UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	HPA Docket No. 01-0023
	)	
Mike Turner and Susie Harmon,	)	
	)	
Respondents	)	**Decision and Order**

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 July 10, 2001. 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).

Complainant alleges that: (1) on May 26, 2000, Mike Turner and Susie Harmon [hereinafter Respondents] entered a horse known as "The Ultra Doc" as entry number 185 in class number 21 at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee, for the purpose of showing or exhibiting The Ultra Doc, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B));

and (2) on May 26, 2000, Respondent Susie Harmon allowed the entry of The Ultra Doc as entry number 185 in class number 21 at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee, for the purpose of showing or exhibiting The Ultra Doc, while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ II). On September 4, 2001, Respondent Mike Turner filed an Answer denying the material allegations of the Complaint, and on October 17, 2001, Respondent Susie Harmon filed an Answer denying the material allegations of the Complaint.

Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] presided at a hearing in Shelbyville, Tennessee, on March 29, 2005. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Brenda S. Bramlett, Law Offices of Bramlett & White, Shelbyville, Tennessee, represented Respondents.

On May 23, 2005, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof. On June 2, 2005, the ALJ issued a Decision and Order [hereinafter Initial Decision] concluding Complainant failed to prove The Ultra Doc was sore on May 26, 2000, when entered as entry number 185 in class number 21 at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee, and dismissing the Complaint (Initial Decision at 5, 8).

On August 15, 2005, Complainant appealed to the Judicial Officer. On October 3, 2005, Respondents filed a response to Complainant's appeal petition. On October 12,

2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the ALJ's conclusion that Complainant failed to prove The Ultra Doc was sore on May 26, 2000, when entered as entry number 185 in class number 21 at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee. Therefore, I do not adopt the ALJ's Initial Decision as the final Decision and Order.

Complainant's exhibits are designated by "CX." Respondents' exhibits are designated by "RX." Transcript references are designated by "Tr. "

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.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(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.

(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.

§ 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, 1824(2), 1825(b)(1)-(2), (c), (d)(5), 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

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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).

DECISION

Decision Summary

I conclude that on or about May 26, 2000, Respondents entered The Ultra Doc as entry number 185 in class number 21 at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee, for the purpose of showing or exhibiting The Ultra Doc, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C.

§ 1824(2)(B)). I assess each Respondent a $2,200 civil penalty and disqualify each Respondent for a period of 1 year from showing, exhibiting, or entering any horse, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

Findings of Fact

1. Respondent Mike Turner is an individual whose mailing address is 2225 Liberty Valley Road, Lewisburg, Tennessee 37091 (Compl. ¶ IA; Respondent Mike Turner's Answer ¶ IA).

2. Respondent Susie Harmon is an individual whose mailing address is 42 Riverside, Ft. Thompson, South Dakota 57339 (Compl. ¶ IB; Respondent Susie Harmon's Answer ¶ IB).

3. At all times material to this proceeding, Respondent Mike Turner was the trainer of The Ultra Doc (Compl. ¶ IC; Respondent Mike Turner's Answer ¶ IC; Tr. 54).

4. At all times material to this proceeding, Respondent Susie Harmon was the owner of The Ultra Doc (Compl. ¶ ID; Respondent Susie Harmon's Answer ¶ ID; CX 5; Tr. 49-50, 54, 61).

5. On or about May 26, 2000, Respondent Mike Turner entered The Ultra Doc as entry number 185 in class number 21 at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee, for the purpose of showing or exhibiting The Ultra Doc, by completing the entry form, paying the entry fee, transporting The Ultra Doc to the 30th

Annual Spring Fun Show Preview, and presenting The Ultra Doc for pre-show inspection (Tr. 49-50, 54, 58-59).

6. On or about May 26, 2000, Respondent Susie Harmon entered The Ultra Doc as entry number 185 in class number 21 at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee, for the purpose of showing or exhibiting The Ultra Doc, by participating in the decision to enter The Ultra Doc in the 30th Annual Spring Fun Show Preview and scheduling herself to ride The Ultra Doc in the 30th Annual Spring Fun Show Preview (CX 5; Tr. 59-60, 68-69).

7. Charles L. Thomas, a Designated Qualified Person,[1] inspected The Ultra Doc during a pre-show inspection at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee, on May 26, 2000 (CX 12, CX 14; Tr. 15-17, 94-96).

