default decision; therefore, the October 8, 2004, Decision and Order reversing the ALJ's July 13, 2004, denial of Complainant's Motion for Default Decision,[11] is error (Respondents' Motion to Reconsider at 2-4).

I disagree with Respondents' contention that only an administrative law judge has authority under section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) to determine whether a respondent has filed meritorious objections to a complainant's motion for adoption of a proposed default decision. Pursuant to the Act of April 4, 1940, as amended (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. app. at 126 (2000)), the Secretary of Agriculture delegated authority to the Judicial Officer to act as final deciding officer in adjudicatory proceedings instituted pursuant to the Rules of Practice.[12] Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) explicitly provides that a party may appeal

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[11]*In re Dennis Hill*, 63 Agric. Dec. ___, slip op. at 4, 64 (Oct. 8, 2004).

[12]See 7 C.F.R. § 2.35(a)(2).

an administrative law judge's ruling denying a complainant's motion for a default decision to the Judicial Officer in accordance with section 1.145 of the Rules of Practice (7 C.F.R. § 1.145), and section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)) requires the Judicial Officer to rule on any such appeal.

Second, Respondents contend the Judicial Officer erroneously inferred "that Respondents received the Amended Complaint after receiving the Hearing Clerk's April 27, 2004, correspondence." Respondents assert they received the Hearing Clerk's letter dated April 27, 2004, after the Hearing Clerk served them with the Amended Complaint justifying their reliance on the Hearing Clerk's letter which states Respondents' Answer to the Amended Complaint "has been received and filed." (Respondents' Motion to Reconsider at 2, 4-6.)

Respondents do not cite, and I cannot locate, any part of the October 8, 2004, Decision and Order, in which I infer the Hearing Clerk served Respondents with the Amended Complaint after Respondents received the Hearing Clerk's April 27, 2004, correspondence. The Hearing Clerk served Respondents with the Amended Complaint on April 30, 2004.[13] The Hearing Clerk sent Respondents the April 27, 2004, correspondence and Respondents assert they received the April 27, 2004, correspondence; however, the record does not establish the date on which Respondents received the Hearing Clerk's correspondence. I have no reason to doubt Respondents' assertion that Amended Complaint" (Respondents' Motion to Reconsider at 5). However, the timing of Respondents' receipt of the Hearing Clerk's letter mischaracterizing Respondents' April 27, 2004, filing as an "Amended Answer To Amended Complaint" is not relevant to this proceeding. My reasons for finding

[13]See note 5.

Respondents' reliance on the Hearing Clerk's April 27, 2004, correspondence misplaced, are fully explicated in *In re Dennis Hill*, 63 Agric. Dec. ___, slip op. at 65-70 (Oct. 8, 2004), and addressed in this Order Denying Petition for Reconsideration, *infra*.

Third, Respondents contend the Judicial Officer erroneously defaulted Respondents when Respondents' Answer clearly placed Complainant, the ALJ, and the Judicial Officer on notice that Respondents disputed or denied the majority of the allegations in the Complaint (Respondents' Motion to Reconsider at 2, 6-7).

Respondents' April 27, 2004, filing denies the material allegations of the Complaint. However, Complainant's operative pleading is the Amended Complaint. Respondents are deemed, for purposes of this proceeding, to have admitted the allegations in the Amended Complaint because they failed to file an answer to the Amended Complaint within 20 days after the Hearing Clerk served them with the Amended Complaint. The Hearing Clerk served Respondents with the Amended Complaint and the Hearing Clerk's April 23, 2004, service letter on April 30, 2004.[14] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and 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 . . . .
>
> . . . .

[14]See note 5.

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

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

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

§ 1.141 Procedure for hearing.

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

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

Moreover, the Amended Complaint 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 amended complaint.

Amended Compl. at 29.

Similarly, the Hearing Clerk informed Respondents in the April 23, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Amended Complaint would constitute an admission of that allegation, as follows:

> April 23, 2004
>
> Mr. Michael Stephenson, Esq.
> McNeely, Stephenson, Thopy & Harrold
> 30 East Washington Street, Suite 400
> Shelbyville, Indiana 46176
>
> Dear Mr. Stephenson:
>
> **Subject: In re: Dennis Hill, an individual d/b/a White Tiger Foundation and Willow Hill Center for Rare & Endangered Species, LLC, an Indiana domestic limited liability company d/b/a Hill's Exotics**
>
> **AWA Docket No. 04-0012**

Enclosed is a copy of Complainant's Amended Complaint, which has been filed with this office in the above-captioned proceeding.

Inasmuch as Complainant has filed the Amended Complaint prior to the filing of a motion for hearing, the amendment is effective upon filing.

You will have 20 days from service of this letter in which to file an answer to the amended complaint. Failure to file a timely Answer to or plead specifically to any allegation of the Amended Complaint shall constitute an admission of such allegation.

Your answer, as well as any motion or requests that you may wish to file hereafter in this proceeding, should be submitted to the Hearing Clerk, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250. An original and 3 copies are required for each document submitted.

Sincerely,

/s/

Joyce A. Dawson

Hearing Clerk

Respondents' answer to the Amended Complaint was required to be filed no later than May 20, 2004. Respondents filed an Answer to Amended Complaint on August 3, 2004, 3 months 4 days after the

Hearing Clerk served Respondents with the Amended Complaint. Respondents' failure to file a timely answer to the Amended Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Amended Complaint and constitutes a waiver of hearing.

Fourth, Respondents contend the Judicial Officer erroneously held Respondents' reliance on the Hearing Clerk's April 27, 2004, letter was misplaced. Respondents point out that I state the Hearing Clerk's April 23, 2004, letter clearly informs Respondents of the requirement for a timely response to the Amended Complaint, but that I dismiss the Hearing Clerk's April 27, 2004, letter, which mischaracterizes Respondents' April 27, 2004, filing, claiming Respondents should not have relied on the Hearing Clerk's mischaracterization. (Respondents' Motion to Reconsider at 2, 7-8.)

I disagree with Respondents' contention that I erroneously held that Respondents' reliance on the Hearing Clerk's April 27, 2004, letter was misplaced. The Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer,[15] the Amended Complaint informs Respondents of the consequences of failing to file a timely answer,[16] and the Hearing Clerk's April 23, 2004, letter, which accompanied the Amended Complaint, states the time within which an answer must be filed and the consequences of failing to file a timely answer. Juxtaposed to all these warnings, Respondents rely on the Hearing Clerk's letter dated April 27, 2004, wherein the Hearing Clerk erroneously mischaracterizes Respondents' April 27, 2004, filing as an "Amended Answer To Amended Complaint" and erroneously states Respondents' Amended Answer has been received and filed.

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[15]See 7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

[16]See Amended Complaint at 29.

Notwithstanding the Hearing Clerk's April 27, 2004, letter, the record establishes that Respondents' April 27, 2004, filing was neither an amended answer nor a response to the Amended Complaint. As an initial matter, the Hearing Clerk did not serve Respondents with the Amended Complaint until April 30, 2004,[17] 3 days after Respondents filed their April 27, 2004, filing. Moreover, Respondents entitle their April 27, 2004, filing "Answer." Further still, Respondents state in the April 27, 2004, filing that the filing is a response to the "Complaint" and pray that the ALJ deny the "Complaint." In addition, Respondents' letter transmitting the April 27, 2004, filing is dated April 22, 2004, the April 27, 2004, filing contains a certificate of service stating counsel for Respondents placed the filing "in the United States Mail, first class, postage prepaid, this 22nd day of April, 2004[,]"[18] and the envelope containing the April 27, 2004, filing is postmarked April 22, 2004, 1 day prior to the date Complainant filed the Amended Complaint and 8 days prior to the date the Hearing Clerk served Respondents with the Amended Complaint. Based on the record before me, I find Respondents' April 27, 2004, filing is an answer filed in response to the Complaint and Complainant's operative pleading is the Amended Complaint. Therefore, I find Respondents' reliance on the Hearing Clerk's April 27, 2004, mischaracterization of Respondents' April 27, 2004, filing, misplaced.

Fifth, Respondents, relying on *Kreider Dairy Farms, Inc. v. Glickman*, 1998 WL 481926 (E.D. Pa. Aug. 10, 1998), *printed in* 57 Agric. Dec. 857; *In re Karl Mitchell*, 60 Agric. Dec. 91 (2001); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997); and *In re Jerald Brown*, 54 Agric. Dec. 537 (1995), contend the Judicial Officer erroneously used formalities

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[17]See note 5.

[18]Answer at second unnumbered page.

and clerical errors to default Respondents, which practice is contrary to United States Department of Agriculture "case law" (Respondents' Motion to Reconsider at 2, 8-9).

I disagree with Respondents' contention that filing a timely response to an amended complaint is a mere formality. The Rules of Practice state the time within which an answer must be filed and provide the failure to file a timely answer shall be deemed an admission of the allegations in the complaint and a waiver of hearing.[19] Moreover, I disagree with Respondents' contention that the practice of issuing default decisions is contrary to United States Department of Agriculture "case law." Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting aside the default decision,[20] generally there is no basis for setting

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[19]See note 15.

[20]*See In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (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 Constitution of the United States); *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*

(continued...)

aside a default decision that is based upon a respondent's failure to file a timely answer.[21]

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[20](...continued)
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).

[21]*See generally In re Wanda McQuary* (Decision as to Wanda McQuary and Randall Jones), 62 Agric. Dec. 452 (2003) (holding the default decision was properly issued where respondent Wanda McQuary filed her answer 6 months 20 days after she was served with the complaint and respondent Randall Jones filed his answer 6 months 5 days after he was served with the complaint and holding the respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re David Finch*, 61 Agric. Dec. 567 (2002) (holding the default decision was properly issued where the respondent filed his answer 3 months 18 days after he was served with the complaint and holding 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 Heartland Kennels, Inc.*, 61 Agric. Dec. 492 (2002) (holding the default decision was properly issued where the respondents filed their answer 3 months 9 days after they were served with the complaint and holding 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 Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444 (2001) (holding the default decision was properly issued where the (continued...)

[21](...continued)
respondents' first filing was 5 months 13 days after they were served with the complaint and 4 months 24 days after the respondents' answer was due and holding 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 alleged in the complaint); *In re Beth Lutz*, 60 Agric. Dec. 53 (2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations alleged in the complaint); *In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months 5 days after they were served with the complaint and 5 months 16 days after the respondents' answer was due and holding 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 Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not respond to the allegations of the complaint and holding the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and holding 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), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding the default decision was properly issued where the respondent filed his answer 1 year 12 days after service of the complaint on the respondent and holding 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 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 holding 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 the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and holding the respondent is deemed,
(continued...)

[21](...continued)
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 Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and holding 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 the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding 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 the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and holding 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 the default decision was properly issued where the respondent failed to file an answer and holding 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 the default decision was properly issued where the respondent failed to file an answer and holding 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 the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but the answer was not received until March 25, 1994, and holding 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), *printed in* 54 Agric. Dec. 870 (1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his 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 the default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the
(continued...)

Further still, I find *Kreider Dairy Farms, Inc. v. Glickman* and *In re Jerald Brown* inapposite, and I find *In re Karl Mitchell* and *In re Spring Valley Meats, Inc.*, do not support Respondents' contention that filing a timely response to an amended complaint is a mere formality.

Respondents, relying on *Kreider Dairy Farms, Inc. v. Glickman*, 1998 WL 481926 (E.D. Pa. Aug. 10, 1998), suggest that my conclusion that Respondents' Answer does not operate as response to Complainant's Amended Complaint elevates form over substance. In *Kreider Dairy Farms*, the United States District Court for the Eastern District of Pennsylvania found the Judicial Officer's determination that the word *postmark* does not include a Federal Express label, elevates form over substance and was erroneous. The district court reasoned: (1) the word *postmark* was not defined in the applicable United States Department of Agriculture rules of practice; (2) the purpose of the postmark is to ensure there is reliable evidence of the date a party sends a document to the Hearing Clerk; and (3) the purpose is met whether a party uses Federal Express or the United States Postal Service.

As initial matter, I note that, on appeal, the United States Court of Appeals for the Third Circuit vacated *Kreider Dairy Farms, Inc. v.*

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[21](...continued)
complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding 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 the default decision was properly issued where the respondents failed to file an answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

Glickman, 1998 WL 481926 (E.D. Pa. Aug. 10, 1998).[22] Moreover, the requirement that a respondent file a timely answer and the consequences of failing to file a timely answer, unlike the district court found with respect to the postmark requirement in *Kreider Dairy Farms*, are clearly stated in the Rules of Practice.

Respondents, relying on *In re Karl Mitchell*, 60 Agric. Dec. 91 (2001); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997); and *In re Jerald Brown*, 54 Agric. Dec. 537 (1995), contend filing a timely response to an amended complaint is a mere formality. In *In re Jerald Brown*, the respondent filed a timely response to the complaint. *In re Jerald Brown* does not address a respondent's failure to file a timely response to a complaint. In *In re Karl Mitchell*, the respondents failed to file a timely answer to the complaint, but the Judicial Officer found, based on the failure to file a timely answer, the respondents were deemed to have admitted the allegations in the complaint. In *In re Spring Valley Meats, Inc.*, the Judicial Officer rejected the respondents' contention that their December 13, 1996, filing constituted a response to the complaint and stated, even if it constituted an answer, the default decision would not be set aside because the purported answer was not timely filed.

For the foregoing reasons and the reasons set forth in *In re Dennis Hill*, 63 Agric. Dec. ___ (Oct. 8, 2004), Respondents' Motion to Reconsider 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. Respondents' Motion to Reconsider was timely filed and automatically stayed the October 8, 2004, Decision and Order. Therefore, since Respondents' Motion to Reconsider is

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[22]*See Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113 (3d Cir. 1999).

denied, I hereby lift the automatic stay, and the Order in *In re Dennis Hill*, 63 Agric. Dec. ___ (Oct. 8, 2004), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration.

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

ORDER

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

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

2. Respondents are jointly and severally assessed a $20,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondents. Respondents shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0012.

3. Respondent Dennis Hill's Animal Welfare Act license (Animal Welfare Act license number 32-A-0160) is revoked.

The Animal Welfare Act license revocation provisions of this Order shall become effective on the 60th day after service of this Order on Respondent Dennis Hill.

RIGHT TO JUDICIAL REVIEW

Respondents have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondents must seek judicial review within 60 days after entry of this Order. 7 U.S.C. § 2149(c). The date of entry of this Order is November 30, 2004.

In re: DAVID GILBERT, AN INDIVIDUAL d/b/a GILBERT'S EDUCATIONAL PETTING ZOO AND SAFARI LAND ZOO.
AWA Docket No. 04-0001.
Order Denying Late Appeal.
Filed November 30, 2004.

AWA – Late appeal.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer concluded he had no jurisdiction to hear Respondent's appeal filed 1 day after Chief Administrative Law Judge Marc R. Hillson's decision became final.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on October 24, 2003. Complainant instituted the 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].

Complainant alleges that David Gilbert, an individual d/b/a Gilbert's Educational Petting Zoo and Safari Land Zoo [hereinafter Respondent], willfully violated the Animal Welfare Act and the Regulations and Standards on or about May 31, 2001, August 10, 2001, August 13, 2001, and August 27, 2001 (Compl. ¶¶ 3-7).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on October 29, 2003.[1] Respondent 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)). The Hearing Clerk sent Respondent a letter dated December 16, 2003, informing Respondent that an answer to the Complaint had not been filed within the time required in the Rules of Practice. Respondent did not respond to the Hearing Clerk's December 16, 2003, letter.

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[1]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3743.

On January 28, 2004, 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" [hereinafter Motion for Default Decision] and a proposed "Decision and Order by Reason of Admission of Facts" [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on February 4, 2004.[2] Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on February 23, 2004.

On August 23, 2004, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] filed a "Decision and Order by Reason of Admission of Facts" [hereinafter Decision and Order]: (1) finding Respondent's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision are not meritorious; (2) concluding Respondent willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (3) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessing Respondent an $8,800 civil penalty (Decision and Order at 2, 6-9).

On August 27, 2004, the Hearing Clerk served Respondent with the Chief ALJ's Decision and Order and a service letter.[3] On September 9, 2004, Respondent requested, and I granted, an extension of time for filing Respondent's appeal petition to

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[2]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 4054.

[3]United States Postal Service Domestic Return Receipt for Article Number 7003 2260 0005 5721 4509.

November 1, 2004.[4] On November 2, 2004, Respondent appealed to the Judicial Officer. On November 22, 2004, Complainant filed "Complainant's Response to Respondent's Petition for Appeal." On November 24, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

The record establishes that the Hearing Clerk served Respondent with the Chief ALJ's Decision and Order on August 27, 2004.[5] Section 1.145(a) of the Rules of Practice provides that an administrative law judge's written decision must be appealed to the Judicial Officer within 30 days after service, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after the issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

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[4]See Informal Order filed September 9, 2004.

[5]See note 3.

Therefore, Respondent was required to file his appeal petition with the Hearing Clerk no later than September 27, 2004.[6] However, Respondent timely requested an extension of time within which to file an appeal petition. On September 9, 2004, I granted Respondent's request and extended the time for Respondent's filing an appeal petition to November 1, 2004.[7] Respondent did not file his appeal petition with the Hearing Clerk until November 2, 2004.

The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's

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[6]Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that an appeal petition must be filed within 30 days after service of the administrative law judge's decision. Thirty days after August 27, 2004, was September 26, 2004. However, September 26, 2004, was a Sunday, and section 1.147(h) of the Rules of Practice provides that when the time for filing expires on a Sunday, the time for filing shall be extended to the next business day, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (h) *Computation of time*. Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

7 C.F.R. § 1.147(h).

The next business day after Sunday, September 26, 2004, was Monday, September 27, 2004. Therefore, Respondent was required to file his appeal petition no later than September 27, 2004.

[7]See note 4.

decision becomes final.[8] The Chief ALJ's Decision and

[8]*In re Vega Nunez*, 63 Agric. Dec. ___ (Sept. 8, 2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final); *In re Ross Blackstock*, 63 Agric. Dec. ___ (July 13, 2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); *In re David McCauley*, 63 Agric. Dec. ___ (July 12, 2004) (dismissing the respondent's appeal petition filed 1 month 26 days after the administrative law judge's decision became final); *In re Belinda Atherton*, 62 Agric. Dec. 683 (2003) (dismissing the respondent's appeal petition filed the day the administrative law judge's decision and order became final); *In re Samuel K. Angel*, 61 Agric. Dec. 275 (2002) (dismissing the respondent's appeal petition filed 3 days after the administrative law judge's decision and order became final); *In re Paul Eugenio*, 60 Agric. Dec. 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision and order became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the administrative law judge's decision and order became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the administrative law judge's decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the administrative law judge's decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the administrative law judge's decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the administrative law judge's decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the administrative law judge's decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the administrative law judge's decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the administrative law judge's decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the administrative law judge's decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the administrative law judge's decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the (continued...)

[8](...continued)
administrative law judge's decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the administrative law judge's decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the administrative law judge's decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the administrative law judge's decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the administrative law judge's decision and order becomes final); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the administrative law judge's decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the administrative law judge's decision and order became final, but not filed until 4 days after the administrative law judge's decision and order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal*
(continued...)

Orderbecame final on November 1, 2004. Respondent filed an appeal petition with the Hearing Clerk on November 2, 2004, 1 day after the Chief ALJ's Decision and Order became final. Therefore, I have no jurisdiction to hear Respondent's appeal.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides, as follows:

> **Rule 4. Appeal as of Right—When Taken**
>
> **(a) Appeal in a Civil Case.**
>
> (1) **Time for Filing a Notice of Appeal.**
>
> (A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879

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[8](...continued)
Research Center of Massachusetts, Inc., 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the administrative law judge's decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the administrative law judge's decision).

F.2d at 1398.[9]

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an

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[9] *Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (stating under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (stating the filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (stating Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989) (stating the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding pro se does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (stating the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

administrative law judge's decision has become final. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.[10] The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after the Chief ALJ's Decision and Order became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and

[10]Fed. R. App. P. 4(a)(5).

protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[11]

Accordingly, Respondent's appeal petition must be denied, since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal."

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

ORDER

Respondent's appeal petition, filed November 2, 2004, is denied. Chief Administrative Law Judge Marc R. Hillson's Decision and Order, filed August 23, 2004, is the final decision in this proceeding.

In re: DAVID GILBERT, AN INDIVIDUAL d/b/a GILBERT'S EDUCATIONAL PETTING ZOO AND SAFARI LAND ZOO.
AWA Docket No. 04-0001.
Errata.
Filed December 14, 2004.

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[11] *Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

AWA – Errata.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Errata issued by William G. Jenson, Judicial Officer.

In the Order Denying Late Appeal filed November 30, 2004, the following correction is made:

On page 1 change "AWA Docket No. 04-0004" to "AWA Docket No. 04-0001."

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In re: DOUGLAS HOLIDAY.
FCIA Docket No. 03-0006.
Order Dismissing Case.
Filed July 6, 2004.

Donald Brittenham, Jr.., for Complainant.
Respondent, Michael P. Malleny.
Order Dismissing Case issued by Marc R. Hillson, Chief Administrative Law Judge.

The parties Mutual Request for Dismissal as a result of settlement, filed on July 1, 2004, is **GRANTED.**
The case is **DISMISSED** with prejudice.

_____

In re: ROSS BLACKSTOCK.
FCIA Docket No. 02-0007.
Order Denying Late Appeal.
Filed July 13, 2004.

FCIA – Late appeal.

The Judicial Officer, on July 13, 2004, denied Respondent's late-filed appeal. The Judicial Officer concluded that he had no jurisdiction to hear Respondent's appeal filed after Chief Administrative Law Judge Marc R. Hillson's decision became final.

Donald A. Brittenham, Jr., for Complainant.
Lynn French, Colorado Springs, CO, for Respondent.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Ross J. Davidson, Jr., Manager, Federal Crop Insurance Corporation [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on July 12, 2002. Complainant instituted the proceeding under the Federal Crop Insurance Act, as amended (7 U.S.C. §§ 1501-1524) [hereinafter the Federal Crop Insurance Act]; regulations issued under the Federal Crop Insurance Act which govern the administration of the Federal Crop Insurance Corporation (7 C.F.R. pt. 400); 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].

Complainant alleges that Ross Blackstock [hereinafter Respondent] willfully and intentionally provided false information to IGF Insurance Company regarding Blackstock Orchards, Inc.'s insurable interest in three orchards identified as unit 0101, unit 0102, and unit 0103 (Compl. ¶ III). On August 19, 2002, Respondent filed an answer denying the material allegations of the Complaint.

On October 28, 2003, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a hearing in Grand Junction, Colorado. Donald A. Brittenham, Jr., Office of the General Counsel, United States Department of Agriculture, represented

Complainant. Lynn French, Colorado Springs, Colorado, represented Respondent.

On January 22, 2004, Respondent filed "Closing Brief" and "Findings of Fact, Conclusions of Law and Order." On January 23, 2004, Complainant filed "Post-Hearing Brief" and a "Proposed Order." On May 17, 2004, the Chief ALJ filed a "Decision": (1) concluding that Respondent repeatedly and intentionally provided false and misleading information as alleged in the Complaint; (2) assessing Respondent a $10,000 civil penalty; (3) disqualifying Respondent from purchasing catastrophic risk protection or receiving non-insured assistance for a period of 2 years; and (4) disqualifying Respondent from receiving any other benefit under the Federal Crop Insurance Act for a period of 10 years (Decision at 9, 17).

On May 22, 2004, the Hearing Clerk served Respondent with the Chief ALJ's Decision.[1] On June 28, 2004, Respondent appealed to the Judicial Officer.[2] On June 29, 2004, Complainant filed

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[1]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 8426.

[2]Respondent titles his June 28, 2004, filing "Motion to Reconsider Civil Fine" and requests reconsideration of the civil penalty assessed by the Chief ALJ against Respondent. The Rules of Practice do not provide for a petition for reconsideration of an administrative law judge's decision. *In re Karl Mitchell*, 60 Agric. Dec. 91, 93-94 n.4 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. Aug. 22, 2002); *In re Anna Mae Noell*, 58 Agric. Dec. 855, 858 (1999) (Order Denying The Chimp Farm Inc.'s Mot. to Vacate); *In re Peter A. Lang*, 57 Agric. Dec. 91, 97-101 (1998) (Order Denying Pet. for Recons.); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418, 1435 (1996) (Order Denying Late Appeal); *In re Lincoln Meat Co.*, 48 Agric. Dec. 937, 938 (1989) (Mot. for Recons. Denied and Decision and Order). Pursuant to section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)), a petition to reconsider the decision of the Judicial Officer may be filed within 10 days after the date of service of the Judicial Officer's decision upon the party filing the petition for reconsideration. A petition for reconsideration filed prior to the Judicial Officer's decision is premature. *In re Karl Mitchell*, 60 Agric. Dec. 91, 93-94 n.4 (2001), *aff'd*, 42 Fed. Appx. 991, 2002

(continued...)

"Complainant's Response to Respondent's Motion to Reconsider Civil Fine." On July 2, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

The record establishes that the Hearing Clerk served Respondent with the Chief ALJ's Decision on May 22, 2004.[3] Section 1.145(a) of the Rules of Practice provides that an administrative law judge's written decision must be appealed to the Judicial Officer within 30 days after service, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after the issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

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[2](...continued)
WL 1941189 (9th Cir. Aug. 22, 2002); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418, 1435 (1996) (Order Denying Late Appeal). Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides for the appeal of an administrative law judge's decision to the Judicial Officer. Therefore, I infer that Respondent's Motion to Reconsider Civil Fine is Respondent's appeal of the Chief ALJ's Decision pursuant to section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)).

[3]See note 1.

7 C.F.R. § 1.145(a).

Therefore, Respondent was required to file his appeal petition with the Hearing Clerk no later than June 21, 2004. Respondent did not file his appeal petition with the Hearing Clerk until June 28, 2004.

The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.[4] The Chief ALJ's Decision became final on

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[4]*In re David McCauley*, 63 Agric. Dec. ___ (July 12, 2004) (dismissing the respondent's appeal petition filed 1 month 26 days after the administrative law judge's decision and order became final); *In re Belinda Atherton*, 62 Agric. Dec. ___ (Oct. 20, 2003) (dismissing the respondent's appeal petition filed the day the administrative law judge's decision and order became final); *In re Samuel K. Angel*, 61 Agric. Dec. 275 (2002) (dismissing the respondent's appeal petition filed 3 days after the administrative law judge's decision and order became final); *In re Paul Eugenio*, 60 Agric. Dec. 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision and order became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the administrative law judge's decision and order became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the administrative law judge's decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the administrative law judge's decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the administrative law judge's decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the administrative law judge's decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the administrative law judge's decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the administrative law judge's decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the administrative law judge's decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the administrative law judge's decision and order became

(continued...)

[4](...continued)
final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the administrative law judge's decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the administrative law judge's decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the administrative law judge's decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the administrative law judge's decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the administrative law judge's decision and order becomes final); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the administrative law judge's decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the administrative law judge's decision
(continued...)

June 26, 2004.[5] Respondent filed an appeal petition with the Hearing Clerk on June 28, 2004, 2 days after the Chief ALJ's Decision became final. Therefore, I have no jurisdiction to hear Respondent's appeal.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides, as follows:

> **Rule 4. Appeal as of Right—When Taken**
>
> **(a) Appeal in a Civil Case.**
>
> (1) **Time for Filing a Notice of Appeal.**
>
> (A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

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[4](...continued)
and order became final, but not filed until 4 days after the administrative law judge's decision and order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the administrative law judge's decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the administrative law judge's decision).

[5]7 C.F.R. § 1.142(c)(4); Decision at 18.

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.[6]

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[6] *Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (stating under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (stating the filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (stating Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989) (stating the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding pro se does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (stating the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an administrative law judge's decision has become final. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.[7] The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after the Chief ALJ's Decision became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and

[7]Fed. R. App. P. 4(a)(5).

protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[8]

Accordingly, Respondent's appeal petition must be denied, since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal."

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

ORDER

Respondent's appeal petition, filed June 28, 2004, is denied. Chief Administrative Law Judge Marc R. Hillson's Decision, filed May 17, 2004, is the final decision in this proceeding.

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[8] *Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

In re: BETSY H. EDWARDS, MARY ANN HINKLE & CECIL M. HINKLE, JR.
HPA Docket No. 03-0004.
Order Dismissing Complaint as to Respondent Mary Ann Hinkle.
Filed November 15, 2004.

Bernandette Juarez, for Complainant.
Respondent, Robert B. Allen..
Order issued by William B. Moran, Administrative Law Judge.

On September 30, 2004, the undersigned signed a Consent Decision and Order as to Betsy H. Edwards and Cecil M. Hinkle, Jr. The Complainant has filed a Notice of Withdrawal of the Complaint as to Respondent Mary Ann Hinkle. In that Notice, the Administrator of the Animal and Plant Health Inspection Service ("APHIS") "unilaterally withdre[ew] its amended complaint as to respondent Mary Ann Hinkle... conclud[ing] that pursuit of this matter would not further the goals of the Act." September 15, 2004 Notice.

Accordingly, the Complaint is dismissed with prejudice as to Respondent Mary Ann Hinkle. The effect of the Notice as to Respondent Mary Ann Hinkle is that this matter has now been completely resolved.

_____

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION FORMERLY KNOWN AS LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AL LION, JR., AN INDIVIDUAL; DAN LION, AN INDIVIDUAL; JEFF LION, AN INDIVIDUAL; and BRUCE LION, AN INDIVIDUAL.

I & G Docket No. 01-0001.
Ruling Dismissing Motion for Expedited Response to Certified Questions.
Filed July 12, 2004.

I&G – Motions entertained by Judicial Officer.

Colleen A. Carroll, for Complainant.
Brian C. Leighton, Clovis, California, for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

On February 20, 2004, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] certified two questions to the Judicial Officer. On June 23, 2004, Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter Respondents] filed a motion requesting that the Judicial Officer promptly address the ALJ's certified questions.[1] On June 25, 2004, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed "Complainant's Response to 'Motion to the Judicial Officer.'" On June 29, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondents' Motion for Expedited Response to Certified Questions.

Section 1.143(a) of the Rules of Practice provides that motions filed or made prior to the filing of an appeal of an administrative law judge's decision, except motions which relate directly to an appeal, shall be ruled on by the administrative law judge, as follows:

§ 1.143 Motions and requests.

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[1]"Respondents' Motion to the Judicial Officer to Promptly Rule on ALJ Clifton's Notice of Intent and Amended Notice of Intention of December 23, 2003 and Later Certified Issues Re Same" [hereinafter Motion for Expedited Response to Certified Questions].

> (a) *General.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties, except (1) requests for extensions of time pursuant to § 1.147, (2) requests for subpoenas pursuant to § 1.149, and (3) motions and requests made on the record during the oral hearing. The Judge shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Judge's decision pursuant to § 1.145, except motions directly relating to the appeal. Thereafter, the Judicial Officer will rule on any motions and requests, as well as the motions directly relating to the appeal.

7 C.F.R. § 1.143(a).

No appeal from an administrative law judge's decision has been filed in this proceeding. Moreover, Respondents' Motion for Expedited Response to Certified Questions does not relate to an appeal from an administrative law judge's decision in this proceeding. Therefore, the Judicial Officer cannot entertain Respondents' Motion for Expedited Response to Certified Questions and Respondents' Motion for Expedited Response to Certified Questions must be dismissed.

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

RULING

Respondents' Motion for Expedited Response to Certified Questions, filed June 23, 2004, is dismissed.

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION FORMERLY KNOWN AS LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR

UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AL LION, JR., AN INDIVIDUAL; DAN LION, AN INDIVIDUAL; JEFF LION, AN INDIVIDUAL; and BRUCE LION, AN INDIVIDUAL.
I & G Docket No. 01-0001.
Order Dismissing Appeal as to Al Lion, Jr., Dan Lion, and Jeff Lion.
Filed July 28, 2004.

I&G – Interlocutory appeal.

The Judicial Officer dismissed an interlocutory appeal from a ruling by Administrative Law Judge Jill S. Clifton on the ground that interlocutory appeals are not permitted under the Rules of Practice.

Colleen A. Carroll, for Complainant.
Brian C. Leighton, for Respondents.
Ruling issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

On January 15, 2004, Al Lion, Jr., Dan Lion, and Jeff Lion [hereinafter Respondents] filed "Respondents' Motion for Summary Judgment and/or Summary Disposition and/or Directed Verdict" [hereinafter Motion for Summary Judgment]. On February 4, 2004, and February 10, 2004, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed responses seeking denial of Respondents' Motion for Summary Judgment.[1] On April 5, 2004, Respondents filed a reply

[1]"Complainant's Response to 'Respondents' Motion for Summary Judgment and/or Summary Disposition and/or Directed Verdict' Filed on Behalf of Respondent Dan Lion" filed February 4, 2004; "Complainant's Response to 'Respondents' Motion for Summary Judgment and/or Summary Disposition and/or Directed Verdict' Filed By Respondents Al Lion, Jr., and Jeff Lion" filed February 10, 2004.

(continued...)

to Complainant's responses to Respondents' Motion for Summary Judgment.[2]

On June 17, 2004, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a "Ruling Denying Motion for Summary Judgment and/or Summary Disposition and/or Directed Verdict" [hereinafter Ruling Denying Respondents' Motion for Summary Judgment]. On July 13, 2004, Respondents appealed to the Judicial Officer seeking reversal of the ALJ's Ruling Denying Respondent's Motion for Summary Judgment.[3] On July 16, 2004, Complainant filed a response to Respondents' appeal petition in which Complainant requests dismissal of Respondents' appeal petition.[4] On July 20, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I find the ALJ's Ruling Denying Respondents' Motion for Summary Judgment is not a "decision" as defined in the rules of practice applicable to this proceeding.[5] The Rules of Practice provide for appeal solely of an

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[1](...continued)

[2]"Respondents' Joint Reply to Complainant's Response to Respondents' Motion for Summary Judgment and/or Summary Disposition and/or Directed Verdict Filed By Respondents Al Lion, Jr., Jeff Lion and Dan Lion" filed April 5, 2004.

[3]"Respondents Al Lion, Jr., Dan Lion and Jeff Lion's Appeal From the ALJ Ruling Denying Respondents' Motion for Summary Judgment and/or Summary Disposition and/or Directed Verdict Rules of Practice, Rule 1.145(a)" filed July 13, 2004.

[4]"Complainant's Response to Appeal of Denial of Motion for Summary Judgment" filed July 16, 2004.

[5]"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].

administrative law judge's decision to the Judicial Officer. Therefore, the ALJ's Ruling Denying Respondents' Motion for Summary Judgment cannot be appealed to the Judicial Officer.

Section 1.145(a) of the Rules of Practice limits the time during which a party may file an appeal to a 30-day period after receiving service of an administrative law judge's written decision, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after the issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

The Rules of Practice define the word "decision" as follows:

> **1.132 Definitions.**
>
> As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder,

> shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:
>
> . . . .
>
> *Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and
>
> (2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

The ALJ has not issued an initial decision in the instant proceeding in accordance with the provisions of 5 U.S.C. §§ 556 and 557, and the Rules of Practice do not permit interlocutory appeals.[6] Therefore, Respondents' appeal of the ALJ's Ruling Denying Respondents' Motion for Summary Judgment must be rejected as premature.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) and (B) of the Federal Rules of Appellate Procedure provides, as follows:

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[6] *In re Velasam Veal Connection*, 55 Agric. Dec. 300, 304 (1996) (Order Dismissing Appeal); *In re L.P. Feuerstein*, 48 Agric. Dec. 896 (1989) (Order Dismissing Appeal); *In re Landmark Beef Processors, Inc.*, 43 Agric. Dec. 1541 (1984) (Order Dismissing Appeal); *In re Orie S. LeaVell*, 40 Agric. Dec. 783 (1980) (Order Dismissing Appeal by Respondent Spencer Livestock, Inc.).

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

Fed. R. App. P. 4(a)(1)(A)-(B).

The notes of the Advisory Committee on Rules regarding a 1979 amendment to Rule 4(a)(1) make clear that Rule 4(a)(1) is specifically designed to prevent premature as well as late appeals, as follows:

> The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "o[f]." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case

> may be, following the entry of the judgment or order appealed from. . . .[7]

Notes of Advisory Committee on Rules—1979 Amendment.

Accordingly, Respondents' appeal of the ALJ's Ruling Denying Respondents' Motion for Summary Judgment must be dismissed, since the Rules of Practice do not permit interlocutory appeals.

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

ORDER

Respondents' interlocutory appeal filed July 13, 2004, is dismissed.

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION FORMERLY KNOWN AS LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AL LION, JR., AN INDIVIDUAL; DAN LION, AN INDIVIDUAL; JEFF LION, AN INDIVIDUAL; and BRUCE LION, AN INDIVIDUAL.
I & G Docket No. 01-0001.
Ruling on Certified Questions.

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[7] *Accord Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam) (notice of appeal filed while timely motion to alter or amend judgment was pending in district court was absolute nullity and could not confer jurisdiction on court of appeals); *Willhauck v. Halpin*, 919 F.2d 788, 792 (1st Cir. 1990) (premature notice of appeal is a complete nullity); *Mondrow v. Fountain House*, 867 F.2d 798, 799-800 (3d Cir. 1989) (appellate court had no jurisdiction to hear appeal during pendency of motion for new trial timely filed in trial court).

Filed December 21, 2004.

I&G – Ruling on certified questions – Agricultural Marketing Act of 1946 – Debarment authority – Subpoena authority.

The Judicial Officer ruled, in response to questions certified by Administrative Law Judge Jill S. Clifton: (1) the Secretary of Agriculture's authority to prescribe regulations for the inspection, certification, and identification of the class, quality, quantity, and condition of agricultural products and to issue regulations and orders to carry out the purposes of the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1631) (Agricultural Marketing Act of 1946), includes authority to issue debarment regulations and to debar persons from benefits under the Agricultural Marketing Act of 1946; and (2) the Agricultural Marketing Act of 1946 does not authorize the Secretary of Agriculture to issue subpoenas.

Colleen A. Carroll, for Complainant.
Brian C. Leighton, and James A. Moody, for Respondents.
Certification to Judicial Officer issued by Jill S. Clifton, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

On February 20, 2004, Administrative Law Judge Jill S. Clifton [the ALJ] certified two questions to the Judicial Officer. Each of the ALJ's questions is followed by "subparts."

Debarment Authority Under the Agricultural Marketing Act of 1946

First, the ALJ asks whether the Secretary of Agriculture has authority to debar persons from benefits under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1631) [hereinafter the Agricultural Marketing Act of 1946], as follows:

Question:

Does the Secretary of Agriculture have the authority under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§1621-1631), to impose debarment of a person from any or all

of the benefits of said Act for a specified period, pursuant to 7 C.F.R. § 52.54?

Subparts:

(1) Does it make a difference if Respondents failed to assert in Respondents' Answer to the Second Amended Complaint filed July 29, 2002, that the Secretary lacks such authority?

(2) Does it make a difference that the criminal penalties pursuant to 7 U.S.C. § 1622 can be imposed upon only knowing participants in the wrongdoing, while the sanction pursuant to 7 C.F.R. § 52.54 can be imposed upon any person who commits or causes the wrongful act(s) or practice(s) **including any agents, officers, subsidiaries, or affiliates of such person?**

(3) Does it make a difference whether the purpose of 7 C.F.R. § 52.54 is (a) remedial or (b) punitive or penal? Which is it?

(4) Does it make a difference if a Respondent is a handler **required** to obtain inspection and certification in order to market the bulk of the produce it handles, under a different statute, the Agricultural Marketing Act of 1937, as amended (7 U.S.C. §§ 601-674) and Marketing Order 989 (7 C.F.R. part 989)?

(5) Does it make a difference if the Secretary of Agriculture has no authority to issue subpoenas or subpoenas duces tecum, when timely requested by Complainant or Respondents and deemed appropriate by

> the administrative law judge, for use in a debarment action pursuant to 7 C.F.R. § 52.54?

