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AGRICULTURE DECISIONS

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

KREIDER DAIRY FARMS, INC. v. USDA.
D.C. Civil No. 03-cv-04840.
Filed July 28, 2005.

(Cite as 142 Fed Appx. 811).

AMMA – Handler-producer status – APA – Sub-dealer – Administrative remedies, failure to exhaust – Futile effort, when not – Agency interpretation of its own regulations

Family farm producing specialty milk for Kosher customers was denied producer-handler status in a second attempt to qualify. Appellant failed to follow the Market Administrators (MA) rules in the information supplied on the "producer-handler" Application. MA had information that Appellant still had at least one sub-dealer in its chain of distribution. Appellant was unjustified in relying on (a) "futile attempt" theory, and (b) information contained in monthly reports to MA (which was incomplete and incompatible) as a substitute for the information required in the standard application form for "producer-handler " status.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Before: SCIRICA, Chief Judge, ALITO and RENDELL, Circuit Judges.

OPINION OF THE COURT

RENDELL, Circuit Judge.

Appellant, Kreider Dairy Farms, appeals the District Court's grant of summary judgment for the Secretary of the Department of Agriculture, contending that it was entitled to producer-handler status under 7 C.F.R.

§ 1002 (Order 2)[1] and, thus, should have been exempt from paying the fluid milk fees otherwise due to the United States Department of Agriculture's Order 2 Market Administrator (MA) from and after November 1991.[2] The District Court based its grant of summary judgment on the grounds that Kreider failed to file a second application and was, therefore, not entitled to any relief. Kreider now appeals.

I. FACTUAL AND PROCEDURAL BACKGROUND

Kreider Dairy Farms is a Pennsylvania family farm corporation. Its farming enterprise includes land, equipment, buildings and dairy cattle through which it produces, processes, packages and distributes fluid milk products at wholesale and retail. In 1986, Kreider agreed to produce Kosher fluid milk products for the Foundation for the Preservation and Perpetuation of the Torah Laws and Customs, Inc. of Baltimore, Maryland (the "FPPTLC"). Those transactions resulted in the FPPTLC acquiring and distributing Kreider-produced kosher fluid milk products in the Baltimore area. In 1990, the FPPTLC, acting as a broker, began ordering additional volumes of kosher milk products from Kreider for delivery to Ahava Dairy Products, Inc., a kosher milk products distributor in New York City. Kreider soon began dealing directly with Ahava, delivering products to the Ahava distribution

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[1]Order 2 was terminated and superseded by Order 1 (7 C.F.R. § 1001) on January 1, 2000, but remained in effect at all times relevant to Kreider's 1998 petition.

[2]The Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to issue marketing orders establishing "milk pools" for particular geographic regions. Each order provides a uniform price to be paid to dairy farmers (ccproducers") from downstream processors and distributors ("handlers") in that pool. See 7 U.S.C. § 608c(l). Under Order 2, this goal was accomplished by creating a special "producer-settlement fund" managed by the MA. Each month, every handler would pay money into, or draw money from, this fund in amounts dependent upon the proportion of his milk that is sold in the more profitable fluid form. Producers would receive a "blended price" that reflected the weighted average value of all milk sold within the area covered by that pool. Producer-handlers, small dairy farms that produce, process and distribute their own milk at their own risk, without drawing on the pool to cover their production needs or relying on the pool to sell their surpluses, are generally exempted from paying such fees. *See Lehigh Valley Farmers v. B*lock, 829 F.2d 409,411-12 (3d Cir. 1987).

warehouse in Brookyn. Kreider also continued to supply the FPPTLC for its uses at various locations, including locations in the State of New Jersey, which were part of the New York-New Jersey Marketing area. In turn, FPPTLC and Ahava would then redistribute the kosher milk obtained from Kreider in the New Jersey-New York area (the Order 2 area).

In December 1990, the Order 2 Market Administrator [MA] notified Kreider that its sales to Ahava might subject it to monthly milk fees to be paid into the producer-settlement fund, so Kreider filed the appropriate application in January 1991 in an attempt to prove that it was an exempt producer-handler. From January 1991 through December 1999, Kreider filed, as requested, monthly reports with the Market Administrator which detailed its sales to Ahava, the FPPTLC and all other customers.

In August 1992, the Market Administrator for Order 2 notified Kreider that its sales of fluid milk products to Ahava caused it to be regulated as a handler operating a partial pool plant and, on that basis, Kreider was billed in excess of $100,000 in fees on account of deliveries going back to November 1991. After this initial billing, Kreider was billed monthly by the Order 2 Market Administrator. The bills at issue here totaled $244,977.97 from December 1995 to December 1999. Kreider ceased its dealings with Ahava in April 1997.

In December 1993, Kreider filed a petition challenging the MA's determination that Kreider was a handler regulated by Order 2 and liable to pay fees to the producer- settlement fund. This initiated Kreider I. The Judicial Officer ("JO") dismissed the petition, based on the MA's determination that Kreider was not eligible for producer- handler status because it sold milk to two subdealers (Ahava and FPPTLC).

On October 18, 1995, Kreider filed a Complaint pursuant to the Agricultural Marketing Agreement Act in the District Court challenging the JO's decision. On August 14, 1 996, the District Court denied the parties' motions for summary judgment and remanded the case for further administrative findings as to whether Kreider was "riding the

pool."[3]

On August 12, 1997, on remand, the ALJ held a hearing and issued a decision that Kreider was "riding the pool" and, therefore, was not entitled to producer-handler status. Kreider did not timely appeal this decision and the decision of the ALJ became final.

On February 17, 1998, Kreider filed a new petition for review, this time directly with the ALJ. The new petition (which we will call Kreider 11) sought a refund of Kreider's payments to the producer-settlement fund from December 1995 through December 1997. Kreider subsequently filed an amended petition which expanded the time period under review to December 1999.

On May 31, 2002, the ALJ dismissed that portion of Kreider I1 which pertained to the time period May 1997-December 1999 because Kreider had failed to re-apply for producer-handler status and, therefore, the petition was not ripe, and, in the alternative, because it would not have been contrary to law for the MA to deny any such application on the merits based on Kreider's ongoing sales to subdealers.

On August 5, 2003, the JO affirmed this decision and held that Kreider's January 1991 application for designation as a producer-handler did not constitute an application for designation as a producer-handler for the period from December 1995 through December 1999 and, therefore, because such an application was a prerequisite, Kreider's petition for review was premature. In the alternative, the JO also held that Kreider would not have been entitled to producer-handler status for the time period from May 1997 through December 1999.

On August 22, 2003, Kreider filed a complaint in the District Court seeking judicial review of the August 5, 2003 decision. The District Court granted defendant's motion for summary judgment and denied

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[3]While it is not important for our purposes, "riding the pool" refers to the circumstance in which an entity such as Kreider is able to reap the advantages of the stability provided by the regulatory program by failing to exercise complete and exclusive control over its distribution so that those to whom it distributes fluid milk (in this case Ahava and FPPTLC) can purchase pool milk whenever Kreider cannot meet their demands. Therefore, Kreider would potentially be able to rely on pool milk to provide milk to its customers when its supply was insufficient, without contributing money to the producer-settlement fund.

plaintiffs motion for summary judgment, confirming the procedural irregularity relied upon at the administrative level. Kreider now appeals.

JURISDICTION

The District Court had jurisdiction pursuant to 7 U.S.C. § 608(c)(15)(B), 28 U.S.C § 1331 and 28 U.S.C. § 1337. We have jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291.

DISCUSSION

Kreider contends that the District Court's conclusion that the filing of a second application was a prerequisite to court review of Kreider's 1998 Petition was in error because (1) Kreider had filed a 1991 application, which was the subject of the 1998 Petition; (2) Kreider's monthly reports, as well as its having contested the Agency's refusal to consider it a producer-handler, fulfilled any requirement that it "apply" in order to be viewed as seeking producer-handler status; and (3) Kreider's filing of an application would have been futile since the Agency clearly was unwilling to modify the position it adopted in 1993 that sales to subdealers disqualified Kreider from producer-handler status.[4]

Kreider first contends that its 1991 application was the subject of the 1998 Petition and, therefore, no other application was necessary. Kreider's amended 1998 Petition read:

> This petition is filed specifically to challenge all payments made and charges levied within the two years preceding the filing of this Petition (prior to its amendment), and all payments which were incurred until Order 2 was terminated and superceded on January 1, 2000.

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[4]Because we will affirm the Order of the District Court based on the fact that Kreider was required, and failed, to file a second application for producer-handler status, we do not reach the issue of whether Kreider would have been entitled to such status had a second application been filed.

In the original application, Kreider reported its milk production for the period beginning December 1989 and ending January 1990. Thus, the 1998 Petition, although filed to preserve the right to protest payments made from December 1995 to December 1999 should the prior petition be resolved other than on the merits, covered a different time period from the original application. The original application was resolved on the merits by the August 12, 1997 decision of the ALJ that Kreider was not entitled to producer-handler status, which Kreider later untimely (and, thus, unsuccessfully) appealed. Therefore, the new petition could not possibly be construed to relate to the original application.

Kreider next argues that any obligation it had to re-apply was fulfilled by its monthly filing of reports of receipts and utilization which disclosed its entitlement to that status on the face of the report. Kreider contends that the acts of reporting its operations and contemporaneously litigating the legal implications of those distributions were the functional equivalent of presenting the application for designation as a producer-handler on a different form.

Again, Kreider's argument fails. Order 2 specifically required, an application "on forms prescribed by the market administrator" containing, at a minimum, the information described in the regulation. *See* 7 C.F.R. *§* 1002.12(a). Under 7 C.F.R. § 1002.30, the monthly reports Kreider filed only had to contain the quantity of milk received, inventoried and distributed each month, as well as a computation of its payment obligations. This is not the same information required, under 7 C.F.R. *§* 1002.12, to be placed in an application for producer-handler status and, given the deference we afford to the agency, there is nothing to suggest that these reports should have been, much less, had to have been, accepted in lieu of an application. *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (holding that "agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation."(internal quotations and citations omitted)).

Finally, Kreider argues that it did not have to exhaust administrative remedies in this case because such exhaustion would have been futile since the Agency adopted the position that sales by a producer-handler to a subdealer serve to disqualify an entity from producer-handler status.

(Appellant's Br. at 23)" The doctrine of exhaustion of administrative remedies requires that parties first use all prescribed administrative measures for resolving a conflict before they seek judicial remedies." *Facchiano v. United States Dept. Of Labor*, 859 F.2d 1163, 1166 (3d Cir. 1988). However, this doctrine does not fit the facts of this case. Kreider's petition was reviewed by both the ALJ and the JO. Additionally, the reason that the Petition was originally denied by the ALJ, at least in part, was that "Kreider Dairy's January 1991 filing of its 'Application for Designation as Producer-Handler' did not constitute an application for producer-handler status for the period May 1997 through December 1999." Therefore, the Petition was not dismissed because Kreider failed to exhaust its administrative remedies, but, rather, because it failed to meet a condition precedent to even filing such a Petition-applying to the MA for producer-handler status.

Additionally, even if the situation can be viewed in terms of failure to exhaust administrative remedies, the futility exception does not apply here. For, Kreider should not have just assumed that a new application to the MA would have been futile, especially for the period during which Kreider had ceased distributing milk through Ahava. Because of changed circumstances, the MA's denial of the 1991 petition and the subsequent litigation did not give Kreider a legitimate basis on which to conclude that any further applications would be futile. Even though Kreider was still supplying at least one subdealer after April 1997 (FPPTLC), given the cessation of its dealings with Ahava, it is not clear that re-application would have been utterly futile.

Therefore, we will AFFIRM the Order of the District Court.

WHITE EAGLE COOPERATIVE ASSOCIATION, ET AL. v. USDA.
Case No. 3:05-CV-0620-AS.
Filed October 28, 2005.

(Cite as: 396 F. Supp. 2d 954).

AMAA – Emergency rule making – double dipping – pooling – diversion limits –

Unwarranted erosion of pool price – Arbitrary and capricious standard – Delegation of authority.

Plaintiffs requested a preliminary injunction against an interim Midwest Milk Marketing Order. The Market Administrator (MA) conducted formal rule making hearings and issued an interim order after receipt of comments. The MA perceived an erosion of "blended milk" price paid to producers for Class I (fluid) milk due to increased diversions by certain producers to non-pool milk processing plants. After a public hearing, a recommended decision was commented on by the producers. In this instance, the MA determined that the recommended decision did not adequately address the adverse effect on the blended milk price as a result of diversion to non-pool milk processing plants. Consequently, the MA issued an interim rule to be voted on by referendum of producers based upon a finding that an "emergency" condition existed. The interim rule limited the amount of diversion of fluid milk that a producer could sell to non-pool milk processing plants without being disqualified from the benefits of the pool blend prices. The court addressed the legal requirements to invoke a preliminary injunction citeing *Lamers Dairy, Inc*., 379 F. 3d 466 for proposition that "the court's deference to administrative expertise rises to a zenith in connection with the intricate complex of regulations of milk marketing." The court determined that the MA made a change in the recommended decision based on a assessment of milk marketing conditions and the effect of diversions of fluid milk on those conditions. The MA had been delegated appropriate authority by the Secretary to issue interim orders based upon reasoned analysis.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

JUDGES: ALLEN SHARP, JUDGE.

OPINION BY: ALLEN SHARP

OPINION:

MEMORANDUM, ORDER AND OPINION

Now before the Court is Plaintiffs' motion for preliminary injunction or, in the alternative, for stay of final action of the U.S. Department of Agriculture ("USDA"). The plaintiffs contend that USDA issued a final decision and final rule on an "emergency" basis without following proper administrative procedures. They now ask the Court to enjoin the enforcement of that rule or to postpone the effective date of the final rule. The Court heard oral arguments on this matter on October 20,

2005. The issues have been fully briefed by the parties.

I. Background

Dairy producers and dairy producer associations brought this suit to enjoin an interim amendment to the federal rules regulating the price of milk. These rules, called milk marketing orders, are part of a program enacted through the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. 601 *et seq*. The program and its history are described in several judicial opinions, e.g., *Zuber v. Allen*, 396 U.S. 168, 183, 90 S. Ct. 314, 24 L. Ed. 2d 345 (1969) and *Alto Dairy v. Veneman*, 336 F.3d 560 (7th Cir. 2003). Basically, milk sold for fluid consumption is more valuable than when it is sold for other ends, such as to make cheese or butter.[1] The program involves a regulatory scheme which fixes minimum prices that handlers must pay for raw milk from producers and provides for market-wide pooling of milk money among eligible producers. This uniform minimum price is known as the "blend" or "pool" price. Each farmer is entitled to receive this price, regardless of the use to which the milk is put. The ultimate result is to reduce competition and raise producer prices. *See Block v. Community Nutrition Institute*, 467 U.S. 340, 342, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984).

Pursuant to the AMAA, the Secretary of Agriculture has issued different milk-marketing orders for different regions of the country. *See Lamers Dairy, Inc. v. U.S. Dep't of Agriculture*, 379 F.3d 466, 469 (7th Cir. 1999). This case involves the Mideast Order, which regulates milk-marketing in portions of Indiana, Ohio, Michigan, West Virginia, Kentucky, and Pennsylvania. 7 C.F.R. § 1033.2.

Generally, amendments to the provisions of a milk marketing order must be made through formal, on-the-record rulemaking. 7 U.S.C. § 608c(1) & (17); 7 C.F.R. § 900.3 & 900.1(j). This process is to include

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[1]The milk is categorized according to its end use: milk intended for fluid consumption is categorized as Class I milk; while milk for yogurt, cheese, or butter is Class II, Class III, or Class IV milk. 7 C.F.. § 1000.40(a)-(d).

public notice, an on-the-record hearing, a recommended decision by the Administrator, opportunity to comment on the proposed amendments, and a final decision by the Secretary. 7 C.F.R. § 900.1-13. The final decision becomes effective only after two-thirds of the affected producers consent to its adoption as a rule through a referendum. 7 U.S.C. § 608c(8) & (9). A recommended decision may be omitted "only if the Secretary finds on the basis of the record that due and timely execution of his functions imperatively and unavoidably requires such omission." 7 C.F.R. § 900.12(d).

In this case, several amendments to the Mideast Order were proposed in late 2004 and early 2005. The proposals included amendments (1) to forbid so-called "double-dipping," pooling milk on both the Mideast Order and a market order implemented by a state, (2) to tighten performance standards for supply plants, and (3) most relevant to this case, to lower "diversion" limits. *See* Milk in the Mideast Marketing Area; Notice of Hearing on Proposed Amendments, 70 Fed. 8043, 8044 (proposed February 17, 2005). A diversion limit is the maximum percentage of a producer's milk that can be sold to non-pool plants rather than to handler pool plants without being disqualified from the pool and thus from entitlement to the minimum blend price. *See* 7 C.F.R. § 1033.13). According to the defendants, the diversion amendment was proposed because the "excessive diversions of milk by a few produces to non-pool plants tends to lower the blend price available to all producers, inasmuch as non-pool plants are more likely to lower value uses." Def. Mem. in Opp. at 7.

USDA conducted a four-day evidentiary hearing on the proposals at which interested parties, including White Eagle Cooperative Association and others, submitted both testimony and documentary evidence. Milk in the Mideast Marketing Area, 70 Fed. Reg. at 43337-43338; Hearing Ex. 11, Plaintiffs' App. Doc. 16. Afterward, USDA received post-hearing briefs from interested parties, including White Eagle. Milk in the Mideast Marketing Area, 70 Fed. Reg. at 43340. The Administrator then issued a tentative decision adopting the producers' proposals. He stated that "associating more milk [with the pool] than is actually part of the legitimate reserve supply of the pooling handler unnecessarily reduces the potential blend price paid to dairy farmers who regularly and consistently service the market's Class I needs." Milk in the Mideast

Marketing Area, 70 Fed. Reg. at 43341.

The Administrator omitted the issuance of a recommended decision for additional comments, and instead issued a tentative decision for immediate submission to a referendum. He stated that an "emergency marketing condition[]" existed. Milk in the Mideast Marketing Area, 70 Fed. Reg. at 43341. That condition was purportedly the "unwarranted erosion" of the blend prices "received by producers who are regularly and consistently serving the Class I needs of the Mideast marketing area" as a result of the "the lack of appropriate limits on the diversion of milk." *Id.*

At the same time, the Administrator invited public comment on the tentative decision, 70 Fed. Reg. at 43335, 43335, and USDA has since received those documents. Declaration of David Z. Walker, P 4.

USDA announced that the amended milk order was approved by producers in the referendum and published the final rule to take effect beginning October 1, 2005. Interim Order Amending the Order, 70 Fed. Reg. 56113 (2005). White Eagle Cooperative Federation, et al., and National All-Jersey, filed exception to the interim decision. Pl. Mem. Appendix, Tabs 18-20. The terms of the Interim Final Rule carry the weight of law and govern the marketing of milk in the Mideast Order today.

USDA may still determine that those comments warrant changes to the interim rule before it is issued in final form, then it will issue a final decision reflecting those changes, and will submit that decision to another producer referendum before the rule is issued in final form. Declaration of David Z. Walker, P 5.

II. Discussion

"A preliminary injunction is an extraordinary remedy intended to preserve the status quo until the merits of a case may be resolved." *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir. 2001). To obtain a preliminary injunction, the plaintiffs must show that: (1) they are reasonably likely to succeed on the merits; (2) no adequate remedy at law exists; (3) absent injunctive relief, they will suffer irreparable harm; and (4) the injunction will not harm the public interest. *Joelner v. Washington Park, Illinois*, 378 F.3d 613, 619 (7th Cir. 2004).

"If the movant can meet this threshold burden, then the inquiry becomes a "sliding scale" analysis where these factors are weighed against one another." *Id.* (citations omitted). Under this sliding scale analysis, the greater the plaintiff's likelihood of success on the merits, the less the balance of harms must weigh in his favor. *See AM General Corp. v. Daimler Chrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002). [8] If, however, the movant cannot show at least a "greater than negligible chance of winning," no injunction may be issued. *Id.* (citing *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 845 (7th Cir. 1999). Applying these standards, the court will address the plaintiffs' motion.

Success on the Merits

Two issues must be evaluated to determine the plaintiffs' likelihood of success on the merits: (1) whether USDA improperly issued the final decision by omitting the recommended decision; and (2) whether the agency employee who issued the decision had authority to do so. The Court addresses both arguments in turn.

1. Whether USDA improperly issued the final decision

The plaintiffs' first claim is that there were no "emergency circumstances" which justified the omission of the recommended decision. A rule may be finalized without a recommended decision "only if the Secretary finds on the basis of the record that due and timely execution of [the Secretary's] functions imperatively and unavoidably requires such an omission." 7 C.F.R. § 900.12(d). A careful examination of the language of this regulation is necessary to evaluate the plaintiffs' claim.

There is no real dispute about the first two elements of the regulation: 1) that the Secretary made a finding that an omission was required and 2) that the Secretary's finding was made "on the basis of the record."[2]

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[2] Plaintiffs clearly dispute that the proper findings were not made and that the record does not adequately support the omission of the recommended decision, but those arguments go to the third element and not whether the Secretary's finding were made "on the basis of the record."

The real dispute is over whether "due and timely execution of [the Secretary's] functions imperatively and unavoidably requires such an omission." The plaintiffs essentially ask the court to find that no "emergency" existed.

The parties disagree on the standard this Court should use when reviewing the Secretary's omission of the recommended decision. The plaintiffs, citing *Xin-Chang Zhang v. Slatterly*, 55 F.3d 732, 744 (2nd Cir. 1995), state that exceptions to ordinary APA procedures "should be narrowly construed and only reluctantly countenanced" by a reviewing court. Plaintiffs also cite *American Federation of Government Employees v. Block*, 210 U.S. App. D.C. 336, 655 F.2d 1153, 1157 fn. 6 (D.C. Cir. 1981), which held that "administrative agencies should remain conscious that such emergency situations are indeed rare and that courts will examine closely proffered rationales justifying the elimination of public procedures." The defendants, on the other hand, state that this court should a apply the highly deferential "arbitrary and capricious" standard and the "substantial evidence" test pursuant to 5 U.S.C. § 706(2). Under those standards, "agency actions are valid as long as the decision is supported by a rational basis,'" and the court's "sole task is to determine whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Pozzie v. U.S. Dep't of Housing and Urban Dev.*, 48 F.3d 1026, 1029 (7th Cir. 1995) (citations omitted). Clearly, the standard applied will have a significant impact on the plaintiffs' likelihood of success on the merits.

The Court is persuaded that the more deferential arbitrary and capricious standard is appropriate. The Supreme Court has described the federal milk-marketing regime as a "labyrinth." *Zuber v. Allen*, 396 U.S. 168, 172, 90 S. Ct. 314, 24 L. Ed. 2d 345 (1962). The Seventh Circuit recently acknowledged this complexity, stating that "[a] court's deference to administrative expertise rises to a zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority." *Lamers Dairy, Inc. v. U.S. Dep't. of Agriculture*, 379 F.3d 466, 473 (7th Cir. 2004) (quoting *Blair v. Freeman*, 125 U.S. App. D.C. 207, 370 F.2d 229, 232 (D.C. Cir. 1966)). The plaintiffs argue that the Court should

not give deference to the agency action here, because it was a matter of procedure and not a matter of substance. That is clearly wrong. The decision to omit the recommended decision was based on an assessment of milk market conditions and the effect of diversions on those conditions. This assessment was undoubtedly a substantive assessment and seems to be precisely the type of decision that requires agency expertise. The plaintiffs cannot simultaneously ask the Court to evaluate the proffered reasons for the omission, declare them inadequate, and ignore the agency's expertise in making those determinations.

The language of the regulation allowing an omission also supports this position. The regulation makes it clear that the *Secretary's finding* is the key to justifying an omission. The regulation could easily say that the decision must be made upon a finding of "good cause," as other closely related regulations do. Instead, the regulation requires only that the finding be made "on the basis of the record" -- a standard that seems very similar to an arbitrary and capricious standard.

Additionally, the Court finds it noteworthy that the authority cited by plaintiffs (*Zhang* and *Block*) does not involve the federal milk marketing regime in any way. *Cf. Gore Inc. v. Espy*, 87 F.3d 767, 772 (5th Cir. 1996) (applying the "arbitrary and capricious" standard as outlined in 5 U.S.C. § 706(2) to a decision by USDA under the milk marketing provisions of the AMAA). As the Seventh Circuit made clear in *Lamers* , the complexity of the milk marketing regulations requires special deference to administrative expertise. Therefore, the Court must review the agency decision to determine if it is supported by a "rational basis," and "whether there has been a clear error of judgment."'

This will be a difficult burden for the plaintiffs to carry. It does not appear, at this stage of the proceedings, that they have a great chance for success. They do not dispute that excess diversions were eroding the blend price, only that the extent of that erosion is not enough to justify an emergency ruling. Pl. Mem. in Supp. at 14. That argument comes very close to asking this Court to substitute its judgment for that of the agency's -- something the Court is not permitted to do. *See Heartwood v. U.S. Forest Service*, 230 F.3d 947, 953 (7th Cir. 2000). It also appears that hearing testimony supports the Administrator's determination and demonstrates that the cost to producers from the price erosion was significant.

2. Whether the agency employee had authority to issue the rule

The plaintiffs' second claim is that the Administrator did not have authority to issue the interim decision and emergency rule. The term "Secretary" is defined by the agency's regulations to include both the Secretary himself and "any officer or employee of the [USDA] to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated to act for the Secretary." 7 C.F.R. § 900.2. Furthermore, 7 U.S.C.§ 6912(a)(1) and 7 C.F.R. § § 2.3, 2.79(a)(8)(viii) demonstrate that the Administrator was in fact delegated authority to act for the Secretary in matters concerning milk marketing regulation. Read together, these provisions show that the Administrator was properly vested with authority to issue the interim decision in this case. The plaintiffs have failed to demonstrate a likelihood of success on the merits on this claim.

In sum, the plaintiffs' likelihood of success on the merits is, at best, only slightly better than negligible. This is especially true in light of the deference that must be given to administrative expertise in this area. Therefore, the other factors must weigh greatly in the plaintiffs' favor for them to succeed. As the analysis below will demonstrate, however, those factors weigh heavily against the plaintiffs. So much so that even if plaintiffs' likelihood of success on the merits were greater, they would still not be entitled to a preliminary injunction.

Adequate Remedy at Law

The defendants declined to discuss this factor in their briefs, and from that the Court will assume they concede that plaintiffs do not have an adequate remedy at law. The plaintiffs contend that damages suffered as a result of being disqualified from participation in the Mideast Milk Order are both incalculable and unrecoverable and, as a result, they have no adequate remedy at law.[3] As outlined below,

[3]This is a curious argument to advance in light of plaintiffs' arguments that the monetary harm they will suffer is much greater than the monetary harm that the defendant producers will suffer.

however, any harm to be suffered by the plaintiffs is purely speculative. As such, the plaintiffs have not made the necessary tripartite threshold showing, even if this factor has been satisfied.

Irreparable Harm

Finding that the plaintiffs will be irreparably harmed if the injunction is not granted is a threshold requirement for granting a preliminary injunction. *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003). Plaintiffs have failed to show that they will be irreparably harmed absent injunctive relief, and this alone is sufficient to deny their motion. The plaintiffs offer only one sentence in their supporting brief to demonstrate irreparable harm. They state, "if plaintiffs are denied injunctive relief, they will never be able to recover the revenues lost by the improperly issued final rule." Any loss that may be suffered by the plaintiffs is purely speculative, however.

The plaintiffs argue that the interim rule will make it more difficult for a producer to qualify its milk under the Mideast Order, Berby Decl., P 6, and that, if a producer is disqualified, it could lose a significant amount of money per hundredweight by virtue of its inability to obtain the blend price. Jacoby Decl., P 10. Plaintiffs fail to present any evidence, however, that any of their member producers have actually been unable to pool their milk on the Mideast Order. That omission is fatal. It is simply not enough to show the harm plaintiffs *might* suffer if they are prevented from pooling their milk on the Mideast Order. As the Seventh Circuit has stated, "speculative injuries do not justify this extraordinary remedy [a preliminary injunction]." *East St. Louis Laborers' Local 100 v.* Bellon Wrecking & Salvage Co., 414 F.3d 700, 704 (7th Cir. 2005).

Public Interest

It is somewhat difficult to discuss the milk marketing scheme in terms of the interest of the general public. As Judge Posner noted in *Alto Dairy*, "milk price discrimination is intended to redistribute wealth from consumers to producers of milk." *Alto*, 336 F.3d at 563. He called the alleged justification for the scheme -- the tendency of dairy farmers

to destroy their business through intense competition -- "almost certainly spurious." *Id.* What is more certain is that the scheme was intended to and in fact does benefit dairy producers. Those producers affected by the rule in question voted overwhelmingly in favor of its passage. Even if these relatively few plaintiffs were to suffer a greater economic impact than the other producers, a simple utilitarian argument weighs heavily against the plaintiffs. It seems reasonable to conclude that the purpose of the milk marketing scheme is to maximize the benefit to the largest number of producers, rather than to minimize a potential negative impact on a handful of producers.

Finally, the interim rules are already in place. Presumably, those in the industry who are affected by the rules have organized their business in compliance with these rules. To roll back the interim rules now would negate the effort and expense involved in that compliance.

In sum, the Court must evaluate the effect of a preliminary injunction on all of the producers, not just the plaintiffs and defendants in this case. The plaintiffs do not dispute that the blend price was being eroded. The Court will not benefit this small group of plaintiffs to the detriment of a much greater number of producers.

III. Conclusion

For the foregoing reasons, plaintiffs motion for preliminary injunction or, in the alternative, for stay of final action is **DENIED. SO ORDERED**.

AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.
2005 AMA Docket No. F&V 989-2.
Decision and Order.
Filed July 12, 2005.

AMAA – Agricultural Marketing Agreement Act – Raisin order – Amendment of regulations other than marketing orders – Dismissal with prejudice.

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's Order Dismissing Petition With Prejudice. Petitioner instituted the proceeding under Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 608c(15)(A)) seeking modification of the Raisin Order (7 C.F.R. pt. 989). The Judicial Officer stated the Raisin Order did not contain the provisions which Petitioner sought to have modified. Instead, the Judicial Officer found the provisions which Petitioner challenged were in 7 C.F.R. pt. 52, regulations promulgated under the Agricultural Marketing Act of 1946. The Judicial Officer concluded the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 608c(15)(A)) does not provide a mechanism for seeking amendment of 7 C.F.R. pt. 52; instead, the mechanism by which Petitioner may seek amendment of 7 C.F.R. pt. 52 is set forth in 5 U.S.C. § 553(e) and 7 C.F.R. § 1.28.

Colleen A. Carroll, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Order issued by Victor W. Palmer, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Lion Raisins, Inc. [hereinafter Petitioner], instituted this proceeding by filing a Petition by Handler for Modification or Exemption [hereinafter Petition] on March 1, 2005. Petitioner instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal marketing order regulating the handling of raisins produced from grapes grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71)

[hereinafter the Rules of Practice].

Petitioner challenges obligations and restrictions purportedly imposed as a result of the United States Department of Agriculture's interpretation of section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) and seeks modification of section 989.159(d) of the Raisin Order (7 C.F.R. § 989.159(d)) (Pet. ¶ V). On March 11, 2005, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a Motion to Dismiss Petition. Respondent contends Petitioner's Petition should be dismissed with prejudice because the Petition does not contain the information required by section 900.52(b)(2)-(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)-(4)) to be contained in each petition filed under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) and the Petition contains allegations and requests that cannot be addressed through a petition instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). On April 4, 2005, Petitioner filed Opposition to Respondent's Motion to Dismiss.

On May 3, 2005, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an Order Dismissing Petition With Prejudice. On June 3, 2005, Petitioner appealed the ALJ's May 3, 2005, Order Dismissing Petition With Prejudice to the Judicial Officer. On June 28, 2005, Respondent filed Respondent's Response to Petition for Appeal, and on June 30, 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 May 3, 2005, Order Dismissing Petition With Prejudice. Therefore, I adopt the ALJ's May 3, 2005, Order Dismissing Appeal With Prejudice as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE—7 AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity

. . . .

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

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

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in

accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 U.S.C. § 608c(15).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER IX—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; FRUITS, VEGETABLES, NUTS), DEPARTMENT OF AGRICULTURE

. . . .

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

. . . .

SUBPART—ORDER REGULATING HANDLING

. . . .

GRADE AND CONDITION STANDARDS

. . . .

§ 989.59 Regulation of the handling of raisins subsequent to their acquisition by handlers.

. . . .

(d) *Inspection and certification*. Unless otherwise provided in this section, each handler shall, at his own expense, before shipping or otherwise making final disposition of raisins, cause and [sic] inspection to be made of such raisins to determine whether they meet the then applicable minimum grade and condition standards for natural condition raisins or the then applicable minimum grade standards for packed raisins. Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted to the committee a copy of such certificate together with such other documents or records as the committee may require. The certificate shall be issued by the Processed Products Standardization and Inspection Branch of the United States Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency will improve the administration of this amended subpart. Any certificate issued pursuant to this paragraph shall be valid only for such period of time as the committee may specify, with the approval of the Secretary, in appropriate rules and regulations.

. . . .

SUBPART—ADMINISTRATIVE RULES AND REGULATIONS

. . . .

QUALITY CONTROL

. . . .

§ 989.159 Regulation of the handling of raisins subsequent to their acquisition.

. . . .

(d) *Submission of inspection certificates to the Committee.* A copy of each inspection certificate which a handler is required to submit to the Committee pursuant to § 989.59(d) shall be submitted not later than Wednesday of the week following the week in which the certificate was issued. This may be accomplished by authorizing the inspection service in writing to submit a copy of each such inspection certificate directly to the Committee. A copy of such authorization shall be furnished to the Committee.

7 C.F.R. §§ 989.59(d), .159(d).

ADMINISTRATIVE LAW JUDGE'S ORDER DISMISSING PETITION WITH PREJUDICE (AS RESTATED)

Petitioner seeks to add language to an implementing regulation (7 C.F.R. § 989.159(d)), issued pursuant to section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)), to require the Processed Products Standardization and Inspection Branch, United States Department of Agriculture [hereinafter the Inspection Branch], to transmit certificates directly to handlers' customers upon request. Petitioner also seeks to be allowed to issue certificates to its customers that provide test results from multiple sources, including the Inspection Branch, which the Inspection Branch may not then construe to be improperly created facsimiles of United States Department of Agriculture certificates.

Petitioner premises its requests upon the fact that, since 1990, it has been preparing certificates for its customers that provide various test

results from Petitioner, the Inspection Branch, and independent laboratories. Petitioner prepares certificates that provide various test results to satisfy customer requests because Petitioner believes information on the United States Department of Agriculture certificates prepared by the Inspection Branch is inaccurate. This practice has led to charges by the United States Department of Agriculture accusing Petitioner of issuing "facsimile" certificates misrepresenting United States Department of Agriculture test results to Petitioner's customers.

Section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)), the provision Petitioner specifies as supporting its right to file a petition under the AMAA, does not address the transmission of certificates by the Inspection Branch or the issuance of certificates that provide test results from multiple sources. The full extent of Petitioner's obligation under section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) is to have the raisins it handles inspected by the Inspection Branch and to submit copies of the certificates obtained from the Inspection Branch to the Raisin Administrative Committee.

The regulation that the United States Department of Agriculture has applied to charge Petitioner with fraud or misrepresentation in its use of certificates and "facsimiles" (7 C.F.R. § 52.54(a)(1)) was promulgated pursuant to the Agricultural Marketing Act of 1946, as amended (7 U.S.C. § 1621-1627) [hereinafter the Agricultural Marketing Act].[1] Modifications of and exemptions from 7 C.F.R. pt. 52 cannot be sought or obtained in a proceeding instituted pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Likewise, the refusal of the Inspection Branch to send certificates directly to Petitioner's customers, is not based upon powers conferred upon the Inspection Branch by the AMAA, but by the Agricultural Marketing Act. The two statutes are different, and the provisions of the AMAA for challenging marketing orders and obligations under marketing orders do not extend to other United States Department of Agriculture regulatory programs.

A proceeding under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) may not be used as a forum to debate questions of policy,

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[1]See authority citation for 7 C.F.R. pt. 52.

desirability, or effectiveness of a marketing order's provisions.[2] So too, a section 8c(15)(A) AMAA (7 U.S.C. § 608c(15)(A)) proceeding may not be used to challenge the policy, desirability, or effectiveness of regulations and practices that are based upon a completely different statute.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises two issues in Petitioner's Appeal to the Judicial Officer [hereinafter Appeal Petition]. First, Petitioner contends the ALJ erroneously held Petitioner did not challenge section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) (Petitioner's Appeal Pet. at 1-2).

Petitioner seeks to require the Inspection Branch to transmit certificates directly to handlers' customers upon request and seeks to be allowed to issue certificates to customers that include test results from multiple sources. However, section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) does not address the transmission of certificates by the Inspection Branch or the issuance of certificates that include test results from multiple sources. As the ALJ correctly states, the full extent of Petitioner's obligation under section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) is to have the raisins it handles inspected by the Inspection Branch and to submit copies of the certificates obtained from the Inspection Branch to the Raisin Administrative Committee.[3] Thus, section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) imposes none of the obligations or restrictions that Petitioner alleges in the Petition.

Moreover, a review of the regulations governing the inspection and certification of processed fruits an vegetables (7 C.F.R. pt. 52), promulgated pursuant to the Agricultural Marketing Act, reveals that

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[2]*In re Lion Raisins, Inc.*, 64 Agric. Dec. 27, 40 (2005), *appeal docketed*, No. CIV-F-05-00640-AWI-SMS (E.D. Cal. May 13, 2005); *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11, 22-3 (2004); *In re Daniel Strebin*, 56 Agric. Dec. 1095, 1133 (1997); *In re Sunny Hill Farms Dairy Co.*, 26 Agric. Dec. 201, 217 (1967), *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).

[3]See Order Dismissing Petition With Prejudice at third unnumbered page.

7 C.F.R. pt. 52, not the Raisin Order, contains the provisions which Petitioner challenges, including the provisions related to distribution of certificates. Section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) does not provide a mechanism for seeking amendment of the regulations governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52) promulgated under the Agricultural Marketing Act. Instead, the mechanism by which Petitioner may seek amendment of 7 C.F.R. pt. 52 is set forth in the Administrative Procedure Act and United States Department of Agriculture regulations, which read as follows:

> **§ 553. Rule making**
>
> . . . .
>
> (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 553(e).

> **§ 1.28 Petitions.**
>
> Petitions by interested persons in accordance with 5 U.S.C. 553(e) for the issuance, amendment or repeal of a rule may be filed with the official that issued or is authorized to issue the rule. All such petitions will be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions.

7 C.F.R. § 1.28.

Second, Petitioner contends the ALJ erroneously concluded Petitioner instituted the proceeding to debate questions of policy, desirability, or effectiveness of the Raisin Order (Appeal Pet. at 2-3).

I disagree with Petitioner's contention that the ALJ erroneously concluded Petitioner instituted the proceeding to debate questions of policy, desirability, or effectiveness of the Raisin Order. Instead, the ALJ concluded section 8c(15)(A) of the AMAA (7 U.S.C. §

608c(15)(A)) could not be used to challenge the policy, desirability, or effectiveness of regulations and practices that are based upon the Agricultural Marketing Act.[4]

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

ORDER

Petitioner's Petition, filed March 1, 2005, is dismissed with prejudice.

This Order shall become effective on the day after service on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to obtain review of this Order in any district court of the United States in which district Petitioner is an inhabitant or has its principal place of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture.[5] The date of entry of this Order is July 12, 2005.

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In re: RED HAWK FARMING & COOLING.
AMA WRPA Docket No. 01-0001.
Decision and Order.
Filed August 23, 2005.

WRPA – Watermelon promotion – First Amendment, claims as applied – Government speech.

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[4]Order Dismissing Petition With Prejudice at third and fourth unnumbered pages.

[5]7 U.S.C. § 608c(15)(B).

Frank Martin, Jr., for Complainant
Charles E. Buri, for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

[1] The watermelon advertising and promotion authorized by the Watermelon Research and Promotion Act, as amended (7 U.S.C. §§ 4901-4916) are government speech, according to *Johanns v. Livestock Marketing Assn.*, 125 S.Ct. 2055, 544 U.S. ____ (2005). Consequently, Red Hawk Farming & Cooling's Petition must be denied.

Discussion

[2] On June 25, 2001, the U. S. Supreme Court in *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001) (herein frequently "United Foods"), struck down on First Amendment grounds the mushroom checkoff program created under the Mushroom Promotion, Research, and Consumer Information Act (the "Mushroom Act", 7 U.S.C. § 6101, *et seq*.

[3] The reliance of Petitioner Red Hawk Farming & Cooling, also known as Red Hawk Farming, and as Red Hawk Farms (herein frequently "Red Hawk"), on *United Foods* was, at the time, justified. Red Hawk's position was reinforced in the Ninth Circuit by *Delano Farms Company v. California Table Grape Commission*, 318 F.3d 895 (9th Cir. 2003), which held that the assessment of independent and competing firms to pay for generic advertising is a violation of the First Amendment. *Id.*, at 898-899.

[4] In response to *United Foods*, actions involving a number of other agricultural products subject to assessments used to pay for generic advertising, were filed and eventually reached the
U. S. Supreme Court.

[5] On May 23, 2005, the U. S. Supreme Court issued its third decision in eight years which considered "whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment." *Johanns v. Livestock Marketing Assn.*, *supra*,

(herein frequently "*Livestock Marketing Assn.*"). *Livestock Marketing Assn.* upheld the constitutionality of compelled assessments used to pay for generic advertising where the advertising is government speech.

[6] *Livestock Marketing Assn.* came out of the Eighth Circuit. The U. S. Supreme Court remanded on May 31, 2005, to various other Courts of Appeals for further consideration in light of *Livestock Marketing Assn.*, cases involving pork (Sixth Circuit), 544 U.S. ____ (2005); alligators (Fifth Circuit), 544 U.S. ____ (2005); and milk (Third Circuit), 544 U.S. ____ (2005).

[7] Not until the U. S. Supreme Court ruled in May 2005 regarding government speech in *Livestock Marketing Assn.*, did it become clear that Red Hawk's arguments would fail. In light of *Livestock Marketing Assn.*, Red Hawk's Petition must be denied.

[8] The U. S. Supreme Court's explanation of why the "Beef Promotion" program is government speech is found mainly at pages 8-10, *Livestock Marketing Assn.* Congress directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products." *Id.* at 9.

[9] Here, likewise, the "Watermelon Promotion" program is directed by Congress. The Watermelon Research and Promotion Act, as amended (herein frequently "the WRPA" or "the Act"), 7 U.S.C. §§ 4901-4916, authorizes "the establishment of an orderly procedure for the development, financing (through adequate assessments on watermelons harvested in the United States, or imported into the United States, for commercial use), and carrying out of an effective, continuous, and coordinated program of research, development, advertising, and promotion designed to strengthen the watermelon's competitive position in the marketplace, and establish, maintain, and expand domestic and foreign markets for watermelons. 7 U.S.C. § 4901.

[10] "Compelled support of government" - - even those programs of government one does not approve - - is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. "The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its

own policies.' *Southworth*, 529 U.S., at 229. *Livestock Marketing Assn.*, at p. 8.

[11] In both the Beef Promotion program and the Watermelon Promotion program, the message of the promotional campaigns is effectively controlled by the Federal Government itself. The degree of governmental control over the message funded by the (targeted assessments) distinguishes these cases from *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). *See Livestock Marketing Assn*. at p. 10.

[12] "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Livestock Marketing Assn.* at p. 10.

[13] "Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. [footnote omitted] And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required." [footnote omitted] *Livestock Marketing Assn.* at p. 12. I conclude that the within case, Red Hawk's case, cannot be distinguished from *Livestock Marketing Assn.*

Procedural History

[14] Red Hawk filed its Second Amended Petition ("Petition" herein) on January 3, 2002. The Petition alleges, among other things, that, in violation of the First Amendment to the United States Constitution, the National Watermelon Promotion Board (herein frequently "Watermelon Board") imposed assessments, penalties, and interest charges upon Red Hawk.

[15] The Respondent is the Administrator of the Agricultural Marketing Service, United States Department of Agriculture (herein

frequently "AMS"). The Answer, filed on January 22, 2002, among other things, defends the relevant statute, plan, and regulations, as promulgated and as applied, under the doctrine of government speech.

[16] The three-day hearing was held before me in Phoenix, Arizona on March 12-13, 2002, and on January 23, 2003. AMS has been ably represented by Gregory Cooper, Esq. and by Frank Martin, Jr., Esq., each with the Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Red Hawk has been ably represented by Charles E. Buri, Esq., of Friedl Richter & Buri, P.A., Scottsdale, Arizona. The transcript is referred to as Tr., except that the third day is referred to as Tr. (23Jan2003).

[17] Red Hawk called 2 witnesses (Jack Lewis Dixon, a farmer and watermelon broker who is a partner (with his parents) in Red Hawk, Tr. 27-67, and 523-526; and William Rayford Collier Watson, Executive Director of the National Watermelon Promotion Board, Tr. 69-139).

[18] AMS called four witnesses (William Joseph McGin, Compliance Director of the National Watermelon Promotion Board, Tr. 141-153; William Rayford Collier Watson, Tr. 155-277, 284-428, 433-445; Martha B. Ransom, Chief of the Research and Promotion Branch for Fruits and Vegetables, AMS, Tr. 446-522; Tr. 7-29 (23Jan2003); and Ronald W. Ward, Ph.D., expert witness in agricultural economics and commodity promotion, Tr. 33-180 (23Jan2003)).

[19] Red Hawk submitted 10 exhibits, Petitioner Exhibits, referred to as PX. PX 1 was admitted into evidence, consisting of PX 1A through PX 1J. PX 2 and PX 3, actual watermelon bins, were admitted into evidence (Tr. 66), but thereafter PX 2 and PX 3 were withdrawn and photographs were substituted (*see* Tr. 523). (PX 2 was the bin designed especially for Red Hawk, and PX 3 was standard watermelon bin used in the general watermelon business. Tr. 41-42.) PX 4 and PX 5 were admitted into evidence. By mail filed May 2, 2002, Red Hawk submitted photographs PX 6 through PX 10, which were admitted into evidence (Tr 5 (23Jan2003)), consisting of photographs of Red Hawk's watermelon bins and cartons which were too bulky to be kept as evidence.

[20] AMS submitted 49 exhibits, Respondent Exhibits, referred to as RX. RX 1, RX 2A, RX 2B, and RX 3 through RX 22 were admitted into evidence. RX 23, which is a duplicate of PX 4, was not admitted

(Tr. 152). RX 24 through RX 41 were admitted into evidence. RX 43 through RX 49 were admitted into evidence.
[21] ALJX 1 and ALJX 2 (*see* Tr. 179 (23Jan2003)), were admitted into evidence.
[22] Red Hawk's Proposed Findings of Fact and Conclusions of Law and Order was timely filed with supporting Opening Brief on March 28, 2003. Red Hawk's Reply Brief was timely filed on May 19, 2003.
[23] AMS's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support thereof was timely filed on April 30, 2003.

Red Hawk's Position

[24] Red Hawk principal Jack Dixon, a partner, testified, in part, as follows:
Mr. Buri: Mr. Dixon, have you paid any of the assessments set forth in Petitioner's Exhibit Number 4?
Mr. Dixon: No, sir.
Mr. Buri: Have you paid any assessments to the National Watermelon Promotion Board since June of 1999?
Mr. Dixon: I don't believe so.
Mr. Buri: Mr. Dixon, why is it that you object to paying the assessments imposed by the National Watermelon Promotion Board?
Mr. Dixon: I believe that - - we do not believe that we should pay an assessment to promote our competition, and to actually help promote watermelons that would cause competition for our company, since we are an individual company.
Mr. Buri: In your opinion, promoting watermelon consumption, does that benefit you as a handler, importer, grower of watermelons?
Mr. Dixon: No, sir. We feel that our quality does.
Mr. Buri: Would you explain that a bit more, please?
Mr. Dixon: We really take a lot of pride in our label. We take a lot of pride in - - not only myself, but the people around me, in the quality of the fruit we pack. We try to pack the best quality grown in the United States, if (not) anywhere.
Mr. Buri: If you were not compelled to pay for advertising or promotion activities that encourage the consumption of watermelons, would you do so for anyone other than yourself or the Red Hawk Farms brand?

Mr. Dixon: No, sir.
Mr. Buri: Mr. Dixon, are you at all bothered by the - - I want to say requirement of the National Watermelon Promotion Act requiring you to be a part of the activities of the National Watermelon Promotion Board?
Mr. Dixon: Yes, sir.
Mr. Buri: Would you belong to this organization if you didn't have to?
Mr. Dixon: No, sir.
Mr. Buri: And why is that?
Mr. Dixon: We feel that we - - we feel that we live in a (free) country, and we should be allowed to build our own business without being forced into a group. We feel like we put up a superior product.
We feel like that we have got a little more money for our product because we do put up a superior product. And what we actually (have) to say, that we can display our watermelons against other people's watermelons, we think that we have a lot better product and the market seems to show that.
Mr. Buri: Do you believe the marketplace works to your advantage?
Mr. Dixon: Definitely.
Tr. 52-54.
[25] Mr. Dixon testified that Red Hawk sorts out all the culls, all the second grade product, and puts the best quality product in Red Hawk cartons and ships them. Tr. 33. Mr. Dixon testified that Red Hawk puts up a premium quality product compared to its competitors. Tr. 33. Mr. Dixon testified that Red Hawk likes to put out what used to be called U.S. Number 1's, a top grade product. Tr. 34. To promote recognition of its product, Red Hawk puts a sticker label on each watermelon. Tr. 36-38, PX 1.
Mr. Buri: Mr. Dixon, why is it that Red Hawk Farming & Cooling places these stickers, 1B through 1J, on individual watermelons that it processes?
Mr. Dixon: Mr. Buri, if you notice, on the bottom of those labels, they have a phone number on there. And we put these labels on there advertising our product, and we want them to know when they buy this label or this product, they have a better watermelon than usual.
They should have a superior watermelon than the average watermelon sold in the store. And that's also why we have our numbers there,

because we've had a lot of compliments, as far as Canada, Florida, and we've had a few complaints too. But we're awful proud of this label[1], that's why we do that.
Mr. Buri: Are you trying to develop brand awareness for Red Hawk Farming & Cooling? Mr. Dixon: Yes, sir.
Tr. 39-40.
[26] Mr. Dixon testified that Red Hawk uses a three-color high graphic bin that is designed especially for Red Hawk, to promote and advertise its watermelons. Tr. 42, PX 2.
Mr. Buri: Now, again, why do you have the Red Hawk Farms watermelons' logo, premium quality, things of that sort, on the outside of (Petitioner's) Exhibit Number 2?
Mr. Dixon: We do that to advertise our company and make sure the public are getting the best watermelon that they can possibly buy.
Mr. Buri: Again, are you trying to develop brand awareness for Red Hawk Farms?
Mr. Dixon: That is correct.
Tr. 42-43.
[27] Mr. Dixon testified that the smaller, individual labels (found in PX 1) cost Red Hawk around $6,000 a year; and that Red Hawk's graphic bins cost Red Hawk an additional $2.25 per bin for advertisement. Tr. 44. (See PX 7 and PX 8, photographs which represent PX 2.) Mr. Dixon estimated the number of bins used the previous year (2001) to have been roughly 40,000 to 50,000. Tr. 44-45. Mr. Dixon confirmed that Red Hawk was spending approximately $100,000 or more per year promoting its Red Hawk Farms brand. Tr. 45.

Findings Of Fact

[28] The Secretary of Agriculture (herein frequently "the Secretary")

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[1] 1A is a larger label (4" x 6") that goes on the bin; 1E is a watermelon honey label (an oval 2" across); 1B, 1C, 1D, 1F, 1G, 1H, 1I, and 1J are labels (ovals from 2" to 2-1/2" across) that go on individual watermelons.

administers the Watermelon Research and Promotion Act, as amended (herein frequently "the WRPA" or "the Act"), 7 U.S.C. §§ 4901-4916, which became law in 1985.

[29] The National Watermelon Promotion Board "opened for business" in 1990, following the referendum in 1989, to administer the program mandated by Congress under the WRPA. Tr. 69-70.

[30] The National Watermelon Promotion Board is not a government entity, but it is tightly supervised by the Secretary, and, on behalf of the Secretary, by personnel of the United States Department of Agriculture (herein frequently "USDA"), specifically, the Chief of the Research and Promotion Branch for Fruits and Vegetables, AMS, and her staff. Tr. 74, 138, 433-35, 449, 506.

[31] The Watermelon Board's Board of Directors, at the time of the hearing (2002), consisted of 14 grower members (producers), 14 first handler members, 2 importer members, and one public member. Tr. 73.

[32] The Watermelon Board's Board of Directors is appointed by the Secretary of Agriculture, who also oversees the industry members' nomination process. Tr. 434-35. RX 41. 7 U.S.C. § 4901.

[33] The Watermelon Board's Board of Directors' marketing plan and communications plan, including budget, were reviewed and approved by the Secretary of Agriculture or on her or his behalf by USDA personnel. Tr. 435, 506.

[34] The WRPA provides for termination or suspension of the plan. 7 U.S.C. § 4913.

[35] The Watermelon Board, as part of its effort to increase demand for watermelon, communicates watermelon safety information and precautions, such as educating retailers to take affirmative hygiene action to avoid cross-contamination, especially since 25% of the watermelon that is shipped is eventually sold to consumers cut-up; and communicating to the media as was necessary in July 2000, after watermelon on a salad bar had been cross-contaminated in the back of the restaurant by tainted beef which had dripped on the watermelon, and several people were sickened from E.coli and a little girl died. Tr. 195-98, 343-46, RX 17.

[36] The Watermelon Board, as part of its effort to increase demand for watermelon, educates retailers and others that to extend watermelon shelf life, a consistent temperature for the watermelons needs to be

maintained; and watermelons should not be placed next to a product that emits a lot of ethylene (such as bananas). Tr. 198-200, 230-231.

[37] The Watermelon Board, as part of its effort to increase demand for watermelon, promotes and advertises watermelon's nutrition and health benefits ("watermelon has a terrific nutritional story"), including lycopene and antioxidants that may help prevent certain cancers, Vitamin A, Vitamin C, potassium, and fiber. RX 2A, Tr. 205, 225-226.

[38] USDA's oversight and control of the Watermelon Board includes acting as an advisor to the Board in the developmental process of promotion, research, and information activities. RX 25 through RX 41, Tr. 449-496, and Tr. 8 (23Jan2003).

[39] USDA's oversight includes the review and approval of each individual research contract. Tr. 436.

[40] All Watermelon Board budgets, contracts, and projects are submitted to USDA for review and approval. RX 25 through RX 41, Tr. 449-496, Tr. 9-10 (23Jan2003).

[41] USDA's oversight includes review and approval (a meticulous, detail-oriented, sometimes intense, word-for word process) of any materials that the Watermelon Board prepares for use. Tr. 219-20, 233, 267-68, 433, 442-43, 506-07, 518-521, RX 41.

[42] USDA's oversight of the Watermelon Board includes retaining final approval authority over every assessment dollar spent, through the budget process for the overall administrative expenses, plus individual and specific promotion and research expenses. Tr. 506, Tr. 7-8 (23Jan2003).

[43] A representative of USDA attends and actively participates in every Watermelon Board meeting, providing comments or feedback. Tr. 449-450, Tr. 8-9 (23Jan2003).

Conclusions

[44] The Watermelon Research and Promotion Act specifically authorizes the compelled subsidy of generic advertising of watermelons. 7 U.S.C. § 4901, *et seq*.

[45] Establishing, maintaining, and expanding domestic and foreign markets for watermelons is declared by the WRPA to be vital to the welfare of not only those concerned with watermelons, but also "the

general economic welfare of the Nation" (7 U.S.C. § 4901(a)(5)) and to be "essential in the public interest" (7 U.S.C. § 4901(b)).

[46] "(A)dvertising" and "promotion" are specifically and repeatedly identified in the WRPA as essential elements of the program designed to strengthen the watermelon's competitive position in the market place. 7 U.S.C. § 4901(a)(6) and (b).

[47] "(A)dequate assessments" on watermelons are recognized by Congress as necessary to such program. 7 U.S.C. § 4901(b).

[48] What Red Hawk is compelled to do, is pay for government speech with which it does not agree. Red Hawk is not actually compelled to speak when it does not wish to speak, because the advertising is not attributed to Red Hawk; Red Hawk is not identified as the speaker; Red Hawk is not compelled to "utter" the message with which it does not agree.

[49] Red Hawk has no constitutional right to avoid paying for government speech with which it does not agree. *Livestock Marketing Assn.* at p. 8.

[50] "The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. *Livestock Marketing Assn.* at p. 11.

[51] In the spirit of AMS's proposed Order (*see* Respondent's April 30, 2003 filing), AMS would have me direct Red Hawk to file all reports currently due to the Watermelon Board, and to pay all assessments and interest and penalties currently due to the Watermelon Board. However, AMS's Answer (filed January 22, 2002), includes no such prayer for relief, and I question whether, within the context of Red Hawk's Petition under 7 U.S.C. § 4909, it is appropriate for me to address those issues. Consequently, I refrain from entering any Order, but I do encourage the parties to resolve these issues of reports, assessments, interest, and penalties, on or before the 11th day after this Decision becomes final, to avoid further litigation expense and to avoid enforcement action.

[52] In light of *Livestock Marketing Assn.*, Red Hawk's Petition must

be and hereby is denied.

Finality

[53] This Decision becomes final without further proceedings 35 days after service unless an appeal petition is filed with the Hearing Clerk within 30 days after service, in accordance with sections 900.64 and 900.65 of the Rules of Practice (7 C.F.R. §§ 900.64-900.65).
Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

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In re: RED HAWK FARMING & COOLING.
AMA WRPA Docket No. 01-0001.
Decision and Order.
Filed November 8, 2005.

WRPA – Watermelon promotion – First Amendment – Government speech – As applied First Amendment claims.

The Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's decision dismissing Petitioner's Petition. Based upon *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), the Judicial Officer concluded watermelon advertising and promotion authorized by the Watermelon Research and Promotion Act (7 U.S.C. §§ 4901-4916) are government speech not susceptible to First Amendment compelled-subsidy challenge; consequently, the Judicial Officer dismissed Petitioner's Petition in which Petitioner sought exemption from assessments imposed by the National Watermelon Promotion Board and used for generic advertising and promotion of watermelons. The Judicial Officer found the National Watermelon Promotion Board's advertising and promotional materials were not attributable to Petitioner and rejected Petitioner's "as-applied" First Amendment claim.

Frank Martin, Jr., for Respondent.
Charles E. Buri, Scottsdale, Arizona, for Petitioner.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Red Hawk Farming & Cooling [hereinafter Petitioner] filed a Second

Amended Petition [hereinafter Petition] on January 3, 2002. Petitioner filed the Petition under the Watermelon Research and Promotion Act, as amended (7 U.S.C. §§ 4901-4916) [hereinafter the Watermelon Research and Promotion Act]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Information Programs (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52).

Petitioner alleges the National Watermelon Promotion Board's assessments, interest, and penalties imposed on Petitioner and used to advertise and promote watermelons violate the First Amendment to the Constitution of the United States. Petitioner seeks an exemption from assessments, interest, and penalties imposed by the National Watermelon Promotion Board. (Pet. at 2.)