8. Mr. Thomas first visually inspected The Ultra Doc and then performed a physical examination of The Ultra Doc by palpation. Mr. Thomas used the rating system found in the National Horse Show Commission Official Rule Book to rate The Ultra Doc's locomotion, physical examination, and appearance. The National Horse Show Commission Uniform Scoring System provides that each horse shall be graded in each of

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[1]A Designated Qualified Person is defined in 9 C.F.R. § 11.1 as a person meeting the requirements specified in 9 C.F.R. § 11.7. Designated Qualified Persions are licensed by horse industry organizations or associations having a Designated Qualified Person program certified by the United States Department of Agriculture. Designated Qualified Persons may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale, or horse auction under 15 U.S.C. § 1823 to detect or diagnose horses which are sore or to otherwise inspect horses and records pertaining to horses for the purpose of enforcing the Horse Protection Act.

three categories: general appearance, locomotion, and physical examination. The ratings range from 1, which is the best rating, to 3, which is the worst rating. A rating of 1 signifies the horse meets or exceeds National Horse Show Commission standards, a rating of 2 signifies the horse is suspect, but meets the minimum National Horse Show Commission standards, and a rating of 3 signifies the horse fails to meet National Horse Show Commission standards. Mr. Thomas found no problem with The Ultra Doc's locomotion and rated The Ultra Doc "1" in the category of locomotion. Mr. Thomas found The Ultra Doc reacted to the palpation of his left and right forelimbs and rated The Ultra Doc "2" in the category of physical examination, noting The Ultra Doc's reaction to the palpation of his left forelimb was "lighter" than The Ultra Doc's reaction to the palpation of his right forelimb. When conducting the physical examination of The Ultra Doc, Mr. Thomas noted The Ultra Doc tossed his head for balance, flexed his abdominal muscles, and brought his rear legs forward when Mr. Thomas was examining The Ultra Doc's right foot. Consequently, Mr. Thomas rated The Ultra Doc "2" in the category of appearance. Using Mr. Thomas' ratings of The Ultra Doc's locomotion, physical examination, and appearance, the total rating of 5 precluded The Ultra Doc's competition for the day, but Mr. Thomas concluded The Ultra Doc was not "sore" as that term is defined in the Horse Protection Act. (CX 5, CX 6, CX 7; RX 2 at 118; Tr. 94-96.)

9. Based upon his examination of The Ultra Doc, Mr. Thomas issued DQP Ticket number 22003 to Respondent Mike Turner (CX 5; Tr. 50).

10. On May 27, 2000, Mr. Thomas executed an affidavit which describes his May 26, 2000, examination of The Ultra Doc and his findings, as follows:

> On the evening of May 26, 2000, I was assigned to work the 30th Annual Spring Fun Show, Shelbyville, Tennessee. Around 8:00pm on May 26, 2000 on pre-show inspection, I inspected a horse for Class Number 21 (Owner-Amateur Riders on Three-Year-Old Walking Stallions) named The Ultra Doc, with exhibitor number 185. The horse was presented by the trainer Mike Turner to the DQP station. The horse reacted to palpation on both front feet. I noted my findings on the DQP EXAMINATION score sheet, Locomotion, No problems. Physical Examination, Reacted left foot outside, right foot inside, left foot lighter than right foot. Appearance, some tossing of head, flexing of abdominal mussel [sic], horse stepped forward in rear when checking right foot. I scored the horse five (5) on the Exam. I issued DQP Ticket Number 22003.

CX 7.

11. John Michael Guedron and Clement A. Dussault, United States Department of Agriculture veterinary medical officers, were assigned to monitor the 30th Annual Spring Fun Show Preview and to examine horses to enforce the Horse Protection Act (CX 10; Tr. 7-10).

12. On May 26, 2000, following Mr. Thomas' examination of The Ultra Doc, Dr. Guedron and Dr. Dussault separately inspected The Ultra Doc. After their independent examinations of The Ultra Doc, Dr. Guedron and Dr. Dussault conferred and determined that they agreed on the locations where palpation caused The Ultra Doc to manifest pain responses and that they agreed The Ultra Doc was sore as that term is defined in the Horse Protection Act (CX 2 items 29, 31; CX 10; Tr. 41-42).