Certification to Judicial Officer at 1-2 (emphasis in original).

Answer:

The Agricultural Marketing Act of 1946 authorizes the Secretary of Agriculture to issue regulations and orders, as follows:

> **§ 1622. Duties of Secretary relating to agricultural products**
>
> The Secretary of Agriculture is directed and authorized:
>
> . . . .
>
> **(h) Inspection and certification of products in interstate commerce; credit and future availability of funds; investment; certificates as evidence; penalties**
>
> To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe[.]
>
> **§ 1624. Cooperation with Government and State agencies, private research organizations, etc.; rules and regulations**
>
> . . . .
>
> (b) The Secretary of Agriculture shall promulgate such orders, rules, and regulations as he deems necessary to carry out the provisions of this chapter.

7 U.S.C. §§ 1622(h), 1624(b).

The Secretary of Agriculture's authority to prescribe regulations for the inspection, certification, and identification of the class, quality, quantity, and condition of agricultural products and to issue regulations and orders to carry out the purposes of the Agricultural Marketing Act of 1946 includes authority to issue debarment regulations and to debar persons from benefits under the Agricultural Marketing Act of 1946.[1] Moreover, the Secretary of Agriculture has long exercised debarment authority under the Agricultural Marketing Act of 1946.[2] I do not find the Secretary of Agriculture's debarment

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[1] *American Raisin Packers, Inc. v. United States Dep't of Agric.*, 66 Fed. Appx. 706, 2003 WL 21259771 (9th Cir. 2003) (stating section 203(h) of the Agricultural Marketing Act of 1946 (7 U.S.C. § 1622(h)) provides ample authority for the promulgation of 7 C.F.R. § 52.54 (a debarment regulation); and affirming the Judicial Officer's debarment of American Raisin Packers, Inc., from receiving inspection services under the Agricultural Marketing Act of 1946) (not to be cited except pursuant to Ninth Circuit Rule 36-3); *West v. Bergland*, 611 F.2d 710 (8th Cir. 1979) (stating regulations which permit the Secretary of Agriculture to withdraw meat grading services under the Agricultural Marketing Act of 1946 are authorized by the Agricultural Marketing Act of 1946; and affirming the district court's denial of a request to enjoin the Secretary of Agriculture from holding an administrative hearing to determine whether meat grading and acceptance services under the Agricultural Marketing Act of 1946 should be withdrawn), *cert. denied*, 449 U.S. 821 (1980).

[2] *See In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165 (2001) (debarring the respondent from receiving inspection services under the Agricultural Marketing Act of 1946), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 Fed. Appx. 706, 2003 WL 21259771 (9th Cir. 2003); *In re Windy City Meat Co.*, 49 Agric. Dec. 272 (1990) (withdrawing from and denying to the respondent meat grading and acceptance services under the Agricultural Marketing Act of 1946); *In re Mirman Bros., Inc.*, 40 Agric. Dec. 201 (1981) (withdrawing from and denying to the respondent meat grading and acceptance services under the Agricultural Marketing Act of 1946); *In re William H. Hutton*, 38 Agric. Dec. 332 (1979) (withdrawing from and denying to the respondent meat grading and acceptance services under the Agricultural Marketing Act of 1946), *appeal dismissed*, No. 79-0634-N (S.D. Cal. May 12, 1980), *final order*, 39 Agric. Dec.

(continued...)

authority under the Agricultural Marketing Act of 1946 affected by any of the issues raised in the five subparts to the ALJ's question regarding the Secretary of Agriculture's debarment authority under the Agricultural Marketing Act of 1946.

Subpoena Authority Under the Agricultural Marketing Act of 1946

Second, the ALJ asks whether the Secretary of Agriculture is authorized by the Agricultural Marketing Act of 1946 to issue subpoenas, as follows:

> **Question:**
>
> Does the Secretary of Agriculture have the authority under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1631), to issue subpoenas and subpoenas duces tecum when timely requested by Complainant or Respondent and deemed appropriate by the Administrative Law Judge, for use in a debarment action pursuant to 7 C.F.R. § 52.54?
>
> **Subparts:**
>
> (1) Does it make a difference if a Respondent is a handler **required** to obtain inspection and certification in order to market the bulk of the produce it handles,

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[2](...continued)
355 (1980); *In re National Meat Packers, Inc.* (Decision as to Charles D. Olsen), 38 Agric. Dec. 169 (1978) (withdrawing from and denying to respondent Charles D. Olsen meat grading and acceptance services under the Agricultural Marketing Act of 1946); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336 (1978) (debarring the respondent from all benefits under the Agricultural Marketing Act of 1946), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980). *See also Arrow Meat Co. v. Freeman*, 261 F. Supp. 622 (D. Or. 1966) (affirming the Agricultural Marketing Service order withdrawing meat grading services under the Agricultural Marketing Act of 1946).

under a different statute, the Agricultural Marketing Act of 1937, as amended (7 U.S.C. §§ 601-674) and Marketing Order 989 (7 C.F.R. part 989)?

(2) Does it make a difference if the debarment action and resulting administrative hearing are not explicit in the statute?

Certification to Judicial Officer at 3-4 (emphasis in original).

Answer:

This proceeding is conducted under the Agricultural Marketing Act of 1946 and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice]. The Agricultural Marketing Act of 1946 does not authorize the Secretary of Agriculture to issue subpoenas.[3] The Rules of Practice explicitly limit the issuance of subpoenas to those authorized by the statute under which the proceeding is conducted, as follows:

§ 1.144 Judges.

. . . .

(c) *Powers*. Subject to review as provided in this subpart, the Judge, in any assigned proceeding, shall have power to:

. . . .

---

[3]*In re Mirman Bros., Inc.*, 40 Agric. Dec. 201 (1981) (stating the Agricultural Marketing Act of 1946 does not grant subpoena powers).

(4) Issue subpoenas as authorized by the statute under which the proceeding is conducted, requiring the attendance and testimony of witnesses and the production of books,

contracts, papers, and other documentary evidence at the hearing[.]

§ 1.149 Subpoenas.

(a) *Issuance of subpoenas.* The attendance and testimony of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the proceeding may be required by subpoena at any designated place of hearing if authorized by the statute under which the proceeding is conducted.

7 C.F.R. §§ 1.144(c)(4), .149(a) (footnote omitted).

Moreover, the Judicial Officer has consistently held that, under the Rules of Practice, an administrative law judge may only issue a subpoena as authorized by the statute under which the proceeding is conducted.[4] The Rules of Practice neither provide an exception for actions that are not explicit in the statute under which the proceeding is conducted nor provide an exception for actions that may affect a respondent under another statute.

———————

In re: CHRIS BURKE.
P.Q. Docket No. 05-0005.
Order Withdrawing Complaint and Dismissing Case.
Filed December 3, 2004.

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[4]*See In re Jim Fobber*, 55 Agric. Dec. 60, 68-69 (1996); *In re Robert Bellinger, D.V.M.*, 49 Agric. Dec. 226, 235 (1990).

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Complainant's November 30, 2004, Motion to Withdraw Complaint is granted. It is hereby ordered that the Complaint, filed herein on November 16, 2004, be withdrawn.

Accordingly, this case is hereby dismissed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties. The Hearing Clerk is requested to show the addresses to which the copies were mailed, and the mailing dates.

_____

In re: AYSEN BROS., INC., BLANCHARD FARMS, INC., PATRICK RICHARD FARMS, D &R BLANCHARD FARMS, INC., JOHN GOODE FARMS, CLAUDE BROS., INC., SJM FARMS, INC., BOUDREAUX ENTERPRISE RJB, LLC.
SMA Docket No. 04-0001
and
RENE CLAUSE & SONS, INC. AND A. N. SIMMONS ESTATE.
SMA Docket No. 04-0002.
Order Dismissing Petitions and Claims by Intervenors.
Filed July 15, 2004.

Risley C. Triche for Petitioners.
Christopher H. Riviere for Intervenors.

Jeffrey Kahn for CCC.
Order by Administrative Law Judge, Victor A. Palmer.

BACKGROUND

These proceedings are pursuant to the Agricultural Adjustment Act of 1938, as amended by the Farm Security and Rural Adjustment Act of 2002, as they pertain to the establishment and transfer of flexible marketing allotments for sugar. (7 U.S.C. § 1359aa-1359kk, "the Act"). The sugar loan and allotment program is administered by the United States Department of Agriculture's Commodity Credit Corporation (CCC). In addition to making loans to processors of domestically grown sugarcane and domestically grown sugar beets who must then pay growers of these commodities not less than minimum amounts that are established by the Department of Agriculture, (*See* 7 C.F.R. §1435.100-1435.106), CCC establishes flexible marketing allotments for sugar for any crop year in which they are required by the Act. Under a formula expressed in the Act, limitations are placed on the percentage of the American Sugar Market that may be supplied by foreign growers and the rest is divided between sugar derived from domestically grown sugar beets and sugar from domestically grown sugarcane. Additionally, the allotments for sugar derived from sugarcane is further allotted among the States in accordance with the Act and implementing regulations. An allotment for cane sugar is allocated among multiple cane sugar processors in the State of Louisiana, (which is the only proportionate share State subject to 7 U.S.C. §1359d(b)(1)(D)), on the basis of past marketings and processings of sugar, and the processor's ability to market its portion of the allotment allocated for the crop year. The Act further requires that a processor's allocation of an allotment shall be shared among growers served by the processor in a fair and equitable manner that reflects the growers' production histories. Louisiana is the only State in which growers have assigned allotments. When a processing facility is closed in Louisiana,

sugarcane growers that delivered sugarcane to the facility prior to the closing may elect to deliver their sugarcane to another processing plant by filing a petition under 7 U.S.C. § 1359ff (c)(8)(A) to have their allocations modified to allow the delivery. Upon the filing of such a petition, CCC may increase the allocation of the processing facility to which the growers have elected to deliver their sugarcane to a level that does not exceed that company's processing capacity, and the increased allocation is then deducted from the allocation of the owner of the closed processing facility. (7 U.S.C. §1359ff(c)(8)(B) and (C)).

The Petitioners are Louisiana growers of sugarcane and members of the South Louisiana Sugar Cooperative (the Cooperative). Each Petitioner had entered into an agreement to supply all of their sugarcane production to the Cooperative. When the Petitioners entered into these agreements, the Cooperative was operating a sugarcane processing facility known as the Glenwood Cooperative Sugar Mill at Napoleon, Louisiana to which Petitioners delivered their sugarcane for processing. However, for economic reasons, the Cooperative closed this facility.

After the closure, these growers petitioned the Secretary, pursuant to 7 U.S.C. §1359ff(c)(8)(A), to move their respective sugar marketing allocations, commensurate with their sugarcane production histories at the closed facility, to other sugarcane processors who agreed to accept their sugarcane. The pertinent provisions of the Act (7 U.S.C. §1359ff(c)(8)) are as follows:

> (8) PROCESSING FACILITY CLOSURES -
>
> (A) IN GENERAL B If a sugarcane processing facility subject to this subsection is closed and the sugarcane growers that delivered the sugarcane to the faciltiy prior to the closure elect to deliver their sugarcane to another processing company, the growers may petition the

> Secretary to modify allocations under this part to allow the delivery.
> (B) INCREASED ALLOCATION FOR PROCESSING COMPANY B The Secretary may increase the allocation to the processing company to which the growers elect to deliver the sugarcane, with the approval of the processing company, to a level that does not exceed the processing capacity of the processing company, to accommodate the change in deliveries.
> (C) DECREASED ALLOCATION FOR CLOSED COMPANY B The increased allocation shall be deducted from the allocation to the company that owned the processing facility that has been closed and the remaining allocation shall be unaffected .
> (D) TIMING B The determinations of the Secretary on the issues raised by the petition shall be made within 60 days after the filing of the petition.

On July 17, 2003, those petitions were granted by CCC even though by letter of June 24, 2003, the Cooperative had requested their denial as being inconsistent with and in violation of its contracts with the growers. The Cooperative was advised at that time (Agency Certified Record, page 174):

> '...We regret the potential negative effect that our decision may have upon South Louisiana. However, we believe that section 359f(c)(8) of the Agricultural Adjustment Act of 1938, as amended, encourages the Department of Agriculture to honor grower petitions to transfer allocation commensurate with their production history if their mill closes.

On July 21, 2003, the Cooperative requested reconsideration of the July 17'th decision.

On October 10, 2003, CCC denied the Cooperative's request for reconsideration (Agency Certified Record, pp.256 - 258), stating that:

> ...Based upon the information available to CCC...CCC has determined to deny the Cooperative's request to reverse its July 17, 2003, approval of the growers' transfer requests. The growers meet the statutory conditions necessary for CCC to allow the transfer. However, in allowing these transfers to occur, CCC wishes to make clear that this approval does not affect in any manner private contractual obligations that the Growers may have and that the provisions of 359f of the Agricultural Adjustment Act of 1938 may not be used to avoid contractual obligations involving the Growers and other parties.
>
> In initially approving the Growers' request, CCC did not pre-empt any existing rights and obligations of the Growers or any other party; similarly, today's determination in no way affects any obligation that may exist in any private contract or agreement between the Growers and any other party. If the Growers have a contractual obligation requiring that they deliver sugarcane to a processor, their action in requesting CCC to allow a transfer of allocation to another processor does not abrogate any obligation under the private contract.
>
> CCC is approving the transfer of the allocations based solely upon the determination that the processor to whom they have delivered sugarcane in the past is no longer functioning and, thus, under section 359f of the Agricultural Adjustment Act of 1938, the Growers may

> at their own initiation, request that CCC transfer allocation to another processor. To the extent the Growers have initiated two separate courses of action that are contradictory, namely (1) entering into private agreements regarding the delivery of sugarcane that they produce to a specified processor and (2) requesting that CCC approve a transfer of allocation to another processor, the Growers must accept responsibility for the consequences of their actions.
>
> While CCC is denying the Cooperative's request for reconsideration of CCC's July 17, 2003 determination, in light of the erroneous assumption of the Growers that CCC's July 17, 2003 determination preempts other contractual obligations of the Growers, CCC will allow the Growers until October 24, 2003 to weigh the consequences of their requests. Unless notified in writing prior to October 24, 2003, CCC will consider the transfer of the Growers' allocation, to the processors designated by the Growers to be final.
>
> Except as set forth in the immediately preceding paragraph, CCC will not, under section 359f of the Agricultural Adjustment Act of 1938, accept petitions to transfer sugar cane allocations to a new processor once harvest begins.

On October 23, 2003, the petition in SMA Docket No. 04-0001 was filed to appeal those parts of the reconsideration opinion that stated the July 17'th determination did not preempt other contractual obligations that the growers may owe, and that CCC would not accept further applications for transfers once harvest began. The petition

alleges that State laws were indeed preempted by CCC by its own final rule addressing the preemption of inconsistent State laws that it previously published in the Federal Register on August 26, 2002. It alleged further that CCC had not been given authority to fix deadlines. On November 17, 2003, CCC filed an Answer and a Motion to Dismiss the Petition. On November 25, 2003, a second Petition was filed by other growers making identical allegations in SMA Docket No. 04-0002. On December 12, 2003, CCC filed an Answer and Motion to Dismiss this second Petition.

Responses by Petitioners to the Answers and Motions to Dismiss were filed on December 10, 2003 in SMA Docket No. 04-0001, and on December 22, 2003 in SMA Docket No. 04-0002.

Notices of Intent to Intervene in both cases were thereafter filed by South Louisiana Sugar Cooperative, Inc., M.A. Patout & Son, Ltd., Raceland Raw Sugar Corporation, and Lafourche Sugars, L.L.C. On April 9, 2004, I entered an Order based on a teleconference held the day before in which May 28, 2004, was set as the date by which the parties would file the Agency Certified Record, motions with supporting briefs, specific identification of the Petitioners in SMA Docket No. 04-0001 and memoranda showing the facts in full as they know them and their legal arguments.

The parties complied with the deadline. The two proceedings have been consolidated and the caption for SMA Docket No. 04-0001 has been changed to show the actual Petitioners.

Upon a careful reading of the Agency Certified Record and the motions and memoranda filed, I have determined to dismiss both petitions as well as the requests by the Intervenors to set aside the reconsideration determination for the reasons that follow:

DISMISSAL OF THE PETITIONS

CCC has urged three reasons for the dismissal of the petitions.

First, CCC contends that the Petitioners were not adversely affected by any part of the reconsideration determination and are

therefore without standing to appeal. This argument is rejected. Petitioners were indeed adversely affected by those portions of the reconsideration decision stating that they may be in violation of their contractual obligations if they send their sugarcane to facilities other than those owned by the Cooperative, and that the earlier decision in their favor was not intended to suggest otherwise. Petitioners therefore have standing to appeal that part of the reconsideration decision.

I agree, however, with CCC's second contention that Petitioners do not have standing to appeal the reconsideration decision's imposition of a deadline upon further grower applications for transfer of sugar marketing allocations. The Petitioners are all growers whose transfer applications were granted and none of them can claim to be adversely affected by this part of the decision. The Act (7 U.S.C §1357ii(a)) specifically limits appeals to: any person adversely affected by reason of any such decision upon which relief can be granted.

CCC's third reason for dismissal is the one that is conclusive and leads me to dismiss both petitions in their entirety. The petitions fail to state a claim upon which relief can be granted. The essence of the Petitioners' claims for relief is that in granting Petitioners' requests to transfer their sugar marketing allocations, CCC thereby preempted State common law and could not later assert otherwise.

CCC is correct that it was not granted and did not exercise the power to preempt conflicting State common law. Petitioners contend that federal preemption of State common law took place when CCC promulgated a rule in implementation of the Act on August 26, 2002, (67 Federal Register 54925, at 54926), which provided:

> Executive Order 12778.[1] The final rule has been reviewed under Executive Order 12778. This rule preempts State laws that are inconsistent with it, however, this rule is not retroactive. Before judicial action may be brought concerning this rule, all administrative remedies must be exhausted.

The implementing rule did not, as Petitioners contend, preempt all State laws. It expressly restricted its preemptive effect to inconsistent State laws.

Federal preemption applies only when it is explicitly stated in the statute; when it is implicitly contained in the statute's structure and purpose; when the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it; when compliance with both federal and state regulation is impossible; when

Congress intends federal law to occupy an entire field of regulation leaving no room for the States to supplement it; or when a challenged State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See 'Fidelity Federal Sav. & Loan Ass'n 'v. De La Cuesta*, 458 U.S. 141, at 152-155, 102 S. Ct. 3014, at 3022- 3023 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, at 698-699, 104 S. Ct. 2694, at 2700 (1984); and *Crosby v. National Foreign Trade Council,* 530 U.S. 363, at 372-373, 120 S.Ct. 2288, at 2293-2294 (2000).

None of these circumstances exist here. Congress never stated that State common law was to be preempted. The statutory provisions and the actions by CCC under them, can be and are being administered so as to avoid any conflict with the State common law. And this makes

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[1] The rule should have referenced Executive Order 12988 which had replaced Executive Order 12778. The language of both Executive Orders was, however, identical.

sense. CCC's and the Secretary's expertise does not extend to interpreting and applying the principles of common law to alleged contractual breaches.

Although I have found no decisions looking to federal preemption of State common law, the Supreme Court has addressed preemption of Federal common law by federal statutes. In *Oneida County, N.Y. v. Oneida Indian Etc.,* 470 U.S. 226, at 235-240, 105 S. Ct. 1245, at 1252-1254 (1985), the Supreme Court held that common law rights of action are not preempted by a federal statute when the statute did not speak directly to the question of remedies and did not establish a comprehensive remedial plan. The displacement of common law by a federal statute is, therefore, not to be lightly inferred.

The sugar allotment program can operate without preemption of the common law. CCC has demonstrated this to be so in the case before us.

The Act states that upon the close of a sugarcane processing facility, the growers that delivered sugarcane to that facility may elect to deliver their sugarcane to another processing company and petition the Secretary to modify processing company allocations to facilitate that election. 7 U.S.S. §1359 ff (c)(8).

CCC interpreted this language as encouraging the Department of Agriculture to honor such grower petitions. (Agency Certified Record, page 174).

This interpretation is permissible and consistent with the language and purposes of the Act. There is nothing in the Act to suggest that CCC's actions should preempt State common law or that CCC should interpret, weigh and apply the common law before coming to a decision on a petition by growers to modify allocations to allow them to deliver their sugarcane to another processing facility when a facility where they formerly made deliveries has closed.

The petition may be filed by growers who "elect to deliver their sugarcane to another processing company" in light of the facility closure, (7 U.S.C. §1359ff(c)(8)(A)). Upon the filing of the petition, CCC then undertakes to determine whether the processing company where the growers elect to deliver the sugarcane has given its approval to the delivery, and that it has sufficient capacity to accommodate the change in deliveries. (7 U.S.C. §1359ff (c)(8)(B)). The section requires no further inquiry or finding by CCC. The allocation to that processing company may then be increased, and deducted from the allocation to the company that owned the closed facility. The section requires that a determination be made within 60 days after the filing of the petition. The language of the section and the purposes of the Act do not appear to contemplate that CCC will hold court during those 60 days and review contracts and actions taken under them to determine their validity and whether the growers may be breaching their terms. Those issues rightly belong with the State Courts that customarily interpret and apply the common law when contracts are in dispute.

In *Louisiana Sugar Cane Products Inc. v. Louisiana Sugar Cooperative,* Civil Action No. 04-0136 (USDC, E.D. LA, April 28, 2004), copy attached as Exhibit D to CCC's Brief, proceedings involving the Act were remanded by the United States District Court for the Eastern District of Louisiana to a State of Louisiana Court. The United States District Court stated, at page 4 of the Order, that the State Court was the proper forum because "the Court is convinced that the claims asserted in plaintiff's petition revolve around, and depend upon, state law issues of contract."

Here too, the proper forum for the Petitioners, the Cooperative and the other Intervenors to determine who first breached the contracts between them and what their appropriate remedies should be, if any, is a State Court, and not a proceeding before the Secretary.

In that the Act and the Secretary's actions under it have not operated to preempt State common law, which is the essence of

Petitioners' claims, the petitions are hereby dismissed for failing to state a claim upon which relief can be granted.

The Intervenors have similarly asserted that CCC should have denied the growers' petitions for transfer of marketing allocations because they were in breach of contractual obligations owed the Cooperative. Again, the Secretary was being asked to act in place of a State Court that is the proper forum to interpret and administer State common law. For the reasons expressed above, the Secretary was not empowered to interpret and apply State common law and CCC was not therefore being arbitrary and capricious or abusing its discretion when it refused to do so. The Intervenors have likewise failed to state a claim upon which relief can be granted and their various requests, claims and motions for any action beyond sustaining the reconsideration decision as issued, are also dismissed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

In re: SOUTHWEST TOBACCO WAREHOUSE, INC.
TIPS Docket No. 04-0001.
Order Dismissing Case.
Filed July 9, 2004.

Kenneth Vail, for Complainant.
Respondent, Pro se.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

The above-captioned case filed May 17, 2004 is **DISMISSED.**

GENERAL

DEFAULT DECISION

ANIMAL QUARANTINE ACT

In re: GIUSEPPA DADDI MARTINIS.
A.Q. Docket No. 02-0006.
Decision and Order.
Filed July 6, 2004.

AQ – Default – Processed meats.

James Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the prohibition of the importation of pork and fruit from Italy into the United States (9 C.F.R. §§ 94.0 *et seq.* and 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 section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111) and the Plant Protection Act (7 U.S.C. § 7701 *et seq*.) (Acts), and the regulations promulgated thereunder, by a complaint filed on April 25, 2002, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint sought civil penalties as authorized by the Acts. This complaint specifically alleged that the respondent illegally imported approximately one kilogram of pork sausage and 36 fresh persimmon fruit from Italy into the Untied States at Detroit, Michigan.

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. Giuseppa Daddio Martinisi, herein referred to as respondent, is an individual whose mailing address is 12170 Randee Road, New Port Richey, Florida 34654.

2. On or about October 15, 2000, respondent imported approximately one kilogram of pork sausage from Italy into the Untied States at Detroit, Michigan, in violation of 9 C.F.R. §§ 94.9(b)(1), 94.9(b)(3), 94.12(b)(1), and 94.12(b)(3) because the pork sausage was not verified as treated and/or was not accompanied by a certificate, as required.

3. On or about October 15, 2000, the respondent imported approximately 36 fresh persimmon fruit into the United States from Italy, at Detroit, Michigan, in violation of 7 C.F.R. §§ 319.56(c) and 319.56-2(e) because the persimmon fruit are prohibited unless 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 (9 C.F.R. §§ 94.0 *et seq*. and 7

C.F.R. § 319.56 *et seq*.) issued under the Acts. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate that payment is in reference to A.Q. Docket No. 02-0006.

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 October 5, 2004.-Editor]

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DEFAULT DECISION

ANIMAL WELFARE ACT

In re: DAVID GILBERT, d/b/a GILBERT'S EDUCATIONAL PETTING ZOO AND SAFARI LAND ZOO.
AWA Docket No. 04-0001.
Decision and Order by Reason of Admission of Facts.
Filed August 23, 2004.

AWA – Default – Exotic animals.

Colleen Carrol for Complainant.
Respondent, Pro se.
Order and Decision by Chief Administrative Law Judge, Marc R. Hillson.

DECISION

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that Respondent David Gilbert, an individual doing business as Gilbert's Educational Petting Zoo and Safari Land Zoo, willfully violated the Act and the Regulations and Standards promulgated thereunder (9 C.F.R. § 1.1 *et seq.*)(the "Regulations" and "standards").

On October 24, 2003, the Hearing Clerk sent to Respondent David Gilbert, by certified mail, return receipt requested, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The package was mailed to the respondent's current mailing address, which Respondent had provided to Complainant. Respondent Gilbert was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that

allegation. Respondent Gilbert actually received the complaint on October 29, 2003. Said Respondent has failed to file an answer to the complaint.

On January 28, 2004, no answer having been filed by Respondent, Complainant filed with the Hearing Clerk a Motion for Adoption of Proposed Decision and Order, contending that the failure to file an answer constituted an admission of the allegations in the complaint, and that a civil penalty of $8800, and certain injunctive relief, was warranted. On February 23, 2004, an unsigned, undated, handwritten document was submitted, apparently by Respondent, to the Hearing Clerk's office. While the Hearing Clerk properly treated the document as objections to Complainant's motion, the document offered no reason for the failure to file an answer, little refutation to the allegations in the complaint, and no dispute as to the requested civil penalty. Accordingly, I find that the objections to Complainant's motion are not meritorious.

Pursuant to sections 1.136 and 1.139 of the Rules of Practice, the material facts alleged in the complaint, are all admitted by Respondent's failure to file an answer or to deny. They are adopted and set forth herein as Findings of Fact and Conclusions of Law, and this decision and order is issued pursuant to section 1.139 of the Rules of Practice.

FINDINGS OF FACT

1. Respondent David Gilbert is an individual whose address is 8772 160th Street, Swaledale, Iowa 50477. Said respondent does business as Safari Land Zoo and Gilbert's Educational Petting Zoo. Between October 20, 1995, and October 26, 2001, said respondent was operating as a dealer, and held AWA license number 42-B-0144, issued to David Gilbert. Thereafter, respondent operated as an exhibitor, and beginning March 12, 2002, held license number 42-C-0150.

2. At all times mentioned herein, respondent David Gilbert had ownership of approximately 45 exotic and wild animals. Said respondent has no history of previous violations of the Act or the Regulations. The gravity of the violations alleged herein is serious, involving failure to allow inspection, failing to ensure that animals had an adequate supply of water, and housing dangerous animals in inadequate facilities that would not restrict the entry of other animals or unauthorized persons.

3. On August 10, 2001, respondent willfully failed, during business hours, to allow APHIS officials to enter his place of business to inspect the facilities, animals and records therein.

4. On or about the following dates, respondent willfully failed to meet the minimum requirements for facilities in section 3.125 of the Standards (9 C.F.R. § 3.125), as follows:

a. May 31, 2001. Respondent's housing facilities for its bear were not structurally sound and maintained in good repair to contain the animal securely. 9 C.F.R. § 3.125(a).

b. May 31, 2001. Respondent's housing facilities for its tiger were not structurally sound and maintained in good repair to contain the animal securely. 9 C.F.R. § 3.125(a).

c. August 13, 2001. Respondent's housing facilities for its bear were not structurally sound and maintained in good repair to contain the animal securely. 9 C.F.R. § 3.125(a).

d. August 27, 2001. Respondent's housing facilities for its bear were not structurally sound and maintained in good repair to contain the animal securely. 9 C.F.R. § 3.125(a).

e. May 31, 2001. Respondent failed to store supplies of food in facilities that adequately protect the food against deterioration or contamination by vermin, and specifically, respondent stored a deer carcass in his driveway. 9 C.F.R. § 3.125(c).

5. On or about the following dates, respondent willfully failed to

meet the minimum requirements for outdoor facilities in section 3.127 of the Standards (9 C.F.R. § 3.127), as follows:

a. May 31, 2001. Respondent failed to enclose his outdoor housing facilities for a bear by a perimeter fence of sufficient height to keep animals and unauthorized persons out. 9 C.F.R. § 3.127(d).

b. May 31, 2001. Respondent failed to enclose his outdoor housing facilities for a tiger by a perimeter fence of sufficient height to keep animals and unauthorized persons out. 9 C.F.R. § 3.127(d).

c. August 13, 2001. Respondent failed to enclose his outdoor housing facilities for a tiger by a perimeter fence of sufficient height to keep animals and unauthorized persons out. 9 C.F.R. § 3.127(d).

d. August 27, 2001. Respondent failed to enclose his outdoor housing facilities for a tiger by a perimeter fence of sufficient height to keep animals and unauthorized persons out. 9 C.F.R. § 3.127(d).

6. On or about the following dates, respondent willfully failed to meet the minimum requirements for watering in section 3.130 of the Standards (9 C.F.R. § 3.130), as follows:

a. May 31, 2001. Respondent failed to provide potable water to a bear as often as necessary for the health and comfort of the animal. 9 C.F.R. § 3.130.

b. May 31, 2001. Respondent failed to provide potable water to a tiger as often as necessary for the health and comfort of the animal. 9 C.F.R. § 3.130.

c. August 13, 2001. Respondent failed to provide potable water to a tiger as often as necessary for the health and comfort of the animal. 9 C.F.R. § 3.130.

7. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for employees in section 3.132 of

the Standards (9 C.F.R. § 3.132), as follows:

a. May 31, 2001. Respondent failed to utilize an sufficient number of adequately-trained employees to maintain a professionally-acceptable level of husbandry practices. 9 C.F.R. § 3.132.

b. August 13, 2001. Respondent failed to utilize an sufficient number of adequately-trained employees to maintain a professionally-acceptable level of husbandry practices. 9 C.F.R. § 3.132.

c. August 27, 2001. Respondent failed to utilize an sufficient number of adequately-trained employees to maintain a professionally-acceptable level of husbandry practices. 9 C.F.R. § 3.132.

CONCLUSIONS OF LAW

1. On August 10, 2001, respondent failed, during business hours, to allow APHIS officials to enter his place of business to inspect the facilities, animals and records therein, in willful violation of section 2146 of the Act and section 2.126 of the Regulations. 7 U.S.C. § 2146(a), 9 C.F.R. § 2.126.

2. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for facilities in section 3.125 of the Standards (9 C.F.R. § 3.125), as follows:

a. May 31, 2001. Respondent's housing facilities for its bear were not structurally sound and maintained in good repair to contain the animal securely. 9 C.F.R. § 3.125(a).

b. May 31, 2001. Respondent's housing facilities for its tiger were not structurally sound and maintained in good repair to contain the animal securely. 9 C.F.R. § 3.125(a).

c. August 13, 2001. Respondent's housing facilities for its bear were not structurally sound and maintained in good repair to contain the animal securely. 9 C.F.R. § 3.125(a).

d. August 27, 2001. Respondent's housing facilities for its bear were not structurally sound and maintained in good repair to contain the animal securely. 9 C.F.R. § 3.125(a).

e. May 31, 2001. Respondent failed to store supplies of food in facilities that adequately protect the food against deterioration or contamination by vermin, and specifically, respondent stored a deer carcass in his driveway. 9 C.F.R. § 3.125(c).

3. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Standards (9 C.F.R. § 3.127), as follows:

a. May 31, 2001. Respondent failed to enclose his outdoor housing facilities for a bear by a perimeter fence of sufficient height to keep animals and unauthorized persons out. 9 C.F.R. § 3.127(d).

b. May 31, 2001. Respondent failed to enclose his outdoor housing facilities for a tiger by a perimeter fence of sufficient height to keep animals and unauthorized persons out. 9 C.F.R. § 3.127(d).

c. August 13, 2001. Respondent failed to enclose his outdoor housing facilities for a tiger by a perimeter fence of sufficient height to keep animals and unauthorized persons out. 9 C.F.R. § 3.127(d).

d. August 27, 2001. Respondent failed to enclose his outdoor housing facilities for a tiger by a perimeter fence of sufficient height to keep animals and unauthorized persons out. 9 C.F.R. § 3.127(d).

4. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for watering in section 3.130 of the Standards (9 C.F.R. § 3.130), as follows:

a. May 31, 2001. Respondent failed to provide potable

water to a bear as often as necessary for the health and comfort of the animal. 9 C.F.R. § 3.130.

b. May 31, 2001. Respondent failed to provide potable water to a tiger as often as necessary for the health and comfort of the animal. 9 C.F.R. § 3.130.

c. August 13, 2001. Respondent failed to provide potable water to a tiger as often as necessary for the health and comfort of the animal. 9 C.F.R. § 3.130.

5. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for employees in section 3.132 of the Standards (9 C.F.R. § 3.132), as follows:

a. May 31, 2001. Respondent failed to utilize an sufficient number of adequately-trained employees to maintain a professionally-acceptable level of husbandry practices. 9 C.F.R. § 3.132.

b. August 13, 2001. Respondent failed to utilize an sufficient number of adequately-trained employees to maintain a professionally-acceptable level of husbandry practices. 9 C.F.R. § 3.132.

c. August 27, 2001. Respondent failed to utilize an sufficient number of adequately-trained employees to maintain a professionally-acceptable level of husbandry practices. 9 C.F.R. § 3.132.

Order

1. Respondent David Gilbert, 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.

2. Respondent David Gilbert is assessed a civil penalty of $8,800.

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.

DEFAULT DECISIONS

PLANT QUARANTINE ACT

In re: PONCE AIRLINES SERVICES a/k/a P.A.S.
P.Q. Docket No. 04-0006.
Decision and Order.
Filed July 6, 2004.

PQ – Default – Improper disposal.

Thomas Bolick, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Protection Act of June 20, 2000, as amended (7 U.S.C. §§ 7701 *et seq*.)(the Act), 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 Act by a complaint filed on March 26, 2004, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture and served by certified mail on respondent Ponce Airlines Services (P.A.S.) on March 30, 2004. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), respondent P.A.S. was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Respondent's answer thus was due no later than April 19, 2004, twenty days after service of the complaint (7 C.F.R. § 136(a)). Respondent P.A.S. never filed an answer to the complaint and the Hearing Clerk's Office mailed it a No Answer Letter on April 22, 2004.

Therefore, respondent P.A.S. failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and failed to deny or otherwise respond to an allegation of the complaint. 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) or to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. Furthermore, since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and respondent's failure to file an answer is deemed such an admission pursuant to the Rules of Practice, respondent's failure to answer is likewise deemed a waiver of hearing. 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. Respondent P.A.S. is the agent in Puerto Rico for various American airlines and has a mailing address of World Cargo Blvd., Terminal D, Base Muniz, Carolina, Puerto Rico 00979.
2. On or about March 21, 2001, in San Juan, Puerto Rico, respondent P.A.S. removed from Atlas Air Flight GT1062 (Aircraft # N-808MC) regulated garbage, which had originated in Colombia, and disposed of it in an unauthorized manner, in violation of 7 C.F.R. § 330.400.

Conclusion

By reason of the Findings of Fact set forth above, P.A.S. has violated the Act. Therefore, the following Order is issued.

Order

Respondent P.A.S. is hereby assessed a civil penalty of four thousand dollars ($4,000.00). This penalty shall be payable to the

"Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent P.A.S. shall indicate that payment is in reference to P.Q. Docket No. 04-0006.

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 P.A.S. 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 16, 2004.-Editor]

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In re: ALFREDO GONZALEZ.
P.Q. Docket No. 03-0004.
Decision and Order.
Filed July 6, 2004.

P.Q. - Default – Avocados.

James Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the prohibition of the importation of avocados from Mexico 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 in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701-7772)(Act), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service on October 29, 2002, alleging that respondent Alfredo Gonzalez violated the Act and regulations promulgated under the Acts (7 C.F.R. § 319.56 *et seq*.).

The complaint sought civil penalties as authorized by section 424 of the Plant Protection Act (7 U.S.C. § 7734). This complaint specifically alleged that on three different occasions respondent illegally imported large quantities of fresh Hass avocados from Mexico into the United States.

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. Alfredo Gonzalez, hereinafter referred to as respondent, is an individual with a mailing address of 160 W. San Ysidro Blvd. A, San Ysidro, California 92173.

2. On or about July 29, 1998, at San Ysidro, California, the respondent imported approximately 169 fresh Hass avocados from Mexico into the United States in violation of 7 C.F.R. §§ 319.56(c) and 319.56-2ff, because importation of such avocados into the United States is prohibited except under specific conditions.

3. On or about February 23, 2000, at San Ysidro, California, the

respondent imported approximately 15 boxes of fresh Hass avocados from Mexico into the United States in violation of 7 C.F.R. §§ 319.56(c) and 319.56-2ff, because importation of such avocados into the United States is prohibited except under specific conditions.

4. On or about February 29, 2000, at Otay Mesa, California, the respondent imported approximately 12 boxes of fresh Hass avocados from Mexico into the United States in violation of 7 C.F.R. §§ 319.56(c) and 319.56-2ff, because importation of such avocados into the United States is prohibited except under specific conditions.

Conclusion

By reason of the Findings of Fact set forth above, the respondent(s) has violated the Act and the regulations issued under the Act (7 C.F.R. § 319.56 *et seq*). Therefore, the following Order is issued.

Order

The respondent, Alfredo Gonzalez, is assessed a civil penalty of three thousand dollars ($3,000.00). The respondent shall pay three thousand dollars ($3,000.00) as a civil penalty. 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 on the certified check or money order that payment is in reference to P.Q. Docket No. 03-0004

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 7 C.F.R. § 1.145 of the Rules of Practice.
[This Decision and Order became final August 27, 2004.-Editor]

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In re: JENNIFER LE.
P.Q. Docket No. 03-0005.
Decision and Order.
Filed July 6, 2005.

P.Q. - Default – Postal shipments.

James Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the prohibition of the movement of importation of certain types of fruit from Hawaii into the continental United States (7 C.F.R. § 318.13 *et seq*.) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701-7772)(Act), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service on November 7, 2002, alleging that respondent Jennifer Le violated the Act and regulations promulgated under the Acts (7 C.F.R. § 318.13 *et seq*.). The complaint sought civil penalties as authorized by section 424 of the Plant Protection Act (7 U.S.C. § 7734). This complaint specifically alleged that on or about February 2, 2001, at Honolulu, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service approximately 6.4 pounds of fresh whole star apples for shipment from Hawaii to the continental United States.

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. Jennifer Le, hereinafter referred to as respondent, is an individual with a mailing address of 2230 Lokilana Street, Honolulu, Hawaii 96819.
2. On or about February 2, 2001, at Honolulu, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service, approximately 6.4 pounds of fresh whole star apples for shipment from Hawaii to the continental United States in violation of 7 CFR §§ 318.13(b) and 318.13-2(a) because movement of such fruits into or through the continental Untied States is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent(s) has violated the Act and the regulations issued under the Act (7 C.F.R. § 318.13 *et seq*.). Therefore, the following Order is issued.