On January 22, 2002, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Respondent's Answer in which Respondent denies the material allegations of the Petition and raises three affirmative defenses: (1) the Petition fails to state a claim upon which relief can be granted; (2) the Watermelon Research and Promotion Act and the plan and regulations issued under the Watermelon Research and Promotion Act (7 C.F.R. pt. 1210), as promulgated and applied, are constitutional under the doctrine of government speech; and (3) the Watermelon Research and Promotion Act and the plan and regulations issued under the Watermelon Research and Promotion Act (7 C.F.R. pt. 1210), as promulgated and applied, are constitutional under the standards in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), and *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) (Respondent's Answer).

On March 12 and 13, 2002, and January 23, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] presided over a hearing in Phoenix, Arizona. Charles E. Buri, Friedl, Richter & Buri, P.A., Scottsdale, Arizona, represented Petitioner. Gregory Cooper and Frank Martin, Jr., Office of the General Counsel, United States Department of

Agriculture, represented Respondent.[1]

On March 28, 2003, Petitioner filed Petitioner's Proposed Findings of Fact and Conclusions of Law and Order and Petitioner's Opening Brief. On April 30, 2003, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof. On May 19, 2003, Petitioner filed Petitioner's Reply Brief.

On August 23, 2005, the ALJ issued a Decision [hereinafter Initial Decision] concluding watermelon advertising and promotion authorized by the Watermelon Research and Promotion Act are government speech and denying Petitioner's Petition (Initial Decision at 1, 13).

On September 20, 2005, Petitioner appealed to the Judicial Officer. On September 27, 2005, Respondent filed a response to Petitioner's appeal petition. On October 5, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt, with minor modifications, the ALJ's Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

Petitioner's exhibits are designated by "PX." Respondent's exhibits are designated by "RX." The transcript is divided into three volumes, one volume for each day of the 3-day hearing. References to "Tr. I" are to the volume of the transcript that relates to the March 12, 2002, segment of the hearing; references to "Tr. II" are to the volume of the transcript that relates to the March 13, 2002, segment of the hearing; and references to "Tr. III" are to the volume of the transcript that relates to the January 23, 2003, segment of the hearing.

APPLICABLE CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const.

Amendment I

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[1]Gregory Cooper withdrew as counsel for Respondent effective March 18, 2002 (Notice of Appearance filed March 18, 2002).

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 80—WATERMELON RESEARCH AND PROMOTION

§ 4901 Congressional findings and declaration of policy

(a) Congress finds that—

(1) the per capita consumption of watermelons in the United States has declined steadily in recent years;

(2) watermelons are an important cash crop to many farmers in the United States and are an economical, enjoyable, and healthful food for consumers;

(3) approximately 2,607,600,000 pounds of watermelons with a farm value of $158,923,000 were produced in 1981 in the United States;

(4) watermelons move in the channels of interstate commerce, and watermelons that do not move in such channels directly affect interstate commerce;

(5) the maintenance and expansion of existing markets and the establishment of new or improved markets and uses for watermelons are vital to the welfare of watermelon growers and those concerned with marketing, using, handling, and importing watermelons, as well as the general economic welfare of the Nation; and

(6) the development and implementation of coordinated programs of research, development, advertising, and promotion are necessary to maintain and expand existing markets and establish new or improved markets and uses for watermelons.

(b) It is declared to be the policy of Congress that it is essential in the public interest, through the exercise of the powers provided herein, to authorize the establishment of an orderly procedure for the development, financing (through adequate assessments on watermelons harvested in the United States, or imported into the United States, for commercial use), and carrying out of an effective, continuous, and coordinated program of research, development, advertising, and promotion designed to strengthen the watermelon's competitive position in the marketplace, and establish, maintain, and expand domestic and foreign markets for watermelons. The purpose of this chapter is to so authorize the establishment of such procedure and the development, financing, and carrying out of such program. Nothing in this chapter may be construed to dictate quality standards nor provide for the control of production or otherwise limit the right of individual watermelon producers to produce watermelons.

§ 4903. Issuance of plans

To effectuate the declared policy of this chapter, the Secretary shall, under the provisions of this chapter, issue, and from time to time may amend, orders (applicable to producers, handlers, and importers of watermelons) authorizing the collection of assessments on watermelons under this chapter and the use of such funds to cover the costs of research, development, advertising, and promotion with respect to watermelons under this chapter. Any plan shall be applicable to watermelons produced in the United States or imported into the United States.

§ 4905. Regulations

The Secretary may issue such regulations as may be necessary to carry out the provisions of this chapter and the powers vested in the Secretary under this chapter.

§ 4906. Required terms in plans

(a) Description of terms and provisions

Any plan issued under this chapter shall contain the terms and provisions described in this section.

(b) Establishment and powers of National Watermelon Promotion Board

The plan shall provide for the establishment by the Secretary of the National Watermelon Promotion Board and for defining its powers and duties, which shall include the powers to–

(1) administer the plan in accordance with its terms and conditions;

(2) make rules and regulations to effectuate the terms and conditions of the plan;

(3) receive, investigate, and report to the Secretary complaints of violations of the plan; and

(4) recommend to the Secretary amendments to the plan.

(c) Membership of Board; representation of interests; appointment; nomination; eligibility of producers; importer representation

(1) The plan shall provide that the Board shall be composed of representatives of producers and handlers, and one representative of the public, appointed by the Secretary from nominations submitted in accordance with this subsection. An equal number of representatives of producers and handlers shall be nominated by producers and handlers, and the representative of the public shall be nominated by the other members of the Board, in such manner as may be prescribed by the Secretary. If producers and handlers fail to select nominees for appointment to the Board, the Secretary may appoint persons on the basis of representation as provided for in the plan. If the Board fails to nominate a public representative, the Secretary shall choose such representative for appointment.

(2) A producer shall be eligible to serve on the Board only as

a representative of handlers, and not as a representative of producers, if–

(A) the producer purchases watermelons from other producers, in combined total volume that is equal to 25 percent or more of the producer's own production; or

(B) the combined total volume of watermelons handled by the producer from the producer's own production and purchases from other producers' production is more than 50 percent of the producer's own production.

(3)(A) If importers are subject to the plan, the Board shall also include 1 or more representatives of importers, who shall be appointed by the Secretary from nominations submitted by importers in such manner as may be prescribed by the Secretary.

(B) Importer representation on the Board shall be proportionate to the percentage of assessments paid by importers to the Board, except that at least 1 representative of importers shall serve on the Board.

(C) If importers are subject to the plan and fail to select nominees for appointment to the Board, the Secretary may appoint any importers as the representatives of importers.

(D) Not later than 5 years after the date that importers are subjected to the plan, and every 5 years thereafter, the Secretary shall evaluate the average annual percentage of assessments paid by importers during the 3-year period preceding the date of the evaluation and adjust, to the extent practicable, the number of importer representatives on the Board.

. . . .

(e) Budget on fiscal period basis

The plan shall provide that the Board shall prepare and submit to the Secretary for the Secretary's approval a budget, on a fiscal period basis, of its anticipated expenses and disbursements in the administration of the plan, including probable costs of research, development, advertising, and promotion.

(f) Assessments; payments; notice

The plan shall provide for the fixing by the Secretary of assessments to cover costs incurred under the budgets provided for in subsection (e) of this section, and under section 4907(f) of this title, based on the Board's recommendation as to the appropriate rate of assessment, and for the payment of the assessments to the Board. In fixing or changing the rate of assessment pursuant to the plan, the Secretary shall comply with the notice and comment procedures established under section 553 of title 5. Sections 556 and 557 of such title shall not apply with respect to fixing or changing the rate of assessment.

(g) Scope of expenditures; restrictions; assessments on per-unit basis; importers

The plan shall provide the following:

(1) Funds received by the Board shall be used for research, development, advertising, or promotion of watermelons and such other expenses for the administration, maintenance, and functioning of the Board as may be authorized by the Secretary, including any referendum and administrative costs incurred by the Department of Agriculture under this chapter.

(2) No advertising or sales promotion program under this chapter shall make any reference to private brand names nor use false or unwarranted claims in behalf of watermelons or their products or false or unwarranted statements with respect to attributes or use of any competing products.

(3) No funds received by the Board shall in any manner be used for the purpose of influencing governmental policy or action, except as provided by subsections (b)(4) and (f) of this section.

(4) Assessments shall be made on watermelons produced by producers and watermelons handled by handlers, and the rate of such assessments in the case of producers and handlers shall be the same, on a per-unit basis, for producers and handlers. If a person performs both producing and handling

functions, both assessments shall be paid by such person.

(5) If importers are subject to the plan, an assessment shall also be made on watermelons imported into the United States by the importers. The rate of assessment for importers who are subject to the plan shall be equal to the combined rate for producers and handlers.

§ 4909. Petition and review

(a) Any person subject to a plan may file a written petition with the Secretary, stating that the plan or any provision of the plan, or any obligation imposed in connection therewith, is not in accordance with law and praying for a modification thereof or to be exempted therefrom. The person shall be given an opportunity for a hearing on the petition, in accordance with regulations prescribed by the Secretary. After the hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

(b) The district courts of the United States in any district in which the person is an inhabitant, or in which the person's principal place of business is located, are hereby vested with jurisdiction to review such ruling, provided that a complaint for that purpose is filed within twenty days from the date of the entry of the ruling. Service of process in such proceedings may be had on the Secretary by delivering to the Secretary a copy of the complaint. If the court determines that the ruling is not in accordance with law, it shall remand the proceedings to the Secretary with directions either to (1) make such ruling as the court shall determine to be in accordance with law, or (2) take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted under subsection (a) of this section shall not impede or delay the United States or the Secretary from obtaining relief under section 4910(a) of this title.

§ 4913. Suspension or termination of plans

(a) Whenever the Secretary finds that a plan or any provision

thereof obstructs or does not tend to effectuate the declared policy of this chapter, the Secretary shall terminate or suspend the operation of the plan or provision.

(b) The Secretary may conduct a referendum at any time, and shall hold a referendum on request of the Board or at least 10 percent of the combined total of the watermelon producers, handlers, and importers eligible to vote in a referendum, to determine if watermelon producers, handlers, and importers favor the termination or suspension of the plan. The Secretary shall terminate or suspend the plan at the end of the marketing year whenever the Secretary determines that the termination or suspension is favored by a majority of those voting in the referendum, and who produce, handle, or import more than 50 per cent of the combined total of the volume of the watermelons produced by the producers, handled by the handlers, or imported by the importers voting in the referendum.

7 U.S.C. §§ 4901, 4903, 4905, 4906(a)-(c), (e)-(g), 4909, 4913 (footnote omitted).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER XI—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MISCELLANEOUS COMMODITIES), DEPARTMENT OF AGRICULTURE

. . . .

PART 1210—WATERMELON RESEARCH AND PROMOTION PLAN

Subpart A—Watermelon Research and Promotion Plan

DEFINITIONS

. . . .

§ 1210.304 Board.

Board means the National Watermelon Promotion Board, hereinafter established pursuant to § 1210.320.

. . . .

NATIONAL WATERMELON PROMOTION BOARD

§ 1210.321 Nominations and selection.

The Secretary shall appoint the members of the Board from nominations to be made in the following manner:

(a) There shall be two individuals nominated for each vacant position.

(b) The Board shall issue a call for nominations by February first of each year in which an election is to be held. The call shall include at a minimum, the following information:

(1) A list of the vacancies and qualifications as to producers and handlers by district and to importers nationally for which nominees may be submitted.

(2) The date by which the nominees shall be submitted to the Secretary for consideration to be in compliance with § 1210.323 of this subpart.

(3) A list of those States, by district, entitled to participate in the nomination process.

(4) The date, time, and location of any next scheduled meeting of the Board, national and State producer or handler associations, importers, and district conventions, if any.

(c) Nominations for producer and handler positions that will become vacant shall be made by district convention in the district entitled to nominate. Notice of such convention shall be publicized to all producers and handlers within such district, and

the Secretary at least ten days prior to said event. The notice shall have attached to it the call for nominations from the Board. The responsibility for convening and publicizing the district convention shall be that of the then members of the Board from that district.

(d) Nominations for importers positions that become vacant may be made by mail ballot, nomination conventions, or by other means prescribed by the Secretary. The Board shall provide notice of such vacancies and the nomination process to all importers through press releases and any other available means as well as direct mailing to known importers. All importers may participate in the nomination process: *Provided*, That a person who both imports and handles watermelons may vote for importer members and serve as an importer member if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person.

(e) All producers and handlers within the district may participate in the convention: *Provided*, That a person that produces and handles watermelons may vote for handler members only if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production; or the combined total volume of watermelon handled by the producer from the producer's own production and purchases from other producer's production is more than 50 percent of the producer's own production; and *provided further*, That if a producer or handler is engaged in the production or handling of watermelons in more than one State or district, the producer or handler shall participate within the State or district in which the producer or handler so elects in writing to the Board and such election shall remain controlling until revoked in writing to the Board.

(f) The district convention chairperson shall conduct the selection process for the nominees in accordance with procedures to be adopted at each such convention, subject to requirements set in § 1210.321(e).

(1) No State in Districts 3, 4, 5, and 7 as currently constituted shall have more than three producers and handlers representatives

concurrently on the Board.

(2) Each State represented at the district convention shall have one vote for each producer position and one vote for each handler position from the District on the Board, which vote shall be determined by the producers and handlers from that State by majority vote. Each State shall further have an additional vote for each five hundred thousand hundredweight volume as determined by the three year average annual crop production summary reports of the USDA, or if such reports are not published, then the three year average of the Board assessment reports; *Provided*, That for the first two calls for nominees, the USDA Crop Production Annual Summary Reports for 1979, 1980, and 1981 will be controlling as to any additional production volume votes.

§ 1210.323 Acceptance.

Each person nominated for membership on the Board shall qualify by filing a written acceptance with the Secretary. Such written acceptance shall accompany the nominations list required by § 1210.321.

MISCELLANEOUS

§ 1210.360 Right of the Secretary.

All fiscal matters, programs or projects, rules or regulations, reports, or other substantive actions proposed and prepared by the Board shall be submitted to the Secretary for approval.

7 C.F.R. §§ 1210.304, .321, .323, .360.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Decision Summary

Based upon *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), I conclude watermelon advertising and promotion authorized by the Watermelon Research and Promotion Act are government speech not susceptible to First Amendment compelled-subsidy challenge. Consequently, Petitioner's Petition, filed January 3, 2002, in which Petitioner seeks exemption from assessments, interest, and penalties imposed by the National Watermelon Promotion Board and used for generic advertising and promotion of watermelons, must be denied.

Discussion

On May 23, 2005, the Supreme Court of the United States issued its third decision in 8 years which considered "whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment." *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. at 2058. *Livestock Marketing Ass'n* upheld the constitutionality of compelled assessments used to pay for generic advertising where the advertising is government speech. On May 31, 2005, the Supreme Court of the United States remanded to various other courts of appeals for further consideration, in light of *Livestock Marketing Ass'n*, cases involving the constitutionality of compelled assessments to pay for generic advertising of pork,[2] alligator products,[3] and milk.[4]

In *Livestock Marketing Ass'n*, the High Court explained that the beef promotion program is government speech because Congress directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products." *Livestock Marketing Ass'n*, 125 S. Ct. at 2063. Here, likewise, the watermelon promotion program is directed by Congress.

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[2] *Johanns v. Campaign for Family Farms*, 125 S. Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Sixth Circuit).

[3] *Landreneau v. Pelts & Skins, LLC*, 125 S. Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Fifth Circuit).

[4] *Johanns v. Cochran*, 125 S. Ct. 2512 (2005) (remanding the case to the United States Court of Appeals for the Third Circuit).

The Watermelon Research and Promotion Act authorizes "the establishment of an orderly procedure for the development, financing (through adequate assessments on watermelons harvested in the United States, or imported into the United States, for commercial use), and carrying out of an effective, continuous, and coordinated program of research, development, advertising, and promotion designed to strengthen the watermelon's competitive position in the marketplace, and establish, maintain, and expand domestic and foreign markets for watermelons." 7 U.S.C. § 4901(b).

"'Compelled support of government'--even those programs of government one does not approve--is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. 'The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.' *Southworth*, 529 U.S., at 229." *Livestock Marketing Ass'n*, 125 S. Ct. at 2062.

In both the beef promotion program and the watermelon promotion program, the message of the promotional campaigns is effectively controlled by the United States government itself. The degree of governmental control over the message funded by targeted assessments distinguishes these promotional programs from the state bar's communicative activities which were at issue in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). *See Livestock Marketing Ass'n*, 125 S. Ct. at 2063.

"When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Livestock Marketing Ass'n*, 125 S. Ct. at 2063.

"Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are

imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. [(7 C.F.R. § 1210.360.)] And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required." *Livestock Marketing Ass'n*, 125 S. Ct. at 2064 (footnotes omitted). I conclude the instant case cannot be distinguished from *Livestock Marketing Ass'n*.

Petitioner's Position

Petitioner's principal, Jack Lewis Dixon, a partner, testified, as follows:

BY Mr. BURI:

Q. Mr. Dixon, have you paid any of the assessments set forth in Petitioner's Exhibit Number 4?

A. No, sir.

Q. Have you paid any assessments to the National Watermelon Promotion Board since June of 1999?

A. I don't believe so.

Q. Mr. Dixon, why is it that you object to paying the assessments imposed by the National Watermelon Promotion Board?

A. I believe that -- we do not believe that we should pay an assessment to promote our competition, and to actually help promote watermelons that would cause competition for our company, since we are an individual company.

Q. In your opinion, promoting watermelon consumption, does

that benefit you as a handler, importer, grower of watermelons?

A. No, sir. We feel that our quality does.

Q. Would you explain that a bit more, please?

A. We really take a lot of pride in our label. We take a lot of pride in -- not only myself, but the people around me, in the quality of the fruit we pack. We try to pack the best quality grown in the United States, if [not] anywhere.

Q. If you were not compelled to pay for advertising or promotion activities that encourage the consumption of watermelons, would you do so for anyone other than yourself or the Red Hawk Farms brand?

A. No, sir.

Q. Mr. Dixon, are you at all bothered by the -- I want to say requirement of the National Watermelon Promotion Act requiring you to be a part of the activities of the National Watermelon Promotion Board?

A. Yes, sir.

Q. Would you belong to this organization if you didn't have to?

A. No, sir.

Q. And why is that?

A. We feel that we -- we feel that we live in a [free] country, and we should be allowed to build our own business without being forced into a group. We feel like we put up a superior product.

We feel like that we have got a little more money for our

product because we do put up a superior product. And what we actually [have] to say, that we can display our watermelons against other people's watermelons, we think that we have a lot better product and the market seems to show that.

Q. Do you believe the marketplace works to your advantage?

A. Definitely.

Tr. I at 52-54.

Mr. Dixon testified that Petitioner sorts out all the culls, all the second grade product, and puts the best quality product in Red Hawk cartons and ships them. Mr. Dixon testified that Petitioner offers a premium quality product compared to its competitors and likes to offer what was previously called "U.S. Number 1's," a top grade product. To promote recognition of its product, Petitioner puts a sticker label on each watermelon. (PX 1; Tr. I at 33-38.)

BY MR. BURI:

Q. Mr. Dixon, why is it that Red Hawk Farming & Cooling places these stickers, 1b through 1j, on individual watermelons that it processes?

A. Mr. Buri, if you notice, on the bottom of those labels, they have a phone number on there. And we put these labels on there advertising our product, and we want them to know when they buy this label or this product, they have a better watermelon than usual.

They should have a superior watermelon than the average watermelon sold in the store. And that's also why we have our numbers there, because we've had a lot of compliments, as far as Canada, Florida, and we've had a few complaints too. But we're

awful proud of this label,[5] that's why we do that.

Q. Are you trying to develop brand awareness for Red Hawk Farming & Cooling?

A. Yes, sir.

Tr. I at 39-40.

Mr. Dixon testified that Petitioner uses a three-color high graphic bin, specially designed for Petitioner, to promote and advertise its watermelons (PX 2; Tr. I at 42).

[BY MR. BURI:]

Q. Now, again, why do you have the Red Hawk Farms watermelons' logo premium quality, things of that sort on the outside of [Petitioner's] Exhibit Number 2?

A. We do that to advertise our company and make sure the public are getting the best watermelon that they can possibly buy.

Q. Again, are you trying to develop brand awareness for Red Hawk Farms?

A. That is correct.

Tr. I at 42-43.

Mr. Dixon testified the smaller, individual labels (found in PX 1) cost Petitioner around $6,000 a year and the graphic bins cost Petitioner an additional $2.25 per bin for advertisement. Mr. Dixon estimated the

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[5]PX 1a is a larger label (4" x 6") that is placed on the bin; PX 1e is a watermelon honey label (an oval 2" across); PX 1b-PX 1d and PX 1f-PX 1j are labels (ovals from 2" to 2½" across) that are placed on individual watermelons.

number of bins used in 2001 to have been roughly 40,000 or 50,000. Mr. Dixon confirmed Petitioner was spending approximately $100,000 or more per year promoting its Red Hawk Farming & Cooling brand. (PX 7, PX 8; Tr. I at 44-45.)

Findings of Fact

1. The Secretary of Agriculture administers the Watermelon Research and Promotion Act (7 U.S.C. §§ 4901-4916).

2. Following a referendum in 1989, the National Watermelon Promotion Board began, in 1990, to administer the program mandated by Congress under the Watermelon Research and Promotion Act (Tr. I at 69-70).

3. The National Watermelon Promotion Board is not a government entity, but it is supervised by the Secretary of Agriculture, and, on behalf of the Secretary of Agriculture, by personnel of the United States Department of Agriculture, specifically, the Chief of the Research and Promotion Branch for Fruits and Vegetables, Agricultural Marketing Service, and her staff (Tr. I at 74, 137-39; Tr. II at 433-36, 449, 506).

4. The National Watermelon Promotion Board, at the time of the hearing, consisted of 14 grower members (producers), 14 first handler members, 2 importer members, and 1 public member (Tr. I at 73).

5. The National Watermelon Promotion Board members are appointed by the Secretary of Agriculture, who also oversees the National Watermelon Promotion Board members' nomination process (Tr. II at 434-35). (7 U.S.C. § 4906(c); 7 C.F.R. §§ 1210.321, .323.)

6. The National Watermelon Promotion Board's marketing plan and communication plan, including budget, were reviewed and approved by the Secretary of Agriculture or on the Secretary's behalf by United States Department of Agriculture personnel (RX 41; Tr. II at 434-35, 506).

7. The Watermelon Research and Promotion Act authorizes the Secretary of Agriculture to terminate or suspend the watermelon research and promotion plan, whenever the Secretary finds that the watermelon research and promotion plan obstructs or does not tend to effectuate the declared policy of the Watermelon Research and Promotion Act (7 U.S.C. § 4913).

8. The National Watermelon Promotion Board, as part of its effort to increase demand for watermelons, provides watermelon safety information to retailers and the media (RX 17; Tr. I at 195-98; Tr II at 343-46).

9. The National Watermelon Promotion Board, as part of its effort to increase demand for watermelons, educates retailers and others that, to extend watermelon shelf-life, a consistent temperature for the watermelons should be maintained and watermelons should not be placed next to products, such as bananas, that emit substantial quantities of ethylene (Tr. I at 198-202).

10. The National Watermelon Promotion Board, as part of its effort to increase demand for watermelons, advertises the nutritional and health benefits of watermelons (RX 2A; Tr. I at 205, 225-26).

11. The United States Department of Agriculture's oversight and control of the National Watermelon Promotion Board includes acting as an advisor to the Board in the developmental process of promotion, research, and information activities (RX 25-RX 41; Tr. II at 449-96; Tr. III at 8).

12. The United States Department of Agriculture's oversight includes the review and approval of each individual research contract (Tr. II at 435-36).

13. All National Watermelon Promotion Board budgets, contracts, and projects are submitted to the United States Department of Agriculture for review and approval (RX 25-RX 41; Tr. II at 449-96; Tr. III at 9-10).

14. The United States Department of Agriculture's oversight includes review and approval (a meticulous, detail-oriented, sometimes intense, word-for-word process) of any materials that the National Watermelon Promotion Board prepares for use (RX 41; Tr. I at 219-20, 233, 267-68; Tr. II at 433, 442-43, 506-07, 518-21).

15. The United States Department of Agriculture's oversight of the National Watermelon Promotion Board includes final approval authority over every assessment dollar spent. Through the budget process, the United States Department of Agriculture retains final approval authority over all administrative expenses and each specific promotion and research expense. (Tr. II at 506; Tr. III at 7-8.)

16. A representative of the United States Department of Agriculture

attends and actively participates in every National Watermelon Promotion Board meeting, providing comments or feedback (Tr. II at 449-50; Tr. III at 8-9).

Conclusions of Law

1. The Watermelon Research and Promotion Act specifically authorizes the compelled subsidy of generic advertising of watermelons (7 U.S.C. § 4906(f), (g)).

2. Congress finds that establishing, maintaining, and expanding domestic and foreign markets for watermelons to be vital to the welfare of not only watermelon growers and those concerned with marketing, using, handling, and importing watermelons, but also to "the general economic welfare of the Nation" (7 U.S.C. § 4901(a)(5)) and to be "essential in the public interest" (7 U.S.C. § 4901(b)).

3. "[A]dvertising" and "promotion" are specifically and repeatedly identified in the Watermelon Research and Promotion Act as essential elements of the program designed to strengthen the watermelon's competitive position in the marketplace (7 U.S.C. § 4901(a)(6), (b)).

4. Congress declares "adequate assessments" on watermelons harvested in the United States, or imported into the United States, for commercial use, are necessary to the watermelon research and promotion program authorized under the Watermelon Research and Promotion Act (7 U.S.C. § 4901(b)).

5. Petitioner is compelled to pay for government speech with which it does not agree. Petitioner is not actually compelled to speak when it does not wish to speak, because the watermelon advertising is not attributed to Petitioner; Petitioner is not identified as the speaker; and Petitioner is not compelled to "utter" the message with which it does not agree.

6. Petitioner has no constitutional right to avoid paying for government speech with which it does not agree. *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. at 2062.

7. "The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to

fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. at 2063.

8. In light of *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), Petitioner's Petition, filed January 3, 2002, must be denied.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises one issue in its Appeal Petition. Petitioner argues the ALJ erroneously failed to consider whether the Watermelon Research and Promotion Act is unconstitutional, as applied. Petitioner asserts the National Watermelon Promotion Board attributes its advertising and promotion to watermelon producers, handlers, and importers in a way that makes them appear to endorse the National Watermelon Promotion Board's messages; thus, the National Watermelon Promotion Board, in violation of the First Amendment, associates Petitioner involuntarily with speech by attributing an unwanted message to Petitioner. (Appeal Pet. at 2-9.)

The Supreme Court of the United States stated in *Livestock Marketing Ass'n* that a First Amendment "as-applied" challenge to speech can be sustained if a party establishes that advertisements are attributable to that party. The High Court found a funding tagline stating that an advertisement comes from "America's Beef Producers" is not sufficiently specific to convince a reasonable fact finder that the advertisement is attributable to any particular beef producer, or even all beef producers. *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. at 2065-66. Justice Thomas, concurring, agreed that "[t]he present record . . . does not show that the advertisements objectively associate their message with any individual [beef producer]. . . . The targeted nature of the funding is also too attenuated a link." *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. at 2067 (footnote omitted).

In the instant proceeding, the advertising and promotional materials (RX 1-RX 22) are not attributable to any particular watermelon producer, handler, or importer or even all watermelon producers, handlers, and importers. Thus, the advertisements and promotional materials do not provide information sufficiently specific to find that the

speech is attributable to Petitioner.

Petitioner's "as-applied" First Amendment claim, based upon references in adverting and promotional materials to watermelon producers, handlers, and importers, cannot be squared with *Livestock Marketing Ass'n*. The Supreme Court of the United States made clear that the mere assertion that attribution to "America's Beef Producers" includes a particular beef producer is insufficient to sustain a First Amendment claim for violation of associational rights. Accordingly, Petitioner's assertion that attribution to watermelon producers, handlers, and importers includes Petitioner as a particular handler or importer is insufficient to sustain Petitioner's "as-applied" First Amendment claim.

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

ORDER

The relief requested by Petitioner is denied. Petitioner's Petition, filed January 3, 2002, is dismissed. This Order shall become effective on the day after service on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to obtain review of the Order in this Decision and Order in any district court of the United States in which district Petitioner is an inhabitant or Petitioner's principal place of business is located. A complaint for the purpose of review of the Order in this Decision and Order must be filed within 20 days from the date of entry of the Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the complaint to the Secretary of Agriculture.[6] The date of entry of the Order in this Decision and Order is November 8, 2005.

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[6]7 U.S.C. § 4909(b).

In re: HP HOOD, LLC; CROWLEY FOODS, LLC; SCHROEDER MILK CO., INC.; AND CRYSTAL CREAM & BUTTER, CO.
2004 Docket No. AMA-M-4-2.
Decision and Order.
Filed October 26, 2005.

Sharlene Deskins, for Complainant
Steven Rosenbaum, for Respondent
Decision and Order by Chief Administrative Marc Hillson.

AMA – Milk Marketing.

Decision

In this decision, I hold that the Agricultural Marketing Service's determination that Carb Countdown is a Class I milk product under the regulations is inconsistent with the plain and unambiguous language of the pertinent regulations. I hold that the Agency's determination that Carb Countdown is subject to the Federal Milk Marketing Orders as a Class I milk product is incorrect, and find that Carb Countdown is not a fluid milk product as defined by the Agency, but is rather a Class II milk product. I further hold that Petitioners are entitled to a refund of the differential between Class I and Class II products that they have paid as a result of the Agency's determination.

Procedural Background

On June 24, 2004, a Petition Challenging the Interpretation and Application of Federal Milk Marketing Orders was filed by HP Hood, LLC, Crowley Foods, LLC, Schroeder Milk Co., Inc., and Crystal Cream & Butter Co. The Petition, filed pursuant to section 15(a) of the Agricultural Marketing Act of 1937, 7 U.S.C. § 608(c), challenged the interpretation of the Dairy Programs Division of USDA's Agricultural Marketing Service (AMS) that Carb Countdown was a fluid milk product as defined in 7 C.F.R. § 1000.15, and was therefore a Class I product. Respondent AMS filed its answer on July 22, 2004. A Motion to Intervene opposing the Petition was filed on behalf of Select Milk

Producer, Inc. on December 13, 2004.

I conducted a hearing in this matter on December 14-15, 2004 in Washington, D.C. Petitioners were represented by Steven Rosenbaum, Esq., and Respondent was represented by Sharlene Deskins, Esq. Petitioners called three witnesses, and two witnesses were called on behalf of Respondent. At the close of the hearing, I granted Select Milk Producer's Motion to Intervene, which according to the rules of procedure gave them the right to file a post-hearing brief in this matter, and I set a briefing schedule for the parties. Subsequent to the hearing, I received briefs with proposed findings of fact and conclusions of law from both parties and the Intervenor, and a reply brief on behalf of Petitioners.

Findings of Fact

1. Petitioners manufacture and market Carb Countdown, a drink that looks like milk and tastes like milk but, because it contains fewer than 8.25 percent nonfat milk solids, cannot be marketed as milk.[1] Tr. 83. Petitioner Hood markets Carb Countdown as a "dairy beverage" rather than as milk, and it can generally be found in the dairy section of the grocery store. RX 6D, 6E, 6F, 6G, Tr. 348-351. Carb Countdown comes in four varieties—homogenized, reduced fat, chocolate and fat-free. It is only marketed under the Hood name. Tr. 34. The other petitioners are companies which have contracts with Hood to manufacture the Carb Countdown products. Tr. 34, 190.

2. Carb Countdown is a strictly designed milk product, manufactured according to a series of formulas devised by Peter Zoltai. Tr. 31-32, 36. The main purpose of Carb Countdown, as indicated by its name, is the reduction of the carbohydrate content that is typically found in milk. Thus, while a glass of whole milk normally contains twelve grams of carbohydrates, a glass of Carb Countdown contains

[1] "Milk that is in final form for beverage use . . . shall contain not less than 8 ¼ percent milk solids not fat. . . " 21 C.F.R. § 131.110(a).

only three grams.[2] The reduction is largely accomplished by removing the lactose, which is a carbohydrate, from the milk. Tr. 64-66.

The non-Hood petitioners manufacture the products for Hood as per specifications and instructions provided by Hood. Tr. 34. The key raw ingredients to make Carb Countdown are supplied by Hood to the other petitioners, and Hood, particularly Mr. Zoltai, has taken a variety of measures, included factory visits and testing of products both by Hood and by independent companies, to assure that the products are made as designed by Hood. Tr. 34-36.

3. Each of the four varieties of Carb Countdown contain by weight less than 6.5% milk solids, although if the skim equivalent method of determining milk solids were used, the results would be different. PX 15, Tr. 37-73. The skim equivalent method, which Respondent contends is the method which should apply in this matter, calculates the percentage of milk solids not by the weight of milk solids that are actually in the finished product, but factors in the milk solids that were removed from the product as if they were still in the product. Tr. 177-179, 290-291, 370-371, RX 12. There is no question that the use of the skim equivalent method does not lead to a percentage value of milk solids by weight in the product as actually constituted. *Id*.

4. Both Petitioners' and Respondent's calculations support a finding that all four Carb Countdown products contain by weight less than 6.5% milk solids, and there is likewise no dispute that if the skim equivalent method is the proper one for determining the percentage of milk solids in a product, then Carb Countdown would contain more than 6.5% milk solids. PX 15, RX 12, Tr. 101-102, 338, 381-383.

5. Because AMS insisted that Carb Countdown was a Class I product under the regulations, they required Petitioners to pay the Class I price into the pool. RX 12. It is undisputed that this was significantly more than Petitioners would have to pay than if the product was classified as a Class II product. PX 16, PX 17. Paul Blehar, an accounting manager at Hood, testified that by the end of November,

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[2] The induction phase of the Atkins diet limits carbohydrate intake to 20 grams per day, so one glass of whole milk would account for more than half of the Atkins limit. Tr. 33.

2004, Hood will have paid into the pool over $2,000,000 more than they would have had Carb Countdown been classified as Class II, and that they would be asking for a refund of the excess payments. Tr. 168. Nancy Erkenbrack, an accountant for Schroeder, testified that as of the date of the hearing they would have paid into the pool over $225,000 in excess charges as a result of the Carb Countdown they manufactured being classified as Class I rather than Class II. Tr. 201. Todd Wilson, an Assistant Market Administrator for AMS in the Texas and New Mexico order, testified on behalf of Respondent, but indicated that, while his exact calculations yielded somewhat different results than Blehar and Erkenbrack, that the calculated differences between Class I and Class II were in the same ballpark as his calculations. Tr. 361-362.

Toward the close of the hearing, I indicated that I would hold supplemental proceedings if I ruled for Petitioners, to account for the additional time period between the date of the hearing and my decision. Tr. 397-400.

Statutory and Regulatory Background

The federal government has been regulating the production and pricing of milk for decades. The primary authority for USDA's regulation of milk, along with other agricultural commodities, is the Agricultural Marketing Adjustment Act of 1937. 7 U.S.C. §601 *et seq*. That Act gave the Secretary of Agriculture broad powers "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish . . . parity prices." 7 U.S.C. § 602 (1).

Section 608c of the Act gave the Secretary broad powers to issue orders applicable to entities "engaged in the handling of any agricultural commodity." 7 U.S.C. § 608c(1). With respect to "milk and its products," Congress stated that orders should classify milk "in accordance with the form in which or the purpose for which it is used" as a basis for fixing the price that handlers of the milk would pay the producers of the milk. 7 U.S.C. § 608c(5)(A). Thus, the price that handlers of milk must pay producers is directly affected by which class of product the milk falls under.

While there presently exist a number of Federal Milk Marketing

Orders, they are all codified in Volume 7 of the Code of Federal Regulations. Part 1000 of Volume 7 defines and delineates the four classes of utilization of milk. For the two classes of milk at issue here:

(a) Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of fluid milk products, except as otherwise provided in this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) In shrinkage assigned pursuant to Sec. 1000.43(b).

(b) Class II milk shall be all skim milk and butterfat:

(1) In fluid milk products in containers larger than 1 gallon and fluid cream products disposed of or diverted to a commercial food processing establishment if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(2) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in half-gallon containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream, sour half-and-half, sour cream mixtures containing nonmilk items, yogurt, and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, coatings, batter, and similar products;

(v) Buttermilk biscuit mixes and other buttermilk for baking that contain food starch in excess of 2% of the total solids, provided that the product is labeled to indicate the food starch content;

(vi) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically-sealed containers;

(vii) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing

such prepared food products;

(viii) A fluid cream product or any product containing artificial fat or fat substitutes that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section; and

(ix) Any product not otherwise specified in this section; and

(3) In shrinkage assigned pursuant to Sec. 1000.43(b).

Thus, whether a product is sold or distributed as a fluid milk product is a pivotal element is determining whether it is Class I or Class II. The regulations include the following definition of "fluid milk product:"

Sec. 1000.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section, fluid milk product means any milk products in fluid or frozen form containing less than 9 percent butterfat that are intended to be used as beverages.

(b) The term fluid milk product shall not include:

(1) . . . any product that contains by weight less than 6.5 percent nonfat milk solids . . .

This regulation has been in effect since 1974. When the regulation was promulgated in 1974, the Secretary of Agriculture explained the exclusion of products with less than 6.5% milk solids as being justified, at least in part, by their not "being in the competitive sphere of the traditional milk beverages." PX 3, 39 Fed. Reg. at 8715. The Secretary emphasized the importance of the fluid milk product definition "clearly defining the products or types of products that are intended to be included" and expressed confidence that the definition in the regulation was clear. *Id*. He went on to state that "In determining whether or not a milk product in fluid form falls within the composition standards of the fluid milk product definition, such standards should be applied to the composition of the product in its finished form, not to the composition of the product on a skim equivalent basis." *Id*. He further recognized that if the classification of a new product appeared "to be incongruous with the intended use of the product, the hearing process remains as an avenue through which a different classification may be considered." *Id*., at 8716.

The 6.5% exclusion remains in the regulations today. In the late 1990's, elimination of the exclusion was specifically considered, and

even recommended by the Agency's own Classification Committee as part of the large scale review of Federal Milk Order mandated by Congress in the Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. § 7523. The Secretary explicitly rejected the notion of changing the 6.5% exclusion, even though it was well understood that this would exclude certain dairy products from being categorized as fluid milk solely "because their nonfat solids content falls slightly below the 6.5% standard." PX 7, 63 Fed. Reg. 4802, 4924 (Jan. 30, 1998).

Conclusions of Law and Discussion

I find that the USDA's regulation clearly and unambiguously categorizes Petitioners' four Carb Countdown products as non-fluid milk products. I further find, to the extent that there is a need to examine the regulatory background and the Agency's long-standing interpretation of this rule, that the Agency's explanations for its adoption of the rule unequivocally support the position advanced by Petitioners. Any change to the rule must be made by additional rulemaking, i.e., formal amendment of the Federal Milk Mark Orders as per the statutory process, and not by simple edict of the Agency. Finally, I find that Petitioners are entitled to refunds for the differentials they paid as a result of Carb Countdown being misclassified as Class I rather than Class II. Rather than rule on the amount of the refunds in this decision, I am scheduling an additional hearing just on the issue of refund amount unless the parties agree on this issue.

1. The language of the regulation clearly and unambiguously exempts Carb Countdown from being categorized as a fluid milk product. The regulation specifies, on its face, that if a product "contains by weight less than 6.5 percent nonfat milk solids" then it is not a fluid milk product. Under the interpretation urged by Respondent, the dispositive factor is not what the product actually contains, but what the product would have contained had not the nonfat milk solids been removed. Almost by definition, the method that USDA is requiring Petitioners to use—calculating the skim milk equivalent—is precisely the opposite of what the regulations require. Rather than focusing on what the product contains, the calculation method espoused by the

Agency requires the adding back in the equivalent weight of the very lactose that was removed to create the low carbohydrate product in the first place. Thus USDA is requiring Petitioners to include what Petitioners' appropriately describe as "phantom ingredients" in order to determine whether a product is a fluid milk product.

Raw milk contains approximately nine percent non fat milk solids. Over half of these non fat milk solids consist of lactose. These lactose solids make up approximately 5.1% of the weight of raw milk. The lactose is removed at either of two facilities by a process of filtration resulting in a product variously known as skim milk retentate, or ultra filtered skim retentate or UF skim. It is this product, with all or most of the lactose removed, which is used in the creation of Carb Countdown.

USDA's own witnesses admitted the obvious—that the language of the regulation was clear. Thus Richard Fleming, the Milk Market Administrator for the Southwest Order, stated that the Agency, in interpreting the regulation, was "questioning and challenging the strict wording of the 6.5. Now, the fallacy in this whole thing really charged Class I for a normal weight, not the skim equivalent weight." Tr. 245. Todd Wilson, another USDA employee with sixteen years experience in the Milk Market Administrator's office, testified that in his calculations finding that Carb Countdown was a Class I product, he included lactose in the product's composition even though he knew that that lactose was not included in the product's actual composition. Tr. 371.

2. Respondent's interpretation is not entitled to deference. Respondent argues that its interpretation of the regulations, which would require Petitioners to include substances removed from Carb Countdown in calculations to determine whether Carb Countdown must be classified as a fluid milk product, is entitled to deference. Petitioner is incorrect. *Chevron* deference is called for when an agency has attempted to implement a regulatory scheme to carry out the expressed intent of Congress, and sets the standard for determining when an agency's promulgation of regulations in the furtherance of the aims of a statute is permissible under a statute. *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Here, the Agency has interpreted the statute by issuing a regulation that is clear on its face, and has been consistently interpreted and remained unchanged, for three

decades. There has never been any suggestion that the Agency's promulgation of this regulation is not consistent with the statute. The *Chevron* decision considered whether EPA even had the authority under the statute to promulgate the regulations in question—a matter not at issue here.

That is not to say that the courts do not grant agencies deference to interpret their regulations. "Agency interpretations of their own regulations have been offered deference by federal reviewing courts for a very long time and are sustained unless 'plainly erroneous or inconsistent' with the regulation." *Paralyzed Veterans of America v. D.C. Arena*, 117 F. 3d 579, 584 (CADC 1997). However, such deference is generally accorded to a reasonable interpretation of an ambiguity in a regulation. *Id*. In the absence of ambiguity, there is nothing to which a reviewing court must defer. Respondent contends that there are multiple possible interpretations to the 6.5% content regulation, and that I must defer to its interpretation that the skim milk equivalent approach is reasonable and appropriate. However, by its own terms the skim milk equivalent analysis does not determine what a product contains, but only what it would have contained had the lactose not been removed. The use of the word "contains" would appear to bar the use of skim milk equivalent analysis, since by its very terms the equivalent analysis does not measure what a product contains, but what it would have contained had not certain ingredients been removed. The Agency is particularly not entitled to its deference where its interpretation appears to be directly contrary to the requirement that a product's nature be determined by its actual content by weight, rather than by a hypothetical content that is simply not based on the actual weight of the product.

3. Even if there was some ambiguity in the regulation, which I hold there is not, the Agency's long-standing interpretation of the regulation is consistent with Petitioners' claim and confirms the inherent clarity of the regulatory language. Indeed, when the very regulation at issue was adopted, the Secretary stated that the language used in the regulation meant what it said, that "In determining whether or not a milk product in fluid form falls within the composition standards of the fluid milk product definition, such standards should be applied to the composition of the product in its finished form, not to the

composition of the product on a skim equivalent basis." PX 3, 39 Fed. Reg. at 8715. When the Agency chose to keep the same definition in the course of its Congressionally mandated and extensive Milk Order review, even over the recommendations of its Classification Committee, it reaffirmed its understanding of the plain language of the regulation. In so doing, the Secretary found that there was no need for a change to the standard ". . . and that no change in the standard is warranted at this time." PX 7, 63 Fed. Reg. 4924. It is clear from this language that the Secretary was confirming that he was not changing any aspect of the definition of fluid milk product, including the manner it which it was to be calculated. Implicit in this statement is that the only way to change the definition would be to change the standard—i.e., through the regulatory process.

4. The provisions that apply to "Farm-Separated milk" do not apply to Carb Countdown. The parties also dispute the application of requirements pertaining to "Farm Separated" milk. In a discussion in a section of the 1999 decision under a section captioned "Farm-Separated Milk," the Secretary indicated that where Ultrafiltration or reverse osmosis was being used **on the farm by the producer**, that milk would "be priced according to the skim-equivalent pounds of such milk." PX 18, 64 Fed. Reg. 16131. The discussion makes it a point of emphasis that the product must be processed in this fashion on the farm by the producer of the milk in order to be subject to this pricing methodology. The two USDA witnesses indicated that even though this discussion was contained in a discussion of how the decision implicated "Farm-Separated milk," it was the intention of the Agency to apply this methodology to any product subjected to ultrafiltration or reverse osmosis. Unfortunately for the Agency's position, the cited discussion contains not a word that would lead any regulated party to conceive that ultrafiltration or reverse osmosis conducted **at a milk plant by a handler** would be subject to the skim-equivalent methodology. If anything, the discussion makes it overwhelmingly clear that usage of the skim-equivalent approach was restricted to this very limited class of milk. Indeed, the discussion takes pains to point out that it applies to "a farm and a producer, as opposed to a plant and a handler." *Id*.

5. The practices of the Southwest Order Administrator are not a valid precedent for the Agency's treatment of Carb Countdown.

The fact that the Southwest Order Administrator apparently used the skim milk equivalent methodology for products marketed in his area does not alter the result here. The incorrect, and apparently unchallenged, implementation of skim milk equivalent for low carbohydrate dairy beverages in the southwest is not a legitimate justification for its use in the northeast, particularly where the language is clear and unambiguous. Certainly, the failure of the low carbohydrate beverage manufacturer subject to the Southwest Order to challenge the imposition of skim milk equivalence is not binding on Petitioners in this case, who apparently have challenged this interpretation as soon as it was applied to them.

6. The only way to achieve the interpretation that the Agency, and Intervenor, desires here, is for the Agency to amend the regulation. While it is true, as mentioned by Petitioner and implied by Intervenor, that the market for Carb Countdown is essentially a milk market—i.e., Carb Countdown looks like milk, is packaged like milk, and presumably tastes a lot like milk—the simple fact is that it is not milk under these regulations. Any perceived injustice can easily be corrected through the carefully crafted regulatory process that controls this heavily-regulated commodity. This was clearly recognized by the Secretary in that this very situation was considered for regulation in the late 1990's rulemaking process, and was specifically rejected by him, with the recognition that if circumstances changed, the fluid milk definition could be changed at a later date. Certainly, the Secretary's authority to classify by regulation Carb Countdown type products as fluid milk products is not an issue before me. My holding is simply that under the current regulation, Carb Countdown is not a fluid milk product, and the Secretary cannot make it so unless the regulation is changed.

While Intervenor points out (brief, p. 13) that "the fractionation of milk is the result of technological innovations and poses a new situation for the Department," such circumstances, if correct, might be a justification for amending the current regulation, but cannot be a legitimate justification for interpreting the regulation in a manner inconsistent with its plain meaning. Indeed, the Secretary's conclusions, in rejecting the recommendations of the Classification Committee to abolish the 6.5% standard, are based on the lack of perceived

competitive problems, with the proviso that "no change in the standard is warranted at this time." PX 7, 63 Fed. Reg. at 4924. Implicit in this justification is the recognition that a change in the definition of fluid milk would necessitate a change in the standard, i.e., a formal amendment to the milk marketing orders.

There is no question that Petitioners would pay significantly less for the milk used in the manufacture of Carb Countdown if Carb Countdown is a Class II product, as Petitioners' maintain, rather than a Class I product, as insisted by Respondent and Intervenor. Paying for milk according to how it is used is one of the central aspects of the federal milk marketing order system, and the system provides an orderly methodology for changing milk marketing orders. If the Agency wants to change the orders as to the definition of fluid milk it must follow its own procedures as mandated by Congress. Changing its long-standing interpretation of a clear and unambiguous regulation by administrative fiat is not the procedure provided by Congress.

7. Petitioners are entitled to a refund. Since I am ruling in favor of Petitioners, and find that Carb Countdown was improperly classified as a Class I product, it is clear that Petitioners are entitled to a refund of the sums that were paid to the pool as a result of the misclassification. While I heard substantial testimony as to the amounts that were overpaid, and while there were some disagreements as to methodology, the estimates of the payments made by Petitioners in excess of what they would have paid if the Category II price was paid were reasonably close to the estimates made by Respondent. However, in the months since the hearing, additional payments have been made. I announced at the hearing that if I ruled in favor of Petitioners, I would briefly reopen the hearing to take additional testimony solely to determine the appropriate amount of the refund. Tr. 398-400. Thus, while this is my final decision on the merits of the case, I will give the parties 30 days to attempt to reach agreement on the refund amount. If the parties are unable to reach agreement, I will set a hearing date as soon as possible.

CONCLUSION AND ORDER

I grant the Petition challenging the Agency's interpretation and application of the Federal Milk Marketing Orders as they apply to Carb

Countdown, and hold that the four Carb Countdown products do not meet the definition of fluid milk product as provided in the regulations. I hold that the Agency improperly classified Carb Countdown as a Class I product and that Petitioners are entitled to a refund for the differential between Class I and Class II payments to the pool, with the amount of the refund to be determined at a supplemental hearing unless the parties agree on the appropriate amount.

The provisions of this order shall become effective on the first day after this decision becomes final. This is my final decision on the merits of this case. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: RICHARD MIELKE, AN INDIVIDUAL; KAYE MIELKE, AN INDIVIDUAL; AND MIELKE'S PEKE PATCH, AN UNINCORPORATED ASSOCIATION.
AWA Docket No. 05-0006.
Decision and Order as to Richard Mielke and Kaye Mielke.
Filed July 29, 2005.

AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Operating as dealer without license – Cease and desist order – Civil penalty – Ability to pay.

The Judicial Officer affirmed the Default Decision issued by Administrative Law Judge Jill S. Clifton (ALJ) concluding: (1) Respondents operated as dealers without an Animal Welfare Act license in willful violation of the Animal Welfare Act (AWA) (7 U.S.C. § 2134) and the regulations issued under the AWA (9 C.F.R. § 2.1(a)(1)); and (2) Respondents knowingly failed to obey a cease and desist order made by the Secretary of Agriculture on December 3, 2003, in *In re Richard Mielke*, 62 Agric. Dec. 726 (2003) (Consent Decision). The Judicial Officer issued a cease and desist order; increased the civil penalty assessed against Richard Mielke by the ALJ from $500 to $3,000; increased the civil penalty assessed against Kaye Mielke by the ALJ from $3,000 to $18,000; and assessed Respondents, jointly and severally, the $5,875 civil penalty which was held in abeyance in *In re Richard Mielke*, 62 Agric. Dec. 726 (2003) (Consent Decision). The Judicial Officer rejected Respondents' request for a substantial reduction in the civil penalties based upon their inability to pay the civil penalties. The Judicial Officer stated a respondent's ability to pay a civil penalty is not one of the factors that the Secretary of Agriculture must consider when determining the amount of a civil penalty.

Bernadette R. Juarez, for Complainant.
Respondents, Pro se.
Initial Decision issued by Administrative Law Judge Jill S. Clifton.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

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

filing a Complaint on December 2, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133 (2004)) [hereinafter the Regulations]; the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-3.142) [hereinafter the Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges: (1) on June 5, 2004, Richard Mielke and Kaye Mielke [hereinafter Respondents] operated as dealers, as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)); and (2) on or about June 5, 2004, Respondents knowingly failed to obey a cease and desist order made by the Secretary of Agriculture under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) (Compl. ¶¶ 4-9).

The Hearing Clerk served Respondent Kaye Mielke with the Complaint, the Rules of Practice, and a service letter on December 10, 2004.[1] The Hearing Clerk served Respondent Richard Mielke with the Complaint, the Rules of Practice, and a service letter on December 11, 2004.[2] Respondents failed to file answers 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 January 14, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order as to Richard Mielke and Kaye Mielke [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Richard Mielke and Kaye Mielke By Reason of Admission of Facts [hereinafter Proposed Default Decision]. The Hearing Clerk

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[1]United States Postal Service Domestic Return Receipt for Article Number 7003 2260 0005 5721 3489.

[2]United States Postal Service Track and Confirm for Article Number 7003 2260 0005 5721 3472.

served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on January 24, 2005.[3] Respondents failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On May 10, 2005, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order as to Richard Mielke and Kaye Mielke By Reason of Default [hereinafter Initial Decision]: (1) concluding Respondents willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)) as alleged in the Complaint; (2) concluding Respondents knowingly failed to obey a cease and desist order made by the Secretary of Agriculture under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) as alleged in the Complaint; (3) ordering Respondents to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; (4) assessing Respondents, jointly and severally, a $5,875 civil penalty; (5) assessing Respondent Richard Mielke a $500 civil penalty; and (6) assessing Respondent Kaye Mielke a $3,000 civil penalty (Initial Decision at 5-8).

On June 30, 2005, Complainant appealed the ALJ's Initial Decision to the Judicial Officer. On July 18, 2005, Respondents filed a response to Complainant's appeal petition. On July 25, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to Respondent Richard Mielke and Respondent Kaye Mielke.

Based upon a careful review of the record, I agree with the ALJ's Initial Decision, except that I disagree with the amount of the civil penalty assessed by the ALJ. Therefore, I adopt the ALJ's Initial Decision as the final Decision and Order as to Richard Mielke and Kaye Mielke, with exceptions. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

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[3]United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 3694 and Article Number 7003 2260 0005 5721 3700.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

§ 2134. Valid license for dealers and exhibitors required

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any

provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is

found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

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

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

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(f), 2134, 2149(a)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

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

FINDINGS AND PURPOSE

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

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

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

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

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

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

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

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

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

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq.*], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq.*], the Occupational Safety and Health Act of 1970 [29

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; and

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

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

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

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

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

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

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

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

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

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

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

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

ANNUAL REPORT

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

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

28 U.S.C. § 2461 (note).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

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

(b) *Penalties*—. . . .

. . . .

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

. . . .

(v) Civil penalty for a violation of Animal Welfare Act,

codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal

to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempt from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the AC Regional Director in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the AC Regional Director.

9 C.F.R. §§ 1.1; 2.1(a)(1) (2004).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Statement of the Case

Respondents failed to file answers to the Complaint 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 in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint that relate to Respondents are adopted as findings of fact. This Decision and Order as to Richard Mielke and Kaye Mielke is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Richard Mielke is an individual whose mailing address is 4799 Tyrone Road, Houston, Missouri 65483. At all times material to this proceeding, Respondent Richard Mielke was operating as a dealer without an Animal Welfare Act license.

2. Respondent Kaye Mielke is an individual whose mailing address is 4799 Tyrone Road, Houston, Missouri 65483. At all times material to this proceeding, Respondent Kaye Mielke was operating as a dealer without an Animal Welfare Act license.

3. Respondent Richard Mielke and Respondent Kaye Mielke were respondents in *In re Richard Mielke*, 62 Agric. Dec. 726 (2003) (Consent Decision) in which: (a) they were found to have committed at least 21 violations of the Animal Welfare Act, the Regulations, and the Standards; (b) their Animal Welfare Act license was revoked; (c) they were jointly and severally assessed a civil penalty of $6,875, of which $5,875, was held in abeyance provided they complied with the Animal Welfare Act and the Regulations during an 18-month "probation period"; and (d) they were ordered to cease and desist from future violations of the Animal Welfare Act, the Regulations, and the Standards.

4. On June 5, 2004, Respondent Richard Mielke operated as a dealer

as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license. Specifically, Respondent Richard Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Phyllis Fish (Animal Welfare Act license number 73-A-1594) of Duncan, Oklahoma. The sale of each dog constitutes a separate violation.

5. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license. Specifically, Respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Hazel Gilpin (Animal Welfare Act license number 73-A-1979) of Big Cabin, Oklahoma. The sale of each dog constitutes a separate violation.

6. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license. Specifically, Respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Michel Lasiter (Animal Welfare Act license number 43-A-4044) of Pierce City, Missouri. The sale of each dog constitutes a separate violation.

7. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license. Specifically, Respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Glenn Manning (Animal Welfare Act license number 42-A-0775) of Waukon, Iowa. The sale of each dog constitutes a separate violation.

8. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license. Specifically, Respondent Kaye Mielke sold three female Pekingese, in commerce, through Southwest Auction Service to Steve Lewis (Animal Welfare Act license number 31-B-0113) of Newark. The sale of each dog constitutes a separate violation.

9. On or about June 5, 2004, Respondents knowingly failed to obey a December 3, 2003, cease and desist order made by the Secretary of Agriculture under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) in *In re Richard Mielke*, 62 Agric. Dec. 726 (2003) (Consent

Decision).

Conclusions of Law

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

2. On June 5, 2004, Respondent Richard Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)). Specifically, Respondent Richard Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Phyllis Fish (Animal Welfare Act license number 73-A-1594) of Duncan, Oklahoma. The sale of each dog constitutes a separate violation (7 U.S.C. § 2149).

3. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)). Specifically, Respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Hazel Gilpin (Animal Welfare Act license number 73-A-1979) of Big Cabin, Oklahoma. The sale of each dog constitutes a separate violation (7 U.S.C. § 2149).

4. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)). Specifically, Respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Michel Lasiter (Animal Welfare Act license number 43-A-4044) of Pierce City, Missouri. The sale of each dog constitutes a separate violation (7 U.S.C. § 2149).

5. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)). Specifically, Respondent

Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Glenn Manning (Animal Welfare Act license number 42-A-0775) of Waukon, Iowa. The sale of each dog constitutes a separate violation (7 U.S.C. § 2149).

6. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)). Specifically, Respondent Kaye Mielke sold three female Pekingese, in commerce, through Southwest Auction Service to Steve Lewis (Animal Welfare Act license number 31-B-0113) of Newark. The sale of each dog constitutes a separate violation (7 U.S.C. § 2149).

7. On or about June 5, 2004, Respondents knowingly failed to obey the cease and desist order made by the Secretary of Agriculture under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) in *In re Richard Mielke*, 62 Agric. Dec. 726 (2003) (Consent Decision). Pursuant to section 19(b) of the Animal Welfare Act, any person who knowingly fails to obey a cease and desist order shall be subject to a civil penalty of $1,650 for each offense, and each day during which such failure continues shall be deemed a separate offense (7 U.S.C. § 2149(b); 7 C.F.R. § 3.91(b)(2)(v)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises one issue in Complainant's Appeal Petition. Complainant contends the amounts of the civil penalties assessed by the ALJ are not sufficient given the seriousness of Respondents' violations of the Animal Welfare Act and the Regulations and the seriousness of Respondents' knowing failures to obey the Secretary of Agriculture's December 3, 2003, cease and desist order. Complainant urges that I assess Respondents, jointly and severally, a $2,750 civil penalty for each of seven violations of the Animal Welfare Act and the Regulations and a $1,650 civil penalty for each of seven failures to obey the Secretary of Agriculture's December 3, 2003, cease and desist order. (Complainant's Appeal Pet. at 2-6.)

The ALJ found the civil penalties requested by Complainant are not

justified under the circumstances in this proceeding and assessed Respondent Richard Mielke a $500 civil penalty for his violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)) and assessed Respondent Kaye Mielke a $3,000 civil penalty for her six violations of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)). In addition, the ALJ imposed no civil penalties for Respondents' failures to obey the Secretary of Agriculture's December 3, 2003, cease and desist order. (Initial Decision at 7-8.)

