UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

| In re: | ) | HPA Docket No. 08-0007 |
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| | ) | |
| Kimberly Copher Back, | ) | |
| Linda Ruth Patton, d/b/a | ) | |
| Sweet Revenge Stables, | ) | |
| and Richard Evans, | ) | |
| | ) | |
| Respondents | ) | **Decision and Order** |

**PROCEDURAL HISTORY**

On October 22, 2007, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], initiated this disciplinary proceeding against Kimberly Copher Back, Linda Ruth Patton, d/b/a Sweet Revenge Stables, and Richard Evans by filing a Complaint alleging violations of the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]. On November 13, 2007, counsel for Ms. Back, Ms. Patton, and Mr. Evans filed an Entry of Appearance and Answer denying the material allegations of the Complaint, raising affirmative defenses, and requesting oral hearing.

Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] conducted a hearing on February 2, 2009, in Louisville, Kentucky. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. David F. Broderick and Christopher T. Davenport, Broderick & Associates, Bowling Green, Kentucky, represented Ms. Back, Ms. Patton, and Mr. Evans. Eleven witnesses testified and nine exhibits were identified and received into evidence.[1] On May 12, 2009, the ALJ issued a decision in which he held that a horse known as "Reckless Youth" was not "sore," as that term is defined in the Horse Protection Act, and dismissed the Complaint. On August 13, 2009, the Administrator filed a timely appeal of the ALJ's decision. On October 14, 2009, Ms. Back, Ms. Patton, and Mr. Evans filed a response to the Administrator's appeal petition and requested oral argument before the Judicial Officer. On October 19, 2009, the Hearing Clerk transmitted the record to me for consideration and decision. Based on the discussion in this Decision and Order, *infra*, I affirm in part and reverse in part.

[1]GX 1 through GX 8 and RX 1. Transcript references are designated "Tr."

## DECISION

### Ms. Back, Ms. Patton, and Mr. Evans' Request for Oral Argument

Ms. Back, Ms. Patton, and Mr. Evans' request for oral argument, which the Judicial Officer may grant, refuse, or limit,[2] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

### Discussion

The Administrator alleges that on or about April 20, 2007, Ms. Back violated 15 U.S.C. § 1824(2)(A) by showing or exhibiting "Reckless Youth" as entry number 35, class number 49, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore; that on or about April 20, 2007, Ms. Back, Ms. Patton, and Mr. Evans violated 15 U.S.C. § 1824(2)(B) by entering for the purpose of showing or exhibiting "Reckless Youth" as entry number 35, class number 49, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore; and that on or about April 20, 2007, Ms. Back violated 15 U.S.C. § 1824(2)(D) by allowing the entry for the purpose of showing or exhibiting "Reckless Youth" as entry number 35, class number 49, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore.

Ms. Back, Ms. Patton, and Mr. Evans, in filing their Answer to the Complaint, raised collateral estoppel and/or judicial estoppel, any applicable statutes of limitations,

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[2] 7 C.F.R. § 1.145(d).

and res judicata, as affirmative defenses. The affirmative defenses may be disposed of summarily. The United States is not bound by any state statutes of limitations.[3] Similarly, counsel's attempt to invoke the federal statute of limitations is without merit as the Complaint in this action was brought well within the 5 years set forth in 28 U.S.C. § 2462, limiting the enforcement of civil fines, penalty, or forfeiture, pecuniary or otherwise.

The general rule is that the United States may not be equitably estopped from enforcing public laws, even though private parties may suffer hardship as a result in particular cases.[4] Even if all the requisite threshold elements necessary to trigger such defenses were present, which they are not, a detailed discussion of the doctrines of res judicata, collateral estoppel, and judicial estoppel is not necessary as the issue of whether any determination or disciplinary proceedings instituted by entities other than the Administrator bar a subsequent enforcement action by the Administrator for the same event has been previously considered and answered adversely to Ms. Back, Ms. Patton, and Mr. Evans by both the Judicial Officer and the United States Court of Appeals for the

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[3] *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343, 350-51 (1939); *United States v. Thompson*, 98 U.S. 486, 490-91 (1878); *FHA v. Muirhead*, 42 F.3d 964, 965 (5th Cir.), *cert. denied*, 516 U.S. 806 (1995); *United States v. Merrick Sponsor Corp.*, 421 F.2d 1076 (2d Cir. 1970).