13. Dr. Guedron completed APHIS Form 7077 (CX 2) items 22 through 26 and items 29 through 31. APHIS Form 7077 (CX 2) sets forth Dr. Guedron's and Dr. Dussault's findings, including the identification of the areas on The Ultra Doc's forelimbs which, when palpated, caused The Ultra Doc to manifest consistent, repeatable pain responses (CX 2 item 31), and Dr. Guedron's and Dr. Dussault's conclusion that The Ultra Doc was "sore" as that term is defined in the Horse Protection Act (CX 2 item 29). Dr. Guedron and Dr. Dussault then signed APHIS Form 7077 (CX 2) indicating they each conducted a physical examination of The Ultra Doc and they each agreed with the information in items 22 through 26 and items 29 through 31 (CX 2 item 32).

14. On May 26, 2000, after he signed APHIS Form 7077 (CX 2), Dr. Dussault executed an affidavit which describes his May 26, 2000, examination of The Ultra Doc and his findings, as follows:

> On May 26, 2000 at about 2000 Dr. Guedron asked me to pre-show check Exhibitor Number 185 in Class Number 21 later identified to me as The Ultra Doc.
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> I observed the horse move around the cone and noted it moved tightly. I approached the horse on the left side making contact with the horse and the horse presented its foot. I examined the posterior aspect and then moved the leg forward. When I palpated the anterior and lateral aspect as noted on the APHIS 7077, of the left front pastern, the horse withdrew its foot. I then placed the foot on the ground. I went to the right side of the horse and made contact with the horse and the horse presented its foot for inspection. I examined the posterior aspect of the right foot and moved the foot forward. When I palpated the areas as noted on the APHIS Form 7077, the anterior and medial aspects of the right foot the horse withdrew its foot. The responses to palpation were mild on the left foot and moderate to severe on the right.

> Dr. Guedron and I conferred and agreed the horse was sore as defined by the Horse Protection Act. Dr. Guedron informed the custodian that the horse was sore. Mike Nottingham and Dr. Guedron filled out the APHIS Form 7077.
>
> In my professional opinion this horse would feel pain while moving and this was caused by mechanical and/or chemical means.

CX 10.

15. The Ultra Doc was reasonably expected to suffer physical pain if he was shown on May 26, 2000, as entry number 185 in class number 21 at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee (CX 2 item 29, CX 10 at 2; Tr. 27).

16. The Ultra Doc exhibited abnormal sensitivity in both of his forelimbs on May 26, 2000, which was caused by mechanical or chemical means or both mechanical and chemical means according to an experienced United States Department of Agriculture veterinary medical officer who observed The Ultra Doc in motion and examined The Ultra Doc on May 26, 2000 (CX 10 at 2; Tr. 27).

17. The Ultra Doc was "sore," as that term is defined in the Horse Protection Act, during pre-show inspection on May 26, 2000 (CX 2 item 29, CX 10 at 2).

Conclusions of Law

1. On or about May 26, 2000, Respondent Mike Turner entered The Ultra Doc as entry number 185 in class number 21 at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee, for the purpose of showing or exhibiting The Ultra Doc, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

2. On or about May 26, 2000, Respondent Susie Harmon entered The Ultra Doc as entry number 185 in class number 21 at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee, for the purpose of showing or exhibiting The Ultra Doc, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

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 section 5 of the Horse Protection Act (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 section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from $2,000 to $2,200.[2] 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

[2]7 C.F.R. § 3.91(b)(2)(vii).

less than 1 year for a first violation and not less than 5 years for any subsequent violation.[3]

Congress has recognized the seriousness of soring horses. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

> The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.
>
> The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask

[3] 15 U.S.C. § 1825(c).

> visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.
>
> The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.
>
> Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

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 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.

Complainant recommends that I assess each Respondent a $2,200 civil penalty (Complainant's Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof at 3-4). The extent and gravity of Respondents' prohibited conduct are great. Two United States Department of Agriculture veterinary medical officers found The Ultra Doc sore. Dr. Guedron and Dr. Dussault found palpation of The Ultra Doc's forelimbs elicited consistent, repeatable pain responses. Dr. Dussault stated The Ultra Doc's responses to palpation were mild on the left foot and moderate to severe on the right foot. Dr. Dussault further stated, in his opinion, The Ultra Doc would feel pain while moving and the pain was caused by mechanical or chemical means or both mechanical and chemical means. (CX 2 items 29, 31, CX 10 at 2.) Weighing all the circumstances, I find each Respondent culpable for a violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Respondents presented no argument that they are unable to pay a $2,200 civil penalty or that a $2,200 civil penalty would affect their ability to continue to do business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[4] Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for Respondents' violations of the Horse Protection Act. Therefore, I assess each Respondent a $2,200 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C.