I disagree with the amounts of the civil penalties assessed by the ALJ and the amount of the civil penalty Complainant urges that I assess Respondents jointly and severally.

When determining the amount of a civil penalty to be assessed for violations of the Animal Welfare Act, the Regulations, and the Standards, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violations, the person's good faith, and the history of previous violations.[4]

The failure to obtain an Animal Welfare Act license before operating as a dealer is a serious violation because enforcement of the Animal Welfare Act, the Regulations, and the Standards depends upon the identification of persons operating as dealers as defined by the Animal Welfare Act and the Regulations. Respondents' failure to obtain the required Animal Welfare Act license thwarted the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act. Respondents have a history of previous violations of the Animal Welfare Act, the Regulations, and the Standards.[5] Moreover, Respondents' knowing failure to obey the Secretary of Agriculture's December 3, 2003, cease and desist order reveals a disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations. Thus, I conclude Respondents lacked good faith.

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[4]7 U.S.C. § 2149(b).

[5]*In re Richard Mielke*, 62 Agric. Dec. 726 (2003) (Consent Decision).

Complainant concedes Respondents have a small-sized business.

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[6]

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[6] *In re Alliance Airlines*, 64 Agric. Dec. ___, slip op. at 17 (July 5, 2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Dennis Hill*, 64 Agric. Dec. 91, 150 (2004), *appeal docketed*, No. 05-1154 (7th Cir. Jan. 24, 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991 (9th Cir. 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 Fed. Appx. 706 (9th Cir. 2003); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order (continued...)

Respondent Richard Mielke committed one violation of the Animal Welfare Act and the Regulations and knowingly failed to obey the Secretary of Agriculture's December 3, 2003, cease and desist order on one occasion. Respondent Richard Mielke could be assessed a maximum civil penalty of $2,750 for his violation of the Animal Welfare Act and the Regulations and is subject to a civil penalty of $1,650 for his knowing failure to obey the Secretary of Agriculture's December 3, 2003, cease and desist order.[7] Respondent Kaye Mielke committed six violations of the Animal Welfare Act and the Regulations

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[6](...continued)
on Remand), *aff'd*, 33 Fed. Appx. 784 (6th Cir. 2002); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

[7]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and provides that any person who knowingly fails to obey a cease and desist order shall be subject to a civil penalty of $1,500 for each offense. 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 penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations by increasing the maximum civil penalty from $2,500 to $2,750 and adjusted the civil penalty assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each knowing failure to obey a cease and desist order by increasing the civil penalty from $1,500 to $1,650 (7 C.F.R. § 3.91(b)(2)(v)).

and knowingly failed to obey the Secretary of Agriculture's December 3, 2003, cease and desist order on six occasions. Respondent Kaye Mielke could be assessed a maximum civil penalty of $16,500 for her six violations of the Animal Welfare Act and the Regulations and is subject to a civil penalty of $9,900 for her knowing failures to obey the Secretary of Agriculture's December 3, 2003, cease and desist order.[8]

After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude a cease and desist order, assessment of a $3,000 civil penalty against Respondent Richard Mielke, and assessment of an $18,000 civil penalty against Respondent Kaye Mielke are appropriate and necessary to ensure Respondents' compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Respondents' Response to Complainant's Appeal Petition

On July 18, 2005, Respondents filed a response to Complainant's Appeal Petition. Respondents admit violating the Secretary of Agriculture's December 3, 2003, cease and desist order. However, Respondents request a substantial reduction in the civil penalties assessed by the ALJ based on their inability to pay the civil penalties.

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondents' inability to pay the civil penalties assessed is

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[8]See note 7.

not a basis for reducing the civil penalties.[9]

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[9]The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *In re Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. *See In re J. Wayne Shaffer*, 60 Agric. Dec. 444, 475 (2001) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to pay the civil penalty is not one of those factors); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744, 757 (1999) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to pay the civil penalty is not one of those factors); *In re James E. Stephens*, 58 Agric. Dec. 149, 199 (1999) (stating the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (1998) (stating the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating the ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating the ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare

(continued...)

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

ORDER

1. Respondents, their agents, employees, successors, and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations, and, in particular, shall cease and desist from engaging in any activity for which an Animal Welfare Act license is required.

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

2. Respondent Richard Mielke is assessed a $3,000 civil penalty. The civil penalty shall be paid in accordance with paragraph 5 of this Order.

3. Respondent Kaye Mielke is assessed an $18,000 civil penalty. The civil penalty shall be paid in accordance with paragraph 5 of this Order.

4. In conformity with the Consent Decision and Order entered December 3, 2003, *In re Richard Mielke*, 62 Agric. Dec. 726 (2003) (Consent Decision), Respondents are jointly and severally assessed the civil penalty of $5,875. The civil penalty shall be paid in accordance with paragraph 5 of this Order.

5. The civil penalties assessed in paragraphs 2 through 4 of this Order shall be paid by certified checks or money orders made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

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[9](...continued)
Act).

Payment of the civil penalties shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondents. Respondents shall state on the certified checks or money orders that payment is in reference to AWA Docket No. 05-0006.

RIGHT TO JUDICIAL REVIEW

Respondents have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondents must seek judicial review within 60 days after entry of this Order.[10] The date of entry of this Order is July 29, 2005.

In re: JOHN F. CUNEO, JR., AN INDIVIDUAL; THE HAWTHORN CORPORATION, AN ILLINOIS CORPORATION; THOMAS M. THOMPSON, AN INDIVIDUAL; JAMES G. ZAJICEK, AN INDIVIDUAL; JOHN N. CAUDILL, III, AN INDIVIDUAL; JOHN N. CAUDILL, JR., AN INDIVIDUAL; WALKER BROTHER'S CIRCUS, INC., A FLORIDA CORPORATION, AND DAVID A. CREECH, AN INDIVIDUAL.
AWA Docket No. 03-0023.
Decision and Order. Decision as to James G. Zajicek
Filed August 17, 2005.

AWA – Abuse, when not – License, trickle down.

Bernadette Juarez and Colleen Carroll, for Complainant
Derek Shaffer and Vincent Colatriano, for Respondent
Decision and Order by Chief Administrative Law Judge Marc Hillson.

In this decision, I find that Respondent James G. Zajicek: (1) was

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[10] 7 U.S.C. § 2149(c).

entitled to exhibit elephants under the license of the owners of the elephants and did not need to obtain a separate exhibitor's license in his own name, (2) did not overwork or otherwise mishandle the elephant Joy on June 26, 2001, and (3) did not abuse the elephant Ronnie on June 26, 2001. Accordingly, I dismiss all of Complainant's counts against Mr. Zajicek.

Procedural Background

This case was initiated by the filing of a complaint on April 11, 2003, by the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS), charging two corporations and five individuals, including Respondent James G. Zajicek, with numerous willful violations of the Animal Welfare Act, 7 U.S.C. § 2131 *et seq*. Respondent Thompson and Complainant agreed to a Consent Decision and Order which was approved by Administrative Law Judge Jill S. Clifton on May 15, 2003, while the remaining Respondents filed timely answers to the complaint. On July 16, 2003, Chief Administrative Law Judge James W. Hunt reassigned the case to me. On September 5, 2003 Complainant filed a Motion to Amend Complaint, which I granted, over the opposition of several Respondents, on December 23, 2003. The amended complaint added an additional Respondent, David Creech, upon whom service has never been effectuated, and who has not participated in these proceedings, and added additional allegations against some of the other Respondents. The amended complaint did not contain any additional allegations against Respondent Zajicek. The remaining Respondents, including Zajicek, filed timely Answers to the Amended Complaint.

Numerous prehearing motions were filed and briefed by the parties. On February 23, 2004, I denied motions to take depositions, to Compel Compliance with Disclosure Order, and to Compel Production of Exculpatory Evidence. I also issued subpoenas on behalf of both Complainant and Respondents. The parties also filed a number of *in limine* motions, and Complainant filed a Motion to Quash Subpoenas. Shortly before the hearing was to commence, I was notified that Complainant had reached settlement with all remaining parties except for Mr. Zajicek, and the parties orally notified me that the hearing would

only need to be conducted with respect to the allegations against Mr. Zajicek. On March 12, 2004, I signed a Consent Decision and Order as to Respondents John F. Cuneo, Jr. and The Hawthorn Corporation, and on March 29, 2004, I signed a Consent Decision and Order as to Respondents John N. Caudill, III, John N. Caudill, Jr., and Walker Brother's Circus, Inc.

On March 8, 9, 10 and 11, 2004, I conducted a hearing in Washington, D.C. in this matter. I heard further testimony, including remote audio-visual testimony of one witness, on March 25. After an assortment of delays, the hearing was finally concluded on October 28, 2004. Complainant was represented by Bernadette Juarez and Colleen Carroll, and Respondent was represented by Derek Shaffer and Vincent Colatriano.

Findings of Fact

1. On June 26, 2001, Complainant inspected the Sterling and Reid Circus, which at that time was performing at a fairground in Marne, Michigan. CX 16[1], ZRX 18, CX 109, Tr. 76-77. The inspection was conducted by a team consisting of three USDA employees, Dr. Denise Sofranko, Joseph Kovach, and Thomas Rippy. Tr. 87-88. They were accompanied by a Michigan Department of Agriculture inspector, Al Rodriquez. *Id*. The inspection was part of a multi-day inspection of circuses where elephants owned by the Hawthorn Corporation were being exhibited. Tr. 340-341.

2. James Zajicek, the trainer who exhibited Hawthorn's elephants at the Sterling & Reid circus on June 26, 2001, did not have a license, issued under the authority of the Animal Welfare Act, to exhibit elephants. Tr. 503. In fact, even though he has been around elephants throughout his adult life, and has been exhibiting elephants as a performer for years, he has never had a license to exhibit elephants. Tr. 487, 503, ZRX 9. He said he has been inspected many times over the years by USDA, and has

[1] Complainant's exhibits are designated by "CX"; Respondent's exhibits are designated by "ZRX"; and Transcript references are designated by "Tr." The record citations are not exhaustive, i.e., where a fact is mentioned numerous times in the record, I did not cite each and every instance.

never been told that he needed his own license, nor has he ever been cited for failure to have a license. Tr. 503-506. There is no factual dispute that Mr. Zajicek did not have a license on the date of the inspection, or any other time he was performing elephants, nor is there any dispute that Hawthorn, the owner of the elephants, did in fact have a license to exhibit. Tr. 506, ZRX 11-15.

3. It is apparent that the contract between Zajicek and Hawthorn had aspects that could be used to justify his status as either an independent contractor or an employee. The characterization of Mr. Zajicek's relationship with Hawthorn is the subject of some dispute, with Complainant contending that Zajicek was an independent contractor, and Zajicek contending that he was an employee. As I discuss later, a resolution of this issue is not necessary.

Thus John Cuneo, owner and president of Hawthorn, in an affidavit taken a month and a half after the inspection, specifically categorizes Zajicek as an independent contractor, who "trains, cares for, handles, transports and exhibits the 4 Asian elephants owned by the Hawthorn Corporation." CX 20, p. 2. The contract itself referred to Zajicek as an "independent performing artist," income and social security taxes were not withheld from his paycheck, his income was reported by Hawthorn on Internal Revenue Service Form 1099 and was characterized as "Nonemployee compensation," and he was allowed to keep a percentage of money he collected for giving elephant rides without that money being reported to the IRS by Hawthorn. CX 105, CX 106 at p. 10, Tr. 656-657. There were numerous clauses in the contract dealing with its voidability and transferability. CX 105 at p. 28. Complainant concedes that a "bona fide employee" may operate under its employer's license. Comp. Br. at p. 5.

Although Respondent contends that he need not have an exhibitor's license whether he is found to be an independent contractor or an employee, he argues that his relationship with Hawthorn meets many of the accepted indicia of employee-employer relationships. Respondent's Brief at pp. 16-18. Thus, he points out that he had four years of back-to-back contracts with Hawthorn, that he received a paid vacation, that all his appearances were in shows scheduled by Hawthorn, that the contract made it clear that Hawthorn had the right to control the manner and means of the performance, that Hawthorn owned the four elephants

Respondent was performing, etc. *Id*., Tr. 496-499.
4. During the afternoon of June 26, Mr. Zajicek used his ankus to prevent Ronnie from striking Joy with her trunk. The impact on Ronnie's trunk was such that a small wound resulted, but attempts by the inspection team to photograph the wound were unsuccessful.
The parties' descriptions of the events of June 26 coincide in many areas, but in several critical aspects the accounts of the events of that day are so different as to be astounding. In particular, the two principle witnesses, Dr. Denise Sofranko for the Complainant, and Mr. Zajicek, gave accounts concerning the pivotal animal abuse issue that in many respects were utterly inconsistent.

The USDA inspection team arrived at the fairgrounds in Marne in the afternoon of June 26th, at approximately 3 p.m. Tr. 77. The weather was sunny, hot and humid, with an afternoon temperature of approximately 90 degrees. *Id*. The June 26 inspection, and the inspection they were planning to conduct the next day at a different circus also utilizing Hawthorn elephants, was prompted by public complaints by animal rights organizations of elephant abuse against Hawthorn. Tr. 95-96. The State inspector was focusing on horses, while the three USDA inspectors were primarily concerned with the elephants. Tr. 89. When they first arrived at the fairgrounds, the team observed that four elephants were in an enclosure, and that one of the elephants, identified as Joy, was saddled to give rides. Tr. 78. The elephants usually gave rides during intermission, as well as before or after the show, and Joy gave some rides during the June 26 intermission. Tr. 81.

The team then entered the performance area. Tr. 78-79. Even though the afternoon show was not very well attended, and there were plenty of seats available fairly close to the performance area, the team elected to sit in the higher rows of the audience so as to get a better view of the proceedings. Tr. 374. Since they were seated apart from the audience, and were wearing khaki inspector uniforms, they were easily discernible as USDA inspectors to Mr. Zajicek. Tr. 551-552. The circus ring was about forty feet in diameter. Tr. 540. Investigator Rippy estimated that they were elevated about five to six feet above the circus ring, and that they were seated about 50-60 feet from the ring. Tr. 107, 113.

The elephant performance took place during the second half of the

show. The show had 18 performing acts with one intermission, which lasted about 20 minutes. Tr. 531-533. The elephant performance took place after intermission and lasted about eight minutes according to Zajicek (Rippy testified that he thought the act was 20 minutes long, but that it may have been only lasted 10 minutes. Tr. 103-104). Tr. 532. The act involved four elephants—Ronnie, Joy, Jackie and Gypsie (all female), and they were led through their routine by Mr. Zajicek, who was assisted by two helpers. Tr. 541. Dr. Sofranko testified that during the performance she saw Mr. Zajicek strike one of the elephants with his ankus, although she was unable to identify which one. Tr. 201. An ankus, also known as a bull hook, is a tool used by trainers and handlers to guide or cue elephants, and consists of a sharp spike and a hook on a short pole. ZRX 8, Tr. 521-525. Dr. Sofranko was unable to state how far back Zajicek's arm was raised before striking the blow, but stated that he did not do it gently. Tr. 380-381. No one else in the inspection team saw Mr. Zajicek strike an elephant during the course of the performance, although Mr. Rippy testified that Dr. Sofranko remarked to him that one of the elephants had been "hooked[2]," even though all were watching the elephant performance and were specifically there to investigate allegations of elephant abuse. Tr. 78-79, 125, 204. No videotape was made of the performance.[3] However, Mr. Rippy did not see Mr. Zajicek do anything during the elephant act that he would consider a possible violation of the Act. Tr. 126. There was apparently no discernible audience reaction. In addition, both Dr. Sofranko and Rippy testified that they saw one of Zajicek's assistants—Mark Pierson—"rake" an elephant's back, although they never identified which elephant and never subsequently inspected the backs of any of the four elephants. Tr. 79-80, 202. Mr. Zajicek testified that he never struck an elephant during the course of this performance. Tr. 541.
Subsequent to the show, the USDA team continued their inspection. Dr.

[2] *i.e.*, struck with the pointed hook of the ankus.

[3] Mr. Rippy testified that his camera was capable of taking fifteen to thirty seconds of video, but that he did not do so. Tr. 163. Apparently, at the inspection conducted at another circus the next day, the group inspection team did have access to a video camera. Tr. 162-164. With the resources APHIS devoted to this investigation, it is more than a little puzzling why there was no attempt to videotape the performance.

Sofranko testified that she introduced herself to Zajicek at the elephant enclosure, asked him questions about foot care, equipment, etc., and then informed him that she had seen him hit an elephant with his ankus. Tr. 202. She said he pointed out the hook wound on Ronnie's trunk, and that he stated he hit her **during the performance** because she was showing aggression towards another elephant—Joy. Tr. 201-202. She stated that once she told him she was going to write him up for a violation for striking Ronnie, Mr. Zajicek became quite upset. Tr. 205. Zajicek's account of the post-performance events differs. He stated that the inspection team approached him about 10 minutes after the show ended and that Dr. Sofranko asked to see his paperwork, which he showed her, along with the foot tools, the feed storage area, etc., and then she asked to have the elephants brought to her. Tr. 553-556. He stated that he was in the corral but that she decided to stay outside the corral. Tr. 556. When he brought Joy over, he stated that Ronnie tried to hit Joy with her trunk and that he quickly reacted by using his ankus to grab Ronnie's trunk and prevent her from taking a shot at Joy. Tr. 557-558. Then he testified that he brought Ronnie over to where Dr. Sofranko was standing, and on his own pointed out that there was a mark on Ronnie's trunk where she had been struck by the ankus. *Id*. When she told him that constituted abuse, and that she would write it up as a noncompliance, he became very upset. Tr. 560.

There is no disagreement that Dr. Sofranko did not ask to see any of the other elephants close up, including an elephant that she and Rippy thought was "raked" across the back by one of the people who assisted Zajicek in his performance. Likewise, there is no dispute that Sofranko asked Rippy to photographically document the injury to Ronnie, that Zajicek brought Ronnie to an area where Rippy could photograph the trunk, and that Rippy took a number of digital photographs of Ronnie's trunk, from a fairly close distance ("more than 10 feet," Tr. 143), using a zoom lens. Tr. 141-147. No witness was able to testify that the photographs showed any discernible mark on Ronnie's trunk that would have been caused by an ankus, and my examination of the photographs indicates that they reveal nothing that appears to be an injury to Ronnie's trunk. Tr. 156, ZRX 37, pp. 25-28.

Whichever account is correct, there is no dispute that as a result of the use of his ankus, Mr. Zajicek caused a wound to appear on Ronnie's

trunk, and that Complainant's efforts to photograph the wound did not result in any picture actually depicting a wound. Dr. Sofranko described the wound as open and oval in shape, that there was some blood and oozing, and that the epidermis was punctured. Tr. 205. Mr. Zajicek described the wound as more like a pin prick, about one-fourth of an inch in diameter, and with a little blood. Tr. 524. Mr. Rippy testified that he saw a mark, and in his affidavit indicated the mark was approximately ¾ by ¼ inch with a "bright red area in the center," ZRX 18, p. 2, but that it was not visible if Ronnie's trunk was flexing the wrong way. Tr. 159.

While many aspects of the testimony of Dr. Sofranko and Mr. Zajicek are irreconcilable, there are many pertinent points of agreement. Both agree that sometime on the afternoon of June 26, Mr. Zajicek used his ankus on Ronnie, and that there was some sort of wound that resulted from the ankus contacting Ronnie's trunk, that Dr. Sofranko told him she was going to write him up, that he became upset and tried to convince her otherwise. While Mr. Zajicek states that the cause of this ankus usage was to separate Ronnie and Joy in the corral, and Dr. Sofranko contends that the wound was caused during the performance, Complainant does not dispute Zajicek's statements that he had to use the ankus to curb aggressive behavior of Ronnie towards Joy.

5. Joy gave rides during the course of the inspection on June 26th. There is no evidence that would demonstrate that Joy did not have rest periods between performances in the elephant act, and in giving rides, that were not at least equal to the time she was performing.

With respect to the issue of whether Joy was overworked by not receiving adequate rest periods between performances, there is no dispute that Joy gave rides on June 26th, and that she also was one of the four elephants that performed two shows on that date. Mr. Rippy testified that he saw Joy giving rides before the show, and during intermission, and that when the USDA party was leaving the fairgrounds at approximately 7:30 p.m., Joy was giving rides. Tr. 98-99. He couldn't speak to the number of rides Joy gave, stating that it might have been less than ten rides. Tr. 101-102. Several of the photographs taken by Mr. Rippy show that Joy was giving rides to different children. CX 22. However, neither the pictures nor the testimony of Complainant's witnesses specify for how long Joy was giving rides, and how long the

intervals were between rides. Tr. 166. In fact, several of the photographs in CX22 showed Joy standing around idle, or chewing on what appears to be a substantial mouthful of hay. Dr. Sofranko contended that Joy was basically working continuously the entire afternoon because she was either giving rides, was ready to give rides or was performing, and that even when an elephant is wearing a headdress between rides, they are in a work mode. Tr. 230-232. Complainant adduced no evidence which would show that Joy did or did not receive rest periods between her rides and her circus performances, nor was there any testimony demonstrating that Joy exhibited any signs of fatigue. Even if Complainant's observations were correct in their entirety, it appears that Joy could not have worked more than 15 or 20 minutes before the first show, then would have had a rest period during the entire first half of the show, then would have worked another 15 or 20 minutes during the intermission, followed by a wait of over half an hour before the elephant act actually performed, and that another 20 minutes would have passed before she again began to give rides.

Mr. Zajicek agreed that Joy was giving rides during the 26th. Tr. 533-538. He stated that there was a very light crowd that day, that Joy gave about 15 rides before the show (with each rider being considered a "ride" and the average number of riders being three or four children, this would amount to three or four trips for Joy), and that Joy gave about the same number of rides during a ten to twenty minute period during intermission. *Id*. His records indicate that 112 rides were given that day. ZRX 36. He further testified that Joy enjoyed giving rides, that she was not tired out during these sessions, that the weight Joy carried was minimal given her size, that veterinarians told him that rides were good exercise for the elephants, and that no one at USDA had mentioned any concerns to him during the post-inspection interview that Joy was being overworked on that day. Tr. 538-539.

6. Even though it is normal practice for USDA to give a copy of their inspection report at the conclusion of the inspection, no such report was provided to Mr. Zajicek, even though Mr. Zajicek testified that he

demanded such a report.[4] When Dr. Sofranko submitted her inspection report to the Agency on July 6, 2001, the only reference to any violation allegedly committed by Mr. Zajicek was for the hooking incident with respect to Ronnie. CX 15. Nor was there any mention of Joy's workload by Mr. Rippy in his after-the-fact inspection report. Tr. 112, ZRX 18. It is undisputed that no USDA official notified Mr. Zajicek that they had a concern about whether Joy was overworked—there is no evidence that any question was ever raised during or in the weeks after the inspection about this concern. Yet the inspectors are duty bound to notify the inspected party of possible violations so that appropriate, timely corrective action may be taken.[5]

Likewise, no USDA inspector indicated either in person, or in their inspection reports, that Mr. Zajicek needed an exhibitor's license in his own right. There was no dispute that Mr. Zajicek had been inspected many times—85-100 in his estimation—without it even being hinted at that he needed an exhibitor's license in his own right, as long as he was operating under a license of the owner of the elephants. James Crawford, a former longtime employee of Sterling and Reid who was circus manager at the time of the inspection, estimated that he knew of forty elephant handlers who were not owners of the elephants they handled, and had never heard of one being told they needed to get a license. He stated that he had never heard of this issue even being raised before this particular case. Tr. 975-978.

Statutory and Regulatory Background

One of the principle objectives of the Animal Welfare Act, 7 U.S.C. § 2131 *et seq*. ("the Act") is "(1) to insure that animals intended for use . . . for exhibition purposes . . . are provided humane care and

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[4] It is interesting to note that Mr. Kovach, one of the inspection team, did give a copy of his brief inspection report to Mr. James Crawford, the circus manager, indicating that no non-compliant items were noted. CX 109.

[5] "If the inspector observes that the facility is not in full compliance with the AWA requirements, he or she will explain to the owner or manager all deficiencies noted during the inspection. The inspector will then give the owner a deadline for correcting these deficiencies." ZRX-3, *Compliance Inspections,* January 2002 (from APHIS web site). See, also, ZRX 4, Tech Note, Animal Care, October 2000.

treatment." In furtherance of this goal, the Act provides that "The Secretary shall issue licenses to . . . exhibitors upon application therefore," 7 U.S.C. § 2133, "Provided, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary," and that a valid license is required to exhibit animals regulated by the Act, 7 U.S.C. § 2134. The Act defines "exhibitor" as "any person . . . exhibiting any animals . . . to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos." 7 U.S.C. § 2132. The definition of "exhibitor" in the regulations promulgated by the Secretary at 9 C.F.R. § 1.1 is essentially the same as the statutory language, except that it modifies and expands the definition to include "animal acts."

The Secretary has promulgated detailed regulations on the proper handling of animals:

> §2.131 Handling of animals.
>
> (a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.
>
> . . .
>
> (2)(i) Physical abuse shall not be used to train, work, or otherwise handle animals.
>
> (ii) Deprivation of food or water shall not be used to train, work, or otherwise handle animals; *Provided, however,* That the short-term withholding of food or water from animals by exhibitors is allowed by these regulations as long as each of the animals affected receives its full dietary and nutrition requirements each day.
>
> (b)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.
>
> (2) Performing animals shall be allowed a rest period between

> performances at least equal to the time for one performance.
> (3) Young or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being.
> (4) Drugs, such as tranquilizers, shall not be used to facilitate, allow, or provide for public handling of the animals.
> (c)(1) Animals shall be exhibited only for periods of time and under conditions consistent with their good health and well-being.
> (2) A responsible, knowledgeable, and readily identifiable employee or attendant must be present at all times during periods of public contact.
> (3) During public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.
> (4) If public feeding of animals is allowed, the food must be provided by the animal facility and shall be appropriate to the type of animal and its nutritional needs and diet.
> (d) When climatic conditions present a threat to an animal's health or well-being, appropriate measures must be taken to alleviate the impact of those conditions. An animal may never be subjected to any combination of temperature, humidity, and time that is detrimental to the animal's health or well-being, taking into consideration such factors as the animal's age, species, breed, overall health status, and acclimation.

The Act provides for the assessment of substantial penalties against violators, including civil penalties of up to $2,500 per violation, and license suspension or revocation.

> If the Secretary has reason to believe that any person licensed as. . . a[n] exhibitor . . . has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

> (b) Any . . .exhibitor . . .that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149.

Conclusions of Law and Discussion

Complainant has failed to meet its burden of proof with respect to any of the allegations that Mr. Zajicek violated the Animal Welfare Act.

1. There is no requirement that Zajicek obtain an exhibitor's license in his own name. Complainant has cited no case law or regulation that would allow it to expand upon or modify, without notice, its long-standing practice of not requiring a mere elephant handler or trainer to obtain a license. Complainant's contention that Zajicek must get a license is inconsistent with its previous practices, and seems to have been crafted for the first time in the prosecution of this case. Further, it would be impracticable for an individual who neither owns the elephants being exhibited nor is responsible for the facilities that are covered by the statute to qualify as a licensee. Finally, the nature of the employment relationship between Mr. Zajicek and Hawthorn is not material to my determination, as even if he is an independent contractor,

I find that he still would not be required to get a license.

When an enforcement agency has a long-standing, widely understood interpretation and implementation of a statutory provision, it has some obligation, if it is going to change that interpretation, to provide notice to those individuals or entities affected by the statute or regulation. Both Zajicek and Crawford testified that USDA had inspected them many times over the years, and that they were always under the impression, since they did not have licenses under their own names, that it was proper to exhibit under the license of the entity that owned the elephants and was in charge of the facilities where the elephants were exhibited. I find it of some significance that none of the people involved in the inspection indicated to Mr. Zajicek during the inspection that they had any concern that he did not have his own exhibitor's license, and that it was not mentioned in any of the relevant inspection reports. Dr. Sofranko testified on cross-examination that the "license number that fit the situation was . . . the license number of the facility that owns the elephants." Tr. 355. Thus, the inspectors appeared quite content to utilize the Hawthorn license number on the appropriate line in their reports.

It appears that the first time Mr. Zajicek ever received notice that the Agency believed he should have had his own license was in the complaint issued nearly two years after the inspection.

While Complainant correctly states in its brief that the Act broadly defines "an exhibitor" as "any person . . . exhibiting any animals," (Comp. Br. At 2), this does not answer the question of whether multiple parties in the chain of exhibition, i.e., the circus owner, the animal owner, the animal trainer (if different from the person directing the performance itself) and the individual who performs with the elephants need to obtain their own exhibitor's license. The Act, and the regulations, makes it clear that any animal act, including one that is part of a circus, requires an exhibitor's license. Neither the Act, nor the regulations, nor any published policy issued by Complainant, specifically addresses the issue of whether multiple vertically-integrated entities need a license, or whether an individual who does not own the exhibited animals or the animal care or training facilities is qualified or even entitled to obtain a license. While a rule, or even a published policy, would be entitled to deference, no document indicating an

established policy one way or the other is in this record, and no such documents were submitted in response to the subpoena duces tecum I issued at Respondent's request. Thus, there is no opportunity for me to accord the Secretary's policy the type of deference that would be required under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The application materials that must be filled out to receive an exhibitor's license would also seem to counter Complainant's contention that Zajicek should have his own license. The application asks for the name of the owner of the animals, and requires "your veterinarian" to complete a form. ZRX 29[6]. There is nothing in this record indicating that Mr. Zajicek employed a veterinarian. The USDA published pamphlet "Licensing and Registration Under the Animal Welfare Act," ZRX 30, states that "Any owner exhibiting animals doing tricks or shows must be licensed. This includes each person owning animals performing in circuses." ZRX 30 at p. 11. Thus, the Agency's own guidance, which was in effect at the time of the June 26, 2001 inspection, and had been issued nine years earlier, appears to impose the licensing requirement on the owner of the elephants. There is no dispute that the owner of the four elephants in this case—The Hawthorn Corporation—was licensed. There is not even a suggestion in the guidance, nor in the application materials, that an individual who does not own the elephants, or manage the premises where the elephants are housed, or is not the person who hires the veterinarian who cares for the elephants, would be the person responsible for getting the license.

I make no finding as to whether Mr. Zajicek was an independent contractor or a *bona fide* employee of Hawthorn, as I find that any such distinction is not material to my determination that Mr. Zajicek was not required to get his own license to exhibit the elephants, as long as he was exhibiting under the license of the owner of the elephants. While Mr. Zajicek's employment status with Hawthorn on June 26, 2001 bore the earmarks of both employee and independent contractor,[7] there is

[6] I allowed ZRX 29 into evidence as an official record or document (along with ZRX 27 and 28), and I took official notice of ZRX 30. Tr. 915-916.

[7] See pages 3-4, *supra*

nothing in this record, including the Agency's own guidance documents and application, which would legitimize distinguishing between an individual who was an independent contractor and one who was an employee. While Complainant is correct that a "bona fide employee of a licensed exhibitor is not required to obtain his or her own license to exhibit animals," Comp. Br., p. 5, it does not logically follow that an individual who is in an independent contractor relationship with a licensed exhibitor must obtain his or her own license to exhibit animals.

Thus, in *William Joseph Vergis*, 55 Agric. Dec. 148 (1996), the Judicial Officer held that "at the very least, APHIS exempts employees of licensees from having to be licensed under the Act if those employees only exhibit animals on behalf of their employers." *Id*., at 157. However, the Judicial Officer declined to hold that an independent contractor, working on behalf of "persons who were properly licensed under the Act," *Id*., required his own license, even where the Respondent (Vergis) was admittedly an independent contractor. The Judicial Officer appeared to find significant that Vergis was not "made aware of any distinction drawn by APHIS between independent contractors and employees of licensees." *Id*. The Judicial Officer further stated that if "Respondent's actions had been for himself or for a person who was not licensed under the Act, Respondent would be found to have engaged in business as an exhibitor without a license, in willful violation of [the Act]." *Id*. Since Zajicek was working, either as an independent contractor or an employee, for Hawthorn Corporation, and since Hawthorn was licensed, the *Vergis* case does not support Complainant's contention that Zajicek needed his own license.

Complainant also cites *Cheryl Z. Ziemann*, 57 Agric. Dec. 976 (1998) as authority supporting its contention that Zajicek needed to obtain a license. However, in that case, the respondent never even appeared at the hearing, and all of the allegations of the complaint were accordingly deemed admitted under Rule of Procedure 141(e)(1). Additionally, that respondent was cited as a dealer, and had been specifically told, both by the USDA and by the person for whom she was negotiating the purchase of dogs, that she needed to obtain a license. The facts in that case stand in stark contrast to the instant case, where the USDA never told Mr. Zajicek that he needed his own license until the issuance of the Complaint, where USDA's practice was not to require a

performing artist to obtain a license when the owner of the animals did have a license, and where Hawthorn Corporation, the owner of the elephants and the holder of the license, believed that Mr. Zajicek was properly performing the elephants on its license.

Thus, there was no requirement in the statute, regulations, or long-time agency practice that would lead an individual in Mr. Zajicek's shoes to believe he would need a license to exhibit elephants in order to work as a circus performer.

2. The preponderance of the evidence does not support a finding that Zajicek violated regulations governing the amount and duration of rest periods between performances. Complainant has offered little in the way of hard facts in support of its contention that the elephant Joy was not given sufficient rest periods between her performances on June 26, 2001. There was no continuous observation of Joy by USDA inspectors, and none of the inspectors even hinted to Mr. Zajicek or to each other that they had any concern that Joy might be overworked. Thomas Rippy, the inspector who apparently spent the most time observing Joy, expressed no concern to Mr. Zajicek or his colleagues concerning Joy being overworked, and admitted that if he had been concerned, he would have so stated in his affidavit. Tr. 112-113. Yet his affidavit likewise expressed no concern that Joy was overworked. ZRX 18.

Complainant's evidence simply doesn't add up. Zajicek's records indicated that Joy gave 112 rides, usually involving around 3 or 4 children at a time, on June 26.[8] This equates to about thirty short trips lasting less than a minute or two each around the corral, over the course of seven or eight hours, although counting the loading and unloading of the riders, each ride was probably three minutes in duration. Tr. 706-707. Mr. Zajicek estimated Joy gave about 15 children rides before the first show, with three or four children riding at a time, and about the same number during the intermission of the afternoon show. With respect to the actual performance of Mr. Zajicek's act involving the four elephants, Mr. Zajicek estimated the act took approximately eight

[8] Complainant contends that additional free rides were given. However, there is no evidence that any free rides were given by Mr. Zajicek or his coworkers on June 26.

minutes, and occurred during the second half of the circus performance. While Mr. Rippy testified that the elephant performance during the second act may have lasted for twenty minutes, (Tr. 103), he also admitted that it could have been less than ten minutes, as Mr. Zajicek indicated. Tr. 104.[9] There is no evidence indicating that Joy gave rides, or was even available to give rides, from the time the circus shows started through the beginning of the intermission, nor is there any such evidence for the time periods between intermission and the elephants' actual eight to ten minute performance, nor was there any such evidence for the period of time between the conclusion of the elephant performance and the conclusion of the circus show itself, which period Zajicek estimated lasted seventeen to twenty minutes. Tr. 736. Thus, it is apparent that at the very least, Joy had a lengthy break between her pre-show rides and her intermission rides, again between intermission and the actual elephant performance, then again a break of more than double the length of the performance time between the performance and her post-show rides. Since the schedule was presumably the same regarding the day's second show, there is very little substance to the contention that Joy did not receive rest periods that were at least equal to the time she performed, let alone to the contention expressed in Complainant's Opening Brief that "respondent failed to provide Joy with a rest period." Br. at 18. In fact there is no evidence that Joy did not have rest periods well in excess of the minimum requirements between her limited elephant ride sessions and performances.

There is some question as to whether the limited number of rides provided by Joy even qualify as "performances" within the meaning of the regulations. Dr. Sofranko testified that Joy would be considered "working" if she was even "on-call" to give rides because she was not being allowed to be on "elephant time"—that is she was not free to do whatever she wanted within the normal bounds of being in captivity. Tr. 211-214. She testified that the failure to be granted sufficient rest periods could lead to physical and mental fatigue, frustration, depression and anger. Tr. 214. Mr. Zajicek, with a lifetime of experience handling

[9] An undated videotape taken by Linda Roberson, ZRX 31, which showed an earlier but similar version of the performance of Mr. Zajicek and the elephants, was approximately eight minutes long.

elephants, testified that Joy actually enjoyed giving rides, and that he had been told by veterinarians that giving rides was good exercise for elephants, particularly because elephants in their natural habitat walked from 15 to 25 miles a day. Tr. 514, 538-539.

Photographs taken by Mr. Rippy depict Joy giving rides at various times during the June 26 inspection. CX 22. There is no documentation as to what time the various photographs were taken, so no conclusions can be drawn as to whether the ride-giving was continuous even as to the periods of time when Joy was available to give rides. Only two of the seven photographs in this exhibit show Joy even giving a ride--CX 22a showing one rider, and CX 22e showing what appear to be three riders. While Joy is saddled during all seven of these photographs, she is just standing around chewing hay in CX 22b and c. There are no photographs or observations that would support a finding that Joy was giving rides without a rest period for any length of time, let alone for the entire afternoon and evening.

While there is no specific case law cited by the parties as to whether activities such as elephant rides are considered "performances" in the context of the regulation, I am satisfied that these rides are "performances" and that they require that rest periods be granted as per the regulations. However, it would be absurd to require a rest period after each individual ride, and I am satisfied that the lengthy time that elapsed between Joy's afternoon pre-show ride session and her intermission ride session, the period between the intermission and the circus performance, and the period between the end of the circus and her post-performance ride session, were easily longer than the time period that Joy was actually giving rides. This finding is particularly easy to make in light of the glaringly inadequate proof of any facts to the contrary—no one was able to testify that Joy gave rides during these intervening periods which undisputedly exceed the periods that Joy was alleged to have been giving rides. It is unnecessary for me to rule as to whether the down times between rides in themselves constitute rest periods for Joy, or whether her merely being saddled, or wearing her "hat" constitutes a performance necessitating a rest period, because the times between the performance sessions, even with "performance" loosely defined to including the giving of rides, still results in rest periods in excess of performance periods for Joy.

Complainant also contends that the transportation of Joy in the early morning hours of June 27 violates the regulation concerning rest between performances. This contention is particularly meritless, in that it would take an extremely novel and baseless interpretation of performance to even transform the transportation of animals between shows into a "performance" under the Act and the regulations. There is no evidence to indicate how many hours of rest Joy had after giving rides in the evening show and before she was transported, nor is there any evidence of how much rest she had after being transported. Thus, even if transportation of Joy was a "performance," which it is not, there is no factual basis in this record that would demonstrate that Joy did not receive more than adequate rest before and after this "performance."

Thus, Complainant has failed to show, by a preponderance of the evidence, that Mr. Zajicek's handling of Joy during June 26, 2001, violated the regulations governing rest periods between performances.

3. Mr. Zajicek's handling of Ronnie and Joy did not violate the Act. Respondent is charged with using physical abuse to train, work and handle Ronnie, and with exhibiting Joy under conditions inconsistent with her good health and well-being. Complainant failed to prove any of these allegations.

During the course of the hearing, I closely observed the demeanor of the witnesses, particularly as it became evident that the accounts of Mr. Zajicek and Dr. Sofranko had some startling differences. One overwhelming impression I received was that of Mr. Zajicek's love for elephants, and particularly the four elephants he was working with in June of 2001.[10] He has worked with elephants his entire adult life, starting with basic husbandry work and working his way up to training and performing in the ring. He maintains a large collection of elephant books. Tr. 493-494. Elephants are like a family to him: "Believe me, these elephants are like my children, I don't have a wife, I don't have any kids, these are my children." Tr. 569. Indeed, he consistently referred to the four elephants as a parent would refer to a child, describing their different personalities, and interactions, and the actions

[10] "I just like elephants, I love elephants, I love everything about them, I like to read about them, I like to see them on my time off, I go visit other people with elephants." Tr. 494.

he needed to take to keep behaviors between the elephants on a harmonious level. The overall demeanor of Mr. Zajicek was not consistent with that of an individual who abused elephants.

On the other hand, Dr. Sofranko also appeared to be a generally credible witness. Her observations of Mr. Zajicek using the ankus to strike an elephant during the performance appear to be candid and, although these observations were not made by anyone else in her party, she did contemporaneously state to Mr. Rippy that she saw Mr. Zajicek strike an elephant with his ankus. I have no reason to question that she believed she saw Mr. Zajicek use his ankus in the manner described.

That being said, I am still a little leery in fully accepting either account of the incident that resulted in the wound on Ronnie's trunk. That Zajicek would use his ankus to prevent Ronnie from taking a "cheap shot" at Joy in Dr. Sofranko's presence in the corral, and then, without any prompting, point out to her that his actions resulted in a citation inviting visible wound on Ronnie's trunk, is a bit difficult for me to imagine. Showing an inspector who is assessing whether violations of the Animal Welfare Act have been committed that one's actions, even if properly taken, resulted in an injury is not consistent with human nature. At the same time, the fact that no one accompanying Dr. Sofranko saw what she saw, even though they were all focused on the elephants' circus performance, makes it difficult to believe that a significant abusive action took place. Dr. Sofranko's testimony also had many internal inconsistencies concerning where she was, and where Mr. Zajicek was, when viewing Ronnie in the corral, and whether Mr. Zajicek "brought" Ronnie over to her, as she testified repeatedly, and then stated on rebuttal that Mr. Zajicek was not even in the corral when he "brought" Ronnie over. Certainly, it is difficult to reconcile Dr. Sofranko's initial testimony with her rebuttal testimony in this area.

With all that being said, it is clear, and generally undisputed, that either during the circus performance, or in the corral after the performance, Mr. Zajicek used his ankus to prevent Ronnie from taking a shot at Joy, and in so doing caused a wound to appear on Ronnie's trunk. The wound punctured Ronnie's skin, and there was evidence of some bleeding. The wound was fairly small by any definition, given that it was caused by the point of the ankus. Mr. Rippy took

photographs of Ronnie's trunk, using a digital camera and a zoom lens from a distance of in the vicinity of ten feet, but no wound was visible in any of the photographs he took.

Complainant contends that by using the ankus to separate Ronnie from Joy, Mr. Zajicek was using physical abuse to train, work and handle Ronnie. I find that Complainant has fallen far short of showing, by a preponderance of the evidence, that the ankus was in any way misused by Mr. Zajicek, and find that his use of the ankus was proper under the circumstances. Indeed, as Mr. Zajicek testified, the ankus is mostly used as a cue for elephants in their training and in their performances, as was evident in the videotape of an earlier performance that was admitted into evidence. Tr. 518-519, ZRX 31. Mr. Zajicek testified that he used a lightweight ankus, short and with a thin handle, and ZRX 8 was a representative sample of his ankus collection (although he indicated that it would not have been bent when he used it). Tr, 520-523. The point of the ankus is designed to be small, so that if it had to be suddenly used to separate two elephants, any penetration of the skin would be similar to a pinprick. It is also designed to be sharp. Tr. 522.

Complainant has not demonstrated that using an ankus to prevent one elephant from possibly harming another is a violation of the regulations or the Act. Given the size of the elephants and the size of the mark left by the ankus, it is apparent that no undue force was applied by Mr. Zajicek. Given that elephants are very social animals, and that they have separate personalities, it is not surprising that within a group of elephants there would be different degrees of shyness and dominance. Mr. Zajicek described elephants as like children that never grow up, and that they normally pick their own pecking order, with one elephant usually becoming the leader. Tr. 511-514. He indicated that the other elephants liked to pick on Joy, and that part of his job was to constantly manage the relationships between the elephants. He is always assessing the moods of his elephants, and has to intervene in many different ways every day. Tr. 514. While Dr. Sofranko testified that Mr. Zajicek struck Ronnie, there is no refutation of his contention that he prevented a possible harmful action by Ronnie against Joy. If anything, it appears that the action taken by Mr. Zajicek was totally appropriate. It certainly would be a major stretch for me to find that the manner he used the ankus constituted some form of abuse or excessive force, where the

mark was so small that close-up digital photographs failed to disclose it. Where the burden of proof is on Complainant, and the Complainant had all the tools to document the size of the wound, and was unable to do so, the benefit of the doubt must go to Mr. Zajicek. This is particularly the case given the gravity of the charges against Mr. Zajicek. While there is no place for animal abusers in circuses, the preponderance of the evidence emphatically supports a finding that Mr. Zajicek is not an animal abuser, but rather a conscientious trainer who took appropriate actions to prevent one elephant from harming another.

That there was some sort of traumatic[11] injury to Ronnie which resulted in a break in her skin, with some bleeding and oozing, does not, of itself, make the case for abuse. The need to intervene arose so quickly that Mr. Zajicek had no choice, in his mind, but to quickly apply the ankus to prevent Ronnie from whacking Joy with her trunk.[12]

The regulatory requirement is not an absolute one of never even allowing a scratch on an animal, particularly where far more severe injuries might result. Rather, the operative language requires an animal to be handled "as carefully as possible in a way that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort." 9 C.F.R. §2.131(a)(1).

I find that Mr. Zajicek acted as carefully and prudently as possible under the circumstances.

It should be noted that preventing harm to Joy was only part of the reason for Mr. Zajicek's use of the ankus. He stated that he did not believe that Ronnie would actually cause injury to Joy, but was more

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[11] Dr. Sofranko defined trauma as harm or damage to living tissue. Tr. 215.

[12] Complainant suggests in its brief at pages 10-11that Mr. Zajicek could have used voice commands or repositioned himself, could have hired additional elephant handlers, or could have removed Ronnie or Joy from the performance. However, Mr. Zajicek testified without refutation that he had no opportunity to issue voice commands or reposition himself, which he clearly would have preferred over using the ankus, because it was a situation requiring him to act virtually instantaneously. How hiring additional elephant handlers would have improved the situation, particularly where Mr. Zajicek was present anyway, is unknown, as there was no testimony in this area. Likewise, the suggestions about removing Ronnie or Joy from the herd are not supported by any expert testimony, and would appear to be inconsistent with proper handling of elephants in light of their well-documented social tendencies.

concerned about Joy's behavior if she was startled by Ronnie's striking her. He was concerned that she might have harmed one of the people in the corral, including himself. If he or one of his coworkers were bumped into and knocked down by a startled elephant, serious injury could result. Tr. 520. Dr. Sofranko herself agreed that the use of the ankus—even if it broke the elephant's skin—might be appropriate in such circumstances. Tr. 323-325. Clearly, whether the wound was generated in the corral or in the circus ring, there were people in the vicinity who could have been hurt by a startled elephant. Thus, Complainant's theory of ankus usage would appear to support Mr. Zajicek's actions.

Separating the elements of the violations alleged to have been committed by Mr. Zajicek, and charging him with causing trauma, physical harm and unnecessary discomfort, appears to be little more than an effort to increase the potential penalty for what appears to be a single instance situation with the ankus. It appears that any trauma, harm or discomfort were attributable to the single use of the ankus, which I have already found to be appropriate under the circumstances.

My finding that use of the ankus to prevent Ronnie from striking Joy applies to the charge that Mr. Zajicek used "physical abuse" to train, work and handle Ronnie. As Dr. Sofranko stated, physical abuse is "unnecessary trauma, unnecessary damage, unnecessary pain, discomfort." Tr. 260. Using an ankus to prevent Ronnie from striking Joy, and perhaps causing more harm to other elephants as well as the people in the area, was entirely necessary and appropriate, and the minimal damage to Ronnie's trunk is a testimony to the skillful, and humane, use of the ankus by Mr. Zajicek.

With respect to Joy, who I have already found was not worked without adequate rest periods, Mr. Zajicek is also charged with exhibiting Joy "under conditions that were inconsistent with [her] good health and well-being," in violation of 9 C.F.R. § 2.131(c)(1). This appears to be based on the belief that by allowing Joy, who was shy or timid and who tended to get picked on, to mingle with the other three elephants, Mr. Zajicek was exposing her to physical and mental harm. Complainant offers little argument in their brief for this proposition, the primary basis for which is the acknowledgement by Mr. Zajicek that the other elephants tended to pick on Joy, and that therefore these herd

dynamics compromised Joy's mental well-being. Comp. Br. at p. 20, footnote 103.

Dr. Sofranko, while trained in many aspects of elephant management, and with a specialty in investigating elephant matters for APHIS, Tr. 184-188, testified that Mr. Zajicek recognized that Ronnie's aggression towards Joy was a problem, but never suggested or implied that a cure for the problem was to segregate Joy from the other three elephants. While Dr. Sofranko stated that she was not a knowledgeable and experienced animal handler, and stated that people who take care of elephants are the real experts in the field, Mr. Zajicek obviously has a lifetime of experience working with elephants. He clearly recognized that the other elephants picked on Joy, and affirmatively took measures to "give Joy the opportunity to protect herself when in the corral, by the way we configured the corral, by the way we did other things, so that Joy had an escape route, if you will, and over a period of time—not a month, not two weeks, but over working with these elephants for approximately three years . . . I could turn them all loose in the same corral." Tr. 513. It is clear that as a result of working with these elephants, Mr. Zajicek devoted considerable effort to accommodate their four different personalities. He "constantly" monitored the elephants to try to ascertain their moods on any given day, and frequently intervened to assure that interactions between elephants, and between elephants and humans, would remain as safe as possible. Tr. 513-518.

Given the undisputed evidence that elephants are social animals, and the utter lack of evidence concerning what Mr. Zajicek could have done to satisfy the regulation with regard to Joy's "good health and well-being," there is no basis, let alone a preponderance of the evidence, to support a violation finding here. None of Complainant's witnesses suggested that it was wrong for Joy to be allowed to associate with the other three elephants, while Mr. Zajicek gave convincing testimony that he was aware of the "pecking order" with his elephants and was taking constant measures to deal with the situation. His testimony on the group dynamics of elephants was consistent with that of James Crawford, who agreed with Mr. Zajicek that "elephants are like children," Tr. 970, and with author and trainer Alan Roocroft, who wrote of the "intensely

social" aspects of inter-elephant relationships.[13] ZRX 26 at 25. What Complainant appears to be suggesting is that rather than try to acknowledge what appear to be normal social relationships between elephants, and to take measures to improve these relationships to reduce the possibility of harm to the elephants and the people around them, that instead Mr. Zajicek should have isolated (and effectively severely punished) Joy because she was the shyest elephant of the four. If anything, this would be "a devastating deprivation." *Id*.

4. Respondent was not denied due process by the conduct of Complainant. Although I have found for Respondent on all counts, Respondent's counsels' comments, particularly in Respondent's Proposed Findings of Facts and Conclusions of Law, concerning the conduct of Complainant, need to be addressed. In particular, Respondent has alleged that throughout the course of the proceedings, by virtue of Complainant's failures to comply with USDA rules, the frequent unwarranted objections during the course of cross-examination of Complainant's witnesses, the failure to disclose potentially exculpatory evidence in a timely manner, the obdurate resistance to subpoenas duces tecum issued by me, and the possible destruction of evidence, Complainant had conducted itself in an obstructionist fashion. I found many aspects of Complainant's conduct throughout this case to be troubling and of concern, but I believe that there was no denial of due process because, over time, Respondent was able to eventually receive all the evidence to which he was entitled, was able to call the government witnesses he requested, and was able to fully cross-examine the government witnesses. [4][1]

The inspection team certainly appeared to fail to comply with its own rules and guidelines when it failed to provide Mr. Zajicek with a copy of any inspection report at the close of the inspection. This could have been prejudicial because, other than being accused by Dr. Sofranko of abusing Ronnie, Mr. Zajicek was not made aware at any time during or after the inspections that he was also potentially liable for a licensing violation as well as for mistreatment of Joy by failing to provide her

[13] An excerpt of Mr. Roocroft's book was admitted as ZRX 26.

[14] Although there is little question that the excessive objections, and the long delay in complying with the subpoena duces tecum, significantly prolonged the hearing.

adequate rest periods. While Mr. Zajicek testified that Dr. Sofranko indicated that no report was provided due to some equipment malfunction problem, (Tr. 565-565),[15] there is no good reason in this record why inspections reports were not in any event submitted to Mr. Zajicek shortly after the inspection. No good reason was ever offered as to why Mr. Zajicek did not receive inspection reports, or why he was never advised, apparently until the filing of the complaint in this case, that he needed an exhibitor's license, or that his treatment of Joy was other than in compliance with the Act.

With respect to the roadblocks to the cross-examination of witnesses by Mr. Zajicek's counsel, there is no question that counsel for Complainant made excessive and frequently meritless objections. There was a consistent pattern where objections were made to perfectly legitimate cross-examination, followed by discussion, followed by my ruling and directive to answer the question, followed by the witness asking for the question to be repeated. While this caused the hearing to drag on far longer than it should have lasted, there was no prejudice to Mr. Zajicek, since eventually all of his legitimate cross-examination was allowed. I also note that the pattern of excessive objections did appear to gradually diminish over the course of the hearing, and I have no basis to believe that Complainant's tactics were deliberately obstructionist in this area.

With respect to the subpoenas, I had issued a subpoena duces tecum on behalf of one of the parties who settled on the eve of the hearing, for APHIS to produce its custodian of records and produce certain documents. Rather than file a motion to quash the subpoena, and rather than complying with the subpoena, Complainant announced near the start of the hearing that it believed the subpoena was no longer effective since it had been issued at the request of an entity that was no longer a party to the proceeding. Since the subpoena had requested information that was potentially pertinent to the defenses of many of the parties who were still in the case at the time of the request, I indicated that this "defense" was not particularly convincing, but I announced on March 11 that, rather than leaving an additional unresolved legal question, and

[15] Although another of the inspectors, Mr. Kovach, did manage to give a copy of his inspection report to Mr. Crawford. CX 109.

given that the hearing was already scheduled to resume on March 25, I would issue a new subpoena if requested by Respondent. A new subpoena, issued solely at the request of Respondent, was delivered to and signed by me the next day.

On March 24, the day before the hearing was to reconvene, Complainant filed a motion to quash the subpoena, principally arguing that since the Rules of Procedure limited discovery, the only way for Respondent to receive the subpoenaed documents was through the FOIA process. Since the FOIA process could go on for many months, there was no practical opportunity for Respondent to receive the subpoenaed documents during the course of the hearing. Complainant also raised issues, many of them valid, concerning the scope of the subpoena.

The rather severe limitations the Rules of Procedure impose on discovery are well established in the USDA case law. In fact, prior to the hearing in this case, I denied a motion filed by Mr. Zajicek to compel production of exculpatory evidence, and I likewise denied his motion for a continuance of the hearing pending his receipt of FOIA materials. However, as I believe I made clear in my bench ruling on March 25, the rules change for the actual trial. Thus, there is no limitation to my issuing a subpoena duces tecum requiring the Agency to produce its custodian of records, and to bring certain records to a hearing. I find it ironic that Complainant requested that I issue a similar subpoena requiring Hawthorn's custodian of records to appear at the hearing, and that the Hawthorn custodian appeared without objection, and brought the requested documents, even though Hawthorn was no longer a party to the proceeding. The rules authorizing me to issue subpoenas do not limit their issuance to non-USDA personnel, and do not state that where an FOIA request for information is pending, the same information can not be reached by subpoena. To allow the USDA to subpoena evidence and at the same time bar Respondent from utilizing the same process would be patently unfair and inconsistent with the Rules of Procedure, the Administrative Procedure Act, and due process generally.

Respondent subsequently prepared a subpoena which was substantially narrower in scope than the one I issued in March, and another motion to quash was filed by Complainant. I denied that motion on May 11. Copies of the photographs taken but not submitted into evidence by Complainant were finally turned over to Respondent on

July 9, 2004. The remaining documents submitted in response to the subpoena were produced on August 16-17.[16]

Unfortunately, it became evident during the **final** day of hearing on October 28, 2004, nearly six months after I denied the motion to quash the subpoena, that Complainant had in its possession a document that clearly was facially responsive to Respondent's request for documents. This document—a report by Mr. Kovach on his inspection of the Sterling & Reid circus for June 26—was submitted as part of the rebuttal case as CX 109, but should have been turned over in response to the subpoena. While the report does not mention Mr. Zajicek or his elephants, it clearly met the prerequisites in the subpoena concerning date, location, and circumstances. Dr. Sofranko specifically testified that Mr. Kovach was part of the team observing the circus act, and the subpoena pertinently requests "written observations or assessments of Mr. Zajicek, of any elephant handled or exhibited by Mr. Zajicek during the relevant time period, or of any facility at which Mr. Zajicek handled or exhibited an elephant during the relevant time period." A written observation from one of Dr. Sofranko's inspection team that "No non-compliant items noted this inspection," is clearly exculpatory vis-à-vis Mr. Zajicek and it should have been turned over in response to the subpoena. However, even though it would have been desirable to receive this information earlier, I find there is no lasting prejudice to Mr. Zajicek, as he could have requested an adjournment to call Mr. Kovach as a witness if he desired. The document was admitted into evidence and the parties had the opportunity to argue its worth in their briefs, which they did to some extent.[17]

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[16]Some of the submitted documents contained redactions. Unedited versions of a number of the subpoenaed documents were reviewed in camera. I found all the redactions to be appropriate. Additionally, Complainant initially declined to submit a privilege log to Respondent, which log was eventually produced, on my order, on October 5. Complainant had claimed that the privilege log was in itself privileged, but in the absence of any cited authority, and in recognition of the fact that common practice involves submission of the privilege log to the party who requested the documents, I directed that the log be produced.

[17]Among several other similar matters mentioned by Respondent is the disappearance/destruction of Mr. Rippy's notes. While Mr. Rippy certainly appeared confused and a little embarrassed about his failure to locate his notes, and the

(continued...)

CONCLUSION AND ORDER

Complainant has failed to prove that Respondent James Zajicek committed any of the alleged violations of the Animal Welfare Act that were the subject of the complaint. Accordingly, I rule in favor of Respondent on all counts, and order that the case against him be dismissed.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

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In re: MARY JEAN WILLIAMS, AN INDIVIDUAL; JOHN BRYAN WILLIAMS, AN INDIVIDUAL; AND DEBORAH ANN MILETTE, AN INDIVIDUAL.
AWA Docket No. 04-0023.
Decision and Order as to Mary Jean Williams.
Filed September 14, 2005.

AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Ability to pay – Cease and desist order – Civil penalty.

The Judicial Officer issued a decision in which he found Mary Jean Williams (Respondent) violated the regulations (9 C.F.R. §§ 2.1(a)(1), .40(a), (b)(1)-(2), (4), .131(a)(1) (2004)) issued under the Animal Welfare Act (Regulations). The Judicial Officer concluded Respondent failed to file a timely answer to the Complaint and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), was deemed to have admitted the allegations of the Complaint and waived opportunity for hearing. The Judicial Officer found Respondent's denial of the allegations of the Complaint in her appeal petition far

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[17](...continued)
subsequent discovery that they had been destroyed, I have no basis to make any conclusion that any abuse was committed in this area, by Mr. Rippy, his chain of command, or counsel.

too late to be considered. Moreover, the Judicial Officer rejected Respondent's request to reduce the civil penalty based on her inability to pay the civil penalty, stating a respondent's ability to pay a civil penalty is not one of the factors the Secretary of Agriculture must consider when determining the amount of a civil penalty. The Judicial Officer ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and assessed Respondent a $5,500 civil penalty.