[4] *OPM v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *INS v. Miranda*, 459 U.S. 14 (1982) (per curiam); *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam); *FCIC v. Merrill*, 332 U.S. 380 (1947).

Sixth Circuit. *In re Jackie McConnell*, 64 Agric. Dec. 436 (2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006).

Congress enacted the Horse Protection Act to end the cruel practice of deliberately "soring" Tennessee Walking horses for the purpose of altering their natural gait and improving their performance at horse shows. When a horse's front feet are deliberately made sore, usually by using chains or chemicals, "the intense pain which the horse suffers when placing his forefeet on the ground causes him to lift them up quickly and thrust them forward, reproducing exactly" the distinctive high-stepping gait that spectators and show judges look for in a champion Tennessee Walking horse. (H.R. Rep. No. 91-1597, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871.)

Congress' reasons for prohibiting soring were twofold. First, soring inflicts great pain on the animals; and second, trainers who sore horses gain an unfair competitive advantage over trainers who rely on skill and patience. In 1976, Congress significantly strengthened the Horse Protection Act by amending it to make clear that intent to sore the horse is not a necessary element of a violation.[5] *See Thornton v. U.S. Dep't. of Agric.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983).

Section 2(3) of the Horse Protection Act (15 U.S.C. § 1821(3)) defines the term "sore," as follows:

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[5]The Horse Protection Act also provides for criminal penalties for "knowingly" violating the Horse Protection Act (15 U.S.C. § 1825(a)). This provision is not at issue in the instant proceeding.

**§ 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 . . . .

The Horse Protection Act creates a presumption that a horse with abnormal, bilateral sensitivity is "sore":

**§ 1825. Violations and penalties**

. . . .
**(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction**
. . . .
(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. § 1825(d)(5). The Horse Protection Act prohibits certain conduct, including:

**§ 1824. Unlawful acts**

> The following conduct is prohibited:
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> . . . .
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> (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 . . . (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)(A)-(B), (D). Violators of the Horse Protection Act are subject to civil and criminal sanctions. Civil sanctions include both civil penalties (15 U.S.C. § 1825(b)(1)) and disqualification for a specified period from "showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction" (15 U.S.C. § 1825(c)). The maximum civil penalty for each violation is $2,200 (15 U.S.C. § 1825(b)(1)).[6] In making the determination concerning the amount of the monetary penalty, the Secretary of Agriculture must "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

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[6]Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, is authorized to adjust the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824. The current maximum civil penalty for violating the Horse Protection Act is $2,200. (7 C.F.R. § 3.91(b)(2)(viii).)

ability to continue to do business, and such other matters as justice may require."

(15 U.S.C. § 1825(b)(1).)

As to disqualification, the Horse Protection Act further provides:

**§ 1825. Violations and penalties**

. . . .

(c) **Disqualification of offenders; orders; civil penalties applicable; enforcement procedures**

In addition to any . . . civil penalty authorized under this section, any person . . . 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 . . . 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(c).

The material facts are not in dispute. On the evening of April 20, 2007, Mr. Evans, trainer of "Reckless Youth," presented the horse, entry number 35, class number 49, to Designated Qualified Person [hereinafter DQP] Greg Williams for inspection prior to showing at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky.[7] Mr. Williams did not find that "Reckless Youth" was sore or that "Reckless

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[7]United States Department of Agriculture [hereinafter USDA] veterinarians swabbed the hooves of nine horses entered into competition on the evening of April 20, 2007, including "Reckless Youth," to determine the presence of foreign substances. Seven of the nine horses swabbed tested positive for foreign substances; however,

(continued...)

Youth" had any abnormality that would preclude the horse from showing. Ms. Back, owner of the horse, rode "Reckless Youth" in the show and the horse finished third in his class. Because "Reckless Youth" finished third in his class, "Reckless Youth" was required to be examined after showing.

