UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	P.Q. Docket No. 03-0008
	)	
Miguel A. Hidalgo,	)	
	)	
Respondent	)	**Decision and Order**

PROCEDURAL HISTORY

Kevin Shea, Acting 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 7, 2002. Complainant instituted this proceeding under the Plant Protection Act (7 U.S.C. §§ 7701-7772); regulations issued under the Plant Protection Act (7 C.F.R. §§ 319.56-.56-8); 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 March 4, 2001, Miguel A. Hidalgo [hereinafter Respondent] imported six mangoes from Peru into the United States at Houston, Texas, in violation of 7 C.F.R. §§ 319.56(c), .56-2(e), and .56-2i (Compl. ¶ II).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on November 12, 2002.[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)).

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, Complainant's Proposed Default Decision and Order, and a service letter on March 11, 2004.[2] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On April 12, 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 Decision and Order [hereinafter Initial Decision and Order]: (1) finding that on or about March 4, 2001, Respondent imported six mangoes from Peru into the United States at Houston, Texas; (2) concluding that Respondent violated the Plant Protection Act and 7 C.F.R. §

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[1]Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912.

[2]Domestic Return Receipt for Article Number 7001 0360 0000 0304 7771.

319.56 *et seq.*; and (3) assessing Respondent a $500 civil penalty (Initial Decision and Order at 2).

On May 4, 2004, Respondent appealed to the Judicial Officer. Complainant did not file a response to Respondent's appeal petition, and on January 11, 2005, 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 the Initial Decision and Order as the final Decision and Order with minor modifications. Additional conclusions by the Judicial Officer follow the ALJ's conclusions, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 104—PLANT PROTECTION

. . . .

SUBCHAPTER II—INSPECTION AND ENFORCEMENT

. . . .

§ 7734. Penalties for violation

. . . .

(b) Civil penalties

(1) In general

Any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this chapter may, after notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of—

(A) $50,000 in the case of any individual (except that the civil penalty may not exceed $1,000 in the case of an initial violation of this chapter by an individual moving regulated articles not for monetary gain), $250,000 in the case of any other person for each violation, and $500,000 for all violations adjudicated in a single proceeding; or

(B) twice the gross gain or gross loss for any violation, forgery, counterfeiting, unauthorized use, defacing, or destruction of a certificate, permit, or other document provided for in this chapter that results in the person deriving pecuniary gain or causing pecuniary loss to another.

(2) Factors in determining civil penalty

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider with respect to the violator—

(A) ability to pay;
(B) effect on ability to continue to do business;
(C) any history of prior violations;
(D) the degree of culpability; and
(E) any other factors the Secretary considers appropriate.

7 U.S.C. § 7734(b)(1)-(2).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

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

. . . .

PART 319—FOREIGN QUARANTINE NOTICES

. . . .

SUBPART—FRUITS AND VEGETABLES

QUARANTINE

§ 319.56 Notice of quarantine.

. . . .

(c) On and after November 1, 1923, and until further notice, the importation from all foreign countries and localities into the United States of fruits and vegetables, and of plants or portions of plants used as packing material in connection with shipments of such fruits and vegetables, except as provided in the rules and regulations supplemental hereto, is prohibited: *Provided*, That whenever the Deputy Administrator for the Plant Protection and Quarantine Programs shall find that existing conditions as to pest risk involved in the importation of the articles to which the regulations supplemental hereto apply, make it safe to modify, by making less stringent, the restrictions contained in any of such regulations, he shall publish such findings in administrative instructions, specifying the manner in which the regulations shall be made less stringent, whereupon such modification shall become effective; or he may, when the public interests will permit, with respect to the importation of such articles into Guam, upon request in specific cases, authorize such importation under conditions, specified in the

permit to carry out the purposes of this subpart, that are less stringent than those contained in the regulations.

§ 319.56-2 Restrictions on entry of fruits and vegetables.

. . . .

(e) Any other fruit or vegetable, except those restricted to certain countries and districts by special quarantine [footnote omitted] and other orders now in force and by any restrictive order as may hereafter be promulgated, may be imported from any country under a permit issued in accordance with this subpart and upon compliance with the regulations in this subpart, at the ports as shall be authorized in the permit, if the U.S. Department of Agriculture, after reviewing evidence presented to it, is satisfied that the fruit or vegetable either:

(1) Is not attacked in the country of origin by injurious insects, including fruit and melon flies (Tephritidae);

(2) Has been treated or is to be treated for all injurious insects that attack it in the country of origin, in accordance with conditions and procedures that may be prescribed by the Administrator;

(3) Is imported from a definite area or district in the country of origin that is free from all injurious insects that attack the fruit or vegetable, its importation can be authorized without risk, and its importation is in compliance with the criteria of paragraph (f) of this section; or

(4) Is imported from a definite area or district of the country of origin that is free from certain injurious insects that attack the fruit or vegetable, its importation can be authorized without risk, and the criteria of paragraph (f) of this section are met with regard to those certain insects, provided that all other injurious insects that attack the fruit or vegetable in the area or district of the country of origin have been eliminated from the fruit or vegetable by treatment or any other procedures that may be prescribed by the Administrator.