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[4]*In re Jackie McConnell*, 64 Agric. Dec. ___, slip op. at 60 (June 23, 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 208 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *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 (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 (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 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (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 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

§ 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.[5]

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 section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)). While section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) requires that the Secretary of Agriculture 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,

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[5]*See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

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.[6]

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, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates section 5 of the Horse Protection Act (15 U.S.C. § 1824).

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[6]*In re Jackie McConnell*, 64 Agric. Dec. ___, slip op. at 62 (June 23, 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 209 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *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, 591 (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, 982 (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, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (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, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

Circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting 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 Respondents' violations of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

COMPLAINANT'S APPEAL PETITION

Complainant raises six issues in Complainant's Appeal and Brief in Support Thereof [hereinafter Complainant's Appeal Petition]. First, Complainant contends the ALJ erroneously disregarded Dr. Guedron's and Dr. Dussault's report of their physical examinations of The Ultra Doc on APHIS Form 7077 (CX 2) on the ground that Dr. Dussault signed the form, but did not complete the form (Complainant's Appeal Pet. at 2-3).

The ALJ found APHIS Form 7077 (CX 2) "lacks probative force" because Dr. Dussault, the United States Department of Agriculture veterinarian who testified, did not complete APHIS Form 7077 (CX 2), but merely signed the previously-prepared form (Initial Decision at 5).

I agree with the ALJ's finding that Dr. Dussault signed APHIS 7077 (CX 2) and did not complete any portion of the form. However, Dr. Dussault testified as to the

procedure for completing that portion of APHIS Form 7077, which relates to physical examinations by United States Department of Agriculture veterinarians of the horse that is the subject of the form.[7] After two United States Department of Agriculture veterinarians independently examine a horse, they confer regarding their findings. If they determine they agree that the horse is sore and agree on the locations where palpation causes the horse to manifest pain responses, the veterinarian who first examines the horse completes the portion of APHIS Form 7077 that relates to the physical examinations and signs the form. The United States Department of Agriculture veterinarian who is the second veterinarian to examine the horse then signs APHIS Form 7077 thereby indicating that he or she physically examined the horse and agrees with the information on the portion of APHIS Form 7077 relating to the physical examinations. (Tr. 20, 26-27, 40-42.)

The record establishes Dr. Guedron was the first United States Department of Agriculture veterinarian to examine The Ultra Doc on May 26, 2000, and Dr. Dussault examined The Ultra Doc after Dr. Guedron concluded his examination (CX 12, CX 14; Tr. 50). After Drs. Guedron and Dussault conferred and determined they agreed The

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[7]APHIS Form 7077 is divided into 32 items. APHIS Form 7077, items 22 through 26 and 29 through 31, relate to physical examinations by United States Department of Agriculture veterinarians. APHIS Form 7077, item 32, is a signature block in which the United States Department of Agriculture veterinarians, who perform the physical examinations, sign indicating each signatory conducted a physical examination and agrees with the portion of the APHIS Form 7077 that relates to the physical examinations. (CX 2.)

Ultra Doc was sore and agreed on the locations where palpation caused The Ultra Doc to manifest pain responses, Dr. Guedron completed the portion of APHIS Form 7077 relating to the physical examinations of The Ultra Doc and signed the form (CX 10 at 2). Then, Dr. Dussault indicated that he conducted a physical examination of The Ultra Doc and agreed with the information on the portion of APHIS Form 7077 relating to the physical examinations of The Ultra Doc by signing APHIS Form 7077 (CX 2).

I find APHIS Form 7077 (CX 2), which reflects the results of two independent pre-show physical examinations of The Ultra Doc on May 26, 2000, by United States Department of Agriculture veterinarians, tends to prove the allegation in the Complaint that The Ultra Doc was sore when entered in the 30th Annual Spring Fun Show Preview on May 26, 2000. Therefore, I disagree with the ALJ's finding that APHIS Form 7077 (CX 2) "lacks probative force" because Dr. Dussault did not complete the form.