Order

The respondent, Jennifer Le, is assessed a civil penalty of five hundred dollars ($500.00). The respondent shall pay five hundred dollars ($500.00) as civil penalty. 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 indicated on the certified check or money order that payment is in reference to P.Q. Docket No. 03-0005.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final August 27, 2004.-Editor].

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In re: RENE VILLALPANDO LIERAS.
P.Q. Docket No. 03-0006.
Decision and Order.
Filed August 23, 2004.

P.Q. - Default – Advocados.

James Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the prohibition of the importation of avocados from Mexico 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 in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701-7772)(Act), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service on November 7, 2002, alleging that the respondent violated the Act and

regulations promulgated under the Acts (7 C.F.R. § 319.56 *et seq*.). The complaint sought civil penalties as authorized by section 424 of the Plant Protection Act (7 U.S.C. § 7734). This complaint specifically alleged that on three different occasions respondent illegally imported over one half ton of fresh Hass avocados from Mexico into the United States.

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. Rene Villalpando Lieras, hereinafter referred to as the respondent, is an individual whose mailing address is 113 N. Lindsay Street, Lake Elsinore, California 92530.
2. On or about January 5, 1999, at San Ysidro, California, the respondent imported approximately 1,100 pounds of fresh Hass avocados from Mexico into the United States, in violation of 7 C.F.R. §§ 319.56(c) and 319.56-2ff, because importation of such avocados into the United States is prohibited except under specific conditions.
3. On or about January 6, 1999, at San Luis, Arizona, the respondent imported approximately 1,100 pounds of fresh Hass avocados from Mexico into the United States, in violation of 7 C.F.R. §§ 319.56(c) and 319.56-2ff, because importation of such avocados into the United States is prohibited except under specific conditions.
4. On or about January 6, 1999, at Calexico, California, the respondent imported approximately 1,100 pounds of fresh Hass avocados from Mexico into the United States, in violation of 7 C.F.R. §§ 319.56(c) and 319.56-2ff, because importation of such avocados

into the United States is prohibited except under specific conditions.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. § 319.56 *et seq*). Therefore, the following Order is issued.

Order

The respondent, Rene Villalpando Lieras, is assessed a civil penalty of three thousand dollars ($3,000.00). The respondent shall pay three thousand dollars ($3,000.00) as a civil penalty. 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 on the certified check or money order that payment is in reference to P.Q. Docket No. 03-0006

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final October 15, 2004.-Editor].

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In re: RICARDO LOPEZ.
P.Q. Docket No. 04-0004.
Decision and Order.
Filed July 31, 2004.

P.Q. - Default – Forgery of certificate.

Thomas Bolick, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Protection Act of June 20, 2000, as amended (7 U.S.C. §§ 7701 *et seq*.)(the Act), 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 Act by a complaint filed on March 1, 2004, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture and served by certified mail on respondent Ricardo Lopez on March 5, 2004. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), respondent Ricardo Lopez was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Respondent Ricardo Lopez's answer thus was due no later than March 25, 2004, twenty days after service of the complaint (7 C.F.R. § 136(a)). Respondent Ricardo Lopez never filed an answer to the complaint and the Hearing Clerk's Office mailed him a No Answer Letter on April 1, 2004.

Therefore, respondent Ricardo Lopez failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and failed to deny or otherwise respond to an allegation of the complaint. 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)

or to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. Furthermore, since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and respondent Ricardo Lopez's failure to file an answer is deemed such an admission pursuant to the Rules of Practice, respondent's failure to answer is likewise deemed a waiver of hearing. Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this amended 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. Respondent Ricardo Lopez is an individual with a mailing address of 511 Shiloh Drive, Apt. 6, Laredo, Texas 78043.
2. On or about April 5, 2001, Respondent Ricardo Lopez forged the signature of a USDA Plant Protection and Quarantine officer onto a federal phytosanitary certificate and presented the forged certificate to agricultural officials of the Government of Mexico, in violation of sections 424(b)(1) and 424(c) of the PPA (7 U.S.C. § 7734(b)(1) and 7734(c)).

Conclusion

By reason of the Findings of Fact set forth above, respondent Ricardo Lopez has violated the Act. Therefore, the following amended Order is issued.

Order

Respondent Ricardo Lopez is hereby assessed a civil penalty of one thousand dollars ($1,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture

APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent Ricardo Lopez shall indicate that payment is in reference to P.Q. Docket No. 04-0004.

This amended 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 amended Default Decision and Order upon respondent Ricardo Lopez 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 October 15, 2004.-Editor].

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In re: JODY ELENEKI.
P.Q. Docket No. 02-0008.
Decision and Order.
Filed September 7, 2004.

P.Q. – Default – Common carrier shipment.

Tracey Manoff, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for violations of the Plant Protection Act (7 U.S.C. §§ 7701 *et seq.*(Act) and the regulation promulgated thereunder (7 C.F.R. § 318.60)(regulation), in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on June 19, 2002 by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged the following:

On or about April 18, 2001, at Honolulu, Hawaii, the respondent offered to a common carrier, specifically Federal Express, approximately 1.5 pounds of rooted ginger plants with soil for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. § 318.60, because movement of such plants with soil from Hawaii into or through the continental United States is prohibited.

The respondent failed to file an answer to the complaint 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. § 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. The failure to file an answer also constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

Findings of Fact

1. Jody Eleneki, respondent herein, is an individual whose mailing address is Title Guaranty Escrow Services, Inc., 450 Kilauea Avenue, Hilo, Hawaii 96720.
2. On or about April 18, 2001, respondent offered to a common carrier, specifically Federal Express, approximately 1.5 pounds of rooted ginger plants with soil for shipment from Hawaii to the continental United States.

Conclusion

By reasons of the facts contained in the Findings of Facts above, the respondent has violated 7 C.F.R. § 318.60. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a penalty of five hundred dollars($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondents shall indicate that payment is in reference to P.Q. Docket No. 02-0008.

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 October 28, 2004.-Editor]

In re: TOILEA NIVILA, and/or TOILEA JR.
P.Q. Docket No. 02-0006.
Decision and Order.
Filed May 4, 2004.

P.Q. - Default – Common carrier shipment.

James Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the prohibition of

the movement or importation of certain types of fruit from Hawaii into the continental United States (7 C.F.R. §§ 318.13(b) and 318.13-2(a)) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701-7772)(Act), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, on March 11, 2002.

The complaint alleged that respondent(s) Toilea Nivila, and/or Toilea Jr. violated the Act and regulations promulgated under the Act (7 C.F.R. §§ 318.13(b) and 318.13-2(a)) by illegally offering for shipment and/or moving mangoes from Hawaii into the continental United States. This complaint sought civil penalties as authorized by section 424 of the Plant Protection Act (7 U.S.C. § 7734).

This complaint specifically alleged that on or about July 10, 2000, the respondent(s), at the Honolulu International Airport, Honolulu, Hawaii, offered to a common carrier, specifically Federal Express, approximately twenty-two (22) pounds of fresh mangoes for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a), because such offer for shipment or movement of such fruit from Hawaii into or through the continental United States is prohibited.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth 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. Toilea Nivila, and/or Toilea, Jr., hereinafter referred to as the

respondent(s), is an individual(s) whose mailing address is P.O. Box 251, Kihei, Hawaii 96753.

2. On or about July 10, 2000, at the Honolulu International Airport, Honolulu, Hawaii, the respondent(s) offered to a common carrier, specifically Federal Express, approximately twenty-two (22) pounds of fresh mangoes for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a), because such offer for shipment or movement of such fruit from Hawaii into or through the continental United States is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent(s) has violated the Act and the regulations issued under the Act (7 C.F.R. § 319.56 *et seq*). Therefore, the following Order is issued.

Order

Respondent(s), Toilea Nivila, and/or Toilea, Jr., is hereby assessed a civil penalty of seven hundred and fifty dollars ($750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 02-0006.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless

there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.
[This Decision and Order became final December 22, 2004.-Editor]

_____

In re: ST. JOHNS SHIPPING COMPANY, INC., AND BOBBY L. SHIELDS a/k/a. LEBRON SHIELDS a/k/a. L. SHIELDS a/k/a BOBBY LEBRON SHIELDS a/k/a COOTER SHIELDS d/b/a BAHAMAS RO RO SERVICES, INC.
P.Q. Docket No. 03-0015.
Decision and Order.
Filed December 21, 2004.

P.Q. – Default – Moving freight, unauthorized – Freight forwarding.

Thomas Bolick for Complainant.
Craig Galle for Respondent.
Decision and Order by Chief Administrative Law Judge, Marc. R. Hillson.

Default Decision and Order

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Protection Act of June 20, 2000, as amended (7 U.S.C. §§ 7701 *et seq.*) (the Act), 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 Act by a complaint filed on September 23, 2003, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture and served by certified mail on respondent Bobby L. Shields a.k.a. Lebron Shields a.k.a. L. Shields a.k.a. Bobby Lebron Shields a.k.a. Cooter Shields d/b/a Bahamas RO RO Services, Inc. (hereinafter "Shields") on October 23, 2003. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), respondent Shields was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty

(20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Shields' answer thus was due no later than November 12, 2003, twenty days after service of the complaint (7 C.F.R. § 136(a)).

On October 23, 2003, Shields filed a letter requesting that his time to submit an answer to the complaint be extended to November 14, 2003. I issued an order granting the extension of time to answer on October 30, 2003. On November 19, 2003, the Hearing Clerk received a letter dated November 10, 2003 and postmarked November 12. Although that letter was addressed to me, rather than the Hearing Clerk, and was apparently delayed in its trip to USDA in Washington, D.C. by being irradiated at an outside location, I conclude that this letter was timely filed. The letter, which I am construing to be Shields' answer, did not deny or fully address the allegations listed in the complaint.

Arguing that Shields either failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) or failed to deny or otherwise respond to an allegation of the complaint, complainant on February 26, 2004 filed a Motion for Proposed Adoption of Default Decision and Order. Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) or to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. While I rule that the answer was timely filed, Shield failure to address the specific allegations of the complaint are deemed an admission pursuant to the Rules of Practice. 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).

Complainant filed a Motion for Adoption of Proposed Default Decision with respect to Shields on February 6, 2004. Although

Shields received a copy of this Motion on March 1, 2004, no response was ever filed.

Although the Proposed Default Decision would have me assess a $15,000 civil penalty against Shields, I am assessing a penalty of only $1,000. The statute on its face limits the penalty that can be assessed against an individual who violates its provisions to $1,000 "in the case of an initial violation of this chapter by an individual moving regulated articles not for monetary gain." 7 U.S.C. § 7734(b)(1)(A). There is no allegation in the Complaint or in the Motion that Respondent has a previous violation or that he was moving regulated articles for monetary gain. Further, the statute specifies that the Secretary must "take into account the nature, circumstance, extent and gravity of the violation." *Id.,* at (b)(2).

Even in the case of a default decision, the Secretary or her designee must at least address the statutory requirements concerning penalty assessment. While the Rules of Practice state that failure to file an Answer "shall be deemed . . . an admission of the allegation in the Complaint," Rule 1.136(c), no allegations made in the Complaint support the requested penalty. Under the minimal facts alleged here, I see no basis to assess a penalty greater than $1,000.

Findings of Fact

1. Respondent Bobby Lebron Shields d/b/a Bahamas RO RO Services is a cargo agent operating a freight forwarding business incorporated in Florida with a mailing address of 437 N.E. Bayberry Lane, Jensen Beach, Florida 34957.

2. On or about September 1, 2001, respondent Bobby Lebron Shields d/b/a Bahamas RO RO Services violated section 413(c) of the Act (7 U.S.C. § 7713(c)) by moving from a port of entry cargo from the Bahamas manifested as "toys and crafts" (container no. 2929862, bill of lading no. 1), without inspection by, and authorization for entry into or transit through the United States from, the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine. Section 413(c) of the Act prohibits any

person from moving any imported plant or plant product, plant pest, noxious weed, or article from a port of entry unless the imported plant or plant product, plant pest, noxious weed, or article is inspected and authorized for entry into or transit through the United States by the U.S. Department of Agriculture.

Conclusion

By reason of the Findings of Fact set forth above, respondent Bobby Lebron Shields d/b/a Bahamas RO RO Services has violated the Act and the regulations issued under the Act. Therefore, the following Order is issued.

Order

Respondent Bobby Lebron Shields d/b/a Bahamas RO RO Services is hereby assessed a civil penalty of one thousand dollars ($1,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent Shields shall indicate that payment is in reference to P.Q. Docket No. 03-0015.

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 Shields 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).

CONSENT DECISIONS
(Not published herein-Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

Circle C. Watermelons and Paul Collins. AMA WRPA Docket No. 04-0001. 9/14/04.

Nathan Jones, d/b/a King Crown Organic Farm. AMAA Docket No. 04-0004. 12/7/04.

ANIMAL QUARANTINE ACT

Federal Express Corporation. A.Q. Docket No. 03-0004. 10/6/04.

ANIMAL WELFARE ACT

Illusion Management, Inc. and Terrell J. Diamond. AWA Docket No. 03-0030. 7/6/04.

Tom Kaelin, d/b/a Kaelin's Kennel, and Petes Direct, Inc. AWA Docket No. 02-0005. 7/19/04.

Linda L. Combs, James A. Smith, Barbara J. Thomsen, Arnold G. Smith, Betty J. Smith, and JLC Kennels, LLC. AWA Docket No. 04-0018. 8/2/04.

Kathy Mock, d/b/a Mock's Kennell. AWA Docket No. 03-0018. 9/30/04.

Michael V. Memmer. AWA Docket No. 02-0027. 10/12/04.

Tom Parker d/b/a African Northwest, Inc. AWA Docket No. 03-0002. 12/16/04.

Chester Gaither, d/b/a Chet's Pets. AWA Docket No. 04-0034. 12/16/04.

ENDANGERED SPECIES ACT

Matsui Nursery, Inc., a/k/a Matsui Wholesale Florist, Inc. ESA Docket No. 03-0001. 8/2/04.

FEDERAL MEAT INSPECTION ACT

Mr. Steven Matteson, Mr. Kenneth E. Barrows, and North American Packers. FMIA Docket No. 04-0007. 7/27/04.

Sardinha Sausage. FMIA Docket No. 04-0006. 9/13/04.

Crescent Custom Slaughtering, Inc., d/b/a Crescent Custom Meats. FMIA Docket No. 04-0005. 9/15/04.

HORSE PROTECTION ACT

Betsy H. Edwards and Cecil M. Hinkle, Jr. HPA Docket No. 03-0004. 10/7/04.

Willie Cook. HPA Docket No. 99-0029. 10/14/04.

David Polk. HPA Docket No. 04-0002. 10/20/04.

Larry W. Mesimer. HPA Docket No. 04-0002. 10/29/04.

Patti Magee and Michael Magee. HPA Docket No. 02-0004. 11/29/04.

INSPECTION AND GRADING ACT

American Meats Processors, L.L.C. I&G Docket No. 04-0002. 8/19/04.

ORGANIC FOODS PRODUCTION ACT

Michael Northrop, d/b/a Michael Northrop & Sons. OFPA Docket No. 04-0001. 7/23/04.

PLANT QUARANTINE ACT

Moctezuma Import, Inc. P.Q. Docket No. 03-0002. 10/12/04.

Gulf Rice Arkansas, L.L.C. P.Q. Docket No. 04-0004. 11/24/04.

Federal Express Corporation. P.Q. Docket No. 03-0011. 10/6/04.

POULTRY PRODUCTS INSPECTION ACT

Mr. Steven Matteson, Mr. Kenneth E. Barrows, and North American Packers. PPIA Docket No. 04-0008. 7/27/04.

Sardinha Sausage. PPIA Docket No. 04-0007. 9/13/04.

Crescent Custom Slaughtering, Inc., d/b/a Crescent Custom Meats. PPIA Docket No. 04-0006. 9/15/04.

AGRICULTURE DECISIONS

Volume 63

July - December 2004
Part Two (P & S)
Pages 892 - 906

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 adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *AGRICULTURE DECISIONS*.

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 number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published 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.

Beginning in Volume 60, each part of *AGRICULTURE DECISIONS* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The alphabetical List of Decisions Reported and the subject matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Beginning in Volume 63 Jul. - Dec. (2004), the initial decisions (and selected miscellaneous orders) of the Administrative Law Judges will be published in *AGRICULTURE DECISIONS* in addition to the Appealed Decisions (if any) issued by the Judicial Officer in the same case.

Consent decisions entered subsequent to December 31, 1986, are no longer published in this publication. However, a list of consent decisions is included. Beginning in Volume 62, consent decisions may be viewed in portable document (pdf) format on the OALJ website (see url below) and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Volumes 59 (circa 2000) through the current volume of *AGRICULTURE DECISIONS* are also available online at http://www.usda.gov/da/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 58 (circa 1999) have been scanned and will appear in portable document format (pdf) on the same OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order.

A compilation of past volumes on Compact Disk of *AGRICULTURE DECISIONS*. will be available for sale at the U.S. Government Printing Office On-line book store at http://bookstore.gpo.gov/ .

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1057 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

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LIST OF DECISIONS REPORTED

JULY - DECEMBER 2004

PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDERS

DEFAULT DECISIONS

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PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDERS

In re: BILLY MIKE GENTRY.
P. & S. Docket No. D-02-0002.
Order Denying Respondent's Motion for Extension of Time filed. October 23, 2002.

Ann K. Parnes, for Complainant.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On July 25, 2002, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a "Decision Without Hearing by Reason of Default." The Hearing Clerk sent Billy Mike Gentry [hereinafter Respondent] the ALJ's Decision Without Hearing by Reason of Default by certified mail on July 26, 2002.[1] The United States Postal Service marked the Hearing Clerk's July 26, 2002, certified mailing "unclaimed" and returned the certified mailing to the Hearing Clerk. On August 28, 2002, the Hearing Clerk remailed the ALJ's Decision Without Hearing by Reason of Default to Respondent by ordinary mail.[2] On October 2, 2002, Respondent filed a letter requesting an extension of time within which to appeal to the Judicial Officer [hereinafter Motion for Extension of Time]. On October 15, 2002, JoAnn Waterfield, Deputy Administrator, Packers and Stockyards Programs [hereinafter Complainant], filed "Complainant's Response to

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[1]See: (1) Letter dated July 26, 2002, from Joyce A. Dawson, Hearing Clerk, to Respondent; (2) Certified Mail Receipt Number 7099 3400 0014 4579 3236; and (3) Document Distribution Form, Office of Administrative Law Judges, Hearing Clerk's Office, indicating the Hearing Clerk sent the ALJ's Decision Without Hearing by Reason of Default and the Hearing Clerk's service letter dated July 26, 2002, to Respondent by certified mail on July 26, 2002.

[2]See Memorandum to the File, Office of the Hearing Clerk, dated August 28, 2002, signed by Fe Carolina Angeles, Legal Technician.

Respondent's Request for Extension of Time to Appeal Decision Without Hearing by Reason of Default." On October 18, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for Extension of Time.

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], which are applicable to this proceeding, provide that where the United States Postal Service marks a certified mailing "unclaimed" and returns the mailing to the Hearing Clerk, the date of service is the date the Hearing Clerk remails the mailing to the same address by ordinary mail.[3] Thus, the Hearing Clerk served Respondent with the ALJ's Decision Without Hearing by Reason of Default on August 28, 2002. Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that a party must file an appeal petition with the Hearing Clerk within 30 days after receiving service of the administrative law judge's decision. Hence, Respondent's appeal petition was due no later than September 27, 2002. Respondent filed Respondent's Motion for Extension of Time on October 2, 2002, 35 days after the Hearing Clerk served Respondent with the ALJ's Decision Without Hearing by Reason of Default and 5 days after Respondent's time for filing an appeal petition had expired. Therefore, Respondent's Motion for Extension of Time must be denied.

Moreover, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ's Decision Without Hearing by Reason of Default became final on October 2, 2002. The Judicial Officer does not have jurisdiction to consider an appeal petition filed on or after the date an administrative law judge's initial decision becomes final.[4] Thus, the

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[3]See 7 C.F.R. § 1.147(c)(1).

[4]*See In re Samuel K. Angel*, 61 Agric. Dec. ___ (Apr. 24, 2002) (dismissing the respondent's appeal petition filed 3 days after the initial decision and order became final); *In re Paul Eugenio*, 60 Agric. Dec. 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the initial decision and order became final); *In re*
(continued...)

[4](...continued)
Harold P. Kafka, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the initial decision and order became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the initial decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the initial decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the initial decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the initial decision and order becomes final); *In re Toscony Provision Co., Inc.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial
(continued...)

Judicial Officer cannot grant a request for an extension of time to file an appeal petition if the request is filed on or after the date the administrative law judge's initial decision becomes final.

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

ORDER

Respondent's Motion for Extension of Time, filed October 2, 2002, is denied.

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[4](...continued)
decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the initial decision and order became final, but not filed until 4 days after the initial decision and order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the initial decision).

In re: HOUSTON LIVESTOCK CO., INC., BILLY MIKE GENTRY.
P. & S. Docket No. D-02-0003.
Order Denying Respondents' Motion for Extension of Time.
Filed October 23, 2002.

Ann K. Parnes, for Complainant.
Respondents, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On July 25, 2002, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a "Decision Without Hearing by Reason of Default." The Hearing Clerk sent Houston Livestock Co., Inc., and Billy Mike Gentry [hereinafter Respondents] the ALJ's Decision Without Hearing by Reason of Default by certified mail on July 26, 2002.[1] The United States Postal Service marked the Hearing Clerk's July 26, 2002, certified mailings "unclaimed" and returned the certified mailings to the Hearing Clerk. On August 28, 2002, the Hearing Clerk remailed the ALJ's Decision Without Hearing by Reason of Default to Respondents by ordinary mail.[2] On October 2, 2002, Respondents filed a letter requesting an extension of time within which to appeal to the Judicial Officer [hereinafter Motion for Extension of Time]. On October 15, 2002, JoAnn Waterfield, Deputy Administrator, Packers and Stockyards Programs [hereinafter Complainant], filed "Complainant's Response to Respondents' Request for Extension of Time to Appeal Decision Without Hearing by Reason of Default." On

[1]See: (1) Letter dated July 26, 2002, from Joyce A. Dawson, Hearing Clerk, to Respondents; (2) Certified Mail Receipt Numbers 7099 3400 0014 4578 8256 and 7099 3400 0014 4579 3229; and (3) Document Distribution Form, Office of Administrative Law Judges, Hearing Clerk's Office, indicating the Hearing Clerk sent the ALJ's Decision Without Hearing by Reason of Default and the Hearing Clerk's service letter dated July 26, 2002, to Respondents by certified mail on July 26, 2002.

[2]See Memoranda to the File, Office of the Hearing Clerk, dated August 28, 2002, signed by Fe Carolina Angeles, Legal Technician.

October 18, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondents' Motion for Extension of Time.

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], which are applicable to this proceeding, provide that where the United States Postal Service marks a certified mailing "unclaimed" and returns the mailing to the Hearing Clerk, the date of service is the date the Hearing Clerk remails the mailing to the same address by ordinary mail.[3] Thus, the Hearing Clerk served Respondents with the ALJ's Decision Without Hearing by Reason of Default on August 28, 2002. Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that a party must file an appeal petition with the Hearing Clerk within 30 days after receiving service of the administrative law judge's decision. Hence, Respondents' appeal petition was due no later than September 27, 2002. Respondents filed Respondents' Motion for Extension of Time on October 2, 2002, 35 days after the Hearing Clerk served Respondents with the ALJ's Decision Without Hearing by Reason of Default and 5 days after Respondents' time for filing an appeal petition had expired. Therefore, Respondents' Motion for Extension of Time must be denied.

Moreover, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ's Decision Without Hearing by Reason of Default became final on October 2, 2002. The Judicial Officer does not have jurisdiction to consider an appeal petition filed on or after the date an administrative law judge's initial decision becomes final.[4] Thus, the

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[3]See 7 C.F.R. § 1.147(c)(1).

[4]*See In re Samuel K. Angel*, 61 Agric. Dec. ___ (Apr. 24, 2002) (dismissing the respondent's appeal petition filed 3 days after the initial decision and order became final); *In re Paul Eugenio*, 60 Agric. Dec. 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the initial decision and order became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the initial decision and order became final), *aff'd per curiam*,
(continued...)

[4](...continued)
259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the initial decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the initial decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the initial decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the initial decision and order becomes final); *In re Toscony Provision Co., Inc.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986)
(continued...)

Judicial Officer cannot grant a request for an extension of time to file an appeal petition if the request is filed on or after the date the administrative law judge's initial decision becomes final.

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

ORDER

Respondents' Motion for Extension of Time, filed October 2, 2002, is denied.

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[4](...continued)
(unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the initial decision and order became final, but not filed until 4 days after the initial decision and order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the initial decision).

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: BILLY PRUITT.
P&S Docket No. D-03-0012.
Decision and Order.
Filed August 16, 2004.

P&S - Default – Surety bond.

Jeffrey H. Armistead, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that Respondent willfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*). The complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*), hereinafter the Rules of Practice, were served upon Respondent by certified mail on July 19, 2003. Accompanying the complaint was a cover letter informing Respondent that an answer must be filed within twenty (20) days of service and that failure to file an answer would constitute an admission of all of the material allegations in the complaint and a waiver of the right to an oral hearing.

Respondent has failed to file an answer within the time period required by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139

of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Billy Pruitt, hereinafter referred to as Respondent, is an individual whose mailing address is 314 Dunn Cannon Lane, Richmond, Kentucky 40475.
2. Respondent is and at all times material herein was:

(a) Engaged in the business of a market agency buying on commission, and of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a market agency buying on commission, and as a dealer to buy and sell livestock in commerce for his own account.

3. Respondent was served with a letter of notice on August 9, 2002, informing him that he was no longer named as a clearee in a bond filed and maintained by another market agency registered to provide clearing services and that a $10,000.00 surety bond or bond equivalent was required to secure the performance of his livestock obligations. Notwithstanding this notice, the Respondent continued to engage in the business of a market agency and a dealer without maintaining an adequate bond or its equivalent.

Conclusions

By reason of the facts alleged in Finding of Fact 3, Respondent has willfully violated section 312 (a) of the Act (7 U.S.C. § 213 (a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29 and 201.30).

Respondent did not file an answer within the time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission of all of the material allegations in the complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision is

entered without hearing or further procedure.

Order

Respondent Billy Pruitt, his agents and employees, directly of indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When Respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312 (b) of the Act (7 U.S.C. § 213 (b)), Respondent is hereby assessed a civil penalty in the amount of one thousand dollars ($1000).

This decision and order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, if it is not 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 September 27, 2004.-Editor]

In re: FARON HELVEY.
P&S Docket No. D-04-0003.
Decision and Order.
Filed September 15, 2004.

P&S - Default – Surety bond.

David A. Richman, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc. R. Hillson, Chief Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that Respondent willfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*). The complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*), hereinafter Rules of Practice, were served to the Respondent by certified mail on May 13, 2004. Accompanying the complaint was a cover letter informing the Respondent that an answer must be filed within twenty (20) days of service, and that failure to file an answer would constitute an admission of all of the material allegations in the complaint and a waiver of the right to an oral hearing.

Respondent has failed to file an answer within the time period required by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as finding 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. Faron Helvey, is hereinafter referred to as Respondent, is an individual whose mailing address is 1205 24th Street, Hondo, Texas

78861.

2. Respondent is and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock on commission; and

(b) Registered with the Secretary of Agriculture as a market agency buying on commission, and as a dealer to buy and sell livestock in commerce for his own account.

3. Respondent was notified by certified mail dated January 28, 2003, that the $10,000 surety bond he maintained to secure the performance of his livestock obligations would terminate on February 26, 2003, and that a $10,000 surety bond or bond equivalent was required to secure the continued performance of his livestock obligations. The letter was returned and pursuant to section 1.147 of the Rules of Practice (7 C.F.R. § 1.147), a Resident Agent of the Packers and Stockyards Programs personally delivered it on April 7, 2003. Notwithstanding this notice, Respondent continued to engage in the business of a market agency buying on commission with maintaining an adequate bond or its equivalent.

Conclusions

By reason of the facts alleged of Fact 3, Respondent has willfully violated section 312 (a) of the Act (7 U.S.C.§ 213(a)), and sections 201.29 of the regulations (9 C.F.R. § 201,29 and 201.30).

Respondent did not file an answer within the time prescribed by section 1.136 of the Rule of Practice (7 C.F.R. § 1.136), which constitutes an admission of all of the material allegations in the complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision is entered without hearing or further procedure.

Order

Respondent, his agents and employees, directly or indirectly through any corporate or other device, in connection with his operations subject

to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When Respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312 (b) of the Act (7 U.S.C. § *(b)), Respondent is hereby assessed a civil penalty in the amount of one thousand dollars ($1000).

This decision and order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, if it is not 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 December 17, 2004.-Editor]

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*Section number missing from Original - Editor.

CONSENT DECISIONS

(Not published herein - Editor)

PACKERS AND STOCKYARDS ACT

Weldon Mack Glidewell, d/b/a Mineral Wells Stockyards Company and Weatherford Stockyards Company. P&S Docket No. D-03-0014. 7/22/04.

Larry F. Wooton and Roswell Livestock Acution Sales, Inc. P&S Docket No. D-02-0013. 7/23/04.

Patsy L. Leone, Jr. P&S Docket No. D-03-0001. 4/20/04.

Joe Don Pogue d/b/a Pogue Cattle Co. P&S Docket No. D-04-0009. 8/27/04.

Aire Alto Cattle, Corp., and Susan C. E. Carter. P&S Docket No. D-04-0007. 9/15/04.

Joseph M. Alder. P&S Docket No. D-04-0015. 9/24/04.

Nour Halal Meat Distributor, Inc., d/b/a Nour Halal Meats, and Handy Farag. P&S Docket No. D-03-0013. 10/4/04.

William C. Gomez, d/b/a Stuart Sale Barn. P&S Docket No. D-03-0015. 11/22/05.

A.J. Peachey & Sons, Inc. P&S Docket No. D-04-0016. 12/17/04.

Nathan Shaull, d/b/a Highmore Auction Sales and HS Cattle. P&S Docket No. 04-0017. 12/22/04.

AGRICULTURE DECISIONS

Volume 63

July - December 2004
Part Three (PACA)
Pages 907 - 1037

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 adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *AGRICULTURE DECISIONS*.

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 number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published 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.

Beginning in Volume 60, each part of *AGRICULTURE DECISIONS* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The alphabetical List of Decisions Reported and the subject matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Beginning in Volume 63 Jul. - Dec. (2004), the initial decisions (and selected miscellaneous orders) of the Administrative Law Judges will be published in *AGRICULTURE DECISIONS* in addition to the Appealed Decisions (if any) issued by the Judicial Officer in the same case.

Consent decisions entered subsequent to December 31, 1986, are no longer published in this publication. However, a list of consent decisions is included. Beginning in Volume 62, consent decisions may be viewed in portable document (pdf) format on the OALJ website (see url below) and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Volumes 59 (circa 2000) through the current volume of *AGRICULTURE DECISIONS* are also available online at http://www.usda.gov/da/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 58 (circa 1999) have been scanned and will appear in portable document format (pdf) on the same OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order.

A compilation of past volumes on Compact Disk of *AGRICULTURE DECISIONS*. will be available for sale at the U.S. Government Printing Office On-line book store at http://bookstore.gpo.gov/ .

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1057 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

LIST OF DECISIONS REPORTED

JULY - DECEMBER 2004

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

DEPARTMENTAL DECISIONS

MISCELLANEOUS ORDERS

DEFAULT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

PACIFIC INTERNATIONAL MARKETING, INC. v.
A & B PRODUCE, INC., ET AL.
NO. 03-3564, CIVIL ACTION NO. 03-5556.
Filed July 21, 2004.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PACA – Trust *res* – Administrative costs not allowed.

Court declined to allow a claim for Administrative expenses out of the PACA trust *res* holding that Congress sought to move unpaid producer creditors to the head of the line with respect to any distributors of a produce purchaser's assets.

JUDGES: M. FAITH ANGELL, UNITED STATES MAGISTRATE JUDGE.

OPINION
MEMORANDUM AND ORDER

I. FACTUAL AND PROCEDURAL BACKGROUND

This case was referred to me by the Honorable Louis H. Pollak for resolution of all nondispositive pretrial matters by Order dated June 17, 2003. Subsequently, the parties consented to the exercise of jurisdiction by a United States Magistrate Judge, and Judge Pollak referred the action to me to conduct all proceedings and order the entry of judgment by Order dated October 1, 2003. Presently before me is Intervenor Exel Transportation Services, Inc.'s Brief in Support of its Administrative Expense Claim and Plaintiffs' opposition to the claim.

Plaintiffs have instituted this action against A&B Produce, Inc. and Anthony G. Badolato, the President of A&B Produce, claiming that Defendants violated provisions of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499a.

II. PACA

PACA was passed into law to encourage fair trading in the marketing of produce and to prevent unfair and fraudulent practices in the industry. *See* H. R. Rep. No. 543, 1984 U.S.C.C.A.N. 405, 406; *see also* Plaintiffs' Opposition to Administrative Expense Claim of Intervenor Excel Transportation Services, Inc. at 1-2. The Act was amended in 1984 by the creation of a statutory trust "to increase the legal protection for unpaid sellers and suppliers of perishable agricultural commodities until full payment of sums due have been received by them[.]" 1984 U.S.C.C.A.N. at 406.

Under the 1984 provision, a buyer's produce, products derived from that produce, and the proceeds gained therefrom are held in a non-segregated, floating trust for the benefit of unpaid suppliers who have met the applicable statutory requirements. *See* 7 U.S.C. § 499e(c); 7 C.F.R. § 46.46(b). Thus, the provision gives certain unpaid sellers of produce an interest in the PACA trust assets superior to that of a perfected, secured creditor. *Idahoan Fresh v. Advantage Produce*,157 F.3d 197, 199 (3d Cir. 1998).

Though United States District Courts maintain jurisdiction to hear actions by trust beneficiaries to enforce payment from the trust and actions by the Secretary to prevent and restrain the dissipation of the trust, *see* 7 U.S.C. § 499e(c)(4), "PACA contains no mechanism for the administration and distribution of trust assets". *In the Matter of United Fruit and Produce Co., Inc.*, 119 B.R. 10, 11 (Bankr. 1990).

In order to implement a procedure for the administration of the PACA Trust in the instant matter, a Stipulation and Agreed Order for Preliminary Injunction and PACA Claims Procedure was entered on September 30, 2003. Pursuant to that Order, the PACA Trust Assets of A&B Produce were to be identified, liquidated, and distributed to A&B Produce's qualified PACA trust beneficiaries on a pro-rata basis. Kenneth Federman, Esquire was appointed the PACA Trustee responsible for identification, recovery and liquidation of A&B Produce's assets.

III. INTERVENOR EXEL TRANSPORTATION SERVICES,

INC.'S ADMINISTRATIVE EXPENSE CLAIM

Exel Transportation Services (Exel) filed a complaint in intervention in which it seeks the payment of administrative expenses chargeable against the *res* of the PACA Trust. Exel arranged and paid for the transportation of shipments of PACA-qualified produce in interstate commerce for delivery to A&B Produce prior to the instant lawsuit. As part of its services, Exel paid the freight charges of the carriers that provided the actual transportation services on behalf of A&B Produce. *See* Intervenor Exel Transportation Services, Inc.'s Brief in Support of its Administrative Expense Claim at 1-2.

There is no PACA statutory provision which defines "administrative expenses"; however, in support of its claim, Exel relies upon the *United Fruit* case. That case differs from the within matter in that it addresses compensating a bankruptcy trustee of a debtor's estate whose incurred expenses came about as direct result of services he rendered, as trustee, which benefitted the trust and its beneficiaries. The services involved the actual administration of the trust. Exel's services were not utilized by the PACA trustee in the administration of the trust, and, therefore, cannot be called administrative expenses. Rather, Exel is simply an unsecured creditor.

As previously noted, Congress amended the PACA in 1984, creating a statutory trust in 7 U.S.C. § 499e(c). The purpose of this trust was "to increase the legal protection for the unpaid sellers and suppliers of agricultural commodities until full payment of sums due have been received by them". 1984 U.S.C.C.A.N. at 406. Congress recognized an increase in non-payment or slow payment by buyers that unfairly burdened produce suppliers. *Id.*

Courts have recognized that the PACA statute grants PACA trust beneficiaries priority even over secured creditors. "Clearly the primary purpose of the PACA trust provisions is to 'move the unpaid produce creditor to the head of the line with respect to any distribution of a produce purchaser's assets.'" *Frio Ice, S.A. v. Sunfruit, Inc., et al.,* 724 F. Supp. 1373, 1377 (S.D. Fla. 1989) *quoting In re Fresh Approach, Inc.*, 48 B.R. 926, 931 (Bankr. N.D.Tex. 1985). "Thus, the provision gives certain unpaid sellers of produce an interest in the PACA trust assets superior to that of a perfected, secured creditor." *Idahoan Fresh*,

157 F.3d at 199.

The Third Circuit has continuously recognized Congress' intent in enacting the PACA amendment was to protect the rights and priority of unpaid sellers and suppliers. "PACA's purpose, as Congress had crystallized, is to ensure payment to the unpaid seller in the perishable agricultural commodities industry." *Tanimura & Antle v. Packed Fresh Produce*, 222 F.3d 132, 138 (3d Cir. 2000) (citations omitted). "In 1984, Congress amended PACA to protect further certain unpaid suppliers of produce by including a statutory trust provision which provides an additional remedy for sellers against a buyer failing to make prompt payment." *Idahoan Fresh*, 157 F.3d at 199.

Contrary to Excel's characterization of their claim as mere payment of an administrative expense, this Court correctly recognized the issue as a question of preferential standing. *See Pacific International Marketing, Inc. v. A&B Produce, Inc., et al.*, CA. No. 03-3564, Order (E.D.Pa. March 17, 2004). In its claim for payment of administrative expenses, Exel is requesting priority payment ahead of the PACA trust beneficiaries. To do so would defeat the purpose of the PACA amendment to place unpaid sellers in a priority position and expand the term "administrative expense" too far. The claim of Exel for payment of administrative expenses shall be denied.

ORDER

AND NOW, this 20th day of July, 2004, upon consideration of Intervenor Exel Transportation Services, Inc.'s Brief in Support of its Administrative Expense Claim and Plaintiffs' Opposition to Administrative Expense Claim of Intervenor Exel Transportation Services, Inc., it is hereby **ORDERED** that Exel Transportation Services, Inc.'s claim for the payment of administrative expenses is DENIED.

IT IS SO ORDERED.

BOTMAN INTERNATIONAL, B.V. v. INTERNATIONAL PRODUCE IMPORTS, INC., ET AL.
NO. 99 CV 5088.

Filed July 27, 2004.

(Cite as: 2004 U.S. Dist. LEXIS 14659).

PACA – PACA Trust *res*, preservation of – Terms of payment, pre-delivery modification of – Responsibly connected – Liability, secondary, of others.

PACA reparation claim where the agreed time due for payment for agricultural commodities lengthened from 21 to 60 days as the buyer's financial condition worsened. Only those sales which were agreed to be paid within 30 days could come within the PACA trust. After notice to buyer that the proceeds of the goods were to be held in a PACA trust under 7 USC 499b, buyers failed to properly maintain the trust *res*. Seller elected to proceed alternately against individuals under 7 USC § e(c)(2) and hold the responsibly connected individuals secondarily liable for failure to act in a fiduciary manner with the trust assets for the beneficiaries (sellers). Buyer was a 100% owned by responsibly connected individual who was found to be active involvement of business operations.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUDGES: R. Barclay Surrick, J.

OPINION
MEMORANDUM AND ORDER

Presently before the Court is Plaintiff's Renewed Motion for Partial Summary Judgment. (Doc. No. 53.) For the reasons that follow, Plaintiff's Motion will be granted in part and denied in part.

1. Factual Background

The following facts are based on documents submitted by the parties. Where the parties dispute certain facts, we construe the record in the light most favorable to the defendants.