Colleen A. Carroll, for Complainant.
Respondent Mary Jean Williams, Pro se.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 19, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Mary Jean Williams, John Bryan Williams, and Deborah Ann Milette willfully violated the Regulations (Compl. ¶¶ 5-11). The Hearing Clerk served Respondent Mary Jean Williams with the Complaint and a service letter on November 19, 2004.[1] Respondent Mary Jean Williams 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 January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order as to Respondents Mary Jean Williams and John Bryan Williams [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Respondents Mary Jean Williams and John Bryan Williams [hereinafter Proposed Default Decision].

[1]Memorandum of Tonya Fisher, dated November 19, 2004.

Respondent Mary Jean Williams failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On April 28, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding Respondent Mary Jean Williams willfully violated sections 2.1(a)(1), 2.40(a)-(b), and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.1(a)(1), .40(a)-(b), .131(a)(1)); (2) ordering Respondent Mary Jean Williams to cease and desist from violating the Animal Welfare Act, the Regulations, and the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) [hereinafter the Standards]; and (3) assessing Respondent Mary Jean Williams a $5,500 civil penalty (Initial Decision at 4-6).

On August 8, 2005, Respondent Mary Jean Williams appealed the ALJ's Initial Decision to the Judicial Officer. On September 6, 2005, Complainant filed a response to Respondent Mary Jean Williams' appeal petition. On September 13, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to Respondent Mary Jean Williams.

Based upon a careful review of the record, I agree with the ALJ's Initial Decision as it relates to Respondent Mary Jean Williams. Therefore, except for minor modifications, I adopt the ALJ's Initial Decision as it relates to Respondent Mary Jean Williams as the final Decision and Order as to Mary Jean Williams. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals

to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

§ 2149. Violations by licensees

. . . .

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to

institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

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

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

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(f), 2149(b)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

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

FINDINGS AND PURPOSE

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

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

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

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

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

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

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

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

(3) improve the collection by the Federal Government of

civil monetary penalties.

DEFINITIONS

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

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

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

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

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

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

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

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

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

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

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq.*], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq.*], the Occupational Safety and Health Act of 1970 [29 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; and

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

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

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

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

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

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

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

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

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

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

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

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

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary

penalty shall apply only to violations which occur after the date the increase takes effect.

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

28 U.S.C. § 2461 (note).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

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

(b) *Penalties*—. . . .

. . . .

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

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who

derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the AC Regional Director in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the AC Regional Director.

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a

part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care; [and]

. . . .

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia[.]

SUBPART I—MISCELLANEOUS

. . . .

§ 2.131 Handling of animals.

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

9 C.F.R. §§ 1.1; 2.1(a)(1), .40(a), (b)(1)-(2), (4), .131(a)(1) (2004).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Statement of the Case

Respondent Mary Jean Williams failed to file an answer to the Complaint 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 in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint that relate to Respondent Mary Jean Williams are adopted as findings of fact. This Decision and Order as to Mary Jean Williams is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Mary Jean Williams is an individual whose business mailing address is Route 1, Box 67, Ivanhoe, Texas 75447. At all times material to this proceeding, Respondent Mary Jean Williams was a *dealer* as that term is defined in the Animal Welfare Act and the Regulations.

2. Respondent Mary Jean Williams has a small business. The gravity of Respondent Mary Jean Williams' violations of the Regulations is great and resulted in the death of a young tiger. Respondent Mary Jean Williams has no record of previous violations of the Animal Welfare Act, the Regulations, or the Standards.

3. On or about September 27, 2002, and September 28, 2002, Respondent Mary Jean Williams operated as a *dealer*, as that term is defined in the Animal Welfare Act and the Regulations, without obtaining an Animal Welfare Act license from the Secretary of Agriculture. Specifically, Respondent Mary Jean Williams, while unlicensed, transported a young tiger for use in exhibition from Hennepin, Illinois, to Bloomington, Illinois. (9 C.F.R. § 2.1(a)(1) (2004).)

4. On September 27, 2002, Respondent Mary Jean Williams failed to have an attending veterinarian provide adequate veterinary care to a young tiger. Specifically, Respondent Mary Jean Williams, who was not a veterinarian, approved of and acquiesced in the administration of a sedative solution to a young tiger by a person who was not a veterinarian. (9 C.F.R. § 2.40(a) (2004).)

5. On September 27, 2002, Respondent Mary Jean Williams failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel. Specifically, Respondent Mary Jean Williams failed to provide personnel capable of handling a tiger safely. (9 C.F.R. § 2.40(b)(1) (2004).)

6. On September 28, 2002, Respondent Mary Jean Williams failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries. Specifically, Respondent Mary Jean Williams lacked any plan to ensure that a young tiger could not escape from its travel enclosure or to provide for the animal's safe recapture. (9 C.F.R. § 2.40(b)(2) (2004).)

7. On September 28, 2002, Respondent Mary Jean Williams failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling. Specifically, Respondent Mary Jean Williams lacked the ability to adequately care for and handle a young tiger and failed to employ personnel capable of adequately caring for and handling a young tiger. (9 C.F.R. § 2.40(b)(4) (2004).)

8. On September 27, 2002, Respondent Mary Jean Williams failed to handle animals as expeditiously and carefully as possible in a manner that would not cause unnecessary discomfort, behavioral stress, or physical harm. Specifically, Respondent Mary Jean Williams, who was not a veterinarian, administered or attempted to administer sedatives to a young tiger. (9 C.F.R. § 2.131(a)(1) (2004) [9 C.F.R. § 2.131(b)(1) (2005)].)

9. On September 28, 2002, Respondent Mary Jean Williams failed to handle animals as expeditiously and carefully as possible in a manner that would not cause unnecessary discomfort, behavioral stress, or physical harm. Specifically, Respondent Mary Jean Williams allowed a young tiger to exit its travel enclosure and escape into a parking lot of a restaurant, which resulted in local authorities shooting and killing the

animal. (9 C.F.R. § 2.131(a)(1) (2004) [9 C.F.R. § 2.131(b)(1) (2005)].)

Conclusions of Law

1. On or about September 27, 2002, and September 28, 2002, Respondent Mary Jean Williams operated as a *dealer*, as that term is defined in the Animal Welfare Act and the Regulations, without obtaining an Animal Welfare Act license from the Secretary of Agriculture. Specifically, Respondent Mary Jean Williams, while unlicensed, transported a young tiger for use in exhibition from Hennepin, Illinois, to Bloomington, Illinois, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)).

2. On September 27, 2002, Respondent Mary Jean Williams failed to have an attending veterinarian provide adequate veterinary care to a young tiger. Specifically, Respondent Mary Jean Williams, who was not a veterinarian, approved of and acquiesced in the administration of a sedative solution to a young tiger by a person who was not a veterinarian, in willful violation of section 2.40(a) of the Regulations (9 C.F.R. § 2.40(a) (2004)).

3. On September 27, 2002, Respondent Mary Jean Williams failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel. Specifically, Respondent Mary Jean Williams failed to provide personnel capable of handling a tiger safely, in willful violation of section 2.40(b)(1) of the Regulations (9 C.F.R. § 2.40(b)(1) (2004)).

4. On September 28, 2002, Respondent Mary Jean Williams failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries. Specifically, Respondent Mary Jean Williams lacked any plan to ensure that a young tiger could not escape from its travel enclosure or to provide for the animal's safe recapture, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2) (2004)).

5. On September 28, 2002, Respondent Mary Jean Williams failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling. Specifically, Respondent Mary Jean Williams lacked the ability to adequately care for and handle a young

tiger and failed to employ personnel capable of adequately caring for and handling a young tiger, in willful violation of section 2.40(b)(4) of the Regulations (9 C.F.R. § 2.40(b)(4) (2004)).

6. On September 27, 2002, Respondent Mary Jean Williams failed to handle animals as expeditiously and carefully as possible in a manner that would not cause unnecessary discomfort, behavioral stress, or physical harm. Specifically, Respondent Mary Jean Williams, who was not a veterinarian, administered or attempted to administer sedatives to a young tiger, in willful violation of section 2.131(a) of the Regulations (9 C.F.R. § 2.131(a) (2004) [9 C.F.R. § 2.131(b)(1) (2005)]).

7. On September 28, 2002, Respondent Mary Jean Williams failed to handle animals as expeditiously and carefully as possible in a manner that would not cause unnecessary discomfort, behavioral stress, or physical harm. Specifically, Respondent Mary Jean Williams allowed a young tiger to exit its travel enclosure and escape into a parking lot of a restaurant, which resulted in local authorities shooting and killing the animal, in willful violation of section 2.131(a) of the Regulations (9 C.F.R. § 2.131(a) (2004) [9 C.F.R. § 2.131(b)(1) (2005)]).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Mary Jean Williams raises two relevant issues in her appeal petition. First, Respondent Mary Jean Williams denies the material allegations of the Complaint.

Respondent Mary Jean Williams' denial of the allegations in the Complaint comes far too late to be considered. Respondent Mary Jean Williams is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because she failed to file an answer to the Complaint within 20 days after the Hearing Clerk served her with the Complaint. The Hearing Clerk served Respondent Mary Jean Williams with the Complaint and the Hearing Clerk's service letter on November 19, 2004.[2] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

[2]See note 1.

§ 1.136 Answer.

(a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

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

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to

> request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

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

> [T]his complaint shall be served upon the respondents, who shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 4.

Similarly, the Hearing Clerk informed Respondent Mary Jean Williams in the August 20, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> August 20, 2004
>
> Ms. Mary Jean Williams
> Mr. John Bryan Williams
> Route 1, Box 67
> Ivanhoe, Texas 75447
>
> Ms. Deborah Ann Milette
> 30-8 Needle Park Circle
> Queensbury, New York 12804
>
> Dear Sir/Madame:
>
> Subject: In re: Mary Jean Williams, an individual; John B. Williams, an individual; and Deborah Ann Milette, an

individual, Respondents -
AWA Docket No. 04-0023

Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.

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

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

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

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

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in

quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Respondent Mary Jean Williams' answer was due no later than December 9, 2004. Respondent Mary Jean Williams' first filing in this proceeding is her appeal petition, which she filed August 8, 2005, almost 8 months after Respondent Mary Jean Williams' answer was due. Respondent Mary Jean Williams' 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)).

On January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Respondent Mary Jean Williams failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On April 28, 2005, the ALJ issued an Initial Decision: (1) concluding Respondent Mary Jean Williams willfully violated sections 2.1(a)(1), 2.40(a)-(b) and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.1(a)(1), .40(a)-(b), .131(a)(1)); (2) ordering Respondent Mary Jean Williams to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; and (3) assessing Respondent Mary Jean Williams a $5,500 civil penalty (Initial Decision at 4-6).

Although, on rare occasions, default decisions have been set aside for

good cause shown or where the complainant states the complainant does not object to setting aside the default decision,[3] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[4]

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[3]*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 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).

[4]*See generally In re Mary Jean Williams* (Decision as to Deborah Ann Milette) 64 Agric. Dec. 364 (2005) (holding the default decision was properly issued where the respondent filed her answer 1 month 4 days after her answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations alleged in the complaint); *In re Bodie S. Knapp*, 64 Agric. Dec.253 (2005) (holding the default decision was properly issued where the respondent filed his answer 1 month 15 days after his answer was due and holding the respondent

(continued...)

[4](...continued)
is deemed, by his failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Wanda McQuary* (Decision as to Wanda McQuary and Randall Jones), 62 Agric. Dec. 452 (2003) (holding the default decision was properly issued where respondent Wanda McQuary filed her answer 6 months 20 days after she was served with the complaint and respondent Randall Jones filed his answer 6 months 5 days after he was served with the complaint and holding the respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re David Finch*, 61 Agric. Dec. 567 (2002) (holding the default decision was properly issued where the respondent filed his answer 3 months 18 days after he was served with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492 (2002) (holding the default decision was properly issued where the respondents filed their answer 3 months 9 days after they were served with the complaint and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444 (2001) (holding the default decision was properly issued where the respondents' first filing was 5 months 13 days after they were served with the complaint and 4 months 24 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Beth Lutz*, 60 Agric. Dec. 53 (2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations alleged in the complaint); *In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months 5 days after they were served with the complaint and 5 months 16 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not
(continued...)

[4](...continued)
respond to the allegations of the complaint and holding the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding the default decision was properly issued where the respondent filed his answer 1 year 12 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and holding the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an
(continued...)

Respondent Mary Jean Williams' first filing in this proceeding was filed with the Hearing Clerk almost 8 months after Respondent Mary Jean Williams' answer was due. Respondent Mary Jean Williams' 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 deemed Respondent Mary Jean Williams to have admitted the allegations of the Complaint.

Moreover, application of the default provisions of the Rules of Practice does not deprive Respondent Mary Jean Williams of her rights under the due process clause of the Fifth Amendment to the Constitution

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[4](...continued)
answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but the answer was not received until March 25, 1994, and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default decision was properly issued where the respondents failed to file an answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

of the United States.[5]

Second, Respondent Mary Jean Williams states she is unable to pay the $5,500 civil penalty assessed by the ALJ.

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondent Mary Jean Williams' inability to pay the $5,500 civil penalty is not a basis for reducing the $5,500 civil penalty.[6]

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[5]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding 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 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).

[6]The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *In re Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. *See In re Mary Jean Williams* (Order Denying Petition to Reconsider as to Deborah Ann Milette), 64 Agric. Dec. ___, slip op. at 9 (Sept. 9, 2005) (stating 7 U.S.C. § 2149(b) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444, 475-76 (2001) (stating 7 U.S.C. § 2149(b) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re Nancy M. Kutz* (Decision and Order as to Nancy M. Kutz), 58 Agric. Dec. 744, 757 (1999) (stating 7 U.S.C. § 2149(b) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to

(continued...)

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

ORDER

1. Respondent Mary Jean Williams, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent Mary Jean Williams.

2. Respondent Mary Jean Williams is assessed a $5,500 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:

Colleen A. Carroll

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[6](...continued)
pay the civil penalty is not one of those factors); *In re James E. Stephens*, 58 Agric. Dec. 149, 199 (1999) (stating the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (1998) (stating the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating the ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating the ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Mary Jean Williams. Respondent Mary Jean Williams shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0023.

RIGHT TO JUDICIAL REVIEW

Respondent Mary Jean Williams has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent Mary Jean Williams must seek judicial review within 60 days after entry of this Order.[7] The date of entry of this Order is September 14, 2005.

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[7] 7 U.S.C. § 2149(c).

BEEF PRODUCTION AND RESEARCH ACT

COURT DECISION

JEANNE CHARTER; STEVE CHARTER v. USDA.
No. 02-36140.
Vacated May 27, 2004.
Filed June 16, 2005.

(Cite as: 412 F.3d 1017).

BPRA – Beef "check-off" – Unconstitutional compelled speech as applied – Compelled to finance speech to which they did not agree.

United States Court of Appeals,
Ninth Circuit.

Appeal from the United States District Court for the District of Montana; Richard F. Cebull, District Judge, Presiding. D.C. No. CV-00-00198-RCB.

Before: CANBY, WARDLAW, and GOULD, Circuit Judges.

ORDER

This is a challenge to the constitutionality of the Beef Promotion and Research Act of 1985 ("the Act"), 7 U.S.C. §§ 2901-11, and the Beef Promotion and Research Order promulgated thereunder, 7 C.F.R. §§ 1260.101-1260.640. The district court entered judgment in favor of the United States Department of Agriculture, holding that the speech at issue is government speech and thus the Act does not violate either the appellants' free speech or association rights. *Charter v. USDA,* 230 F.Supp.2d 1121 (D.Mont.2002). We heard argument and submitted the appeal for decision on March 31, 2004. When the Supreme Court granted certiorari in *Johanns v. Livestock Marketing Ass'n,* --- U.S. ----, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005), we vacated submission pending the outcome in *Johanns* because the parties here challenged the Act on grounds identical to those asserted in *Johanns.* We now order

the appeal resubmitted for decision.

In *Johanns,* the Supreme Court, like the district court here, first held that the speech at issue is "from beginning to end the message established by the Federal Government," *i.e.,* the Government's own speech. *Id.* at ----, 125 S.Ct. at 2061. Further, because the beef "checkoff" program promulgated under the Act funds the Government's own speech, the Court held that the Act is not susceptible to a facial First Amendment compelled-subsidy challenge. *Id.* at ---- - ----, 125 S.Ct. at 2061-64. The Court nevertheless stated, without expressing a view on the point, that "if it were established ... that individual beef advertisements were attributed to respondents," such facts might form the basis for an "as applied" challenge. *Id.* at ----, 125 S.Ct. 2064. The theory would be one of compelled speech, *i.e.,* that because the speech is attributed to the individual respondents, the government unconstitutionally uses their endorsement to promote a message with which they do not agree. *Id.* Because the *Johanns* trial record was "altogether silent" on whether the individual respondents would be associated with speech labeled as coming from "America's Beef Producers," the Court held that "on the record before us an as-applied First Amendment challenge to the individual advertisements affords no basis on which to sustain the Eighth Circuit's judgment [in favor of respondents], even in part." *Id.*

Unlike in *Johanns,* the record in this case is not "altogether silent" on whether the individual appellants who are beef producers would be associated with the speech to which they object. For example, Jeanne Charter, one of the appellants, declared in an affidavit:

> The checkoff [program] results in our being associated against our will with positions both political and economic, from the National Cattlemen's Beef Association (NCBA), the primary checkoff contractor. The NCBA routinely, before Congress, and in other public ways and in press announcements, states that it is the trade organization and marketing organization of America's one million cattle producers. We are not members of the NCBA, yet as cattle producers, we are associated with their messages. We are, likewise, associated with Montana Beef Council views endorsing highly processed beef products and disparaging natural beef as a waste of time. We believe such promotion devalues the

product we raise.

In light of the Supreme Court's recognition (without expressing a view on the issue) that an attribution claim might form the basis for an as-applied First Amendment challenge to the Act, the district court's decision must be vacated and the case remanded for further proceedings to determine, among other things, whether speech was attributed to appellants and, if so, whether such attribution can and does support a claim that the Act is unconstitutional as applied. *Id.; see also id.* at ---- n, 125 S.Ct. at 2064 (Thomas, J., concurring) (noting that, pursuant to Federal Rule of Civil Procedure 15, "on remand respondents may be able to amend their complaint to assert an attribution claim").

VACATED AND REMANDED.

_____

LIVESTOCK MARKETING ASSOCIATION, ETC., ET AL. v. USDA.
Nos. 02-2769/2832.
Filed July 20, 2005.

(Cite as 2005 U.S. App. LEXIS 14785).

BPRA – Beef "check-off".

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PRIOR HISTORY: Appeals from the United States District Court for the District of South Dakota.

OPINION

On consideration of the United States Supreme Court's judgment dated May 23, 2005, remanding the matter to this court, the opinion dated July 8, 2003, is hereby vacated.

FARM SERVICES ACT

COURT DECISION

MAURICE D. MITCHELL, SR. v. USDA.
4:04-CV-90003 [LEAD CASE], 4:04-CV-90128
Filed November 15, 2005.

(Cite as 400 F. Supp. 2d 1133).

FSA – NAD – Person, definition – Separateness of accounts.

Participants in the Farm Service Agency (FSA) benefits program (loans) were found to have violated the regulations associated with the plan in that FSA records showed that they signed up as 5 separate individuals whereas in actuality they could not prove their "separateness." The result of the improper sign-up was that limitations on FSA benefits per person were grossed- up for the acreage in question. Three of the five had faithfully repaid their portion of the FSA benefits, but the remaining two participants filed bankruptcy. The farm program sought repayment from the non-bankrupt parties. The court upheld the hearing officer's finding that the five parties did not have the required separate interests to escape being held jointly and severally liable for the debts of the other. The bank accounts were co-mingled, farm supplies were jointly purchased, and they each signed personal guarantees for all of the loans.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION

JUDGES: ROBERT W. PRATT, U.S. DISTRICT JUDGE

OPINION BY: ROBERT W. PRATT

OPINION:

MEMORANDUM OPINION AND ORDER

In 1998, the United States Department of Agriculture (USDA) found that Plaintiffs Maurice D. Mitchell, Sr., Marvin Mitchell, and Marlene Mitchell, together with Steve Agan and George Paul, devised a scheme to evade limitations placed upon the amount of farm program benefits they could receive from the federal government in 1997. All three Plaintiffs repaid the farm program benefits they had received for the

years 1997 and 1998, as they were required to do under the applicable penalty regulation. In 2002, the USDA determined that the three Plaintiffs were jointly and severally liable for the farm program benefits received by Agan and Paul in the years 1997 and 1998. Having exhausted their administrative remedies, the Plaintiffs now appeal that determination.

I. FACTS AND PROCEEDINGS

A. *1998 and 1999 Administrative Proceedings*

In 1998, the Farm Service Agency (FSA) initiated administrative proceedings against Maurice Mitchell, Sr., and his son and daughter-in-law, Marvin and Marlene Mitchell, alleging that they participated in a scheme or device to evade FSA payment limitations for the year 1997. The FSA concluded the Mitchells did participate in such a scheme, along with Agan and Paul, who worked as contractors on the Mitchell's farm (Admin Rec. 1710-21). The FSA found that Maurice Mitchell, Sr., Marvin and Marlene Mitchell, Agan, and Paul had applied as five separate persons for FSA payment purposes, even though FSA records reflected that there were only two persons eligible for payments in 1996 (Admin Rec. 4, 1718; Appeal Rec. 12, 13). The FSA also found that the Mitchells did not actively engage in farming in 1997 despite collecting FSA payments for that year (Admin Rec. 1718, Appeal Rec. 9, 11, 17). The Mitchells appealed the decision to the USDA National Appeals Division (NAD), which upheld the findings against them (Appeal Rec. 13, 17). The Mitchells did not attempt to appeal the findings any further. As required under the relevant penalty regulation, 7 C.F.R. § 1400.5, the Mitchells repaid the FSA farm payments they had received in 1997 and 1998.[1]

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[1] 7 C.F.R. § 1400.5 states:

> (a) All or any part of the payment otherwise due a person on all farms in which the person has an interest may be withheld or be required to be refunded if the person adopts or participates in adopting a scheme or device designed to evade this part or that has the effect of evading this part. Such acts shall include, but are not limited to: (1) Concealing information that affects the application of this part; (2) Submitting false or erroneous information; or (3) Creating fictitious

(continued...)

B. *2002 Proceedings*

In 2002, Marvin and Marlene Mitchell filed for bankruptcy. Apparently prompted by the bankruptcy proceedings, the Iowa State Committee of the USDA ("Committee") determined, on September 18, 2002, that Marvin and Marlene Mitchell were jointly and severally liable for the repayment of the farm payments that Agan and Paul received in 1997 and 1998 (Appeal Rec. 26). The Committee made the same determination with respect to Maurice Mitchell, Sr. Brief of Maurice Mitchell, Sr. at 1.

The Mitchells appealed the September 18, 2002 decision to the National Appeals Division, which denied their appeals on the ground that the decisions were not appealable because joint and several liability is a matter of general applicability (Appeal Rec. 3). *See* 7 C.F.R. § 11.6(a)(2)("The Director shall determine whether the decision is adverse to the individual participant and thus appealable or is a matter of general applicability and thus not subject to appeal.").

C. *The Current Proceedings*

Maurice Mitchell, Sr. filed a Complaint (Clerk's No. 1) with this Court on January 5, 2004, seeking declaratory relief. Marvin and Marlene Mitchell also filed a Complaint with this Court on February 27, 2004, seeking declaratory relief and a refund of monies withheld from them, plus interest. Marvin and Marlene Mitchell also sought damages (Case No. 4:04-cv-90128). On April 27, 2004, the Court consolidated the two cases (Clerk's No. 7). On February 25, 2005, the Court ordered dismissal of the Mitchells' claim for monetary damages because none of the statutes waiving sovereign immunity permitted an award of monetary damages against the federal government (Clerk's No. 13). The

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[1](...continued)
entities for the purpose of concealing the interest of a person on a farming application.

(b) If the Deputy Administrator determines that a person has adopted a scheme or device to evade, or that has the purpose of evading, the [relevant] provisions . . . such person shall be ineligible to receive payments under the programs specified in § 1400.1 with respect to the year for which such scheme or device was adopted and the succeeding year.

Court did not dismiss the Mitchells' claims seeking declaratory relief. Maurice Mitchell, Sr. filed a brief with the Court on July 27, 2005, as did Marvin and Marlene Mitchell (Clerk's Nos. 21, 27). The Government filed a brief on August 24, 2005 (Clerk's No. 24). The Plaintiffs did not file a reply brief. The matter is fully submitted. *See* Local Rule 7.1(g)(allowing parties five days to file a reply brief).

II. STANDARD OF REVIEW

Judicial review of a NAD decision is authorized under 7 U.S.C. § 6999, which states: "A final determination of the [National Appeals] Division shall be reviewable and enforceable by any United States district court of competent jurisdiction in accordance with chapter 7 of Title 5." Judicial review is also appropriate under the Administrative Procedure Act, 5 U.S.C. § 704.

An agency's interpretation of the statutes and regulations it administers is subject to *de novo* review, a standard under which the Court accords substantial deference to the agency's interpretation. *Patel v. Ashcroft,* 375 F.3d 693, 696 (8th Cir. 2004)(citing *Regalado-Garcia v. INS,* 305 F.3d 784, 787 (8th Cir. 2002)). The Court "will defer to an agency's interpretation of . . . a statute if that interpretation is consistent with the plain meaning of the statute or is a permissible construction of an ambiguous statute." *Coal. for Fair and Equitable Reg. of Docks on Lake of the Ozarks v. FERC,* 297 F.3d 771, 778 (8th Cir. 2002)(citing *Escudero-Corona v. INS,* 244 F.3d 608, 613 (8th Cir. 2001)), *cert. denied,* 538 U.S. 960, 123 S. Ct. 1749, 155 L. Ed. 2d 511 (2003); *see generally Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The Court also accords substantial deference to an agency's interpretation of its own regulations and will uphold that interpretation "unless it violates the Constitution or a federal statute, or unless the interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Coal. for Fair and Equitable Reg. of Docks on Lake of the Ozarks,* 297 F.3d at 778 (quoting *Univ. of Iowa Hosps. and Clinics v. Shalala,* 180 F.3d 943, 950-51(8th Cir. 1999)); *see also Gardebring v. Jenkins,* 485 U.S. 415, 430, 108 S. Ct. 1306, 99 L. Ed. 2d 515 (1988); 5 U.S.C. § 706(2)(B) & (C).

III. LAW AND ANALYSIS

The Mitchells do not challenge the outcome of the 1998 and 1999 proceedings, and, as the Defendants note in their brief, the deadline for appealing those proceedings has passed. *See* 28 U.S.C. § 2401(a); *Spannaus v. U.S. Dep't of Justice,* 262 U.S. App. D.C. 325, 824 F.2d 52, 56 (D.C. Cir. 1987). The Mitchells challenge only the finding, in 2002, that they are jointly and severally liable for debts incurred by Paul and Agan as a result of the 1998 and 1999 proceedings.

Under regulations promulgated by the USDA, parties may be held jointly and severally liable if they are considered to be "one person" under the regulatory scheme:

> If two or more individuals or entities are considered to be one person and the total payment received is in excess of the applicable payment limitation provision, such individuals or entities shall be jointly and severally liable for any liability that arises therefrom. The provisions of this section shall be applicable in addition to any liability that arises under a criminal or civil statute.
> 7 C.F.R. § 1400.7.

The Mitchells argue that the five participants in the scheme -- Maurice Mitchell, Marlene and Marvin Mitchell, Paul, and Agan -- were not "one person" within the meaning of the term in 7 C.F.R. § 1400.7 and, therefore, cannot be held jointly and severally liable for one another's debts under the regulation. The term "person" is defined in 7 C.F.R. § 1400.3, which the Court sets forth below:

> Person. (1) A person is:
>
> (i) An individual, including any individual participating in a farming operation as a partner in a general partnership, a participant in a joint venture, or a participant in a similar entity;
>
> (ii) A corporation, joint stock company, association, limited partnership, limited liability partnership, limited liability company, irrevocable trust, revocable trust combined with the grantor of the trust, estate, or charitable organization, including any such entity or organization participating in the farming operation as a partner

> in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or as a participant in a similar entity;
>
> (iii) A State, political subdivision, or agency thereof.

7 C.F.R. § 1400.3 (def. of *person* (1)).

The regulation goes on to explain that, in order to be considered a separate person, an individual must meet certain requirements:

> (2) In order for an individual or entity, other than an individual or entity that is a member of a joint operation, to be considered a separate person for the purposes of this part, in addition to other provisions of this part, the individual or entity must:
>
> (i) Have a separate and distinct interest in the land or the crop involved;
>
> (ii) Exercise separate responsibility for such interest; and
>
> (iii) Maintain funds or accounts separate from that of any other individual or entity for such interest.

7 C.F.R. § 1400.3 (def. of *person* (2)).

The Government contends that, in 1999, the NAD Hearing Officer found, and the NAD Director Review affirmed, that the Mitchells were not separate persons because they did not maintain separate funds, as required under subpart iii, and that this finding should be afforded res judicata in the current proceedings. According to the Government, these findings authorize the imposition of joint and several liability against the Mitchells.

In Marvin and Marlene Mitchell's appeal from the initial FSA decision, the Hearing Officer concluded that Marvin and Marlene Mitchell, together with Maurice Mitchell, Sr., Agan, and Paul, bought and sold chemicals among each other to create the appearance that each of their balances on loans, issued by the lender FarmPro, were reduced to the FarmPro loan limit. The Hearing Officer observed that FarmPro had required personal guarantees for all of the loans from each of the

five borrowers, "suggest[ing] a business relationship between these persons close enough to warrant recognition by [FarmPro]." These facts led the Hearing Officer to find that "the loan accounts of these persons were not separate and distinct from each other." Admin. Rec. at 1729. Thus, the Hearing Officer concluded, the parties were not separate persons under 7 C.F.R. § 1400.3(b) (def. of *person* (2)(iii)) because they did not maintain funds or accounts separate from one another.[2]

In the NAD Review of the proceedings against the Mitchells, the NAD Director reviewed the requirements in 7 C.F.R. § 1400.3(b) (def. of *person* (2)) and concluded that the Hearing Officer did not err in finding that the parties involved in the loan scheme were not separate persons under the regulations because they did not maintain separate funds or accounts. Appeal Rec. at 12, 18. The Director also concluded that the Mitchells "did not provide capital from funds that were separate and distinct." The Director continued: "The FarmPro loans were used interchangeably on all the farming operations in that it was one farming operation and all the individual's have an interest." Appeal Rec. at 12, 18. While these findings were used to support the NAD's determination that the individuals were not "actively engaged in farming," *see* 7 C.F.R. § 1400.201, nothing in the regulations indicates that the same "person" determination could not be used to support a finding of joint and several liability under 7 C.F.R. § 1400.7.

The Plaintiffs suggest that subpart B of 7 C.F.R. § 1400, located at 7 C.F.R. § 1400.100-1400.109, should guide the Court's determination of who constitutes "one person." The provisions in subpart B delineate when a partnership, company, corporation, joint operation, trust, estate, husband and wife, minor, or government entity is considered to be one person under the regulations. 7 C.F.R. § 1400.101-109. The Plaintiffs argue that, because they do not fall into any of these categories, they are not "one person" and therefore cannot be subject to joint and several liability.

The only case that the Court is aware of with similar facts is *Bateman*

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[2] The Court notes that the Mitchells acknowledged this finding in their post-hearing brief during their appeal to the National Appeals Division, which stated: "The Agency found that neither Maurice Mitchell, Marvin Mitchell, Marlene Mitchell, George Paul, or Steven Agan were separate 'persons.'" (Admin Rec." 1773). In their appeal, the Mitchells argued that they were separate persons (Admin Rec. 1774). Their appeal was denied.

Co. v. United States Dep't of Agric, 123 F. Supp. 2d 625 (M.D. Ga. 2000). In *Bateman,* the owners of two farms received disaster relief funds, despite the fact that they leased their land out and were not engaged in any farming operations. The FSA attempted to collect the disaster relief funds that had been erroneously disbursed and concluded that the two farm owners were jointly and severally liable for repayments on the funds. *Id.* at 628. The court found that imposition of the joint and several liability provision was appropriate because the owners applied for federal assistance on the same application as the lessee, becoming "one, joint entity requesting federal funding." *Id.* at 636. Thus, the court concluded, the farm owners did not "exercise separate responsibility" for the farming interests and were not "separate persons" under 7 C.F.R. § 1400.3(b) (def. of *person* (2)(ii)). *Id.* Because they were not separate persons under 7 C.F.R. § 1400.3(b), they could be held jointly and severally liable for one another's debts. *Id; see also Logan Farms, Inc. v. Espy,* 886 F. Supp. 781, 793 (D. Kan. 1995) (construing 7 C.F.R § 795.20, another USDA regulation allowing for the imposition of joint and several liability, and concluding that the NAD did not err when it determined farm owner and lessee were "one person").

The Mitchells attempt to distinguish *Bateman* on the ground that, unlike the plaintiffs in that case, the Mitchells were prejudiced by the amount of time that lapsed between the initial finding of liability and the later finding of joint and several liability. In *Bateman,* the FSA waited nearly twenty-one months before notifying the plaintiffs of the initial adverse decision that had been rendered against them and declaring them ineligible for benefits they had already received. *Bateman,* 123 F. Supp. 2d at 635. The *Bateman* plaintiffs challenged the decision on the basis that the FSA had violated 7 U.S.C. § 6994, which provides: "Not later than 10 working days after an adverse decision is made that affects the participant, the Secretary shall provide the participant with written notice of such adverse decision and the rights available to the participant under this subchapter or other law for the review of such adverse decision." 7 U.S.C. § 6994. The court concluded that although the FSA had not notified the plaintiffs of the decision within ten days, as required by the statute, there was no legal basis for dismissing the case based on the FSA's failure to follow the ten-day rule. Moreover, the court stated,

the plaintiffs were not prejudiced because the FSA's delay allowed them to keep the improperly obtained money for an extended period of time without paying interest. *Bateman,* 123 F. Supp. 2d at 635.

In the current case, the Mitchells do not contend that the ten-day provision in 7 U.S.C. § 6994 applies to the finding of joint and several liability. Instead, the Mitchells argue that they were prejudiced by the significant amount of time that elapsed between the initial finding of liability, in 1998, and the finding of joint and several liability in 2002. They also contend that they were prejudiced by the NAD Director's determination that they could not appeal the imposition of joint and several liability.

The Mitchells do not point to any statutory or judicial authority indicating that the USDA's interpretations of its own regulations violated a federal statute or the federal Constitution. In light of the NAD determination, in 1999, that the Mitchells acted as "one person" when they rearranged the FarmPro loan funds, joint and several liability is appropriate under 7 C.F.R. § 1400.7. The Court is not persuaded by the Mitchells' argument that only people who fall into the categories enumerated in subpart B of 7 C.F.R. § 1400 may be considered "one person" for purposes of joint and several liability. Nothing in the regulation indicates that subpart B is comprehensive in that respect. Given the substantial deference that the Court must afford the agency's interpretation of the regulations, the Court cannot conclude that the Agency's interpretation was plainly erroneous or inconsistent with the regulation.

Similarly, the Court must defer to the NAD Director's determination that the decision to impose joint and several liability was "a matter of general applicability" and therefore not appealable. The Court is not aware of any authority indicating that a finding of joint and several liability is not a matter of general applicability, and the Plaintiffs do not point to any such authority. Nor is the Court convinced that any prejudice caused by the delay in notifying the Mitchells of the joint and several liability was substantial enough to warrant overturning the NAD Director's determination. Marvin and Marlene Mitchell do not state how they were prejudiced by the delay, and Maurice Mitchell, Sr., states only that his ability to seek contribution from Marvin and Marlene Mitchell, who have filed for bankruptcy, has been prejudiced. While the Court is sympathetic to the Mitchells' frustration at being notified of their joint

and several liability several years after the initial finding that they improperly received farm payments, it would be inappropriate for the Court to overrule the NAD Director's determination in the absence of any authority indicating that the NAD decision violated the federal Constitution or a federal statute, or that the decision was plainly erroneous or inconsistent with the applicable regulations. *See Coal. for Fair and Equitable Reg. of Docks on Lake of the Ozarks,* 297 F.3d at 778. Furthermore, the regulation imposing joint and several liability predates the initial finding of liability against the Mitchells, and they arguably could have anticipated that the regulation would apply to them. For the reasons discussed above, the NAD Director's determination that Maurice Mitchell, Sr., Marvin Mitchell, and Marlene Mitchell are jointly and severally liable for any liability arising from the 1998 and 1999 proceedings is AFFIRMED.

IT IS SO ORDERED.

FARM SERVICES ACT

DEPARTMENTAL DECISIONS

In re: CARLA BUTLER.
FSA Docket No. 05-0001.
Decision and Order.
Filed August 9, 2005.

FSA – Salary Offset - Farm service loan – Default – Deficiency -Liability of spouse – Conversion of sale proceeds.

Danny L. Woodyard, for Complainant.
Respondent - Pro Se.
Decision and Order by Administrative Law Judge Peter Davenport.

DECISION

This matter is before the Administrative Law Judge upon the Petition of Carla Butler who seeks review of a proposed offset of her federal salary. A telephonic hearing was held on June 14, 2005. The Petitioner, Carla Butler, who is not represented by counsel, participated *pro se*. Farm Services Agency, (hereafter "FSA") the Department of Agriculture agency that initiated the offset was represented by Danny L. Woodyard, Esquire, Office of General Counsel, United States Department of Agriculture, Little Rock, Arkansas. Following the telephonic hearing, FSA submitted additional documentation addressing the matters raised during the hearing. The additional documentation was provided to Ms. Butler for comment and she has responded and included additional documentation.

The issues before me are whether the Petitioner, a federal employee, owes a debt to the Respondent, whether the debt is eligible to be the subject of an offset, and if so, the amount of the debt. Once the amount of the debt is determined, the Administrative Law Judge is also required to determine the percentage of disposable pay to be deducted in satisfaction of the debt.

The obligation in this case was created when the Petitioner Carla Butler and her husband Danny Butler applied for and received a loan in the amount of $67,500.00 from which $50,331.00 was used to purchase

cattle and the remaining $17,169.00 was used to purchase farm equipment. The Butlers both executed and delivered to FSA a promissory note dated March 24, 2000 which was to be repaid over a seven year term. The note was secured by the cattle and equipment purchased with the loan proceeds and by a second lien on a 110 acre farm. Attachment A to FSA Answer to Petition.

During the years 2000, 2001 and 2002, Danny Butler sold the cattle that were security for the FSA loan and failed to account for the proceeds. He was charged with criminal conversion, a violation of 18 U.S.C. § 658 in Case No. 2:02CR43PG in the United States District Court for the Southern District of Mississippi. Pursuant to his plea of guilty, on October 9, 2003, he was sentenced to three years probation and to pay restitution of $47,543.38. Paragraph 2 and Attachment B, Answer of FSA; Attachments A, B and D1 to FSA Report and Memorandum.

As previously noted in my Order entered on June 15, 2005, Carla Butler has advanced five arguments in opposition to the proposed offset of her federal salary. Initially, she asserts that collection of the restitution imposed against her husband in a related criminal proceeding is sufficient, as the amount of restitution represented the net value owed after deducting the value of the farm equipment at the time of the criminal proceedings.

Secondly, she alleges that she and her husband were told that if her husband entered into a plea agreement, recourse on the amount owed would be sought only against her husband.

Third, she questions whether FSA can "legally" offset her salary.

Her fourth contention is that if FSA can in fact "legally" offset her salary, she feels a lesser amount would be appropriate.

Lastly, she questions the amount of the debt.

Ms. Butler's third argument will be addressed first. Her argument that FSA cannot "legally" offset her salary is without merit. The statutory basis for offsetting the salary of a federal employee is found in 5 U.S.C. § 5514:

> (a)(1) When the head of an agency or his designee determines that an employee.... is indebted to the United States for debts to which the United States is entitled to be repaid at the time of the

> determination....the amount of indebtedness may be collected in monthly installments, or at officially established pay intervals from the current pay account of the individual....The amount deducted for any period may not exceed 15 percent of disposable pay....

Before an offset can be effectuated, the statute requires notice to the employee and an explanation of the employee's rights which include the right to inspect and copy Government records relating to the debt, the opportunity to enter into a written agreement to repay the debt according to a mutually agreed upon schedule and an opportunity for a hearing on the determination of the agency concerning the existence or amount of the debt, and in the case of an individual whose repayment schedule is established other than by a written agreement, upon the terms of the repayment schedule. 5 U.S.C. § 5514 (a)(2).

The implementing regulations are found in 7 C.F.R. Subpart C §§ 3.51 *et seq*. and contain specific requirements for the petition for a hearing, direct that the hearings be conducted by an appropriately designated hearing official upon all relevant evidence and place the burden of proof upon the agency to prove the existence of the debt and upon the employee for the ultimate burden of proof once the debt is established.

During the telephonic hearing, Ms. Butler acknowledged signing the loan and related security documents, thereby obviating the necessity of further proof as to the existence of the original debt. Notice of the intended offset of her federal salary was given to Carla Butler in a letter dated March 16, 2005 which was sent by certified mail. No postal receipt appears in the file; however, a handwritten entry indicates that her "petition" for a hearing dated April 15, 2005 was received by facsimile transmission on April 19, 2005 and the original which appears in the file was hand delivered on April 29, 2005 according to the date stamp. As there is no evidence of the date of the employee's receipt of the letter of March 16, 2005, her petition will be considered timely filed.

Although Ms. Butler has admitted executing the documents giving rise to the debt, she has asserted affirmative defenses in her first two arguments against collection from her, namely that the restitution judgment against her husband in the criminal conversion case acted to bar collection action against her and secondly that she (and her husband)

were told that if he entered into a plea agreement, recourse would be sought only against him.

The evidence before me does in fact show that only Danny Butler was charged with a criminal offense and the restitution judgment was entered only as to him. Carla Butler was released from the indictment and was neither charged with any criminal offense nor is she responsible for the restitution which was ordered paid by her husband. Consistent with the restitution judgment, FSA did create a judgment account in the amount of $47,443.38, representing the unpaid balance of the loan of $62,444.38 as of October 9, 2003 less the estimated $15,000.00 value of the then unliquidated collateral. This accounting entry does not operate to extinguish the liability owed by the Butlers, but rather merely identifies the amounts being paid as restitution.

While Ms. Butler may have wishfully assumed that the discussions releasing her from further liability encompassed both the criminal liability (which was borne only by her husband) as well as the remaining civil liability, the evidence in the file more strongly supports FSA's position that release of only the criminal liability was contemplated. No written agreement affecting the civil liability has been produced and the position of the United States Attorney's Office is clearly set forth in a Memorandum dated December 20, 2004 addressed to John S. Porter, Farm Loan Chief, Mississippi State FSA Office. It notes that "Mrs. Butler was released from the indictment and was not included as a defendant in the criminal restitution judgment. If she is still a debtor on a note held by the agency, you are certainly free to offset her salary." Attachment E to FSA Answer to the Petition for Review. The Memorandum goes on to request reporting of any amounts received by reason of the offset so that the restitution balance could be adjusted to reflect the payments. Accordingly, Ms. Butler's first two arguments cannot be accepted and will not shield her from civil liability on the unpaid balance owed to FSA.

The amount of the debt still must be determined. Ms. Butler indicated that as part of the criminal proceedings, a representative from FSA valued the equipment in the possession of the Petitioner and her husband as being $15,000.00, leaving $47,443.38 as the amount of the criminal conversion. By her account, that the equipment was valued in August of 2003, but was not sold until March of 2005 and during the period of

delay, she had received favorable offers to purchase certain of the equipment, but was not allowed to liquidate the equipment even with the understanding that the proceeds would go directly to FSA. Her position is that the ensuing delay in liquidation caused depreciation in the value of the equipment which resulted in diminished proceeds when the property was ultimately sold. Although the affidavit of Randy M. Saxon (Exhibit 1 to Agency's Report and Memorandum) indicates that he does not remember making a valuation of the chattel property, the Presentence Investigation Report[1] prepared by the United States Probation Office contains information (credited to FSA Loan Officer Rand Saxon) that the fair market value of the equipment as of February 2002 was "about $15,000.00."[2] Attachment to Petitioner's Response to Agency's Report and Memorandum. As I find any valuation made by FSA was used only to establish the dollar amount of the criminal conversion as required by the Sentencing Guidelines in the sentencing process and in determining the appropriate amount of restitution, it will not preclude collection of the civil liability from the actual loss suffered by FSA.

Ms. Butler's position that FSA was responsible for the delay in liquidating the equipment is disputed. The affidavit of Randy Saxon, the e-mail from Joe Williams and the affidavits of Steven L. Wade and Leonard A. Beatty are consistent in presenting a picture of less than full cooperation from the Butlers.[3] Accordingly, FSA's actual loss will be used in computing the outstanding debt.

The evidence in the file reflects that the original debt of $67,500.00 was reduced by a single payment by the Butlers made on October 22, 2001 in the amount of $12,526.00. Other than that payment and the net proceeds of $7,395.23 from the sale of the equipment, there is no

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[1] Paragraph 28 of the Presentence Investigation Report

[2] The sale of the equipment brought $8,525.00. From the gross proceeds, commission of $689.00 and hauling charges of $200.00 were deducted by the auction company. Administrative charges of $240.77 were also deducted, leaving $7,395.23 applied to the outstanding loan balance.

[3] While doubt may be cast upon the affidavit of Randy Saxon by the Presentence Investigation Report as to whether he "valued" the equipment, the other portions of his affidavit are corroborated by Joe Williams, Steven L. Wade and Leonard A. Beatty as well as the case note entries attached as part of the FSA Report and Memorandum.

evidence of further payments being made. As of March 16, 2005, the outstanding balance was $61,794.46, together with interest accruing from and after that date. [4]

Although the Petitioner has asked that FSA consider a lesser percentage than the 15% proposed both in her Petition and during the telephone conference, she has introduced no evidence which upon which a lesser percentage would be warranted.

Accordingly, the following Findings of Fact and Conclusions of Law will be entered.

FINDINGS OF FACT

1. The Petitioner, Carla Butler and her husband, Danny Butler, applied for and received a loan from FSA in the amount of $67,500.00 and on March 24, 2000, in consideration of the loan executed and delivered to FSA a promissory note and security agreement.

2. The Petitioner is an employee of the United States Postal Service and as such is an individual whose salary is subject to federal offset.

3. The Petitioner was given notice of the proposed offset of her federal salary and the notice dated March 16, 2005 is in full compliance with the statutory requirements of 5 U.S.C. § 5514 and the implementing regulations.

4. Actions by the Butlers in failing to voluntarily liquidate the equipment collateral and having all of the equipment readily available contributed to any delay in liquidation of the farm equipment.

5. The Petitioner is currently indebted to FSA in the amount of $61,794.46 together with accrued interest from and after March 16, 2005.

CONCLUSIONS OF LAW

1. By executing the promissory note in the amount of $67,500.00

[4] For accounting purposes, FSA created a judgment account (Loan 44-02) for the restitution payments and administratively reduced the original loan (Loan 44-01) by the amount of the restitution ordered to be paid. The resulting balance on Loan 44-01 was then calculated to be $19,751.79 with a daily accrual rate of $3.7880. Although it appeared that FSA contemplated collecting only Loan 44-01 as recomputed from Carla Butler, FSA is not precluded from collecting the entire outstanding deficiency from either or both of the borrowers.

dated March 24, 2000 to FSA, Carla Butler is a joint obligor for any outstanding balance owed to FSA.

2. Carla Butler, as an employee of the United States Postal Service, is an employee against whom an offset of her federal salary may be effected.

3. The notice of proposed offset dated March 16, 2005 complied with all statutory and regulatory requirements for offsetting her salary.

4. Neither the discussions prior to the entry of a guilty plea by Danny Butler nor the restitution judgment act to preclude imposition of civil liability on Carla Butler as a joint obligor of the debt owed to FSA.

5. The amount owed to FSA as of March 16, 2005 is $61,794.46 together with interest accruing from and after that date.

6. FSA is entitled to offset 15% of the Petitioner's disposable federal salary until the same shall be paid in full.

Copies of this Decision shall be served on the parties by the Hearing Clerk's Office.

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In re: RICHARD L. BLACKWOOD.
FSA Docket No. 05-0002.
Decision and Order.
Filed October 25, 2005.

FSA –Default, FSA loan – Salary offset – Co-Signer.

Kimble J. Hayes, for Complainant
Respondent, Pro Se.
Decision and Order by Administrative Law Judge Peter Davenport.

DECISION

This matter is before the Administrative Law Judge upon the Petition of Richard L. Blackwood who seeks review of a proposed offset of his federal salary. A telephonic hearing was held on September 15, 2005. The Petitioner, Richard L. Blackwood, who is not represented by counsel, participated *pro se*. Farm Services Agency, (hereafter "FSA") the Department of Agriculture agency that initiated the offset was

represented by Kimble J. Hayes, Farm Loan Chief, Farm Services Agency, United States Department of Agriculture, Morgantown, West Virginia. Following the telephonic hearing, the Petitioner was given time to submit additional documentation addressing the matters raised during the hearing. The additional documentation was provided to FSA and they have responded.

The issues before me are whether the Petitioner, a federal employee, owes a debt to the Respondent, whether the debt is eligible to be the subject of an offset, and if so, the amount of the debt. Once the amount of the debt is determined, the Administrative Law Judge is also required to determine the percentage of disposable pay to be deducted in satisfaction of the debt.

The underlying obligation in this case arises from a loan made through Farmers Home Administration (now FSA) dated September 19, 1997 to Black Bear Cattle Co., a West Virginia corporation of which the Petitioner was an officer. The loan was for operating expenses and was in the amount of One Hundred Fifty Thousand Eight Hundred Fifty-One Dollars and Seventy-One Cents ($150,851.71).[1] The loan documents were executed by Steven R. Johnston, the corporation's President, Richard L. Blackwood, its Treasurer and Secretary, by Steven R. Johnston and Richard L. Blackwood, both individually.

The Petitioner does not deny execution of the note but contests the amount alleged due. He alleges that the dispute as to amount is due to the lack of servicing and failure to follow proper procedures on the part of Bank of Greenville and Farm Services Agency. He also argues that 7 C.F.R. § 1951.111 precludes salary offset as his federal salary was identified on the farm and home plan to pay other expenses and not farm related expenses, alleges that FSA failed to provide him a copy of "all records and related correspondence" as requested free of charge and that because the timelines set forth in 7 C.F.R. § 1951.111(e)(11) have not been met the salary offset should be waived.

Heads of agencies are mandated by the Federal Debt Collection Act, 31 U.S.C. § 3711, to "take all appropriate steps to collect [a delinquent]

[1] The Real Estate Deed of Trust included as part of the documentation submitted with the file reflects that two loans were made on September 19, 1997. In addition to the loan at issue in this action, there was an additional loan in the amount of $24,389.40.

debt" including "Federal Salary Offset." The statutory basis for offsetting the salary of a federal employee is found in 5 U.S.C. § 5514:

> (a)(1) When the head of an agency or his designee determines that an employee.... is indebted to the United States for debts to which the United States is entitled to be repaid at the time of the determination....the amount of indebtedness may be collected in monthly installments, or at officially established pay intervals from the current pay account of the individual....The amount deducted for any period may not exceed 15 percent of disposable pay.

Before an offset can be effectuated, the statute requires notice to the employee and an explanation of the employee's rights which include the right to inspect and copy Government records relating to the debt, the opportunity to enter into a written agreement to repay the debt according to a mutually agreed upon schedule and an opportunity for a hearing on the determination of the agency concerning the existence or amount of the debt, and in the case of an individual whose repayment schedule is established other than by a written agreement, upon the terms of the repayment schedule. 5 U.S.C. § 5514 (a)(2).

The implementing regulations are found in 7 C.F.R. Subpart C §§ 1951.101 *et seq*. and contain specific requirements for the petition for a hearing, direct that the hearings be conducted by an appropriately designated hearing official upon all relevant evidence and place the burden of proof upon the agency to prove the existence of the debt and upon the employee for the ultimate burden of proof once the debt is established.

The file reflects that the procedural prerequisite of notice was properly given by letter dated November 8, 2004. While the Petitioner complains that he was not provided with all of the documents he requested free of charge, it is clear that by letter dated December 17, 2004, he was provided copies of pertinent documents, afforded an opportunity to inspect his complete file[2] upon notice so that arrangements could be made and assured that every effort would be

[2] According to the Agency Response, the Petitioner's file consists of 9 separate files over 12 inches thick.

made to provide any document relating to the existence or non-existence of the debt. As 7 C.F.R. § 1951.111(f) expressly makes reference to costs of copies, his complaint concerning not being provided material without cost beyond what was provided (given the size and volume of material contained in the complete file) is without merit. Similarly, although the Petitioner indicates that amount of the debt is disputed due to lack of servicing and failure to follow proper procedure, no specific deficiencies have been raised or documented.

The Petitioner next asserts that the following language contained in 7 C.F.R. § 1951.111 precludes salary offset in his case:

In addition, for Farm Loan Program direct loans, salary offset will not be instituted if the Federal salary has been considered on the Farm and Home Plan, and it was determined the funds were to be used for another purpose other than payment on the USDA Agency loan.

The Farm and Home Plan is a financial and cash flow statement used for active loans. In this case, the loan was made in the name of Black Bear Cattle Company and the Petitioner's salary was not considered in the corporation's plan.[3] Accordingly, I find that the cited language does not apply in this case.

The Petitioner suggests that because the regulatory timeline set forth in 7 C.F.R. § 1951.111(e)(11) was not met in this case that the salary offset should be waived. For some years prior to 2005, USDA salary offset cases were sent pursuant to a contractual arrangement to the Veterans Administration for decision. Sometime near the end of 2004, the Veterans Administration decided to terminate their agreement to continue hearing the cases and the cases were referred to Administrative Law Judges with the Department of Agriculture[4]. While the timeline has not been met in this case, not all of the delay in reaching a decision was caused by FSA as some difficulty was encountered by the Judge's staff in securing the Petitioner's availability. It is however clear that the Petitioner has not been prejudiced by the passage of time as, in fact, the

[3] Even were this not the case, Farm Service Agency indicates that it is the interpretation of the agency that this reference only applies to borrowers that have active plans (for the current year) with the agency. Mr. Blackwood has no current plan.

[4] 7 C.F.R. § 1951.111(g) indicates that the hearing officer must be a USDA Administrative Law Judge or a person who is not a USDA employee.

additional time taken to reach the decision has operated to the advantage of the Petitioner by delaying implementation of the offset. Waiver of the offset under these circumstances is not appropriate.

The evidence of record establishes that the Petitioner is indebted to the United States of America in the amount of One Hundred Six Thousand, Eight Hundred Ninety-Two Dollars and Seventy-Three Cents ($106,892.73) as of August 10, 2005, representing a principal balance of $95,128.01, interest accrued through August 10, 2005 and additional interest at the annual rate of 5.00% accruing at the rate of $13.0312 per day.

Accordingly, the following Findings of Fact and Conclusions of Law will be entered.

FINDINGS OF FACT

1. Black Bear Cattle Company, a West Virginia corporation, applied for and received a loan from Farmers Home Administration (now FSA) in the amount of $150,851.71 and on September 19, 1997 in consideration of the loan, the corporation by and through its corporate officers, including the Petitioner, executed and delivered to FSA a promissory note and Real Estate Deed of Trust. The Promissory Note was also executed by the Petitioner and the President of the corporation individually.

2. The Petitioner is an employee of the United States Department of Agriculture and as such is an individual whose salary is subject to federal offset.

3. The Petitioner was given notice of the proposed offset of his federal salary and the notice dated November 8, 2004 is in full compliance with the statutory requirements of 5 U.S.C. § 5514 and the implementing regulations.

4. The Petitioner is currently indebted to FSA in the amount of $106,892.73 together with accrued interest from and after August 10, 2005, with additional interest accruing at the rate of $13.0312 per day.

CONCLUSIONS OF LAW

1. By executing the promissory note in the amount of $150,851.71 dated September 19, 1997 to Farmers Home Administration (now FSA),

Richard L. Blackwood is a joint obligor for any outstanding balance owed to FSA.

2. Richard L. Blackwood, as an employee of the United States Department of Agriculture, is an employee against whom an offset of his federal salary may be effected.

3. The notice of proposed offset dated November 8, 2004 complied with all statutory and regulatory requirements for offsetting his salary.

4. There are no legal restrictions to the debt within the meaning of 7 C.F.R. §1951.111(c)(2).

5. The provisions contained in 7 C.F.R. § 1951.111 precluding the use of salary offset in cases where the Federal salary has been considered in the Farm and Home Plan and it was determined the funds were to be used for a purpose other than payment on the USDA Agency loan are not applicable under the facts of this case.

6. The amount owed to FSA as of August 10, 2005 is $106,892.73 together with interest accruing from and after that date at the rate of $13.0312 per day.

7. FSA is entitled to offset 15% of the Petitioner's disposable federal pay as defined in 7 C.F.R. § 1951.111(b)(4) until the same shall be paid in full.

Copies of this Decision shall be served on the parties by the Hearing Clerk's Office.

FOOD SAFETY INSPECTION SERVICE

COURT DECISIONS

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA, NATIONAL MEAT ASSOCIATION,v. USDA.*
No. 05-35214, No. 05-35526
Filed July 25, 2005.

(Cite as:143 Fed. Appx. 751).

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RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA, v. USDA
No. 05-35264.
Filed August 17, 2005, Amended.**

(Cite as: 2005 U.S. pp. Lexis 17360, 415 F.3d 1078).

FSIS – BSE- Preliminary injunction, what factors support – Deference to agency actions.

The Appeals court reversed the lower court's finding because it contained legal error by failing to give proper deference to the USDA's findings especially where the agency's decision involves a high level of technical expertise. The lower court listed six reasons for imposing a preliminary injunction. In relying on the experts of the proponent of the preliminary injunction, the lower court put itself in the position of evaluating complex scientific evidence concerning Bovine Spongiform Encephalopathy (BSE) and substituting its judgment for the agency. The agency exercised reasoned analysis in arriving at a specifically tailored partial lifting of the ban on importation of Canadian cattle to the US. While the USDA proposed rule was said to present "low-risk" to beef consumers, the lower court evaluated the catastrophic harm to an single individual contracting the disease as paramount and unworthy of risk taking.

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*See following case which was filed later as amended- Editor

**Reprinted as amended at Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA, 2005 U.S. App. LEXIS 17360 (9th Cir. Mont., Aug. 17, 2005).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDGES: Before: TASHIMA, PAEZ, and CALLAHAN, Circuit Judges. Opinion by Judge A. Wallace Tashima.

OPINION BY:TASHIMA, Circuit Judge:

We must decide whether the district court erred in issuing a preliminary injunction prohibiting the implementation of a regulation of the United States Department of Agriculture ("USDA") permitting the resumption of the importation of Canadian cattle into the United States.

We conclude that it did and therefore reverse the district court.

At the heart of this case lies a relatively new cattle disease caused by the practice of feeding cows, herbivores by nature, the brains and other central nervous system tissues of other cows. Technically known as Bovine Spongiform Encephalopathy ("BSE"), this disease, popularly known as mad cow disease, has spread from farms in England to 25 countries around the world since its discovery in 1986.