Dr. Miava Binkley, one of the USDA veterinarians at the show, conducted the first post-show examination of "Reckless Youth." She found pain responses on the left foot when she palpated the lateral bulb on the rear of the foot. She repeated the palpation of this area several times eliciting a pain response each time. On her examination of the right foot, she found repeated pain responses when she palpated the medial bulb on the back of this foot. When she palpated the front of the foot on the lateral side, she found a repeated strong pain response. Dr. Binkley then asked DQP Williams to examine the horse. (GX 6). Mr. Williams testified, when he examined the right foot of "Reckless Youth," there was some movement at one spot, but he did not get a repeated response. Mr. Williams indicated he thought the horse "was fine with me." (Tr. 217.)

Dr. Binkley next asked Dr. Lynn Bourgeois, the second USDA veterinarian at the show that evening, to examine "Reckless Youth." Dr. Bourgeois' examination found "abraded epithelium in the pocket area" and when he palpated the lateral heel bulb of the

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[7](...continued)
because the swabs were for a general study of the frequency of the use of foreign substances, the swabs were not identified to specific horses. Therefore, the swabbing is not relevant to whether "Reckless Youth" was sore. (Tr. 35-36, 95-101.)

left foot he "elicited repeatable and reproducible pain responses" which included withdrawal of the limb and "strong clenching of shoulder and abdominal muscles." Palpation of the lateral aspect of the pastern along the coronary band produced similar pain reactions. Examination of the right foot also revealed abraded epithelium. Palpation of the medial heel bulb and the entire anterior pastern along the coronary band produced "repeated, reproducible pain responses." (GX 7.)

After the examinations, the two USDA veterinarians discussed the horse, agreeing "Reckless Youth" was bilaterally sore (GX 6 at 2, GX 7 at 2). Dr. Binkley then completed an APHIS FORM 7077, Summary of Alleged Violations, marking on the diagram in block 31 the locations where both USDA veterinarians found pain responses. After Dr. Binkley signed the form, Dr. Bourgeois indicated his agreement by signing the form. (GX 1.)

As noted by the ALJ, most cases rely on the statutory presumption found in 15 U.S.C. § 1825(d)(5) to find a horse sore. In this case, in addition to a finding of soreness under the statutory presumption, the record contains sufficient evidence to find "Reckless Youth" was "sore," as that term is defined in 15 U.S.C. § 1821(3). Both Dr. Binkley and Dr. Bourgeois stated that, in their professional opinions, "Reckless Youth" was sored using either caustic/irritating chemicals or a mechanical device/overwork in chains (GX 6 at 2, GX 7 at 2). Furthermore, Dr. Binkley testified that

"Reckless Youth" would suffer pain while walking or moving as a result of the soring and use of action devices/chains (Tr. 17-18).

The ALJ presented a number of reasons for dismissing this case. First, the ALJ questioned the abilities of the USDA veterinarians to determine whether a horse is "sore" because they do not maintain licenses to practice veterinary medicine. (*See* ALJ's Initial Decision, nn.5, 7, 8, 21). Dr. Binkley, who has been a USDA veterinary medical officer for over 20 years, received her Doctor of Veterinary Medicine degree from Kansas State University in 1983. Prior to joining USDA, Dr. Binkley was in private practice for approximately 4 years in Michigan. She attends numerous USDA-conducted training sessions, as well as other professional meetings, every year. (Tr. 7-8, 31-32, 38-39.)

Dr. Bourgeois received his Doctor of Veterinary Medicine degree from Louisiana State University and was in private practice for approximately 3 years in Louisiana before joining USDA over 29 years ago (Tr. 104). Dr. Bourgeois has examined approximately 7,200 to 9,600 horses for Horse Protection Act compliance while employed by USDA (Tr. 106-07). He, too, attended USDA training sessions regarding examining horses for violations of the Horse Protection Act. In fact, Dr. Bourgeois was an instructor at USDA training sessions for DQPs. (Tr. 134-35.)

Dr. Binkley and Dr. Bourgeois are very experienced in the detection of "sore" horses. That neither Dr. Binkley nor Dr. Bourgeois chooses to pay annually for a license

to practice veterinary medicine, which is not required or necessary for his or her job, is immaterial and carries no weight. In fact, based on their training and experience, I find Dr. Binkley and Dr. Bourgeois are experts in determining whether horses are "sore."