Over the course of nearly two years, Plaintiff Botman International, B.V. ("Botman International"), a corporation engaged as a supplier of perishable agricultural commodities with its principal place of business

in the Netherlands, sold and shipped over 460 individual shipments of produce to Defendant International Produce Imports, Inc. ("IPI"). Initially, IPI was a Pennsylvania corporation with its sole shareholders consisting of Defendants Dirk J. Keijer ("Mr. Keijer") and Clare A. Keijer ("Ms. Keijer"), individuals who are husband and wife. However, in early May, 1999, Ms. Keijer resigned as an officer and director and transferred her shares to Mr. Keijer. Thereafter, Ms. Keijer worked as general counsel to IPI which, on July 1, 1999, was re-incorporated in Delaware for the purpose of facilitating a possible bankruptcy filing. (Tr. of Oct. 29, 1999 hearing, at 75-76.)

IPI initially developed a business relationship with Botman International in the fall of 1997, when Mr. Keijer met Adri Botman, president of Botman International, at a produce convention. Shortly after that meeting it was decided that IPI and Botman International would undertake a limited number of produce transactions to determine whether it was worthwhile to continue. After a number of trades were completed Mr. Botman traveled to the Keijers' home in Oxford, Pennsylvania in January, 1998, to discuss whether to continue their trading relationship. At this meeting Mr. Botman gave Mr. Keijer a document entitled "Conditions of Sale Governing Export Transactions" which they discussed in detail, including provisions stating that goods would be paid for within twenty-one days of the date of the invoice relating to the delivery of those goods.[1] Mr. Keijer agreed that IPI would adhere to the terms contained therein.

From January, 1998 until August, 1999, IPI repeatedly purchased produce from Botman International. Each of these purchases is reflected by an invoice prepared by Botman International detailing the date of purchase, the type and quantity of produce being purchased, and the unit price of the produce. In addition, the invoices contain figures apparently stating the amount of freight and packing costs and include language relating to the manner in which the produce was shipped. Examination of the invoices reveals that produce shipped to IPI was destined for a

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[1] Clause 11 of the Conditions of Sale states: "Payment of the goods delivered shall be made within 3 weeks of the date of the invoice relating to the delivery, unless agreement has been reached in writing on a departure from this rule." (Def.s' Ex. A.).

variety of locations, with many of these locations being several hours distant from the Philadelphia area.[2]

When each shipment arrived at its destination, it was trucked to a warehouse and inspected. After inspection, adjustments to the invoices were made through negotiations between IPI and Botman International to account for any irregularities in the shipped produce. The produce was then stored at a warehouse until sold by IPI to another party. Virtually all of IPI's business revolved around purchasing produce from Botman International and re-selling that produce in the Philadelphia area, with IPI's largest single account being Giant Foods.[3] In 1999, approximately ninety percent of IPI's supply of produce came from Botman International. (Tr. of Oct. 25, 1999 hearing, at 30.) Thus, at all times relevant to this case, Botman International was a component of Giant Foods's produce supply chain.

As IPI continued to do business with Botman International, IPI began to incur substantial debt. In April, 1999, IPI's debt to Botman International had increased to such a level that Botman International requested financial information from IPI in order to re-evaluate its creditworthiness. In response, IPI delivered to Botman International a Profit and Loss Statement covering the period January, 1999, through March, 1999, informing Botman International of IPI's exact financial condition.

In May, 1999, IPI's financial situation took a turn for the worse when another firm displaced IPI as a produce dealer for Giant Foods. Prior to May, 1999, when IPI received a shipment of produce from Botman International, that shipment would be warehoused by Colace, one of Giant Foods' main produce suppliers. Although Colace sold the same type of produce to Giant Foods, it was not, strictly speaking, IPI's competitor at the time that IPI was trading with Botman International

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[2] Sometimes produce was shipped to the following locations: New York City, New York; Newark, New Jersey; Washington, D.C.; and Philadelphia, Pennsylvania.

[3] Giant Foods accounted for approximately twenty percent of IPI's sales. (Tr. of Oct. 25, 1999 hearing, at 27-28.)

because IPI dealt only with produce imports from Holland whereas Colace dealt in more locally grown produce. This changed, however, in May, 1999, when Botman International began selling produce to Colace. Because Giant Foods was now able to buy Holland produce from Colace, IPI lost the Giant Foods account. This had a devastating impact on IPI's already shaky finances and led Mr. Keijer to travel to Holland on or about May 10, 1999, to discuss the matter with Mr. Botman.

When the Keijers flew to Holland to meet with Mr. Botman in May, 1999, IPI was approximately $ 1.6 million in arrears and approximately sixty to ninety days overdue in its payments to Botman International. Although there is some dispute over exactly what information was communicated to Mr. Botman at this meeting, Defendants contend that Mr. Botman was informed that for IPI to remain viable, it was imperative that it be able to maintain the Giant Foods account. At this meeting, according to Defendants, it was proposed by Botman International that IPI would receive a twenty-five cent per carton commission for logistical support. Also, according to Defendants, there was an agreement by Mr. Botman and Botman International to extend IPI's payment schedule to sixty days. In support of their contention that Botman International agreed to extend IPI's payment schedule to sixty days, Defendants cite to a May 12, 1999, Memorandum signed by Mr. Keijer and Mr. Botman stating, in pertinent part, "For its part, Botman has expressed its concern that an aging analysis of IPI's account shows that some of IPI's invoices are outstanding for more than 60 days. Botman International and IPI agree that it [sic] their mutual goal to find solutions to IPI's financial concerns so as to enable it to bring its account within the 60 day range which is acceptable to Botman." (Apr. 10, 2000, Aff. of Dirk Keijer, Ex. C.) The Memorandum also states that "IPI agrees to provide Botman with monthly and cumulative profit and loss statements" and that the parties discussed various measures proposed by Botman to facilitate IPI's financial recovery. According to the Memorandum, one of the measures discussed was an "incentive bonus." However, it is clear from the Memorandum that no agreement as to any bonus had been reached at that time. Rather, the document itself states that "the specific amount, timing, duration and method of payment [had]

yet to be discussed." [4] *Id*.

After the May, 1999 meeting, IPI continued to purchase numerous lots of produce from Botman International until August 30, 1999. During this time, IPI's debt to Botman International remained substantial. To protect itself, on September 9, 1999, Botman International sent IPI Notices of Intent to Preserve Trust Benefits covering invoices between July 20, 1999, up to and including August 25, 1999 and covering a total of $ 433,079.54 in unpaid invoices.[5] Ultimately, by September 29, 1999, IPI owed Botman International a then-undisputed balance of $ 1,464,233.75 for produce that it had purchased.

As IPI's debt was mounting higher and higher, IPI's principals sought to limit whatever potential liability they might incur for the unpaid produce under the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § § 499a, et seq. For this reason, Ms. Keijer resigned her position as an officer of IPI and transferred all of her shares of IPI to her husband. After resigning as an officer of IPI, Ms. Keijer undertook the representation of IPI as its general counsel. In another effort to limit PACA liability, IPI sought to have the payment schedule extended to sixty days during the May 12, 1999, meeting with Mr. Botman. Because PACA regulations provide that "the maximum time for payment for a

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[4] One of the most intensely disputed facts in this case is whether this document represents an agreement between IPI and Botman International. Defendants contend that it does; Botman International contends that it does not. In Judge Buckwalter's November 4, 1999, Memorandum regarding Botman's Motion for Preliminary Injunction, Judge Buckwalter found that the document clearly was not an agreement and that Botman refused any effort by IPI to characterize it as such. (Doc. No. 10.) We agree with Judge Buckwalter's conclusion in this respect.

[5] Under the Perishable Agricultural Commodities Act, 7 U.S.C. § 499e(c)(3), an unpaid produce supplier loses the benefits of the PACA trust "unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored."

shipment to which a seller, supplier, or agent can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance of the commodities," 7 C.F.R. § 46.46(e)(2), had Botman International been agreeable to extending the payment schedule to sixty days, this would have prevented the creation of the PACA trust.

Broadly speaking, this case concerns IPI's alleged failure to pay Botman International for various shipments of produce that IPI ordered and received from Botman totaling $ 1,4 64,233.75. However, it is clear from the submissions of the parties that this case more closely revolves around the alleged failure of Defendants to maintain a statutorily mandated trust pursuant to PACA. With respect to these particular allegations, Botman International claims that between July 20, 1999 and August 25, 1999, Botman International sold produce to IPI totaling $ 433,079.54 and that Botman International took appropriate measures under PACA to preserve its trust benefits as to this amount.

Botman International initiated this action by filing suit in this court on October 15, 1999. On that same day, Botman International requested that the court issue a preliminary injunction to enforce the statutory trust under PACA and to establish a constructive trust until Defendants paid $ 1,464,233.75 plus interest, costs, and attorneys' fees to Botman International. On October 25, 27, and 29, 1999, Judge Buckwalter held a hearing on the issuance of a preliminary injunction and, after making several findings of fact, entered a Preliminary Injunction on November 4, 1999. After the preliminary injunction was issued Botman International amended its complaint on November 18, 1999 to assert additional causes of action against Defendants. Defendants answered the complaint on December 8, 1999. The initial pleadings in this matter were then followed by a litany of motions to dismiss and for summary judgment, as well as two motions by Defendants to amend their answer to the complaint. Judge Buckwalter denied the motions to dismiss and for summary judgment on June 28, 2000 and permitted Defendants to amend their answer. Defendants' Amended Answer to Amended Complaint with Affirmative Defenses and Counterclaims consists of 1,510 paragraphs contained within its extraordinarily bulky 552 pages. The Amended Answer also contains sixteen affirmative defenses and six counterclaims. Much of Defendants' Amended Answer consists of an exceptionally detailed pleading of the facts underlying their six

counterclaims wherein Defendants describe documents that were simultaneously filed as exhibits. On June 27, 2001, Botman International filed the Instant Motion.

II. Legal Standard

Summary judgment may be granted pursuant to Federal Rule of Civil Procedure 56 "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment . . . may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." FED. R. CIV. P. 56(c). The moving party has the initial burden of demonstrating the absence of genuine issues of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Following such a showing by the moving party, the nonmoving party must make a sufficient showing to establish the existence of an essential element of his case with respect to which he has the burden of proof. *Celotex*, 477 U.S. at 322-23. "At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

III. Discussion

Judge Buckwalter made numerous findings of fact and conclusions of law with respect to this matter in his Memorandum accompanying the Order of Preliminary Injunction entered on November 4, 1999.
The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is

customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 69 (3d Cir. 1999).

In light of the preliminary nature of the earlier proceedings in this matter, we will exercise our independent judgment with respect to Judge Buckwalter's earlier findings of fact and conclusions of law.

A. Defendants' Counterclaims Against Botman International

Defendants have raised six counterclaims that Botman International argues are without merit and should be dismissed. Because Defendants have raised issues in their Counterclaims that are relevant to our analysis of Botman International's claims, we will address Defendants' Counterclaims before considering the merits of Plaintiff's claims.[6]

1. Counterclaims Alleging that Botman International's Invoices Contained Overcharges

Defendants' First through Fifth Counterclaims essentially allege that Botman International sold various shipments of produce to IPI at inflated amounts for which Defendants now seek to recover. In their First Counterclaim, Defendants allege that Botman International, in

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[6] Defendants have also raised sixteen affirmative defenses in their Amended Answer. Plaintiff argues that these affirmative defenses "are essentially the same issues argued before the Court during the three days of hearings on the preliminary injunction, and/or already decided by Judge Buckwalter in motion practice" and that they should be "summarily dismissed." (Renewed Motion, at 17.) Plaintiff does not, however, offer any argument directed to any particular affirmative defense. To the extent that Defendants have raised these affirmative defenses in their response to Botman's Renewed Motion for Partial Summary Judgment, we will address them.

breach of its fiduciary and contractual obligations, illegally overcharged IPI for transportation services and that it was also enriched through the receipt of transportation rebates or other promotional payments from its transportation providers. Defendants also allege that these overcharges and rebates were used to obtain further profits "through manipulation of currency and exchange rates between Dutch Guilders . . . and U.S. Dollars." (Amended Answer P 1481.) Defendants demand that Plaintiff disgorge any illegal profits and that the illegal profits be held in a constructive trust for IPI's benefit.

In their Second Counterclaim, Defendants raise substantially the same allegations as in their First Counterclaim, i.e., that Botman International made false, misleading, and fraudulent statements that formed the basis of at least eighty-five, if not all, of Plaintiff's invoices, and request that "any and all overcharges found to be involved in Plaintiff's affirmative claims for unpaid shipments must be reduced by the sum of the actual and true charges, which Defendants believe to total more than $ 510,000.00 . . . ." (Answer P 1487.)

In their Third Counterclaim Defendants allege that Botman International's agents made materially false and misleading statements as to transportation charges in a scheme to defraud IPI of an amount estimated to exceed $ 2,000,000.00.

Defendants' Fourth Counterclaim alleges no additional facts, but merely states a claim for unjust enrichment based upon the alleged illegal profits.

Defendants' Fifth Counterclaim alleges a claim under the Rackateer Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962 et seq. Like Defendants' first four Counterclaims, Defendants' RICO claim is rooted in the allegation that Botman International was transmitting fraudulent invoices and statements to IPI by wire and mail "for the purpose of obtaining illegal and secret profits for IPI." (Amended Answer P 1500.)

Whether Defendants' allegation that Botman International overcharged IPI for certain produce shipments has merit necessarily hinges upon the language in Botman International's invoices relating to freight charges. This language seemingly indicates that many of the shipments from Botman International to IPI were negotiated on a cost

plus freight basis. Such an agreement, Defendants contend, is reflected in certain invoices containing phrases such as "Shipment is landed, customs cleared" or "Shipment is C/F."

The first step in determining whether Botman International overcharged IPI for produce shipments is to determine the meaning of the terminology used in the invoices. In interpreting the meaning of these terms, we note that the transactions between IPI and Botman International concerned the sale of perishable produce in the course of foreign commerce and therefore the transactions are governed by the terms of PACA. We will assume that the terminology used in the invoices has a meaning consistent with similar language used in PACA and its regulations.

We note that the parties do not appear to disagree as to the meaning of the phrases at issue. The phrases "Shipment is landed, customs cleared" or "Shipment is C/F" have meanings that concern the manner in which a particular shipment of produce is to be shipped to the purchaser. IPI argues that "'C/F' means that the seller is to pay for cargo and freight and, if PACA governs, is the same as 'C.a.f.', 'cost and freight.'" (Def.s' response, at 4.) PACA regulations specify that the term "C.a.f." means "cost and freight" and "shall be deemed to be the same as f.o.b. sales, except that the selling price shall include the correct freight charges to destination."[7] 7 C.F.R. § 46.43(v). Although Botman International does not contest Defendants' interpretation of the terms stated on the invoice, it argues that the terminology used in the invoices did not accurately reflect the contract between Botman International and IPI. Indeed, Botman International contends that "notwithstanding anyhing [sic] to the contrary on the Botman invoices, all shipments to IPI were on a 'delivered' basis." (Pl.'s Reply, at 3.)

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[7] Regulations provide that "f.o.b." means "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point . . . and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." 7 C.F.R. § 46.43(i). In an f.o.b. sale, the buyer is liable for paying freight charges. Tom Lange Co., Inc. v. ANIC, Inc., U.S. Dept. of Agric., PACA Docket R-93-81, slip op. (Sept. 22, 1993) (attached to Defendants' response as Exhibit A).

Looking to PACA regulations, "'Delivered' or 'delivered sale' means that the produce is to be delivered by the seller on board car, or truck, or on dock if delivered by boat, at the market at which the buyer is located, or at such other market as is agreed upon, free of any and all charges for transportation or protective service. 7 C.F.R. § 46.43(p). The seller assumes the risk of loss and damage in transit not caused by the buyer." *Id*. Having sold the produce on a "delivered" basis, Botman International argues that "it doesn't matter to the buyer whether the shipping charges are listed as $ 50.00 or $ 50,000.00, because the price of the goods including such charges was set before shipping, and the shipping charges are paid by the seller." (Pl.'s Reply Memo., at 4.) In response, Defendants argue that even if Botman International did ship all produce to IPI on a "delivered" basis, Botman International's claim must be reduced by any transportation costs to market paid by IPI for all of the shipments in an amount to be determined at trial.

After careful examination of the invoices in question, we find that they clearly demonstrate that the listed shipping costs were irrelevant to the amount paid by IPI for produce it purchased from Botman International.[8] Indeed, in many instances it is impossible to attribute any meaning at all to the listed freight charges. Instead it is apparent that when IPI negotiated to purchase produce from Botman International, the shipping price was implicitly included in the per unit cost and the listed freight charge was irrelevant. For example, on or about July 20, 1999, IPI ordered 2,240 units of tomatoes from Botman International at a price of $ 7.00 per unit. The total dollar amount of tomatoes purchased was

[8] In a sworn statement before the District Court of Alkmaar in the Netherlands, Adri Botman characterized the transportation and packing costs as "fictitious amounts," stating, "Once the unit prices and the quantities had been agreed upon, the prices for freight and packing were entered by hand before such an invoice was printed. These prices do not correspond to the transportation and packaging costs actually charged to IPI. The reasons why we do not enter the actual amounts here is that we do not want to let our competitors know what our actual transportation costs are. As a matter of fact, these transportation costs are aggressively negotiated by us and they constitute a part of our profit margin. The amounts listed for freight and packing on the invoices have no influence whatsoever on the import duties which Botman must pay." (Def.'s Opp., Ex. 10.)

$ 15,680.00. For this shipment of tomatoes, Botman International invoiced IPI for $ 15,680.00 and indicated that the "shipment is landed, customs cleared[,] duties paid." However, Botman International's invoice also indicates "freight included" for $ 16,000.00 and "packing included" for $ 2,240.00. Thus the sum of freight and packing charges listed on the invoice is alone $ 2,560.00 more than the actual invoiced amount. This example is not anomalous and it is significant for two reasons. First, it shows that when IPI ordered produce it did so on a unit price basis that was agreed to beforehand. There were no unknown charges levied against IPI. When IPI ordered tomatoes for $ 7.00 per unit, it received tomatoes at $ 7.00 per unit. Second, the example demonstrates the flaw in Defendants' argument that it only recently discovered that it was being charged for inflated shipping costs. In the above example the sum of the listed shipping charges totaled $ 18,240.00 whereas IPI was only invoiced for $ 15,680.00 - the cost of the produce alone. In other words, the listed shipping charges sometimes exceed the amount that Botman International actually charged IPI by very substantial amounts. Certainly it cannot be said that IPI only recently became aware that the listed shipping charges were inaccurate. That the shipping charges were inconsistent with the billed amount is clear from even a casual examination of the invoices. It is clear that IPI was not paying inflated shipping charges when the listed shipping charges were not a component of the total price paid by IPI.[9]

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[9] Defendants' argument that Plaintiff was under a fiduciary duty to obtain the lowest possible freight, transportation, and port clearing charges and to include only the actual and true charges for such services in its pricing and invoices to IPI is unavailing. In support of this argument, Defendants have *cited Tom Lange Co., Inc. v. ANIC, Inc.*, U.S. Dept. of Agric., PACA Docket R-93-81, slip op. (Sept. 22, 1993) (attached to Defendants' response as Exhibit A), a case argued by Defendants' present counsel. In ANIC, a purchaser of perishable agricultural produce argued that the seller of the produce had improperly inflated freight charges so as to make improper profits in violation of PACA. In response, the seller of the produce argued that it was not required by PACA to disclose what it was billed by the trucking companies that it utilized to ship the produce to the buyer. The Secretary of Agriculture disagreed. The Secretary held that because the subject sales were f.o.b., the buyer is responsible for the freight. In such a case, a seller acts in a fiduciary capacity if the seller initially finds a trucker, pays the

(continued...)

Defendants also argue that if Botman International had shipped all of the produce on "delivered" terms, as Botman International itself suggests, the claim must be reduced by transportation costs to market paid by IPI. Once again we have undertaken a careful review of the invoices in question and have discovered that not all of the invoices state the destination to which the shipments were delivered and that many of the invoices indicate that shipments were made to locations far from Philadelphia.[10]

Significantly, Defendants have not submitted receipts or other records that show that IPI ever paid for shipping costs for goods it received from Botman International. In other words, the record wholly lacks any evidence relating to transportation costs actually paid by IPI.

Defendants have failed to provide any evidence from which we could conclude that the location of these shipments was not previously agreed upon by the parties. As defined in the PACA regulations, a "delivered sale" is shipped by the seller to the buyer's market, "or at such other market as is agreed upon." 7 C.F.R. § 46.43(p) (emphasis added). Defendants have not suggested, and the voluminous record in this case also does not disclose, any instance in which IPI rejected a shipment of produce for failure to ship to the agreed-upon market. The mere fact that the produce may have been delivered to New York City or some other location besides Philadelphia does not lead to the conclusion that

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(...continued)
freight, and invoices the buyer. Because ANIC involved an f.o.b. sale, it is inapposite. In the instant case IPI was not separately billed for the shipping costs incurred by Botman International. By including the shipping cost as a component of the price of the produce that Botman International sold to IPI, Botman International made IPI fully aware of all costs inherent in the sale and IPI then had the opportunity to refuse to purchase the produce at the price offered. IPI cannot now come to court declaring that Botman International had a fiduciary duty to prevent IPI from making imprudent business decisions regarding its purchases of produce.

[10] The shipments were mostly sent to airports in New York City, Newark, and Philadelphia. However, at least one shipment was sent via air to Chicago, and numerous other shipments were sent via air to Washington, D.C.

Botman International's claims must be reduced by the cost of IPI's transportation costs to Philadelphia. Botman International cannot be held liable where there has been no showing that IPI paid any freight charges for the produce it received from Botman International and where there is no indication that the produce was delivered to a location different from that agreed upon by the parties. Accordingly, we are compelled to conclude that Botman International did not fraudulently overcharge Plaintiff for any shipments of produce. We will therefore grant Plaintiff's motion for summary judgment with respect to Defendants' First through Fifth Counterclaims.

2. Sixth Counterclaim: Breach of Contract

Defendants' Sixth Counterclaim alleges that Botman International and IPI entered into an oral agreement in which Botman was to compensate IPI for its loss of the Colace/Giant Foods account by paying IPI the sum of twenty-five cents per box/carton for all produce sold to Colace and/or Giant Foods by or for Botman International. Defendants further allege that this sum "would be paid to IPI by issuance of credit memo invoices by Botman International for 'logistical services' and credited to IPI's account with Botman for a period of five (5) years commencing on May 12, 1999." (Def.s' Answer P 1506.) Defendants contend that Botman International issued the required credits to IPI from May through August, 1999, but stopped the payments in September, 1999 despite the fact that Botman International continues to sell substantial amounts of produce to Colace/Giant Foods.

Botman International has moved for summary judgment with respect to this breach of contract claim arguing that there was no agreement to pay the twenty-five cent fee. First, Botman International disputes that IPI ever had a direct relationship with Giant Foods. Rather, Botman International contends that IPI bought produce from Botman International, sold the produce to a third party, and that third party then sold the produce to Giant Foods. Botman International also disputes Defendants' assertions that the loss of the Giant Foods account negatively affected IPI's profitability and that Botman International used confidential information it obtained from IPI to negotiate sales directly with the Colace firm for the Giant Foods account. While Botman

International does not dispute the fact that IPI is no longer a supplier of produce to Giant Foods, Botman International contends that this is due to the fact that Giant Foods decided to eliminate the middlemen and deal directly with Botman International. Finally, Botman International disputes that there was ever an agreement to compensate IPI for the loss of the Giant Foods account.

Botman International certainly has met its initial burden in demonstrating the absence of a genuine issue of material fact concerning the existence of any oral agreement on May 12, 1999, for Botman International to compensate IPI. Of particular significance is a document signed by both Mr. Keijer and Mr. Botman stating, "Botman has proposed a substantial 'incentive bonus' plan as a means of motivating IPI to continue its business relationship with Botman in a positive manner, however, the specific amount, timing, duration and method of payment have yet to be discussed." (Botman Certification, Doc. 55, Ex. 13.) This document was signed on the same day that Defendants allege that a different oral agreement was reached, yet this document expressly disclaims any agreement as to an "incentive bonus."[11]

Because Botman International has met its initial burden of demonstrating the absence of a genuine issue of material fact with respect to this claim, it is incumbent upon Defendants to come forward with a showing that a genuine issue of material fact exists. However, Defendants have failed to respond to Plaintiff's motion for summary judgment with respect to their Sixth Counterclaim. In failing to respond Defendants have quite obviously failed to meet their burden. Moreover, we deem Defendants' Sixth Counterclaim to be abandoned. *Estate of Henderson v. City of Philadelphia*, No. 98-3861, 1999 U.S. Dist. LEXIS 10367, at *48-49 (E.D. Pa. July 12, 1999) (granting the defendant's motion for summary judgment where the plaintiff abandoned its claim

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[11] In his November 4, 1999 Memorandum addressing Botman International's Motion for Preliminary Injunction, Judge Buckwalter found that the document signed on May 12, 1999, "is clearly not an agreement and Botman clearly refused any effort by IPI to so characterize it." (Doc No. 10 P 7.)

by failing to mention a claim as a basis for denying the defendant's motion for summary judgment); *Wright v. Montgomery County,* No. 96-CV-4597, 1998 U.S. Dist. LEXIS 20414, at *11-12 (E.D. Pa. Dec. 22, 1998) ("In the instant matter, Plaintiff failed to respond to Defendants' Motion for Summary Judgment concerning all of Plaintiff's State Law Tort Claims pleaded in Counts Two through Eight of the Complaint. The Plaintiff, however, responded to Defendant's Motion for Summary Judgment regarding his constitutional claim. By choosing to defend his constitutional claim, and not his state law claims, it is apparent that the Plaintiff has elected to abandon his state law tort claims.") Accordingly, we will grant summary judgment on Defendants' Sixth Counterclaim in favor of Botman International and against Defendants.

B. Plaintiff's Claims against IPI

1. Count I: Breach of Contract

In Count I of its Amended Complaint, Botman International alleges that from May 12, 1999 through August 30, 1999, IPI contracted to purchase perishable agricultural commodities on account and that IPI has failed to pay Botman International the balance of $ 1,464,233.75, thereby breaching its contract with Botman International. When this case was filed, Defendants did not dispute the fact that IPI owed $ 1,464,233.75 to Botman International for produce that IPI had purchased but never paid for. In fact, on or about September 29, 1999, Mr. Keijer faxed a letter to Botman International stating, "As agreed on September 28th, 1999, International Produce Imports, Inc. ("IPI") confirms that the undisputed balance of outstanding and unpaid invoices due and payable to Botman International B.V. ("Botman") is $ 1,464,233.75." (Certification of Adri Botman, Exhibit 4.) This fact was confirmed by Mr. Keijer at the October 25, 1999 hearing for the preliminary injunction. During the cross-examination of Mr. Keijer by Mr. Gentile the following exchange took place:

Q: Do you acknowledge that IPI, your company, owes Botman more than $ 1.4 million?

A: Yes, sir.

(Tr. of Oct. 25, 1999 hearing, at 18.)[12] Mr. Keijer now states, "I believed at that time that IPI owed Botman $ 1.4 million on account of the invoices in the Complaint. That was, however, prior to my discovery the following April of the facts which indicate to me that Botman had been defrauding IPI of many thousands of dollars in secret profits and freight overcharges. (Declaration of Dirk J. Keijer, at 5.) However, for the reasons stated above, there has been no showing that Botman International defrauded IPI or that the invoices inaccurately reflect the true value of goods purchased and received by IPI. It cannot be said that Defendants have only just now discovered the shipping charges listed on the invoices were false. That these charges were fictitious is apparent from a casual examination of the invoices that were in Mr. Keijer's possession. Accordingly, we will grant Plaintiff's motion for summary judgment with respect to its breach of contract claim against IPI.

2. Counts II, III and IV: Failure to Maintain Trust Under PACA, Breach of Fiduciary Duty, and Dissipation of Trust Assets

In Count II of its Amended Complaint, Botman International alleges that a statutory trust arose in favor of Botman International upon IPI's receipt of perishable agricultural commodities purchased from Botman International, and that IPI has failed to maintain this trust in violation of PACA and its regulations. Botman International further alleges that the statutory trust consists of all inventories of food or other products

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[12] During the cross-examination of Mr. Keijer by Mr. Gentile the following exchange took place:

Q: Do you acknowledge that IPI, your company, owes Botman more than $ 1.4 million?

A: Yes, sir.

(Tr. of Oct. 25, 1999 hearing, at 18.)

derived from the commodities and the proceeds from the sale of the commodities, amounting to $ 433,079.54. Botman International alleges that IPI failed to hold perishable agricultural commodities subject to the PACA trust in trust for the benefit of Botman International. This, according to Botman International, constituted a breach of trust. In Count III, Botman International alleges that IPI dissipated trust assets by improperly spending proceeds obtained from the resale of perishable agricultural commodities for purposes other than promptly paying Botman International as required by 7 U.S.C. § 499b. Similarly, in Count IV Botman International alleges that IPI failed to pay for perishable agricultural commodities that IPI received from Botman International in violation of PACA and its regulations.

PACA was enacted by Congress in 1930 for the purpose of regulating the interstate trade in perishable agricultural commodities such as fresh fruits and vegetables. George Steinberg & Son, Inc. v. Butz, 491 F.2d 988, 990 (2d Cir. 1974). In 1984, PACA was amended to provide for a statutory trust on the behalf of unpaid suppliers or sellers.

Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. 7 U.S.C. § 499e (c)(2).

Federal regulations implementing the PACA state that the PACA trust is a "nonsegregated 'floating' trust." 7 C.F.R. § 46.46(b). *See also Consumers Produce Co. v. Volante Wholesale Produce*, 16 F.3d 1374, 1378 (3d Cir. 1994); *In re United Fruit & Produce Co. Inc.*, 242 B.R. 295, 301-02 (Bankr. W.D. Pa. 1999). "Commingling of trust assets is contemplated." 7 C.F.R. § 46.46(b). Thus, a seller need not trace specific trust assets in order to recover assets subject to the trust. *See In re W.L. Bradley Co.*, 75 B.R. 505, 509 (Bankr. E.D. Pa. 1987). "The PACA trust provisions were modeled after the PSA [Packers and Stockyards Act, 7 U.S.C. § § 181-229] trust provisions and authority

developed under that statute is persuasive in the interpretation of the PACA trust." *Consumers Produce*, 16 F.3d at 1382 n.5 (citing *In re Fresh Approach, Inc.*, 48 B.R. 926, 931 (Bankr. N.D. Tex. 1985)). PACA regulations provide that when a statutory trust arises under PACA, the dealer to whom the goods were sold is "required to maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities. Any act or omission which is inconsistent with this responsibility, including dissipation of trust assets, is unlawful and in violation of section 2 of the Act, (7 U.S.C. 499b)." 7 C.F.R. § 46.46(d)(1).

Thus, even if there is no dissipation of trust assets there may still be a breach of trust if the trustee does not "maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities." *Id.* It is clear from the record that Botman International is a PACA trust creditor. On September 9, 1999, Botman International sent IPI a Notice of Intent to Preserve Trust Benefits covering invoices between July 20, 1999 and August 25, 1999. The total of the invoices subject to the PACA trust is $ 433,079.54. Furthermore, Defendants admit that Botman International has not been paid for the shipments sent to IPI during July and August of 1999. (Def.s' Response, at 3.) Defendants argue that Botman International misrepresented freight charges on its invoices and is therefore barred from recovery because of "unclean hands."[13]

In order to prevail on an "unclean hands" defense, a defendant must show fraud, unconscionability, or bad faith on the part of the defendant. *S & R Corp. v. Jiffy Lube, Int'l*, 968 F.2d 371, 377 n.7 (3d Cir. 1992). Defendants have not adequately shown any of these elements. Although the freight charges listed on Botman International's invoices appear to be incorrect, there has been no showing by Defendants that they have relied upon these representations. Furthermore, Defendants have not

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[13] Defendants have, in fact, raised other arguments as to why there can be no PACA liability in this case, but these arguments are raised only with respect to the claims of dissipation against the individual defendants.

come forward with any invoices or receipts indicating that it was IPI, not Botman International, who paid for shipping of produce from Botman International to IPI. This, together with the fact that many of the invoices so clearly demonstrate that the indicated shipping charges were meaningless, convinces us that Defendants cannot show unclean hands in this case.

It is also clear that Defendants do not have sufficient liquid assets to pay Botman International $ 433,079.54. However, Defendants argue that there has been no dissipation of trust assets because the combination of IPI's cash and accounts receivable far exceeds the value of the PACA trust. Although Defendants have not attached any documents to their response to Botman International's Renewed Motion for Summary Judgment, certain documents do inform our opinion in this respect. For instance, in Defendants' Compliance With Temporary Restraining Order, it is indicated that as of October 11, 1999, IPI had outstanding accounts receivable of $ 581,774.[14]

Under 7 U.S.C. § 499e(c)(2), accounts receivable are part of the PACA trust and must be preserved for the benefit of all unpaid suppliers. There is evidence here that accounts receivable have been preserved for the benefit of Botman International. At any rate, there is certainly no showing that the accounts receivable are fictitious or otherwise uncollectible. In other words, Botman International has not shown that there has been a dissipation of trust assets by IPI. Because it has not been shown that the trust res is insufficient to pay the beneficiaries of the trust, we need not address whether the payment of business expenditures out of the floating trust constitutes a dissipation of trust assets. *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346 (S.D.N.Y. 1993) and its progeny are distinguishable in this respect. There the courts held that the use of proceeds from the sale of perishable agricultural produce for legitimate business expenditures is

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[14] We note this is consistent with Judge Buckwalter's finding that IPI's accounts receivable are substantially less than the amount owed to Botman International. The total amount of money owed to Botman International is much greater than the value of the PACA trust. This is because the PACA trust covers only shipments delivered to IPI between approximately July 20, 1999 and August 25, 1999.

a breach of trust. See *Id.* at 348. However, in neither Morris Okun or any other similar case was there a dispute over the value of the trust res.[15] Although Botman International is free to show that these accounts receivable are non-existent or illusory, at this time there is a material issue of fact as to whether IPI dissipated trust assets.

Therefore, we will deny Plaintiff's Renewed Motion for Summary Judgment on Count III, Dissipation of Trust Assets.

Regardless of whether IPI dissipated trust assets, it is clear that IPI has breached a duty owed to Botman International with respect to the manner in which it has kept the PACA trust. PACA regulations require that trust assets be "freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities." 7 C.F.R. § 46.46(d)(1). Defendants concede that IPI's liquid assets are insufficient to satisfy IPI's obligations to Botman International subject to the PACA trust. In failing to make assets "freely available to satisfy [its] outstanding obligations" to Botman International, IPI has breached its duty as trustee. Because there is no issue of material fact as to whether IPI has maintained trust assets in a manner such that the assets are available to satisfy its debts to Botman International, we conclude that IPI has breached the PACA trust and its corresponding fiduciary duty to Botman International. Accordingly, summary judgment will be entered in favor of Botman International and against IPI with respect to Counts II (Failure to Maintain Trust Under PACA) and IV (Breach of Fiduciary Duty) of Plaintiff's Amended Complaint.

C. Plaintiff's Claims Against the Individual Defendants

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[15] Because it has not been shown that the trust res is insufficient to pay the beneficiaries of the trust, we need not address whether the payment of business expenditures out of the floating trust constitutes a dissipation of trust assets. *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346 (S.D.N.Y. 1993) and its progeny are distinguishable in this respect. There the courts held that the use of proceeds from the sale of perishable agricultural produce for legitimate business expenditures is a breach of trust. See *Id.* at 348. However, in neither Morris Okun or any other similar case was there a dispute over the value of the trust res.

Botman International argues that the Keijers are responsibly connected persons to IPI and, as such, are liable to PACA trust creditors for any breach of trust or dissipation of trust assets that has occurred.[16] In response, Defendants argue that there has been no dissipation of PACA trust assets and that there is no basis for holding the individual defendants personally liable. In particular, Defendants argue that the payment of officers salaries and supplies are not properly considered a dissipation of PACA trust assets and that IPI's cash and accounts receivable exceed any amount that may arguably be subject to a PACA trust. Moreover, since the IPI's assets exceed the trust amount, Defendants argue, there is a material issue of fact as to whether there has been any dissipation of assets and therefore judgment should not be entered against the individual defendants.

PACA itself does not specify that a "responsibly connected" person will have personal liability for corporate debts. See 7 U.S.C. § 499a(b)(9). Under the statute, the only significance that attaches to being a "responsibly connected" person is that such a person is subject to certain restrictions regarding future employment with a PACA licensee. See 7 U.S.C. § 499h(b). Nevertheless, a growing number of courts have imposed personal liability on persons who are actively involved in the day-to-day operations of the corporation.[17] See, e.g., *Shepard v. K.B.*

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[16] The term 'responsibly connected' means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners." 7 U.S.C. § 499a(b)(9). Notably, the statute does not declare that "responsibly connected" persons may be held secondarily liable for breach of fiduciary duty.

[17] Although most of the cases that hold individuals to be secondarily liable purport to do so because the person was actively involved in the operation of the corporation,

(continued...)

Fruit & Vegetable, Inc., 868 F. Supp. 703, 705-06 (E.D. Pa. 1994). These courts have generally concluded that "the crucial factor in imposing such liability is the existence of fiduciary duties under the Act and a breach of those duties when the PACA trust is not preserved." Bartholomew M. Botta, Personal Liability for Corporate Debts: The Reach of the Perishable Agricultural Commodities Act Continues to Expand, 2 Drake J. Agric. L. 339, 345 (1997). When considering whether to impose personal liability on an individual, courts have generally held that "PACA liability attaches first to the licensed seller of perishable agricultural commodities. If the seller's assets are insufficient to satisfy the liability, others may be found secondarily liable if they had some role in causing the corporate trustee to commit the breach of trust." *Shepard*, 868 F. Supp. at 706. One is not secondarily liable under PACA simply because the person is an officer or shareholder of a corporation. *Id.* Rather, the court must first consider whether the person was actively involved in the corporation and if such involvement is sufficient to establish legal responsibility. *Id.* If a sufficient basis for legal responsibility exists, it then must be determined whether the person breached a fiduciary duty owed to the PACA creditor. *Id.* "Being a statutory trust, PACA incorporates common law breach of trust principles." *Id.*

1. Plaintiff's Claims Against Mr. Keijer for Breach of Fiduciary Duty/Conversion and Dissipation of Trust Assets

It is undisputed that Mr. Keijer was actively involved in the operation of IPI throughout the history of IPI's dealings with Botman International. (Def.s' Amended Answer P 6, Dec. of Dirk J. Keijer P 12.) At all times while the PACA trust has been in existence, Mr. Keijer has been an

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(...continued)
we note that in each case the person held secondarily liable would also be considered a "responsibly connected" person. However, the converse is not true. A person who would be considered "responsibly connected" under the statute may not be held secondarily liable if they did not exercise day-to-day control over the corporation. *See Shepard*, 868 F. Supp. at 706; *Mid-Valley Produce Corp. v. 4-XXX Produce Corp.*, 819 F. Supp. 209 212-13.

officer of IPI and holder of 100 percent of the outstanding stock of IPI. There has never been any suggestion that he is merely a nominal officer. Indeed, by Mr. Keijer's own admissions, he was solely responsible for IPI's activities during the time period in which the PACA violations occurred. (Declaration of Dirk Keijer P 17.) These facts are sufficient to establish that Mr. Keijer had "active involvement" in the operation of the business such that he may be held secondarily liable if IPI breached its fiduciary duty owed to Botman International under PACA. See *Shepard*, 868 F. Supp. at 706.

In determining whether Mr. Keijer may be held liable for dissipation of PACA trust assets, we note that there is a material question of fact as to whether IPI has dissipated any trust assets. Therefore, we must also necessarily reach the same conclusion with respect to Mr. Keijer, for his liability for dissipation of trust assets is dependent upon a finding that IPI is liable for dissipation of trust assets. Accordingly, we will deny Plaintiff's Renewed Motion for Summary Judgment on Count X (Dissipation of Trust Assets) with respect to Mr. Keijer.