§ 319.56-2i Administrative instructions prescribing treatments for mangoes from Central America, South America, and the West Indies.

(a) *Authorized treatments*. Treatment with an authorized treatment listed in the Plant Protection and Quarantine Treatment Manual will meet the treatment requirements imposed under § 319.56-2 as a condition for the importation into the United States of mangoes from Central America, South America, and the West Indies. The Plant Protection and Quarantine

> Treatment Manual is incorporated by reference. For the full identification of this standard, see § 300.1 of this chapter, "Materials incorporated by reference."
>
> (b) *Department not responsible for damage*. The treatments for mangoes prescribed in the Plant Protection and Quarantine Treatment Manual are judged from experimental tests to be safe. However, the Department assumes no responsibility for any damage sustained through or in the course of such treatment.

7 C.F.R. §§ 319.56(c), .56-2(e), .56-2i (2001).

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

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is an individual with a mailing address of 9608 Nonquitt Drive, Fairfax, Virginia 22031-1711.

2. On or about March 4, 2001, Respondent imported six mangoes from Peru into the United States at Houston, Texas, in violation of 7 C.F.R. §§ 319.56(c), .56-2(e),

and .56-2i because importation of such mangoes from Peru into the United States is prohibited, except under specific conditions.

Conclusions

1. By reason of the Findings of Fact, Respondent has violated the Plant Protection Act and regulations issued under the Plant Protection Act (7 C.F.R. § 319.56 *et seq*.).

2. The $500 civil penalty assessed against Respondent in the Order is a reasonable, adequate, and appropriate civil penalty for Respondent's violations.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent states in his appeal petition that he moved from 9608 Nonquitt Drive, Fairfax, Virginia 22031, 5 years ago or more and that he did not receive any of the Hearing Clerk's "previous letters." I infer Respondent asserts the first filing Respondent received in this proceeding is the ALJ's Initial Decision and Order.

Section 1.147(c)(1) of the Rules of Practice provides that a complaint is deemed to be received by a party on the date of delivery by certified mail to the last known residence of the party, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
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> . . . .
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> (c) *Service on party other than the Secretary*. (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically

> ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

On November 7, 2002, the Hearing Clerk sent the Complaint, the Rules of Practice, and a service letter by certified mail to Respondent at 9608 Nonquitt Drive, Fairfax, Virginia 22031-1711. Someone signed the Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912 attached to the envelope containing the Complaint, Rules of Practice, and service letter,[3] and the United States Postal Service stamped the Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912 with the date of delivery, November 12, 2002.[4]

The Hearing Clerk properly serves a document in accordance with the Rules of Practice when a party to a proceeding, other than the Secretary, is served with a certified

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[3]The recipient of the Complaint, the Rules of Practice, and the service letter did not print his or her name in the space provided on the Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912; however, the recipient signed the Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912 "Shog."

[4]See note 1.

mailing at the party's last known residence and someone signs for the document.[5] Therefore, the Hearing Clerk properly served Respondent with the Complaint in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) on November 12, 2002.

Sections 1.136(c) and 1.139 of the Rules of Practice state the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> . . . .
>
> (c) *Default*. Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.
>
> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion

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[5] *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. 83, 95 2003), *aff'd sub nom. Trimble v. United States Dep't of Agric.*, 87 Fed. Appx. 456, 2003 WL 23095662 (6th Cir. 2003); *In re Roy Carter*, 46 Agric. Dec. 207, 211 (1987); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573, 1576 (1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Joseph Buzun*, 43 Agric. Dec. 751, 754-56 (1984).

> shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. §§ 1.136(c), .139.

Moreover, the Complaint informs Respondent of the consequences of failing to file a timely answer, as follows:

> The respondent shall have twenty (20) days after service of this Complaint in which to file an Answer with the Hearing Clerk, United States Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, in accordance with the applicable Rules of Practice (7 C.F.R. § 1.136). Failure to deny or otherwise respond to any allegation in this Complaint shall constitute an admission of the allegation. Failure to file an Answer within the prescribed time shall constitute an admission of the allegations in this Complaint and a waiver of hearing.

Compl. at 2.

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

CERTIFIED RECEIPT REQUESTED

November 7, 2002

Mr. Miguel A. Hidalgo
9608 Nonquitt Drive
Fairfax, Virginia 22031-1711

Dear Mr. Hidalgo:

Subject: In re: Miguel A. Hidalgo, Respondent -
P.Q. Docket No. 03-0008

Enclosed is a copy of a Complaint which has been filed with this office under the Federal Plant Pest Act, as amended and the Plant Quarantine Act, as amended.