As BSE spread throughout the globe during the past 20 years, USDA instituted a policy of barring the importation of ruminants[1] and ruminant products from countries where BSE was known to exist. In a final rule entitled *Bovine Spongiform Encephalopathy: Minimal Risk Regions and Importation of Commodities; Final Rule and Notice*, 70 Fed. Reg. 460 (Jan. 4, 2005) (the "Final Rule"), USDA relaxed this longstanding practice, allowing limited ruminant imports from Canada, despite the fact that two cases of BSE had been found in Canada at the time.

Plaintiff-Appellee, Ranchers Cattlemen Action Legal Fund United Stockgrowers of America ("R-CALF"), successfully blocked the implementation of the Final Rule, convincing the court below to find the rule arbitrary and capricious under the Administrative Procedure Act

[1]Ruminants are hoofed mammals generally defined by their four-chambered stomachs and their practice of chewing a cud consisting of regurgitated, partially digested food. Ruminants include cattle, sheep, goats, deer, giraffes, camels, llamas, and okapi, among others.

("APA"), 5 U.S.C. § 706(2), and to issue a preliminary injunction prohibiting its enforcement. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. United States Dep't of Agric.*, 359 F. Supp. 2d 1058 (D. Mont. 2005) ("*R-CALF I*"). Because we conclude that the district court applied an incorrect legal standard, we reverse.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Bovine Spongiform Encephalopathy

BSE was first diagnosed in England in the late 1980s. This new disease spread rapidly, infecting thousands of English cattle and eventually reaching countries all over the globe. Although the disease has since been largely contained, it continues to persist, and it resides at the center of the current lawsuit.

BSE is a species of Transmissible Spongiform Encephalopathy ("TSE"), a family of degenerative neurological diseases that affects a wide range of animals, including sheep, goats, and deer, as well as humans. Although there remains some dispute, it is widely believed that BSE and other TSEs are caused by prions, abnormally shaped and extremely hardy proteins that were only recently discovered.

TSEs have a debilitating neurological impact on their victims. After an incubation period of months or years, the diseases create myriad tiny holes in the brain, slowly deteriorating their victims' mental and physical abilities until death eventually results. In cattle, BSE has an incubation period of two to eight years, during which time the infected animal shows no outward sign of the illness. Once the disease progresses, however, infected cattle begin showing symptoms within two to three months. These symptoms can include nervousness or aggression, abnormal posture, impaired coordination, decreased milk production, and loss of body condition despite continued appetite.

At the height of the BSE epidemic in the United Kingdom, tens of thousands of cattle were confirmed to have the disease, and by some estimates the number of infected cattle in the United Kingdom may have reached into the millions. All told, there have been more than 187,000

[2] On July 14, 2005, after the completion of briefing and oral argument we issued a stay of the preliminary injunction pending the resolution of this appeal. *See* Fed. R. App. P. 8(a).

confirmed cases of BSE in cattle worldwide, over 95 percent of which have occurred in the United Kingdom.

Epidemiological investigations in England quickly determined that BSE was likely spread through cattle feed that was infected with the BSE agent. The blame for the contaminated feed fell squarely on the practice, common in Europe at the time, of creating high-protein cattle feed through the "recycling" of otherwise unusable cattle parts. This process is known as "rendering," and involves placing animal protein in large tanks and cooking at temperatures high enough to kill most microorganisms.[3] Although the rendering process is able to eliminate most bacterial and viral diseases, the BSE agent is resistant enough to heat and other sterilization processes to withstand the conversion into feed. Infected tissue from a single infected cow, when rendered into cattle feed, could therefore be fed to hundreds of cattle, exposing them all to the possibility of infection.

Several years after the discovery of BSE, the disease became a matter of much more serious concern. In 1996, the British government announced that a new form of TSE in humans, variant Creutzfeldt-Jakob Disease ("vCJD"), was likely caused by human consumption of cattle products that were contaminated with the BSE agent. To date, only approximately 150 cases of vCJD have been identified worldwide, the vast majority of which occurred in England during the height of its BSE epidemic. Although vCJD has been diagnosed in two people in North America, in both cases the disease is believed to have been contracted

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[3]Rendering continues to this day in the United States, where approximately 50 billion pounds of tissue from dead animals are converted into animal feed each year. The breadth of the practice at one Baltimore rendering facility has been reported to include:

> Bozeman, the Baltimore City Police Department quarter horse who died last summer in the line of duty. . . . A baby circus elephant who died while in Baltimore this summer. Millions of tons of waste meat and inedible animal parts from the region's supermarkets and slaughterhouses. Carcasses from the Baltimore zoo. The thousands of dead dogs, cats, raccoons, possums, deer, foxes, snakes, and the rest that local animal shelters and road-kill patrols must dispose of each month.
>
> Van Smith, *What's Cookin?*, Baltimore City Paper, Sept. 27, 1995.

in England; no case of vCJD has ever been linked to North American beef.[4]

Because BSE is a relatively new disease, and because prions are a relatively recent scientific discovery, the state of knowledge surrounding BSE is somewhat incomplete. Efforts to understand the disease fully have been hampered because current testing methodology is not particularly effective in identifying it. No live animal test for BSE exists, meaning that cows must be slaughtered before they can be tested. In addition, the tests that do exist are unable to detect the disease during the vast majority of the time a cow is infected. The earliest point at which current tests can detect the disease is two to three months before an animal starts showing clinical signs of infection. BSE has an incubation period that lasts for four to five years on average, however, during which the animal carries the disease but shows no outward symptoms.

Given these testing limitations, there remain a number of open public health questions surrounding BSE, in particular concerning the means through which the disease can be transmitted. The only documented method of BSE transmission is through the consumption of feed contaminated with the BSE agent. Some research involving both BSE and other TSEs, however, suggests that BSE may be transmitted through means other than contaminated feed. For example, in experiments on sheep, mice, and hamsters, both BSE and scrapie, a TSE disease that affects sheep, were transmitted through whole blood transfusion. At least one case of vCJD is also believed to have been transmitted through human blood transfusion. Other studies have suggested that prions can be exchanged through saliva, while still others suggest that BSE may be transmitted maternally.

Despite the highly infectious nature of the BSE agent, evidence suggests that meat from cows infected with BSE may be safely consumed by humans because BSE does not occur in all parts of its host. Specifically, the BSE agent appears not to exist in muscle tissue of cattle. Rather, the disease is generally confined to the central nervous

[4]The single known case of vCJD in the United States occurred in a Florida woman who was born in England in 1979. It is believed she was exposed to BSE before she moved to the United States in 1992. Similarly, the single case of vCJD in Canada occurred in a man who had stayed in the United Kingdom on multiple trips.

system - the brain, spinal cord, eyes, dorsal root ganglia, and trigeminal ganglia[5] - although it has also been found in the tonsils and distal ilium, a part of the small intestine, of cattle. Research on other TSEs, however, calls into question whether the BSE agent is truly limited to these tissues. Specifically, some research has suggested that sheep infected with scrapie may have prions in their muscle tissue.

Despite the fact that it has only been known to exist for 20 years, the geographic range of BSE is substantial. From England, it has spread to cattle in most of Europe, as well as in the Middle East, Japan, and Canada. 9 C.F.R. § 94.18(a)(1) (2003). As of the date of the district court's opinion, however, BSE had never occurred in a cow native to the United States. That changed on June 24, 2005, when the Secretary of Agriculture announced that a cow in Texas had tested positive for BSE. *Statement by Dr. John Clifford Regarding the Epidemiological Investigation into the recently confirmed BSE case* (June 29, 2005), *available at* http://www.aphis.usda.gov/lpa/issues/bse/bse.html. A subsequent investigation revealed that the cow was born in the United States approximately 12 years ago.

B. United States Regulation of BSE

The federal government has implemented a number of safety measures to minimize the threat of BSE to U.S. citizens and livestock. These precautions consist of an interlocking regulatory framework overseen by three different federal agencies. First and foremost, since 1997, the Food and Drug Administration ("FDA") has overseen a feed ban that prohibits the feeding of ruminant protein to other ruminants. *See* 21 C.F.R. § 589.2000 (2005). Such feed bans are generally the first line of defense against the spread of BSE, and they have been highly effective in other countries. The prevalence of BSE in the United Kingdom, for example, dropped drastically after it implemented its feed ban.

Critics, however, question whether the FDA feed ban is truly

[5]Trigeminal ganglia are clusters of nerve cells connected to the brain that lie close to the exterior of the skull. Dorsal root ganglia are clusters of nerve cells attached to the spinal cord and contained within the bones of the vertebral column.

effective. *See, e.g.*, Thomas O. McGarity, *Federal Regulation of Mad Cow Disease Risks*, 57 Admin. L. Rev. 289, 307 (2005). Given the highly infectious and resilient nature of the BSE agent, these critics argue that the FDA feed ban has "gaps" that could result in the use of feed derived from rendered cattle protein as feed for cattle. For example, cattle are allowed to be fed human "plate waste" from establishments such as amusement parks, despite the fact that this plate waste may contain beef products. In addition, the feed ban allows rendered cattle protein to be fed to non-ruminants, such as pigs and chickens. Thus, BSE could be spread through mislabeled feed or through misfeeding on a farm. Finally, waste from the floor of chicken coops is commonly scooped up and fed to cattle; uneaten chicken feed or chicken droppings that contain the BSE agent could therefore be fed to cattle via this procedure.

An agency within USDA, Food Safety and Inspection Services ("FSIS"), oversees a second line of defense against BSE. FSIS promulgates regulations to ensure that the nation's food supply of meat, eggs, and poultry is safe.
See http://www.fsis.usda.gov/About_FSIS/index.asp. These regulations restrict certain cattle parts from being incorporated into the human food supply. For example, FSIS regulations prohibit the use of "downer" cattle[6] as human food because inability to stand is a common BSE symptom. 9 C.F.R. § 309.2 (2005). FSIS regulations also prohibit those cattle parts that have demonstrated BSE infectivity, known as specified risk materials ("SRMs"), from being used in human food.[7] 9 C.F.R. § 310.22 (2005). Finally, FSIS regulations prohibit certain methods of slaughter and butchering thought to increase the risk of

[6]Non-ambulatory or "downer" cattle are cattle that "cannot rise from a recumbent position or that cannot walk." 9 C.F.R. § 309.2(b) (2005). FSIS banned these cattle from the human food supply because "surveillance data from European countries in which BSE has been detected indicate that non-ambulatory cattle are among the animals that have a greater incidence of BSE than other cattle." *Prohibition of the Use of Specified Risk Materials and Requirements for the Disposition of Non-Ambulatory Disabled Cattle*, 69 Fed. Reg. 1862, 1862 (January 12, 2004) ("*FSIS SRM Rule*").

[7]Because BSE infectivity spreads as a cow ages, current regulations define only the distal ilium and tonsils of all cattle to be SRMs. 9 C.F.R. § 310.22(a) (2005). The brain, spinal cord, and other central nervous system components are only considered to be SRMs in cattle of 30 months of age and older. Id.

contaminating meat with central nervous system tissues.[8]

Another branch of USDA, Animal and Plant Health Inspection Services ("APHIS"), provides the final link in the regulatory framework. APHIS promulgates regulations designed to protect the United States from the introduction of BSE from other countries. To achieve this goal, until the Final Rule was promulgated, APHIS banned the importation of all ruminants and ruminant products from countries where BSE was known to exist. *See* 9 C.F.R. § § 93.401, 94.18 (2003).

APHIS has also been actively involved in the development of international guidelines to fight the spread of BSE. In this role, APHIS works with the Office International des Epizooties ("OIE"), the organization recognized by the World Trade Organization as responsible for the development and periodic review of standards, guidelines, and recommendations with respect to animal health and "zoonoses" (diseases that are transmissible from animals to humans).

C. Factual Background

Early this year, APHIS announced its decision to relax its ban on the importation of ruminants and ruminant products from countries where BSE was known to exist. The genesis of this policy change occurred on May 20, 2003, when a cow in Alberta was diagnosed with BSE. This represented not only the first case of BSE native to North America, but it wreaked havoc on the highly integrated beef market that exists

[8]Specifically, FSIS regulations prohibit the use of "air-injection captive bolt stunning," a process through which a metal bolt and compressed air are driven into the cranium of cattle, because the practice poses a risk of contaminating edible meat with central nervous system tissue. *See* 9 C.F.R. § 310.13(a)(2)(iv)(C) (2005). The regulations also prohibit the use of "Advanced Meat Recovery" systems and the labeling of "mechanically separated beef" as meat. *See FSIS SRM Rule*, 69 Fed. Reg. at 1866. The former "is a technology that enables processors to remove the attached skeletal muscle tissue from livestock bones without incorporating a significant amount of bone or bone product into the final meat product." *Id.*; *see also Meat Produced by Advanced Meat/Bone Separation Machinery and Meat Recovery (AMR) Systems*, 69 Fed. Reg. 1874, 1876 (Jan. 12, 2004). The latter "is a paste-like and batter-like meat product produced by forcing [beef] bones with attached edible meat under high pressure through a sieve." *See* http://www.fsis.usda.gov/oa/pubs/lablterm.htm.

between the United States and Canada. Shortly after the infected cow was announced, then Secretary of Agriculture Veneman issued an Emergency Order adding Canada to the list of regions where BSE was known to exist. *Change in Disease Status of Canada Because of BSE*, 68 Fed. Reg. 31,939 (May 29, 2003). Under the regulations then in effect, all imports of live ruminants or ruminant meat products from Canada were prohibited. *See* 9 C.F.R. § § 93.401, 94.18 (2003).

Beginning in August 2003, the Secretary incrementally began moving to reopen the border to Canadian ruminants and ruminant products and to reestablish the voluminous North American beef trade. On August 8, 2003, the Secretary announced that she would begin allowing certain "low-risk" ruminant products to be imported into the United States from Canada, the most significant of which was "boneless bovine meat from cattle under 30 months of age." *See* Final Rule, 70 Fed. Reg. at 536; USDA News Release No. 0281.03 (Aug. 8, 2003), *available at* http://www.usda.gov/wps/portal.

On November 4, 2003, the Secretary published notice of a proposed rule, seeking to amend the regulations governing the importation of ruminants from countries where BSE is known to exist. *Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities*, 68 Fed. Reg. 62,386 (Nov. 4, 2003). The proposed rule would have allowed the importation of ruminants from countries in a newly created category - "regions that present a minimal risk of introducing [BSE] into the United States via live ruminants and ruminant products." *Id.* The new regulation proposed to designate only Canada as a minimal-risk region. *Id.* The comment period for the proposed rule was set to expire on January 5, 2004. *Id.*

A month and a half after the Secretary published the notice of proposed rule, on December 23, 2003, a cow in Washington State was diagnosed with BSE. *Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities*, 69 Fed. Reg. 10,633 (Mar. 8, 2004). An investigation revealed that the cow was born in Canada and was imported into the United States in 2001. *Id.* at 10,634. Given that the cow was born before Canada's feed ban went into effect in 1997, USDA determined that the likeliest cause of its BSE infection was contaminated feed. *Id.* Nevertheless, in response to this discovery USDA reopened the comment period for its proposed rule for an additional 30 days, extending it until April 7, 2004. *Id.* at 10,633.

On April 19, 2004, USDA moved, without public notice, to expand the types of ruminant products eligible to be imported from Canada.[9] *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. United States Dep't of Agric.*, 2004 U.S. Dist. LEXIS 29218, 2004 WL 1047837 (D. Mont. 2004) ("*R-CALF TRO*"). R-CALF sued to prevent this move, and the district court granted a temporary restraining order on April 26, 2004, barring the Secretary from proceeding with that plan. *Id*.

On January 4, 2005, USDA published its Final Rule. The agency, after having considered 3,379 comments from interested parties, proceeded with its plan to reopen the border to Canadian ruminants and ruminant products. Final Rule, 70 Fed. Reg. at 460, 469. Among other provisions, the Final Rule allowed the importation of Canadian cattle under 30 months of age provided the cattle were immediately slaughtered or fed and then slaughtered.[10] *Id*. at 548. The Final Rule also permitted the importation of beef products from Canadian cattle of all ages. *Id*. at 461, 465. The rule was scheduled to go into effect on March 7, 2005. *Id*. at 460.

At roughly the same time that USDA published its Final Rule, two additional cases of BSE were confirmed in Alberta - one on January 2, 2005, and another on January 11. *Bovine Spongiform Encephalopathy;*

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[9]Specifically, USDA issued a memorandum stating that, effective April 19, 2004, all existing permits to import meat from Canada "will be deemed to cover all edible bovine meat products (bone-in, boneless, ground meat, further processed)," provided each shipment is accompanied by a statement that the meat was processed in "establishments that are certified to FSIS as eligible for export to the United States." *R-CALF TRO*, 2004 U.S. Dist. LEXIS 29218, 2004 WL 1047837 at *2. USDA also published a table identifying "Low Risk Canadian Products." That table included "boneless, bone-in, ground meat, and further processed bovine meat products," bovine tongue, bovine hearts, kidneys, and tripe, and bovine lips." *Id.*

[10]According to *amicus* Pioneer, Inc., a family-owned feedlot, the cattle industry is generally comprised of three parts: ranchers, who breed cattle and grow them until they reach approximately 650 pounds; feedlots, which purchase cattle from ranchers and feed them high protein feed until they reach approximately 1,150 pounds; and meat packers, which purchase cattle from feedlots and process them for human consumption. Thus, the Final Rule allowed Canadian cattle either to be sold to a feedlot for feeding or to be sold directly to a meat packing company for slaughter.

Minimal Risk Regions and Importation of Commodities; Finding of No Significant Impact and Affirmation of Final Rule, 70 Fed. Reg. 18,252, 18,254 (Apr. 8, 2005). One of these cows, like the two previous Canadian cattle diagnosed with BSE, was born before Canada's feed ban; the other, however, was born shortly thereafter. *Id.* at 18,258. Once again, USDA attributed the infections in both cows to contaminated feed manufactured before Canada's feed ban went into effect. *Id.* at 18,255. Nonetheless, USDA indefinitely suspended the implementation of the portion of its Final Rule that permitted the importation of beef products from cattle over 30 months of age.[11] *Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities; Partial Delay of Applicability*, 70 Fed. Reg. 12,112 (Mar. 11, 2005).

D. Procedural History

Six days after USDA published the Final Rule, R-CALF filed this action, seeking to enjoin the rule's implementation.[12] In its complaint, R-CALF alleged that USDA's rulemaking violated the Administrative Procedures Act ("APA"), the Regulatory Flexibility Act ("RFA"), and the National Environmental Policy Act ("NEPA"). On February 1, 2005, three weeks after filing its complaint, R-CALF filed its application for a preliminary injunction to enjoin the Final Rule *pendente lite*.

On March 2, 2005, the district court issued a preliminary injunction, barring USDA from implementing its Final Rule. *See R-CALF I*, 359 F. Supp. 2d at 1074. The district court's primary reason for enjoining the Final Rule was its finding that the rule was arbitrary and capricious in violation of the APA. *Id.* at 1063-69; *see also* 5 U.S.C. § 706(2). The district court's overarching concern was that USDA, "ignoring its statutory mandate to protect the health and welfare of the people of the

[11]As mentioned above, an additional cow in the United States tested positive for BSE on June 24, 2005. Because this cow was approximately 12 years old, USDA has attributed its infection to contaminated feed it was exposed to before the U.S. feed ban came into effect.

[12]R-CALF describes itself as a non-profit cattle association that represents U.S. "cattle producers, cattle backgrounders, and independent feedlot owners" on issues concerning international trade and marketing.

United States, established its goal of re-opening the border to the importation of live beef from Canada and thereafter attempted to work backwards to support and justify this goal." *R-CALF I*, 359 F. Supp. 2d at 1066. Given the agency's "preconceived intention, based upon inappropriate considerations, to rush to reopen the border regardless of uncertainties in the agency's knowledge," the district court found the Final Rule to be arbitrary and capricious. *Id.* at 1074.

The district court specifically based its determination that the Final Rule was arbitrary and capricious under the APA on six independent grounds. First, the court found that USDA failed adequately to quantify the risk of Canadian cattle to humans, instead relying on a qualitative statement that the risk was "low" or "very low." *Id.* at 1064-65. Without a quantitative assessment, the district court felt that it "had no way of assessing the merits of the USDA's actions." *Id.* at 1065.

Second, the district court held that USDA had erroneously calculated the prevalence of BSE in the Canadian herd. *Id.* at 1065-66. USDA had divided the number of cases in the last 12 months (two) by the total size of the Canadian herd over 24 months of age (5.5 million) to arrive at a prevalence rate of approximately 0.4 cases per million head of adult cattle. Final Rule, 70 Fed. Reg. at 464. The district court rejected this calculation, however, and instead adopted R-CALF's measure of 5.5 cases per million head.[13] *R-CALF I*, 359 F. Supp. 2d at 1066.

Third, the district court found that USDA's reliance on the Canadian feed ban was unjustified. *Id.* at 1066-68. The court found that the science was uncertain in this area and that methods of BSE transmission other than consumption of contaminated feed may exist. *Id.* at 1066. It also found that the feed ban had not been in place an adequate amount of time, and that it was not fully effective because it allowed both bovine blood and rendered animal fat in cattle feed. *Id.* at 1067-68.

Fourth, the court found that USDA's reliance on the removal of SRMs

[13]To achieve the rate of 5.5 cases per million head, R-CALF calculated the prevalence of BSE among tested cattle in Alberta (one in 3,000) and divided it by 60, the assumed amount by which tested cattle will have BSE over untested cattle (because tested cattle, which show outward signs of the disease, are more likely to have BSE than the population at large). The result is one infected cow per 180,000 head of cattle, or approximately 5.56 per million.

to protect human health was also unjustified. *Id.* at 1068. According to the district court, evidence indicated that "it is no longer reasonable to presume that there is no risk of exposure to BSE infectious agents once an SRM removal requirement is in place." *Id.*

Fifth, the district court found that USDA's failure to ban the importation of pregnant cows was arbitrary and capricious. *Id.* at 1069. According to the district court, BSE may be transmitted both maternally and through fetal bovine blood. *Id.* Thus, because the Final Rule did not require heifers to be pregnancy checked as a condition of entry into the United States, calves born to imported cattle could become "a vector for BSE infection in the U.S." *Id.*

Finally, the district court found that USDA had failed to respond adequately to comments recommending mandatory BSE testing for Canadian cattle. *Id.* Because testing can identify a BSE infection up to three months before the cow shows outward signs of the disease, the court found that testing would be useful because it would "detect some cases of BSE that would otherwise go undetected." *Id.* In light of the "irreparable injury" that it believed a case of BSE would cause, the court viewed USDA's actions as arbitrary and capricious. *Id.*

In addition to finding the Final Rule arbitrary and capricious under the APA, the district court also relied on two other bases for enjoining its implementation. First, the court held that USDA had failed to satisfy NEPA's procedural requirements, both by failing to make its environmental assessment available for public review and comment before the Final Rule was published, and by failing to prepare an environmental impact statement. *Id.* at 1069-71. Second, the court concluded that USDA had violated the RFA by failing to consider whether product labeling or voluntary BSE testing would have mitigated the Final Rule's impact on small businesses. *Id.* at 1071-73.

Based on the above, the district court found that R-CALF had raised "very serious questions on the merits." *Id.* at 1074. The district court also found that R-CALF, and the American public, would be irreparably harmed by allowing the importation of Canadian beef. *Id.* at 1073-74. The court specifically found that the introduction of BSE into the United States would cause irreparable harm to the American public because of the increased risk of vCJD to consumers of beef. *Id.* at 1073. Further, it found that the association with Canadian beef would stigmatize all U.S. meat, causing a "serious, irreparable impact on ranchers in the U.S.

and the U.S. economy." *Id*. Finally, the district court found that the NEPA violation, in and of itself, would cause irreparable harm and warranted preliminary injunctive relief. *Id*.

In light of its determination that R-CALF was likely to succeed on the merits, and that the balance of hardships tipped in R-CALF's favor, the district court issued a preliminary injunction barring implementation of the Final Rule. *Id*. at 1074. Two weeks later, USDA filed this timely appeal.

II. ANALYSIS

"A district court's order granting a preliminary injunction is subject to limited review." *Price v. City of Stockton*, 390 F.3d 1105, 1109 (9th Cir. 2004). We will reverse "only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id*. A reviewing court should generally refrain from reviewing "the underlying merits of the case." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). Rather, "as long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003).

The standard for granting a preliminary injunction balances the plaintiff's likelihood of success against the relative hardship to the parties." *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). This circuit has recognized two different sets of criteria for preliminary injunctive relief. Under the traditional test, a plaintiff must show: "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005). The alternative test requires that a plaintiff demonstrate "*either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of

hardships tips sharply in his favor." *Id.* (emphasis in original). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum." *Id.*

As we conclude below, the district court's finding that R-CALF had a strong likelihood of success on the merits was premised on legal error. Further, we disagree with the district court's assessment of the irreparable harm threatened by the Final Rule. Thus, we hold that a preliminary injunction was unwarranted in this case.

A. Likelihood of Success on the Merits

The district court identified three distinct grounds for its finding that R-CALF had a strong likelihood of success on the merits: (1) that the Final Rule was arbitrary and capricious under the APA; (2) that USDA had failed to satisfy NEPA's procedural requirements; and (3) that USDA had failed adequately to consider the Final Rule's effect on small businesses, as required by the RFA. None of these grounds withstands scrutiny.

1. Administrative Procedure Act

The APA provides that a court, when reviewing agency action, shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. An agency's action violates this standard if

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

City of Sausalito v. O'Neill, 386 F.3d 1186, 1206 (9th Cir. 2004) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)).

Regulations are presumed to be valid, and therefore review is deferential to the agency. *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003). All that is required is that the agency have "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Id.* Further, "the court is not empowered to substitute its judgment for that of the agency." *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001). Deference to the informed discretion of the responsible federal agencies is especially appropriate, where, as here, the agency's decision involves a high level of technical expertise. *Id.*

While review is therefore deferential, it is not toothless; courts must conduct a "thorough, probing, in-depth" inquiry into the validity of regulations. *Nat'l Ass'n of Homebuilders*, 340 F.3d at 841. This inquiry must be "searching and careful" to ensure that the agency decision does not contain a clear error of judgment. *City of Sausalito*, 386 F.3d at 1206; *Nat'l Ass'n of Homebuilders*, 340 F.3d at 841. In performing this inquiry, the court is not allowed to uphold a regulation on grounds other than those relied on by the agency. *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1236 ("The reviewing court may not substitute reasons for agency action that are not in the record.").

The district court failed to abide by this deferential standard. Instead, the district court committed legal error by failing to respect the agency's judgment and expertise. Rather than evaluating the Final Rule to determine if USDA had a basis for its conclusions, the district court repeatedly substituted its judgment for the agency's, disagreeing with USDA's determinations even though they had a sound basis in the administrative record, and accepting the scientific judgments of R-CALF's experts over those of the agency. For example, in assessing the prevalence of BSE in the Canadian herd, the district court rejected USDA's calculation and accepted the prevalence rate provided by R-CALF's expert, completely without explanation. *R-CALF I*, 359 F. Supp. 2d at 1066.

The district court's lack of deference may be attributable to its misreading of the Animal Health Protection Act ("AHPA"), 7 U.S.C. § 301 *et seq.*, the statute under which the Final Rule was promulgated.

Based on the AHPA's statement of congressional findings, 7 U.S.C. § 8301, the district court appears to have imposed a requirement on USDA that its Final Rule present no additional risk to human or animal health.[14] *See R-CALF I*, 359 F. Supp. 2d at 1065 ("The [AHPA] directs the Secretary of the USDA to protect the health and welfare of the people of the United States."). The AHPA is, in fact, based upon congressional findings that "the prevention, detection, control, and eradication of diseases and pests of animals are essential to protect . . . animal health [and] the health and welfare of the people of the United States." 7 U.S.C. § 8301(1). The provision of the Act under which the Final Rule was promulgated, however, states only that "the Secretary [of Agriculture] may prohibit or restrict . . . the importation or entry of any animal, article, or means of conveyance . . . if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into or dissemination within the United States of any pest or disease of livestock." 7 U.S.C. § 8303(a)(1).

The AHPA was only recently enacted, in 2002, and, as of yet, there are few reported cases interpreting its provisions. Nonetheless, the statute's terms indicate a congressional intent to give the Secretary wide discretion in dealing with the importation of plant and animal products. More to the point, the AHPA does not impose any requirement on USDA that all of its actions carry no associated increased risk of disease. Indeed, the statute's use of the word "may" suggests that the Secretary is given discretion over such decisions as whether to close the borders.

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[14]While the district court never explicitly stated that it was imposing such a "zero-risk" requirement, its reasoning suggests that it did. For example, the court faulted the agency for "presuming that there is no risk of exposure to BSE infective agents once an SRM removal requirement is in place." *R-CALF I*, 359 F. Supp. 2d at 1068. Similarly, the court found the Final Rule arbitrary and capricious because the agency refused to act to remove the "small probability" that BSE could be transmitted from a pregnant Canadian cow to its offspring. *Id.* at 1069.

Indeed, the district court appears to have required USDA to disprove all scientific uncertainty associated with BSE. It noted, for example, that there is no "conclusive scientific proof" that cattle feed is the only method of BSE transmission. *Id.* at 1066. In other areas of the opinion, any level of scientific uncertainty surrounding a USDA decision rendered that decision an "assumption." *E.g.*, *id.* at 1066, 1067, 1068; *see also id.* at 1074 (criticizing USDA for acting despite "uncertainties in the agency's knowledge of the possible impacts on human and animal health").

See, e.g., *United States v. George*, 85 F.3d 1433, 1437 (9th Cir. 1996) (statute's use of term "may" "indicates that we should review a district court's decision . . . for abuse of discretion"). Although sparse, the AHPA's legislative history also supports this view. *See* H.R. Conf. Rep. 107-424, *reprinted in* 2002 U.S.C.C.A.N. 141, 388 (in order to best protect against animal disease, "a regulatory definition of disease should be left to the discretion of the Secretary," which will allow "the agency to have maximum flexibility to focus its resources and respond to new or emerging disease threats"). It is also notable that open borders are a default under the AHPA, and the Secretary can close them only if "necessary" to prevent livestock disease. *See* 7 U.S.C. § 8303.

The structure of the AHPA is therefore inconsistent with the district court's strict requirement that the USDA regulation remove all risk of BSE entering the United States. Because the district court interpreted the statute to contain such a requirement, its analysis of the Final Rule's compliance with the APA was fundamentally flawed.[15]

Our own review of the Final Rule leads us to conclude that the Secretary had a firm basis for determining that the resumption of ruminant imports from Canada would not significantly increase the risk of BSE to the American population. In conducting this review, we believe it is appropriate to view the BSE prevention measures currently in place as part of a comprehensive system. Thus, rather than follow the "divide and conquer" strategy of analyzing each protective component of the regulatory system in isolation, we evaluate the cumulative effects of the multiple, interlocking safeguards.

USDA's comprehensive protections begin, first, with the low incidence of BSE in Canadian cattle. This assures that if any infected cattle are imported, the number will be relatively small.[16] Next,

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[15]We are in no way, of course, implying that the Secretary has unlimited powers to open and close the borders as he sees fit. As the AHPA's structure indicates, however, the Secretary has considerable discretion to decide when an open or closed border is appropriate. Absent a strong showing that the Secretary is not exercising that discretion consistent with the statutory requirements, his judgment should not be overturned.

[16]For example, assuming two million cattle enter the United States from Canada per year, less than one would be expected to have BSE based on Canada's prevalence rate
(continued...)

Canada's feed ban, which USDA considers effective, and its import restrictions on cattle from areas with high BSE rates, ensure that Canada's prevalence rate will not rise dramatically. Canada also takes other measures, such as BSE testing and epidemiological investigations, that help it find and understand the source of BSE in its cattle population, which helps it further minimize the prevalence of BSE in its herd. These steps ensure, as USDA found, that Canada's already low rate of BSE is decreasing. Final Rule, 70 Fed. Reg. at 464.

From the already low prevalence rate in the Canadian herd as a whole, USDA permits the importation of only a subset of those animals that are extremely unlikely to have BSE - those under 30 months of age. In England, only 0.01 percent of those animals diagnosed with BSE were under 30 months of age. *Meat Produced by Advanced Meat/Bone Separation Machinery and Meat Recovery (AMR) Systems*, 69 Fed. Reg. 1874, 1875 (Jan. 12, 2004). In addition, USDA's scientific evidence suggests that Canadian cattle under 30 months of age will be far less likely to be in the advanced stages of BSE, given that the incubation period of BSE depends on the amount of BSE agent to which an animal has been exposed. Based on Canada's low BSE rate and its feed ban, Canadian cattle should have a much lower exposure than English cattle, resulting in a correspondingly greater incubation period. Thus, the age restriction further reduces the risk of introduction of BSE from Canada's herd.

Inside the United States, the risk of dissemination of BSE is addressed by the requirement that Canadian cattle be immediately slaughtered or fed and then slaughtered before they reach the age of 30 months. Again, because of BSE's lengthy incubation period, this age limit helps to ensure that BSE will not progress in any infected animals before they are slaughtered. Once they are slaughtered, the FDA's feed ban ensures that they will not be fed to other cattle, preventing further dissemination of the disease if, in fact, an imported cow were infected.

As for human health, cattle slaughtered in the United States are subject to FSIS regulations designed to minimize the risk that any infectious material will enter the human food supply. These regulations largely prohibit parts of the central nervous system and other cattle parts

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[16](...continued)
of 0.4 cases per million head of adult cattle.

that have shown BSE infectivity from contaminating human food. In addition, FSIS has placed restrictions on the manner in which cattle may be slaughtered - air compression devices are banned to protect against the possibility that they might inject parts of the brain into the bloodstream. FSIS regulations also require the removal of all SRMs from slaughtered cattle, and they restrict the use in human food of "mechanically separated beef" and meat obtained from "Advanced Meat Recovery" systems.

The final defense against human BSE infection is biological. The limited nature of the vCJD outbreak indicates that there may be a substantial species barrier that prevents BSE from easily infecting humans. Indeed, the fact that there have been only slightly over 150 confirmed cases of vCJD worldwide - orders of magnitude less than the number of cases of BSE in cattle - suggests that humans likely do not contract the disease easily.

This regulatory system, with its numerous overlapping and complementary safeguards, is designed to minimize the risk of BSE to American livestock and consumers. Thus, substantial evidence supports USDA's conclusion that these protections will effectively achieve that goal. Further, a comprehensive study commissioned by USDA, known as the "Harvard-Tuskegee Study," evaluated the likely effects of the introduction of BSE into the United States. The study concluded that, if 10 infected cows were imported into the United States from Canada, on average only three new cases of BSE would result and the disease was "virtually certain" to be eradicated from the United States within 20 years.

Instead of evaluating the BSE safeguards as part of a larger system, the district court parsed the regulations and faulted USDA for any risk that a given step failed to remove. The district court listed six specific grounds as the bases for its finding that the Final Rule was arbitrary and capricious. We examine each of them *seriatim* and conclude that none of them supports its conclusion.

a. Lack of quantitative standards

The district court faulted USDA for "making assumptions of

qualitative judgments," rather than performing "a quantitative assessment of the risk of various options." *R-CALF I*, 359 F. Supp. 2d at 1065. It concluded that, "presented with the USDA's conclusions that the risks to U.S. cattle and consumers are 'low' without any definition as to what that means and why the risks presented by the Final Rule are acceptable, this Court has no way of assessing the merits of the USDA's actions." *Id.*

The district court's imposition of such a bright-line prohibition on qualitative standards was incorrect. The Supreme Court has made clear that courts should not upset agency decisions, even those announced with "less than ideal clarity," if "the agency's path may reasonably be discerned." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496, 157 L. Ed. 2d 967, 124 S. Ct. 983 (2004) (internal quotation marks omitted); *see also Vigil v. Leavitt*, 381 F.3d 826, 833 (9th Cir. 2004); *Nat'l Ass'n of Homebuilders*, 340 F.3d at 846. Moreover, the AHPA does not require the Secretary to quantify a permissible level of risk or to conduct a risk assessment.

Under this standard, the administrative record is an adequate basis for discerning USDA's conclusions. For example, USDA's conclusion that the prevalence of BSE in the Canadian herd is "very low" is supported by its observation that "Canada's incidence rate of two infected cattle in 2003 out of a population of 5.5 million cattle over 24 months of age [is well below] OIE's recommendation of less than two infected cattle per million during each of the last four consecutive 12-month periods within the cattle population over 24 months of age." Final Rule, 70 Fed. Reg. at 464. Similarly, the "very low" risk of a consumer contracting vCJD is supported by its finding that "the removal of SRMs effectively mitigates the BSE risk to humans." *Id.* at 465. Indeed, the Harvard-Tuskegee Study, one of the centerpieces of USDA's rulemaking, concluded that SRM removal "would reduce . . . potential human exposure to BSE by 95 percent." *Id.* at 467.

The low risk of a human developing vCJD is also supported by USDA's observation that "the number of cases of vCJD identified to date suggest a substantial species barrier that may protect humans from widespread illness due to BSE." *Id.* at 462. It is also supported by anecdotal evidence of vCJD outbreaks in other parts of the world. In Switzerland, for example, the BSE rate in 1995 was 73.6 cases per million head of cattle, and has been above 20 for most of the past 10

years, *see* http://www.oie.int/eng/info/en_esbincidence.htm, yet Switzerland has not identified a single case of vCJD. Finally, no case of vCJD has ever been attributed to Canadian beef or to the North American meat supply.

b. Prevalence of BSE in Canada

The district court concluded that "Canada has not conducted sufficient testing for BSE to accurately assess the rate of BSE infection in Canada." *R-CALF I*, 359 F. Supp. 2d at 1065. It also concluded that the actual rate of BSE in Canada was "greater than 5.5 cases per million head of cattle . . . [putting] Canada on par with a number of European countries with a BSE problem." *Id.* at 1066. Based on this number, the district judge found that the importation of "2-3 million head of cattle from Canada during the remainder of 2005" presented a "potentially catastrophic risk of danger to the beef consumers in the U.S." *Id.*

The district court, in this instance, impermissibly substituted its judgment for that of the agency. The USDA, in its Final Rule, calculated Canada's BSE prevalence rate to be between 0.3 and 0.4 per million head of cattle. Final Rule, 70 Fed. Reg. at 464. The district court gave no reason for departing from this calculation and, instead, adopting the calculation of R-CALF's expert wholesale. The district court did so even though R-CALF's calculation contained the same type of unexplained assumptions that the court found fatal to the Final Rule. For example, R-CALF's expert assumed that cattle with outward signs of BSE are 60 times more likely to have the disease than cattle with no symptoms, and assumed that the prevalence rate of BSE in Alberta was representative of the rate in Canada as a whole.

USDA, on the other hand, based its calculation of Canada's BSE rate on OIE guidelines; indeed, the OIE website lists Canada's 2003 incidence rate as 0.33 and its 2004 rate as 0.149. *See* http://www.oie.int/eng/info/en_esbincidence.htm . The district court erred by departing from USDA's method of calculation, which was supported by the administrative record, without providing any reason. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989) ("When specialists express conflicting views, an

agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); *Nat'l Wildlife Fed'n v. United States Army Corps of Eng'rs*, 384 F.3d 1163, 1177 (9th Cir. 2004).

c. Effectiveness of Canadian feed ban

The district court also questioned USDA's reliance on the Canadian feed ban. First, it found that there was "no conclusive scientific proof" that consumption of infected feed is the only method of BSE transmission, commenting that transmission may occur through blood and saliva. *R-CALF I*, 359 F. Supp. 2d at 1066-67. Second, the court found evidence that the feed ban had not been effective, both because the ban had only been in place for seven years and because the 4.2-year average incubation period of BSE suggested that the infected Canadian cows had contracted BSE well after the feed ban was put in place. *Id.* at 1067. Finally, the court found gaps in the ban, finding that both bovine blood and rendered animal fat were allowed in animal feed and that both could transmit BSE. *Id.* at 1067-68.

As to the first reason, the USDA explicitly considered scientific evidence on alternative theories of transmission and rejected them, finding that "oral ingestion of feed contaminated with the BSE is the only documented route of field transmission of the disease." Final Rule, 70 Fed. Reg. at 486; *see also id.* at 491 (discussing infectivity of blood).

The trial court's criticisms of Canada's feed ban are also baseless. The district court's main criticism is that Canada's feed ban had been in place for only seven and a half years, not the eight years recommended by OIE guidelines. Applying such a strict reading of OIE guidelines, however, was incorrect. According to a declaration submitted by the Head of the International Trade Department of OIE, OIE recommends that an importing country evaluate the exporting country's risk mitigation measures as a whole, and "would not consider it appropriate for the importing country to apply each criterion as an item on a checklist." Thus, "a deficiency in the length of time a feed ban has been effectively applied could be addressed through restrictions on the age of live cattle imported." The Final Rule reveals that this is precisely the approach that USDA took. *See, e.g.*, Final Rule, 70 Fed. Reg. at 463 (discussing multiple criteria used to evaluate a potential minimal-risk region); *id.* at

548 (restricting imports of Canadian cattle to those under 30 months of age).

Nor do we agree that the 4.2-year average incubation period demonstrates the ineffectiveness of Canada's feed ban. USDA explained that the incubation period of BSE in cattle depends upon the level of exposure the cattle have to the BSE agent. The 4.2-year figure was obtained from analyzing cattle during the BSE epidemic in England, which represents the highest level of exposure to BSE in history. Cows in Canada can be expected to have a longer incubation period because of their significantly lower levels of BSE exposure.

Finally, the district court also erred in criticizing the Canadian feed ban based on its "gaps," which allow blood and rendered animal fat in cattle feed. As discussed above, USDA considered BSE transmission through blood and determined that the science did not support ingestion of blood as a means of transmission. *Id.* at 491. USDA also considered transmission through fat and concluded that, provided the fat is not impure, it poses no risk of transmission of BSE. *Id.* at 500-01 (discussing potential transmission of BSE through tallow). Again, the district court gave no reason for rejecting USDA's expert scientific opinion.

d. Effectiveness of SRM removal

The district court also found that R-CALF had presented sufficient evidence to establish that "it is no longer reasonable to presume that there is no risk of exposure to BSE infectious agents once an SRM removal requirement is in place." *R-CALF I*, 359 F. Supp. 2d at 1068. USDA's conclusion that SRM removal is effective, however, had support in the administrative record. *See* Final Rule, 70 Fed. Reg. at 467 (discussing Harvard-Tuskegee Study, which concluded that SRM removal would reduce human exposure to BSE by 95 percent).

e. Maternal transmission of BSE and fetal blood serum

The district court also found the Final Rule arbitrary and capricious because it "does not prohibit cattle of breeding age from being bred

either before or after entering the U.S.," and "there is a small probability that BSE can be transmitted maternally." *R-CALF I*, 359 F. Supp. 2d at 1069. In addition, the court found USDA's prohibition of fetal blood serum to be inconsistent with the possibility of allowing pregnant cows to be imported into the United States. *Id*.

Contrary to the district court's findings, however, USDA has made it abundantly clear that cattle may not be imported for breeding under the new regulations. Instead, they must be immediately slaughtered, or fed and slaughtered before they reach 30 months of age. Final Rule, 70 Fed. Reg. at 548-49. Furthermore, USDA discussed the concerns that the district court raised, and found that they were not sufficient to justify addressing. *Id*. at 515 ("Although some evidence suggesting maternal transmission exists, such transmission has not been proven, and, if it occurs at all, it occurs at very low levels not sufficient to sustain an epidemic.").

We also find that there is a basis for USDA's disparate treatment of fetal blood serum. As the district court acknowledged, fetal blood serum is used for "bovine vaccine production" and "bovine embryo transfer." *R-CALF I*, 359 F. Supp. 2d at 1069. Because the serum is injected directly into an animal's bloodstream, it carries a higher risk of transmitting BSE, and "might pose a risk of livestock if used in" these applications. Final Rule, 70 Fed. Reg. at 502. Thus, any inconsistency in the USDA's approach to offspring of imported Canadian cattle and fetal blood serum has an adequate explanation in the record.

f. Mandatory testing of Canadian cattle

Finally, the district court held that it was arbitrary and capricious for the agency not to require all Canadian cattle to be screened for BSE, because the screening test could identify some animals with BSE that would not otherwise be identified. *R-CALF I*, 359 F. Supp. 2d at 1069. The Final Rule, however, contains a lengthy comment in which USDA responded to requests for testing of Canadian cattle. Final Rule, 70 Fed. Reg. at 475-76. USDA explained that, because testing can only detect the disease two to three months before a cow starts demonstrating clinical signs of the disease, a cow may be infected and thus produce a false negative on a test. *Id.* Because of the long incubation period of BSE, and the relatively short window in which non-targeted testing is

effective, the USDA did not consider testing to be a "food safety" measure. *Id.* Rather, testing was best used to determine if BSE exists in a country and to determine its prevalence - goals that can both be achieved by targeted testing of animals with clinical signs of BSE. *Id.*

Over the past few years, USDA's policies regarding BSE testing have been subject to a high degree of criticism. *See, e.g.*, *Mad Beef Policy*, Los Angeles Times, Jul. 1, 2005; McGarity, *supra*, at 337-40. These criticisms have generally focused on USDA's refusal to allow voluntary testing of cattle, rather than its refusal to require mandatory testing of Canadian cattle. Although these criticisms are not without their valid points, we do not believe that they are so powerful as to render USDA's testing policy invalid. USDA's approach to BSE testing - that, until better tests are developed, prophylactic measures such as the feed ban and SRM removal are the best methods of protecting human and animal health - is defensible. While its wisdom may be subject to debate on the merits, its choices are not so lacking support in the administrative record as to be "arbitrary and capricious."

g. Conclusion

In sum, USDA decided to reopen the border to Canadian ruminants after making a reasoned determination that the importation of a small number of BSE-infected cattle into this country would not pose a serious risk to humans or livestock. As part of its determination, USDA necessarily decided that the risks inherent in the uncertainty surrounding the current scientific understanding of BSE were insufficiently significant to justify the continued exclusion of Canadian cattle. Rather than criticizing USDA for allowing these risks as a part of its policy, the district court should have evaluated whether there was an adequate basis in the administrative record for USDA's conclusion that the risks were acceptable.

Our review of the record leads us to conclude that the risks inherent in the Final Rule are small, and that the rule likely is supported by an adequate administrative record. We therefore conclude that the district court erred in finding that R-CALF has a strong likelihood of success on the merits of its APA claim.

2. Regulatory Flexibility Act

We also conclude that the district court erred in concluding that USDA has a strong likelihood of success on its claim under the RFA. The RFA was passed in 1980 to "encourage administrative agencies to consider the potential impact of nascent federal regulations on small businesses." *Assoc. Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 111 (1st Cir. 1997). In certain cases, it requires agencies to publish an "initial regulatory flexibility analysis" at the time a proposed rule is published, and a "final regulatory flexibility analysis" at the time a final rule is published. 5 U.S.C. § § 603, 604. Judicial review is available only of the final analysis. 5 U.S.C. § 611.

The RFA requires that a final analysis contain the following:

> (1) a succinct statement of the need for, and objectives of, the rule;
>
> (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
>
> (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
>
> (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
>
> (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the

impact on small entities was rejected.
5 U.S.C. § 604(a).

The RFA imposes no substantive requirements on an agency; rather, its requirements are "purely procedural" in nature. *United States Cellular Corp. v. FCC*, 349 U.S. App. D.C. 1, 254 F.3d 78, 88 (D.C. Cir. 2001); *see also Envtl. Defense Ctr., Inc. v. United States EPA*, 344 F.3d 832, 879 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085, 159 L. Ed. 2d 246, 124 S. Ct. 2811 (2004) ("Like the Notice and Comment process required in administrative rulemaking by the APA, the analyses required by the RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit."). To satisfy the RFA, an agency must only demonstrate a "reasonable, good-faith effort" to fulfill its requirements. *United States Cellular*, 254 F.3d at 88; *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000); *Assoc. Fisheries*, 127 F.3d at 114.

The district court faulted USDA for considering only two alternatives in its final regulatory flexibility analysis: "leaving the regulations unchanged or modifying the import requirements by either requiring that imported beef come from cattle slaughtered at less than 30 months of age or continuing to prohibit the entry of live ruminants." *R-CALF I*, 359 F. Supp. 2d at 1072; *see also* Final Rule, 70 Fed. Reg. at 543. The district court held that the agency erroneously rejected the alternatives of a country-of-origin labeling program and voluntary testing of slaughtered Canadian cattle. *R-CALF I*, 359 F. Supp. 2d at 1072.

The district court erred in concluding that USDA did not meet the RFA's requirements.

The Final Regulatory Flexibility Analysis, available at http://www.aphis.usda.gov/lpa/issues/bse/risk_assessment/03-080-3_econ_analysis.pdf, reveals that USDA conducted a detailed economic assessment of the impact of its proposed rule on small businesses. It concluded that the majority of businesses affected by the proposed Final Rule would qualify as small businesses, and that the effect of the Final Rule was likely to vary depending upon the sector of the cattle industry the business occupied, rather than the size of the business. The negative

economic effects the rule would create would generally affect those on the supply side of the beef industry - primarily ranchers - while those on the production side - feedlots and meat packers - would tend to benefit from the rule. In this respect, the alternatives identified by the district court would not necessarily ease the burden on small businesses; rather, they would reallocate the rule's burden to small businesses in different sectors of the beef industry. *Cf. Assoc. Fisheries*, 127 F.3d at 115 (where the majority of businesses affected by a rule are small businesses, Congress's desire to have agencies write rules that distinguish . . . between big and small businesses has diminished relevance.").

More importantly, the specific concerns the district court raised were considered by USDA in its response to comments on the rule. USDA rejected the first alternative - the implementation a country-of-origin labeling program - because it did not consider such a program to concern food safety or animal health. Final Rule, 70 Fed. Reg. at 533. USDA rejected the second alternative, voluntary BSE testing, because it does not consider such testing reliable enough to be used as a food safety measure, as discussed above. *See* Part II.A.1.f, *supra*. Given that USDA discussed and rejected these alternatives in the body of its Final Rule, the agency did not err in failing to consider them as alternatives in its final regulatory flexibility analysis. *See Assoc. Fisheries*, 127 F.3d at 115 ("Section 604 does not require that [a final regulatory flexibility analysis] address every alternative, but only that it address significant ones.").

3. National Environmental Policy Act

NEPA was enacted in 1970 to "promote efforts which will prevent or eliminate damage to the environment and biosphere." 42 U.S.C. § 4321; *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989) ("Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality."). Like the RFA, NEPA does not impose any substantive requirements on an agency's decision; rather, it mandates only a process that the agency must follow. *Id.* at 350 ("NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

Under NEPA's procedural requirements, an agency must prepare a

"detailed statement" on the environmental impact of a proposed rule when that rule is a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332. NEPA provides no private right of action to enforce its requirements. *Stratford v. FAA*, 350 U.S. App. D.C. 432, 285 F.3d 84, 88 (D.C. Cir. 2002). Thus, to bring suit to vindicate NEPA's requirements, a plaintiff must rely on the provisions of the APA that confer "standing to an 'aggrieved party' within the meaning of the substantive statute upon which the claim is based." *Id.*; *see also* 5 U.S.C. § 702; *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 394-96, 93 L. Ed. 2d 757, 107 S. Ct. 750 (1987).

To narrow the wide range of potential plaintiffs who may assert a "procedural injury" under this section of the APA, the Supreme Court has adopted a "zone of interests" test.[17] *See id.* at 397 n.12 (stating that the purpose of the zone of interests test is "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives"). This test imposes the requirement, beyond constitutional standing requirements, that a plaintiff assert an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Nev. Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 715-16 (9th Cir. 1993). Thus, to assert a claim under NEPA, a plaintiff must allege injury to the environment; economic injury will not suffice. *Id.* at 716 ("[A] plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA."); *Stratford*, 285 F.3d at 88 ("[A] NEPA claim may not be raised by a party with no claimed or apparent environmental interest."); *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 902-03 (9th Cir.

[17]R-CALF incorrectly argues that the Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997), drastically narrowed the applicability of the zone of interests test. In *Bennett*, the Court considered the specific question of standing under the Endangered Species Act's citizen-suit provision, not the APA. *Id.* at 161-62. It expressly found that the "ESA's citizen-suit provision . . . negates the zone-of-interests test" based on its language and its purpose. *Id.* at 164-66. Thus, *Bennett* simply does not address actions under NEPA. Indeed, this court has continued to use the zone of interests test to evaluate the standing of NEPA plaintiffs after *Bennett*. *See Save Our Sonoran*, 408 F.3d at 1119; *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001); *see also Stratford*, 285 F.3d at 88 (applying the zone of interest test in a NEPA action).

1996) ("NEPA's purpose is to protect the environment, not the economic interests of those adversely affected by agency decisions.") (internal quotation marks omitted). A plaintiff can, however, have standing under NEPA even if his or her interest in primarily economic, as long as he or she also alleges an environmental interest or economic injuries that are "causally related to an act within NEPA's embrace." *Port of Astoria, Or. v. Hodel*, 595 F.2d 467, 476 (9th Cir. 1979).

The injuries alleged in R-CALF's complaint do not fall within NEPA's zone of interests. R-CALF points to only one paragraph in its complaint to justify its standing under NEPA. Every allegation in this paragraph, however, concerns the economic interest of R-CALF members except the following: "R-CALF USA members will also be adversely affected by the increased risk of disease they face when Canadian beef enters the U.S. meat supply."

We conclude that this alleged harm is insufficient to fall within NEPA's zone of interests. As mentioned above, "NEPA's purpose is to protect the environment." *W. Radio Servs. Co.*, 79 F.3d at 902; *see also Stratford*, 285 F.3d at 88 ("[A] NEPA claim may not be raised by a party with no claimed or apparent environmental interest."). More specifically, NEPA is concerned with harm to the physical environment: "If a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 778, 75 L. Ed. 2d 534, 103 S. Ct. 1556 (1983); *cf. Cantrell*, 241 F.3d at 679 ("In NEPA cases, we have described this 'concrete interest' test as requiring a 'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact."). R-CALF's claimed interest, however, has no connection to the physical environment; rather, it is solely a matter of human health. While it is true that NEPA contains references to human health in its statement of policy, *see* 42 U.S.C. § 4321, as the Supreme Court has explained, those references are to the statute's goals, not its means. *Metro. Edison Co.*, 460 U.S. at 773 ("Although NEPA states its goals in sweeping terms of human health and welfare, those goals are the *ends* that Congress has chosen to pursue by *means* of protecting the physical environment."). Here, R-CALF has failed to show any relationship between risks to human health and environmental harms. *Cf. Port of Astoria*, 595 F.2d at 476.

Because R-CALF has failed to allege any connection to injury to the

physical environment, its injury falls outside of NEPA's zone of interests. Even assuming R-CALF's alleged injury could satisfy the zone of interests test, however, its NEPA claim must fail for the additional reason that R-CALF lacks organizational standing to assert a NEPA challenge.

> An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000) (citing *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)). R-CALF fails the second of these three elements.

As mentioned above, R-CALF is a "non-profit cattle association representing over 12,000 U.S. cattle producers on issues concerning international trade and marketing." As is evident from the paragraph in its complaint that discusses standing, economic issues are highly relevant to its purpose. We do not see the connection, however, between the purported environmental interest that R-CALF attempts to raise here and the "trade and marketing" interests it is organized to protect.

We therefore hold that R-CALF lacks standing to bring a NEPA challenge to the Final Rule. Thus, the district court erred in permitting R-CALF to proceed with its NEPA claim and in concluding that it had a likelihood of success on that claim.[18]

B. Balance of Hardships

After finding that R-CALF had demonstrated a strong likelihood of success on the merits, the district court found that the Final Rule carried a definitive risk of causing "significant irreparable harm." *R-CALF I*, 359 F. Supp. 2d at 1073. The district court identified three ways in which the Final Rule would cause such harm: the increased risk of vCJD

[18]Given our holding that R-CALF lacks standing to bring a NEPA claim, we need not address the district court's conclusion that the possibility of environmental harm justifies its preliminary injunction.

to American beef consumers, unspecified environmental injury stemming from USDA's failure to comply with NEPA, and injury to the U.S. beef industry and the U.S. economy that would result from a "stigma" that tainted Canadian beef would inflict upon the U.S. meat supply. *Id.* We believe the district court's calculus overstated the harm that would result from the rule.

If the Canadian herd were to have a higher infection rate than the U.S. herd, the importation of Canadian cattle might pose some increased risk to the health of the U.S. population, however slight. Even assuming, however, that the introduction of a fatal disease into the United States would constitute irreparable harm, *cf. Harris v. Board of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) (accepting as irreparable harm "pain, infection, amputation, medical complications, and death"), the record does not justify the conclusion that the Final Rule makes such harm likely, or even probable. Rather, based on the low incidence of BSE in the Canadian herd, the numerous safeguards against BSE in this country, the lack of any Canadian cattle under 30 months of age found with BSE, and the lack of any case of vCJD attributable to Canadian beef, any increased risk to human and animal health created by the Final Rule is negligible.

In retrospect, the district court's concern over the possibility of "stigma" harming the American beef industry appears to be overstated. The record does not support the district court's alarmist findings that the "irreparable economic harm" the district court foresaw from the stigma of Canadian beef will actually befall the American beef industry. Following the case of BSE diagnosed in a Washington State cow in 2003, consumer demand for, and confidence in, American beef remained strong. Final Rule, 70 Fed. Reg. at 522. According to USDA, American demand for beef in 2004 is estimated to have increased seven to eight percent over 2003 levels. Yet, Canadian beef was flowing into this country throughout 2004 under permits issued by USDA.[19] This

[19]The district court's April 26, 2004, temporary restraining order prevented USDA only from expanding the categories of Canadian beef that could be imported under existing importation permits. The court explicitly limited its order to "all edible bovine meat products beyond those authorized by USDA's action of August 8, 2003 (boneless bovine meat, boneless Veal (meat), and bovine liver) from cattle under the age of 30 months." *R-CALF TRO*, 2004 WL 1047837 at *9.

(continued...)

evidence belies the district court's prediction of catastrophic injury to the U.S. beef industry.[20]

C. Preliminary Injunction

Contrary to the district court's conclusion, we conclude that the Final Rule will likely survive judicial scrutiny under the correct legal standard; thus, R-CALF has not shown a likelihood of success on the merits of its action. We also conclude that R-CALF has failed to make the requisite showing of irreparable harm. For these reasons, we must reverse the district court's preliminary injunction. *See Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1125-26 (9th Cir. 2002).

III. CONCLUSION

For the foregoing reasons, the district court's grant of a preliminary injunction is

REVERSED.

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[19](...continued)

[20]Indeed, the district court's finding of irreparable economic harm is undermined by the industry itself. Numerous *amici curiae* briefs have been filed in this case by organizations representing large sectors of the American meat industry, all of whom seek reversal of the preliminary injunction. If the Final Rule posed a true risk of exposing American beef to an irreparable stigma one would not expect to see such a broad coalition of industry members supporting its implementation.

HORSE PROTECTION ACT

COURT DECISION

WINSTON T. GROOVER, JR., a/k/a WINKY GROOVER v. USDA.
No. 04-4519.
Filed October 31, 2005.

(Cite as:

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

The court upheld the Decision of the Judicial Officer (JO). Upon review of the record, the court concluded that the JO's reliance on the opinions of two Veterinarians employed by USDA was substantial evidence and it can not be said that reliance on such evidence would have been unreasonable. The JO's decision weighed conflicting evidence and reached a conclusion that had a rational and a factual basis, and was in compliance with the law in this case.