However, a PACA trustee has a duty to preserve trust assets in a manner in which the assets are freely available to satisfy the trustees' obligations. 7 C.F.R. § 46.46(d)(1). Thus, a breach of fiduciary duty may occur even without dissipation of trust assets if the trust assets are not preserved in a manner such that they are freely available to satisfy IPI's obligations to Botman International. It has already been established that IPI has breached the statutory trust and its corresponding fiduciary duty to Botman International by failing to preserve the PACA trust assets in a manner such that they are freely available to satisfy IPI's debts to Botman International. Because Mr. Keijer was admittedly responsible for all of IPI's activities at all relevant times, Mr. Keijer is secondarily liable for that breach of trust. *See Mid-Valley Produce Corp. v. 4-XXX Produce Corp.*, 819 F. Supp. 209, 212. Accordingly, we will grant summary judgment in favor of Botman International and against Mr. Keijer with respect to Counts IX (Breach of Fiduciary Duty - Constructive Trust) and XI (Breach of Fiduciary Duty - PACA) of Plaintiff's Amended Complaint.

2. Plaintiff's Claims Against Ms. Keijer for Breach of Fiduciary Duty/Conversion Dissipation of Trust Assets

Botman International argues that Ms. Keijer is a responsibly connected person in this matter and that she, like Mr. Keijer, may be held secondarily liable for a breach of fiduciary duty and dissipation of trust assets. In support of this argument, Botman International argues that in order to avoid personal liability under PACA, Ms. Keijer began taking steps in May, 1999, to dissociate herself from IPI by resigning as an officer and transferring her stock in the corporation to Mr. Keijer. After dissociating herself from IPI, Plaintiff contends that Ms. Keijer "caused IPI to be re-incorporated in Delaware, in anticipation of taking it into bankruptcy" (Pl.'s Reply, at 24) and prepared "the 'so called' agreement to change the terms of payment to '60 days,' which would take the transactions outside of the PACA, . . . flew to Hoofddorp to have it executed by Mr. Botman . . ., and began putting a PACA disclaimer on IPI invoices." (Pl.'s Reply, at 25.) In support of its argument that Ms. Keijer should be held secondarily liable, Botman International also sets forth Judge Buckwalter's finding that "until May 5, 1999, Clare C. Keijer was a shareholder and officer of IPI. Thereafter, she remained as general counsel to IPI and had sufficient managerial functions with respect to financial matters as to be in a position of control, together with Dirk Keijer, over the corporate entity, IPI, now through her legal services, a Delaware Corporation." (Memo. of November 4, 1999, Findings of Fact P 4.)

We find that a genuine issue of fact exists as to whether Ms. Keijer was actively involved in the operation of IPI subsequent to May 5, 1999. It is uncontested that Ms. Keijer was acting as IPI's general counsel, for which she received a salary, even though she was not an officer or shareholder at any time in which the PACA trust was in existence. (Pl.'s Reply, at 24.) We are not persuaded that it is appropriate at this stage to infer that because Ms. Keijer was involved insome business decisions she was actively involved in the decisions leading to IPI's failure to perform its PACA obligations. The record reflects that Ms. Keijer would, on occasion, assist in IPI's bookkeeping, that she was knowledgeable about IPI's operations, and that she performed legal services for IPI. However, it does not necessarily follow from these facts that Ms. Keijer was involved in the day-to-day control over IPI's affairs such that she can be held legally responsible for any PACA trust

violations that may have occurred.

We also note that Botman International has failed to set forth any cases demonstrating that persons not formally associated with a dealer may be held personally liable for the acts of the corporation. We are not aware of any case in which a person has been held secondarily liable who was not either a shareholder or officer of the corporation.[18] *Cf. Skone & Connors Produce v. Panattoni,* No. 91-36358, 1994 U.S. App. LEXIS 27368 (9th Cir. Sept. 14, 1994) (finding personal liability for a husband and wife who were the sole shareholders of a PACA dealer); Morris Okun 814 F. Supp. 346 (holding shareholder and officer personally liable); *Mid-Valley Produce*, 819 F. Supp. 209 (holding president of corporation personally liable); *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280 (9th Cir. 1997) (holding that individual shareholders, officers, or directors of a corporation may be held personally liable under PACA); *Bronia, Inc. v. Ho*, 873 F. Supp. 854 (S.D.N.Y. 1995) (finding liability on the part of a person who was sole shareholder, director, and president of the corporation).

For the foregoing reasons, we will deny Plaintiff's Renewed Motion for Partial Summary Judgment with respect to all claims against Ms. Keijer.

An appropriate Order follows.

ORDER

AND NOW, this 27th day of July, 2004, upon consideration of Plaintiff's Renewed Motion for Partial Summary Judgment (Doc. No. 53), Defendants' response (Doc. No. 57), Plaintiff's Reply Memorandum of Law in Support of Motion for Partial Summary Judgment (Doc. No. 64), and all documents contained in the record, it is ORDERED that:

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[18] Although we have not discovered any case in which a person who is neither shareholder nor officer has been held secondarily liable for breach of fiduciary duty, we do not presently hold that such formal contacts are necessary to secondary liability. Our decision to deny summary judgment as to claims against Ms. Keijer is sufficiently grounded in the fact that there has not been an adequate showing of her active involvement, regardless of whether formal contacts are necessary or not.

1. Summary Judgment is GRANTED in favor of Plaintiff and against Defendants on Defendants' First through Sixth Counterclaims;

2. Summary Judgment is GRANTED in favor of Plaintiff and against IPI on Counts I (Breach of Contract), II (Failure to Maintain Trust Under PACA), and IV (Breach of Fiduciary Duty);

3. Summary Judgment against IPI on Count III (Dissipation of Trust Assets) is DENIED;

4. Summary Judgment is GRANTED in favor of Plaintiff and against Dirk J. Keijer on Counts IX (Breach of Fiduciary Duty - Constructive Trust) and XI (Breach of Fiduciary Duty - PACA);

5. Summary Judgment against Dirk J. Keijer on Count X (Dissipation of Trust Assets) is DENIED; and

6. Summary Judgment against Clare A. Keijer is DENIED on all Counts.

IT IS SO ORDERED.
BY THE COURT:
R. Barclay Surrick, J.

MERNA K. JACOBSON v. USDA.
No. 03-1157.
Filed August 5, 2004.

(Cite as: 2004 U.S. App. 202).

PACA – Payment, failure to make prompt – "Responsibly connected" – Presumptions, rebuttable if holding more than 10% ownership –"Actively involved," when not.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JUDGES: BEFORE: Ginsburg, Chief Judge, and Sentelle and Roberts, Circuit Judges.

OPINION

ORDER

Upon consideration of petitioner's petition for rehearing filed July 16, 2004, it is **ORDERED** that the petition be denied.

Per Curia

THE POTATO KING, INC., VIKING PRODUCE, INC., WHOLESALE PRODUCE SUPPLY CO., W.A. WHITE BROKERAGE CO., KELLOGG COMPANY FOOD BROKERS and OKRAY FAMILY FARMS, INC., v. BENSON'S WHOLESALE FRUIT, INC., DAVID A. ROALKVAM, RHONDA ROALKVAM, ROYAL BANCSHARES, INC. and ROYAL BANK.
No. 03-C-552-C .
Filed August 27, 2004.

(Cite as: 2004 U.S. Dist. LEXIS 17523).

PACA – Trust *res* preservation – Responsibly connected – Secondary liability for trust assets.

PACA seller notified buyer of intent to preserve PACA trust assets under 7 USC § 499e(c)(4). The sole owners of the seller entity failed to maintain the trust *res* and assets were distributed to creditors and employee salaries. Seller may bring action under a reparation order to be enforced by the Secretary under 7 USC § 499f or g, or alternately, through a court action under 7 USC § 499e(c)(5) wherein individuals may be held secondarily liable for breach of the PACA fiduciary trust.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JUDGES: BARBARA B. CRABB, District Judge.

OPINION AND ORDER

In this civil action for declaratory, injunctive and monetary relief, plaintiffs The Potato King, Inc., Viking Produce, Inc., Wholesale Produce Supply Co., W.A. White Brokerage Co., Kellogg Company Food Brokers and Okray Family Farms, Inc. are suing defendants Benson's Wholesale Fruit, Inc., David Roalkvam, Rhonda Rolkvam, Royal Bancshares, Inc. and Royal Bank for breach of contract and violation of the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499a et seq. Plaintiffs argue that they incurred damages when defendants failed to maintain and use trust funds as required under the Act. Jurisdiction is present. 28 U.S.C. § 1331.

Presently before the court is plaintiffs' motion for partial summary judgment against defendant Benson's Wholesale Fruit, Inc. for failure to pay promptly and maintain trust assets and breach of contract and against defendants David and Rhonda Roalkvam for breach of fiduciary duty. Plaintiffs seek $ 185,760.54 from defendants. Defendants have not submitted any response to plaintiffs' motion for summary judgment against them. On February 4, 2004, I entered a final default judgment against defendant Benson's Wholesale Fruit, Inc., ordering defendant to pay plaintiffs $ 153,101.54 plus pre-judgment and post-judgment interest and costs and disbursements of this action, totaling $ 164,641.95. The default judgment did not include the amount owed to plaintiff Okray Family Farms, Inc. Because I have entered final judgment against defendant Benson's Wholesale Fruit, Inc., I will deny plaintiffs' motion for partial summary judgment with respect to defendant Bensons' as moot as it applies to plaintiffs The Potato King, Inc., Viking Produce, Inc., Wholesale Produce Supply Co., W.A. White Brokerage Co. and Kellogg Company Food Brokers. However, I will grant the motion as it applies to plaintiff Okray Family Farms, Inc. In addition, plaintiffs argue that because defendants David and Rhonda Roalkvam are officers and shareholders of defendant Benson's Wholesale Fruit, Inc., they are liable to plaintiffs for breach of trust under the Act. Because the Act permits recovery against both the corporation and its controlling officers and because plaintiffs have

shown they are entitled to judgment as a matter of law, I will grant plaintiffs' motion for summary judgment against defendants David and Rhonda Roalkvam. From the plaintiffs' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiff The Potato King, Inc. is a Wisconsin corporation with its principal place of business in La Crosse, Wisconsin. Plaintiff Viking Produce, Inc. is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. Plaintiff W.A. White Brokerage Co., is a Minnesota corporation with its principal place of business in Maiden Rock, Wisconsin. Plaintiff Wholesale Produce Supply Co. is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. Plaintiff Kellogg Company Food Brokers is a Minnesota corporation with its principal place of business in Mound, Minnesota. Plaintiff Okray Family Farms, Inc. is a Wisconsin corporation with its principal place of business in Plover, Wisconsin. All plaintiffs are engaged in the business of buying and selling wholesale quantities of perishable agricultural commodities in interstate commerce. Defendant Benson's Wholesale Fruit, Inc. distributes wholesale fresh produce and is a Wisconsin corporation with its principal place of business in Elroy, Wisconsin. Defendants David A. Roalkvam and Rhonda Roalkvam are officers of defendant Benson's. Defendants David and Rhonda Roalkvam purchased Benson's in 1991 and each owns 50% of the company's outstanding stock. In addition, they own the building where defendant Benson's is located and leased it to defendant Benson's until May 2003. Defendant Benson's paid the lease payments to David and Rhonda Roalkvam, who deposited those payments into their personal checking account.

B. Plaintiffs' Relationship with Defendants.

Plaintiffs The Potato King, Viking Produce, W.A. White, Wholesale Produce and Kellogg Company entered into contracts with defendant Benson's under which plaintiffs agreed to sell produce and Benson's agreed to purchase that produce. Although plaintiffs sold Benson's $

185,760.54 in produce, defendant Benson's failed to pay the contracts. Defendant Benson's owes the following amounts to plaintiffs: 1) $ 17,895.47 to plaintiff The Potato King; 2) $ 8,843.79 to plaintiff Viking Produce; 3) $ 78,042.85 to plaintiff W.A. White; 4) $ 41,086.80 to plaintiff Wholesale Produce; 5) $ 7,232.63 to plaintiff Kellogg Company; and 6) $ 32,659.00 to plaintiff Okray Family Farms.

C. Violations under the Perishable Agricultural Commodities Act of 1930.

When plaintiffs sold produce to defendant Benson's, plaintiffs became beneficiaries of a trust pursuant to the Perishable Agricultural Commodities Act. The trust assets consist of all defendant Benson's produce or produce-related assets, including all funds commingled with funds from other sources and all assets procured by such funds in the possession or control of Benson's since the creation of the trust. Benson's failed to maintain sufficient trust assets to fully satisfy all qualified trust claims under the Act, such as plaintiffs' unpaid claims asserted in this action. Therefore, defendant Benson's breached its fiduciary duty to maintain sufficient trust assets to pay all trust claims under the Act. Benson's is in possession, custody and control of the trust assets for the benefit of plaintiffs and other similarly situated trust beneficiaries.

Defendants David and Rhonda Roalkvam are the only people in a position to control the trust assets of Benson's. Defendants David and Rhonda Roalkvam failed to maintain the trust fund, as required under the Act and they permitted assets subject to the trust fund to be transferred to third parties such as defendant Royal Bank and used for payroll, insurance and other bills. There was never a period when all of Benson's produce debt was paid in full.

Plaintiffs gave written notices of their intent to preserve trust benefits to Benson's in accordance with the Act's amendments of 1995 by including the statutory trust language, as set forth in 7 U.S.C. § 499e(c)(4), on each of their invoices and by sending those invoices to Benson's. Plaintiffs are "creditors," "suppliers" and "sellers" of produce under the Act. Defendants have no reason to dispute the validity of plaintiffs' claims under the Act and are aware of no facts that void plaintiffs' trust rights under the Act.

OPINION

On February 4, 2004, I entered a default judgment against defendant Benson's, ordering it to pay plaintiffs $ 153,101.54, plus pre-judgment interest in the amount of $ 7,618.07 plus $ 469.00 in costs, for a total award of $ 164,641.95, plus post-judgment interest. Defendant Benson's owed this amount pursuant to the agreements that it had with plaintiffs The Potato King, W.A. White, Wholesale Produce, The Kellogg Company and Viking Produce. The amount owed to plaintiff Okray Family Farms, Inc. was not included in the default judgment. Now plaintiffs, including plaintiff Okray Family Farms, Inc., move for partial summary judgment against defendant Benson's and defendants David and Rhonda Roalkvam. The undisputed facts that support plaintiffs' motion for partial summary judgment show that defendant Benson's owes plaintiffs a total of $ 185,760.54. The discrepancy in the amounts owed to plaintiffs under the default judgment and the motion for partial summary judgment is the result of adding the amount defendant Benson's owes to plaintiff Okray Family Farms, Inc., $ 32,659.00, to the total award sought ($ 153,101.51 plus $ 32,659.00 equals $ 185,760.54). In addition, I understand that plaintiffs are moving for partial summary judgment against defendants David and Rhonda Roalkvam to secure a secondary source of payment for its unpaid claims under the Perishable Agricultural Commodities Act.

7 U.S.C. § 499e(c)(2) provides in pertinent part that all "perishable agricultural commodities received by a . . . dealer . . . and any receivables or proceeds from the sale of such commodities . . . shall be held by such . . . dealer . . . in trust for the benefit of all unpaid suppliers or sellers of such commodities . . . until full payment of the sums owing in connection with such transactions has been received." Thus, when a dealer receives perishable agricultural commodities from a seller, a trust is created in favor of that unpaid seller. 7 U.S.C. § 499e(c)(2). This trust remains in effect until the seller receives full payment for the perishable agricultural commodities. *Id.* The Act defines "dealer" as "any person engaged in the business of buying or selling in wholesale or jobbing quantities . . . any perishable agricultural commodity in interstate or foreign commerce . . ." 7 U.S.C. § 499a(b)(6).

Defendants Benson's Wholesale Fruit, Inc. and David and Rhonda

Roalkvam do not oppose plaintiffs' motion for partial summary judgment. However, because I entered a default judgment against defendant Benson's Wholesale Fruit, Inc. on February 4, 2004, I will deny plaintiffs' motion against defendant Benson's as moot to the extent that the motion applies to plaintiffs The Potato King, W.A. White, Wholesale Produce, The Kellogg Company and Viking Produce. Because plaintiff Okray Family Farms, Inc. was not included in the default judgment and because it is undisputed that defendant Benson's owes this plaintiff $ 32,659.00, I will grant plaintiffs' motion for partial summary judgment against defendant Benson's Wholesale Fruit, Inc. only as it applies to the amount owed to plaintiff Okray Family Farms, Inc.

As to plaintiffs' motion against defendants David and Rhonda Roalkvam, it is undisputed that defendant Benson's is a distributor of wholesale fresh produce and that defendants David and Rhonda Roalkvam own defendant Benson's entirely. Furthermore, it is undisputed that defendants David and Rhonda Roalkvam failed to maintain the trust fund, as required under the Act, by permitting assets subject to the trust fund to be transferred to third parties such as defendant Royal Bank and used for payroll, insurance and other bills. Plaintiffs are beneficiaries of the trust assets and have rights under the Act to those assets. Trust rights under the Act "may be enforced either through a reparation order issued by the Secretary of Agriculture and subsequent judicial enforcement, 7 U.S.C. § 499f & g, or through a court action for breach of fiduciary trust, 7 U.S.C. § 499e(c)(5)." Patterson Frozen Foods v. Crown Foods International, 307 F.3d 666, 669 (7th Cir. 2002). "The latter remedy permits recovery against both the corporation and its controlling officers." *Id.*

Because it is undisputed that defendants David and Rhonda Roalkvam are controlling officers of defendant Benson's, which breached its fiduciary duty to maintain sufficient trust assets to pay all trust claims under the Act, I will grant plaintiffs' motion for partial summary judgment against defendants David A. Roalkvam and Rhonda Roalkvam. Defendants David and Rhonda Roalkvam are liable to plaintiffs' unpaid claims under the Act, totaling $ 185,760.54 and owed to the plaintiffs as follows: 1) $ 17,895.47 to plaintiff The Potato King; 2) $ 8,843.79 to plaintiff Viking Produce; 3) $ 78,042.85 to plaintiff

W.A. White; 4) $ 41,086.80 to plaintiff Wholesale Produce; 5) $ 7,232.63 to plaintiff Kellogg Company; and 6) $ 32,659.00 to plaintiff Okray Family Farms.

ORDER

IT IS **ORDERED** that

1. The motion for partial summary judgment by plaintiffs The Potato King, Inc., Viking Produce, Inc., Wholesale Produce Supply Co., W.A. White Brokerage Co. and Kellogg Company Food Brokers against defendant Benson's Wholesale Fruit, Inc. is **DENIED** as moot;

2. The motion for partial summary judgment by plaintiff Okray Family Farms, Inc. against defendant Benson's Wholesale Fruit, Inc. is **GRANTED**;

3. The motion for partial summary judgment by plaintiffs The Potato King, Inc., Viking Produce, Inc., Wholesale Produce Supply Co., W.A. White Brokerage Co., Kellogg Company Food Brokers and Okray Family Farms, Inc. against defendants David A. Roalkvam and Rhonda Roalkvam is **GRANTED** for breaching their fiduciary duty under the Perishable Agricultural Commodities Act of 1930;

4. Defendants David and Rhonda Roalkvam are liable to plaintiffs' unpaid claims under the Act, totaling $ 185,760.54 and owed to the plaintiffs as follows: 1) $ 17,895.47 to plaintiff The Potato King; 2) $ 8,843.79 to plaintiff Viking Produce; 3) $ 78,042.85 to plaintiff W.A. White; 4) $ 41,086.80 to plaintiff Wholesale Produce; 5) $ 7,232.63 to plaintiff Kellogg Company; and 6) $ 32,659.00 to plaintiff Okray Family Farms.

Entered this 27th day of August, 2004.

_____

TRAY-WRAP, INC. v. USDA.
No. 02 Civ. 6898 (RCC).
Filed October 18, 2004.

(Cite: as 2004 U.S. Dist. LEXIS 20895).

PACA – Bribery – Inspection services, withheld – Arbitrary & capricious, when not – Breach of contract, when not – Negligence in failure to provide inspections, when not.

Court granted summary judgement against Tray-Wrap (a business seeking USDA inspection services under PACA). Court dismissed Tray-Wrap's negligence claim filed under Federal Tort Claims Act (FTCA) because it had failed to exhaust its administrative remedies. Court dismissed Tray-Wrap's contract claim against USDA for its alleged failure to deliver inspection services holding that Tray-Wrap failed to allege the details and existence of a contract for those services. Court dismissed Tray-Wrap's claim of denial of Constitutional due process for USDA's failure to grant Tray-Wrap an entitlement (inspections) since due process claims do not usually extend to claims of entitlement except where the government has little or no discretion to award the entitlement.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OPINION
MEMORANDUM & ORDER

KEVIN THOMAS DUFFY, U.S.D.J.

Plaintiff Tray-Wrap, Inc. ("Plaintiff" or "Tray-Wrap") brings this action against Defendant Ann M. Veneman, Secretary of Agriculture, United States Department of Agriculture ("USDA"), for negligence, breach of contract, due process violations, and Administrative Procedure Act ("APA") violations. Plaintiff seeks the restoration of inspection and grading services provided by the Agricultural Marketing Service ("AMS")[1] and monetary damages. Defendant moves for dismissal, or alternatively, for summary judgment.

I. Background:

Tray-Wrap, a company located at Hunts Point in the Bronx, New York, buys produce wholesale, repackages it, and sells it. After buying produce, Tray-Wrap typically applies to AMS for inspection services.

[1] AMS is part of the USDA and provides inspections of produce upon request.

AMS inspections are voluntary and a company must apply for them, either orally or in writing. At the conclusion of an inspection, the AMS inspector issues a certificate stating whether the produce meets a specified grade. This determination is based on the presence of quality defects in a sample taken of the produce.

On October 27, 1999, a federal grand jury indicted eight AMS inspectors at Hunts Point and twelve owners or employees of companies operating there. These individuals were indicted for participating in an alleged racketeering and bribery scheme. Tray-Wrap manager Anthony Spinale ("Spinale") was one of the indicted individuals. The nine-count indictment against Spinale alleged that he bribed AMS inspectors in connection with inspections for Tray-Wrap and G&T Terminal Packaging Co. ("G&T"), another company with which he was affiliated. AMS responded by immediately suspending its inspectors who were indicted. AMS also conditionally withdrew inspection services from companies (including Tray-Wrap) whose owners or employees were indicted. AMS orally notified these companies of its decision within days. AMS subsequently sent letters to these companies setting forth the basis of its decision and inviting them to submit additional information. One of the affected companies, Cooseman Specialties, Inc. ("Cooseman"), filed suit against AMS and sought to enjoin it from withdrawing inspection services. AMS and Cooseman resolved the action by agreeing that, inter alia, inspection services would be restored if Cooseman represented that none of its indicted employees would participate in AMS inspections during the pendency of their criminal cases. Thereafter, AMS developed a similar template agreement for the other affected companies. The agreement required a company to represent that its indicted employees would have no involvement in AMS inspections during the pendency of their criminal cases. In addition, the companies had to waive their right to file any claims against USDA arising out of the circumstances that led to the agreement. Nine of the twelve affected companies entered into this template agreement and all had inspection services restored.

Of the three companies that did not enter into the template agreement, two (Tray-Wrap and G&T) were affiliated with Spinale. On March 13, 2000, Tray-Wrap, G&T, and a third company (collectively, "Tray-Wrap I Plaintiffs") filed suit against AMS claiming that AMS's

withdrawal of inspection services violated its due process rights and 7 C.F.R. § 50.11(a) ("Tray-Wrap I"). Tray-Wrap I Plaintiffs sought, inter alia, a temporary restraining order and preliminary injunction to stay the withdrawal of inspection services.

The Honorable Denny Chin, on April 12, 2000, denied Tray-Wrap I Plaintiffs' request for a temporary restraining order and preliminary injunction. In doing so, Judge Chin stated:

> The government's proposal for settlement is more than reasonable. Inspection services would be reinstated upon entering into the settlement agreement. Mr. Spinale can remain involved in the operation of the company. He would simply be prohibited from participating in inspections . . . . The government's actions are not arbitrary and capricious. They are not unreasonable.

Transcript of April 12, 2000 Hearing, at 9-10 (Lawler Decl. Ex. Q.)

On January 26, 2001, Spinale pled guilty to one count of bribing an AMS inspector. The remaining eight counts against Spinale involving Tray-Wrap were dismissed pursuant to a plea agreement. Spinale admitted, however, that "on the other dates in the Indictment, I paid Mr. Cashin $ 100 per inspection to influence the outcome of the report." Transcript of January 26, 2001 Hearing, at 10-11 (Lawler Decl. Ex. T.) Subsequently, on April 30, 2001, the remaining claims in Tray-Wrap I were dismissed with prejudice by stipulation.

On October 25, 2001, Spinale submitted a request for an AMS inspection on behalf of Tray-Wrap. AMS denied this request pursuant to its conditional withdrawal of inspection services. AMS subsequently advised Tray-Wrap that it needed to submit a letter stating that Spinale was no longer an employee. Tray-Wrap sent such a letter to AMS on November 14, 2001. AMS then sent a revised agreement to Tray-Wrap that would restore inspection services. The revised agreement provided, inter alia, that:

> Tray-Wrap acknowledges that Anthony Spinale is no longer employed by Tray-Wrap. Tray-Wrap agrees that if it ever rehires Anthony Spinale that it will immediately notify USDA that

> Anthony Spinale is one of its employees. Tray-Wrap, further agrees that a designated representative of Tray-Wrap shall be authorized to accept any inspection report from any official of the USDA on the warehouse floor, located on the first floor.

Agreement for Restoration of Inspection Services at Tray-Wrap, Inc. (Faraci Aff. Ex. B.)

In addition, the revised agreement provided that Tray-Wrap would waive its right to sue USDA on account of the circumstances giving rise to the agreement. Tray-Wrap refused to sign the agreement and AMS has therefore not restored inspection services to it.

While Spinale has not been employed by Tray-Wrap since late 2001, he continues to participate in AMS inspections at Hunts Point for other companies with which he is affiliated. Tray-Wrap filed the instant suit (Tray-Wrap II) on August 22, 2002.

II. Defendant's Motions to Dismiss:

Defendant seeks to dismiss the Complaint on three grounds: (A) lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1); (B) failure to state a claim pursuant to Rule 12(b)(6); and (C) res judicata.

A. Plaintiff's Negligence Claim:

Plaintiff claims that it is entitled to monetary damages under the Federal Tort Claims Act ("FTCA") for AMS's negligence in refusing to provide it with inspection services. Defendant contends that this claim should be dismissed pursuant to Rule 12(b)(1) because Plaintiff failed to comply with certain procedural requirements of the FTCA.

The doctrine of sovereign immunity provides that the United States may only be sued with its consent. *See United States v. Mitchell*, 463 U.S. 206, 212, 77 L. Ed. 2d 580, 103 S. Ct. 2961 (1983). Congress waived the United States' sovereign immunity for certain claims by enacting the FTCA. See 28 U.S.C. § § 1346(b), 2671-80. This waiver is subject to numerous conditions, each of which must be satisfied before a court may exercise its jurisdiction. One such condition is that a plaintiff filing suit under the FTCA must first file an administrative

claim with the appropriate federal agency. See *Id.* § 2675(a) (providing that a plaintiff filing suit under the FTCA must "have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail."); see also 7 C.F.R. § 1.51 (noting that FTCA claims brought against the USDA must first be presented to the USDA). The administrative claim must "provide enough information to permit the agency to conduct an investigation and to estimate the claim's worth." *Romulus v. United States*, 160 F.3d 131, 132 (2d Cir. 1998).

Failure to comply with this requirement deprives a court of subject matter jurisdiction and requires dismissal. *See Adeleke v. United States*, 355 F.3d 144, 153 (2d Cir. 2004) (dismissing FTCA claim for lack of subject matter jurisdiction because "it is undisputed that [plaintiff] did not file any administrative claim with respect to his seized personal property."). Plaintiffs bear the burden of proving compliance with this requirement. *See Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999). It is undisputed that Tray-Wrap has never filed an administrative claim with the USDA. Accordingly, this court lacks subject matter jurisdiction to hear Plaintiff's FTCA claim and it is dismissed.[2]

B. Plaintiff's Breach of Contract Claim:

Plaintiff also claims that AMS's actions in refusing to restore inspection services breached its contract with Plaintiff. Defendant contends that this claim should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

To state a claim for breach of contract under New York law, a plaintiff must allege: (1) the existence of an agreement; (2) adequate performance of the contract by the plaintiff; (3) breach of contract by the defendant; and (4) damages. *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996). While these elements need not be separately pleaded, failure to allege them will result in dismissal. *See, e.g., Sony Fin. Servs., LLC v. Multi Video Group, Ltd.*, 2003 U.S. Dist. LEXIS 10058, No. 03

[2] It is thus unnecessary to consider Defendant's additional contention that Plaintiff's FTCA claim should be dismissed on the grounds that AMS's alleged negligence is not comparable to any common law tort liability in New York state.

Civ. 1730 (LAK), 2003 WL 21396690, at *2 (S.D.N.Y. June 17, 2003) (dismissing counterclaim for breach of contract because movant failed to allege terms of contract, nature of breach, or that defendant actually performed under contract); *Sel-Lab Marketing, Inc. v. Dial Corp*., 2002 U.S. Dist. LEXIS 15932, No. 01 CIV. 9250 (SHS), 2002 WL 1974056, at *4-6 (S.D.N.Y. Aug. 27, 2002) (dismissing breach of contract claim because plaintiff failed to allege facts that could establish the existence of a valid contract).

Plaintiff cursorily notes in its Complaint that it had a "contractual right to inspection services." (Compl. P13.) Plaintiff does not allege how this contract was formed or what its terms were. Such conclusory allegations cannot establish the existence of a valid contract.[3] Likewise, Plaintiff does not plead that it performed its obligations under this supposed contract. Accordingly, Plaintiff's breach of contract claim is dismissed.

C. Plaintiff's Due Process Claim:

Plaintiff also claims that AMS's summary refusal to restore inspection services violated Plaintiff's due process rights as guaranteed by the Fifth Amendment. Defendant argues that this claim should be dismissed pursuant to Rule 12(b)(6).

The Due Process Clause of the Fifth Amendment extends its procedural guarantees only to "deprivation of a protected interest in life, liberty, or property." *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 581 (2d Cir. 1989). To have a constitutionally protected interest in property, "a person clearly must have more than an abstract need . . . for it . . . . He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). Plaintiff is claiming a constitutionally protected

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[3] Plaintiff may be alleging that the Agricultural Marketing Act of 1946 ("AMA") and the regulations promulgated thereunder establish a contractual right to inspection services. If so, this argument is far off the mark. A statute is presumed not to create a contractual obligation, absent a clear intent by the government. See Nat'l R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co., 470 U.S. 451, 465-66, 84 L. Ed. 2d 432, 105 S. Ct. 1441 (1985). Neither the AMA nor the regulations promulgated thereunder reflect such an intent.

interest in receiving inspection services that have been conditionally withdrawn.

Plaintiffs generally do not have legitimate claims of entitlement to government benefits (such as AMS inspection services) that are awarded in the government's discretion. *See, e.g., Sanitation and Recycling Indus. v. City of New York*, 107 F.3d 985, 995 (2d Cir. 1997) ("The Commission is vested with broad discretion to grant or deny a license application, which forecloses plaintiffs from showing an entitlement to one."); *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994) ("Where a local regulator has discretion with regard to the benefit at issue, there normally is no entitlement to that benefit.").

To have a legitimate claim of entitlement to such benefits, the government must have very little authority or discretion to deny them, such that conferral of the benefit is essentially assured. *See Bernheim v. Litt*, 79 F.3d 318, 323 (2d Cir. 1996) (stating that "where the complained-of conduct concerns matters that are within an official's discretion, entitlement to that benefit arises only when the discretion is so restricted as to virtually assure conferral of the benefit."); *RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989) ("Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest.").

AMS withdrew inspection services from Plaintiff pursuant to 7 C.F.R. § 50.11. This regulation provides that "The grading or inspection services withdrawn, after appropriate corrective action is taken, will be restored immediately, or as soon thereafter as a grader or inspector can be made available." 7 C.F.R. § 50.11. Because the USDA regulations are silent as to what constitutes "corrective action," AMS has discretion in determining whether this requirement has been fulfilled. Even assuming, however, that "corrective action" is established, a party must still apply to AMS for inspection services. In considering such applications, AMS has the discretion to deny them. See 7 C.F.R. § 51.9 (providing that an application for inspection services may be rejected by the inspector in charge if, inter alia, "it appears that to perform the inspection and certification service would not be to the best interest of the Government."); *Id.* § 51.46 (listing various reasons for which an

application for inspection services may be denied). Applicants are thus not assured of receiving inspection services from AMS-especially after they have been conditionally withheld. Accordingly, Plaintiff does not have a constitutionally protected property interest at stake and its due process claim is dismissed pursuant to Rule 12(b)(6).

III. Defendant's Motion for Summary Judgment:

Defendant moves for summary judgment on Plaintiff's APA claims. While its Complaint is far from clear, Plaintiff seems to allege that AMS's refusal to restore inspection services should be set aside pursuant to the APA, 5 U.S.C. § 706(2)(A), because: (1) AMS acted contrary to its own regulations ("first APA claim"); and (2) AMS's refusal was arbitrary, capricious, or an abuse of discretion ("second APA claim"). Defendant claims that it is entitled to summary judgment because AMS's refusal to restore inspection services was conducted in accordance with law and was not arbitrary, capricious, or an abuse of discretion.

Summary judgment is appropriate where there is no genuine issue of material fact, such that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). "Genuine" facts are those facts that provide a basis for a "rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). There is no genuine issue of material fact concerning AMS's denial of inspection services that would preclude entry of summary judgment.

A. Plaintiff's First APA Claim:

According to 5 U.S.C. § 706(2)(A), an agency's actions may be set aside if the agency did not act "in accordance with law." Courts must, however, give "substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 129 L. Ed. 2d 405, 114 S. Ct. 2381 (1994).

AMS conditionally withheld inspection services from Plaintiff in October 1999 pursuant to 7 C.F.R. § 50.11. According to this regulation, once inspection services are conditionally withheld, they will be restored after corrective action has been taken--a determination left to AMS's discretion. AMS acted in accordance with this regulation in

refusing to restore inspection services to Plaintiff. AMS determined that corrective action would be established if Plaintiff signed a template agreement. Because Plaintiff has refused to sign this agreement, it has not had inspection services restored. Plaintiff complains of never receiving a hearing on this issue. However, no USDA regulation requires that a hearing must be held to determine whether corrective action has been established and inspection services should be restored. Since AMS acted in accordance with its regulations, Defendant is entitled to judgment as a matter of law on Plaintiff's first APA claim.

B. Plaintiff's Second APA Claim:

An agency's actions may also be set aside if they were "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). The court must conduct its review "based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 84 L. Ed. 2d 643, 105 S. Ct. 1598 (1985). The scope of this review is "narrow and deferential." *Henley v. Food and Drug Admin.*, 77 F.3d 616, 620 (2d Cir. 1996). In conducting this review, the court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 53 (2d Cir. 2003).

The record reveals that AMS's decision not to restore inspection services unless Plaintiff signed a template agreement was not arbitrary, capricious, or an abuse of discretion. AMS made the decision to conditionally withdraw inspection services to ensure that "the bribery or other illegal or corrupt practices [at Hunt's Point] had been eliminated." (Skelton Decl. P14.) To that end, AMS drafted a template agreement that would restore inspection services to Plaintiff and other companies if they made certain representations. Judge Chin found in Tray-Wrap I that this proposed agreement was "more than reasonable" and did not rise to the level of arbitrary activity needed to set aside an agency's determination. Transcript of April 21, 2000 Hearing, at 9 (Lawler Decl. Ex. Q.) AMS learned in November 2001 that Spinale was no longer affiliated with Tray-Wrap. In response, AMS offered to restore inspection services if Tray-Wrap signed an agreement that was less restrictive than the one Judge Chin found to be reasonable. This latest proposal required Plaintiff, inter alia, to acknowledge that Spinale was

no longer employed by Plaintiff (which supposedly was the case) and to contact AMS if that fact changed.

Plaintiff emphasizes that charges against Spinale involving Tray-Wrap were dropped. Spinale also admitted, however, that he committed all of the offenses alleged in the indictment (including those involving Tray-Wrap). See Transcript of January 26, 2001 Hearing, at 10-11 (Lawler Decl. Ex. T.) Moreover, since pleading guilty to bribery, Spinale has had a continued presence at Hunt's Point and has frequently participated in inspection services for other companies. Plaintiff also complains about the proposal's waiver clause. This clause does not waive Plaintiff's right to ever sue USDA. It merely prevents Plaintiff from re-litigating AMS's withdrawal of inspection services for perhaps the third time.

Accordingly, AMS's decision not to restore inspection services to Plaintiff unless it signed a template agreement was not arbitrary, capricious, or an abuse of discretion. Rather, this decision was a reasonable means of ensuring that corruption at Hunts Point was eliminated. Therefore, Defendant is entitled to judgment as a matter of law on Plaintiff's second APA claim.

IV. Conclusion:

Defendant's motion to dismiss Plaintiff's negligence, breach of contract, and due process claims is granted. Defendant's motion for summary judgment on Plaintiff's remaining APA claims is granted. It is thus unnecessary to consider Defendant's motion to dismiss for res judicata.

SO ORDERED

_____

TRAY-WRAP, INC., v. PACIFIC TOMATO GROWERS. LTD.
02 Civ. 1615 (DC).
Filed November 1, 2004.

(Cite as: 2004 U.S. Dist. LEXIS 22389).

PACA – Reparation – Stipulation agreement, reversal.

Parties entered into a settlement agreement which dismissed reparation claim under PACA. Court denied Pacific's motion to set aside the agreement pursuant to FRCP 60(b)3 [Fraud in procuring settlement agreement] on the grounds that the opposing party Tray-Wrap, Inc. failed to disclose its legal tactics of pursuing matters after the settlement agreement in bringing suit in a state court on the same claims.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OPINION
MEMORANDUM DECISION

CHIN, D.J. USDJ

This case was filed on March 1, 2002, pursuant to the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499a et seq., to appeal a decision and order of the United States Department of Agriculture (the "DOA"). Appellant Tray-Wrap, Inc. ("Tray-Wrap") sought to set aside the DOA's decision, which found Tray-Wrap liable to appellee Pacific Tomato Growers, Ltd. ("Pacific") for $ 38,000.00, as the balance due for eight shipments of tomatoes delivered to Tray-Wrap, with interest and costs.

Although Tray-Wrap was appealing a DOA decision, the parties were entitled to a trial de novo. 7 U.S.C.§ 499g(c). The trial was scheduled for December 6, 2002, but on the eve of trial, the parties advised the Court that they had settled. Accordingly, the Court issued a 30-day order on December 5, 2002, discontinuing the action with prejudice but allowing the parties to restore the action within 30 days if settlement were not consummated within that time. In a letter dated January 2, 2003, the parties requested an extension of time to restore the action. That application was granted and the time was extended to February 7, 2003.

The Court did not hear from the parties within the extended time period, but they submitted a stipulation of dismissal on March 20, 2003, which the Court so ordered on March 26, 2003 and the Clerk docketed on April 1, 2003.

In relevant part, the stipulation provided:

> It is hereby stipulated and agreed . . . the above entitled action be, and the same hereby is dismissed; i.e., [Tray-Wrap] withdraws its appeal herein, and . . . [Pacific] will notify the P.A.C.A. Branch of the U.S. Department of Agriculture, Agricultural Marketing Service in Washington, D.C. in writing that it is dismissing its complaint . . . and it is further stipulated and agreed that [Tray-Wrap] shall be refunded its bond posted with this Court.

Tray-Wrap subsequently sued Pacific in New York Supreme Court for malicious prosecution in this matter. That complaint was filed on November 14, 2003.