Second, Complainant contends the ALJ erroneously found that APHIS Form 7077 (CX 2) has significant omissions and errors (Complainant's Appeal Pet. at 3-6).

The ALJ found APHIS Form 7077 (CX 2) has significant omissions and errors and stated, given the errors on APHIS Form 7077 (CX 2), the form is evidence more of sloppiness and inaccuracy than it is of a violation of the Horse Protection Act. The ALJ does not identify the omissions to which he refers, but does correctly identify two errors on APHIS Form 7077 (CX 2). (Initial Decision at 4-5.)

The errors identified by the ALJ are in APHIS Form 7077, item 12 and item 17, which Michael K. Nottingham completed (CX 2 item 21). APHIS Form 7077, item 12

(CX 2 item 12), identifies the owner of The Ultra Doc as "John Harmon." I agree with the ALJ that APHIS 7077, item 12 (CX 2 item 12), is not consistent with the facts; however, I do not find the error significant. Respondent Susie Harmon admits that, at all times material to this proceeding, she was the owner of The Ultra Doc (Compl. ¶ ID; Respondent Susie Harmon's Answer ¶ ID); therefore, the identity of the owner of The Ultra Doc is not at issue in this proceeding.

APHIS Form 7077, item 17, identifies The Ultra Doc's sex as "G." Mr. Nottingham did not testify; however, the ALJ found the letter "G" in APHIS Form 7077, item 17 (CX 2 item 17), indicates that Mr. Nottingham identified The Ultra Doc as a gelding (Initial Decision at 4). I agree with the ALJ that APHIS Form 7077, item 17 (CX 2 item 17), is not consistent with the facts. The record clearly establishes that, at all times material to this proceeding, The Ultra Doc was a stallion (CX 5, CX 7; RX 4; Tr. 55, 61); however, I do not find the error significant. The disposition of this proceeding is not dependent upon whether The Ultra Doc was a gelding or a stallion. Further, the record does not indicate that Mr. Thomas', Dr. Guedron's, or Dr. Dussault's physical examinations, findings, or conclusions were in any way dependent upon whether The Ultra Doc was a gelding or a stallion. I also note APHIS Form 7077, item 17 (CX 2 item 17), requires the person completing the item to identify the sex of the horse that is the subject of the form. Sex is defined as either of the two major forms of individuals that

occur in most species and that are distinguished as female or male.[8] Thus, one would expect that Mr. Nottingham would have identified The Ultra Doc's sex as either female or male. Instead, Mr. Nottingham identified The Ultra Doc as a gelding. A gelding is generally defined as a castrated male horse.[9] Thus, APHIS Form 7077, item 17 (CX 2 item 17), correctly, but indirectly, identifies The Ultra Doc's sex as male.

APHIS Form 7077 establishes that two United States Department of Agriculture veterinarians conducted a pre-show inspection of The Ultra Doc on May 26, 2000, at the 30th Annual Spring Show Preview, in Shelbyville, Tennessee, and each veterinarian found areas of consistent, repeatable pain responses in the locations indicated on APHIS Form 7077, item 31 (CX 2 item 31), and concluded The Ultra Doc was sore (CX 2 item 29). Thus, I find APHIS Form 7077 (CX 2) has probative value, and I do not find the two errors on APHIS Form 7077 (CX 2) identified by the ALJ affect the probative value of APHIS Form 7077 (CX 2).

Third, Complainant contends the ALJ erroneously referred to Dr. Dussault as the "secondary" veterinarian (Complainant's Appeal Pet. at 6-7).

The ALJ referred to Dr. Dussault as the "secondary" veterinarian, as follows:

> . . . As the "secondary" veterinarian, Dr. Dussault did not complete the government form designated as APHIS Form 7077 (Government Ex. 2),

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[8]Merriam Webster's Collegiate Dictionary 1073 (10th ed. 1997).

[9]Merriam Webster's Collegiate Dictionary 484 (10th ed. 1997); *State v. Royster*, 65 N.C. 539 (N.C. 1871) (per curiam) (stating castrated male horses are called geldings; those that are not castrated are called stallions).

> but merely added his signature to the form after it had been completed by others and that evening at his motel executed an affidavit prepared by Michael Nottingham (Government Ex. 10).

Initial Decision at 4 (footnotes omitted).