United States Court of Appeals
For the Sixth Circuit

Before: SILER and CLAY, .Circuit Judges; CARR, Chief District Judge.*

ORDER

Winston T. Groover, Jr. seeks review of a final order by the Secretary of the United States Department of Agriculture issued on December 13,2004, under the Horse Protection Act of 1970, (HPA), 15 U.S.C. §§5 1821-31. The parties have waived oral argument and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On November 6, 2000, Bobby R. Acord, Administrator for the

*The Honorable James G. Carr, Chief United States District Judge for the Northern District of Ohio, sitting by designation.

Animal and Plant Health Inspection Service (APHIS), an agency of the United States Department of Agriculture, initiated a disciplinary proceeding under HPA against Beverly Burgess, Groover, and Groover Stables. The complaint alleged that on or about July 7,2000, Groover and Groover Stables transported a horse known as "Stocks Clutch FCR" to the Cornersville Lions Club 54th Annual Horse Show in Comersville, Tennessee, while the horse was sore, for the purpose of showing or exhibiting the horse in that show, and exhibiting the horse in the show, in violation of 15 U.S.C. $8 1824(1) and 1824(2)(A). The complaint further alleged that Burgess allowed Groover and Groover Stables to exhibit "Stocks Clutch FCR" while the horse was sore in violation of 15 U.S.C. § 1824(2)(D). Burgess, Groover, and Groover Stables denied the allegations in the complaint.

On April 21, 2004, an administrative law judge (ALJ) issued a Decision and Order concluding that Groover and Groover Stables violated § 1824(2)(A) by exhibiting "Stocks Clutch FCR" while the horse was sore. The ALJ assessed Groover a $2,200 civil penalty and disqualified Groover 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 for one year. The ALJ dismissed the complaint against Burgess.

The ALJ's decision became final on May 31,2004. Groover appealed the ALJ's decision to the Secretary of Agriculture on June 28, 2004. On November 15, 2004, the Secretary issued a final decision. The Secretary concluded that Groover violated HPA by exhibiting "Stocks Clutch FCR" while the horse was sore and assessed a $2,200 civil penalty against him. The Secretary disqualified Groover for one year from horse industry activities as provided for by statute. Groover filed a timely petition for review on December 13, 2004. Groover contends that the Secretary's decision is not supported by substantial evidence.

Our review of an administrative decision regarding HPA is limited to a determination of whether proper legal standards were used and whether substantial evidence exists to support the decision. *Bobo v. U. S. Dep 't of Agric*., 52 F.3d 1406, 1410 (6th Cir. 1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Substantial evidence means more than a scintilla, but less than a preponderance, and must be based on the

record taken as a whole. *Id.*

The facts establish that the APHIS employs veterinarians to serve as medical officers to monitor horse shows and to detect and document findings of sore horses. Dr. David Smith and Dr. Sylvia Taylor were the veterinarians working at the Cornersville Lions Club Horse Show.

Dr. Smith and Dr. Taylor conducted post-show examinations of the horses finishing in second and third place at the horse show on July 7, 2000. Both doctors examined "Stocks Clutch FCR" after the horse won second place in its class. Dr. Smith examined the horse first. He prepared an affidavit on July 8, 2000. Dr. Smith concluded that "stocks Clutch FCR" was sore along the lateral aspect of the left fore pastern and was in violation of the scar rule. He concluded that the horse was sored by mechanical and/or chemical means.

Without revealing the results of his examination, Dr. Smith asked Dr. Taylor to conduct an examination of "Stocks Clutch FCR." Dr. Taylor prepared an affidavit after her examination on July 7,2000. Dr. Taylor concurred with Dr. Smith's findings that "Stocks Clutch FCR" exhibited a pain response and was sore in the left forefoot. Dr. Taylor also concurred in the finding that the horse exhibited scars on both front feet in violation of the scar rule. The veterinarians agreed that the horse was sore due to the use of chemical and/or mechanical means in violation of HPA.

HPA provides for Designated Qualified Persons (DQP) to be employed by horse industry organizations to detect if horses are sore. 15U.S.C. § 1823; 9 C.F.R. § 11.7. These individuals need not be veterinarians, but must attend USDA-certified training programs. DQPs examine every horse before they show, after they are shown, and at Tennessee Walking events. *See* 9 C.F.R. **§** 11.20. Mr. Charles Thomas and Mr. Andy Messick are employed as part-time DQPs by the National Horse Show Commission, the organization that managed the Comersville show. Thomas and Messick are not veterinarians.

After the USDA veterinarians examined "Stocks Clutch FCR" and determined that the horse was sore, Groover requested that Thomas and Messick examine the horse. Messick, who examined "Stocks Clutch FCR" prior to the show, was the first DQP to examine the horse after the show. Messick examined "Stocks Clutch FCR" approximately five to ten minutes after the USDA veterinarians had completed their examinations. Messick found that the horse had soft, uniformly

thickened tissue and did not demonstrate a pain response upon palpation on the left or right forefoot. He also testified that he did not observe redness or swelling of the posterior pastern of either foot. Thomas also found no abnormal pain reactions when he palpated the horse's front pasterns, nor did he find that "Stocks Clutch FCR" was in violation of the scar rule.

Approximately two hours after the USDA veterinarians examined "Stocks Clutch FCR," Dr. Randall T. Baker, a veterinarian in private practice in Lewisburg, Tennessee, hired by Burgess, examined the horse. Dr. Baker found that "Stocks Clutch FCR" was not sore on its front pasterns. He believed that the scars on the pasterns did not violate HPA because he concluded that the tissue was pliable, despite hair loss and thickened epithelial tissue on both posterior pasterns. Dr. Baker detected no evidence of redness or swelling on either the left or right posterior pasterns.

The essence of Groover's appeal is a disagreement with the evidentiary findings of the Secretary. The Secretary was presented with conflicting evidence as to whether "Stocks Clutch FCR" was sore. In support of the Secretary's decision are the opinions of two USDA veterinarians who independently concluded that the horse was sore in violation of HPA. To support Groover's position are the opinions of two DQPs, who are not veterinarians, and the opinion of one private veterinarian hired by the horse's owner who examined the horse two hours after the event. These individuals concluded that "Stocks Clutch FCR" was not sore.

The court's standard of review is whether there is substantial evidence to support the Secretary's decision. *Bobo*, 52 F.3d at 1410-11. As two USDA veterinarians made independent examinations of the horse after it was shown and both reached the same conclusions, the Secretary's conclusion that "Stocks Clutch FCR" was sore is supported by substantial evidence. The Secretary's reliance on these opinions cannot be deemed to be unreasonable as the conflicting evidence consists of the opinions of two non-doctors and a veterinarian who examined the horse hours after the event. *Id.* at 1411. Thus, under *Bobo*, the Secretary's decision is supported by substantial evidence and must be upheld. *Id.*

Accordingly, the petition for review is denied.

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: RONALD BELTZ, AN INDIVIDUAL, AND CHRISTOPHER JEROME ZAHND, AN INDIVIDUAL.
HPA Docket No. 02-0001.
Decision and Order.
Filed September 6, 2005.

HPA – Soring.

Brian T. Hill, for Complainant
Greg Shelton, for Respondent
Decision and Order by Chief Administrative Law Judge Marc Hillson.

Decision as to Christopher J. Zahnd

In this decision, I find that United States Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) did not meet its burden of proving, by a preponderance of the evidence, that Respondent Christopher J. Zahnd violated the Horse Protection Act by entering or showing a horse that was sore. 15 U.S.C. § 1824(2)(B). Accordingly, the Complaint against Respondent is dismissed.

Procedural History

On October 25, 2001, a complaint was filed by the Acting Administrator of APHIS, alleging that Respondent entered Lady's Ebony Ace in a horse show in Shelbyville, Tennessee while the horse was sore, for the purpose of showing or exhibiting the horse, in violation of the Horse Protection Act. The complaint also cited the owner of the horse, Ronald Beltz, for violating the Act. Imposition of civil penalties and disqualification from participation in horse show related activities were requested by the Complainant. Both Respondents filed answers, and a hearing was scheduled for June 3, 2004. Amended answers were filed on May 6, 2004. Complainant moved to postpone the hearing when he discovered that one of his subpoenaed witnesses, Dr. Guedron,

would be unavailable, and I cancelled the hearing on June 1, 2004. At an August 17, 2004, telephone conference, the parties and I agreed to a December 1, 2004 hearing date.

I conducted a hearing in this matter on December 1, 2004 in Huntsville, Alabama. Complainant was represented by Brian T. Hill, and Respondent was represented by Greg Shelton. At the hearing, Complainant called four witnesses, including one of the veterinarians who examined Lady's Ebony Ace, but he did not call, or even attempt to subpoena, Dr. Guedron, who was the other examining veterinarian. Respondent called two witnesses, including Respondent himself, but did not call Mr. Charles Thomas, the Designated Qualified Person (DQP) who examined Lady's Ebony Ace before the APHIS veterinarians, because Mr. Thomas did not receive the subpoena until after the hearing. Respondent's Brief, p. 1. Complainant submitted eight exhibits, including a videotape of the APHIS veterinarians inspecting Lady's Ebony Ace. Respondent submitted no exhibits.

During the hearing I was informed that Complainant had earlier reached a settlement with Ronald Beltz, and on January 18th, 2005, I signed a Consent Decision and Order concluding that matter.

Following the hearing I received briefs from both parties, and a reply brief from Complainant.

Findings of Fact

1. Respondent Christopher J. Zahnd was the trainer of a horse named Lady's Ebony Ace on May 25, 2000. CX 1, CX 4, CX 6.

2. On May 25, 2000, Lady's Ebony Ace was entered at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee. Complaint, Amended Answer.

3. Lady' Ebony Ace spent most of May 25th prior to the show in a trailer. Tr. 87-90. Both Respondent and Larry Appleton, Jr., who was assisting him as a groom, inspected her before the show, and found no response to palpation which would indicate to them that the horse was sore. Tr. 84-85, 98-99.

4. The DQP, Charles Thomas, inspected Lady's Ebony Ace and noted a response to his palpation. CX 7. He found that there was a mild reaction to the palpation on the outside of the left foot and a stronger

reaction on the outside of the right foot. *Id*. Combined with the slight pull on the reins he noted when the horse was walked slowly, he gave the horse a score of 5, making it ineligible to be shown that night.

5. Lady's Ebony Ace was then examined by Dr. Clement Dussault, a veterinarian in the employ of APHIS. CX 1, CX 3, CX8, Tr. 35-36. He noted that the horse moved somewhat freely when being led around a cone. CX 3. He also noted that when palpating medial and lateral aspects of the horse's right and left front feet, the horse withdrew each foot. CX 1, CX 3, Tr. 35-36. He termed the responses to palpation "moderate." CX 3. He found the horse to be bilaterally sore and determined that it would feel pain in moving. CX 3, Tr. 42.

6. As per normal APHIS protocol, Dr. Dussault then asked Dr. Guedron, another APHIS veterinarian who was present at the show, to examine Lady's Ebony Ace. Tr. 18-20, 36-38. Dr. Guedron appeared to achieve even more of a reaction in the horse when palpating its front legs. CX 8, Tr. 38-39.

7. During Dr. Dussault's examination of Lady's Ebony Ace, he did not smell anything, did not see any visible signs of scarring, and did not note any hair loss. Tr. 49-50. He stated that his notation on APHIS Form 7077, which is the Summary of Alleged Violations, CX 1, that there was a failure to comply with the scar rule, e.g., that the horse was scarred, was made in error, and that no scarring was evident. Tr. 24. Nevertheless, he concluded, after conferring with Dr. Guedron, that the pain that the horse would feel when moving was caused by mechanical and/or chemical means. Tr. 40, CX 3.

8. Dr. Guedron did not testify at the hearing. An earlier hearing had been postponed solely because Dr. Guedron, who had left APHIS, was unable to attend. No attempt was made to subpoena Dr. Guedron for the December 1 hearing, nor was there any request to allow him to testify through audiovisual telecommunications or telephone.

9. Respondent has trained and exhibited horses of this breed for fifteen years. Tr. 97. He testified that he had never been cited before or since this inspection for a soring violation of the Act, including numerous showings of Lady's Ebony Ace. Tr. 100, CX 4. He stated that the reactions to palpation were due to the horse acting "silly" as a result of spending most of the day in a horse trailer, and as a result of the extended examination process. CX 4, Tr. 99.

Statutory and Regulatory Background

The Horse Protection Act is pertinently predicated on the findings that

(1) the soring of horses is cruel and inhumane; [and]

(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

15 U.S.C. § 1822.

Congress elaborated on what it meant by a "sore" horse:

. . .

(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.

15 U.S.C. § 1821(3).

Among the activities prohibited by the Act are:

. . .

> (2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824.

Finally, "a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs." 15 U.S.C. § 1825(d)(5).

Violators of the Act are subject to severe sanctions. Civil penalties of up to $2200 may be imposed, as well as disqualification from showing or exhibiting any horse for at least a year. 15 U.S.C. § 1825(b)(1), (c).

Discussion

I find that Complainant has failed to establish, by a preponderance of the evidence, that Respondent showed or exhibited a "sore" horse as defined by the statute. While Complainant clearly demonstrated that Lady's Ebony Ace reacted to palpation in a manner indicative of pain, and the reaction was sufficient to trigger the statutory presumption that the horse was sore, such factors such as the failure of Dr. Guedron to testify, the absence of any indicia of soring other than the reaction to palpation, the explanations offered by Respondent as to the cause of the pain reaction, Respondent's long and impressive record of compliance with the HPA, and the lack of any rebuttal evidence contradicting Respondent's explanation, support a conclusion that the statutory presumption has been overcome by Respondent.

That the DQP and Dr. Dussault achieved a pain reaction from palpating Lady's Ebony Ace is undisputed, although only Dr. Dussault was available to testify as to how much pressure was put on the horse during palpation. He testified that he used the proper technique, which involved pressing his thumb on the horse's pastern until the thumbnail blanched. Tr. 22. He noted, when observing the videotape of the

examination of the horse, CX 8, that as each person examined the horse, first the DQP Thomas, then himself, and then Dr. Guedron, the apparent pain response from the horse was more severe. Tr. 38-39. However, since each of the three found a pain response in the same spot, he decided, after conferring with Dr. Guedron, that the horse should be written up. Tr. 40-41, CX 3.

It appeared from my view of the videotape that Dr. Guedron was palpating Lady's Ebony Ace with more force than either Thomas or Dr. Dussault. Without his direct testimony, it is difficult to give much weight to the statements on his examination that are contained in his affidavit, CX 2, although it is clear visually that he achieved the same but stronger reactions as were generated by Dr. Dussault. The lack of testimony on what his observations were in regard to sight and smell could be significant, particularly in light of the statutory presumption imposed by Congress.

It has long been recognized that evidence of pain during palpation is an indication that a horse is sore. While Congress imposed a presumption that bilateral pain ("abnormal sensitivity in . . . both of its forelimbs") in either the front or back legs is evidence that a horse is sore, the presumption is a rebuttable one. Thus, in *Landrum v. Block*, 40 Agric. Dec. 922 (1981), the court stated that "Caution in dealing with presumptions is especially appropriate in this case because a respondent in the civil proceedings in question is not protected by the standard of proof beyond a reasonable doubt that would apply in a true criminal case, despite the quasi-criminal nature of the potential sanctions." 40 Agric. Dec. 922, 925. That court further warned against assuming that the presumption, once established, somehow shifts the burden of persuasion, emphasizing that the "burden of persuading the trier of fact that a horse was artificially sored remains with the Secretary from the beginning to the end of the administrative process." *Id*. Thus, even if Complainant establishes, as it does here, that the horse had a bilateral reaction to palpation, I must determine, after hearing Respondent's evidence, and evaluating the credibility of the witnesses, whether the preponderance of the evidence supports a finding that the horse was sored by artificial or chemical means. If I cannot so find, I must decide in favor of the Respondent.

Thus, in *Martin v. USDA*, 1995 WL 329255 (6th Cir. 1995)

(unpublished), the Court of Appeals held that:

> once the party accused of soring the horse has produced credible evidence of a natural cause for the soreness, the agency must produce evidence that the horse was made sore by artificial means. Otherwise, the USDA's detection of "abnormal sensitivity," which does not require a finding that the soreness was caused artificially, would always control the result. Substantial evidence that indicates artificial soring is not present in this record.

Even though Dr. Dussault concluded in his affidavit that the bilateral pain reaction he observed constituted soring "by the use of mechanical and/or chemical means," CX 3, p. 2, he testified at the hearing that he saw no objective evidence of the usage of such means, specifically indicating that he observed no scarring, smelled no chemicals, and saw no evidence of any hair loss—three of the most common indicia of the use of mechanical and/or chemical soring devices. It appears that Dr. Dussault's conclusion that soring occurred by mechanical or chemical means was simply based on the statutory presumption. While the presumption states that a horse is presumed to be sore--which by definition means that mechanical or chemical means have been unlawfully applied to impact its gait--that there is no physical manifestation such as odor, scarring, or hair loss remains a fact that should be considered by the administrative law judge.

Dr. Guedron's affidavit is entitled to little weight in this proceeding. As counsel for Respondent pointed out at trial and in his brief, the videotape of Dr. Guedron's examination of Lady's Ebony Ace, and the statements made in his affidavit, raised questions on which Respondent was entitled to cross-examination. The Rules of Procedure specify that witnesses must testify at a hearing on oath or affirmation and be subject to cross-examination. 1.141(h). Complainant made no effort to subpoena Dr. Guedron for this hearing, even though counsel requested a postponement of the previously scheduled hearing solely because of Dr. Guedron's unavailability. Complainant had the opportunity to ask for Dr. Guedron's testimony to be taken through audio-visual telecommunications or through telephonic means, or possibly even through a rule 1.148 motion to take depositions where testimony would otherwise not be available. Complainant elected to not pursue any of

these paths. Thus, while I allowed Dr. Guedron's affidavit into evidence, I indicated that I intended to give it very little, if any, weight. Tr. 70-72.

Respondent Christopher Zahnd appeared to be a forthright and credible witness. He testified that when he checked the horse, it was sound and showed no evidence of soreness. He stated that he had shown this particular horse numerous times both before and after this show during 2000, probably eight to ten times a month during the season that runs from March to November. In fact, the horse was the "fifteen-two world champion mare" two years after this inspection. Tr. 100. He testified that he had been showing this horse for seven years, as of the date of the hearing, that he showed about 300 horses per year in the ten years that he had become a full time trainer of Tennessee walking horses, and that this was the only time he had been cited under the Horse Protection Act. His account of his compliance record was unrebutted.

He further testified that he observed Larry Appleton, who was assisting him as a groom, inspect the horse, and that the horse was not sore when Appleton palpated her. He then examined the horse himself, and was satisfied that the horse was not sore.

He proceeded to watch the examination of the horse first by DQP Thompson, then by Dr. Dussault and finally by Dr. Guedron. The horse had a stronger reaction to palpation as it went through its third, fourth and fifth examinations, and Mr. Zahnd indicated that the horse would be expected to react a little more each time it was examined. He testified that the horse stood fine, "even resting her back foot while one of the inspectors was checking her," Tr. 103, which he stated was inconsistent with the behavior to be expected in a sore horse. Tr. 106. He also testified that the horse could be "stubborn and hateful" when irritated. Tr. 105

Both Zahnd and Appleton testified that the horse's behavior was at least in part attributable to the fact that she had spent virtually that entire day in the horse trailer, including a considerable portion of time--two to three hours--being transported.

They each testified that the more a horse is palpated, the more irritated it can get, and that she was getting palpated quite a bit. Zahnd also testified that in his experience when a horse is treated by chemical or mechanical means, that there is a visible physical manifestation in the

way of scarring or observable hair loss, which was not present here. While Zahnd is obviously not a veterinarian, his lengthy experience as a horse trainer is entitled to some respect, as is his record of compliance.

Factoring in all the evidence, I conclude that Complainant has not demonstrated, by a preponderance of the evidence, that Respondent violated the Horse Protection Act as charged. While Lady's Ebony Ace clearly had increased pain reactions to palpation as she went through repeated examinations, thus triggering the presumption of soring, several factors lead me to conclude that the presumption was rebutted. The failure of Complainant to attempt to call Dr. Guedron, whose palpations of the horse appeared to my eye to be more forceful than that of Dr. Dussault, to hear his explanations for his conclusions, is a significant detriment to Complainant's case. In addition, Respondent's witnesses suggested reasonable explanations for the horse's behavior, including her long day standing in the horse trailer and her temperament. The fact that the horse bore no physical manifestations of soring, other than the reaction to palpation, is also a factor in my decision, as there was no rebuttal to the contention expressed by Respondent that 90 percent of sored horses showed scarring or hair loss, or would smell of the chemicals used. Tr. 108-109. Finally, the Respondent's long and otherwise unblemished compliance record over fifteen years of training Tennessee walking horses, while not determinative, is an indication to me that Lady's Ebony Ace's reaction to palpation was not a result of soring.

CONCLUSIONS OF LAW AND ORDER

1. The bilateral reaction to pain from palpation of Lady Ebony's Ace was sufficient to trigger the statutory presumption that the horse was sore.

2. The preponderance of the evidence does not support a finding that Lady's Ebony Ace was a sored horse.

Wherefore, it is ordered that the complaint against Respondent is dismissed.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of

Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

_____

In re: KIM BENNETT.
HPA Docket No. 04-0001.
Decision and Order.
Filed September, 23, 2005.

HPA – Soring.

Frank Martin, for Complainant.
David Broderick, for Respondent
Decision and Order by Administrative Law Judge Victor Palmer.

DECISION AND ORDER

Preliminary Statement

This is a case of first impression in a disciplinary proceeding under the Horse Protection Act, as amended (15 U.S.C. § 1821 *et seq*.; "the Act"). At issue is whether the refusal to allow a government official to complete his inspection of a Tennessee Walking Horse is a violation of law when the evidence fails to prove that the inspection was reasonable as required by the Act and an applicable regulation. This proceeding was initiated by a complaint filed on April 15, 2004, by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"). The complaint alleges that on August 26, 2002, Kim Bennett violated the Act (15 U.S.C. § 1824 (9)) and an implementing regulation (9 C.F.R. § 11.4), by refusing to allow an authorized APHIS official to inspect a horse he had entered and intended to show at the 64th Annual Tennessee Walking Horse National Celebration Show ("the 2002 Celebration"). Mr. Bennett filed a timely answer denying the allegations and requesting a hearing. I held an oral hearing in Nashville, Tennessee, on May 17-18, 2005, at which testimony was recorded and transcribed ("TR__"), and

various exhibits were received from Complainant ("CX__") and from Respondent ("RX__"). USDA was represented by Frank Martin, Jr., Esq., Office of the General Counsel, USDA, Washington, DC. Kim Bennett was represented by David Broderick, Esq. and Tad T. Pardue, Esq., Broderick & Associates, Bowling Green, KY. In accordance with a schedule set at the hearing, briefing was completed by the parties on August 12, 2005.

Upon consideration of the record evidence and the arguments of the parties, I have decided for the reasons that follow, that Complainant has failed to prove that Kim Bennett violated the Act and the regulations and an order dismissing the case with prejudice is hereby being entered.

Findings of Fact

1. The respondent, Kim Bennett, is an individual whose mailing address is 636 Mt. Lebanon Road, Alvaton, Kentucky 42122. (Answer).

2. Kim Bennett obtained a degree in equine science from Middle Tennessee State University in 1976, and has been a trainer and breeder of Tennessee Walking Horses since 1980. He has a trainer's license with the Walkers Training Association and an AAA Judge's license with the National Horse Show Commission. Both licenses are in good standing. He has judged shows throughout America and twice judged the Celebration. Kim Bennett has served on the National Board of the Tennessee Walkers Breeders and Exhibitors Association for approximately eighteen years. He served on the License Enforcement Committee of the Walking Horse Owners Association until its merger with the National Horse Show Commission. He is a voting member of the National Horse Show Commission and has represented the Tennessee Walking Horse Owners Association on that Commission for approximately fifteen years. (TR 392-395).

3. Kim Bennett and his wife, Leigh Bennett, who is also a licensed horse trainer and an AAA certified judge, keep upwards of fifty horses on their farm in Alvaton, Kentucky. (TR 315-316).

4. In February 2002, Kim Bennett and Leigh Bennett began training a horse named "The Duck" after it had been purchased, based on their advice, for $100,000.00 by Dr. Dwight and Elizabeth Ottman of Owensboro, Kentucky. (TR 317, TR 400-402).

5. The Duck was a stallion and a past World Grand Champion.

It was being used exclusively for breeding at the time of its purchase by the Ottmans. In 2002, the Duck was bred with 32 mares for which a $900.00 stud fee was charged for each breeding. Kim Bennett undertook to restore the horse's form to win another championship at the 2002 Celebration to increase its value even more. The Duck was an unusually nervous and aggressive horse that was sensitive to its environment, could get excited fairly easily and was not very fond of strangers. (TR 15, TR 260, TR 295 and TR 402-404).

6. On August 26, 2002, shortly before 11:00 PM EDT, Kim Bennett led the Duck into the inspection area of the Calsonic Arena in Shelbyville, Tennessee where the 2002 Celebration was being held, and presented the horse for pre-show inspection. The Duck had been entered by Kim Bennett for showing and exhibiting at the 2002 Celebration as entry number 784 in class 104. Class 104 was considered a qualifying event for the 2002 World Grand Championship. (TR 320, TR 408, CX 1, CX 2, CX 3, CX 4A).

7. As a stallion recently used for breeding, the Duck became very agitated and easily aroused when near other horses. Because of the Duck's unsteady temperament and the possibility that it might become excited and difficult to handle and mount, Kim Bennett had waited until the inspection area was clear of other horses that might distract the Duck before leading it to the inspection area. (TR 322, TR 405-408).

8. On August 26, 2002, at about 11:00 PM EDT, a pre-show inspection of the Duck was made by Mark Thomas, a Designated Qualified Person employed by the National Horse Show Commission that had been engaged to conduct the inspection process for the 2002 Celebration. (TR 9, TR 408).

9. Mark Thomas has been a licensed Designated Qualified Person for fourteen years and has inspected horses at hundreds of horse shows. (TR 13).

10. Mark Thomas conducted a three-part inspection of the Duck, as he did other horses, consisting of (1) general appearance, (2) locomotion and (3) palpation. He gave the Duck the best score in each category. (TR 16-18).

11. Mark Thomas approved the Duck to be shown and exhibited, and Kim Bennett, who was to be the horse's rider, then led it to the warm-up area. (TR 27, TR 410).

12. Two APHIS Veterinary Medical Officers were assigned to the 2002 Celebration and were present in the inspection area on the evening of August 26, 2002. They were Dr. Michael Guedron and Dr. Lynn Bourgeois. Dr. Bourgeois was the Show Veterinarian, the APHIS designation for the veterinarian in charge, whose duties included inspecting horses himself, the management of both Dr. Guedron and a team of APHIS inspectors, the monitoring of the Designated Qualified Persons and their performance, and trying to make everything go smoothly.(TR 130-131, TR 134-136, TR 187, TR 212-213).

13. Before the 2002 Celebration, complaints had been made to USDA about Dr. Guedron's demeanor and the performance of his duties at horse shows. He smoked while around horses and in designated non-smoking areas. He failed to stand during the playing of the National Anthem. He would so conduct pre-show inspections that horses with nothing wrong with them would miss their show class. A Designated Qualified Person complained to Dr. Bourgeois at a special meeting held on August 25, 2002, that Dr. Guedron had intimidated and harassed him. In the year 2002, Dr. Guedron was involved in a majority of the conflicts that were the subject of conflict resolutions with the National Horse Show Commission's Designated Qualified Persons. (TR 38, TR 190-193, TR 204, TR 206, TR 266-267).

14. Kim Bennett knew of Dr. Guedron's reputation when he led the Duck into the warm-up area to show him at the 2002 Celebration. (TR 394-400).

15. Kim Bennett later learned that Dr. Guedron had a problem with his employment application with USDA and had lost his license to practice in the State of Florida. (TR 395-399, TR 442).

16. Dr. Guedron is no longer employed by APHIS or USDA. It is believed that he presently lives in the State of Florida. (TR 111-112, TR 206, TR 388, RX 13).

17. As Kim Bennett led the Duck into the warm-up area on the evening of August 26, 2002, he was followed by Dr. Guedron who stopped Mr. Bennett and instructed him to return the horse to the inspection area for another inspection. Dr. Guedron did not tell Kim Bennett why he wanted to re-inspect the horse and did not provide a reason when asked. Kim Bennett nonetheless agreed to the re-inspection and allowed it to be conducted by Dr. Guedron until he observed him palpate the horse's left front pastern in a way that Kim Bennett believed

to be abusive and calculated to elicit a reaction from a horse that was not sore. At that point, Kim Bennett led the horse away from Dr. Guedron. Dr. Guedron asked Kim Bennett if he was refusing inspection.

Mr. Bennett replied: "No, I am not. I am only asking that you inspect the horse properly". Further conversations took place, and Mr. Bennett became more agitated as his opportunity to exhibit the horse and re-establish it as a champion, disappeared with the passage of time. Dr. Bourgeois, the Show Vet, asked Mr. Bennett whether or not he would allow Dr. Guedron to complete his inspection and Kim Bennett replied: "Not Dr. Guedron". Kim Bennett requested that Dr. Bourgeois inspect the horse instead of Dr. Guedron because Dr. Guedron was using the points of his thumbs rather than the balls of his thumbs to palpate the horse's foot. This request could have been granted by Dr. Bourgeois but, without any reason being given, was refused. Apparently, Dr. Bourgeois believed it was more important to uphold Dr. Guedron's authority than to defuse the situation by performing the inspection himself. Dr. Bourgeois was also unwilling to do more to take control of the situation because he believed he had been "emasculated" by orders given to him that night by Dr. Gibson, the APHIS Deputy Administrator for Animal Care who happened to be in attendance at the 2002 Celebration. (TR 137, TR 160, TR 162, TR 199,TR 220-222, TR 328-335, TR 411-420, CX 4-A).

18. The customary procedure when a Veterinary Medical Officer finds a violation of the Act, is to request the Designated Qualified Person who passed the horse for exhibition to write a ticket on the horse. However, this instruction was not given and no ticket was ever written. (TR 194-195).

19. Dr. Guedron did not testify at the hearing. He did not file an investigative report, affidavit, or statement of any kind. The record is totally devoid of any evidence from Dr. Guedron on why he undertook to inspect the Duck on the evening of August 26, 2002, the way in which he palpated the horse, or the reactions he elicited.

Conclusions

Complainant has not met the burden of establishing through a preponderance of evidence that Kim Bennett refused to allow a

representative of APHIS to reasonably inspect the horse Kim Bennett had entered to exhibit and show at the 2002 Celebration. Therefore, Kim Bennett has not violated the implementing regulation and the Act, and this proceeding should be dismissed with prejudice.

The Act has a two-fold purpose in regulating horse shows. First, it seeks to prevent the pain horses experience when subjected to abusive "soring" techniques to enhance their performance at horse shows. Second, it seeks to take away the unfair advantage an exhibitor of a sore horse has over exhibitors who do not sore their horses. *See In re: George Blades*, 40 Agric. Dec. 1725,1736 (1981). To achieve these objectives, the Act requires the management of horse shows to disqualify sore horses and appoint inspectors, known as Designated Qualified Persons, to diagnose and detect the sore horses. To assure compliance, the Act requires USDA to prescribe regulations for the appointment of these inspectors and the manner of their inspections. *See* 15 U.S.C. § 1823.

In addition, USDA may have its own representatives inspect the horse shows and required records provided that:

> …Such an inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner….

15 USC § 1823 (e). (emphasis supplied)

Kim Bennett is charged with refusing a USDA inspection and violating the provision of the Act that prohibits:

The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 4 [15 USC § 1823].

15 USC § 1824 (9).

Kim Bennett is likewise charged with violating an implementing regulation that recognizes the delegation of the USDA inspection function to APHIS and states:

> Each horse owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse at any horse

> show,… shall allow any APHIS representative to reasonably inspect such horse at all reasonable times and places the APHIS representative may designate….APHIS representatives will not generally or routinely delay or interrupt actual individual classes or performances at horse shows,…for the purposes of examining horses, but they may do so in extraordinary situations such as but not limited to, lack of proper facilities for inspection, refusal of management to cooperate with Department inspection efforts, reason to believe that failure to immediately perform inspection may result in the loss, removal, or masking of any evidence of a violation of the Act or the regulations, or a request by management that such inspections be performed by an APHIS representative.

9 CFR § 11.4 (a). (emphasis supplied)

Kim Bennett allowed Dr. Guedreon, an APHIS representative, to start an inspection of the horse Mr. Bennett was about to mount and ride into the show ring, but refused to allow Dr. Guedron to continue the inspection when Mr. Bennett observed that it was not being reasonably conducted. He did not refuse the APHIS inspection per se, but he sought to assure that it would be reasonably conducted by having it performed by another APHIS inspector.

I found Kim Bennett to be a credible witness. His testimony that the horse was sound and an inappropriate candidate for a pre-show re-inspection was supported by:

1. Mark Thomas, the Designated Qualified person who conducted the pre-show inspection. (TR 24, TR 66).
2. Dr. Stephen Mullens, a private veterinarian employed on the evening of August 26, 2002, by Mr. Bennett to examine the horse to determine if it was sound or sore to help resolve his controversy with APHIS. (TR 76, TR 80-81).
3. Lonnie Messick, Executive Vice President of the National Horse Show Commission and its Animal Care Designated Qualified Persons Coordinator. (TR 258, TR 260-261).
4. Kurt Moss, a horse trainer holding an AAA judge's license with the National Horse Show Commission. (TR 297-298).
5. Duane Rector, the horse's blacksmith who also holds a judge's

license. (TR 307-309).
6. Leigh Bennett, Kim Bennett's wife, who is also a licensed horse trainer and an AAA certified judge. (TR 325).

All six of these witnesses impressed me as credible and trustworthy. The sole witness to testify for APHIS to support its allegation that Kim Bennett refused a reasonable inspection was the Show Veterinarian, Dr. Lynn Bourgeois. On the night of August 26, 2002, Dr. Bourgeois did not witness the pre-show inspection of the horse by Mark Thomas, the Designated Qualified Person. (CX 3). He did not see Dr. Guedron ask Mr. Bennett to have the horse return for re-inspection, and did not see Dr. Guedron inspecting the horse. (TR 138). He did not undertake to inspect the horse himself when Mr. Bennett requested him to do so, but instead decided to "let him vent until the winners of the last class came out and were inspected". (CX 3). He did not attempt to defuse the situation that night, but instead is still angry that his superior "emasculated" him by giving him instructions with which he disagreed. (Finding 17).

Dr. Bourgeois attempted to show that Dr. Guedron's request to inspect the horse was reasonable by watching a videotape of Mr. Thomas' inspection, and opining when its left foot was palpated, "there was a subtle move". (TR 146). However, none of the other expert witnesses who testified detected such a reaction. Dr. Bourgeois also testified on the basis of watching the videotape, that Dr. Guedron elicited a response when he palpated the horse's left foot. (TR148). But the videotape (CX 4-A) did not enable him to see if Dr. Guedron may have obtained a reaction by using an improper technique such as palpating the horse's foot with the points of his thumbs rather than the balls of his thumbs.

Complainant has the burden of proving a violation of the Act by a preponderance of the evidence. *In re Robert B. Mc Cloy, Jr.,* 61 Agric. Dec. 173,195 (2002). The Act specifically requires a USDA inspection to be conducted "in a reasonable manner" (15 U.S.C. § 1823 (e)). The controlling regulation likewise requires "any APHIS representative to reasonably inspect" the horse (9 C. F. R. § 11.4 (a)).

The preponderance of evidence in this case fails to prove that Dr. Guedron conducted the horse's inspection in a reasonable manner. He elected to initiate a pre-show inspection of the last horse to leave the inspection area with very little time left to make its class event.

Typically, APHIS inspections are conducted at the completion of these events.(TR 210-211, RX 26 at page 19). In fact, the governing regulation charges APHIS inspectors to ordinarily avoid delaying individual classes:

> ….APHIS representatives will not generally or routinely delay or interrupt actual individual classes or performances at horse shows,…for the purposes of examining horses,…

9 C. F. R. § 11.4 (a).

Even assuming Dr. Guedron had a good reason for conducting a pre-show inspection of the horse that could and did delay the horse from competing in its class, there is no proof that he conducted the inspection properly to qualify as being performed in a "reasonable manner". Only two people have actual knowledge of how Dr. Guedron palpated the horse. They are Kim Bennett and Dr. Guedron. Kim Bennett testified that Dr. Guedron did not palpate the horse properly. There is no evidence to refute this testimony. Dr. Guedron did not testify and never prepared an investigative report, an affidavit, or any kind of statement attesting to the fact that he properly palpated the horse's foot. Without such evidence, a finding cannot be made that he conducted the inspection in a reasonable manner. This is a necessary element of Complainant's proof that has not been met. Inasmuch as Complainant has failed to meet its burden of proof, this proceeding against Kim Bennett is being dismissed with prejudice.

ORDER

This proceeding that was filed against Kim Bennett, respondent, is hereby dismissed with prejudice. This dismissal shall become effective and final thirty–one (31) days after receipt thereof unless Complainant shall appeal this Decision and Order to the Judicial Officer within thirty (30) days after receiving it in accordance with 7 C.F.R. §1.145.

_____

In re: MIKE TURNER AND SUSIE HARMON.
HPA Docket No. 01-0023.
Decision and Order.
Filed October 26, 2005.

HPA – Horse protection – Sore – Entry – Secondary veterinarian – Sex defined – Gelding defined – Baird test applicability – Civil penalty – Disqualification.

The Judicial Officer reversed the initial decision by Administrative Law Judge Peter M. Davenport (ALJ) and concluded Respondents entered a horse known as "The Ultra Doc" in a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B). The Judicial Officer agreed with Complainant that Complainant's exhibit 2 (APHIS Form 7077) had probative value despite two errors on the form and despite Complainant's failure to call as witnesses the persons who completed the form. The Judicial Officer also found that bilateral, reproducible pain responses to palpation are sufficient to be considered abnormal sensitivity, even if the responses are mild, and trigger the presumption in 15 U.S.C. § 1825(d)(5) that the horse manifesting such responses, is sore. The Judicial Officer also found the test in *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994), inapposite because Complainant did not seek a finding that the owner of the horse violated 15 U.S.C. § 1824(2)(D). The Judicial Officer assessed each Respondent a $2,200 civil penalty and disqualified each Respondent for 1 year.

Robert A. Ertman, for Complainant.
Brenda S. Bramlett, Shelbyville, Tennessee, for Respondents.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on 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

. . . .

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

[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.

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 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.
>
> 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 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

[2] 7 C.F.R. § 3.91(b)(2)(vii).

[3] 15 U.S.C. § 1825(c).

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 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. § 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

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[4] *In re Jackie McConnell*, 64 Agric. Dec. 436, 490 (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).

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, 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]

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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.

[6]*In re Jackie McConnell*, 64 Agric. Dec. 436, 492 (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),

(continued...)

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).

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).

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[6](...continued)
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).

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 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

[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.)

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), 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).

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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).

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 "<u>abnormal</u> sensitivity or inflammation in <u>both</u> 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 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

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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).

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.

In re: RONALD BELTZ, AN INDIVIDUAL; AND CHRISTOPHER JEROME ZAHND, AN INDIVIDUAL.
HPA Docket No. 02-0001.
Decision and Order as to Christopher Jerome Zahnd.
Filed December 28, 2005.

HPA – Horse protection – Sore – Entry – Palpation pressure – Indicia of soring – Silly horses – Record of compliance – Civil penalty – Disqualification.

The Judicial Officer reversed the initial decision by Chief Administrative Law Judge Marc R. Hillson and concluded Respondent entered a horse known as "Lady Ebony's Ace" in a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B). The Judicial Officer found Complainant proved by a preponderance of the evidence that Lady Ebony's Ace was "sore" as that term is defined in the Horse Protection Act and Lady Ebony's Ace manifested abnormal sensitivity in both of her forelimbs triggering the statutory presumption that she was a horse which was sore (15 U.S.C. § 1825(d)(5)). The Judicial Officer found Respondent did not rebut the statutory presumption and found Respondent's evidence did not outweigh Complainant's evidence that Lady Ebony's Ace was sore. The Judicial Officer assessed Respondent a $2,200 civil penalty and disqualified Respondent for 1 year.

Brian T. Hill, for Complainant.
Kenneth Shelton, Decatur, Alabama, for Respondent.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

William R. DeHaven, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter

[11] 15 U.S.C. § 1825(b)(2), (c).

Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on October 25, 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) [hereinafter the Rules of Practice].

Complainant alleges that on May 25, 2000, Christopher Jerome Zahnd [hereinafter Respondent] entered a horse known as "Lady Ebony's Ace" as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace, while Lady Ebony's Ace was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ II.1).[1] On December 4, 2001, Respondent filed an answer denying the material allegations of the Complaint, and on May 6, 2004, Respondent filed an amended answer denying the material allegations of the Complaint.

On December 1, 2004, the Chief ALJ presided at a hearing in Huntsville, Alabama. Brian T. Hill, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Greg L. Shelton, Shelton & Shelton, Decatur, Alabama, represented Respondent. At the hearing, Complainant called four witnesses and introduced eight exhibits. Respondent called two witnesses, but did not introduce any exhibits.

On February 17, 2005, Respondent filed a "Brief in Support of Christopher Jerome Zahnd." On February 18, 2005, Complainant filed "Complainant's Proposed Findings of Fact, Conclusions of Law, Proposed Order and Brief in Support Thereof." On March 18, 2005, Complainant filed "Complainant's Reply Brief."

On September 6, 2005, the Chief ALJ issued a "Decision as to Christopher J. Zahnd" [hereinafter Initial Decision as to Christopher J. Zahnd]: (1) concluding Complainant failed to prove by a preponderance of the evidence that Lady Ebony's Ace was sore on May 25, 2000, when

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[1]Complainant also alleged that Ronald Beltz violated the Horse Protection Act (Compl. ¶¶ II.1, II.2). Complainant and Ronald Beltz agreed to a consent decision which Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] entered on January 18, 2005. *In re Ronald Beltz*, 64 Agric. D ec.854(2005) (Consent Decision as to Ronald Beltz).

Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace; and (2) dismissing the Complaint (Initial Decision as to Christopher J. Zahnd at 11).

On October 24, 2005, Complainant appealed to the Judicial Officer. On November 16, 2005, Respondent filed a response to Complainant's appeal petition. On November 23, 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 Chief ALJ's conclusion that Complainant failed to prove by a preponderance of the evidence that Lady Ebony's Ace was sore on May 25, 2000, when Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee. Therefore, I do not adopt the Chief ALJ's Initial Decision as to Christopher J. Zahnd as the final Decision and Order as to Christopher Jerome Zahnd.

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

APPLICABLE STATUTORY 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.

DECISION

Decision Summary

I conclude Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace, while Lady Ebony's Ace was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). I assess Respondent a $2,200 civil penalty and disqualify 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.

Discussion

Respondent admits on May 25, 2000, he entered Lady Ebony's Ace as entry number 15 in class number 13 in the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace (Compl. ¶ I.3; Amended Answer ¶ I.3). Thus, the only issue in this proceeding is whether Lady Ebony's Ace was sore when Respondent entered her in the 30th Annual Spring Fun Show Preview. Complainant proved by a preponderance of the evidence[2] that Lady Ebony's Ace was sore when

[2]Complainant, as the proponent of an order, has the burden of proof in this proceeding (5 U.S.C. § 556(d)). The standard of proof by which this burden is met is the preponderance of the evidence standard. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Jackie McConnell*, 64 Agric. Dec. 436, 473-74 (2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Beverly Burgess* (Decision as to Winston T. Groover, Jr.), 63 Agric. Dec. 678, 712 (2004), *appeal docketed sub nom. Winston T. Groover, Jr. v. United States Dep't of Agric.*, No. 04-4519 (6th Cir. Dec. 13, 2004); *In re Robert B. McCloy*, 61 Agric. Dec. 173, 195 n.6 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re William J. Reinhart*, 60 Agric. Dec. 241, 258 n.7 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d

(continued...)

Respondent entered her in the 30th Annual Spring Fun Show Preview. Moreover, Complainant proved by a preponderance of the evidence[3] that Lady Ebony's Ace manifested abnormal sensitivity in both of her forelimbs when palpated during pre-show inspection at the 30th Annual Spring Fun Show Preview triggering the statutory presumption that Lady Ebony's Ace was a horse which was sore.[4] As discussed in this Decision and Order as to Christopher Jerome Zahnd, *infra*, Respondent's evidence that Lady Ebony's Ace was not sore when Respondent entered her in the 30th Annual Spring Fun Show Preview is not sufficient to rebut the statutory presumption that she was a horse which was sore when Respondent entered her in the 30th Annual Spring Fun Show Preview and does not outweigh Complainant's evidence that Lady Ebony's Ace was sore when Respondent entered her in the 30th Annual Spring Fun Show Preview.

Findings of Fact

1. Respondent is an individual whose mailing address is 630 County Road 368, Trinity, Alabama 35673 (Compl. ¶ I.2; Amended Answer ¶ I.2; CX 4 at 1).

2. Respondent was the trainer of Lady Ebony's Ace on May 25, 2000 (CX 1, CX 4 at 1, CX 5, CX 6).

3. On May 25, 2000, Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 in the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace (Compl. ¶ I.3; Amended Answer ¶ I.3).

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[2](...continued)
279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

[3]See note 2.

[4]15 U.S.C. § 1825(d)(5).

4. Lady Ebony's Ace spent most of May 25, 2000, prior to the show, in a horse trailer. Both Respondent and Larry Appleton, Jr., who was assisting Respondent as a groom, inspected Lady Ebony's Ace before the show and found no response to palpation. (Tr. 84-90, 98-99.)

5. On May 25, 2000, a Designated Qualified Person,[5] Charles Thomas, inspected Lady Ebony's Ace during a pre-show inspection at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee (CX 5).

6. Mr. Thomas noted Lady Ebony's Ace reacted to palpation of each of her front feet and noted a limitation of the freedom of movement of Lady Ebony's Ace when led. Specifically, Mr. Thomas found Lady Ebony's Ace had a mild reaction to his palpation on the outside of the left front foot and a stronger reaction to his palpation on the outside of the right front foot and Lady Ebony's Ace pulled slightly on the reins and walked slowly when led. Based on his findings, Mr. Thomas gave Lady Ebony's Ace a score of 5, making her ineligible to be shown that night. However, Mr. Thomas concluded Lady Ebony's Ace was not "sore" as that term is defined in the Horse Protection Act. (CX 5, CX 7.)

7. Based on his examination of Lady Ebony's Ace, Mr. Thomas issued DQP Ticket number 22001 (CX 5, CX 6, CX 7).

8. On May 27, 2000, Mr. Thomas executed an affidavit which describes his May 25, 2000, examination of Lady Ebony's Ace and his findings, as follows:

> On the evening of May 25, 2000, I was assigned to work the 30th Annual Spring Fun Show, Shelbyville, Tennessee. Around 9:10pm on May 25, 2000 on pre-show inspection, I inspected a mare, for Class Number 13 (Owner-Amateur Riders on Four-Year-Old Walking Mares or Geldings, Specialty) named

[5]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 Persons 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.

> Lady Ebany's [sic] Ace, with exhibitor number 15. The horse was presented by the trainer Chris Zahnd to the DQP station. The horse reacted to palpation on both front feet. I noted my findings on the DQP EXAMINATION score sheet, Locomotion, slight pull on reins when led, walked slow. Physical Examination, mild reaction on left front outside stronger reaction on right front outside. Appearance, no problem. I scored the horse five (5) on the Exam. I issued DQP Ticket Number 22001.

CX 5.

9. Dr. Clement Dussault, a veterinarian employed by the Animal and Plant Health Inspection Service, United States Department of Agriculture, then examined Lady Ebony's Ace. Dr. Dussault noted Lady Ebony's Ace moved somewhat freely when being led around a cone. Dr. Dussault also noted, when palpating medial and lateral aspects of the right front foot, Lady Ebony's Ace withdrew her foot, and when palpating medial and lateral aspects of the left front foot, Lady Ebony's Ace withdrew her foot. Dr. Dussault termed Lady Ebony's Ace's responses to palpation "moderate." Dr. Dussault found Lady Ebony's Ace to be bilaterally sore and determined Lady Ebony's Ace would feel pain when moving. (CX 1, CX 3, CX 8; Tr. 35-36, 42.)

10. Dr. Dussault then asked Dr. Guedron, another Animal and Plant Health Inspection Service, United States Department of Agriculture, veterinarian who was present at the show, to examine Lady Ebony's Ace. Dr. Guedron noted Lady Ebony's Ace walked slowly with a shortened gait and was reluctant to lead. Dr. Guedron also noted, when palpating medial and lateral aspects of the right front foot, Lady Ebony's Ace withdrew her foot, reared her head, and shifted her weight to her rear feet, and when palpating medial and lateral aspects of the left front foot, Lady Ebony's Ace withdrew her foot, reared her head, and shifted her weight to her rear feet. Dr. Guedron termed Lady Ebony's Ace's responses to palpation "strong." (CX 1, CX 2, CX 8; Tr. 18-20, 36-39.)

11. During Dr. Dussault's examination of Lady Ebony's Ace, he did not smell anything on Lady Ebony's Ace, he did not see any visible signs of scarring on Lady Ebony's Ace, and he did not note any hair loss

on Lady Ebony's Ace. Dr. Dussault stated his notation on APHIS Form 7077, which is the Summary of Alleged Violations, that there was a failure to comply with the scar rule,[6] was made in error, and that no scarring was evident. Dr. Dussault concluded, after conferring with Dr. Guedron, that the pain Lady Ebony's Ace would feel when moving was caused by mechanical or chemical means or both mechanical and chemical means. (CX 1, CX 2 at 2, CX 3 at 2; Tr. 24, 40, 49-50.)

12. On May 26, 2000, Dr. Dussault executed an affidavit which describes his May 25, 2000, examination of Lady Ebony's Ace and his findings, as follows:

> On May 25, 2000 at about 2110 I observed DQP Charles Thomas pre-show check Exhibitor Number 15, in Class Number 13 later identified to me as Lady Ebany's [sic] Ace. I noted a foot withdrawal when the DQP palpated both pasterns. The DQP wrote ticket 22001.
>
> I observed the horse move around the cone and noted it moved somewhat freely. 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 medial and lateral aspect as noted on the APHIS Form 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 medial and lateral aspects of the right foot the horse withdrew its foot. The responses to palpation were moderate.
>
> I asked Dr. Guedron to check the horse and noted when it moved it did not move freely. I did not observe Dr. Guedron palpate this horse.
>
> Dr. Guedron and I conferred and agreed the horse was sore

[6]The scar rule is set forth in 9 C.F.R. § 11.3.

as defined by the Horse Protection Act. I informed the custodian that the horse was sore. Mike Nottingham and I 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 3.

13. On May 27, 2000, Dr. Guedron executed an affidavit which describes his May 25, 2000, examination of Lady Ebony's Ace and his findings, as follows:

I first saw Entry #15 in Class #13 - a 4 year-old black mare later identified as "Lady Ebony [sic] Ace" - when Dr. Dussault asked me to examine it pre-show at approximately 9:15 pm CDT. I did not witness the DQP's inspection or Dr. Dussault's exam, but understood that the horse had been disqualified from showing by the DQP.

As I had the horse walk and turn around the cone, I noted that it was walking slowly with a shortened gait and was reluctant to lead, as evidenced by its pulling back on the reins with its head held high. I began my physical exam with the left leg and foot and elicited strong, consistent and repeatable pain responses - as evidenced by the horse forcefully withdrawing its foot, rearing its head, and shifting its weight to its rear feet - to digital palpation of both the medial and lateral heel bulbs. I continued my exam with the right leg and foot and elicited the same strong, consistent and repeatable pain responses to digital palpation of the same areas of the pastern as described for the left foot.

Dr. Dussault and I conferred and agreed that the horse was sore as defined by the Horse Protection Act. He then informed the custodian of our decision and that USDA, APHIS would be initiating a Federal case in this regard. Mr. Nottingham and

> Dr. Dussault filled out the APHIS Form 7077, and I added my signature.
>
> In my professional opinion, this horse was sored by the use of chemicals and/or action devices.

CX 2.

14. Respondent has trained and exhibited horses for 15 years and has shown Lady Ebony's Ace numerous times. Respondent testified he had never been cited before or since May 25, 2000, for a violation of the Horse Protection Act. Respondent stated Lady Ebony's Ace's reactions to palpation were due to her acting "silly" as a result of spending most of the day in a horse trailer and the extended examination process. (CX 4 at 2; Tr. 97, 99-100.)

15. On May 25, 2000, during pre-show examinations by Mr. Thomas, Dr. Dussault, and Dr. Guedron, Lady Ebony's Ace manifested abnormal sensitivity in both of her forelimbs.

Conclusions of Law

On May 25, 2000, Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace, while Lady Ebony's Ace 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.[7] The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation.[8]

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

[7] 7 C.F.R. § 3.91(b)(2)(vii).

[8] 15 U.S.C. § 1825(c).

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 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 Respondent a $2,200 civil penalty (Complainant's Proposed Findings of Fact, Conclusions of Law, Proposed Order and Brief in Support Thereof ¶ II and Proposed Order). The extent and gravity of Respondent's prohibited conduct are great. Two United States Department of Agriculture veterinary medical officers found Lady Ebony's Ace sore (CX 1, CX 2 at 2, CX 3 at 2). Dr. Dussault and Dr. Guedron found palpation of the forelimbs elicited consistent, repeatable pain responses from Lady Ebony's Ace (CX 2, CX 3). Dr. Dussault stated Lady Ebony's Ace's responses to palpation on the left front foot and right front foot were moderate. Dr. Dussault further stated, in his opinion, Lady Ebony's Ace would feel pain when moving and the pain was caused by mechanical or chemical means or both mechanical and chemical means. (CX 3 at 2.) Dr. Guedron stated Lady Ebony's Ace's responses to palpation on the left front foot and

right front foot were strong. Dr. Guedron further stated, in his opinion, Lady Ebony's Ace was sored by the use of mechanical or chemical means or both mechanical and chemical means. (CX 2.) Weighing all the circumstances, I find Respondent culpable for the violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Respondent presented no argument that he is unable to pay a $2,200 civil penalty or that a $2,200 civil penalty would affect his ability to continue to do business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[9] Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed 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 Respondent's violation of the Horse Protection Act. Therefore, I assess 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

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[9]*In re Mike Turner*, 64 Agric. Dec. ___, slip op. at 21 (Oct. 26, 2005), *appeal docketed*, No. 05-4487 (6th Cir. Nov. 23, 2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 490 (2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 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).

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

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

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

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

Horse Protection Act for the first time.[11]

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, 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).

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 Respondent's violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

Complainant's Appeal Petition

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[11]*In re Mike Turner*, 64 Agric. Dec. ___, slip op. at 23 (Oct. 26, 2005), *appeal docketed*, No. 05-4487 (6th Cir. Nov. 23, 2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 490 (2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 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).

The Chief ALJ found that on May 25, 2000, Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace. Moreover, the Chief ALJ found that on May 25, 2000, during pre-show inspection, Lady Ebony's Ace manifested abnormal sensitivity in both of her forelimbs triggering the statutory presumption that Lady Ebony's Ace was a horse which was sore.[12] However, the Chief ALJ concluded Respondent rebutted the statutory presumption that Lady Ebony's Ace was a horse which was sore and Complainant did not prove by a preponderance of the evidence that Lady Ebony's Ace was sore. Complainant appeals the Chief ALJ's conclusions that Respondent rebutted the presumption that Lady Ebony's Ace was sore and that Complainant did not prove by a preponderance of the evidence that Lady Ebony's Ace was sore (Complainant's Appeal of the ALJ's Decision and Order, and Brief in Support Thereof at 2-12).

The Chief ALJ found the following factors support the conclusions that Respondent rebutted the statutory presumption that Lady Ebony's Ace was a horse which was sore and that Complainant failed to prove by a preponderance of the evidence that Lady Ebony's Ace was sore: (1) Dr. Guedron's failure to testify; (2) the absence of scarring, chemical odor, or hair loss on Lady Ebony's Ace; (3) the reasonableness of Respondent's explanation for Lady Ebony's Ace's reactions to palpation; and (4) Respondent's record of compliance with the Horse Protection Act (Initial Decision as to Christopher J. Zahnd at 6). I disagree with the Chief ALJ's conclusion that these factors rebut the statutory presumption that Lady Ebony's Ace was sore on May 25, 2000, when Lady Ebony's Ace manifested abnormal sensitivity in both of her forelimbs in response to palpation by two United States Department of Agriculture veterinarians and a Designated Qualified Person. I also disagree with the Chief ALJ's conclusion that these factors outweigh the evidence introduced by Complainant showing that Lady Ebony's Ace was sore on May 25, 2000.

Dr. Guedron's Failure to Testify

[12]The statutory presumption is set forth in 15 U.S.C. § 1825(d)(5).

The Chief ALJ states "[t]he failure of Complainant to attempt to call Dr. Guedron, whose palpations of the horse appeared to my eye to be more forceful than that of Dr. Dussault, to hear his explanations for his conclusions, is a significant detriment to Complainant's case." (Initial Decision as to Christopher J. Zahnd at 10.)

I do not find Dr. Guedron's failure to testify regarding the pressure he used when palpating Lady Ebony's Ace, a detriment to Complainant's case. Dr. Dussault addressed the issue of the pressure used to palpate a horse to determine whether the horse is "sore" as that term is defined under the Horse Protection Act, as follows:

> BY MR. HILL:
>
> Q. I'm just going to ask you a couple of questions or you can give me a couple of answers about the pain thresholds once again. Now, in palpation when you do your examination -- you told us that you palpate how hard in -- for your exams?
>
> [BY DR. DUSSAULT:]
>
> A. Basically, I palpate -- what we train all our veterinarians and DQPs is to palpate enough to just blanch your thumb.
>
> Q. Okay.
>
> A. The other thing in pain responses is that we don't know when the horse comes in as to where it is on the pain curve, I mean whether the pain is going up or the pain is coming down. Now --
>
> JUDGE HILLSON: Can you -- wait. I'm sorry to interrupt. When -- you used the expression, Blanch your thumb. Maybe you ought to spell the word blanch and tell us what you mean by, Blanch your thumb.
>
> THE WITNESS: Basically, it would be, when I press down on my thumb, to white it out.

JUDGE HILLSON: Okay. And why don't you just spell that just to make sure we have it?

THE WITNESS: B-L-A-N-C-H.

JUDGE HILLSON: Okay.

THE WITNESS: So when we're palpating -- and that's -- why sometimes there looks to be a discrepancy is that -- the first person gets a little bit of a reaction and the next person gets a little more and the next person gets a little more is the horse is going up the pain curve. And the reverse of that is the first person will get a big reaction, the second person gets less, and the third person may not get a reaction at all, because the horse is going down the other side, you know.

So it's hard to tell where you're at in that pain threshold when you're examining a horse. But –

. . . .

Q. In your experience, does a normal horse -- a normal, un-sore horse -- does it -- would it -- does it react -- is there any reaction to even fairly heavy touching with the thumbs?