On March 25, 2004, Pacific moved to set aside the April 1, 2003 order of dismissal pursuant to Fed. R. Civ. P. 60(b). The motion is hereby denied.

DISCUSSION

Pacific seeks relief from the April 1, 2003 order under Rule 60(b)(3) and (6) . Rule 60(b) provides in relevant part that:

> the court may relieve a party . . . from a final judgment, order, or proceeding for . . . (3) fraud . . ., misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

I address the request for relief under the two subsections separately.

A. Rule 60(b)(3)

The Second Circuit has held that "a Rule 60(b)(3) motion cannot be granted absent clear and convincing evidence of material misrepresentations and cannot serve as an attempt to relitigate the merits" of a case. *Fleming v. New York Univ*., 865 F.2d 478, 484 (2d Cir. 1989).

In the instant case, there is no indication, much less clear and convincing evidence, of fraud. Pacific does not provide specific incidences of misrepresentation by Tray-Wrap and there is no indication that misrepresentations were made to Pacific before it signed the stipulation.

Both parties in this case were represented by counsel who were fully capable of negotiating the terms of the document. Pacific argues that Tray-Wrap omitted material information by failing to disclose that it planned to sue Pacific in state court. Pacific has not shown, however, any duty on the part of Tray-Wrap -- its adversary in a lawsuit -- to disclose its legal strategy. Pacific could have required a general release or it could have insisted on a provision in the stipulation prohibiting future litigation.

Pacific signed the stipulation without objection, but now apparently believes it was injured by the settlement. This is not a basis for vacating an order under Rule 60(b). "When a party makes a deliberate, strategic choice to settle, she cannot be relieved of such a choice merely because her assessment of the consequences was incorrect." *United States v. Bank of New York*, 14 F.3d 756, 759 (2d Cir. 1994).

In its motion papers, Pacific includes conclusory statements alleging that Tray-Wrap defrauded the court. Although Rule 60(b) does not limit the power of the Court to decide a claim of fraud upon the court, Pacific has provided no evidence to substantiate the claim. Fraud upon the court "is limited to fraud which seriously affects the integrity of the normal process of adjudication." *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988). Pacific has presented no evidence of such fraud here.

The Rule 60(b)(3) motion is denied.

B. Rule 60(b)(6)

Relief may be granted under Rule 60(b)(6) when "extraordinary circumstances" justify relief or "where the judgment may work an extreme and undue hardship." In re *Emergency Beacon Corp*., 666 F.2d 754, 759 (2d Cir. 1981) (citations omitted). It is well-settled that "relief cannot be had under clause (6) if it would have been available under the earlier clauses." 11 Charles A. Wright, et al., Federal Practice & Procedure § 2864 at 362 (2d ed. 1995). See also, e.g., Emergency Beacon, 666 F.2d at 758 ("Relief under clause (6) is not available unless the asserted grounds for relief are not recognized in clauses (1)-(5)").

Pacific argues in its motion and reply papers that it was defrauded by Tray-Wrap, arguments appropriately categorized under clause (3) of Rule 60(b), discussed above. These arguments cannot be a basis for relief under Rule 60(b)(6). Nor has Pacific demonstrated any

extraordinary circumstances or undue hardship in any other respect. With no alternative basis for relief under Rule 60(b)(6), that prong of the motion is denied as well.

CONCLUSION

For the above reasons, Pacific's motion is denied. Tray-Wrap's request for costs and sanctions under Fed. R. Civ. P. 11, made as part of its opposition to the Rule 60(b) motion rather than separately as required by Rule 11(c)(1)(A), is also denied.

SO ORDERED

In re: FLEMING COMPANIES, INC., CAVENDISH FARMS, ET AL., v. FLEMING COMPANIES, INC., ET AL.
No. 03-1049-SLR.
Filed November 8, 2004.

(Cite as: 316 B.R. 809).

PACA – Trust, PACA – Canned agricultural commodities – Qualified products – Fresh, canned is not.

Sellers of wholesale food products to a now bankrupt retailer seek to have their canned food products (which were originally fresh fruits and/or vegetables) specially protected by the trust created under PACA [7 USC § 499 e(c)(2)]. The court denied sellers claim that "canned goods" are included in the definition of "fresh" [7 CFR § 46.2(u)]. Lacking specific definition as guidance, the court rationalized that PACA was created to protect sellers of "fresh" agricultural commodities which were highly perishable and where the value of the commodities quickly declined. Canned commodities on the other hand are meant to be stored with little or no further deterioration and as such do not come under the protection of the Act.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JUDGES: ROBINSON, Chief Judge.

MEMORANDUM OPINION

I. INTRODUCTION

On November 18, 2003, defendants filed a motion to withdraw the bankruptcy reference pursuant to 28 U.S.C. § 157(d). The motion was granted. Now before the court is defendants' motion for summary judgment against Dole Packaged Foods and Del Monte (D.I. 18), plaintiffs Dole Packaged Foods' and Del Monte's cross motion for summary judgment (D.I. 20), plaintiffs' motion for summary judgment directed to "battered and coated produce" (D.I. 27), and plaintiffs' motion for partial summary judgment on fees and interest charges. (D.I. 32)

II. BACKGROUND

Defendants are "food, grocery and general merchandise wholesaler[s] and distributor[s]" that bought and sold processed food products in interstate commerce. (D.I. 1 at 2) On April 1, 2003, defendants initiated bankruptcy proceedings under Chapter 11 of the United States Bankruptcy Code. *Id.* Since filing the bankruptcy petition, defendants have continued to operate their business as debtors-in-possession. *Id.*

Plaintiffs are ten independent corporations, each of which sold wholesale quantities of various food products to defendants. *Id.* On September 26, 2003, plaintiffs filed an adversary complaint in bankruptcy court alleging violations of the Perishable Agricultural Commodities Act ("PACA"). See 7 U.S.C. § 499a et. seq. (2004).

PACA was intended to protect suppliers of perishable agricultural products from the risk that a wholesale buyer of produce would be unable to pay for the goods. See generally *Patterson Frozen Foods, Inc. v. Crown Foods Int'l, Inc.*, 307 F.3d 666, 669 (7th Cir. 2002); *Magic Restaurants, Inc. v. Bowie Produce Co. (In re Magic Restaurants, Inc.),* 205 F.3d 108, 112 (3d Cir. 2000). Unlike other creditors, an interest in the goods themselves is of little protection to such suppliers because the goods are marketable for a finite amount of time. To alleviate this risk, Congress provided three types of protections under PACA. First, the act prohibits "unfair conduct" by entities in the agricultural commodities business. See 7 U.S.C. § 499b (2004). Second, it requires any entity carrying on "the business of a commission merchant, dealer, or broker"

in the agricultural field to be licensed by the Secretary of Agriculture. 7 U.S.C. § 499c. Third, and of relevance to the dispute at bar, it created a "trust for the benefit of all unpaid suppliers or sellers" of agricultural commodities. 7 U.S.C. § 499e(c)(2). The trust is funded with "agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities." *Id.* The trust remains in place until all "the sums owing in connection with such transactions have been received by such unpaid suppliers." *Id.* Unpaid suppliers who qualify under PACA are given an interest in the buyer that is superior to any other lien or secured creditor. *See Magic Rest.*, 205 F.3d at 112.

In order to be protected by PACA, plaintiffs have to show: (1) the goods in question were perishable agricultural commodities; (2) the commodities were received by a commission merchant, dealer or broker; and (3) they provided written notice of their intent to enforce PACA. At issue in three of the motions is whether canned goods and frozen potatoes are perishable agricultural commodities. In the fourth motion, the issue is whether the interest and attorney fees associated with defendants' overdue payments can be taken out of the PACA trust.

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.10, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Horowitz v. Fed. Kemper Life Assurance Co.*, 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine

issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Pa. Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995).

The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

IV. CROSS MOTIONS FOR SUMMARY JUDGMENT

Defendants argue that PACA does not cover the canned goods they purchased from plaintiffs Dole Packaged Food and Del Monte because canned goods do not constitute fresh produce, as defined under PACA. Plaintiffs argue that the definition of "fresh," as promulgated by the United States Department of Agriculture ("USDA"), encompasses the canned goods sold to defendants. This court agrees with defendants.

PACA's application is limited to "perishable agricultural commodit[ies]," defined as fresh fruits or vegetables "of every kind and character." 7 U.S.C. § 499a (2004). PACA was enacted to protect "producers of perishable agricultural goods [who] in large part [are] dependent upon the honesty and scrupulousness of the purchaser." *Magic Rest.*, 205 F.3d at 110. In 1984, PACA was amended to give unpaid suppliers an interest in the trust corpus of a bankrupt buyer that is superior to the interest of any other creditor. *Id.* at 112. Congress reported that this added protection was necessary because sales of perishable agricultural commodities "'must be made quickly or they are not made at all . . . . Under such conditions, it is often difficult to make credit checks, conditional sales agreements, and take other traditional safeguards.'" *Id.* at 111 (quoting H.R. Rep. No. 98- 543, at 3 (1983), reprinted in 1984 U.S.C.C.A.N. 405, 406).

Congress vested regulatory authority under PACA with the USDA.

See 7 U.S.C. § 499o. The USDA expanded upon Congress's definition of "perishable agricultural commodity" in its regulations, stating:

> 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. The effects of the following operations shall not be considered as changing a commodity into a food of a different kind or character: Water, steam, or oil blanching, chopping, color adding, curing, cutting, dicing, drying for the removal of surface moisture; fumigating, gassing, heating for insect control, ripening and coloring; removal of seeds, pits, stems, calyx, husk, pods, rind, skin, peel, et cetera; polishing, precooling, refrigerating, shredding, slicing, trimming, washing with or without chemicals; waxing, adding of sugar or other sweetening agents; adding ascorbic acid or other agents to retard oxidation; mixing of several kinds of sliced, chopped, or diced fruit or vegetables for packaging in any type of containers; or comparable methods of preparation.

7 C.F.R. § 46.2(u) (2003).[1]

It is evident from the above language that the USDA has included within the scope of PACA's protection a broad range of processes characterized as not altering the essential nature of "fresh" fruits and vegetables. Indeed, the USDA recently amended its definition of "fresh" to include "battered" and "coated" fruits and vegetables. *See Fleming Companies, Inc. v. USDA*, 322 F. Supp.2d 744, 749 (E.D. Tex. 2004). Despite the wide net thrown out by the USDA in its regulation, however, the court declines to characterize canned goods as "fresh," for several reasons.

In the first instance, such a characterization flies in the face of

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[1] In 2004, the USDA amended its definition to include "coating" and "breading." 7 C.F.R. § 46.2(u) (2004).

PACA's legislative history. As noted above, Congress created the trust at issue in order to protect suppliers of "perishable" agricultural goods because sales of such goods must be made quickly, while the goods are still marketable. Common sense informs the notion that suppliers of canned goods are not forced to make such quick sales because the canning process renders their products nonperishable for an extended period of time, certainly well beyond the time it takes to negotiate a sale.

Such a characterization likewise is contrary to the ordinary meaning of the words chosen by Congress to define the statutory territory. More specifically, Congress used "fresh" to describe a "perishable agricultural commodity," the common definition of which explicitly excludes canned goods. See The American Heritage Dictionary 534 (2d ed. 1984) (defining "fresh" as "not preserved, as by canning, smoking or freezing"). The rationale of PACA and the common definition are in accord. There is no indication that Congress intended something other than the ordinary meaning. Therefore, PACA was not intended to include canned goods.

Furthermore, in similar legislation, Congress has specifically excluded canned goods from the ambit of "perishable" agricultural commodities. For instance, in 1936 Congress promulgated another act that dealt with perishable agriculture commodities, the Walsh-Healey Act. See Act of June 30, 1936, ch. 881, 49 Stat. 2036. The act was intended to use the power of federal contracts to raise employee wages. *Id*. The act, however, did not apply to contracts for "perishables." See 41 U.S.C. § 43 (2004); § 9, 49 Stat. at 2039. With respect to the Walsh-Healey Act, the USDA explicitly defined "perishable" as not including canned products. See 41 C.F.R. § 50-201.2 (b) (2004).[2] Without a reason to conclude that Congress or the USDA is using "perishable" to mean something different under PACA than under the Walsh-Healey Act, this court infers that "perishable" does not include canned goods.

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[2] The legislative history of the Walsh-Healey Act does not indicate the rationale behind the exception, nor does it indicate what Congress intended "perishable" to mean. The exception was in the original act that notably was enacted only six years after PACA. Four years after the Walsh-Healey Act, PACA was amended to add cherries in brine in the definition of "perishable agricultural commodity," but the rest of the definition remained the same. See June 29, 1940, ch. 456, § 2, 54 Stat. 696.

Finally, at least one other court has found that when fruits have undergone a preservation process, they no longer can be characterized as "fresh." *See In re L. Natural Foods Corp.*, 199 B.R. 882 (Bankr. E.D. Pa. 1996) (holding that dried apricots and prunes were not "fresh" because the drying process removed so much internal water that the nature of the item had changed).

In sum, despite the broad language employed by the USDA in its regulation, it does not specifically include "canning" among those processes characterized as not altering the essential nature of a "fresh" fruit or vegetable. Absent such specific direction from the USDA, there is no persuasive evidence that canned goods otherwise were intended to be or are included within the scope of PACA's protection. In sum, the court declines to ignore PACA's plain language and legislative history or to discard common sense in order to embrace plaintiffs' position.

V. MOTION FOR SUMMARY JUDGMENT ON BATTERED AND COATED CLAIMS

Plaintiffs' motion for summary judgment with respect to their battered and coated potato products is denied without prejudice to renew. At issue in this case is not only whether plaintiffs' products are protected under PACA, but also whether the USDA's inclusion of battered and coated potatoes is a valid administrative action. This court is not bound by the decision of the United States District Court for the Eastern District of Texas with respect to its determination that the USDA's amendment is valid.At this time, the parties have not briefed the court on the issue of administrative validity, and this court declines to consider whether plaintiffs' frozen potato products are included in the USDA's definition of "fresh" before it considers the validity of the amended definition. To enable the parties to file more complete motions for summary judgment on this issue, discovery is opened for ninety (90) days with respect to plaintiffs' battered and coated french fries. At the close of discovery, the parties are expected to file any necessary motions for summary judgment.

VI. MOTION FOR PARTIAL SUMMARY JUDGMENT ON

PREJUDGMENT INTEREST AND ATTORNEY FEES[3]

A trust created pursuant to PACA is available for the payment of all "sums owing in connection with such transactions." 7 U.S.C. § 499e (emphasis added). Plaintiffs claim attorney fees and prejudgment interest are sums owing in connection with the sales at issue. Defendants argue that PACA is narrower and only the amount owed for the commodities is covered by the trust fund.

1. Attorney Fees

Under the American Rule, a winning party is not automatically entitled to attorney fees. Attorney fees can be awarded if there is a statutory basis or evidence of Congressional intent to award fees. *See generally Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975). Section 499e makes no provision for attorney fees. Other sections of PACA, however, do allow for attorney fees. See, e.g., 7 U.S.C. § 499g(c) (providing fees to a party who successfully appeals from a reparation order for violation of § 499b). Clearly, Congress understood that the award of attorney fees in the trust provision would require express language in the statute. If Congress had intended the trust provision to include attorney fees, it would have included such a statement. *See Middle Mountain Land and Produce v. Sound Commodities, Inc*., 307 F.3d 1220, 1225 (9th Cir. 2002); *Hereford Haven, Inc. v. Stevens*, 1999 U.S. Dist. LEXIS 3116, No. 98-CV-0575, 1999 WL 155707, at *4 (N.D. Tex. March 12, 1999); *Valley Chip Sales v. New Arts Tater Chip Co*., 1996 U.S. Dist. LEXIS 18232, No. 96-2351, 1996 WL 707028, at *6 (D. Kan. Oct. 10, 1996); *In re W.L. Bradley Co*., 78 B.R. 92, 95 (Bankr. E.D. Penn. 1987).

In addition to a statutory basis, attorney fees can be awarded if there

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[3] Defendants filed a motion to strike plaintiffs' reply memorandum of law in support of plaintiffs' motion for summary judgment. Defendants argued that plaintiffs' reply contained "new arguments, new authorities, and new evidence." (D.I. 44 at 2) Defendants, however, fail to direct the court's attention to any arguments, authorities or evidence in the reply memorandum that are not included in the plaintiffs' original brief. Nor do the defendants provide evidence regarding which material in the reply brief "should have been included in a full and fair opening brief." Local Rule 7.1.3 (c)(2). From what the court has discerned, everything in plaintiffs' reply memorandum is either in the original brief or in response to defendants' arguments in opposition of plaintiffs' motion. Therefore, defendants' motion is denied.

is a contractual basis for them. *See Middle Mountain Land and Produce*, 307 F.3d at 1225 (citing *Alyeska Pipeline Serv. Co.*, 421 U.S. at 257-59). In this case, some of the plaintiffs included provisions for attorney fees in their invoices sent to defendants. Defendants argue that the attorney fees provisions included in the invoices were not binding provisions of a contract because they materially altered the agreement. Defendants further argue that different laws apply to each of the plaintiffs because they are each "residents" of different states.

This court did not find any statutory difference between the states at issue because each has adopted U.C.C. § 2-207 verbatim.[4] See generally Cal. Com. Code § 2207 (West 2002), Fla. Stat. ch. 672.207 (2004), Tex. Bus. & Com. Code Ann. § 2-207 (Vernon 1994), Pa. Stat. Ann. tit. 13 § 2207 (West 1984). Pursuant to U.C.C. § 2-207, the attorney fees included in plaintiffs' invoices are considered "sums owing in connection with [the] transaction." *See Country Best v. Christopher Ranch, LLC,* 361 F.3d 629 (11th Cir. 2004) (per curiam); *Weis-Buy Servs. v. Paglia*, 307 F. Supp. 2d 682 (W.D. Penn. 2004); *E. Armata, Inc. v. Platinum Funding Corp*., 887 F. Supp. 590 (S.D.N.Y. 1995). Despite defendants' own indication that the consideration of whether a change materially alters a contract is one that depends on the unique facts of every case, they have not asserted any facts that would indicate that the attorney fees provisions at issue materially changed their contracts with plaintiffs. (D.I. 38 at 13, citing *Hunger U.S. Special Hydraulics Cylinders Corp. v. Hardie-Tynes Mfg. Co*., 2000 U.S. App. LEXIS 1520, No. 99-4042, 2000 WL 147392, at *9 fn.10 (10th Cir. Feb. 4, 2000)

Plaintiffs Cavendish Farms, DiMare Fresh, Dole Fresh Fruit, Dole Fresh Vegetables and Heinz included clauses in their invoices requiring defendants to pay attorney fees associated with collecting overdue

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[4] Plaintiff Cavendish is a Canadian corporation that shipped fruits and vegetables to various locations throughout the United States. (D.I. 41 at 6) Heinz is a Pennsylvania corporation. (Id.) Dole Fresh Fruit and Dole Fresh Vegetable and are both California corporations. (Id.) Defendant Fleming is a Texas corporation. (Id.) Although the contracts at issue could be controlled by laws of other states, defendants do not argue that the contracts are governed by any state laws other than those cited.

payments. (D.I. 41 at Ex. A, B, C, D, E) These plaintiffs are entitled to collect attorney fees because the fees are directly associated with the transactions at issue. The other plaintiffs, however, are not entitled to attorney fees because there is no contractual or statutory basis for such an award.

2. Prejudgment Interest

Prejudgment interest can be awarded to a party at the court's discretion. When implementing PACA, Congress intended to protect agricultural commodity dealers when buyers failed to pay for purchased goods. The act gives an unpaid supplier an interest that is superior to all other creditors, which illustrates Congress's intent to provide suppliers with the utmost protection with respect to monies owed. This superior interest is broad, as it encompasses all "sums owing in connection with [the] transaction." 7 U.S.C. § 499e(c); *see also Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 138 (3d Cir. 2000). Allowing a buyer to make a late payment without paying the appropriate interest, and accumulating the interest for itself, is antithetical to the purpose of PACA. *See generally Middle Mountain Land and Produce,* 307 F.3d at 1224; *Valley Chip Sales, Inc.*, 1996 U.S. Dist. LEXIS 18232, No. 96-2351, 1996 WL 707028, at *6; *E. Armata, Inc.*, 887 F. Supp. at 595; *In re W.L. Bradley Co.*, 78 B.R. 92, 94.

Plaintiffs Cavendish Farms, DiMare Fresh, Dole Fresh Fruit, Dole Fresh Vegetables and Heinz included a provision for interest on late payments in their invoices. Once included in the agreement, the interest is explicitly connected to the sales transaction. If successful, these plaintiffs are entitled to prejudgment interest at the rate cited in the sales contract. The other plaintiffs are also legally entitled to prejudgment interest at a rate to be determined, if necessary, upon the conclusion of the case.

VII. CONCLUSION

For the stated reasons, defendants' motion for summary judgment against plaintiffs Del Monte Foods and Dole Packaged Foods is granted. Plaintiffs' Del Monte Foods and Dole Packaged Foods motion for summary judgment is denied.

Plaintiffs' motion for summary judgment with respect to battered and

coated produce is denied without prejudice to renew. Discovery on the issue is opened for ninety days and any new or renewed motions for summary judgment are due two weeks after that.

Plaintiffs' motion for summary judgment with respect to their right to attorney fees and costs is granted in part and denied in part. Plaintiffs' motion with respect to attorney fees is granted as to plaintiffs Cavendish Farms, DiMare Fresh, Dole Fresh Fruit, Dole Fresh Vegetables and Heinz. Plaintiffs' motion for summary judgment with respect to attorney fees is denied as to plaintiffs Dimare Fresh, Dimare-Tampa, and Dole Distribution- Hawaii. Plaintiffs' motion with respect to prejudgment interest is granted as to all plaintiffs. Defendants' motion to strike plaintiffs' reply memorandum of law in support of plaintiffs' motion for summary judgment is denied. An order consistent with this memorandum opinion shall issue.

B.T. PRODUCE CO., INC., v. ROBERT A. JOHNSON SALES, INC.
No. 03 Civ. 5634 (VM).
Filed December 14, 2004.

(Cite as: 354 F. Supp. 2d 284).

PACA – Reparation – Bribery – Reparation order, presumptive validity of facts recited therein.

B.T. Produce (wholesaler) appealed a reparation order which found that wholesaler's agent (Taubenfeld) was involved in a scheme or pattern to bribe USDA inspectors such that R.A.J.S. was induced by mistake to accept a lower market price based upon false inspection reports. The court found that the unsupported and inherently contradictory affidavits of the convicted USDA inspectors regarding the dates of the bribery acts did not overcome the presumptive validity of the Reparation Order under 7 USC 499g(c). The plea agreement of B.T.'s agent directly contradicted the dates of illegal activity described in the affidavit of the USDA inspector who were convicted of accepting bribes.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF

NEW YORK

JUDGES: Victor Marrero, U.S.D.J.

DECISION AND ORDER

Petitioner B.T. Produce Co, Inc. ("BTP") has appealed a June 30, 2003 reparation order (hereinafter, "Reparation Order") rendered by a Judicial Officer of the United States Department of Agriculture ("USDA") in favor of respondent Robert A. Johnson Sales, Inc. ("RAJS"), awarding RAJS $ 34,171.75 plus interest and costs. Under Section 499g(c) of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499a et seq., such an appeal is reviewed de novo by a federal district court, "except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated." 7 U.S.C. § 499g(c). BTP's appeal was filed with this Court on July 30, 2003.

RAJS has now moved for summary judgment on the appeal pursuant to Fed. R. Civ. P. 56.[1] The Court grants RAJS's motion, concluding that BTP has failed to produce any evidence that reasonably calls into question the validity of the Reparation Order.

I. BACKGROUND

A. BTP'S INVOLVEMENT IN CORRUPTION AT HUNTS POINT PRODUCE MARKET

The reparations proceeding that is the subject of the instant motion is one of many that arose out of corrupt practices at the Hunts Point Wholesale Produce Market in the Bronx, New York. *See Koam Produce, Inc. v. DiMare Homestead, Inc.*, 213 F. Supp. 2d 314 (S.D.N.Y. 2002) (hereinafter, "Koam I") (affirming PACA reparation award arising out of corrupt practices at Hunts Point); *Koam Produce, Inc. v. DiMare Homestead, Inc*. 222 F. Supp. 2d 399 (S.D.N.Y. 2002) (hereinafter, "Koam II") (awarding attorney's fees to prevailing party in

[1] The parties have also moved for the Court to take judicial notice of several documents relevant to this appeal. For reasons discussed infra, the Court grants these motions.

reparation proceeding under PACA), aff'd, 329 F.3d 123 (hereinafter, "Koam III") (affirming Koam I and Koam II). As uncovered by federal investigators and as discussed in Koam I, 213 F. Supp. 2d at 317-18, produce wholesalers operating out of the Hunts Point Market would regularly pay small bribes to USDA inspectors and supervisors, who in exchange for the bribes would artificially downgrade produce in official inspections requested by the wholesalers. The wholesalers would then be able to use the fraudulent inspections as leverage with produce suppliers to negotiate a reduction in the price paid by the wholesalers to the suppliers, who were not present during the inspections and who had no reasonable means of calling the inspections' results into question. This conduct occurred from at least the beginning of 1996, when the federal government began an investigation it called "Operation Forbidden Fruit," through October 27, 1999, when twenty-one people, including eight USDA inspectors and thirteen owners and employees of produce wholesalers were arrested for their roles in the bribery scheme. See *Id.*; United States Department of Agriculture, Report and Analysis of the Hunts Point Bribery Incident (hereinafter, "USDA Report"), attached as Ex. C to RAJS's Request for Court to Take Judicial Notice of Matters in Support of RAJS's Motion for Summary Judgment, dated Aug. 31, 2004 (hereinafter, "RAJS Request for Judicial Notice").[2]
Though this point is disputed by BTP in its pleadings and two brief affidavits submitted on its behalf, numerous documents indicate that an employee and part-owner of BTP, William Taubenfeld ("Taubenfeld"), had paid bribes and received benefits under the illicit arrangement from at least 1996 until he was arrested and indicted on October 27, 1999.[3]

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[2] The Court grants RAJS's request to take judicial notice of the USDA Report, which was made without opposition from BTP. Courts have frequently taken judicial notice of official government reports as being "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b). *See, e.g., Texas & Pac. Ry. Co. v. Pottorff,* 291 U.S. 245, 254 n. 4, 78 L. Ed. 777, 54 S. Ct. 416 (1933), amended on other grounds, 291 U.S. 649, 54 S. Ct. 525 (1934) (taking judicial notice of official reports put forth by the Comptroller of the Currency); *Kaggen v. I.R.S.*, 71 F.3d 1018, 1021 (2d Cir. 1995).

[3] The Court also grants RAJS's and BTP's requests to take judicial notice of various documents from a criminal case brought by the United States against Taubenfeld. See

(continued...)

Although Taubenfeld's indictment only charged him with thirteen bribes of USDA inspectors between March and August of 1999, see Indictment, *United States v. Taubenfeld*, 99 Cr. 1094 (S.D.N.Y. Oct. 27, 1999), attached as Ex. A to Plaintiff-Appellant's Request for the Court to Take Judicial Notice, dated Sept. 30, 2004 (hereinafter, "BTP Request for Judicial Notice"), his Plea Agreement permitted him to plead guilty to only one count of bribery in exchange for a promise from the Government that he would not "be further prosecuted criminally . . . for his participation, from in or about 1996 through in or about October 27, 1999, in making cash payments to United States Department of Agriculture produce inspectors in connection with inspections of fresh fruit and vegetables at B.T. Produce Co., Inc." Plea Agreement at 2, *United States v. Taubenfeld*, 99 Cr. 1094 (S.D.N.Y. Feb. 2, 2000) (hereinafter, "Taubenfeld Plea Agreement"), attached as Ex. A to RAJS Request for Judicial Notice (emphasis added).[4] Furthermore, in Taubenfeld's sentencing hearing, neither Taubenfeld nor his attorney objected when Judge Cote of this Court described Taubenfeld's illegal conduct as occurring between January 1996 and October 1999, and asked if there were any remaining factual issues in dispute related to the Government's case against Taubenfeld. See Transcript at 3-4, *United States v. Taubenfeld*, 99 Cr. 1094 (S.D.N.Y. May 11, 2000) (hereinafter, "Taubenfeld Sentencing Hearing"), attached as Ex. B to RAJS Request

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(...continued)
United States v. Taubenfeld, 99 Cr. 1094 (DLC) (S.D.N.Y. filed Oct. 27, 1999). The parties did not object to each others' requests, and the documents the parties are seeking to introduce -- Taubenfeld's indictment, his plea agreement with the Government, and the transcript of his sentencing hearing, are subject to judicial notice pursuant to Fed. R. Evid. 201(b). See, e.g., Jacques v. R.R. Retirement Bd., 736 F.2d 34, 40 (2d Cir. 1984) (taking judicial notice of complaint in inferior court within same jurisdiction in related case); Allen v. City of Yonkers, 803 F. Supp. 679, 697 n.22 (S.D.N.Y. 1992) (taking judicial notice of prior action in this District involving some of the same parties).

[4] The Plea Agreement was also part of the official USDA record that served as the basis for the Reparation Order. See Certified Copy of PACA Docket No. R-01-033 at 5.

for Judicial Notice.[5] BTP nonetheless insists that there is no evidence that Taubenfeld bribed any USDA inspectors on its behalf before the fall of 1998, at the earliest. (See BTP's Memorandum of Law in Opposition to Motion for Summary Judgment (hereinafter, "BTP Mem. of Law") at 3-4.) In support of its assertions, BTP puts forth two declarations by USDA inspectors who pled guilty to taking bribes and preparing fraudulent inspections as part of the corrupt practices at the Hunts Point Market, and who claim that Taubenfeld had not begun bribing them or other inspectors until the later half of 1998, at the earliest. (See Declaration of Michael Tsamis, dated Sept. 25, 2004 (herinafter, "Tsamis Decl."), attached to Plaintiff-Appellant's Counter-Statement of Contested Material Facts (hereinafter, "BTP Rule 56.1 Statement"), P3 ("I did, occasionally receive $ 50.00 payments from Billy Taubenfeld in 1999, but I have no recollection of receiving such payments from anyone at BT Produce prior to late 1998."); Declaration of Glenn Jones, dated Sept. 24, 2004 (hereinafter, "Jones Decl."), attached to BTP Rule 56.1 Statement, P4 ("I was personally aware when Billy Taubenfeld, a salesman at B.T. Produce . . ., first began making payments to inspectors when they were present at that wholesaler to perform inspections on produce shipments. Such payments did not begin until the later half of 1998.").)

B. THE DISPUTE BETWEEN THE PARTIES

In 1996 and 1997, RAJS, a California supplier of grapes, sold several shipments of grapes to BTP at the Hunts Point Market that had been inspected by USDA inspectors and found below grade. On the basis of these inspections, RAJS had agreed to reduce the prices it would otherwise have charged BTP for the shipped grapes. Upon learning of the corrupt practices at the Hunts Point Market during that period of

[5] Judge Cote's description of Taubenfeld's involvement in the fraudulent scheme appears to be based at least in part on the Presentence Investigation Report that the Probation Department prepared to aid in Judge Cote's sentencing of Taubenfeld. *See Presentence Investigation Report, United States v. Taubenfeld*, 99 Cr. 1094 (S.D.N.Y. Apr. 28, 2000) (hereinafter, "Taubenfeld PSR"). In that Report, to which Taubenfeld had no substantive objections, see *Id.* at 25, Taubenfeld is described as having bribed a cooperating witness "for many years," *Id.* at 9, and as having paid corrupt inspectors regular bribes from at least January 1996 through the date of his arrest in 1999, see *Id.* at 12.

time, RAJS filed a PACA reparation claim against BTP on March 24, 2000, seeking reimbursement for the amount by which ten separate shipments of grapes to BTP during 1996 and 1997 were devalued as a result of allegedly fraudulent inspections.[6] BTP filed counterclaims related to the ten shipments, alleging that it was fraudulently induced to overpay for the shipments by more than $ 100,000.

The resulting Reparation Order denied RAJS's claims as to five of the shipments and BTP's counterclaims in their entirety, but granted reparations against BTP for the five other devalued shipments. The Reparation Order first acknowledged that there was no explicit evidence on the record that any of the inspections of the ten challenged shipments were fraudulent. It further noted that five of the ten challenged shipments were inspected by UDSA employees who were not implicated in the bribery scheme. The Reparation Order thus denied RAJS's reparation claims related to those five shipments, concluding that RAJS could not demonstrate that the inspections were tainted by bribes. See Reparation Order at 13. The other five inspections, however, were undertaken by USDA inspectors who were charged and convicted of accepting bribes from wholesalers. The Reparation Order determined that these inspections were procured by Taubenfeld acting as an agent for BTP, and that Taubenfeld's actions could thus be charged to BTP. See *Id.* at 21. Because the inspections were procured by an individual who had admitted to committing bribes during the period at issue, and conducted by USDA inspectors who had been found to have accepted bribes during that same period, the Reparations Order concluded that the allowances or downward price adjustments that RAJS had agreed to accept as a result of the five corrupt inspections could be set aside on the grounds of misrepresentation or unilateral mistake. See *Id.* at 24. It denied BTP's counterclaims on the grounds that they were time-barred under PACA's nine-month statute of limitations and were not supported by evidence that the parties had reached an accord and satisfaction on

[6] RAJS's PACA claims were not time-barred, despite a nine-month statute of limitations normally applying to such claims, see 7 U.S.C. § 499f(a)(1), because Congress explicitly extended the deadline for filing PACA reparation claims "involving the allegation of a false inspection certificate prepared by a grader of the Department of Agriculture at the Hunts Point Terminal Market" until January 1, 2001. Grain Standards and Warehouse Improvement Act of 2000, Pub. L. No. 106-472, § 309, 114 Stat. 2058, 2075.

the shipments that served as the basis for its counterclaims. *Id*. at 18-19. Since BTP had no evidence independent of the allegedly fraudulent inspection certificates to support its claims that RAJS's produce was damaged at the time it was accepted, the Reparations Order required BTP to pay damages to RAJS reflecting the amount by which the produce was devalued as a result of the inspections. For three of the shipments, designated as Shipments 3, 7, and 8 in the Reparation Order, damages were calculated as the difference between the contract price BTP had originally agreed to pay RAJS and the amount it ultimately paid after RAJS agreed to make adjustments as a result of the inspections. Those damages totaled $ 18,120.00. The other two shipments, designated as Shipments 9 and 10 in the Reparations Order, were sold on what was known as an "open" basis, with the prices of the shipments to be negotiated upon their arrival at the Hunts Point Market. *Id*. at 14-15. Based on published prices at the market for various grades of grapes on the days Shipments 9 and 10 arrived at the Hunts Point Market, the Reparations Order concluded that RAJS received $16,051.75 less than it would have had the inspections not downgraded the grapes. It thus ordered BTP to pay RAJS this amount in damages as well, for a total of $ 34,171.75 in damages, plus interest in the amount of 10 percent per annum from January 1, 1998 until paid, plus $ 300.00 in costs.

This appeal followed.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) provides for summary judgment when the materials offered in support of an in opposition to the motion "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Court ascertains which facts are material by considering the substantive law of the action, for only those "facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Normally, a moving party who bears the ultimate burden of proof at

trial must "support" its motion for summary judgment by "informing the district court of the basis for its motion," and by identifying portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In this case, however, BTP, the nonmoving party, bears an initial burden of production at trial to call into question the prima facie validity of the Reparation Order. This burden of production is placed on BTP by 7 U.S.C. § 499g(c), which states that reparation orders must be treated as "prima-facie evidence of the facts therein stated." *See Frito Lay, Inc. v. Willoughby*, 274 U.S. App. D.C. 340, 863 F.2d 1029, 1032 (D.C. Cir. 1988); *Frankie Boy Produce Corp. v. Sun Pacific Enterprises*, 2000 U.S. Dist. LEXIS 9961, No. 99 Civ. 10158 (DLC), 2000 WL 991507 at *1 (S.D.N.Y. July 19, 2000).

Frito Lay establishes that BTP must make an affirmative showing that there is a genuine issue for trial in order to defeat RAJS's motion for summary judgment. As in Frito Lay, the appellee, RAJS, faces the burden of proving its right to recover under PACA. Also as in *Frito Lay*, the appellee (RAJS) discharged its initial burden as moving party under *Celotex* "when, armed with the prima facie value of the Secretary's decision, [RAJS] alerted the Court to the absence of evidence to support appellant's case." *Frito Lay*, 863 F.2d at 1033.[7] As the appellant was required to do in *Frito Lay*, BTP must in this case "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* (quoting *Celotex*, 477 U.S. at 324) (internal quotation marks omitted).

B. BTP HAS FAILED TO MEET ITS BURDEN OF PRODUCTION

The Court concludes that BTP has failed to introduce any evidence that legitimately calls into question the Reparation Order's prima facie validity. For BTP to succeed in establishing that there is a "genuine issue for trial," *Id.*, it must demonstrate that there is some means of distinguishing RAJS's claims from those of the produce supplier in

[7] Other than the documents related to Taubenfeld and Operation Forbidden Fruit judicially noticed infra, RAJS is has introduced no evidence other than the Reparation Order in support of its Motion for Summary Judgment.

Koam. In that case, a produce supplier who agreed to accept downward price adjustments from wholesalers at the Hunts Point Market as a result of negative USDA inspections filed a PACA reparation claim against the wholesaler, seeking damages associated with those downward adjustments. The inspections were conducted by USDA inspectors who admitted to taking bribes during that period of time, and were requested by an employee of the wholesaler who had admitted to paying bribes during that time. The PACA reparation order in that case found no evidence that the specific inspections giving rise to the downward adjustments were fraudulent, but nonetheless ordered the wholesaler to pay reparations. The District Court affirmed the reparation order over the objection of the wholesaler, who argued that the supplier needed to offer evidence that each of the challenged inspections were actually fraudulent.

The Court of Appeals rejected that argument, concluding that the wholesaler's price adjustment agreements could be voided under the doctrine of unilateral mistake even without evidence that the specific inspections were fraudulent. Under the doctrine:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake . . ., and
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

Koam III, 329 F.3d at 127 (quoting Restatement (Second) of Contracts § 153).

The Circuit Court found that the supplier's lack of knowledge concerning the wholesaler's and inspectors' involvement in a bribery scheme at the time the adjustments were made led the supplier to be mistaken concerning the validity of the [USDA inspections: "It is clear that, when the parties agreed to the price adjustments, DiMare [the supplier] was mistaken as to both whether Koam [the wholesaler] had

paid bribes to USDA inspectors to influence the outcome of inspections and whether the USDA inspectors who examined the tomatoes had accepted bribes." *Id.* It was equally clear to the Circuit Court that the mistakes were material and adverse to the supplier, that the supplier did not bear the risk of mistake, and that the mistake was the fault of the wholesaler's failure to disclose its own involvement in bribery activities. *Id.* at 127-28. The Circuit Court also held that the adjustments were voidable on the grounds that it would be unconscionable to enforce the agreements, "which resulted from the work of inspectors who had accepted bribes." *Id.* at 128.

The Reparation Order in this case was based on the same legal doctrine adopted by the Circuit Court in Koam III, as well as on the doctrine of misrepresentation. See Reparation Order at 19-24. As approved of by the Circuit Court in Koam III, the Reparation Order granted relief under these doctrines where a downward price adjustment was requested by an employee of a produce wholesaler, Taubenfeld, who was convicted of bribing public officials, based on an inspection conducted by an inspector who was convicted of taking bribes. BTP does not take issue with the Reparation Order's legal analysis, but instead argues that this case can be distinguished from Koam on the grounds that its employee, Taubenfeld, did not begin to engage in illegal activity until after the inspections at issue in this case were already completed.[8] The only evidence that it has introduced in this Court in support of this argument, however, are two declarations by USDA inspectors who pled guilty to accepting bribes from produce wholesalers. These declarations, as described above, briefly assert that Taubenfeld did not begin bribing USDA inspectors until late 1998. They are accompanied by conclusory allegations in BTP's brief that Taubenfeld did not begin making illegal payments until 1998, at the earliest. See BTP Mem. of Law at 2 ("There was no evidence introduced in the USDA proceeding that Billy Taubenfeld (or anyone else at BT) made any illegal payments to any inspector prior to the earliest criminal

[8] BTP does not dispute that the inspectors whose reports prompted RAJS to accept downward price adjustments were accepting bribes at the time of the inspections.

charge relating to March 24, 1999.");[9] *Id.* at 4 ("The Secretary would be likewise justified in voiding agreements between the Fall of 1998, when it can now be established that Taubenfeld began his illegal payments, and October 27, 1999 when he was arrested and ceased his connection with BT.")