The record establishes that Dr. Guedron and Dr. Dussault examined The Ultra Doc on May 26, 2000, and that Dr. Guedron was the first of the two veterinarians to examine The Ultra Doc (CX 2, CX 10, CX 12, CX 14). Dr. Dussault testified that, generally, the first United States Department of Agriculture veterinarian to examine a horse completes the portion of the APHIS Form 7077 that relates to the physical examinations of the horse identified on the form and then signs the form. The second veterinarian to examine the horse identified on APHIS Form 7077 signs the form indicating that he or she has examined the horse and agrees with the information on the form relating to the physical examinations (Tr. 40-42). However, there is no evidence that the second United States Department of Agriculture veterinarian to examine a horse is a "secondary" veterinarian who is in any way subordinate to the veterinarian who first examines the horse. Therefore, I find the ALJ's reference to Dr. Dussault as the "secondary" veterinarian error; however, I find the error harmless.

Fourth, Complainant contends the ALJ erroneously stated a mild pain response to palpation does not demonstrate abnormal sensitivity and does not trigger the presumption that the horse demonstrating the mild pain response is a horse which is sore (Complainant's Appeal Pet. at 7-8).

Dr. Dussault stated in his affidavit that The Ultra Doc's responses to palpation were mild on the left front foot and moderate to severe on the right front foot (CX 10 at 2). The ALJ indicates that a mild response to palpation does not constitute a manifestation of abnormal sensitivity, as follows:

> . . . Compounding the problems with the APHIS Form 7077 is the affidavit of Dr. Dussault which recounts only a "mild" response to palpation on the left side. 15 U.S.C. § 1825(d)(5) requires manifestation of "abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs" to trigger a presumption of soreness.

Initial Decision at 5 (footnote omitted, emphasis in original).

Section 6(d)(5) of the Horse Protection Act (15 U.S.C. § 1825(d)(5)) provides, in any civil action to enforce the Horse Protection Act, a horse shall be presumed to be sore if it manifests abnormal sensitivity in both of its forelimbs or hindlimbs. Bilateral, reproducible pain responses to palpation are sufficient to be considered abnormal sensitivity and trigger the presumption that a horse, which manifests such sensitivity, is sore.[10]

Dr. Dussault and Dr. Guedron found areas of consistent, repeatable pain responses on each of The Ultra Doc's forelimbs during their examinations on May 26, 2000 (CX 2 item 31, CX 10 at 2; Tr. 19-21, 26-27). Moreover, Mr. Thomas found The Ultra Doc

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[10]*In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 294-95 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 204 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Billy Gray*, 52 Agric. Dec. 1044, 1077 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re Lloyd R. Smith*, 51 Agric. Dec. 327, 330-31 (1992).

reacted to palpation on each of his forelimbs during Mr. Thomas' pre-show examination conducted on May 26, 2000 (CX 6; Tr. 94, 99). The Ultra Doc's "mild" responses to Dr. Dussault's palpation of his left front foot (CX 10 at 2) and The Ultra Doc's "lighter" responses to Mr. Thomas' palpation of his left front foot (CX 6) are manifestations of abnormal sensitivity in The Ultra Doc's left forelimb. Therefore, the findings by Dr. Dussault, Dr. Guedron, and Mr. Thomas are sufficient to invoke the rebuttable statutory presumption. Respondents failed to rebut the presumption that The Ultra Doc was sore; therefore, the statutory presumption is sufficient to establish that The Ultra Doc was sore when entered. Moreover, since the evidence establishes The Ultra Doc was sore without reliance on the presumption, the presumption is not an indispensable part of Complainant's case.

Fifth, Complainant contends the ALJ erroneously concluded Mr. Thomas' findings conflicted with Dr. Dussault's findings (Complainant's Appeal Pet. at 9-10).

The ALJ states, "[i]n order to accept the opinion of Dr. Dussault that the horse was 'sore' within the meaning of the Act as is recited in his affidavit, I must totally discount the opinion and findings of a highly qualified and experienced DQP" (Initial Decision at 7). However, the ALJ also states Mr. Thomas' "findings were consistent with all but the conclusion found in Dr. Dussault's affidavit" (Initial Decision at 6).