A. I have never -- I've been around horses for many years. And I mean it's -- a diagnostic method that's used, you know, by veterinarians and by physicians, chiropractors and everyone is digital palpation. I've -- in fact, when I train new VMOs new to the Horse Protection Act, I'll –

Q. VMOs being what?

A. Veterinarian Medical Officers. Veterinarians that we've hired that have not worked in the Horse Protection Act before -- I'll in fact show them how -- you know, I'll put my thumb on their thumb and show them that you can press as hard as

you want -- as long as you're not jabbing the horse, you can press as hard as you want -- you know proper digital palpation -- and you will not get that horse to move.

Q. All right.

A. If you would, just about anything you put on the horse -- the saddle, the bridle, anything like that -- a wrap -- would cause the horse pain. And it just doesn't. And I think, you know, the other thing you have to look at is -- we go through there, and we palpate hundreds of horses a night and get no reactions whatsoever.

Q. Okay. So basically, again, when you touch them with the thumbs, if you're getting that type of reaction just from just your thumbs, you're expecting that as this horse moves, it's going to be feeling pain if it's getting -- if you're getting a response just from your thumbs?

A. That' correct. That horse is in pain at that time –

Q. Okay. I have no --

A. -- and is going to feel pain.

Tr. 77-80. Based on the record before me, I find the pressure Dr. Guedron used to palpate Lady Ebony's Ace irrelevant to the issue of whether Lady Ebony's Ace was sore during the pre-show inspection on May 25, 2000. Therefore, I reject the Chief ALJ's conclusion that Dr. Guedron's failure to testify regarding the pressure he used when palpating Lady Ebony's Ace constitutes a detriment to Complainant's case.

Absence of Scarring, Chemical Odor, and Hair Loss

The Chief ALJ found scarring, chemical odor, and hair loss to be three of the most common indicia of the use of mechanical or chemical soring devices or both mechanical and chemical soring devices (Initial

Decision as to Christopher J. Zahnd at 8). Dr. Dussault testified he did not see any scarring or detect the odor of chemicals on Lady Ebony's Ace and did not remember any hair loss on Lady Ebony's Ace (Tr. 49-50).

The Secretary of Agriculture's policy has been that digital palpation alone is a highly reliable method to determine whether a horse is "sore," as defined in the Horse Protection Act.[13] The Secretary of Agriculture's reliance on palpation to determine whether a horse is sore is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses as part of their efforts to enforce the Horse Protection Act. Moreover, the Horse Protection Regulations (9 C.F.R. pt. 11), issued pursuant to the Horse Protection Act, explicitly provides for digital palpation as a diagnostic technique to determine whether a horse complies with the Horse Protection Act. Further, in the instant proceeding, Lady Ebony's Ace's reactions to digital palpation are not the only evidence that she was sore. I also find significant observations of Lady Ebony's Ace's locomotion as described in Mr. Thomas' affidavit and the summary of

[13]*See, e.g.*, *In re Bowtie Stables, LLC*, 62 Agric. Dec. 580, 608-09 (2003); *In re William J. Reinhart*, 59 Agric. Dec. 721, 751 (2000), *aff'd per curiam*, 39 Fed. Appx. 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 878 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 836 (1996); *In re Kim Bennett*, 55 Agric. Dec. 176, 180-81, 236-37 (1996); *In re C.M. Oppenheimer, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 54 Agric. Dec. 221, 309 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1319 (1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 201 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1292 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259-60 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1232-33 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1191 (1993); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1151 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1072-73 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 287 (1993); *In re Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24).

his examination of Lady Ebony's Ace and Dr. Guedron's affidavit (CX 3 at 2, CX 5, CX 7).

I disagree with the Chief ALJ's finding that scarring, chemical odor, and hair loss are the three most common indicia of the use of mechanical or chemical soring devices or mechanical and chemical soring devices. Instead, based upon my experience with Horse Protection Act cases, I find that the most common indicium of the use of mechanical or chemical soring devices or both mechanical and chemical soring devices is a horse's repeatable, consistent reactions to digital palpation on both of the horse's forelimbs.

Dr. Dussault testified that a horse may be found to be sore without any chemical odor or hair loss (Tr. 59-60). In addition, Dr. Dussault testified, when he finds a horse that reacts to digital palpation, he examines the horse to determine if the cause of the reaction could be something other than the use of mechanical or chemical devices, as follows:

> [BY MR. HILL:]
>
> Q. Okay. And talking about the palpation, what is it that you're looking for with the palpation?
>
> [BY DR. DUSSAULT:]
>
> A. I'm looking for the animal to give me a repeatable consistent response to palpation. It would be the same type of technique that any doctor would use when he's trying to -- when you're trying to figure out where somebody is feeling pain. It's -- the thing that's true and tested for hundreds of years is to put your hands on and palpate.
>
> And what you're trying to do is localize where the horse or where the subject will react. And the first reaction to any pain is withdrawal; you try to get away from pain. So I'm trying to -- the least thing I'm looking for is to have the animal repeatedly withdraw the limb –
>
> Q. Okay.

A. -- or move the limb.

Q. And this pain would be an indication that what -- of what necessarily?

A. That the animal's feeling some pain.

Q. And from -- by chemical, or by –

A. It can be a chemical or mechanical means, something that somebody has done. We'll also look to see if there are other -- you know, if there is another reason why the animal is probably feeling the pain, you know, if it came out post-show, you know, did it struck itself in the ring, is there a cut on there, or is there something else going on.

If it's not repeatable and it's not consistent and -- then we will try to eliminate any other cause. And if we can't -- and that's done -- as I said, that's all done –

Q. All right.

A. -- in a minute to a minute and 15 seconds. Then we'll find it -- you know, we'll do the paperwork.

Q. So you do try to determine whether there were some other source, a cut, or that he bumped his leg on something?

A. Yes.

Q. And --

A. Because you can -- you know, if it bumped its leg recently, you may -- there may be some swelling there. He may have a cut. I mean it's not -- you know, we see periodically horses coming in that have struck themselves, and you'll have a cut, and you'll have bleeding, something like that. And that's what we're

trying to find.

Tr. 16-18.

I do not find the absence of evidence of scarring, chemical odor, and hair loss on Lady Ebony's Ace rebuts the statutory presumption that Lady Ebony's Ace was a horse which was sore during Mr. Thomas', Dr. Dussault's, and Dr. Guedron's pre-show examinations on May 25, 2000. Moreover, the absence of evidence of scarring, chemical odor, and hair loss does not support the Chief ALJ's finding that "Dr. Dussault's conclusion that soring occurred by mechanical or chemical means was simply based on the statutory presumption." (Initial Decision as to Christopher J. Zahnd at 8.) Instead, the evidence establishes that Dr. Dussault examined Lady Ebony's Ace for natural causes for her reactions to digital palpation before concluding that she had been sored by mechanical or chemical devices or both mechanical and chemical devices.

Respondent's Explanation for Lady Ebony's Ace's Reactions to Palpation

Respondent stated Lady Ebony's Ace's reactions to palpation were not a response to pain, but rather were caused by Lady Ebony's Ace acting "silly" as a result of spending most of May 25, 2000, in a horse trailer and the extended examination process (CX 4 at 2; Tr. 99). The Chief ALJ found Respondent "suggested reasonable explanations for [Lady Ebony's Ace's] behavior" (Initial Decision as to Christopher J. Zahnd at 10).

Dr. Dussault testified that one can distinguish between a "silly" horse and a horse that is sore, as follows:

[BY MR. HILL:]

Q. Okay. Are there horses that may just be -- that may just act up, that may, you know, just be nervous? And have you run across horses that are just nervous?

[BY DR. DUSSAULT:]

A. Yes. We call them a silly horse.

Q. Okay.

A. And basically, these horses are very good in the aspect that they get their feet looked at a lot. So 99 percent of them -- 99.99 percent of them, we don't have any issues with them. But every once in awhile, you'll get a horse that just doesn't want his feet touched the minute you go up to it, and we call it a silly horse. And --

Q. So how do you determine whether it's a silly horse or whether it's a sore horse?

A. Basically, a silly horse, no matter where you touch it -- sometimes even before you start touching it, the horse is moving around. And basically, again, what we're looking for is a repeatable consistent response in an area of the foot. In a silly horse, you know, you can start up at the knee, and the horse is all over the place.

Tr. 21-22. The video tape of the examinations of Lady Ebony's Ace by Mr. Thomas, Dr. Dussault, and Dr. Guedron reveals that Lady Ebony's Ace was not a "silly" horse that reacted as soon as she was approached or touched (CX 8). Instead, Lady Ebony's Ace responded to the three examinations only when she was touched on her two front feet. Moreover, Respondent and Mr. Appleton each examined Lady Ebony's Ace on May 25, 2000, prior to the pre-show examinations conducted by Mr. Thomas, Dr. Dussault, and Dr. Guedron. Respondent described Lady Ebony's Ace's lack of reaction to Mr. Appleton's and Respondent's examinations, as follows:

[BY MR. SHELTON:]

Q. Did you inspect this horse?

A. Yes, sir.

Q. Did you inspect this horse before -- on the evening of all this going on, did you inspect her?

A. Yes, sir.

Q. Did you do it before she went in, or after?

A. Before.

Q. Did you see Larry Appleton inspect her?

A. Yes, sir.

Q. Did you see any palpation responses when Larry examined her?

A. No, sir.

Q. Did you see any palpation responses when you examined her?

A. No, sir.

Tr. 98. Mr. Appleton confirmed Lady Ebony's Ace reacted in the same manner to his examination as she reacted to Respondent's examination (Tr. 84-85). Based on the record before me, I do not find Respondent's explanation that Lady Ebony's Ace was merely "silly" a reasonable explanation for Lady Ebony's Ace's reactions to palpation by Mr. Thomas, Dr. Dussault, and Dr. Guedron. The evidence establishes that Lady Ebony's Ace was not a "silly" horse that reacted to each touch by those examining her or to the mere approach of an individual to examine her.

Respondent's Record of Compliance with the Horse Protection Act

The Chief ALJ states Respondent's record of compliance with the Horse Protection Act, while not determinative, is an indication that

Lady's Ebony Ace's reactions to palpation were not a result of soring (Initial Decision as to Christopher J. Zahnd at 11).

I do not find Respondent's record of compliance with the Horse Protection Act prior to and after May 25, 2000, relevant to the issue of whether Lady Ebony's Ace's reactions to palpation on May 25, 2000, were the result of soring. As discussed in this Decision and Order as to Christopher Jerome Zahnd, *supra*, Respondent's history of violations of the Horse Protection Act is only relevant to the sanction to be imposed for his May 25, 2000, violation of the Horse Protection Act.

ORDER

1. Respondent 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:

Brian T. Hill
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's payment of the civil penalty shall be forwarded to, and received by, Mr. Hill within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 02-0001.

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

RIGHT TO JUDICIAL REVIEW

Respondent has the right to obtain review of the Order in this Decision and Order as to Christopher Jerome Zahnd in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of the Order in this Decision and Order as to Christopher Jerome Zahnd and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[14] The date of the Order in this Decision and Order as to Christopher Jerome Zahnd is December 28, 2005.

_____

[14]15 U.S.C. § 1825(b)(2), (c).

HONEY RESEARCH, PROMOTION, AND CONSUMER INFORMATION ACT

DEPARTMENTAL DECISIONS

In re: WALTER L. WILSON, d/b/a BUZZ 76 APIARIES; RICHARD L. ADEE, d/b/a ADEE HONEY FARMS; STEVE E. PARKAPIARIES, A CALIFORNIA CORPORATION; A.H. MEYER & SONS, INC., A SOUTH DAKOTA CORPORATION; LYLE JOHNSTON, d/b/a JOHNSTON HONEY FARMS; COY'S HONEY FARM, INC., AN ARKANSAS CORPORATION; PRICE APIARIES, A SOUTH DAKOTA CORPORATION; JIM ROBERTSON, d/b/a ROBERTSON POLLINATION SERVICE; AND TUBBS APIARIES, INC., A MISSISSIPPI CORPORATION. AND THE AMERICAN HONEY PRODUCERS ASSOCIATION, INC., AN OKLAHOMA CORPORATION – INTERESTED PARTY TO WHICH NO RELIEF CAN BE GRANTED.
HRPCIA Docket No. 01-0001.
Decision and Order.
Filed September 7, 2005.

HRPCIA – First Amendment – Government speech – Honey promotion.

Frank Martin, Jr., for Complainant.
Brian C. Leighton, James A. Moody, for Respondents.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision

Decision Summary

[1] The coordinated programs of research, promotion, consumer education, and industry information, including advertising, under the Honey Research, Promotion, and Consumer Information Act, as amended (7 U.S.C. §§ 4601-4613), are government speech, in accordance with *Johanns v. Livestock Marketing Assn.*, 125 S.Ct. 2055,

544 U.S. ____ (2005). Consequently, this Petition of individual honey producers must be denied.

Findings Of Fact

[2] The Secretary of Agriculture (herein frequently "the Secretary") administers the Honey Research, Promotion, and Consumer Information Act, as amended (7 U.S.C. §§ 4601-4613) (herein frequently "the Honey Act"), which was established by Congress in 1984.

[3] The Honey Act establishes the National Honey Board, which, under the Secretary's supervision, administers the program mandated by Congress under the Honey Act. 7 U.S.C. § 4606, *et seq*.

[4] The National Honey Board includes 7 honey producers (at least 50% of the National Honey Board are producers), 2 honey handlers, 2 honey importers, and a national honey marketing cooperative representative (1 co-op member). 7 U.S.C. § 4606. Tr. 184.

[5] The National Honey Board's goal is to maintain increased demand for honey. Tr. 305. 7 U.S.C. § 4601. Among the activities of the National Honey Board is generic advertising (advertising for the entire industry of honey designed to promote honey as a desirable product).

[6] The National Honey Board is funded with the assessments paid by honey producers and honey importers. Tr. 21-22, 356. 7 U.S.C. § 4606(e).

[7] Assessments initially were voluntary but thereafter became mandatory. Tr. 66, 107.

[8] The assessments are exacted by collecting from honey producers and honey importers a penny on every pound of honey sold. 7 U.S.C. § 4606(e).

[9] Collection on honey produced in the United States is accomplished by "first handlers" (bottlers or others who place the honey in commerce), who deduct the assessments from the amount paid to the honey producers and forward the assessments to the National Honey Board. Tr. 22.

[10] The National Honey Board initiates budgets, marketing and program ideas. Tr. 331, 607.

[11] All National Honey Board budgets, contracts, and projects are submitted to the United States Department of Agriculture for review and approval. Tr. 427-429, 432, RX 1 through RX 52. *See also*, Tr. 331-33.

[12] The National Honey Board is not a government entity, but it is tightly supervised by the Secretary; and, on behalf of the Secretary, by personnel of the United States Department of Agriculture, specifically, AMS; and even more specifically, by the Chief of the Research and Promotion Branch for Fruits and Vegetables, AMS (Martha B. Ransom), and her staff. Tr. 427-29. *See also* Tr. 331-33.

[13] The National Honey Board pays for USDA's oversight. Tr. 353.

[14] The National Honey Board staff are not government employees. Tr. 187, 346. The staff salaries are not set by USDA. Tr. 573-75.

[15] The property of the National Honey Board is not government owned.

[16] The Secretary appoints each member of the National Honey Board, in accordance with the specific directions contained in the Honey Act, from nominees proposed by the National Honey Nominations Committee. 7 U.S.C. § 4606, *et seq*. Tr. 575-76.

[17] The Secretary appoints each member of the National Honey Nominations Committee, in accordance with the specific directions contained in the Honey Act, from nominees proposed by State beekeeper associations. 7 U.S.C. § 4606, *et seq*. Tr. 576.

[18] USDA's oversight and control of the National Honey Board includes acting as an advisor to the National Honey Board in the developmental process of promotion, research, and information activities. Tr. 427, 463-529, RX 1 through RX 52.

[19] A representative of USDA attends each and every meeting of the National Honey Board as an active participant. Tr. 427.

[20] Representatives of USDA who attend meetings of the National Honey Board provide comments or feedback to the Board at such meetings. Tr. 427.

[21] USDA's oversight of the National Honey Board includes retaining final approval authority over every assessment dollar spent by the Board. Tr. 427, 432.

[22] USDA's oversight includes review and approval (a meticulous, detail-oriented, sometimes intense, word-for word process) of any materials that the National Honey Board prepares for use. Tr. 332-333, 374-386, 428-29, RX 1 through RX 52.

[23] USDA review and approval of projects (whether advertising, promotion, research, industry information, or consumer education) include evaluation in accordance with USDA policy, AMS guidelines, Federal Trade Commission advertising laws and regulations, and Food and Drug Administration's labeling requirements. Tr. 429. RX 60.

[24] The honey locator, on the third website that the National Honey Board operates, is one example of the National Honey Board's marketing to increase demand for honey, enabling producers to be found by those seeking local honey, or seeking different varieties of honey that are available depending on the floral source. Tr. 195.

[25] The antioxidant level in honey, which varies depending on the floral source, is one example of research undertaken by the National Honey Board. Tr. 196.

[26] The use of light spectroscopy to detect adulteration of honey with high fructose corn syrup or sucrose or other sugars, to help maintain purity of honey products, is another area of research in which the National Honey Board was involved, cooperating with Penn State University. Tr. 197.

[27] Honeybees' value as pollinators was the subject of a study funded by the National Honey Board (RX 70); about 1/3 of our diet is dependent on such pollination, and the toxic impact of pesticides on the bees is of great concern. Tr. 198-203.

[28] The Honey Act prescribes the contents of the Order to be issued by the Secretary. 7 U.S.C. § 4606, *et seq*.

[29] The Honey Act provides for termination or suspension of the Order, including referenda on request of the National Honey Board or at least 10% of those subject to assessment. 7 U.S.C. § 4612.

[30] The Honey Act provides for notice and comment rulemaking. 7 U.S.C. § 4606, *et seq*.

[31] The honey industry is divided roughly 50/50 into direct consumer sales versus the industrial ingredient market. Tr. 50. Floral source determines the honey's flavor, quality and price. Tr. 51-52, 76-77. Based on market competitiveness, honey producers may sell directly

to consumers, directly to packers or be part of a cooperative. Tr. 47-53, 77-79.

[32] The National Honey Board does not regulate the price, quality or sales amount of honey. The National Honey Board does not provide an anti-trust exemption for the honey industry. Tr. 84-85.

[33] National Honey Board advertisements and publications are not attributed to individual honey producers; they bear a trademark symbol that is the property of the National Honey Board; they do not bear a government symbol. Tr. 346-47.

[34] Petitioner Walter L. Wilson, a beekeeper, honey producer, and sole proprietor of Buzz 76 Apiaries, paid assessments to the National Honey Board. Mr. Wilson objects to paying the assessments and seeks a full refund of his assessments. His payments from Crop Year 1998 through Crop Year 2002 were: 1998- $9,374.84; 1999- $12,585.54; 2000- $4,853.97; 2001- $9,607.78; and 2002- $4,631.90. PX 8.

[35] Petitioner Richard L. Adee, a beekeeper, honey producer and sole proprietor of Adee Honey Farms, paid assessments to the National Honey Board. Mr. Adee objects to paying the assessments and seeks a full refund of his assessments. His payments from Crop Year 1998 through Crop Year 2002 were: 1998- $11,921.34; 1999- $23,308.19; 2000- $48,406.93; 2001- $24,506.65; and 2002- $18,136.48. PX 1. Tr. 28.

[36] Petitioner Steve E. Park Apiaries, Inc., a corporation, a beekeeper and honey producer, represented by shareholder Steve Elwood Park, paid assessments to the National Honey Board. Steve E. Park Apiaries, Inc. objects to paying the assessments and seeks a full refund of its assessments. Its payments from Crop Year 1996 through Crop Year 2002 were: 1996- $2,948.49; 1997- $9,944.36; 1998- $5,450.89; 1999- $550.17; 2000- $8,032.25; 2001-$12,019.38; and 2002- $6,227.14. PX , Tr. 280.

[37] Petitioner A.H. Meyer & Sons, Inc., a corporation, a beekeeper and honey producer, represented by Jack Meyer Jr., a shareholder and Vice President, paid assessments to the National Honey Board. A.H. Meyer & Sons, Inc. objects to paying the assessments and seeks a full refund of its assessments. Its payments from Crop Year 1998 through Crop Year 2002 were: 1998- $11,859.44; 1999-

$9,163.30; 2000- $13,647.40; 2001- $7,747.87; and 2002- $11,037.21. PX 10.

[38] Petitioner Lyle Johnston, also known as Lyle B. Johnston, a beekeeper, honey producer and sole proprietor of Johnston Honey Farm, also known as Johnston Honey Farms, paid assessments to the National Honey Board. Mr. Johnston objects to paying the assessments and seeks a full refund of his assessments. His payments from Crop Year 1996 through Crop Year 2002 were: 1996- $2,308.73; 1997- $838.41; 1998- $1,167.67; 1999- $1,216.66; 2000- $1,386.33; 2001- $953.38; and 2002- $2,049.84. Tr. 82-83, 72-75, PX 2.

[39] Petitioner Coy's Honey Farm, Inc., a corporation, a beekeeper and honey producer, represented by shareholder and President Bobby Coy, paid assessments to the National Honey Board. Coy's Honey Farm, Inc. objects to paying the assessments and seeks a full refund of its assessments. Its payments from Crop Year 1997 through Crop Year 2002 were: 1997- $5,640.97; 1998- $8,345.45; 1999- $9,298.05; 2000- $11,199.73; 2001- $9,875.79; and 2002- $4,341.76. PX 9.

[40] Petitioner Price Apiaries, a corporation, a beekeeper and honey producer, also known as Price Honey Farms, and as Price Honey, represented by shareholder Harvey Price, paid assessments to the National Honey Board. Price Apiaries objects to paying the assessments and seeks a full refund of its assessments. Its payments from Crop Year 1996 through Crop Year 2002 were: 1996- $4,945.08; 1997- $4,370.46; 1998- $5,834.10; 1999- $4,027.03; 2000- $7,439.99; 2001- $3,590.13; and 2002- $1,462.86. PX 3, Tr. 109, 113.

[41] Petitioner Jim Robertson, full name James Vincent Robertson, a beekeeper and honey producer and sole proprietor of Robertson Pollination Service, paid assessments to the National Honey Board. Mr. Robertson objects to paying the assessments and seeks a full refund of his assessments. His payments from Crop Year 1997 through Crop Year 2002 were: 1997- $2,638.81; 1998- $1,959.88; 1999- $657.89; 2000- $2,442.45; 2001- $987.98; and 2002- $727.56. PX 12-13, Tr. 131-171.

[42] Petitioner Tubbs Apiaries, Inc., a corporation, represented by shareholder and President Hubert Tubbs, Jr., beekeeper and honey producer, paid assessments to the National Honey Board. Tubbs

Apiaries, Inc. objects to paying the assessments and seeks a full refund of his assessments. Its payments from Crop Year 1998 through Crop Year 2002 were: 1998- $1,957.41; 1999- $1,747.61; 2000- $1,268.13; 2001- $1,263.87; 2002 (partial only, not all of 2002 had been reported when Declaration prepared)- $408.96. PX 7.

Procedural History

[43] Petitioners instituted this proceeding pursuant to the Honey Research, Promotion, and Consumer Information Act, as amended (7 U.S.C. §§ 4601-4613) (the Honey Act); the Honey Research, Promotion, and Consumer Information Order and its regulations (7 C.F.R. § 1240 *et seq*.) (the Honey Order); and the First Amendment to the United States Constitution.

[44] The Petition, filed on September 28, 2001, alleges, among other things, that assessments collected pursuant to the Honey Act violate Petitioners' freedom of speech and freedom of association rights under the First Amendment to the United States Constitution.

[45] Petitioners initially included The American Honey Producers Association, Inc.; Walter L. Wilson, d.b.a. Buzz 76 Apiaries; Richard L. Adee, d.b.a. Adee Honey Farms; Steve E. Park Apiaries, a California corporation; A.H. Meyer & Sons Inc., a South Dakota corporation; Lyle Johnston, d.b.a. Johnston Honey Farms; Coy's Honey Farm, Inc., an Arkansas Corporation, Price Apiaries, a South Dakota corporation; and Tubbs Apiaries, Inc., a Mississippi corporation.

[46] Respondent is the Administrator of the Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS"). AMS's Answer, filed on October 25, 2001, among other things, claims that the Honey Act; the Honey Order, and the rules and regulations promulgated thereunder (7 C.F.R. § 1240 *et seq*.), as interpreted by AMS and the National Honey Board, were and are fully in accordance with the law.

[47] The case was initially assigned to Administrative Law Judge Dorothea A. Baker but was reassigned to me, Administrative Law Judge Jill S. Clifton, on July 15, 2002.

[48] Petitioners' Motion For Judgment on the Pleadings and/or Motion for Summary Judgment, was filed on September 12, 2002.

[49] Respondent's Opposition to Petitioners' Motion for Judgment on the Pleadings and/or Motion For Summary Judgment and in Support of Respondent's Cross-Motion to Dismiss Petitioner The American Honey Producers Association, Inc. for Lack of Standing, was filed on October 10, 2002. Respondents' Supplemental Authority was filed November 4, 2002.

[50] Petitioners' Reply To Respondent's Opposition to Petitioners' Motion For Judgment on the Pleadings and/or Motion for Summary Judgment; and Petitioners Opposition to Respondent's Cross-Motion to Dismiss The American Honey Producers Association, Inc. for Lack Of Standing, was filed on October 24, 2002. Petitioners' Supplemental Authority was filed October 31, 2002.

[51] My Order Denying the Petitioners' Motion for Judgment on the Pleadings was issued and filed on December 27, 2002.

[52] My Order Realigning the Parties and Amending the Caption was also issued and filed on December 27, 2002. Therein I declared that The American Honey Producers Association, Inc., had exhausted "its 'administrative remedies' by attempting to obtain relief here" but that since it is "not 'subject to an order,'" "it is not entitled to be a petitioner in this case. 7 U.S.C. 4609." I kept The American Honey Producers Association, Inc., as a party, identifying it as an "Interested Party To Which No Relief Can Be Granted."

[53] The three-day hearing was held before me in Fresno, California on February 3-5, 2003. Individually named Petitioners have been ably represented by Brian C. Leighton, Esq., of Clovis, California. The American Honey Producers Association, the Interested Party to Which No Relief Can be Granted, has been ably represented by James A. Moody, Esq., of Washington D.C. AMS has been ably represented by Frank Martin, Jr., Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, D.C. The transcript is referred to as Tr.

[54] Petitioners called five witnesses: Richard Adee, a beekeeper and honey producer, owner of Adee Honey Farms, a sole proprietorship, Tr. 13-70; Lyle Johnston, a beekeeper and honey producer, owner of Johnston Honey Farm, also known as Johnston Honey Farms, a sole proprietorship, Tr. 72-99; Harvey Price, a "semi-retired" beekeeper and honey producer, a shareholder in Price Apiaries, a corporation, also

known as Price Honey Farms, and as Price Honey (*see* Tr. 113-114), Tr. 100-130; James Vincent Robertson, a beekeeper and honey producer, owner of Robertson Pollination Service, a sole proprietorship, Tr. 131-171; and Steve Elwood Park, a beekeeper and honey producer, shareholder in Steve E. Park Apiaries, Inc., Tr. 269-297.

[55] AMS called three witnesses: Gene Brandi, a beekeeper and honey producer, owner-operator of Gene Brandi Apiaries, also National Honey Board Chair since June 2001 (Tr. 183), Tr. 178-248, 257-268; Julia Pirnack, National Honey Board, Industry Services Director, Tr. 299-420; and Martha B. Ransom, Chief of the Research and Promotion Branch, Fruit and Vegetable Programs, AMS, Tr. 423-532, 536-681.

[56] Petitioners submitted 13 exhibits, Petitioners' Exhibits, referred to as PX. PX 1 through PX 13 were admitted into evidence. Tr. 298.

[57] AMS submitted 82 exhibits, Respondent's Exhibits, referred to as RX. RX 1 through RX 6, RX 7A, RX 7B, RX 8 through RX 68, and RX 70 through RX 82 were admitted into evidence.

[58] During the hearing, James Vincent Robertson, owner of Robertson Pollination Service, a sole proprietorship, testified (Tr. 131-171), and he has since been added to the case caption as a Petitioner. *See* Notice of Filing of Affidavit-Verification-Declaration filed March 24, 2003; I approve the amended case caption included therein. Tr. 687-91.

[59] Petitioners' Post-Hearing Brief was timely filed on May 29, 2003. Petitioners' Post-Hearing Reply Brief was timely filed on June 26, 2003. Petitioners' supplemental authority was filed on July 11, 2003, and on October 24, 2003; and on April 21, 2004.

[60] AMS's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof, was timely filed on June 11, 2003.

Individual Honey Producer Petitioners' Position

[61] Agriculture holds some of the last nomadic tribes.[1] Like the wheat, corn and pea harvesters, honey producers find themselves moving from state to state throughout the year to follow the fruit of their

[1] Agriculture's nomads travel with a focus on production.

labors. As they move, their bees pollinate crops and produce honey from different floral sources, creating the varieties of honeys we know and consume.

[62] The testimony of Richard Adee, who grew up in a beekeeping family and bought his first bee operation in 1957 (Tr. 18), is illustrative of the position of the individual honey producer Petitioners. Mr. Adee testified, in part, as follows:

Mr. Leighton: . . . what goes into your beekeeping operation?

Mr. Adee: . . . we raise bee colonies, and we - - it's what's called a migratory bee operation. We move bees a lot, but we have a queen breeding operation in Mississippi, Woodville, Mississippi where we start like our cow/calf operation. We start raising our colonies of bees there. They go north to the honey producing country of the Dakotas. And then they're there for the summer. In the fall, in October, they're moved from the Dakotas to California to get ready for the pollination season, which is in progress right today (3 February). After the pollination is over, we - - the almonds is the big pollination. Then we go from the almonds. Some of them will go up to Washington State to the apples. Some of them will go back to Mississippi to start the process over again for breeding new bees and new queens. And the rest will go back to the Midwest to make honey. So in the summertime, they all eventually wind up back in the Dakotas to produce honey. So they're really kind of a bunch of tourists.

Mr. Leighton: Okay. And I don't know what the proper lingo is, but how many hives do you have?

Mr. Adee: We have 55,000 colonies.

Mr. Leighton: Okay. And is a colony in one box?

Mr. Adee: One colony is the - - they're the queen, the bees, and the box is necessary to produce honey.

Mr. Leighton: And approximately how many bees are there in a colony?

Mr. Adee: Oh, in the summertime, you can have up to 70,000. Going into winter, about 30,000.

Mr. Leighton: Okay.

Mr. Adee: They reduce their colony numbers so that they - - when they're not making honey, they don't eat all of the honey that they have gathered, so by natural attrition, they - - the colony numbers are

restricted for the winter months.

Mr. Leighton: Now are there certain kinds of crops that you look for as far as making honey?

Mr. Adee: Crops that we look for?

Mr. Leighton: Yes.

Mr. Adee: Well, we - - yeah, to a degree. We look for the most nectar producing plants, and out in the Midwest, that's alfalfa and sweet clover.

Mr. Leighton: Okay.

Mr. Adee: Here in California would probably be the orange . . .

Mr. Leighton: Okay.

Mr. Adee: . . . crop would be the main - - maybe some sage if they got a little rain.

Mr. Leighton: Okay. And for example, would you make honey out of almonds?

Mr. Adee: No, no. We hope they make enough honey out of the almonds just to replenish what they're eating, but almond honey is not a good tasting honey.

Mr. Leighton: What is the best tasting honey?

Mr. Adee: Well, of course I'm prejudiced to sweet clover.

Mr. Leighton: Okay. And you have a lot of that in the Dakotas.

Mr. Adee: We do . . .

Mr. Leighton: Okay.

Mr. Adee: . . . when we get the right moisture, yes.

Mr. Leighton: And how often do you collect the honey?

Mr. Adee: Well, we start in the latter part of July. And this is - - it's kind of continuing process going through - - hopefully through the end of October, but most of the time, we'll collect it one time from the colony. We - - the ones we start on first we'll put some empty boxes back on. We can go and collect twice on those, but the process - - you could just collect once and save yourself going back twice, but . . .

Mr. Leighton: This sounds like a dumb question, but approximately how much honey could a good honeybee collect for you every year?

Mr. Adee: A good colony of bees?

Mr. Leighton: Yeah.

Mr. Adee: Yeah, that's a good question. We try to set our budgets based on 100 pounds per colony, but during these real dry years, we've

been - - like last year, we didn't quite make 40, so it was kind of a bad year. We have made up to 180 or 200 pounds, but our budgets are set on 100 pounds per colony.
Tr. 14-18.

[63] Individual honey producer Petitioners object to being compelled to pay the assessments used to pay for generic advertising under the Honey Act. In their view, they are being compelled to subsidize private speech in violation of their First Amendment rights to freely speak and freely associate. Petitioners seek refunds on back assessment payments already made.

[64] Individual honey producer Petitioners distinguished their position from that described in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997). [AMS does not rely on *Wileman Brothers*; see AMS's Brief filed June 11, 2003, at page 4, footnote 1.] On cross-examination, Ms. Martha Ransom, Chief of the Research and Promotion Branch, Fruit and Vegetable Programs, AMS, testified regarding the nature of the National Honey Board's statutorily defined authority.

Mr. Leighton: Let me ask it a different way. Can the National Honey Board take any action to set honey prices?

Ms. Ransom: No.

Mr. Leighton: Can they take any action to set any honey prices that packers have to pay producers?

Ms. Ransom: No.

Mr. Leighton: Does the National Honey Board have any authority to set prices for which honey can be sold?

Ms. Ransom: No.

Mr. Leighton: Does the National Honey Board have any authority to control the supply of honey?

Ms. Ransom: No.

Mr. Leighton: In fact, Congress actually stated in the Act that there's no such authority, correct?

Ms. Ransom: That's correct.

Mr. Leighton: Okay. And is it your understanding that honey producers can produce as much honey as they want?

Ms. Ransom: Yes, sir.

Mr. Leighton: That they can sell as much honey as they want?

Ms. Ransom: Yes.
Mr. Leighton: That they can export as much honey as they want?
Ms. Ransom: Yes.
Mr. Leighton: That they can sell domestically as much honey as they want?
Ms. Ransom: Yes.
Mr. Leighton: They can sell it at any price?
Ms. Ransom: Yes.
Mr. Leighton: At any time?
Ms. Ransom: Yes.
Mr. Leighton: To any consumer or customer they want?
Ms. Ransom: Yes.
Tr. 582-84.
Mr. Leighton: Do they have any quotas?
Ms. Ransom: No.
Tr. 584.
Mr. Leighton: Does the National Honey Board enforce any quality restrictions?
Ms. Ransom: No, Mr. Leighton.
Tr. 585.

[65] The individual honey producer Petitioners emphasize the competitive environment in which they operate, again distinguishing their industry from that described in *Glickman v. Wileman Brothers*, *supra*. Richard Adee's testimony is illustrative:

Mr. Leighton: Okay. Does the National Honey Board regulate your operation? Mr. Adee: No.
Mr. Leighton: Okay.
Mr. Adee: No, sir.
Mr. Leighton: Is the only thing they do is collect your assessment?
Mr. Adee: That's correct, sir.
Mr. Leighton: Okay. Is the honey production fully competitive?
Mr. Adee: Yes, sir.
Mr. Leighton: Okay. Is honey marketing fully competitive?
Mr. Adee: Yes, sir.
Mr. Leighton: Does the National Honey Board do anything setting, like, prices?
Mr. Adee: No, sir.

Mr. Leighton: Okay. Do they set the amount of money that honey producers are paid by packers?

Mr. Adee: No, sir.

Mr. Leighton: Okay. Do they limit the amount that you can produce?

Mr. Adee: No, sir.

Mr. Leighton: Do you have any quotas?

Mr. Adee: No, sir.

Mr. Leighton: Are any - - is any honey mandatorily put in to reserves?

Mr. Adee: No, sir.

Mr. Leighton: How is it how you determine which packer you are going to use? Mr. Adee: Basically, it's all based on price. Wherever we can get the best price, that's the market we'll sell to.

Mr. Leighton: Okay. And you have the choice to do that, correct?

Mr. Adee: Yes, sir.

Tr. 36-38. *See also* Petitioner Lyle Johnston's testimony at Tr. 84-85.

[66] Petitioners assert that the money used to finance the research and promotion aspects of the Honey Promotion program could be better spent, and they question the overall efficacy of the Honey Promotion program because the activities have not increased honey prices.

[67] Richard Adee's testimony illustrated the impact of even a penny per pound: Mr. Leighton: Okay. And can you tell us what the significance of the amount of assessments that you pay?

Mr. Adee: How much does this add up . . .

Mr. Leighton: Well, no, not how much they add up to, but how much is - - is it a penny a pound?

Mr. Adee: Oh, it's a penny a pound . . .

Mr. Leighton: Okay.

Mr. Adee: . . . yes, sir. Yes, sir.

Mr. Leighton: And is a penny a pound a significant amount of money?

Mr. Adee: A penny a pound for years and years was two percent of our gross, and sometimes it was 100 percent of our profit. We didn't make two percent during those years when the crops are down in the 40 and 50 . . . pound per colony range. . . .

Mr. Leighton: The penny a pound could've been your profit?

Mr. Adee: It could've been.

Mr. Leighton: Okay. And were there years that would've been?

Mr. Adee: There were years that it was - - when the costs - - when we were operating in the red, it was a cost. Yes, definitely.

Tr. 22-23.

[68] Individual honey producer Petitioners indicate that the Honey Promotion program has not been effective in raising the price of honey partially because it cannot promote U.S. honey over imported honey. They assert that imported honey has been a problem, particularly when other countries dump their product on the U.S. market, an occurrence that honey producers fought and won at the International Trade Commission[2] against China and Argentina. Tr. 44-45, 81-82, 276-280.

Discussion

[69] On June 25, 2001, the U. S. Supreme Court in *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001) (herein frequently "*United Foods*"), struck down on First Amendment grounds the mushroom checkoff program created under the Mushroom Promotion, Research, and Consumer Information Act (the "Mushroom Act"), 7 U.S.C. § 6101, *et seq*.

[70] The reliance of the individual honey producer Petitioners on *United Foods* was, at the time, justified. In response to *United Foods*, actions were filed involving a number of agricultural products subject to assessments used to pay for generic advertising. The actions that eventually reached the U. S. Supreme Court that were encouraging to the individual honey producer Petitioners, included beef (Eighth Circuit), pork (Sixth Circuit), milk (Third Circuit), and alligators (Fifth Circuit).

[71] The position of the individual honey producer Petitioners was also reinforced by *Delano Farms Company v. California Table Grape Commission*, 318 F.3d 895 (9th Cir. 2003), which held that the assessment of independent and competing firms to pay for generic

[2]Honey producers funded, from pledges among themselves, attorneys and economic experts to bring the anti-dumping case, raising close to $800,000. Tr. 45, 289. The Honey Board did provide the ITC with information, including lists of names, and web site locations with statistical information maintained by the Honey Board. Tr. 307.

advertising is a violation of the First Amendment. *Id.*, at 898-899.

[72] Particularly persuasive in bolstering the position of the individual honey producer Petitioners, was the alligator case, *Pelts & Skins v. Landreneau*, 365 F.3d 423 (5th Cir. 2004) (the alligator case). *See* Petitioners' filing April 21, 2004.

[73] On May 23, 2005, the U. S. Supreme Court issued its third decision in eight years which considered "whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment." *Johanns v. Livestock Marketing Assn.*, *supra*, (herein frequently "*Livestock Marketing Assn.*") (the beef case). *Livestock Marketing Assn.* upheld the constitutionality of compelled assessments used to pay for generic advertising where the advertising is government speech.

[74] *Livestock Marketing Assn.* came out of the Eighth Circuit. The U. S. Supreme Court remanded on May 31, 2005, to various other Courts of Appeals for further consideration in light of *Livestock Marketing Assn.*, the cases involving pork (Sixth Circuit), 544 U.S. ____ (2005); milk (Third Circuit), 544 U.S. ____ (2005); and alligators (Fifth Circuit), 544 U.S. ____ (2005).

[75] Not until the U. S. Supreme Court ruled in May 2005 regarding government speech in *Livestock Marketing Assn.*, did it become clear that the individual honey producer Petitioners' arguments would fail. In light of *Livestock Marketing Assn.*, the individual honey producers' Petition must be denied.

[76] The U. S. Supreme Court's explanation of why the "Beef Promotion" program is government speech is found mainly at pages 8-10, *Livestock Marketing Assn.* Congress directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products." *Id.* at 9.

[77] Here, likewise, the "Honey Promotion" program is directed by Congress. The Honey Act, 7 U.S.C. §§ 4601-4613, authorizes "the establishment of an orderly procedure for the development and financing, through an adequate assessment, of an effective, continuous, and nationally coordinated program of promotion, research, consumer education, and industry information . . . 7 U.S.C. § 4601(b)(1). The "Honey Promotion" program is designed to "strengthen the position of the honey industry in the marketplace;" "maintain, develop, and expand

domestic and foreign markets and uses for honey and honey products;" "maintain and improve the competitiveness and efficiency of the honey industry;" and "sponsor research to develop better means of dealing with pest and disease problems". 7 U.S.C. § 4601(b)(1). These excerpts are merely a portion of the purposes declared in the Honey Act. *See* 7 U.S.C. § 4601 for the complete "Findings and purposes" of the Honey Act.

[78] "'Compelled support of government' - - even those programs of government one does not approve - - is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. 'The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.' *Southworth*, 529 U.S., at 229." *Livestock Marketing Assn.*, at p. 8.

[79] In both the Beef Promotion program and the Honey Promotion program, the message of the promotional campaigns is effectively controlled by the Federal Government itself. The degree of governmental control over the message funded by the (targeted assessments) distinguishes these cases from *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). *See Livestock Marketing Assn*. at p. 10.

[80] "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Livestock Marketing Assn*. at p. 10.

[81] "Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. [footnote omitted] And Congress, of course, retains oversight

authority, not to mention the ability to reform the program at any time. No more is required." [footnote omitted] *Livestock Marketing Assn.* at p. 12. I conclude that the within case, the individual honey producer Petitioners' case, cannot be distinguished from *Livestock Marketing Assn*.

Conclusions

[82] As Justice Thomas remarked in his concurring opinion in *Livestock Marketing Assn.*, "the practice of using targeted taxes to fund government operations, such as excise taxes, dates from the founding, *see* The Federalist No. 12, p. 75 (J. Cooke ed. 1961)." Justice Thomas prefaced that observation with "Like the Court, I see no analytical distinction between 'pure' government speech funded from general tax revenues and from speech funded from targeted exactions . . ." *Livestock Marketing Assn.*

[83] The Honey Research, Promotion, and Consumer Information Act specifically authorizes the compelled subsidy of generic advertising of honey and honey products. 7 U.S.C. §§ 4601-4613.

[84] Congress made the following finding in the Honey Act: "The maintenance and expansion of existing honey markets and the development of new or improved markets or uses are vital to the welfare of honey producers and those concerned with marketing, using, and processing honey, along with those engaged in general agricultural endeavors requiring bees for pollinating purposes. 7 U.S.C. § 4601(a)(4).

[85] The Honey Act was passed for a "substantial" - - indeed, a "compelling" - - government interest. 7 U.S.C. §§ 4601(a) (4), (5), (6), (7), (8), (9), and (10).

[86] A "nationally coordinated program of promotion, research, consumer education, and industry information" was created by Congress to "strengthen the position of the honey industry in the marketplace." 7 U.S.C. § 4601(b)(1)(A).

[87] "(A)dequate assessment(s)" on honey are recognized by Congress as necessary to such program. 7 U.S.C. § 4601(b)(1).

[88] The National Honey Board is appointed by the Secretary of Agriculture, in accordance with the specific directions contained in the

Honey Act. 7 U.S.C. § 4606, *et seq*. Tr. 575-76.

[89] The National Honey Board's projects and budgets (whether advertising, promotion, research, industry information, or consumer education) are reviewed and approved by the Secretary of Agriculture or on her or his behalf by USDA personnel. Tr. 429. RX 60.

[90] The National Honey Board, as part of its effort to increase demand for honey, educates chefs, consumers, retailers and others of the ways honey enhances food and nutrition. Tr. 305-320, RX 1 through RX 11.

[91] The National Honey Board, as part of its effort to increase demand for honey, develops health-related messages to promote and advertise honey's health benefits, including anti-microbial properties and antioxidant capability. Tr. 196-97, 258, 305-06.

[92] The coordinated programs of research, promotion, consumer education, and industry information, including advertising, under the Honey Research, Promotion, and Consumer Information Act, as amended (7 U.S.C. §§ 4601-4613), are government speech, in accordance *Livestock Marketing Assn.*

[93] What the individual honey producer Petitioners are compelled to do, is pay for government speech with which they do not agree. The individual honey producer Petitioners are not actually compelled to speak when they do not wish to speak, because the advertising is not attributed to them; they are not identified as the speaker; they are not compelled to "utter" the message with which they do not agree. [94]

The individual honey producer Petitioners have no constitutional right to avoid paying for government speech with which they do not agree. *Livestock Marketing Assn.* at p. 8.

[95] The individual honey producer Petitioners have no right to choose the message or the messenger of government speech.

[96] "The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. *Livestock Marketing Assn.* at p. 11.

[97] The Honey Act provides for termination or suspension of the plan. 7 U.S.C. § 4612.

[98] The Honey Act and the Honey Order, both as promulgated and as administered, are fully in accordance with law, including the First Amendment to the United States Constitution.

[99] In light of *Livestock Marketing Assn.*, this Petition of individual honey producers must be and hereby is denied.

Finality

[100] This Decision becomes final without further proceedings 35 days after service unless an appeal petition is filed with the Hearing Clerk within 30 days after service, in accordance with sections 900.64 and 900.65 of the Rules of Practice (7 C.F.R. §§ 900.64-900.65).

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

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In re: WALTER L. WILSON, d/b/a BUZZ 76 APIARIES; RICHARD L. ADEE, d/b/a ADEE HONEY FARMS; STEVE E. PARK APIARIES, A CALIFORNIA CORPORATION; A.H. MEYER & SONS, INC., A SOUTH DAKOTA CORPORATION; LYLE JOHNSTON, d/b/a JOHNSTON HONEY FARMS; COY'S HONEY FARM, INC., AN ARKANSAS CORPORATION; PRICE APIARIES, A SOUTH DAKOTA CORPORATION; JIM ROBERTSON, d/b/a ROBERTSON POLLINATION SERVICE; TUBBS APIARIES, INC., A MISSISSIPPI CORPORATION; AND THE AMERICAN HONEY PRODUCERS ASSOCIATION, INC., AN OKLAHOMA CORPORATION.
HRPCIA Docket No. 01-0001.
Decision and Order.
Filed November 28, 2005.

HRPCIA – Honey promotion – First Amendment – Government speech.

The Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's decision dismissing Petitioners' Petition. Based upon *Johanns v. Livestock Marketing Ass'n*,

125 S. Ct. 2055 (2005), the Judicial Officer concluded honey advertising and promotion authorized by the Honey Research, Promotion, and Consumer Information Act (7 U.S.C. §§ 4601-4613) are government speech not susceptible to First Amendment compelled-subsidy challenge. Citing *Livestock Marketing Ass'n*, the Judicial Officer rejected Petitioners' and The American Honey Producers, Inc.'s claim that honey promotion authorized by the Honey Research, Promotion, and Consumer Information Act was not government speech because the speech was not initiated by the government and United States Department of Agriculture oversight, review, and approval of the speech only served as a negative check on the speech, not as an affirmative mechanism for compelling particular content or viewpoints.

Frank Martin, Jr., for Respondent.
Brian C. Leighton, Clovis, California, for Petitioners.
James A. Moody, Washington, DC, for The American Honey Producers Association, Inc.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The American Honey Producers Association, Inc.; Walter L. Wilson; Richard L. Adee; Steve E. Park Apiaries; A.H. Meyer & Sons, Inc.; Lyle Johnston; Coy's Honey Farm, Inc.; Price Apiaries; and Tubbs Apiaries, Inc., instituted this proceeding by filing a Petition[1] on September 28, 2001. Petitioners[2] filed the Petition pursuant to the Honey Research,

[1]Petitioners entitled their Petition "Petition Pursuant To 7 U.S.C. § 4609 Contending That The Honey Research, Promotion, And Consumer Information Legislation And The Assessments Imposed For The Same Violates Petitioners' Rights Guaranteed Under The First Amendment Of The United States Constitution And Seeking A Modification Of The Order And An Exemption From The Order And A Refund Of Assessments (7 U.S.C. § 4609; 7 C.F.R. § 1209.402 *et seq.*)" [hereinafter Petition].

[2]On December 27, 2002, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an Order Realigning the Parties and Amending the Caption in which the ALJ: (1) concluded The American Honey Producers Association, Inc., did not have standing to file a petition pursuant to the Honey Research, Promotion, and Consumer Information Act, as amended (7 U.S.C. §§ 4601-4613) [hereinafter the Honey Research, Promotion, and Consumer Information Act]; (2) identified The American Honey Producers Association, Inc., as a party which cannot obtain the relief sought in the Petition; and (3) amended the case caption to reflect the identification of The American (continued...)

Promotion, and Consumer Information Act, and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Information Programs (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52) [hereinafter the Rules of Practice].

Petitioners: (1) assert assessments collected from Petitioners pursuant to the Honey Research, Promotion, and Consumer Information Act and used for speech-related purposes violate Petitioners' rights to freedom of speech and to freedom of association guaranteed under the First Amendment to the Constitution of the United States; and (2) seek an exemption from paying assessments pursuant to the Honey Research, Promotion, and Consumer Information Act and a refund of assessments paid within the previous 3 years (Pet. ¶¶ 16-19).

On October 25, 2001, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Respondent's Answer denying the material allegations of the Petition and raising two affirmative defenses: (1) the Petition fails to state a claim upon which relief can be granted; and (2) the Honey Research, Promotion, and Consumer Information Act and the rules and regulations promulgated under the Honey Research, Promotion, and Consumer Information Act (7 C.F.R. pt. 1240) [hereinafter the Honey Order] are in accordance with law.

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[2](...continued)
Honey Producers Association, Inc., as a party which cannot obtain the relief sought in the Petition. Jim Robertson, d/b/a Robertson Pollination Service, testified in the February 2003 hearing conducted by the ALJ, he was not included as a petitioner in the September 28, 2001, Petition due to inadvertent error (Tr. 134). Following the February 2003 hearing, the ALJ added Jim Robertson, d/b/a Robertson Pollination Service, as a petitioner, and on September 7, 2005, the ALJ approved the amendment of the case caption to include Jim Robertson, d/b/a Robertson Pollination Services, as a petitioner (Tr. 687-91; Notice of Filing of Affidavit-Verification-Declaration of Jim Robertson Doing Business As Jim Robertson Pollination Service, filed March 24, 2003; the ALJ's September 7, 2005, Decision [hereinafter Initial Decision] at 12). I treat Mr. Robertson as if he had been a petitioner beginning September 28, 2001; therefore, all references in this Decision and Order to "Petitioners" include Walter L. Wilson, d/b/a Buzz 76 Apiaries; Richard L. Adee, d/b/a Adee Honey Farms; Steve E. Park Apiaries, a California corporation; A.H. Meyer & Sons, Inc., a South Dakota corporation; Lyle Johnston, d/b/a Johnston Honey Farms; Coy's Honey Farm, Inc., an Arkansas corporation; Price Apiaries, a South Dakota corporation; Jim Robertson, d/b/a Robertson Pollination Service; and Tubbs Apiaries, Inc., a Mississippi corporation.

On February 3, 4, and 5, 2003, the ALJ presided over a hearing in Fresno, California. Brian C. Leighton, Law Offices of Brian C. Leighton, Clovis, California, represented Petitioners. James A. Moody, Washington, DC, represented The American Honey Producers Association, Inc. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On May 29, 2003, Petitioners filed Petitioners' Post-Hearing Brief. On June 11, 2003, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof. On June 26, 2003, Petitioners filed Petitioners' Post-Hearing Reply Brief. On July 11, 2003, Petitioners filed Petitioners' Supplemental Authority Re Petitioners' Post-Hearing Brief; on October 24, 2003, Petitioners filed Petitioners' Citation of Additional Authorities; on November 28, 2003, Petitioners and The American Honey Producers Association, Inc., filed Petitioners' and The American Honey Producers' Association, Inc. Motion to Expedite a Ruling on Petitioners' Challenge Re National Honey Board; and on April 21, 2004, The American Honey Producers Association, Inc., filed a letter enclosing court decisions.

On September 7, 2005, the ALJ issued an Initial Decision: (1) concluding the Honey Research, Promotion, and Consumer Information Act and the Honey Order are in accordance with law, including the First Amendment to the Constitution of the United States; and (2) denying Petitioners' Petition (Initial Decision at 1-2, 27).

On October 7, 2005, Petitioners and The American Honey Producers Association, Inc., appealed to the Judicial Officer. On October 20, 2005, Respondent filed a response to Petitioners' and The American Honey Producers Association, Inc.'s appeal petition. On October 28, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt, with minor modifications, the ALJ's Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

Petitioners' exhibits are designated by "PX." Respondent's exhibits are designated by "RX." Transcript references are designated "Tr."

APPLICABLE CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 77—HONEY RESEARCH, PROMOTION, AND CONSUMER INFORMATION

§ 4601. Findings and purposes

(a) Findings

Congress makes the following findings:

(1) Honey is produced by many individual producers in every State in the United States.

(2) Honey and honey products move in large part in the channels of interstate and foreign commerce, and honey which does not move in such channels directly burdens or affects interstate commerce.

(3) In recent years, large quantities of low-cost, imported honey have been brought into the United States, replacing domestic honey in the normal trade channels.

(4) The maintenance and expansion of existing honey markets and the development of new or improved markets or uses are vital to the welfare of honey producers and those concerned with marketing, using, and processing honey, along with those engaged in general agricultural endeavors requiring bees for pollinating purposes.

(5) The honey production industry within the United States is comprised mainly of small- and medium-sized businesses.

(6) The development and implementation of coordinated programs of research, promotion, consumer education, and industry information necessary for the maintenance of markets and the development of new markets have been inadequate.

(7) Without cooperative action in providing for and financing such programs, honey producers, honey handlers, wholesalers, and retailers are unable to implement programs of research, promotion, consumer education, and industry information necessary to maintain and improve markets for these products.

(8) The ability to develop and maintain purity standards for honey and honey products is critical to maintaining the consumer confidence, safety, and trust that are essential components of any undertaking to maintain and develop markets for honey and honey products.

(9) Research directed at improving the cost effectiveness and efficiency of beekeeping, as well as developing better means of dealing with pest and disease problems, is essential to keeping honey and honey product prices competitive and facilitating market growth as well as maintaining the financial well-being of the honey

industry.

(10) Research involving the quality, safety, and image of honey and honey products and how that quality, safety, and image may be affected during the extraction, processing, packaging, marketing, and other stages of the honey and honey product production and distribution process, is highly important to building and maintaining markets for honey and honey products.

(b) Purposes

The purposes of this chapter are—

(1) to authorize the establishment of an orderly procedure for the development and financing, through an adequate assessment, of an effective, continuous, and nationally coordinated program of promotion, research, consumer education, and industry information designed to—

(A) strengthen the position of the honey industry in the marketplace;

(B) maintain, develop, and expand domestic and foreign markets and uses for honey and honey products;

(C) maintain and improve the competitiveness and efficiency of the honey industry; and

(D) sponsor research to develop better means of dealing with pest and disease problems;

(2) to maintain and expand the markets for all honey and honey products in a manner that—

(A) is not designed to maintain or expand any individual producer's, importer's, or handler's share of the market; and

(B) does not compete with or replace individual advertising or promotion efforts designed to promote individual brand name or trade name honey or honey products; and

(3) to authorize and fund programs that result in government speech promoting government objectives.

. . . .

§ 4603. Honey research, promotion, and consumer information

To effectuate the declared policy of this chapter, the Secretary shall, subject to the provisions of this chapter, issue and, from time to time, amend orders and regulations applicable to persons engaged in the production, sale, or handling of honey and honey products in the United States and the importation of honey and honey products into the United States.

§ 4604. Notice and hearing

(a) Notice and comment

In issuing an order under this chapter, an amendment to an order, or a regulation to carry out this chapter, the Secretary shall comply with section 553 of title 5.

(b) Formal agency action

Sections 556 and 557 of that title shall not apply with respect to the issuance of an order, an amendment to an order, or a regulation under this chapter.

(c) Proposal of an order

A proposal for an order may be submitted to the Secretary by any organization or interested person affected by this chapter.

§ 4605. Findings and issuance of order

After notice and opportunity for comment has been provided in accordance with section 4604(a) of this title, the Secretary shall issue an order, an amendment to an order, or a regulation under this chapter, if the Secretary finds, and specifies in the order, amendment, or regulation, that the issuance of the order, amendment, or regulation will assist in carrying out the purposes of this chapter.

§ 4606. Required terms of order

(a) Terms and conditions of order

Any order issued by the Secretary under this chapter shall contain the terms and conditions described in this section and, except as provided in section 4607 of this title, no others.

(b) National Honey Nominations Committee; composition; nominations; terms; Chairman; compensation; meetings; voting

(1) Such order shall provide for the establishment and appointment by the Secretary of a National Honey Nominations Committee which shall consist of not more than one member from each State, from nominations submitted by each State association. If a State association does not submit a nomination, the Secretary may provide for nominations from that State to be made in a different manner, except that if a State which is not one of the top twenty honey-producing States in the United States (as determined by the Secretary) does not submit a nomination, such State shall not be represented on the Committee.

(2) Members of the Committee shall serve for three-year terms with no member serving more than two consecutive three-year terms, except that the term of appointments to the Committee may be staggered periodically, as determined by the Secretary.

(3) The Committee shall select its Chairman by a majority vote.

(4) The members of the Committee shall serve without compensation but shall be reimbursed for their reasonable expenses incurred in performing their duties as members of the Committee.

(5) The Committee shall nominate the members and alternates of the Honey Board and submit such nominations to the Secretary. In making such nominations, the Committee shall meet annually, except that, when determined by the Chairman, the Committee may conduct its business by mail ballot in lieu of an annual meeting. In order to nominate members to the Honey Board, at least 50 percent of the members from the twenty leading honey producing States must vote. A majority of the National Honey Nominations Committee shall constitute a quorum for voting at an annual meeting. In the case of a mail ballot, votes must be received from a majority of the Committee.

(c) Honey Board; membership; terms; alternates; compensation; powers; duties

(1) The order described in subsection (a) of this section shall provide for the establishment and appointment by the Secretary of a Honey Board in accordance with this subsection.

(2) The membership of the Honey Board shall consist of—

(A) 7 members who are honey producers appointed from nominations submitted by the National Honey Nominations Committee, one from each of seven regions of the United States which shall be established by the Secretary on the basis of the production of honey in the different areas of the country;

(B) 2 members who are handlers appointed from nominations submitted by the Committee from recommendations made by qualified national organizations representing handler interests;

(C) if approved in a referendum conducted under this chapter, 2 members who—

(i) are handlers of honey;

(ii) during any 3 of the preceding 5 years, were also importers of record of at least 40,000 pounds of honey; and

(iii) are appointed from nominations submitted by the Committee from recommendations made by—

(I) qualified national organizations representing handler interests or qualified national organizations representing importer interests; or

(II) if the Secretary determines that there is not a qualified national organization representing handler interests or a qualified national organization representing importer interests, individual handlers or importers that have paid assessments to the Honey Board on imported honey or honey products;

(D) 2 members who are importers appointed from nominations submitted by the Committee from recommendations made by—

(i) qualified national organizations representing importer interests; or

(ii) if the Secretary determines that there is not a qualified national organization representing importer interests, individual importers that have paid assessments to the Honey Board on imported honey or honey products; and

(E) 1 member who is an officer, director, or employee of a national honey marketing cooperative appointed from nominations submitted by the Committee from recommendations made by qualified national honey

marketing cooperatives.