The Court concludes that the unsupported declarations of the two inspectors are insufficient in several respects to call into question the Reparation Order. First, the supplier in Koam was allowed to void downward price adjustments on the grounds that it would be unconscionable to enforce adjustments "which resulted from the work of inspectors who had accepted bribes" where the company benefitting from the adjustments had engaged in, and profited from, illegal bribery, *Koam III*, 329 F.3d at 128, as well as on the basis of the produce wholesaler's failure to inform the supplier of the ongoing corrupt activities at the market. It would be similarly unconscionable to enforce RAJS's adjustments in this case. BTP does not dispute that the inspections of Shipments 3, 7, 8, 9 & 10 "resulted from the work of inspectors who had accepted bribes" in exchange for downgrading produce at the time they inspected RAJS's shipments, nor does it deny awareness of the corrupt practices pervading the Hunts' Point Market at the time the adjustments were made, or dispute that it benefited financially from corruption at the market. Furthermore, if RAJS had known of the widespread corruption at the market, it may have decided to discount the USDA inspections or seek independent inspections, rather than simply accept price adjustments on the basis of the inspections themselves. BTP deprived RAJS of those options when it failed to tell RAJS that the inspections it had ordered were inherently suspect. See Restatement (Second) of Contracts § 153.

Second, the declarations lack sufficient foundation to call into question the validity of Taubenfeld's own admission that he began bribing USDA inspectors beginning in 1996, at the latest. As discussed above, Taubenfeld acknowledged bribing inspectors from 1996 until

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[9] This allegation is directly contradicted by evidence that the Plea Agreement, in which Taubenfeld admitted his bribery of USDA inspectors from "in or about 1996 through in or about October 27, 1999," was part of the official USDA record at the time the Reparation Order was issued. See Certified Copy of PACA Docket No. R-01-033 at 5.

1999 on numerous occasions. See Taubenfeld Plea Agreement at 2 (Taubenfeld admitting "his participation, from in or about 1996 through in or about October 27, 1999, in making cash payments to United States Department of Agriculture produce inspectors in connection with inspections of fresh fruit and vegetables at B.T. Produce Co., Inc."); Taubenfeld Sentencing Hearing (reiterating Taubenfeld's admission that he began bribing USDA officials in 1996); Taubenfeld PSR (same). Neither of the declarants, who do not profess to know Taubenfeld personally or to have spoken with him about when he began bribing officials, would be in a position to know better than Taubenfeld himself when Taubenfeld began paying bribes at the Hunts Point Market. None of BTP's pleadings attempts to explain why the convicted inspectors' speculative declarations should be credited where they are directly contradicted by Taubenfeld's admissions concerning matters uniquely within his own knowledge.[10] See Fed. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.") (emphasis added); *Patterson v. County of Oneida*, 375 F.3d 206, 219 (2d Cir. 2004) (concluding that a party may not create a genuine issue for trial "merely by the presentation of assertions that are conclusory") Third, the Court finds these declarations inherently contradictory and implausible. While the Court may not assess credibility on summary judgment, *see Hayes v. New York City Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996), "when evidence is so contradictory and fanciful that it cannot be believed by a reasonable person, it may be disregarded." *Jeffreys v. Rossi*, 275 F. Supp. 2d 463, 476-77 (S.D.N.Y. 2003). BTP has introduced no statements and made no arguments calling into question the validity of its own agent Taubenfeld's admissions, which may be charged to BTP, even though it had every opportunity to do so during the USDA reparations proceeding and this appeal. Not only are

[10] Declarant Glenn Jones alleges that "in my position as both inspector and supervisor in the Hunts Point Market, I had first hand personal knowledge of all of the people in that market who did, and those who did not make payments to USDA inspectors." (Jones Decl. P3.) But Jones, even if he was a self-styled leader of a corrupt enterprise, was in no position to know whether or when Taubenfeld may have paid bribes to USDA inspectors who, in turn, failed to report those bribes to him.

the declarations directly contradicted by its agent's admissions; at least one of the declarations is contradicted as well by the declarant's own statements during the criminal proceedings brought against him. While Michael Tsamis states in his declaration that none of his inspections were influenced by bribes (see Tsamis Decl. P4 ("Nor were any of may inspections written up with any notations other than what resulted from my personally examining the produce and then following the training and procedures given me by the USDA Inspection Service")), he admitted during his plea hearing that he "accepted $ 150 for performing three inspections . . . to downgrade the commodities that the applicant was getting and give adjustments in the price." Transcript at 38, *United States v. Tsamis*, 99 Cr. 1085 (LAK) (S.D.N.Y. Feb. 9, 2000).[11] Permitting BTP to manufacture an issue for trial on the basis of conflicts between its own agent, Taubenfeld, and these declarants "would be a terrible waste of judicial resources and a fraud on the court." Jeffreys, 275 F. Supp. 2d at 477.

BTP's other objections to RAJS's summary judgment motion lack merit. First, BTP asserts that the Court should adopt the approach of the District Court in *Six L's Packing Co., Inc. v. Post & Taback, Inc.*, 132 F. Supp. 2d 306 (S.D.N.Y. 2002), attached as Ex. 3 to BTP's Request for Judicial Notice, in which the court approved a proposed settlement recommended by a Special Master for distribution of a limited PACA trust fund.[12] (See BTP Mem. of Law at 5.) In that case, the District Court was faced with multiple claimants to the limited assets of an insolvent wholesaler, many of whom were mere nonpayment creditors. The court also lacked the benefit of factual findings contained in USDA reparation orders because produce suppliers who alleged fraudulent downgrading were forced to file claims directly in District Court in order to have any opportunity to recover against the insolvent

[11] Declarant Jones stated in his plea allocution that he "received cash payments to downgrade produce," *Id.* at 34, but unlike Tsamis, he does not purport in his declaration to have avoided being influenced by bribes when inspecting produce.

[12] The Court takes judicial notice of the Special Master's Report and the Order approving the recommendations contained in the Report as accurately reflecting the District Court's disposition of the case.

wholesaler. In addition, the parties had extremely limited opportunity to engage in discovery concerning the extent to which the wholesaler had engaged in bribery. See Revised Special Master's Report and Recommendation at 2-5 & 10, *Six L's Packing Co., Inc. v. Post & Taback, Inc.*, Nos. 01 Civ. 0573, 01 Civ. 0934 (JSR) (Consolidated) (S.D.N.Y. Nov. 20, 2001), attached as Ex. 2 to BTP Request for Judicial Notice. None of these conditions obtain here: RAJS has brought a claim for damages directly against a solvent defendant; the Court has the benefit of the Reparation Report as a prima facie source of factual findings; and BTP had ample opportunity, both during the USDA reparation proceedings and in the de novo proceeding before the Court, to discover evidence that, despite Taubenfeld's admissions, BTP's business practices were not tainted by bribery before late 1998. Therefore, the approach taken by the District Court in the Six L's case does not apply here.

Next, BTP reasserts its counterclaims against RAJS, arguing that it overpaid by over $ 46,000 for Shipments 1, 2, 4, 5, and 6, as designated by the Reparation Order, which were performed by USDA inspectors who had never been accused of bribery. BTP bears the burden of proof on these claims, *see Koam III*, 329 F.3d at 128, but offers no evidence in support of its argument. Even if its claims were not barred by the PACA statute of limitations,[13] BTP cannot under *Celotex* resist summary judgment where it has no evidence of overpayment that could create a genuine issue for trial. BTP is incorrect when it argues that it may rely solely on "the evidence submitted before the Secretary" without introducing or pointing to any record evidence in support of its counterclaims before this Court, either in its brief or in its Local Rule 56.1 Statement. Under PACA, the record before the Court on appeal consisted only of the Reparation Order and the pleadings filed before the

[13] BTP acknowledges that its counterclaims would otherwise be time-barred under PACA, but argues that it may nonetheless assert them under N.Y.C.P.L.R. § 203(d), which permits counterclaims to be asserted late if the "counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends." The Court expresses serious reservations concerning the availability of this state procedural rule under PACA, which designated a strict time limitation for filing PACA reparation claims with a limited exception for those had been harmed by bribery at Hunts Point Market, but does not reach this question, given BTP's failure to introduce any evidence in support of its counterclaims.

USDA Secretary. See 7 U.S.C. § 499g(c); *Frito Lay*, 863 F.2d at 1036. BTP has had ample opportunity to conduct discovery in this Court, or to seek to introduce discovery that may have been conducted during the reparation proceeding into evidence here. Since it has not done so, the Court concludes that RAJS is entitled to judgment as a matter of law on BTP's counterclaims.

BTP's arguments that a trial is necessary to determine whether damages were properly calculated for Shipments 9 and 10, which were sold on an "open" price. But, as with its counterclaims, BTP introduces absolutely no evidence suggesting that those shipments were properly priced, or that the damage calculations employed by the Reparation Order are incorrect. This wholly unsupported argument may be disregarded by the Court on summary judgment.

III. CONCLUSION

For the reasons stated above, it is hereby

ORDERED that the Motion for Summary Judgment of respondent Robert A. Johnson Sales, Inc. ("RAJS") against petitioner B.T. Produce Co., Inc. ("BTP"), pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, is hereby granted; it is further

ORDERED that judgment be entered in favor of RAJS in the amount of $ 34,171.75, plus interest thereon at the rate of 10 percent per annum from January 1, 1998, plus $ 300, plus additional costs, expenses, and attorney's fees pursuant to 7 U.S.C. § 499g(c); and it is finally

ORDERED that RAJS submit its application for costs, expenses and attorney's fees to the Court by January 7, 2005, that BTP submit its response to RAJS's application by January 21, 2005, and that RAJS submit any reply to BTP's response by January 28, 2005.

The Clerk of Court is directed to close this case, subject to its being reopened in the event that the application for costs and fees authorized above is filed.

SO ORDERED.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: KLEIMAN & HOCHBERG, INC.
PACA Docket No. D-02-0021
and
MICHAEL H. HIRSCH
PACA Docket No. APP-03-0005
and
BARRY J. HIRSCH
PACA Docket No. APP-03-0006.
Filed December 3, 2004.

PACA – Responsibly connected – Bribery – False inspection reports – Target price – Willful – Flagrant – Repeated – Aggravating circumstances – Mitigating circumstances – Sanctions.

Ruben Rudolph, Christopher Young-Morales and Charles Kendall for Complainant.
Marc C. H. Mandell and Charles Hultrstrand, for Respondents.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

DECISION

In this decision I find that in PACA Docket No. D-02-0021, Respondent Kleiman & Hochberg, Inc.[1] willfully violated the Perishable Agricultural Commodities Act (Act), and the regulations thereunder. In particular, I find that Respondent violated section 2(4) of the Act, as a consequence of one of its principals paying bribes to a USDA inspector on 12 occasions. However, because I find these violations were only committed in order to expedite inspections and not to gain an advantage over shippers or others in any of the specific transactions relied upon by Complainant, I am imposing a civil

[1]In PACA Docket No. D-02-0021, the USDA's Associate Deputy Administrator, Fruit and Vegetable Service, Agricultural Marketing Service is the Complainant, and Kleiman & Hochberg is the Respondent. In PACA Docket No. APP-03-0005, Michael H. Hirsch is the Petitioner, and in PACA Docket No. APP-03-0006 Barry J. Hirsch is the Petitioner.

penalty of $180,000 for the violations in lieu of a ninety day license suspension, and I am not revoking Respondent's PACA license. I also find that both Michael H. Hirsch, in PACA Docket No. APP-03-005, and Barry J. Hirsch, in PACA Docket No. APP-03-0006, are responsibly connected to Respondent.

Procedural History

On July 16, 2002, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, issued a Complaint charging Respondents with "willfully, flagrantly and repeatedly" violating section 2(4) of the Act, and requesting that Respondent's PACA license be revoked. On September 16, 2002, Respondent filed its Answer, denying that it had violated the Act as alleged, and claiming several affirmative defenses. Meanwhile, on February 12, 2003, James R. Frazier, Chief of the PACA Branch of the Agricultural Marketing Services, made determinations that Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Respondent. On March 17, 2003, Michael and Barry Hirsch each filed appeals of those determinations. On April 4, 2003, former Chief Judge James W. Hunt consolidated the disciplinary case against Respondent and the Petitions of the Hirsches for hearing, pursuant to Rule 137(b) of the Rules of Procedure.

The consolidated matter was reassigned to me on July 16, 2003. I conducted a hearing in New York City from March 1 through 4, and from March 15 through 18, 2004. Christopher Young-Morales and Charles Kendall of the U. S. Department of Agriculture's Office of General Counsel represented the Agency, and Mark Mandell and David Gendelman represented Respondent in the disciplinary case and the Petitioners in the responsibly connected matter. The parties subsequently filed initial and reply briefs, and proposed findings of fact and conclusions of law.

Factual Background

What was apparently a long-standing atmosphere of corruption surrounding the Hunts Point Terminal Market in the Bronx became the subject of a fairly extensive federal investigation in 1999. Hunts Point is the largest wholesale produce terminal market in the United States and is the home of many produce houses, including that of Respondent. It handles huge volumes of produce, delivered from points throughout the country and the world. Because produce may have been grown or shipped from many thousands of miles away from New York City, inspections by USDA inspectors play an important role in resolving potential disputes as to the quality of the produce received at Hunts Point.

Produce inspections are normally requested by the receiver of the produce at the market, although the receiver may be acting at the behest of the shipper or another party up or down the line. Approximately 22,000 produce inspections are conducted annually by USDA inspectors at Hunts Point. These inspections are crucial to the successful working of the market at Hunts Point and other produce markets, as the USDA is ostensibly a neutral party who examines the product and verifies its condition, thus allowing for the resolution of potential disputes concerning the condition of the product that arrives at the wholesale market. The inspection certificate allows those parties who no longer have direct access to the produce, such as shippers or growers, to make informed business decisions as to the value of the load, and can result in the renegotiation of terms regarding the sale of the produce.

As a general rule, produce needs to be sold as quickly as possible. This is particularly true with produce that is near ripe or ripe, or where there are defects within the shipment, since the passing of time reduces the value of the produce to the extent that much of it may have to be repackaged or even discarded. Normally, even where an inspection is requested, it is often beneficial to the wholesaler and the shipper to begin selling the produce immediately to get the best price for the produce. Essentially, every hour ripe or defective produce sits around

the warehouse costs someone money. However, it is in everyone's best interest that the inspection be conducted as soon as possible, so that an accurate accounting of the state of the produce is available to settle possible disputes.

The 1999 investigation, known as Operation Forbidden Fruit, apparently conducted primarily by the Federal Bureau of Investigation (FBI) with the significant involvement of USDA's Office of Inspector General (OIG), uncovered a large network of USDA inspectors who were receiving bribes regarding their conduct of inspections, and produce houses that were paying these bribes. At the same time, it was evident that many produce houses were not paying bribes, and not all inspectors were corrupt.

Complainant's principal witness, William Cashin, is a former USDA inspector at Hunts Point who was caught accepting bribes by investigators, and was arrested by the FBI. Tr. 50[2]. To avoid a prison term, Cashin agreed to wear or carry devices allowing him to record, either through audio or visual means, many of the transactions that involved the alleged offering and taking of bribes. Tr. 51, CX 19. During the course of Cashin's participation in Forbidden Fruit, between the time of his agreement with the government to cooperate in March 1999 and his resignation in August 1999, Cashin continued his normal business activities as an inspector. At the conclusion of each business day, he would meet with FBI and OIG agents to discuss the days events, principally which inspections he received bribes for and for how much. Tr. 51-2, 55-6. He turned over the money he received as bribes during each of these meetings.[3] These meetings are recorded on the FBI 302 forms, many of which have been received in evidence at the hearing.

[2]"Tr." Refers to the transcript. Complainant's exhibits are marked CX and are sequentially numbered. Respondent's exhibits are marked RX and are sequentially lettered (A-Z, AA-UU). The exhibits for the responsibly connected cases are marked RCMH and RCBH for Michael and Barry Hirsch respectively.

[3]While it is undisputed that Cashin turned over the bribes paid for the 12 inspections at issue here, there is some dispute as to whether he turned over other bribes paid by Respondent.

CX 10. It is worth noting that apparently the only activity that Cashin was asked about was the identity of the person offering the bribe, the house that person worked for, the type of produce inspected, and the amount of the bribe. Amazingly, particularly in light of the allegations made by Complainant in this case that in exchange for the bribes Cashin "helped" the briber by misreporting some aspect of what he observed, there is no evidence on these forms as to what Cashin did in exchange for the bribes.

Cashin testified that he received bribes on numerous occasions over a number of years from John Thomas, a 31.6 % shareholder and vice-president of Respondent. CX 1, Tr. 41-48, 243. Cashin specifically accounted for 12 inspections where he received bribes from Thomas during the pendency of the Forbidden Fruit investigation. These 12 inspections are cited in the Complaint. Cashin testified that in each of these 12 inspections, he "helped" Respondent by altering one or more aspects of the inspection certificate, but that he had no recollection as to what he did in any specific inspection to "help" Respondent. Tr. 44-5. He testified that he would have "helped" Respondent by overstating the defects, overstating the number of produce containers he inspected, and misstating the temperature of the produce. Tr. 46-50. However, he could not state what he did in any particular instance. Tr. 49.

At the conclusion of Operation Forbidden Fruit, Cashin resigned his position. Tr. 30. John Thomas, Respondent's part owner and vice-president, was indicted on October 21, 1999, for Bribery of a Public Official, a crime for which he eventually pled guilty on October 17, 2001. However, there are significant differences between the initial indictment and the superseding information to which he pled. Initially, Thomas was charged with seven counts of Bribery, based on the payments he made to Cashin in connection with 12 inspections. CX 8A. The indictment alleged that Thomas "made cash payments to a United States Department of Agriculture produce inspector *in order to influence the outcome of inspections* of fresh fruits and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York." (emphasis added). The superseding information to which Thomas pled guilty to one count of bribery alleged that Thomas "made

cash payments to a United States Department of Agriculture produce inspector *in order to obtain expedited inspections*." (emphasis added). CX 8. As I discuss below, while I hold Respondent responsible under the Act for the crimes committed by Thomas, the motivation for the crimes, and the impact of the crimes on the shippers and growers involved, are factors I am considering in terms of the appropriate remedy against Respondent.

Thomas freely admitted to paying bribes for the inspections in question. Tr. 509-12, 529. Thomas has been with Respondent for approximately 30 years, and basically runs the night shift. Tr. 509. He testified that in the 1980's he had been visited by USDA inspector Danny Arcery. Tr. 510. This visit was in response to complaints he had made about late produce inspections. Tr. 509-10. He testified that Arcery told him that in order to avoid late inspections, he had to "tip" the inspector $25 to get him "to come quicker rather than purposely later," Tr. 510, 529-32, and that if these instructions were not complied with the produce would be allowed to rot before an inspector would show up. Id., at 511. He testified that while he paid bribes to inspectors and their supervisors, he never asked for "help" and no "help" was ever offered. Tr. 513. He further testified that he never asked for nor received a falsified inspection report, and that the only reason he was paying the inspectors and their supervisors was "to get a quicker inspection as opposed to being purposely delayed." Tr. 518. He further testified that while he was somewhat involved in the sales of the produce, he did not deal with the shipper in settling accounts and had no role in going back to the shipper and adjusting prices. His partners, Barry and Michael Hirsch, handled prices with the shippers. Tr. 535. He also testified that all the bribes came out of his own pocket, and not from company funds and that no one else at Respondent knew he was making these payments. Tr. 519.

I heard a great deal of testimony, presented mostly by Respondent, concerning the significance of the 12 inspection reports that were issued for the inspections where bribes were paid to Cashin, which were the subject of the initial indictment, and which form the basis of Complainant's case. Through the testimony of Barry and Michael

Hirsch, as well as the testimony of many of the shippers who supplied the produce that was inspected, Respondents presented the circumstances behind each of these transactions.

Michael Hirsch testified that Respondent is primarily in the business of buying and selling produce, purchasing from shippers, growers and brokers. Respondent employs up to ninety people, and is a 24-hour a day operation, with the Hirsch brothers principally running the daytime portions of the business. Tr. 573-82. Most contact with suppliers occurs during the daytime. Tr. 576-7. Buying and selling of produce involves a constant give and take, trying to balance the needs of customers with the produce available. Tr. 576-9. Handling of distressed produce, including produce that is rejected by other houses or by wholesale customers, is a part of their business. Tr. 582-3. Frequently, a shipper will call stating that it is bringing in some distressed and/or rejected merchandise with the request that Respondent do the best it can in selling the produce. *Id.* In many cases, an inspection is called in even before an order arrives, if they know they will need an inspection. Michael Hirsch estimated that 5% of the loads they receive are inspected. Tr. 583-4.

The most common arrangement between Respondent and its shippers, particularly with merchandise that they know in advance has some problems is "price-after-sale" or "pas." Under these circumstances, there is no price fixed upon delivery of the product, although shipping documents frequently have "price ideas" on them. Tr. 578-80. Rather, Respondent records the price it received for each box of produce, factoring in any boxes lost due to repacking or dumping. This account of sale document may also reflect expenses, such as the fee[4] paid the USDA for the inspection. When the entire load is sold or otherwise disposed of, the average net sales price is calculated, at which point Respondent agrees upon a final price for the load with the shipper. Other pricing arrangements are also made, such as consignment, where Respondent would get an agreed upon percentage of whatever the final sale price was. Also, invoices will generally indicate which party pays

[4] The legal inspection fee, as opposed to any bribes.

the freight.

There are also a few more nebulous factors that are used to reach a final price between Respondent and its shippers. Thus, Lawrence Kroman of I. Kunik Company, who has worked with Respondent for approximately 18 years, explained that " . . . the settlement price depends on basically . . . my assessment or our assessment of what that price on that particular file needs to be. Some files the prices are close to what I want, sometimes the prices are more than I want, sometimes the prices are less than what I want. It's based on our relationship, I guess, and our long term goals together, I'd call it." Tr. 962. Other witnesses similarly testified that the final price paid by Respondent for a shipment of produce would be affected by such relationship factors, which frequently affect the final price paid. Tr. 624, 639.

With respect to the individual loads that are the subject of the 12 inspections at issue for which bribes were admittedly paid, Complainant provided undisputed evidence that Thomas bribed Cashin in connection with each of the inspections. However, the only evidence supporting Cashin's claim that in each of these 12 inspections he falsified the inspection reports to "help" Respondent is Cashin's uncorroborated word. Indeed, Cashin was unable to point to a specific instance regarding any of these inspection certificates where he falsified the information. Tr. 49. He only stated that he falsified each report. Even in his daily briefings with the FBI, there is not one single instance where Cashin told the agents of any specific falsification he made in any inspection certificate. In response, Respondent's witnesses testified that in each of the inspections at issue, the inspection report accurately depicted the produce described. Not only was this testified to in great detail by Respondent's principals Michael and Barry Hirsch, but the shippers and suppliers involved in these transactions also testified that the inspection certificates were generally consistent with their perception of the produce, and that since the produce was priced after sale, the inspection certificate was of little moment to the transaction in any event. Tr. 962-3.

For example, one of the cited inspection certificates, for which

Cashin was paid, involved a shipment of cantaloupes from I. Kunik Co. This certificate, dated 4/15/99 and signed by Cashin, RX D, p. 5 (also CX 11, p. 4) indicates that 10% of the produce has sunken areas, and a like proportion suffered from some decay. The sunken area is an indentation caused by age and dehydration. Tr. 804. Barry Hirsch testified that all business with Kunik is done as pas, which was confirmed by Lawrence Kroman, vice president of Kunik. Tr. 797, 961. Although the manifest for the load, RX D, p. 2, listed a price that would appear to be inconsistent with a pas, Kroman confirmed that the $14.25 per box on the manifest was "what I am shooting for as a return on the product" and that it was indeed a pas. Tr. 974. The report of sale sheet, RX D, p. 4, indicates that after the 1064 boxes were fully disposed of, and factoring in the cost of dumping some boxes and the cost of the inspection, the average box was sold by Respondent for $12.10. Respondent paid Kunik $11.75 per box for the entire load, making a "profit" of only 35 cents per box, not even enough to cover its costs when labor is factored in. Kroman admitted that no company in the business "could remain viable at 35 cents a carton," Tr. 978, and went on to explain, much as Barry Hirsch did, that in the course of a relationship lasting decades, sometimes Kroman would ask Hirsch to "work a little close," Tr. 979, and sometimes the margin would be bigger than would be justified by the particular load in question. There was no indication that the inspection certificate was not reflective of the condition of the produce, and the inspection certificate appeared not to be a factor in the settling of the price of the load.

Barry Hirsch was asked, regarding a different load, "Why would you even bother getting an inspection? " He replied, "When the work came in and it was really bad, every once in a while we'd call to get inspected, just in case the shipper needed the inspection for one of his growers or the shipper called me and asked me to get them inspected, we would get them inspected." Tr. 789. With respect to the Kunik load of cantaloupes that are the subject of RX D, the inspection certificate was never even sent to Kunik, Tr. 808, nor was it discussed with Kroman. Tr. 988-9.

In another shipment, Fisher Bros. Sales, Inc., pertinently contracted

with Respondent to sell 479 cartons of South African Bonheur grapes. RX F. This, too, was pas, as were all transactions between Respondent and Fisher. The grapes were not in the best condition, as Mr. Galo, who was Fisher's Director of Sales at the time, testified that "they'd probably been in the warehouse for a good four or five weeks," and that they were probably cleaning out the cooler at the warehouse. Tr. 1005. Fisher had a target price for the grapes and, when Respondent was able to sell the grapes for a higher price, Fisher received its full target price. Galo testified that the USDA inspection performed by Cashin played no part in Fisher's dealings with Respondent. Tr. 1026.

Similar scenarios were testified to regarding the other transactions that were the subject of the inspection certificates. With respect to each inspection certificate, either Michael or Barry Hirsch, and in most cases a representative of the shipper as well, testified that the inspection certificate accurately reflected the condition of the produce, that the certificate had no impact on the financial aspects of the transaction because the shipper knew in advance that the produce had some problems, and the final settlement of the load was based on the sales price of the produce more than anything else.

Cashin was also questioned as to his role regarding three other inspections that he stated he conducted, at Respondent's location, but for which he told the FBI investigators he did not receive any illegal payment. These inspections were conducted at Respondent's facility on 4/15/99, and are mentioned in the 302 forms at CX 10, page 4. Cashin testified that he conducted these inspections for "J Scott"—who Cashin said was a buyer who kept an office at Respondent's location. Tr. 148-9. Cashin testified he was never paid bribes for these three inspections. John Thomas, during the course of his testimony, stated that the three inspections Cashin claimed he conducted on 4/15/99 for Scott were in fact conducted for Respondent, and that he paid him a $50 bribe for each inspection. Tr. 516. Subsequently, Helene Traeger, Respondent's assistant office manager, testified that Scott had left Respondent's facilities after an argument in July 1998 and never returned. Tr. 736-8, 740-2. Barry Hirsch, too, confirmed that Scott would not have called for these three inspections, since Scott no longer worked there at the

time of the inspections, and that these suppliers were not people Scott worked with even when he was there. Tr. 870-3. Indeed, James Scott himself testified that he left Respondent in mid-July of 1998 and that he had never called for any inspections when he was working at Respondent's facility. Tr. 1047-52.

Carolyn Shelby, a marketing specialist, testified as to her role in the investigation. She basically reviewed a large number of documents, although she discovered that many sales records were lost in a fire at Respondent's facility. Tr. 287. She documented the license records of Respondent, and particularly looked at reparation complaints filed against Respondent. She testified that she did not know what were the outcomes of the reparation complaints against Respondent, nor did she know if the inspections affected the price of the produce at all. Tr. 324-6.

John Koller, a senior marketing specialist with the PACA Branch, testified as Complainant's sanctions witness. Koller testified that by Thomas's paying of bribes to Cashin, Respondent had committed willful, repeated and flagrant violations of PACA. Tr. 350-1. He testified that bribery destroyed the integrity of the inspection process, and constituted a failure by Respondent to perform duties described in Section 2(4) of the Act. He recommended that the license of Respondent be revoked, contending that, due to the seriousness of the violations, civil penalties were not adequate. On cross-examination, Koller admitted that it was generally desirable for inspections to be conducted as close to arrival time of the produce as possible. Tr. 368. He based his sanction recommendation on the commission of bribery, finally concluding that bribing a produce inspector is an unfair practice under the Act, and one for which license revocation was the appropriate sanction. Tr. 349-50.

With respect to whether Michael and Barry Hirsch were responsibly connected to Respondent, Thomas and the Hirsches consistently testified that Thomas acted on his own in paying bribes, and that neither of the brothers was aware that anything illegal was going on until Thomas was arrested. However, there was no dispute that Michael Hirsch was the

president and a director of Respondent, as well as a 31.6 % stockholder, and that during the period that is the subject of this case he played a major role in the day to day management of the company, that he worked there from 7:30 a.m. to 6 p.m. every day, that he played a significant role in determining the prices that would be paid for produce, and that his role in the company's operations was far from ministerial or nominal. Similarly, it was undisputed that Barry Hirsch served as treasurer, director and a 31.6 % stockholder, and that he, too, had significant day to day management roles with Respondent, including buying and selling of produce, overseeing warehouse operations, and generally running the daytime operations of the business with his brother. CX 1.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable produce. Among other things, it defines and seeks to sanction unfair conduct in the conduct of transactions involving perishables. Section 499b provides:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> . . .
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to

> perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

The penalties for violating the Act may be severe. Thus, upon a finding that a licensed dealer or broker "has violated any of the provisions of section 499b," the Secretary may, "if the violation is flagrant and repeated . . . revoke the license of the offender." 7 U.S.C. §499h(a). The Act also provides for civil penalties as an alternative to license suspension or revocation. "In lieu of suspending or revoking a license . . . the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues . . .giv[ing] due consideration to the size of the business, the number of employees, and the seriousness, nature and amount of the violation." 7 U.S.C. §499h(e).

The Act does not require that Respondent be aware of the specific violations committed by one of its principals or employees in order for the company to be found liable for the violations. Section 16 of the Act, 7 U.S.C. §499p, provides: . . . the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person."

In addition to penalizing the violating dealer or broker, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then only upon approval of the Secretary. *Id.*

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

Findings of Fact

1. Kleiman & Hochberg, Inc. (Respondent) is a New York Corporation whose business and mailing address is 226-233 Hunts Point Terminal Market, Bronx, New York 10474. At all times pertinent to this matter, Respondent was a licensee under the Perishable Agricultural Commodities Act (PACA, or the Act). CX 1.

2. William J. Cashin was employed as a produce inspector at the Hunts Point Terminal Market, New York, office of the United States Department of Agriculture's Agricultural Marketing Service's Fresh Products Branch, from July 1979 through August 1999. Tr. 30.

3. Cashin was one of numerous USDA produce inspector's who participated in a scheme whereby they received bribes for the conduct of produce inspections. On March 23, 1999, Cashin was arrested by agents of the FBI and USDA's OIG. Tr. 50. After his arrest, Cashin entered into a cooperation agreement with the FBI, agreeing to assist the FBI with their investigation into corruption at Hunts Point Market. Tr. 50, CX 19.

4. With the approval of the FBI and the OIG, Cashin continued to perform his duties as a produce inspector in the same fashion as before his arrest. Cashin surreptitiously recorded interactions with individuals at different produce houses using audio and/or video recording devices. At the end of each day, Cashin would give the FBI agents his tapes, turn in any bribes he received, and recount his activities. The FBI agents would prepare a "302" report summarizing what Cashin told them about

that day's activities. Tr. 51-52; CX 10.

5. Beginning at least in the late 1980's, and continuing through August 1999, John Thomas paid bribes to William Cashin and other USDA inspectors. Tr. 509-512. The purpose of these bribes was to expedite inspections. *Id.*

6. John Thomas paid Cashin a $50 bribe to conduct each of the 12 inspections referred to in the Complaint.

7. The information reported in each of the inspection certificates referred to in the Complaint appears to be accurate.

8. There is no credible evidence in this record indicating that the bribes paid to Cashin for the 12 inspections referred to in the Complaint were used to gain a bargaining or economic advantage over any of the suppliers of the produce involved in these 12 transactions.

9. During the period in which he paid bribes to Cashin, John Thomas was vice president, a director and a 31.6 % shareholder of Respondent. CX 1.

10. During the period described in paragraph 9, Michael Hirsch was president, a director and a 31.6 % shareholder of Respondent. CX 1.

11. During the period described in paragraph 9, Barry Hirsch was treasurer, a director and a 31.6 % shareholder of Respondent. CX 1.

12. Both Michael and Barry Hirsch were actively involved in the day-to-day management of Respondent's business. There is no evidence that they knew or should have known that Thomas was paying bribes.

Conclusions of Law

1. Payment of bribes to a USDA produce inspector constitutes a failure to perform a duty express or implied in connection with transactions of perishable agricultural commodities in violation of section 2(4) of PACA.

2. The acts of bribery committed by John Thomas constitute violations of section 2(4) of PACA by Respondent.

3. Respondent has committed 12 willful, flagrant and repeated violations of PACA 2(4) by paying bribes to a USDA produce inspector.

4. The appropriate sanction in this case is license suspension for a period of 90 days. Rather than suspend Respondent's license, I impose an alternative civil penalty of $180,000.

5. Michael H. Hirsch is responsibly connected to Respondent.
6. Barry J. Hirsch is responsibly connected to Respondent.

Discussion

I find that one of Respondent's principal owners and officers, John Thomas, paid bribes to William Cashin in each of the 12 instances alleged by Complainant. I further find that bribery of a USDA produce inspector violates the Perishable Agricultural Commodities Act, and that these violations were willful, flagrant and repeated. I find that Respondent is liable for these violations. I further find that the preponderance of the evidence shows that these bribes were not paid to gain any advantage over produce shippers and sellers, but were paid in order to obtain inspections in a timely manner. Therefore, I am not granting Complainant's request to revoke Respondent's PACA license, but I am instead requiring that Respondent pay a civil penalty of $180,000 in lieu of a 90-day suspension of their license. Since I am not suspending or revoking Respondent's license (unless Respondent elects to serve the suspension rather than pay the penalty), there is no ban on the employment of Michael or Barry Hirsch by any licensee; however, I am making a finding, in the event that my sanction remedy is subsequently reversed, that Michael and Barry Hirsch are each responsibly connected to Respondent.

I. Respondent's bribery of a USDA produce inspector on at least 12 occasions constituted willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act.

A. John Thomas, an officer and major shareholder in Respondent, paid bribes to USDA produce inspector William Cashin on at least 12 occasions.

Both Thomas and Cashin freely acknowledged that Thomas did indeed make $50 payments to Cashin on the 12 occasions alleged in the Complaint. In fact there was no dispute that these 12 occasions were representative of a long-standing practice that went back at least until the 1980's. In fact, Thomas even testified that he paid Cashin an additional

$150 for three inspections that were not included in the Complaint even though they occurred on the same day as two other inspections that were included in the Complaint.

It is likewise undisputed that Thomas was vice-president of Respondent at the time the violations alleged in the Complaint were committed, and that he was a 31.6 % shareholder of Respondent.

B. Respondent is liable for the violative acts of Thomas that were committed within the scope of his employment or office.

Section 16 (U.S.C. §499p) of the Act that states that "in every case" "the act, omission, or failure of any agent, officer or other person acting for or employed by any commission merchant, dealer, or other person acting for or employed by any commission merchant, dealer or broker, within the scope of his employment or office," "shall be deemed the act, omission, or failure" of the employer. Thomas testified that he paid the bribes in order to insure that inspections he ordered were not delayed. Thomas stated that the money used to pay the bribes came out of his own pocket, and there was no paper trial indicating otherwise. He also stated, and the Hirsch brothers confirmed, that he acted without their knowledge or approval. However, the purpose behind the bribes, even as expressed by Thomas, was to benefit Respondent, as the alleged threat of delayed inspections would harm Respondent as an entity. Even though Thomas, as a nearly one-third owner of Respondent, would obviously share in any benefit that Respondent received, it is evident that the bribes paid, whatever their motivation, were designed to benefit Respondent in the conduct of its business.

Thus, in *Post & Tauback, Inc*., 62 Agric. Dec. 802 (2003), the Judicial Officer held that Section 16 "provides an identity of action between a PACA licensee and the PACA licensee's agents and employees." *Id.,* at 820. As long as Thomas was acting within the scope of his employment, which he clearly was, violations committed by him are deemed to be violations by Respondent.

Even if Michael and Barry Hirsch were unaware of Thomas' actions,

the absence of actual knowledge is insufficient to rebut the burden imposed by section 499p. In *Post & Taback, Inc.*, the Judicial Officer unequivocally held that "as a matter of law,

. . . violations by [an employee] . . .are . . . violations by Respondent, even if Respondent's officers, directors, and owners had no actual knowledge of the . . . bribery
. . . and would not have condoned [it]." *Id.,* at 821. I agree with Complainant's contention that if a company can be held responsible for the acts of an employee, who was not an officer or an owner, even where the company's officers had no knowledge of the acts committed by that employee, then *a fortiori* the company would be responsible for the acts of a person who is both an owner and an officer, whether or not the other officers had actual knowledge of the violative conduct. See Complainant's Initial Brief at 29. The clear and specific language of the Act would be defeated by any other interpretation.

C. Bribery of a USDA produce inspector violates PACA.

Section 2(4) of the PACA makes it unlawful "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any . . . transaction." Agency case law has consistently interpreted this provision to hold that the payment of bribes to a USDA produce inspector is a violation of PACA. Thus, the Judicial Officer held in *Post & Taback:*

> A produce buyer's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector in connection with produce inspections eliminates, or has the appearance of eliminating, the objectivity and impartiality of the inspector and undermines the trust that produce buyers and sellers have in the integrity of the inspector and the accuracy of the inspector's determinations of the condition and quality of the inspected produce. Moreover, unlawful gratuities and bribes paid to United States Department of Agriculture inspectors threaten the integrity of the entire inspection system and undermine the produce industry's trust

in the entire inspection system.

Id., at 825.

Bribery, whatever the motive, in and of itself offends the notion of fair competition. The Agency, through the Judicial Officer, and the Courts, have recognized that there is a general commercial duty to deal fairly which is required of all PACA licensees. *In Sid Goodman and Co., Inc*., 49 Agric. Dec. 1169, 1183-4 (1990), aff'd, 945 F. 2d 398 (4th Cir. 1991), cert. denied, 503 U.S. 970 (1992), the Judicial Officer cites a line of cases to the effect that "members of the produce industry have an obligation to deal fairly with one another" and goes on to hold that commercial bribery is "unfair" in the context of PACA. Similar holdings, although under distinguishable circumstances, confirm this view of commercial bribery. *See e.g., JSG Trading Corp*., 58 Agric. Dec. 1041 (1999), aff'd 235 F. 3rd 608 (D.C. Cir. 2001), cert. denied, 122 S. Ct. 458 (2001).

D. The bribery violations committed by Respondent were willful, flagrant and repeated.

While Thomas testified that the motivation for his payments to Cashin was to receive timely inspections, and while he essentially testified that Cashin was part of an extortion or shakedown ring among USDA inspectors, it is apparent that rather than complaining to other government officials, including the FBI, he opted to make the requested payments. There is no evidence, even from Thomas' own testimony, that he viewed the payments as anything more than an efficient means to get his work done. With the long standing nature of these payments, going back upwards of ten years based on Thomas' own testimony, Complainant easily meets its burden of showing that the illegal payments, or bribes, were willful, flagrant and repeated.