The challenge to the use of digital palpation for detecting sore horses is equally unavailing. As noted by the ALJ, various United States Courts of Appeals have upheld my findings that digital palpation is an appropriate method for determining whether a horse is "sore" under the Horse Protection Act. These cases include decisions issued after *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), relied on by the ALJ in his decision (ALJ's Initial Decision at 9 n.12). Ms. Back, Ms. Patton, and Mr. Evans presented no argument that has not previously been presented to me in earlier cases addressing the validity of digital palpation for determining whether horses are "sore" under the Horse Protection Act. My decisions in these earlier cases have been upheld by the various United States Courts of Appeals. Absent convincing new reasoning supporting the theory that digital palpation is not an appropriate method for determining soreness, I decline to disregard the teachings of the United States Courts of Appeals that have upheld my position that digital palpation is a valid and appropriate method for determining whether horses are "sore" under the Horse Protection Act.

Therefore, based on my finding that Dr. Binkley and Dr. Bourgeois are experts in the detection of "sore" horses and that their digital palpation of "Reckless Youth" showed significant evidence that the horse was sore in each front foot, I find "Reckless Youth"

was "sore" when entered and shown on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky.[8]

The Administrator alleged Ms. Back violated 15 U.S.C. § 1824(2)(A) by showing or exhibiting "Reckless Youth" as entry number 35, class number 49, on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore. Ms. Back rode "Reckless Youth" into the ring during the competition for class number 49 at the show. Therefore, I find Ms. Back showed the horse on April 20, 2007, at the Spring Jubilee Charity Horse Show (Tr. 300-01; GX 8) and conclude Ms. Back violated 15 U.S.C. § 1824(2)(A) by showing or exhibiting "Reckless Youth" as entry number 35, class number 49, on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore.

The Administrator alleged Mr. Evans violated 15 U.S.C. § 1824(2)(B) by entering for the purpose of showing or exhibiting "Reckless Youth" as entry number 35, class number 49, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore. My position has long been that "the entering of the horse is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited." *Elliott v. Administrator, Animal and Plant Health Inspection Serv.*, 990 F.2d 140, 143-44 (4th Cir. 1993), citing *In re William*

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[8]This finding in no way questions the truthfulness or character of the DQP who found "Reckless Youth" was not sore. In my view, based on the testimony and evidence in the record, the DQP erred during his examination of the horse.

*Dwayne Elliott*, 51 Agric. Dec. 334 (1992). The United States Court of Appeals for the Fourth Circuit concluded "that the USDA's interpretation of 'entering' is reasonable and not contrary to Congressional intent and thus we are bound to give it effect." *Elliott*, 990 F.2d at 145, citing *Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842 (1984).

One of the activities required to be completed before a horse can be shown is presenting the horse to the DQP for inspection. On April 20, 2007, Mr. Evans presented "Reckless Youth" to DQP Williams for inspection prior to Ms. Back's riding the horse in the show (Tr. 276). Furthermore, Mr. Evans admitted he entered "Reckless Youth" as entry number 35, class number 49, at the Spring Jubilee Charity Horse Show on April 20, 2007 (Tr. 277). I find Mr. Evans entered the horse on April 20, 2007, at the Spring Jubilee Charity Horse Show. Therefore, I conclude Mr. Evans violated 15 U.S.C. § 1824(2)(B) by entering for the purpose of showing or exhibiting "Reckless Youth" as entry number 35, class number 49, on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore.

The Administrator alleges that Ms. Patton violated 15 U.S.C. § 1824(2)(B) by entering for the purpose of showing or exhibiting "Reckless Youth" as entry number 35, class number 49, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore. To find Ms. Patton in violation of 15 U.S.C. § 1824(2)(B), I must make two specific findings. First, I must find that "Reckless Youth" was sore. As

stated in this Decision and Order, *supra*, I find "Reckless Youth" was "sore," when entered and shown on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky. Next, I must find Ms. Patton participated in at least one of the "activities required to be completed before a horse can actually be shown or exhibited." *Elliott*, 990 F.2d at 144.