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

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

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

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

> Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.
>
> Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears on the last page of the complaint.
>
> Sincerely,
> /s/
> Joyce A. Dawson
> Hearing Clerk

Letter dated November 7, 2002, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent (emphasis in original).

Respondent's answer was due no later than December 2, 2002. Respondent's first filing in this proceeding is dated April 30, 2004, and was filed May 4, 2004, 1 year 5 months 2 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, Respondent is deemed, for purposes of this proceeding, to have admitted the allegations of the Complaint.

On December 13, 2002, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the time prescribed in section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). Respondent failed to respond to the Hearing Clerk's December 13, 2002, letter.

On March 8, 2004, Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order, and the Hearing Clerk sent Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter by certified mail to Respondent at 9608 Nonquitt Drive, Fairfax, Virginia 22031-1711. "Ruth Nancy Hidalgo" signed the Domestic Return Receipt for Article Number 7001 0360 0000 0304 7771 attached to the envelope containing Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and the service letter. The United States Postal Service stamped the Domestic Return Receipt for Article Number 7001 0360 0000 0304 7771 with the date of delivery, March 11, 2004. Therefore, the Hearing Clerk properly served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) on March 11, 2004.

Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order within 20 days after service, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On April 12, 2004, the ALJ issued the Initial Decision and Order in which the ALJ found Respondent admitted the allegations in the Complaint by reason of default.

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,[6] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[7] The Rules of Practice

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[6]*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 Perishable Agricultural Commodities Act had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

[7]*See generally In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default

(continued...)

provides that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent's first filing in this proceeding was filed 1 year 5 months 2 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly issued the Initial Decision and Order.

To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[8] The Rules of Practice, which provides for service by certified mail to a

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[7](...continued)
decision was properly issued where the respondent's response to the complaint was filed more than 9 months after service of the complaint on the respondent and the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of 7 C.F.R. § 319.56 alleged in the complaint); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision was properly issued where the respondent's response to the complaint was filed 43 days after service of the complaint on the respondent and the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of 7 C.F.R. § 319.56(c) alleged in the complaint).

[8]*See also Trimble v. United States Dep't of Agric.*, 87 Fed. Appx. 456, 2003 WL 23095662 (6th Cir. 2003) (holding that sending a complaint to the respondent's last known business address by certified mail is a constitutionally adequate method of notice
(continued...)

respondent's last known principal place of business or last known residence, which procedure was followed in this proceeding, meets the requirements of due process of law. As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):

> Whether a method of service of process accords an intended recipient with due process depends on "whether or not the form of . . . service [used] is *reasonably calculated* to give him actual notice of the proceedings and an opportunity to be heard." *Milliken*, 311 U.S. at 463, 61 S. Ct. at 343 (emphasis added); *see Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant's last known address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Speigel nevertheless failed to receive service is irrelevant as a matter of constitutional law. [Omission and emphasis in original.]

Similarly, in *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E.2d 1344, 1346 (1982), the court held:

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[8](...continued)
and lack of actual receipt of the certified mailing does not negate the constitutional adequacy of the attempt to accomplish actual notice); *DePiero v. City of Macedonia*, 180 F.3d 770, 788-89 (6th Cir. 1999) (holding service of a summons at the plaintiff's last known address is sufficient where the plaintiff is not incarcerated and where the city had no information about the plaintiff's whereabouts that would give the city reason to suspect the plaintiff would not actually receive the notice mailed to his last know address), *cert. denied*, 528 U.S. 1105 (2000); *Weigner v. City of New York*, 852 F.2d 646, 649-51 (2d Cir. 1988) (stating the reasonableness and hence constitutional validity of any chosen method of providing notice may be defended on the ground that it is in itself reasonably certain to inform those affected; the state's obligation to use notice "reasonably certain to inform those affected" does not mean that all risk of non-receipt must be eliminated), *cert. denied*, 488 U.S. 1005 (1989); *NLRB v. Clark*, 468 F.2d 459, 463-65 (5th Cir. 1972) (stating due process does not require receipt of actual notice in every case).

> It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically authorized to do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably calculated to reach interested parties. *See Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865. [Footnote omitted.]

Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[9]

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

ORDER

Respondent is assessed a $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

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

P.O. Box 3334
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 P.Q. Docket No. 03-0008.

RIGHT TO JUDICIAL REVIEW

The Order assessing Respondent a civil penalty is a final order reviewable under 28 U.S.C. §§ 2341-2351.[10] Respondent must seek judicial review within 60 days after entry of the Order.[11] The date of entry of the Order is January 24, 2005.

Done at Washington, DC

January 24, 2005

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William G. Jenson
Judicial Officer

[10]7 U.S.C. § 7734(b)(4).

[11]28 U.S.C. § 2344.