A violation is "willful" if "irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute." *PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780, 789 (2001). Here, Thomas, and therefore Respondent, knew that the payments made to Cashin in the 12

inspections involved in this case, as well as the countless illegal payments over at least the previous decade, were illegal, but essentially decided that they needed to make these payments for the benefit of their business. Clearly, Respondent made a business decision to violate the law, rather than to pursue alternative measures. This constitutes willful conduct.

Likewise, the violations were "flagrant." In *Post & Taback, supra,* the Judicial Officer found, citing the dictionary definition of "flagrant" as covering conduct "conspicuously bad or objectionable" or so bad that it "can neither escape notice nor be condoned," that "payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities are conspicuously bad and objectionable acts that cannot escape notice or be condoned because . . . they corrupt the United States Department of Agriculture's produce inspection system and disrupt the produce industry." *Id*., at 829-30. While there are some significant distinctions between the purposes of the bribes in this case versus those in *Post and Taback*, and other pertinent decisions, which I will discuss below in the context of sanctions, the long-standing practice of Respondent bribing Cashin and other inspectors easily meets the definition of flagrant under applicable case law.

Finally, the violations are obviously repeated. Not only did Thomas admit making illegal payments to Cashin in at least the 12 instances cited by Complainant, he also alleged that he made three other payments to Cashin for inspections that Cashin did not report to the FBI, and admitted that he had made payments for inspections at least since his alleged meeting with Danny Arcery in the late 1980's. Since repeated means more than once, this element has been established by Complainant.

Thus, I hold that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA.

II. The Appropriate Sanction Against Respondent is a Civil Penalty of $180,000.

Although Respondent has committed at least 12 serious violations of the PACA by making illegal payments to Cashin, the sanction of license revocation, as urged by Complainant, is not appropriate under the facts of this case. I base my sanctions decision on a number of factors, including that the preponderance of the evidence establishes that the illegal payments to Cashin in these specific 12 instances were not used to gain a competitive advantage over any shipper or grower and that there is no credible evidence that Thomas made these payments for any reason other than to receive expedited inspections. Looking at the cases cited that support PACA license revocation, I must conclude that these violations, while serious, warrant a lesser sanction than those cases where bribes were paid in order to take economic advantage of the suppliers of the produce involved.

A. The initial indictment of John Thomas cannot be used to demonstrate that he committed the violations alleged, since he pled to a superseding information, which is dispositive.

Complainant has contended, at some length, that even though John Thomas eventually pled to an information charging him with making illegal payments to a USDA produce inspector in order to receive expedited inspections, I should look at the original indictment in order to determine the acts he really committed. Not surprisingly, Respondent has vigorously contested this approach.

Complainant contended in its opening brief at pages 12-14, 21-22, that the "indictment . . . supports the weight of the evidence, to the effect that Mr. Thomas paid the bribes to Mr. Cashin in order to affect the outcome of produce inspections." While, as I discuss below, I disagree that the weight of the evidence indicates that Thomas was making the payments to influence the outcome of produce inspections, I further disagree with Complainant's contention that the indictment can be considered as evidence that the crimes/violations alleged were committed. While the indictment played a significant role in triggering the PACA Branch's investigation of Respondent, as it should have, I believe it would be inappropriate for me to consider it as an indication that its allegations are correct, particularly where, as here, it has been

superseded by an information to which Thomas pled guilty. Indeed, it appears that the government voluntarily dismissed the initial indictment as part of accepting Thomas' guilty plea on the information in open court.

The limited cases cited by Complainant on the issue provide no help to their position. The cases of *Bousley v. U.S.*, 523 U.S. 614 (1998) and *Peveler v. U.S.*, 269 F. 3d 693 (C.A. 6, 2001), merely hold that when a person elects to vacate a guilty plea which was entered into as a result of plea bargaining, they must make a showing of actual innocence not only for the charges to which they pled, but to the initial charges which the government dropped in order to reach a bargain. The necessary predicate to the application of the holding of these two cases is the existence of an action to vacate a guilty plea. In Thomas' case, he has strongly insisted that his plea was appropriate, and reflected the criminal acts that he actually committed. *Bousley* and *Peveler* are inapposite. With respect to Thomas' motivation for bribing Cashin, I give the initial indictment no weight at all.

B. The preponderance of the evidence establishes that the motivation for the bribes paid by Respondent to Cashin was to prevent delays in inspections, that the 12 inspections that were the subject of the Complaint were not falsified by Cashin, and that Respondent did not use the 12 inspections at issue here to gain any business or commercial advantages vis-à-vis the shippers or growers involved.

The only evidence concerning the motivation for paying bribes to Cashin comes from the testimony of Cashin and Thomas. Unsurprisingly, their testimony conflicts in a number of areas. Thomas stated that he began making payments to USDA produce inspectors for the sole purpose of getting timely inspections beginning when he was told by Arcery that failure to make these payments would result in seriously delayed inspections. He testified that he never asked for "help" on any inspection and knew of no inspection certificates that reflected false information. Although he was indicted for paying bribes to influence the outcome of produce inspections, the only crime of which he stands convicted related to this case is for paying bribes to

expedite inspections. In fact, Thomas essentially testified, and counsel argued, that he was really the victim of an organized extortion scheme involving a large number of USDA inspectors, including supervisors and management. Given the number of inspectors indicted and convicted as a result of Operation Forbidden Fruit, and the alleged involvement of supervisors and management, it is not difficult to see how an individual could reach this conclusion.

While Thomas, and thus Respondent, maintained that they never paid bribes to influence inspections, Cashin testified that in each of the 12 inspections he made alterations to the inspection certificate, to "help" Respondent. Unfortunately, Cashin's recollection was such that he could not recall a single specific instance of any alteration he made to any certificate. He testified that he might have changed various items reported on the certificate, including temperature, count, and condition of the produce. While it may be understandable that Cashin would not specifically remember what he wrote on an inspection form nearly five years after the fact, his version of events is further tainted by the absolute lack of mention, in any of the 302 forms compiled by the FBI, of any actions he had taken with regard to the inspections other than actually conducting the inspections and accepting his illegal payment. It is incomprehensible to me how the investigation team, which included members of USDA's OIG, would not have recorded any accounts offered by Cashin of alterations made in the inspection certificates if there was evidence that such alterations were made. Further, Cashin was equipped with both video and audio recording equipment at various times, yet nothing was introduced into evidence which showed that Cashin "helped" Respondent in any way.

Cashin's recollection and/or credibility was greatly reduced by his account of the inspections he said he made for "J Scott." As discussed, *supra*, Cashin claimed that three inspections, for which he told the investigators he had not received illegal payments, were performed for "J Scott." Subsequent testimony from a number of witnesses, including James Scott himself, demonstrated that Scott had not worked at Respondent's produce house since approximately nine months before these three inspections took place, and that he had nothing to do with

these inspections. Thomas testified that he had in fact paid Cashin for these three inspections, and Respondent suggested that Cashin simply pocketed the money himself. This does not demonstrate, as suggested by Respondent, that Cashin's testimony was false in its entirety, but it strongly impacts his credibility. When the most affirmative and emphatic statements offered about the circumstances of inspections on a particular date are so glaringly incorrect, it certainly casts doubt on the statements made by Cashin concerning his alteration of the certificates.

Additionally, Respondent devoted a significant portion of its case to showing that the inspection certificates were in fact reflective of the produce inspected by Cashin. Extensive testimony by Michael and Barry Hirsch, as well as the testimony of Lawrence Kroman of I.J. Kunik, Dino Gallo, former Director of Sales for Fisher, and Peter Silverstein, President of Northeast Trading, Inc., corroborated this assertion of Respondent. Many of the transactions involved in the 12 inspections were of shipments known to be having "problems." Thus, for example, the Bonheur grapes that were the subject of Cashin's April 29, 1999 inspection (RX F, p. 3) were received by Respondent four to five weeks after the close of the season for Bonheur's, and were effectively the result of cleaning out Fisher's storage cooler. That the grapes were in less than ideal condition is consistent with their age. Similarly, the shipment of grape tomatoes received from NET and inspected by Cashin on May 28, 1999 (RX H, p. 9) had been rejected by the Stew Leonard's chain store. That 13% of the grape tomatoes were reported as defective by Cashin is not surprising; presumably that was the reason for the rejection. As a result, significant repacking had to be done by Respondent. *Id*., at 6. Further, NET had significant problems with the grower of these tomatoes, and believed that Cashin's inspection results were correct. Tr. 1106-7.

While Respondent did not have testimony from each and every supplier and grower whose produce was inspected by Cashin in these 12 instances, Complainant has offered no testimony, other than Cashin's generic statements that he "helped" Respondent on each inspection, that would allow me to find that, in any of the 12 instances, the produce was not in fact as Cashin described it in the inspection certificate. At the

very least, the preponderance of the credible evidence supports the finding that the inspection certificates were generally accurate as to the condition of the produce inspected.

The preponderance of the evidence also supports a finding that Respondent's illegal payments were not used as a means of dealing unfairly with the suppliers of the produce, a factor which I find is important in imposing the appropriate sanction for these violations. Respondent's witnesses uniformly testified that the inspection certificates had no bearing on the prices paid by Respondent for the produce, and that the ultimate price paid was based on the amount actually received by Respondent from its sales of the produce. Most of the contracts from the inspections at issue were based on price after sale, with a few others on consignment. There was no prearranged price, although there were price suggestions or goals on some of the shipping documents. Following the establishment of the selling price of the produce, which included factoring in produce that had been dumped or repacked, as well as the costs of inspections and, occasionally, freight and other charges, the final price was agreed to. Even here, there was no set formula for establishing prices, as Respondent and its suppliers testified that prices were often finalized based on long-term relationships, on what price was needed to get a return for a particular customer, and many other nebulous factors.

While Respondent's witnesses testified repeatedly that the purpose of the bribes paid by Thomas was to receive expedited inspections and that Respondent did not use the bribes to gain any advantage over the suppliers of the produce, Complainant provided little evidence to contradict this assertion. Thus, Complainant's sanctions witness testified that the bribes "tended to benefit Respondent . . . by Respondent making a bribery payment to a produce inspector to obtain false information for an inspection certificate . . . Respondent would be in a position to use the information that was reported on that inspection that is false to contact the shipper. And by presenting that certificate to the shipper to negotiate or obtain that kind of price adjustments or resolving disputes with the transaction." Tr. 345. But Complainant was unable to back this assertion up in the face of Respondent's evidence to

the contrary.

C. A civil penalty of $180,000 is the appropriate sanction.

At the close of the hearing, I asked both Complainant and Respondent to discuss appropriate sanctions. Tr. 1424-26. In particular, I asked the parties to discuss options available to me that were less onerous than the license revocation urged by Complainant and more onerous than the complete exoneration urged by Respondent. In their briefs, both parties chose to ignore my request and went for the all-or-nothing approach to sanctions. Neither party discussed other options available to me such as suspension of the license for a limited period and/or imposition of civil penalties, even though these options are explicitly available under the statute.

Even though Complainant has not met its burden of showing that the illegal payments made by Thomas were used to induce Cashin to alter inspection certificates, and even though Respondent has demonstrated to my satisfaction that it did not use these payments as part of a scheme to gain a financial advantage in produce transactions over their produce suppliers, this does not exonerate Respondent under the PACA. As discussed, *supra*, USDA case law strongly supports Complainant's contention that bribery of a USDA inspector constitutes a serious violation of the Act.

On the other hand, where the Judicial Officer has ultimately imposed the sanction of revocation, there has generally been a finding that the violator did commit the violation in order to gain a financial advantage, a circumstance not shown by the preponderance of the evidence in this case. Thus, several of the cases cited by Complainant to support revocation indicate that a significant factor leading to the imposition of the most severe sanction was that illegal payments were used to the economic advantage of the payor vis-à-vis the party with whom the payor was transacting business. Thus, in the recent decision of *Post & Taback, supra*, the Judicial Officer affirmed the administrative law judge's finding that payments were made "to influence the outcome of United States Department of Agriculture inspections of fresh fruits and

vegetables" and that the false information on the inspection certificates was used "to make false and misleading statements to produce sellers." These factual findings are considerably different than my findings in this case, as I have concluded that Complainant has neither shown that the inspection certificates were inaccurate nor that they were used to deceive or mislead the produce sellers. Similarly, in *Sid Goodman and Co., Inc., supra*, the payments were made to employees of another company to induce them to purchase from Goodman, to the economic advantage of Goodman and the disadvantage of the company of the employees who received the illegal payments. In *Tipco, Inc*., 50 Agric. Dec. 871 (1991), also cited by Complainant, the decision emphasized, among other things, that "members of the produce industry have an obligation to deal fairly with one another," *Id*., at 862, a significant factor in the Judicial Officer's decision to revoke a PACA license. Here, the testimony has been consistent that the Respondent did not deal unfairly with its suppliers, that the suppliers felt that the inspection certificates were accurate and that they had been dealt with fairly by Respondent, and that generally that Respondent has continued to maintain cordial business relationships with these suppliers at least through the date of these hearings.

In imposing a sanction, the Secretary of Agriculture takes "aggravating and mitigating circumstances into account . . . The United States Department of Agriculture's sanction policy has long provided that the sanction is determined by examining all relevant circumstances." *George A. Heimos Produce Company, Inc*., 62 Agric. Dec. 763, 797 (2003). Respondent committed willful, flagrant and repeated violations by paying bribes to USDA inspectors, which in itself constitutes an extremely serious violation of the PACA. Respondent did not pay these bribes to gain an economic or transactional advantage over its produce suppliers. Thus, rather than imposing the "death penalty" of license revocation, I believe that an appropriate sanction would be a 90-day suspension of Respondent's license. Under the alternative assessment provisions of the PACA, Respondent is assessed a penalty of $180,000, based on $2,000 per day for 90 days of continuous violation. In assessing this penalty, I am factoring in the size of Respondent's business, and the number of employees. Looking at

exhibits reflecting on Respondent's profitability, including the salaries paid to its principals, e.g., RCMH 6-8, I am satisfied that a penalty of this amount is an adequate sanction to deter future violations for Respondent and others, without seriously impeding Respondent's ability to continue in business. In *Heimos,* the Judicial Officer determined that, where a suspension was the appropriate sanction, "a civil penalty with an equivalent deterring effect is an appropriate sanction." *Id*., at 797.

III. Both Barry and Michael Hirsch are Responsibly Connected to Respondent.

Although I am only imposing a civil penalty against Respondent, I am making findings on the two responsibly connected petitions in the event that my sanction imposition is reversed or modified, or if Respondent elects to accept the 90-day license suspension in lieu of the payment of the $180,000 civil penalty.

Barry and Michael Hirsch are each officers, directors and holders of over 31% of the stock in Respondent. Both are intimately involved in the day-to-day activities of the company. Their principal defense to the finding of the PACA Branch that they are not responsibly connected is reliance on the exception for a "person not actively involved in the activities resulting in a violation of this chapter." While there has been no showing that the Hirsches were involved in the violative activities—a fact generally conceded by Complainant—this does not provide the Hirsches any relief. The statute requires not only a showing of non-involvement in the violative activities, but requires an additional showing that the person "was only nominally a partner, officer, director or shareholder."

The record establishes to a certainty that each of the Hirsches was fully involved in Respondent's business. Indeed, in their Proposed Finding of Facts in the responsibly connected case, the Hirsches ask me to find that "Barry Hirsch was the Treasurer and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint" (Proposed Finding of Fact 1) and "Michael Hirsch was the President and 32% stockholder of

Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint" (Proposed Finding of Fact 2). These facts refute any possible contention that either of the Hirsches could show that they were not responsibly connected either by showing they were not "actively involved" or that their positions were only "nominal." Under the statutory definition, the fact that the Hirsches might not have been involved in the violative activities does not exonerate them unless they show that they were not actively involved or that their position was purely nominal. The Hirsches simply cannot meet the second part of the statutory test for escaping the responsibly connected label.

CONCLUSION AND ORDER

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent is assessed a civil penalty of $180,000 in lieu of a 90-day suspension of its license.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: CHARLES E. ELLIOTT, JR.
PACA-APP Docket No. 04-0008.
Order Dismissing Case.
Filed July 6, 2004.

Clara Kim, for Respondent.
Joe Carl "Buzz" Jordan, for Petitioner.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

The parties Joint request to Dismiss Petition for Review is **GRANTED**.

Accordingly, this case is **DISMISSED**.

In re: JOHN COPE'S FOOD PRODUCTS, INC., PACA Docket No. D-02-0027 and
In re: VERNON A. FREY, PACA Docket No. APP-03-0015 and
In re: WARREN H. DEBNAM, PACA Docket No. APP-03-0017.
Order Dismissing Case as to Petitioner Walter H. Debnam.
File August 13, 2004.

Charles Kendall for Complainant.
Mark D. Evans for Respondents.
Decision and Order by Chief Administrative Law Judge, Marc R.Hillson.

Warren H. Debnam (Petitioner), and the Administrator, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (Respondent), jointly request that his Petition be withdrawn without prejudice.

In accordance with the terms of their Joint Motion, filed August 11,

2004, this case is DISMISSED without prejudice as to Warren H. Debnam.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

In re: JOHN COPE'S FOOD PRODUCTS, INC., PACA Docket No. D-02-0027 and
In re: VERNON A. FREY, PACA Docket No. APP-03-0015
and
In re: WARREN H. DEBNAM, PACA Docket No. APP-03-0017
Order Dismissing Case as to Petitioner Vernon A. Frey.
File August 13, 2004.

Charles Kendall for Complainant.
Mark D. Evans for Respondents.
Decision and Order by Chief Administrative Law Judge, Marc R.Hillson.

Vernon A. Frey (Petitioner), and the Administrator, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (Respondent), jointly request that his Petition be withdrawn without prejudice. In accordance with the terms of their Joint Motion, filed August 11, 2004, this case is **DISMISSED** without prejudice as to Vernon A. Frey. Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

In re: JUAN MARTINEZ and ANTOLIN DEL COLLADO.
PACA - APP Docket No. -05-0001.
Order Dismissing Case.
Filed November 15, 2004.

Eric Paul, for Respondent.
Randall Norlund, for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

Petitioners Motion to Withdraw Petition for Review of the responsibly Connected Determination is **GRANTED**. It is hereby

ordered that the Petition for Review, filed herein on October 5, 2004, be withdrawn.

Accordingly, this case is **DISMISSED**.

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In re: ATLANTA EGG & PRODUCE CO., INC., CHARLES R. BRACKETT AND TOM D. OLIVER
PACA Docket No. D-03-0003, D-03-0004.
Three Rulings.
Filed December 4, 2004.

Andrew Stanton for Complanant.
William M. Droze for Respondent.
Ruling by Chief Administrative Law Judge, Marc. R. Hillson.

Three Rulings

I grant the parties' joint motion for extension of time for prehearing exchanges. I deny the Motion of Petitioners Brackett and Oliver to intervene in the Atlanta Egg proceeding. I am today signing the default judgment against Atlanta Egg. However, in order to provide Petitioners with due process in their responsibly connected proceedings, I will allow them, as part of their case presentation, to demonstrate that Atlanta Egg did not commit violations that were charged in the complaint against Atlanta Egg.

Ruling I

The parties have requested that the exchanges ordered in the Brackett and Oliver cases, as ordered by Judge Jill Clifton on May 8, 2003, be delayed until ten days after I issue a decision on the Motion to Intervene in Atlanta Egg. Since I am issuing that decision today, I order that the submission by Counsel for Brackett and Oliver originally scheduled for November 26, 2003 is now due fifteen days after the date I sign this Ruling, and that the submission by Counsel for AMS originally scheduled for December 19, 2003 be scheduled 30 days after Petitioners' submissions.

Ruling II

The complaint against Atlanta Egg was filed in October, 2002, approximately eight months after the company had filed for bankruptcy. No response to the complaint was ever filed by Atlanta Egg and Complainant in February, 2003 filed a Motion for Decision Without Hearing by Reason of Default. No response to this Motion was ever received from Atlanta Egg, although they apparently were properly served on May 20, 2003. In the meantime, Petitioners Brackett and Oliver were also notified in February, 2003, by the Chief of the PACA Branch, that they were responsibly connected with Atlanta Egg. They filed a timely petition challenging the responsibly connected determination in March. Then, in May, with the Atlanta Egg Default Motion still pending, Brackett and Oliver filed a Motion to Intervene in the Atlanta Egg proceeding.

The gist of Petitioners' argument for intervention is that the decision by Atlanta Egg not to respond to the Complaint was outside of their hands, since Atlanta Egg is bankrupt and Petitioners have no authority to tell the bankruptcy trustee what to do, and that it would be a denial of due process for the findings in the default decision to apply to their responsibly connected cases. If they were unable to defend Atlanta Egg against the many violations alleged by Complainant, they contend, then they would effectively be denied any defense, unless they could show that they were not responsibly connected to Atlanta Egg. In other words, any violations that Atlanta Egg was found to have committed would automatically be attributed to them, if they were responsibly connected with Atlanta Egg at the time of the violations' occurrence.

Complainant, on the other hand, argues that Petitioners receive all the due process they are entitled to in the course of the responsibly connected hearing, even though the violations committed by Atlanta Egg would be held against them without their having an opportunity to contest them. Further, Complainant points out that there is no provision for intervention in PACA cases, and that, as officers in Atlanta Egg, Petitioners had the ability to cause Atlanta Egg to timely contest the complaint.

USDA case law is clear on this issue. There is no right to intervene in "responsibly connected" proceedings, whether brought under PACA

or other statutes. I agree with Complainant that *Syracuse Sales Co.*, 52 Agric. Dec. 1511, 1513 (1993) and *In re Bananas, Inc.,* 42 Agric. Dec. 426 (1983), unequivocally hold that in the absence of a specific provision in the rules of practice allowing intervention in disciplinary cases, as opposed to reparation cases, there is no authority to allow intervention. Although I have no basis to find, as urged by Complainant, that Petitioners, as officers of a bankrupt corporation whose affairs are now being handled by a trustee, somehow had the ability to cause Atlanta Egg to timely contest its disciplinary case, any such finding would not affect my disposition of this matter, given that I simply have no authority to allow intervention.

Since Petitioners have no right to intervene, I am today signing the default decision against Atlanta Egg.

Ruling III

Even though I denied Petitioners the right to intervene in the Atlanta Egg matter, I believe that due process considerations require that they be given some leeway to attack or explain the violation findings against Atlanta Egg, to the extent that they can demonstrate, in the event they are found to be responsibly connected, that certain violations did not occur, or that the violations were of lesser severity than alleged. I believe this approach is necessary so that deciding officials will be better able to impose appropriate sanctions in the event I do find Petitioners to be responsibly connected. The very close relationship between disciplinary proceedings and responsibly connected proceedings has been recognized by the USDA for a number of years, and was a basis for the 1996 changes in the Rules of Procedure requiring consolidation of disciplinary and responsibly connected cases where they arise from the individuals' relationship with the company during the time in question. 7 C.F.R. 1.137(b); 61 Fed. Reg. 11501-4 (March 21, 1996). Petitioners' ability to challenge the underlying violations, when such violations can lead directly to a sanction against Petitioners, should not rise or fall solely based on whether the company charged in the disciplinary proceeding elects to contest the charges, particularly where, as here, the company has filed for bankruptcy and is under the supervision of a bankruptcy trustee.

I am not unmindful that, as pointed out by the PACA Branch in its

October 15 Brief, many of the allegations raised by Petitioners in defense of Atlanta Egg, such as the making of partial or late payments, would not change the sanctions against Atlanta Egg, even if they had contested the complaint. However, to the extent it might impact the Secretary's decision on sanctions against Petitioners, I anticipate that some development of the record in this area is appropriate.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: LOUIS PRODUCE CORPORATION, INC.
PACA Docket No. D-03-0020.
Decision and Order.
Filed July 31, 2004.

PACA-Default – Willful failure to pay despite motive.

David A. Richman, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) hereinafter referred to as the "Act," instituted by a complaint filed on May 12, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period January 2002 through June 2002, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 18 sellers, 251 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $337,694.77.

The complaint also asserts that on July 17, 2002, Respondent filed a Voluntary Petition in Bankruptcy pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq*.) in the United States Bankruptcy Court for the Eastern District of Louisiana (Case No. 02-15072). Respondent admitted in its bankruptcy schedules that the 18 sellers listed in the complaint hold unsecured claims in amounts greater than or equal to the amounts alleged in the complaint. The complaint requests the issuance of a finding that Respondent committed willful, repeated and flagrant violations of section 2(4) of the PACA, and publication of the facts and circumstances of the violations.

Respondent has filed an answer in which Respondent admitted that

it has failed to make full payment promptly to the produce sellers listed in the complaint, but denies that its failure to pay as required by the Act was willful. Respondent's admissions in its answer are sufficient to justify the issuance of this Decision Without Hearing Based on Admissions.

The Judicial Officer's policy with respect to admissions in PACA disciplinary cases in which the respondent is alleged to have failed to make full payment promptly is set forth in *In re: Scamcorp, Inc., d/b/a Goodness Greeness,* 57 Agric. Dec. 527, 549 (1998), as follows:

> In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked. (Emphasis added)

The complaint in this case was served on the Respondent on May 17, 2003 by certified U.S. mail, as evidenced by the posting date of the return receipt which was attached to the complaint. Respondent admitted in its answer that it failed to pay produce vendors the amounts alleged in the complaint. Under *Scamcorp,* Respondent was required to be in full compliance with the PACA by September 14, 2003, 120 days after service of the complaint. The affidavit of Gregory A. Breasher of the PACA Branch, Agricultural Marketing Service, attached to Complainant's Motion for Decision Without Hearing Based on Admissions, indicated that in December 2003, Mr. Breasher contacted five of the produce sellers listed in the complaint, and found that those five sellers were still owed **$217,506.00** for purchases of various perishable agricultural commodities. This case, therefore, shall be treated as a "no-pay" case which, as the Judicial Officer stated in *Scamcorp,* warrants the revocation of Respondent's PACA license. Since Respondent's license has terminated due to its failure to pay the

annual renewal fee (complaint, paragraph II(b)), the appropriate sanction here is the issuance of a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA, and publication of the facts and circumstances of the violations.

Respondent stated in its answer that it did not willfully make "misleading or false statements to defraud any supplier to profit." Louis Despaux, President of the Respondent corporation, explained that all of his suppliers knew the money problems he was having and still continued to sell to him. The Judicial Officer addressed this issue in *In re: Hogan Distributing, Inc.*, 55 Agric. Dec. 622 (1996), stating that the respondent's failure to pay its produce obligations were willful, despite the respondent's claim that financial difficulties forced the violations to occur. The Judicial Officer held that a "violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute." *Id.* at 626. The Judicial Officer again addressed the issue in *Scamcorp,* stating that the respondent in that case knew, or should have known, that it could not make prompt payment for amount of perishable agricultural commodities it ordered, and by continuing to order such goods, it intentionally violated the PACA and operated in careless disregard of the payment requirements of the PACA. *Scamcorp,* 57 Agric. Dec. at 553. The same analysis applies here.

As stated by the Judicial Officer in *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996):

> [B]ecause of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time.

In view of Respondent's admission that it has failed to make full payment promptly to 18 sellers in the total amount of $337,694.77 for 251 lots of perishable agricultural commodities, and the fact that

Respondent has not paid the aggrieved sellers in full within 120 days of service of the complaint, Complainant's Motion for a Decision Without Hearing Based On Admissions is granted.

Findings of Fact

1. Louis Produce Corporation, Inc. is a corporation organized and existing under the laws of the State of Louisiana. Its business address is 67-81 French Market Place, New Orleans, Louisiana 70116. Its mailing address is 7548 Patricia Street, Arabi, Louisiana 70032.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 971153 was issued to Respondent on March 28, 1997. This license terminated on March 28, 2003, pursuant to section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. Respondent, during the period January 2002 through June 2002, failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $337,694.77 for 251 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce.

4. On July 17, 2002, Respondent filed a voluntary petition pursuant to Chapter 7 of the United States Bankruptcy Code (11 U.S.C. § 701 *et seq.*) in the United States Bankruptcy Court for the Eastern District of Louisiana. In that matter, case number 02-15072, Respondent admitted in its bankruptcy schedules that the 18 sellers listed in paragraph III of the complaint hold unsecured claims in an amount greater than or equal to the amounts alleged in the complaint.

5. In its answer to the complaint, Respondent admited its failure to make full payment promptly.

6. Respondent failed to pay the produce debt described above, and failed to come into full compliance with the PACA, within 120 days of service of the complaint against it.

Conclusions

Respondent's failures to make full payment promptly with respect to the transactions described in Finding of Fact No. 3, above, constitute willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*), this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final September 9, 2004.-Editor.-]

In re: FIELDERS CHOICE PRODUCE, INVESTORS, LLC.
PACA Docket No. D-03-0022.
Decision Without Hearing by Reason of Default.
Filed July 27, 2004.

PACA - Default – Prompt payment, failure to make.

Jeffrey Armistead, for Complainant.
Steven J. Brown, for Respondent.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.)(hereinafter referred to as the "Act"), instituted by a complaint filed on May 20, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period November 2000 through January 2002, Fielders Choice Produce Investors, LLC, (hereinafter "Respondent") failed to make full payment promptly to eight sellers of the agreed purchase prices, or balances thereof, for 207 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce in the total amount of $244,114.33.

A copy of the complaint was mailed to Respondent by certified mail at its last known principal place of business on May 20, 2003, and was returned to the office of the Hearing Clerk. A copy of the complaint was served on Respondent by regular mail on June 11, 2003, and pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 *et seq*., hereinafter "Rules of Practice") the Respondent is deemed served with the complaint on the date of that mailing. No answer to the complaint has been received. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a decision without hearing based upon Respondent's default, 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 is a limited liability company organized and existing under the laws of the state of Arizona. Its business mailing address was 490 East Pima, Phoenix, Arizona 85004-2838.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 010664 was issued to Respondent on April 11, 2001. This license terminated on April 11,

2002, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period November 2000 through January 2002, Respondent purchased, received and accepted in interstate and foreign commerce, 207 lots of perishable agricultural commodities from eight sellers, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $244,114.33.

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, flagrant, and repeated 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, flagrant, and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final September 17, 2004.-Editor]

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In re: QUEEN CITY MARKETING SERVICES, INC.
PACA Docket No. D-03-0029.
Decision Without Hearing by Reason of Default.
Filed July 27, 2004.

PACA - Default – Prompt payment, failure to make.

Clara Kim, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter "Act" or "PACA"), instituted by a Complaint filed on July 17, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period May 2002 through January 2003, Respondent Queen City Marketing Services, Inc., (hereinafter "Respondent") failed to make full payment promptly to 11 sellers of the agreed purchase prices in the total amount of $249,109.58 for 56 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

On July 18, 2003, a copy of the Complaint was mailed to Respondent via certified mail to its business mailing address. The Complaint was returned unclaimed by the U.S. Postal Service on August 12, 2003. On August 15, 2003, a copy of the Complaint was re-sent to Respondent's business address via regular mail by the Hearing Clerk. Pursuant to Section 1.147(c) (7 C.F.R. § 1.147(c)) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*; hereinafter "Rules of Practice"), service is deemed made on the date of remailing by regular mail. Respondent has not answered the Complaint. The time for filing an Answer having expired, 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 (7 C.F.R § 1.139) of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Ohio. Its business address is 700 West Pete Rose Way, Suite 344, Cincinnati, Ohio 45203. Its business mailing address is c/o Agent Richard A. Castellini, 1000 Tri-State Building, 432 Walnut Street, Cincinnati, Ohio 45202.

2. At all times material herein, Respondent was licensed or operating subject to license under the provisions of the PACA. PACA license number 19990008 was issued to Respondent on October 1, 1998. That license terminated on October 1, 2002, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual fee.

3. During the period May 2002 through January 2003, Respondent purchased, received and accepted in interstate commerce, from 11 sellers, 56 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $249,109.58.

Conclusions

Respondent's failure to make full payment promptly with respect to the 56 transactions set forth in Finding of Fact No. 3 above, constitutes willful, flagrant and repeated 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, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed

to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final September 27, 2004.-Editor]

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In re: ALL WORLD FARMS, INC.
PACA Docket No. D-03-0027.
Decision Without Hearing by Reason of Default.
Filed August 20, 2004.

PACA - Default – Prompt payment, failure to make.

Jeffrey Armistead, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*)(hereinafter referred to as the "Act"), instituted by a complaint filed on June 24, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period January 2001 through November 2002, All World Farms, Inc., (hereinafter "Respondent") failed to make full payment promptly to 23 sellers of the agreed purchase prices, or balances thereof, for 65 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce in the total amount of $354,079.10.

A copy of the complaint was mailed to Respondent by certified mail

at its last known principal place of business on June 24, 2003, and was returned to the office of the Hearing Clerk. A copy of the complaint was served on Respondent by regular mail on August 8, 2003, and pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 *et seq*., hereinafter "Rules of Practice"), the Respondent is deemed served with the complaint on the date of that mailing. No answer to the complaint has been received. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a decision without hearing based upon Respondent's default, 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 is a corporation originally organized and existing under the laws of the State of Florida. Respondent's business address was 1291-A South Powerline Road, Pompano Beach, Florida 33069. On November 27, 2001, Respondent incorporated in the State of Pennsylvania. Respondent's business mailing address is 202 East Fairfield Avenue, Suite 282, New Castle, Pennsylvania 16105.

2. At all times material herein, Respondent was licensed under the provisions of the PACA or conducted business subject to license. License number 990091 was issued to Respondent on October 22, 1998. This license terminated on October 22, 2002, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period January 20001 through November 2002, Respondent purchased, received and accepted in interstate and foreign commerce, 65 lots of perishable agricultural commodities from 23 sellers, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $354,079.10.

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, flagrant, and repeated 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, flagrant, and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final November 22, 2004.-Editor]

In re: BAYSIDE PRODUCE, INC.
PACA Docket No. D-04-0010.
Decision Without Hearing by Reason of Default.
Filed August 25, 2004.

PACA - Default – Prompt payment, failure to make.

David A. Richman, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.)(the "Act"), instituted by a Complaint filed on April 26, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period November 23, 2002, through February 7, 2003, Respondent Bayside Produce, Inc. (hereinafter "Respondent") failed to make full payment promptly to 22 sellers of the agreed purchase prices, or balances thereof, in the total amount of $163,102.70 for 74 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

A copy of the Complaint was mailed to Respondent by certified mail at its business mailing address on April 26, 2004, and was returned by the Postal Service to the Department of Agriculture. A copy of the Complaint was remailed to Respondent at the same address by ordinary mail on May 12, 2004 pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 *et seq*., hereinafter "Rules of Practice").

A copy of the Complaint was also mailed to Respondent by certified mail at its last known principal place of business (street address) on April 26, 2004, and was returned by the Postal Service to the Department of Agriculture. A copy of the Complaint was remailed to Respondent at the same address by ordinary mail on May 21, 2004 pursuant to Section 1.147(c) of the Rules of Practice.

Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation incorporated in the state of California on August 6, 1997. Its business address was 1120 Growers St., Salinas, CA 93901. Its mailing address is P.O. Box 7265, Spreckels, California, 93962.

2. At all times material herein, Respondent was licensed under the PACA. License number 19981824 was issued to Respondent on August 26, 1998. This license terminated on August 26, 2003, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth in paragraph III of the Complaint, during the period November 23, 2002, through February 7, 2003, Respondent purchased, received, and accepted in interstate commerce, from 22 sellers, 74 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $163,102.70.

Conclusions

Respondent's failure to make full payment promptly with respect to the 109 transactions set forth in Finding of Fact No. 4 above constitutes wilful, 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

Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed

to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final October 28, 2004.-Editor]

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In re: GARDEN FRESH PRODUCE, INC.
PACA Docket No. D-04-0007.
Decision Without Hearing by Reason of Default.
Filed August 25, 2004.

PACA - Default – Prompt payment, failure to make.

Charles Kendall, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.)(the "Act"), instituted by a Complaint filed on January 27, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period January 14, 2002, through February 26, 2003, Respondent Garden Fresh Produce, Inc. (hereinafter "Respondent") failed to make full payment promptly to five (5) sellers of the agreed purchase prices, or balances thereof, in the total amount of $379,923.25 for 109 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

A copy of the Complaint was mailed to Respondent by certified mail at

its last known principal place of business on January 27, 2004, and was returned by the Postal Service to the Department of Agriculture on February 9, 2004. Upon inquiry by the office of the Hearing Clerk, the Postal Service indicated by letter received April 27, 2004 that Respondent had moved and left no forwarding address. A copy of the Complaint was remailed to Respondent at the same address by ordinary mail on April 28, 2004 pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 *et seq*., hereinafter "Rules of Practice"). Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation incorporated in the state of Nevada on April 26, 2000. Its business address was 3940 E. Craig Rd. #103, North Las Vegas, Nevada 89030. Its mailing address is 43 E. Romie Lane, Salinas, California, 93901-3123.

2. At all times material herein, Respondent was licensed under the PACA. License number 20001495 was issued to Respondent on July 28, 2000. This license terminated on July 28, 2003, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth in paragraph III of the Complaint, during the period January 14, 2002, through February26, 2003, Respondent purchased, received, and accepted in interstate commerce, from five (5) sellers, 109 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $379,923.25.

Conclusions

Respondent's failure to make full payment promptly with respect to the 109 transactions set forth in Finding of Fact No. 4 above constitutes wilful, 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

Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final December 17, 2004.-Editor]

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In re: SEVEN SEAS TRADING CO., INC., d/b/a VALLEY VIEW FARMS.
PACA Docket No. D-03-0031.
Decision Without Hearing by Reason of Default.
Filed October 29, 2004.

PACA – Default – Prompt payment, failure to make.

Ann K. Parnes for Complainant.
Respondent - Pro se.
Decision and Order issued by Marc R. Hillson 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" or "PACA"), instituted by a complaint filed on September 5, 2003, by the Associate Deputy Administrator, Perishable Agricultural Commodities Branch, Fruit and Vegetable Programs of the Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period November 1999 through February 2002, Respondent Seven Seas Trading Co., Inc., d/b/a Valley View Farms (hereinafter "Respondent") failed to make full payment promptly to 27 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,227,758.83 for 176 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was sent to Respondent's last known principal place of business on December 18, 2003 by certified mail, and received on December 23, 2003. This complaint has not been answered. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a decision without hearing based upon Respondent's default, 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 is a corporation organized and existing under the laws of the state of New York. Respondent's last known business address is 119 Chrystie Street, New York, New York, 10002.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 760471 was issued to Respondent on October 1, 1975. This license terminated on March 19, 2003, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period November 1999 through February 2002, Respondent purchased, received and accepted in interstate and foreign commerce 176 lots of perishable agricultural commodities from 27

sellers, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,227,758.83.

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, flagrant and repeated 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, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and 1.145).

Copies hereof shall be served upon the parties.

CONSENT DECISIONS

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

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AGRICULTURE DECISIONS

Volume 63

July - December 2004
Part Four
List of Decisions Reported (Alphabetical Listing)
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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *AGRICULTURE DECISIONS*.

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 number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published 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.

Beginning in Volume 60, each part of *AGRICULTURE DECISIONS* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The alphabetical List of Decisions Reported and the subject matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Beginning in Volume 63 Jul. - Dec. (2004), the initial decisions (and selected miscellaneous orders) of the Administrative Law Judges will be published in *AGRICULTURE DECISIONS* in addition to the Appealed Decisions (if any) issued by the Judicial Officer in the same case.

Consent decisions entered subsequent to December 31, 1986, are no longer published in this publication. However, a list of consent decisions is included. Beginning in Volume 62, consent decisions may be viewed in portable document (pdf) format on the OALJ website (see url below) and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Volumes 59 (circa 2000) through the current volume of *AGRICULTURE DECISIONS* are also available online at http://www.usda.gov/da/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 58 (circa 1999) have been scanned and will appear in portable document format (pdf) on the same OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order.

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Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1057 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

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