The evidence regarding Ms. Patton's participation in the entry process is scant. The interview log, summarizing Ms. Patton's interview with APHIS investigators, states: "Mrs. Patton stated she was not at the show . . . . However she paid the entry fee and was reimbursed by Kim Back as part of monthly fees." (GX 4 at 2.) (See also GX 5 at 1.) When asked at the hearing if the interview log was "an accurate presentation of the interview" she responded "Yes." (Tr. 312.) However, when asked on cross-examination if she operated the stables where Mr. Evans trained "Reckless Youth," Ms. Patton said "No, I just own it." Her testimony continued:

> [BY MR. BRODERICK:]
>
> Q. It's on property that you own.
>
> A. Yes.
>
> Q. Who operates it?
>
> A. Richard Evans.
>
> Q. Other than you owning the land, do you have anything to do with it?
>
> A. No.

Tr. 313-14.

I find no other evidence that demonstrates Ms. Patton participated in the entry process of "Reckless Youth." Absent additional evidence, such as a check for the entry fees with her signature or an entry form with her signature, I cannot find, by a preponderance of the evidence, that Ms. Patton entered (or participated in the entry process of) "Reckless Youth" as entry number 35, class number 49, on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky. Therefore, I conclude Ms. Patton did not violate the Horse Protection Act.

I have examined the other issues raised and found they do not alter the disposition of the instant proceeding; therefore, discussing those issues would be nothing more than an advisory opinion, and I do not address those issues.

**Findings of Fact**

1. Kimberly Copher Back is a resident of Mount Sterling, Kentucky. At all times material to the instant proceeding, Ms. Back owned "Reckless Youth," a Tennessee Walking Horse.

2. Richard Evans is a resident of Mount Sterling, Kentucky. Mr. Evans trained "Reckless Youth" at Sweet Revenge Stables, which is located on property owned by his mother-in-law, Linda Ruth Patton, for approximately 24 months prior to entering "Reckless Youth" in the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, on April 20, 2007.

3. Richard Evans entered "Reckless Youth" as entry number 35, class number 49, in the Spring Jubilee Charity Horse Show held on April 19-21, 2007, in Harrodsburg, Kentucky, for the purpose of showing or exhibiting "Reckless Youth" in the show.

4. Linda Ruth Patton is a resident of Mount Sterling, Kentucky, where she owns the land upon which Sweet Revenge Stables is located. Richard Evans is responsible for training horses at, and stable operation of, Sweet Revenge Stables.

5. On April 20, 2007, Mr. Evans, trainer of "Reckless Youth," presented the horse, entry number 35, class number 49, to DQP Greg Williams for inspection prior to showing "Reckless Youth" at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky.

6. On April 20, 2007, at the pre-show inspection for class number 49, DQP Greg Williams did not find that "Reckless Youth" was sore or that "Reckless Youth" had any abnormality that would preclude "Reckless Youth" from competing in the Spring Jubilee Charity Horse Show.

7. On April 20, 2007, Kimberly Copher Back rode "Reckless Youth" during the competition at the Spring Jubilee Charity Horse Show and finished third in the class competition. By reason of placing in the class, "Reckless Youth" was subjected to a post-show inspection, during which "Reckless Youth" was examined by two USDA veterinarians, Dr. Miava Binkley and Dr. Lynn Bourgeois, and DQP Greg Williams.

8. DQP Greg Williams had 1 or 2 years of experience as a DQP on April 20, 2007 (Tr. 204).

9. Dr. Miava Binkley and Dr. Lynn Bourgeois are each graduates of a school of veterinary medicine and each has a Doctor of Veterinary Medicine degree. Neither Dr. Binkley nor Dr. Bourgeois is currently licensed to practice veterinary medicine. A license to practice veterinary medicine is not required for employment as a USDA veterinary medical officer.

10. On the post-show inspection of "Reckless Youth," both USDA veterinarians found pain responses on each front foot when palpated. The two USDA veterinarians conferred about their findings and concluded "Reckless Youth" was "sore." DQP Greg Williams found some movement on one foot and concluded "Reckless Youth" was not "sore."

11. The record does not contain any evidence that "Reckless Youth" exhibited any abnormality of gait, locomotion, swelling, redness, scarring, blisters, or chemical odor.

**Conclusions of Law**

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

2. On the basis of the evidence in the record before me, I conclude "Reckless Youth" was "sore," as that term is defined in the Horse Protection Act, when entered and

shown on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky.

3. On April 20, 2007, Kimberly Copher Back showed "Reckless Youth" as entry number 35, class number 49, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(A).