I agree with the ALJ that Dr. Dussault and Mr. Thomas reached different conclusions. Dr. Dussault concluded The Ultra Doc was "sore," as that term is defined in the Horse Protection Act, when he examined The Ultra Doc on May 26, 2000 (CX 2

item 29, CX 10 at 2). Mr. Thomas concluded The Ultra Doc was not "sore," as that term is defined in the Horse Protection Act, when he examined The Ultra Doc on May 26, 2000 (CX 5). I also agree with the ALJ's statement that Mr. Thomas' findings were consistent with Dr. Dussault's findings. Dr. Dussault stated in his affidavit The Ultra Doc's "responses to palpation were mild on the left foot and moderate to severe on the right" (CX 10 at 2). Mr. Thomas stated on the National Horse Show Commission DQP Examination score sheet that The Ultra Doc "reacted left foot outside rt. foot inside left foot lighter than right foot" (CX 6). Mr. Thomas also testified regarding his findings, as follows:

> [BY MS. BRAMLETT:]
>
> Q. And under the category of physical examination, could you read into the record what you found upon your examination?
>
> [BY MR. THOMAS:]
>
> A. I found that the palpation of the horse reacted in the left foot, outside on the right foot inside, and the right foot was stronger and gave more reaction in the right foot than did the left foot.

Tr. 94. Therefore, I disagree with the ALJ's statement that in order to accept the opinion of Dr. Dussault that the horse was "sore" within the meaning of the Horse Protection Act, one must totally discount Mr. Thomas' findings.

Sixth, Complainant contends the ALJ erroneously concluded, if The Ultra Doc was sore, it would be necessary to determine whether the owner was insulated from liability

by her instructions to the trainer and other precautionary actions (Complainant's Appeal Pet. at 11).

The ALJ states it is unnecessary to decided whether Respondent Susie Harmon is insulated from liability, as follows:

> As I conclude that the complainant has failed to offer sufficient proof to support a violation of the Act, it is unnecessary to decide whether the Respondent Susie Harmon's oral and written instructions to her trainer together with the other precautionary actions taken by her, including the periodic unannounced visits by a number of different veterinarians would insulate her from liability consistent with the holding of *Baird v. USDA*, 39 F.3d 131 (6th Cir. 1994).

Initial Decision at 7-8.

Section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)) prohibits any person from showing or exhibiting, in any horse show or horse exhibition, any horse which is sore; section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) prohibits any person from entering for the purpose of showing or exhibiting, in any horse show or horse exhibition, any horse which is sore; section 5(2)(C) of the Horse Protection Act (15 U.S.C. § 1824(2)(C)) prohibits any person from selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore; and section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) prohibits any horse owner from allowing another person to do one of the acts prohibited in section 5(2)(A), (B), and (C) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (B), (C)). *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994), holds that a horse owner cannot be found to have allowed another person to do one of the acts prohibited in section 5(2)(A), (B), or (C) of

the Horse Protection Act (15 U.S.C. § 1824(2)(A), (B), (C)), in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), if certain factors are shown to exist.

Complainant alleges Respondent Susie Harmon violated section 5(2)(B) and (D) of the Horse Protection Act (15 U.S.C. § 1824(2)(B), (D)) (Compl. ¶ IIB; Tr. 5). However, Complainant now seeks only a finding that Respondent Susie Harmon violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof; Complainant's Appeal Petition). Moreover, I do not conclude that Respondent Susie Harmon violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Therefore, I find *Baird* inapposite.

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

ORDER

1. Respondent Mike Turner 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:

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

Respondent Mike Turner's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 60 days after service of this Order on Respondent Mike Turner. Respondent Mike Turner shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 01-0023.

2. Respondent Mike Turner 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 Respondent Mike Turner shall become effective on the 60th day after service of this Order on Respondent Mike Turner.

3. Respondent Susie Harmon 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:

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

Respondent Susie Harmon's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 60 days after service of this Order on Respondent Susie Harmon. Respondent Susie Harmon shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 01-0023.

4. Respondent Susie Harmon 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 Respondent Susie Harmon shall become effective on the 60th day after service of this Order on Respondent Susie Harmon.

RIGHT TO JUDICIAL REVIEW

Respondents have the right to obtain review of this Order in the court of appeals of the United States for the circuit in which they reside or have their place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondents must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[11] The date of this Order is October 26, 2005.

Done at Washington, DC

October 26, 2005

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William G. Jenson
Judicial Officer

[11] 15 U.S.C. § 1825(b)(2), (c).