4. On April 20, 2007, Richard Evans entered for the purpose of showing and exhibiting "Reckless Youth" as entry number 35, class number 49, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B).

5. On the basis of the evidence in the record before me, I conclude Linda Ruth Patton did not enter "Reckless Youth" in the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, on April 20, 2007. Therefore, I conclude Ms. Patton did not violate the Horse Protection Act.

**Sanction**

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than $2,000 for each violation of 15 U.S.C. § 1824. However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824 by increasing the maximum civil penalty from $2,000 to $2,200

(7 C.F.R. § 3.91(b)(2)(viii)). The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation of the Horse Protection Act and not less than 5 years for any subsequent violation of the Horse Protection Act (15 U.S.C. § 1825(c)).

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 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

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

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, in determining the amount of the civil penalty, the Secretary of Agriculture 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.

Although the maximum civil penalty authorized by statute and regulation is $2,200, the Administrator recommends that I assess Ms. Back and Mr. Evans only a $2,000 civil penalty (Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, and Memorandum in Support Thereof at 5). The extent and gravity of Ms. Back's and Mr. Evans' violation of the Horse Protection Act are great. Two USDA veterinary medical officers found "Reckless Youth" sore. Dr. Binkley and Dr. Bourgeois found palpation of "Reckless Youth's" forelimbs elicited consistent, repeatable pain responses. Weighing all the circumstances, I find Ms. Back and Mr. Evans each culpable for a violation of 15 U.S.C. § 1824(2).

Neither Ms. Back nor Mr. Evans presented any argument that he/she is unable to pay a $2,000 civil penalty or that a $2,000 civil penalty would affect his/her ability to continue to do business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[9] Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed, I would not find a maximum penalty in this case to be inappropriate. However, the administrative officials charged

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[9]*In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1504 (2005), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007); *In re Mike Turner*, 64 Agric. Dec. 1456, 1475 (2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); *In re Jackie McConnell*, 64 Agric. Dec. 436, 490 (2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 208 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

with responsibility for achieving the congressional purpose of the Horse Protection Act request a civil penalty less than the maximum; therefore, I assess Ms. Back and Mr. Evans the civil penalty recommended by the Administrator, $2,000 each.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under 15 U.S.C. § 1825(b) may be disqualified from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.[10]

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under 15 U.S.C. § 1825(b). While 15 U.S.C. § 1825(b)(1) requires that the Secretary of Agriculture

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[10] *See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1705-06.

consider certain specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[11]

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, I generally find necessary the imposition of at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

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[11] *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1505-06 (2005), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007); *In re Mike Turner*, 64 Agric. Dec. 1456, 1476 (2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); *In re Jackie McConnell*, 64 Agric. Dec. 436, 492 (2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 209 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

Circumstances in a particular case might justify a departure from this policy. Since, under the 1976 amendments, intent and knowledge are not elements of a violation, few circumstances warrant an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record before me does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for Ms. Back's and Mr. Evans' violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

For the foregoing reasons, the following Order is issued.

**ORDER**

1. Kimberly Copher Back is assessed a $2,000 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:

Robert A. Ertman
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

Ms. Back's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 6 months after service of this Order on her. Ms. Back shall indicate on

the certified check or money order that payment is in reference to HPA Docket No. 08-0007.

2. Kimberly Copher Back is disqualified for a period of 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 Ms. Back shall become effective on the 60th day after service of this Order on her.

3. Richard Evans is assessed a $2,000 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:

Robert A. Ertman
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

Mr. Evans' payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 6 months after service of this Order on him. Mr. Evans shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 08-0007.

4. Richard Evans is disqualified for a period of 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 Mr. Evans shall become effective on the 60th day after service of this Order on him.

**RIGHT TO JUDICIAL REVIEW**

Ms. Back and Mr. Evans have the right to obtain review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which he/she resides or has his/her place of business or in the United States Court of Appeals for the District of Columbia Circuit. Ms. Back and/or Mr. Evans must file a notice of appeal in such court within 30 days from the date of the Order in this Decision and Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[12] The date of the Order in this Decision and Order is March 17, 2010.

Done at Washington, DC

March 17, 2010

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William G. Jenson
Judicial Officer

[12] 15 U.S.C. § 1825(b)(2), (c).