. . . .

(e) Assessment; collection; rates; exemption; effect of exemption on referendum voting status

(1) IN GENERAL.—The Honey Board shall administer collection of the assessment provided for in this subsection, and may accept voluntary contributions from other sources, to finance the expenses described in subsections (d) and (f) of this section.

(2) RATE.—Except as provided in paragraph (3), the assessment rate shall be $0.01 per pound (payable in the manner described in section 4608 of this title), with—

(A) in the case of honey produced in the United States, $0.01 per pound payable by honey producers; and

(B) in the case of honey or honey products imported into the United States, $0.01 per pound payable by honey importers.

. . . .

§ 4609. Petition and review

(a) Filing of petition; hearing

(1) In general

Subject to paragraph (4), a person subject to an order may file a written petition with the Secretary—

(A) that states that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law; and

(B) that requests—

(i) a modification of the order, provision, or obligation; or

(ii) to be exempted from the

order, provision, or obligation.

(2) Hearing

In accordance with regulations issued by the Secretary, the petitioner shall be given an opportunity for a hearing on the petition.

(3) Ruling

After the hearing, the Secretary shall make a ruling on the petition that shall be final, if in accordance with law.

(4) Statute of limitations

A petition filed under this subsection that challenges an order, any provision of the order, or any obligation imposed in connection with the order, shall be filed not later than 2 years after the later of—

(A) the effective date of the order, provision, or obligation challenged in the petition; or

(B) the date on which the petitioner became subject to the order, provision, or obligation challenged in the petition.

(b) District court; jurisdiction; review; rulings

The district courts of the United States in any district in which such person is an inhabitant, or carries on business, are hereby vested with jurisdiction to review such ruling, provided a complaint for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to the Secretary a copy of the complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to subsection (a) of this section shall not impede, hinder, or delay the United States or the Secretary from obtaining relief pursuant to

section 4610 of this title.

. . . .

§ 4612. Termination or suspension

. . . .

(b) Authority of Secretary

If the Secretary finds that an order issued under this chapter, or any provision of the order, obstructs or does not tend to effectuate the purposes of this chapter, the Secretary shall terminate or suspend the operation of the order or provision.

7 U.S.C. §§ 4601(a)-(b), 4603-4605, 4606(a)-(c)(2), (e)(1)-(2), 4609, 4612(b).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER XI—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MISCELLANEOUS COMMODITIES), DEPARTMENT OF AGRICULTURE

. . . .

PART 1240—HONEY RESEARCH, PROMOTION, AND

CONSUMER INFORMATION

Subpart A—Honey Research, Promotion, and Consumer Information Order

. . . .

HONEY BOARD

§ 1240.30 Establishment and membership.

A Honey Board is established to administer the terms and provisions of this part. The Board shall consist of twelve (12) members, each of whom shall have an alternate. Seven members and seven alternates shall be honey producers; two members and two alternates shall be honey handlers; two members and two alternates shall be honey importers; and one member and one alternate shall be an officer, director, or employee of a national honey marketing cooperative. The Board shall be appointed by the Secretary from nominations submitted by the Committee, pursuant to § 1240.32. Notwithstanding any other provision of this part, at least 50 percent of the members of the Board shall be honey producers.

. . . .

§ 1240.32 Nominations.

All nominations to the Board authorized under § 1240.30 herein shall be made in the following manner.

(a) *Establishment of National Honey Nominations Committee*.

(1) There is established a National Honey Nominations Committee, which shall consist of not more than one member from each State, appointed by the Secretary from nominations submitted by each State beekeeper association. Wherever there is more than one eligible association within a State, the Secretary shall

designate the association most representative of the honey producers, handlers, and importers not exempt under § 1240.42 (a) and (b) to make nominations for that State.

(2) If a State Association does not submit a nomination for the Committee, the Secretary may select a member of the honey industry from that State to represent that State on the Committee. However, if a State which is not one of the top twenty honey producing States (as determined by the Secretary) does not submit a nomination, such State shall not be represented on the Committee.

(3) Members of the Committee shall serve for three-year terms, except that the term of appointments to the Committee may be staggered periodically, as determined by the Secretary. No member shall serve more than two consecutive three-year terms. The term of office shall begin on July 1.

(4) The Committee shall select its Chairperson by a majority vote.

(5) The members of the Committee shall serve without compensation, but shall be reimbursed for necessary and reasonable expenses incurred in performing their duties as members of the Committee and approved by the Board. Such expenses shall be paid from funds collected by the Board pursuant to § 1240.41.

(b) *Nominations to the Board.*

(1) The Committee shall nominate the members and alternate members of the Board and submit such nominations promptly to the Secretary for approval.

. . . .

MISCELLANEOUS

. . . .

§ 1240.61 Right of the Secretary.

All fiscal matters, programs or plans, rules or regulations,

reports, or other substantive actions proposed and prepared by the Board shall be submitted to the Secretary for approval.

§ 1240.62 Suspension or termination.

(a) The Secretary shall, whenever the Secretary finds that this subpart or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act, terminate or suspend the operation of this subpart or such provisions thereof.

(b) Except as otherwise provided in paragraph (c) of this section, five years from the date the Secretary issues an order authorizing the collection of assessments on honey under provisions of this subpart, and every five years thereafter, the Secretary shall conduct a referendum to determine if honey producers and importers favor the termination or suspension of this subpart.

(c) The Secretary shall hold a referendum on the request of the Board, or when petitioned by 10 percent or more of the honey producers and importers subject to assessment under this subpart to determine if the honey producers and importers favor termination or suspension of this subpart. A referendum under this paragraph may not be held more than once every two (2) years. If the Secretary determines, through a referendum conducted pursuant to this paragraph, that continuation of this subpart is approved, any referendum otherwise required to be conducted under paragraph (b) of this section shall not be held less than five (5) years after the date the referendum was conducted under this paragraph.

. . . .

Subpart B—General Rules and Regulations

. . . .

§ 1240.123 Right of the Secretary.

All fiscal matters, programs, projects, rules or regulations, reports, or other substantive action proposed and prepared by the Board shall be submitted to the Secretary for approval.

7 C.F.R. §§ 1240.30, .32(a)-(b)(1), .61, .62, .123.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Decision Summary

Based upon *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), I conclude the coordinated programs of research, promotion, consumer education, and industry information authorized by the Honey Research, Promotion, and Consumer Information Act, are government speech not susceptible to First Amendment compelled-subsidy challenge. Consequently, Petitioners' Petition, filed September 28, 2001, in which Petitioners seek exemption from assessments imposed under the Honey Research, Promotion, and Consumer Information Act and used for generic advertising and promotion of honey, must be denied.

Findings of Fact

1. The Secretary of Agriculture administers the Honey Research, Promotion, and Consumer Information Act (7 U.S.C. §§ 4601-4613).

2. The Honey Research, Promotion, and Consumer Information Act establishes the National Honey Board, which, under the Secretary of Agriculture's supervision, administers the program mandated by Congress under the Honey Research, Promotion, and Consumer Information Act (7 U.S.C. § 4606).

3. The National Honey Board includes seven honey producers (at least 50 percent of the National Honey Board are producers), two honey handlers, two honey importers, and one officer, director, or

employee of a national honey marketing cooperative (7 U.S.C. § 4606; Tr. 184).

4. The National Honey Board's goal is to increase the demand for honey. The National Honey Board, as part of its effort to increase the demand for honey, promotes honey as a desirable product. (7 U.S.C. § 4601; Tr. 305-06.)

5. The National Honey Board is funded with the assessments paid by honey producers and honey importers (7 U.S.C. § 4606(e); Tr. 21-22, 356).

6. Initially, payment of assessments was voluntary. Thereafter, payment of assessments became mandatory. (Tr. 66, 107.)

7. Assessments are exacted by collecting from honey producers $0.01 for each pound of honey produced in the United States and by collecting from honey importers $0.01 for each pound of honey or honey products imported into the United States (7 U.S.C. § 4606(e)).

8. First handlers, bottlers or others who place honey in commerce, collect assessments on honey produced in the United States by deducting the assessments from the amount paid to the honey producers. These first handlers then forward the assessments to the National Honey Board. (Tr. 22.)

9. The National Honey Board initiates budgets, marketing ideas, and program ideas (Tr. 330-31, 607-08).

10. All National Honey Board budgets, contracts, and projects are submitted to the United States Department of Agriculture for review and approval (RX 1-RX 52; Tr. 330-33, 425-29, 431-32).

11. The National Honey Board is not a government entity, but it is supervised by the Secretary of Agriculture, and, on behalf of the Secretary, by personnel of the United States Department of Agriculture, specifically by the Chief of the Research and Promotion Branch for Fruits and Vegetables, Agricultural Marketing Service (Martha B. Ransom), and her staff (Tr. 330-33, 424-29).

12. The National Honey Board pays for the United States Department of Agriculture's oversight (Tr. 353).

13. The National Honey Board staff are not government employees. The National Honey Board staff salaries are not set by the United States Department of Agriculture. (Tr. 187, 346, 573-75.)

14. The property of the National Honey Board is not government-

owned (Tr. 578).

15. The Secretary of Agriculture appoints each member of the National Honey Board, in accordance with the specific directions contained in the Honey Research, Promotion, and Consumer Information Act, from nominees proposed by the National Honey Nominations Committee (7 U.S.C. § 4606; Tr. 575-76).

16. The Secretary of Agriculture appoints each member of the National Honey Nominations Committee, in accordance with the specific directions contained in the Honey Research, Promotion, and Consumer Information Act, from nominees proposed by state beekeeper associations (7 U.S.C. § 4606; Tr. 576).

17. The United States Department of Agriculture's oversight and control of the National Honey Board includes acting as an advisor to the National Honey Board during the development of promotion, research, education, and information activities (RX 1-RX 52; Tr. 427, 463-529).

18. A representative of the United States Department of Agriculture attends each meeting of the National Honey Board as an active participant (Tr. 427).

19. Representatives of the United States Department of Agriculture who attend meetings of the National Honey Board provide comments or feedback to the Board at the meetings (Tr. 427).

20. The United States Department of Agriculture's oversight of the National Honey Board includes retaining final approval authority over every assessment dollar spent by the Board (Tr. 427, 432-34).

21. The United States Department of Agriculture's oversight includes review and approval (a meticulous, detail-oriented, sometimes intense, word-for-word process) of any material that the National Honey Board prepares for use (RX 1-RX 52; Tr. 330-33, 374-86, 428-29).

22. United States Department of Agriculture review and approval of projects (whether advertising, promotion, research, industry information, or consumer education) include evaluation in accordance with United States Department of Agriculture policy, Agricultural Marketing Service guidelines, Federal Trade Commission advertising laws and regulations, and Food and Drug Administration labeling requirements (RX 60; Tr. 429).

23. The honey locator, on the third website that the National

Honey Board operates, is one example of the National Honey Board's marketing to increase demand for honey. The honey locator enables potential purchasers to locate local honey producers and to locate honey producers that have particular varieties of honey. (Tr. 195-96.)

24. The National Honey Board has undertaken research on the antioxidant level in honey, which varies depending on the floral source (Tr. 196-97).

25. The National Honey Board, in cooperation with Pennsylvania State University, has been involved with research using light spectroscopy to detect honey adulterated with high fructose corn syrup or sucrose or other sugars and to thereby help maintain purity of honey products (Tr. 197-98).

26. The National Honey Board funded a study of the honeybees' value as pollinators. About one-third of our diet is dependent on, or benefits from, honeybee pollination. The toxic impact of pesticides on the honeybees is of great concern. (RX 70; Tr. 198-203.)

27. The Honey Research, Promotion, and Consumer Information Act prescribes the contents of the Honey Order to be issued by the Secretary of Agriculture (7 U.S.C. § 4606).

28. The Honey Research, Promotion, and Consumer Information Act provides for termination or suspension of the Honey Order, including referenda, on request of the National Honey Board or at least 10 percent of those subject to assessment, to determine if persons subject to assessment approve continuation of the Honey Order (7 U.S.C. § 4612).

29. The Honey Research, Promotion, and Consumer Information Act provides for notice and comment rulemaking (7 U.S.C. § 4604).

30. Honey is sold in roughly equal amounts to consumers and to the industrial ingredient market. Floral source determines the honey's flavor, quality, and price. Based on market competitiveness, honey producers may sell directly to consumers, may sell directly to packers, or be part of a cooperative. (Tr. 47-53, 76-79.)

31. The National Honey Board does not regulate the price, quality, sales, importation, or exportation of honey. The National Honey Board does not provide an anti-trust exemption for the honey industry. (Tr. 84-85.)

32. National Honey Board advertisements and publications are

not attributed to individual honey producers; they bear a trademark that is the property of the National Honey Board; they do not bear a government symbol (Tr. 346-47).

33. Petitioner Walter L. Wilson, a beekeeper, honey producer, and sole proprietor of Buzz 76 Apiaries, paid assessments to the National Honey Board. Mr. Wilson objects to paying the assessments and seeks a full refund of his assessments. His payments from crop year 1998 through crop year 2002 were: 1998 - $9,374.84; 1999 - $12,585.54; 2000 - $4,853.97; 2001 - $9,607.78; and 2002 - $4,631.90. (PX 8.)

34. Petitioner Richard L. Adee, a beekeeper, honey producer, and sole proprietor of Adee Honey Farms, paid assessments to the National Honey Board. Mr. Adee objects to paying the assessments and seeks a full refund of his assessments. His payments from crop year 1998 through crop year 2002 were: 1998 - $11,921.34; 1999 - $23,308.19; 2000 - $48,406.93; 2001 - $24,506.65; and 2002 - $18,136.48. (PX 1; Tr. 28.)

35. Petitioner Steve E. Park Apiaries, Inc., a beekeeper and honey producer, represented by shareholder Steve Elwood Park, paid assessments to the National Honey Board. Steve E. Park Apiaries, Inc., objects to paying the assessments and seeks a full refund of its assessments. Its payments from crop year 1996 through crop year 2002 were: 1996 - $2,948.49; 1997 - $9,944.36; 1998 - $5,450.89; 1999 - $550.17; 2000 - $8,032.25; 2001 - $12,019.38; and 2002 - $6,227.14. (PX 5; Tr. 280.)

36. Petitioner A.H. Meyer & Sons, Inc., a beekeeper and honey producer, represented by Jack Meyer, Jr., a shareholder and vice president, paid assessments to the National Honey Board. A.H. Meyer & Sons, Inc., objects to paying the assessments and seeks a full refund of its assessments. Its payments from crop year 1998 through crop year 2002 were: 1998 - $11,859.44; 1999 - $9,163.30; 2000 - $13,647.40; 2001 -$7,747.87; and 2002 - $11,037.21. (PX 10.)

37. Petitioner Lyle Johnston, a beekeeper, honey producer, and sole proprietor of Johnston Honey Farm, also known as Johnston Honey Farms, paid assessments to the National Honey Board. Mr. Johnston objects to paying the assessments and seeks a full refund of his

assessments. His payments from crop year 1996 through crop year 2002 were: 1996 - $2,308.73; 1997 - $838.41; 1998 - $1,167.67; 1999 - $1,216.66; 2000 -$1,386.33; 2001 - $953.38; and 2002 - $2,049.84. (PX 2; Tr. 72-75, 82-83.)

38. Petitioner Coy's Honey Farm, Inc., a beekeeper and honey producer, represented by Bobby Coy, a shareholder and president, paid assessments to the National Honey Board. Coy's Honey Farm, Inc., objects to paying the assessments and seeks a full refund of its assessments. Its payments from crop year 1997 through crop year 2002 were: 1997 - $5,640.97; 1998 - $8,345.45; 1999 - $9,298.05; 2000 - $11,199.73; 2001 - $9,875.79; and 2002 - $4,341.76. (PX 9.)

39. Petitioner Price Apiaries, a beekeeper and honey producer, also known as Price Honey Farms, and as Price Honey, represented by Harvey Price, a shareholder, paid assessments to the National Honey Board. Price Apiaries objects to paying the assessments and seeks a full refund of its assessments. Its payments from crop year 1996 through crop year 2002 were: 1996 - $4,945.08; 1997 - $4,370.46; 1998 - $5,834.10; 1999 - $4,027.03; 2000 - $7,438.99; 2001 - $3,590.13; and 2002 - $1,462.86. (PX 3; Tr. 109-11, 113-14.)

40. Petitioner Jim Robertson, a beekeeper and honey producer and sole proprietor of Robertson Pollination Service, paid assessments to the National Honey Board. Mr. Robertson objects to paying the assessments and seeks a full refund of his assessments. His payments from crop year 1997 through crop year 2002 were: 1997 - $2,638.81; 1998 - $1,959.88; 1999 - $657.89; 2000 - $2,442.45; 2001 - $987.98; and 2002 - $727.56. (PX 12; Tr. 131-71.)

41. Petitioner Tubbs Apiaries, Inc., a beekeeper and honey producer, represented by Hubert Tubbs, Jr., a shareholder and president, paid assessments to the National Honey Board. Tubbs Apiaries, Inc., objects to paying the assessments and seeks a full refund of its assessments. Its payments from crop year 1998 through crop year 2002 were: 1998 - $1,957.41; 1999 - $1,747.61; 2000 - $1,268.13; 2001 - $1,263.87; 2002 (partial only, not all of 2002 had been reported when Hubert Tubbs, Jr., prepared his declaration) - $408.96. (PX 7.)

Petitioners' Position

The testimony of Richard Adee, who grew up in a beekeeping family and bought his first bee operation in 1957 (Tr. 18), is illustrative of the position of Petitioners.

[BY MR. LEIGHTON:]

Q. Okay. And could you just describe for the record what goes into your beekeeping operation? What do you do?

[BY MR. ADEE:]

A. You want to get out early this afternoon, but we do, we raise bee colonies, and we -- it's what's called a migratory bee operation. We move bees a lot, but we have a queen breeding operation in Mississippi, Woodville, Mississippi where we start like our cow/calf operation. We start raising our colonies of bees there. They go north to the honey producing country of the Dakotas. And then they're there for the summer. In the fall, in October, they're moved from the Dakotas to California to get ready for the pollination season, which is in progress right today. After the pollination is over, we -- the almonds is the big pollination. Then we go from the almonds. Some of them will go up to Washington State to the apples. Some of them will go back to Mississippi to start the process over again for breeding new bees and new queens. And the rest will go back to the Midwest to make honey. So in the summertime, they all eventually wind up back in the Dakotas to produce honey. So they're really kind of a bunch of tourists.

Q. Okay. And I don't know what the proper lingo is, but how many hives do you have?

A. We have 55,000 colonies.

Q. Okay. And is a colony in one box?

A. One colony is the -- they're the queen, the bees, and the box is necessary to produce honey.

Q. And approximately how many bees are there in a colony?

A. Oh, in the summertime, you can have up to 70,000. Going into winter, about 30,000.

Q. Okay.

A. They reduce their colony numbers so that they -- when they're not making honey, they don't eat all of the honey that they have gathered, so by natural attrition, they -- the colony numbers are restricted for the winter months.

Q. Now are there certain kinds of crops that you look for as far as making honey?

A. Crops that we look for?

Q. Yes.

A. Well, we -- yeah, to a degree. We look for the most nectar producing plants, and out in the Midwest, that's alfalfa and sweet clover.

Q. Okay.

A. Here in California would probably be the orange . . . .

Q. Okay.

A. . . . crop would be the main -- maybe some sage if they got a little rain.

Q. Okay. And for example, would you make honey out of almonds?

A. No, no. We hope they make enough honey out of the almonds just to replenish what they're eating, but almond honey is not a good tasting honey.

Q. What is the best tasting honey?

A. Well, of course I'm prejudiced to sweet clover.

Q. Okay. And you have a lot of that in the Dakotas?

A. We do . . .

Q. Okay.

A. . . . when we get the right moisture, yes.

Q. And how often do you collect the honey?

A. Well, we start in the latter part of July. And this is -- it's kind of continuing process going through -- hopefully through the end of October, but most of the time, we'll collect it one time from the colony. We -- the ones we start on first we'll put some empty boxes back on. We can go and collect twice on those, but the process -- you could just collect once and save yourself going back twice, but . . .

Q. This sounds like a dumb question, but approximately how much honey could a good honeybee collect for you every year?

A. A good colony of bees?

Q. Yeah.

A. Yeah, that's a good question. We try to set our budgets based on 100 pounds per colony, but during these real dry years, we've been -- like last year, we didn't quite make 40, so it was kind of a bad year. We have made up to 180 or 200 pounds, but our budgets are set on 100 pounds per colony.

Tr. 14-18.

Petitioners object to being compelled to pay the assessments used to pay for generic advertising under the Honey Research, Promotion, and Consumer Information Act. In their view, they are being compelled to subsidize private speech in violation of their First Amendment rights to freedom of speech and to freedom of association. Petitioners seek refunds on assessment payments already made.

Petitioners distinguished their position from that described in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). On cross-examination, Ms. Martha Ransom, Chief of the Research and Promotion Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, testified regarding the nature of the National Honey Board's statutorily defined authority.

BY MR. LEIGHTON:

Q. Let me ask it a different way. Can the National Honey Board take any action to set honey prices?

[BY MS. RANSOM:]

A. No.

Q. Can they take any action to set any honey prices that packers have to pay producers?

A. No.

Q. Does the National Honey Board have any authority to set prices for which honey can be sold?

A. No.

Q. Does the Honey Board have any authority to control the supply of honey?

A. No.

Q. In fact, Congress actually stated in the Act that there's no such authority, correct?

A. That's correct.

Q. Okay. And is it your understanding that honey producers can produce as much honey as they want?

A. Yes, sir.

Q. That they can sell as much honey as they want?

A. Yes, Mr. Leighton.

Q. That they can export as much honey as they want?

A. Yes.

Q. That they can sell domestically as much honey as they want?

A. Yes.

Q. They can sell it at any price?

A. Yes.

Q. At any time?

A. Yes.

Q. To any consumer or customer they want?

A. Yes.

. . . .

Q. Do they have any quotas?

A. No.

. . . .

Q. Okay. Does the National Honey Board enforce any quality restrictions?

A. No, Mr. Leighton.

Tr. 582-85.

Petitioners emphasize the competitive environment in which they operate, again distinguishing their industry from that described in *Wileman Bros*. Richard Adee's testimony is illustrative:

[BY MR. LEIGHTON:]

Q. Okay. Does the National Honey Board regulate your operation?

[BY MR. ADEE:]

A. No.

Q. Okay.

A. No, sir.

Q. Is the only thing they do is collect your assessment?

A. That's correct, sir.

Q. Okay. Is the honey production fully competitive?

A. Yes, sir.

Q. Okay. Is honey marketing fully competitive?

A. Yes, sir.

Q. Does the National Honey Board do anything setting, like, prices?

A. No, sir.

Q. Okay. Do they set the amount of money that honey producers are paid by packers?

A. No, sir.

Q. Okay. Do they limit the amount that you can produce?

A. No, sir.

Q. Do you have any quotas?

A. No, sir.

Q. Are any -- is any honey mandatorily put in to reserves?

A. No, sir.

. . . .

Q. How is it how you determine which packer you are going to use?

A. Basically, it's all based on price. Wherever we can get the best price, that's the market we'll sell to.

Q. Okay. And you have the choice to do that, correct?

A. Yes, sir.

Tr. 36-38.

Petitioners assert the money used to finance the research and promotion aspects of the honey promotion program could be better spent, and they question the overall efficacy of the honey promotion program because the activities have not increased honey prices.

Richard Adee's testimony illustrates the impact of an assessment of $0.01 for each pound of honey produced:

[BY MR. LEIGHTON:]

Q. Okay. And can you tell us what the significance of the amount of assessments that you pay?

[MR. ADEE:]

A. How much does this add up . . .

Q. Well, no, not how much they add up to, but how much is -- is it a penny a pound?

A. Oh, it's a penny a pound . . .

Q. Okay.

A. . . . yes, sir. Yes, sir.

Q. And is a penny a pound a significant amount of money?

A. A penny a pound for years and years was two percent of our gross, and sometimes it was 100 percent of our profit. We didn't make two percent during those years when the crops are down in the 40 and 50 cent per pound per colony range. And this could be very, very could significant.

Q. The penny a pound could've been your profit?

A. It could've been.

Q. Okay. And were there years that it would've been?

A. There were years that it was -- when the costs -- when we were operating in the red, it was a cost. Yes, definitely.

Tr. 22-23.

Petitioners indicate the honey promotion program has not been effective in raising the price of honey partially because the honey promotion program cannot promote United States honey over imported honey. Petitioners assert imported honey has been a problem, particularly when other countries dump their product on the United States market, an occurrence that honey producers fought and won at the International Trade Commission against China and Argentina. (Tr. 44-45, 81-82, 276-80.)

Discussion

On May 23, 2005, the Supreme Court of the United States issued its third decision in 8 years which considered "whether a federal program

that finances generic advertising to promote an agricultural product violates the First Amendment." *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. at 2058. *Livestock Marketing Ass'n* upheld the constitutionality of compelled assessments used to pay for generic advertising where the advertising is government speech. On May 31, 2005, the Supreme Court of the United States remanded to various courts of appeals for further consideration, in light of *Livestock Marketing Ass'n*, cases involving the constitutionality of compelled assessments to pay for generic advertising of pork,[3] alligator products,[4] and milk.[5]

In *Livestock Marketing Ass'n*, the High Court explained that the beef promotion program is government speech because Congress directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products." *Livestock Marketing Ass'n*, 125 S. Ct. at 2063. Here, likewise, the honey promotion program is directed by Congress. The Honey Research, Promotion, and Consumer Information Act authorizes "the establishment of an orderly procedure for the development and financing, through an adequate assessment, of an effective, continuous, and nationally coordinated program of promotion, research, consumer education, and industry information . . . ." 7 U.S.C. § 4601(b)(1). The honey promotion program is designed to "strengthen the position of the honey industry in the marketplace"; "maintain, develop, and expand domestic and foreign markets and uses for honey and honey products"; "maintain and improve the competitiveness and efficiency of the honey industry"; and "sponsor research to develop better means of dealing with pest and disease problems." 7 U.S.C. § 4601(b)(1).

"'Compelled support of government'--even those programs of government one does not approve--is of course perfectly constitutional,

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[3]*Johanns v. Campaign for Family Farms*, 125 S. Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Sixth Circuit).

[4]*Landreneau v. Pelts & Skins, LLC*, 125 S. Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Fifth Circuit).

[5]*Johanns v. Cochran*, 125 S. Ct. 2512 (2005) (remanding the case to the United States Court of Appeals for the Third Circuit).

as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. 'The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.' *Southworth*, 529 U.S., at 229." *Livestock Marketing Ass'n*, 125 S. Ct. at 2062.

In both the beef promotion program and the honey promotion program, the message of the promotional campaigns is effectively controlled by the United States government itself. The degree of governmental control over the message funded by targeted assessments distinguishes these promotional programs from the state bar's communicative activities which were at issue in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). *See Livestock Marketing Ass'n*, 125 S. Ct. at 2063.

"When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Livestock Marketing Ass'n*, 125 S. Ct. at 2063.

"Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. [(7 C.F.R. § 1240.61.)] And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required." *Livestock Marketing Ass'n*, 125 S. Ct at 2064 (footnotes omitted). I conclude the instant case cannot be distinguished from *Livestock Marketing Ass'n*.

Conclusions of Law

1. As Justice Thomas remarked in his concurring opinion in *Livestock Marketing Ass'n*, "the practice of using targeted taxes to fund government operations, such as excise taxes, dates from the founding, see The Federalist No. 12, p. 75 (J. Cooke ed. 1961)." Justice Thomas prefaced that observation with "Like the Court, I see no analytical distinction between 'pure' government speech funded from general tax revenues and from speech funded from targeted exactions. . . ." *Livestock Marketing Ass'n*, 125 S. Ct. at 2066.

2. The Honey Research, Promotion, and Consumer Information Act specifically authorizes the compelled subsidy of generic advertising of honey and honey products (7 U.S.C. §§ 4601-4613).

3. Congress made the following finding in the Honey Research, Promotion, and Consumer Information Act:

> The maintenance and expansion of existing honey markets and the development of new or improved markets or uses are vital to the welfare of honey producers and those concerned with marketing, using, and processing honey, along with those engaged in general agricultural endeavors requiring bees for pollinating purposes.

7 U.S.C. § 4601(a)(4).

4. The Honey Research, Promotion, and Consumer Information Act was passed for a substantial, indeed, a compelling government interest (7 U.S.C. § 4601(a)(4)-(10)).

5. A "nationally coordinated program of promotion, research, consumer education, and industry information" was created by Congress to "strengthen the position of the honey industry in the marketplace" (7 U.S.C. § 4601(b)(1)(A)).

6. "[A]dequate assessment[s]" on honey producers and honey importers are recognized by Congress as necessary to a nationally coordinated program of promotion, research, consumer education, and industry information (7 U.S.C. § 4601(b)(1)).

7. The National Honey Board is appointed by the Secretary of

Agriculture, in accordance with the specific directions contained in the Honey Research, Promotion, and Consumer Information Act (7 U.S.C. § 4606; Tr. 575-77).

8. The National Honey Board's projects and budgets (whether advertising, promotion, research, industry information, or consumer education) are reviewed and approved by the Secretary of Agriculture or on the Secretary's behalf by United States Department of Agriculture personnel (RX 60; Tr. 427-30).

9. The National Honey Board, as part of its effort to increase demand for honey, educates chefs, consumers, retailers, and others about the ways in which honey enhances food and nutrition (RX 1-RX 11; Tr. 305-20).

10. The National Honey Board, as part of its effort to increase demand for honey, develops health related messages to promote and advertise honey's health benefits, including anti-microbial properties and antioxidant capability (Tr. 196-97, 257-59, 305-06).

11. The coordinated programs of research, promotion, consumer education, and industry information, including advertising, under the Honey Research, Promotion, and Consumer Information Act, are government speech, in accordance *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005).

12. Petitioners are compelled to pay for government speech with which they do not agree. Petitioners are not actually compelled to speak when they do not wish to speak, because the advertising is not attributed to Petitioners; Petitioners are not identified as the speakers; and Petitioners are not compelled to "utter" the message with which they do not agree.

13. Petitioners have no constitutional right to avoid paying for government speech with which they do not agree. *Livestock Marketing Ass'n*, 125 S. Ct. at 2062.

14. Petitioners have no right to choose the message or the messenger of government speech.

15. "The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to

fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object." *Livestock Marketing Ass'n*, 125 S. Ct. at 2063.

16. The Honey Research, Promotion, and Consumer Information Act provides for termination or suspension of the Honey Order (7 U.S.C. § 4612).

17. The Honey Research, Promotion, and Consumer Information Act and the Honey Order, both as promulgated and as administered, are fully in accordance with law, including the First Amendment to the Constitution of the United States.

18. In light of *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), Petitioners' Petition, filed September 28, 2001, must be denied.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioners and The American Honey Producers Association, Inc., raise two issues in their Appeal Petition. First, Petitioners and The American Honey Producers Association, Inc., contend the ALJ erroneously found facts that are not supported by substantial evidence or are contrary to the evidence (Appeal Pet. at 4).

Petitioners and The American Honey Producers Association, Inc., assert the ALJ's finding that "[t]he National Honey Board . . . is tightly supervised by the Secretary" (Initial Decision at 3) is not supported by substantial evidence or is contrary to the evidence.

I disagree with Petitioners' and The American Honey Producers Association, Inc.'s contention that the ALJ's finding is not supported by the evidence. Martha B. Ransom, Chief of the Research and Promotion Branch for Fruits and Vegetables, Agricultural Marketing Service, testified that she supervises a staff of six persons who oversee several national promotion boards, including the National Honey Board (Tr. 424-26). Ms. Ransom's direct testimony provides a detailed description of the extent of the Secretary of Agriculture's supervision of the National Honey Board (Tr. 427-571). Julia Pirnack, the industry services director for the National Honey Board, also testified regarding the extent of the Secretary of Agriculture's supervision of the National

Honey Board (Tr. 330-33). I find the ALJ's characterization of the Secretary of Agriculture's supervision of the National Honey Board is supported by Ms. Ransom's and Ms. Pirnack's testimony, and I find no evidence that contradicts Ms. Ransom's and Ms. Pirnack's testimony regarding the extent of the Secretary of Agriculture's supervision of the National Honey Board.

Petitioners and The American Honey Producers Association, Inc., assert the ALJ's finding that "USDA's oversight and control of the National Honey Board includes acting as an advisor to the National Honey Board in the developmental process of promotion, research, and information activities" (Initial Decision at 4) is not supported by substantial evidence or is contrary to the evidence.

I disagree with Petitioners' and The American Honey Producers Association, Inc.'s contention that the ALJ's finding is not supported by the evidence. Ms. Ransom testified that she and her staff acts as advisors in the development of National Honey Board activities, as follows:

> [BY MR. MARTIN:]
>
> Q. And, as part of your oversight activities, are you an active advisor in the development process of the activities of the Honey Board?
>
> [BY MS. RANSOM:]
>
> A. Yes, either me or my staff. The day-to-day, most of the contact is by a marketing specialist that's assigned to the program.

Tr. 427. Further, the record contains no evidence that contradicts Ms. Ransom's testimony regarding the United States Department of Agriculture's role in the development of promotion, research, and information activities.

Petitioners and The American Honey Producers Association, Inc., assert the ALJ's finding that "USDA's oversight of the National Honey

Board includes retaining final approval authority over every assessment dollar spent by the Board" (Initial Decision at 4) is not supported by substantial evidence or is contrary to the evidence.

I disagree with Petitioners' and The American Honey Producers Association, Inc.'s contention that the ALJ's finding is not supported by the evidence. Ms. Ransom testified that she oversees assessment dollars spent by the National Honey Board, as follows:

> [BY MR. MARTIN:]
>
> Q. Do you oversee the Honey Board?
>
> [BY MS. RANSOM:]
>
> A. Yes, we do.
>
> Q. And, as part of your oversight activities, do you retain final approval authority over assessment dollars that the Honey Board spends?
>
> A. That's correct.
>
> . . . .
>
> Q. Now, does the Honey Board submit its budgets to you for review and approval?
>
> A. Yes, it does.
>
> Q. And have you reviewed Honey Board budgets and approved them?
>
> A. Yes, every year.
>
> Q. Okay. Would you just take a look at page 3 of RX-60, please? I see a section there entitled "Contracts." Could you briefly tell us what that provides for?
>
> A. Contract section provides that AMS will review

and approve contracts for the development and carrying out of the Board's programs, and say that it has certain criteria also that the have to have. The prohibition of -- on lobbying. Also, that no funds can be expended under the contract until USDA approval. And that the Boards are required to notify potential contractors of this fact.

Q. Now, does the Honey Board, as well as other research promotion boards that you and your staff supervise, submit all contracts to you for reviewing . . .

A. Yes.

Q. . . . and . . .

A. Yes.

Q. . . . approval? And does your staff review and approve all contracts submitted?

A. Yes, they do.

Q. Okay. Would you please take a look at page 4 of RX-60? And I would refer your attention to the section "Accountability for Financial and Program Progress." Would you tell us what that provides, briefly, please?

A. It basically provides that AMS will review financial statements for each accounting period, and that AMS -- the Boards are supposed to send AMS annual progress reports on their programs.

Q. And are the Boards, in fact, audited on some periodic basis?

A. Yes, the Boards are all required to get an

independent auditor to do a financial audit at the end of each fiscal year.

Tr. 427, 432-34. Further, the record contains no evidence that contradicts Ms. Ransom's testimony regarding the United States Department of Agriculture's oversight of the National Honey Board's expenditures of assessment dollars.

Petitioners and The American Honey Producers Association, Inc., assert the ALJ's finding that "USDA's oversight includes review and approval (a meticulous, detail-oriented, sometimes intense, word-for word process) of any materials that the National Honey Board prepares for use" (Initial Decision at 4) is not supported by substantial evidence or is contrary to the evidence.

I disagree with Petitioners' and The American Honey Producers Association, Inc.'s contention that the ALJ's finding is not supported by the evidence. Ms. Ransom testified that before the National Honey Board can use advertising, promotional, research, industry information, or consumer education material, the material must be reviewed and approved by the United States Department of Agriculture (Tr. 428-29). Similarly, Ms. Pirnack testified that before National Honey Board material can be used, the United States Department of Agriculture must review and approve the material (Tr. 330-33). Further, the record contains no evidence that contradicts Ms. Ransom's and Ms. Pirnack's testimony regarding the United States Department of Agriculture's review and approval of the National Honey Board's advertising, promotional, research, industry information, and consumer education material, prior to use.

Petitioners and the American Honey Producers Association, Inc., assert the ALJ's finding that "USDA review and approval of projects (whether advertising, promotion, research, industry information, or consumer education) include evaluation in accordance with USDA policy, AMS guidelines, Federal Trade Commission advertising laws and regulations, and Food and Drug Administration's labeling requirements" (Initial Decision at 4) is not supported by substantial evidence or is contrary to the evidence.

I disagree with Petitioners' and The American Honey Producers Association, Inc.'s contention that the ALJ's finding is not supported by

the evidence. Ms. Ransom testified about the standards the United States Department of Agriculture uses when reviewing the National Honey Board's advertising, promotional, research, industry information, and consumer education material, as follows:

[BY MR. MARTIN:]

Q. Once the Honey Board approves a project . . .

[BY MS. RANSOM:]

A. Right.

Q. . . . does it submit a proposal to you for approval?

A. Yes.

Q. Okay. And do you review the project?

A. Yes, we do.

Q. And if you have any concerns, do you raise them with the Honey Board?

A. Yes, we do.

Q. Would you approve a project unless the Honey Board addressed any of your concerns that you may have?

A. No, we wouldn't.

Q. Now, do you approve the content of these projects?

A. Yes.

Q. And are these projects usually involve advertising and promotional activities?

A. The advertising, promotion, research, industry information, consumer education.

Q. Now, what standards do you use in reviewing the submissions by these Boards, including the Honey Board?

A. Well, there's USDA policy and AMS guidelines, but then there are also the Federal Trade Commission Advertising Laws and Regulations, and the Food and Drug Administration's labeling laws.

Tr. 428-29.

In addition, Respondent introduced a number of exemplars of United States Department of Agriculture standards used during the United States Department of Agriculture review of material submitted by the National Honey Board (RX 60, RX 62-RX 68). The Standards for Promotional Materials Under Fruit and Vegetable Research and Promotion Programs and Marketing Orders corroborate Ms. Ransom's testimony regarding United States Department of Agriculture standards used when reviewing the National Honey Board's advertising, promotional, research, industry information, and consumer education material, as follows:

> All boards, councils, and committees are required to submit all promotional materials (all media, including the Internet) for use in domestic and export markets to AMS prior to their use. AMS will follow the laws, rules, and regulations enforced by the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC); the provisions of statutes, orders, and plans relating to promotional activity; and federal policy.

RX 62 at 1 (footnote omitted). Further, the record contains no evidence that contradicts Ms. Ransom's testimony regarding the United States

Department of Agriculture standards used when reviewing the National Honey Board's advertising, promotional, research, industry information, and consumer education material.

Petitioners and The American Honey Producers Association, Inc., assert the ALJ's finding that "National Honey Board advertisements and publications are not attributed to individual honey producers" (Initial Decision at 6) is not supported by substantial evidence or is contrary to the evidence.

I disagree with Petitioners' and The American Honey Producers Association, Inc.'s contention that the ALJ's finding is not supported by the evidence. The record contains no evidence that National Honey Board material is attributable to an individual honey producer. None of the exemplars of National Honey Board material introduced by Respondent (RX 1-RX 52) is attributable to an individual honey producer.

Second, Petitioners and The American Honey Producers Association, Inc., contend the ALJ erroneously concluded the programs of research, promotion, consumer education, and industry information under the Honey Research, Promotion, and Consumer Information Act are government speech, in accordance with *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005). Petitioners and The American Honey Producers Association, Inc., assert the programs of research, promotion, consumer education, and industry information under the Honey Research, Promotion, and Consumer Information Act are not government speech because the speech is not initiated by the government and United States Department of Agriculture oversight, review, and approval of the speech only serve as a negative check on the speech, not as an affirmative mechanism for compelling particular content or viewpoints. (Appeal Pet. at 7-10.)

Livestock Marketing Ass'n is dispositive of Petitioners' and The American Honey Producer Association, Inc.'s claim on appeal. The message set forth in the promotional campaign for honey, as for beef in *Livestock Marketing Ass'n*, is the message established and controlled by the United States government and constitutes government speech not susceptible to compelled-subsidy challenge under the First Amendment to the Constitution of the United States.

In *Livestock Marketing Ass'n*, the High Court primarily relied on structural factors that apply equally to the beef promotion program and the honey promotion program. That is, "Congress has directed the implementation of a 'coordinated program' of promotion" of the product, "Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain," and "Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well)." *Livestock Marketing Ass'n*, 125 S. Ct. at 2062-63. These aspects of the program, which demonstrate that the program involves government speech, apply to the honey program as well as the beef program.

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

ORDER

The Petition, filed September 28, 2001, is dismissed. This Order shall become effective on the day after service on Petitioners and The American Honey Producers Association, Inc.

RIGHT TO JUDICIAL REVIEW

Petitioners and The American Honey Producers Association, Inc., have the right to obtain review of the Order in this Decision and Order in any district court of the United States in which district Petitioners and The American Honey Producers Association, Inc., are inhabitants or Petitioners' and The American Honey Producers Association, Inc.'s principal places of business are located. A complaint for the purpose of review of the Order in this Decision and Order must be filed within 20 days from the date of entry of the Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the complaint to the Secretary of Agriculture.[6] The date of entry of the Order in this Decision and Order is November 28, 2005.

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[6]7 U.S.C. § 4609(b).

INSPECTION AND GRADING

COURT DECISIONS

LION BROS. v. USDA.
No. CV-F-05-0292 REC SMS.
Filed August 29, 2005.

(Cite as 2005 U.S. Dist. LEXIS 36744).

I&G – Ripeness – Producer – Handler – Inspection, who may request inspection – Interested person – NAFI -Non-appropriated fund instrumentality.

Producer of Raisins (Lion) made a request through its association, the Raisin Administrative Committee - (RAC) for a USDA inspection of raisins that the producer was holding in storage. Lion wanted the USDA inspection of its raisins before a sale to a "handler" of raisins for characteristics, class, quality, and condition so that Lion could make marketing decisions. Lion did not contend that it was a "handler" of raisins. The Raisin Marketing Order permitted a "handler" or an "interested person" to receive USDA inspection services upon proper request. Because Lion was not a handler they had no standing to challenge the RAC rules. Lion sought an injunction as an "interested person" to prohibit USDA from denying Lion inspection services upon application. Lion's injunction request was premature in that the application for services was to RAC and not to USDA and did not ripen until after the case was filed.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JUDGES: Robert E. Coyle, UNITED STATES DISTRICT JUDGE.

OPINION BY: Robert E. Coyle

OPINION:

ORDER DISMISSING CASE FOR LACK OF SUBJECT MATTER JURISDICTION.

On August 22, 2005, the court heard Defendant's motion to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction. Upon due consideration of the written and oral arguments of the parties, the court GRANTS Defendant's motion on the grounds that the Complaint was not ripe when filed.

I. Background

On February 28, 2005, Plaintiff Lion Brothers Farms ("Lion") filed a complaint against the United States Department of Agriculture ("USDA") alleging that the USDA failed to provide Lion with agricultural inspections of raisins as requested by Lion. The Complaint seeks declaratory and injunctive relief.

A. Raisin Inspections Generally

Pursuant to its authority under the Agricultural Marketing Act of 1946, as amended, 7 U.S.C. § 1621 *et seq.*, (the "1946 Act"), the USDA has issued regulations governing the inspection and certification of certain fresh fruits, vegetables, and processed products and established standards for grades of those commodities. Title 7, Part 52 of the Code of Federal Regulations provides for the inspection and certification of processed fruits and vegetables, including processed raisins, and the standards for those commodities. 7 C.F.R. § 52.

Part 52 also contains the regulations regarding the application for inspection and grading services under the 1946 Act. It provides that "any interested party" may make and application for inspections. 7 C.F.R. § 52.5. It further specifies the procedure for making an application; "an application for inspection service may be made to the office of inspection or to any inspector, at or nearest the place where the service is desired." 7 C.F.R. § 52.6. An application may be made orally or in writing and must provide certain necessary information including but not limited to, the name of the product, name and address of the packer or plant where such product was packed, the location of the product, its lot or car number, codes or other identification marks, the number of containers, the type and size of the containers, the interest of the applicant in the product, whether the lot has been inspected previous to the application by any Federal agency and the purpose for which

inspection is desired. 7 C.F.R. § 52.7.

An application must be made in accordance with the regulations in part 52 to be considered filed, 7 C.F.R. § 52.8, and failure to comply with the filing procedures may be a basis for rejecting an inspection request. 7 C.F.R. § 52.10.

Pursuant to its authority under the Agricultural Marketing Agreement Act of 1937, as amended 7 U.S.C. § 601 *et seq.*, (the "1937 Act"), the USDA has also established a marketing order regulating the handling of raisins produced from grapes grown in California and establishing minimum grade and condition standards for both natural condition and packed California raisins (the "Raisin Marketing Order" or "Order"). The Raisin Marketing Order is set forth in Title 7, part 989 of the Code of Federal Regulations. The Raisin Administrative Committee ("RAC") is appointed by the USDA to oversee the Raisin Marketing Order.

Part 989 contains the regulations regarding inspections under the Raisin Marketing order. The Order requires each "handler" of California raisins to cause "an inspection and certification to be made of all natural condition raisins acquired or received" with exceptions not applicable here, 7 C.F.R. § 989.58(d), and sets forth minimum grade and condition standards for natural condition raisins at 7 C.F.R. § 989.701.

The Agricultural Marketing Service ("AMS") is charged with the administration of the inspection regulations and provides inspection and grading services to applicants in accordance with the regulations established pursuant to the 1937 Act and the 1946 Act. Inspections of natural condition and processed raisins are designed to assess the essential characteristics, class, quality, and condition of the product and to determine whether the product does or does not meet the applicable grade or grade and condition standards.

B. Lion's Allegations

Lion is a producer of grapes and raisins in Fresno and Madera counties. It is not a "handler" of raisins. In October 2004, Lion Raisins, which is a handler of raisins, contacted Ron Worthley, the Senior Vice President of the RAC, regarding providing inspections for raisins belonging to Lion that Lion had agreed to store with Lion Raisins. Compl. Ex. A.

On October 13, 2004, Mr. Worthley informed Lion Raisins that there "are no provisions in the Marketing Order" for such an inspection, i.e. "no provisions that allow a grower to have his fruit certified as being inspected and meeting the minimum grade standards for incoming raisins and then hold them for future delivery to a packer." Compl. Ex. B (emphasis added).

On October 20, 2004, Lion wrote to the RAC that it "would like to have the USDA perform an incoming inspection on about 500 tons of raisins at the Lion Raisins facility." Compl. Ex. C. To this Mr. Worthley replied that it was the handler, Lion Raisons, rather than the producer, Lion, that "would be required to acquire, place on memorandum storage or return the raisins to the producer according to the Raisin Marketing Order." Compl. Ex. D.

Lion responded to this by explaining by fax dated November 2, 2004, that Lion did not want to commit to selling its raisins to the handler but wanted to obtain an inspection from the USDA and then determine how to market its raisins. The fax requested that Mr. Worthley "confirm USDA will inspect said raisins on behalf of Lion Brothers ASAP." Compl. Ex. E. Mr. Worthley responded that he asked for a review of Lion's request and that the USDA was looking into the issue. Compl. Ex. F.

On November 18, 2004, Bruce Lion, on behalf of Lion, replied that "I have read through the Marketing Order and I see no reason not to approve what we have asked to be done." Compl. Ex. G. Mr. Worthley's response was that the Raisin Marketing Order had no provision allowing a grower to have raisins certified as being inspected and that the procedure under the Raisin Marketing Order requires that a handler have inspections done in its name. Compl. Ex. H. Since Lion is not a handler, it would have to deliver its raisins to a handler for inspection under the marketing order.

Lion alleges based on this correspondence that the USDA impermissibly refused to provide it with inspections. Lion's first cause of action alleges that it was entitled to receive inspections under section 989.58 and 989.158 (a) (3) (the Raisin Marketing Order), as well as under Title 7, Part 52 of the Code of Federal Regulations. Lion seeks declaratory relief because, as it is not a handler, it cannot challenge the Raisin Marketing Order through the USDA's administrative proceedings. Lion's second cause of action seeks an injunction prohibiting the USDA

from precluding Plaintiff from applying for and receiving incoming USDA inspections.

II. The Current Motion

USDA has moved to dismiss or, in the alternative for summary judgment on the basis that Lion's claims are not ripe. The USDA argues that inspections were never requested of or denied by the USDA, making Lion's claims premature.

Lion asserts that the USDA's motion should be denied "because the RAC -- the arm of USDA and which body oversees the Order's regulations -- claimed that it discussed this matter with USDA and the requested inspections cannot take place." Pl.'s Opp'n at 2. Lion argues that it has therefore been denied inspections and its claim appropriate for judicial review. In the alternative, Lion asserts that subsequent to USDA's motion being filed, Lion specifically requested an inspection from the USDA and the request was wrongly denied.

III. Legal Standard"Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of article III of the federal Constitution." *St. Clair v. City of Chico*, 880 F.2d 199, 201, *cert. denied*, 493 U.S. 993, 110 S. Ct. 541, 107 L. Ed. 2d 539 (9th Cir. 1989) (citations omitted). Challenges to a court's subject matter jurisdiction, including claims of ripeness, are addressed under Rule 12 (b) (1) rather than Rule 12(b) (6) of the Federal Rules of Civil Procedure.[7] *Id*. "[W]hen considering a motion to dismiss pursuant to Rule 12 (b) (1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

The ripeness doctrine is concerned with whether a "dispute has yet

[7]The summary judgment standard should be used if the jurisdictional question is "so intertwined" with the merits of a case that it depends on resolution of the merits. *Steen v. John Hancock Life Ins*. Co., 106 F.3d 904, 910 (9th Cir. 1997). There is no such intertwining in this case and, even viewing the facts in the light most favorable to Lion, the outcome would be the same.

matured to a point that warrants decision." 13A C. Wright, A Miller, & E. Cooper, Federal Practice & Procedure § 3532 (1984). It is meant to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co*., 473 U.S. 568, 580, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967)). If a claim involves "contingent future events that may not occur as anticipated, or indeed may not occur at all," it is not ripe. Id. (quoting 13A C. Wright, A Miller, & E. Cooper, Federal Practice & Procedure § 3532 (1984)). Ripeness also concerns the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." Id. (quoting *Abbott Labs*, 387 U.S. at 149).

Ripeness is determined as of the commencement of the litigation; it "is not a moving target affected by a defendant's action." *Makua v. Rumsfeld*, 136 F. Supp. 2d 1155, 1161 (D. Haw. 2001) (*citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc*., 528 U.S. 167, 189-91, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000)). "[S]ubsequent ripening of the issue while the matter is under the court's consideration on a jurisdictional motion to dismiss is not sufficient to confer the court with jurisdiction that did not originally exist when the action was initiated." 15 Moore's Federal Practice, § 101.74 (Matthew Bender 3d ed. 2005).

IV. Discussion

In support of its motion, USDA offers the declaration of Mickey Martinez, who is the officer in charge of the Processed Products Branch Inspection Service for AMS in Fresno, California. One of Mr. Martinez's duties is to supervise the provision of inspection and grading services for various commodities, including raisins. Mr. Martinez avers that, as of June 13, 2005, Lion "has not applied for USDA inspection and certification services for processed raisins. Nor has Lion Bros.[] applied for USDA inspection and grading services for natural condition raisins as a handler, or at all." Martinez Decl. P 9.

Lion argues that the sole issue before the court is a legal one: can "Lion Bros, a producer of raisins [] governed by the Raisin Marketing Order receive and pay for the same inspection that a handler, also regulated by the same Marketing Order, can receive and pay for under

the grade and condition requirements of the Marketing Order." Pl.'s Opp'n at 7. In other words, Lion argues that because it is entitled to inspections under the Raisin Marketing Order it was wrongful for the RAC to refuse to perform the requested inspection.

A. Lion Is Not Entitled to Inspections Under the Order

The Raisin Marketing Order is specific; it states that "Each ***handler***, shall cause an inspection to be made. . . ." 7 C.F.R. § 989.58(d) (emphasis added). It is undisputed that Lion is a producer and not a handler of raisins. Lion has cited no language in the Raisin Marketing Order under which it could be arguable that a producer such as Lion is required to procure inspections under the Order in the same manner and at the same rate as handlers. Nor is there any language in the Raisin Marketing Order that could be said to entitle a producer to receive inspections pursuant to the Order. This is precisely what Mr. Worthley communicated to Lion in October of 2004. Compl. Ex. B. Because Lion was not required or entitled to receive inspections under the Order, there can be no argument that such an inspection was wrongfully denied.

B. Did the Correspondence Between Lion & the RAC Constitute an Application Pursuant to Part 52?

The only means by which a non-handler such as Lion can obtain USDA inspections is pursuant to the 1946 Act and the regulations promulgated thereunder, namely Part 52 of Title 7 of the Code of Federal Regulations. Part 52 provides that any "interested party" may request an inspection pursuant to the 1946 Act. Lion, as a producer, would plainly qualify as an "interested party." The question of ripeness turns on whether Lion applied for inspections pursuant to Part 52.

The USDA argues that Lion's request to the RAC was insufficient because the RAC is not an arm of the USDA such that making a request to the RAC is tantamount to a request of the USDA. USDA cites *Lion Raisins v. United States*, 57 Fed. Cl. 435, 437 (2003), in which the Court of Federal Claims held that the RAC is a non-appropriated fund instrumentalities ("NAFI") and that it was not part of the government such that jurisdiction was proper in the court of claims.

Lion argues in response that the RAC is "one and the same" as the USDA, however Lion has cited, and the court's own research has revealed, no authority for this proposition. To the extent Lion argues that because the RAC consulted with the USDA in determining that Lion was not entitled to inspections under the Raisin Marketing Order, the request was properly made to the USDA, Lion is mistaken. Lion's correspondence with the RAC indicates that it is seeking inspections under the Raisin Marketing Order, see, *inter alia*, Compl. Ex. G., not as an "interested party" under Part 52. The issue on which the RAC consulted with the USDA was unrelated to the application process under Part 52.

Even if the RAC is part of the USDA, Part 52 provides that applications for inspection be made to "the office of inspection or to any inspector, at or nearest the place where service is desired." 7 C.F.R. § 52.6. The RAC is not an inspector or an inspection office; the regulations relating to the duties of the RAC do not indicate that the administration of inspections for producers is amongst the RAC's duties. See 7 C.F.R. § 989.36. Mr. Martinez, as the Officer in Charge of the AMS inspection office in Fresno, is the proper party to whom requests for inspections pursuant to Part 52 should be made.

The correspondence between the RAC and Lion does not amount to an application for inspection services pursuant to Part 52. As no request for an inspection was made by Lion, no application was wrongly denied. The Complaint was not ripe for judicial review when filed.

C. Subsequent Correspondence With USDA is Insufficient

Lion asserts that the USDA's motion is "disingenuous," Pl.'s Opp'n at 3, because after Lion received USDA's motion to dismiss, which was filed on June 14, 2005,

Lion Bros. did specifically ask USDA directly what the government claimed that Plaintiff did not do,[8] and the unequivocal response from the USDA inspection service of June 21, 2005 claimed that said inspection service for a producer was not available under the Order or Part 52 of 7

[8]According to the letter of Mr. Martinez dated June 21, 2005 (Leighton Decl. Ex. I), Lion's request was dated June 15, 2005. Neither Lion nor USDA submitted a copy of this request.

C.F.R.

Pl.'s Opp'n at 2-3 (citing Leighton Decl. Ex. I). Assuming, arguendo, that Lion's letter to Mr. Martinez constituted a proper application for inspection services and that the response cited by Lion was an improper refusal,[9] this is insufficient to confer subject matter jurisdiction that was lacking when the Complaint was filed. See Moore's, supra.

ACCORDINGLY, IT IS ORDERED that the USDA's motion is hereby GRANTED.
FURTHER ORDERED that the Complaint is DISMISSED for lack of subject matter jurisdiction. The clerk shall close the case.

IT IS SO ORDERED.

LION RAISINS, INC. v. USDA.
Case No. CV F-02-5064 JKS.
Filed September 22, 2005.

(Cite as: 2005 U.S. Dist. LEXIS 29595)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

I&G – FOIA – Criminal investigation, ongoing, reason for redaction.

In a civil case a litigant (Lion) made a FOIA request of the USDA, but received redacted documents. Lion contended that the information sought was necessary for its civil case and was solely in the possession of the USDA. The court held that the USDA presented adequate justification for the withholding of the information (for the civil case) on the grounds that a criminal investigation concerning the same litigant was ongoing.

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[9]To the extent Lion asserts that Mr. Martinez's letter claimed inspections are not available to Lion under 7 C.F.R. § 52, the assertion is unsupported. At no point does the letter imply that Lion cannot receive inspections under part 52. To the contrary, the letter informs Lion that if it "would like to request an inspection of natural condition raisins, please submit an application for inspection services pursuant to section 52.6 of the regulations governing inspection and certification. 7 C.F.R. § 52.6." Leighton Decl. Ex. I.

PRIOR HISTORY: Lion Raisins, Inc. v. USDA, 354 F.3d 1072, 2004 U.S. App. LEXIS 563 (9th Cir. Cal., 2004)

JUDGES: JAMES K. SINGLETON, JR., United States District Judge.

OPINION BY: JAMES K. SINGLETON, JR.

ORDER

Lion Raisins, Inc. ("Lion") sought materials from the United States Department of Agriculture ("USDA") under the Freedom of Information Act ("FOIA"). The Court denied the requests, Docket No. 27, and Lion appealed. On appeal the Ninth Circuit affirmed in part and reversed in part. *See Lion Raisins, Inc. v. U.S. Dept. of Agric.*, 354 F.3d 1072 (9th Cir. 2004). The Ninth Circuit remanded a single issue to this Court for further proceedings, namely whether the USDA may shield two investigatory reports termed by the parties the Agricultural Marketing Services Report ("AMS") and the Office of Inspector General Report ("OIG") under the law enforcement exception to the FOIA. *See* 5 U.S.C. § 552(b)(4), (b)(7)(A); *Lion Raisins*, 354 F.3d at 1084-85. The appellate court indicated that this Court's task would be simple: "Because Lion requested specific documents, and the USDA identified the exemptions under which it withheld each document, the USDA need only explain, publicly and in detail, how releasing each of the withheld documents would interfere with the government's ongoing criminal investigation." *Id.* at 1084. The Ninth Circuit directed this Court's attention to *Lewis v. I.R.S.*, 823 F.2d 375, 378-79 (9th Cir. 1987), to illustrate the "public" showing which the USDA must make in order to shield the documents. *Id.* at 1084 n. 13. The government has now made its showing, turning over redacted copies of the AMS and OIG reports and explaining the redactions using language apparently borrowed from *Lewis*. Lion challenges the quality of the showing and the good faith of the United States Attorney's Office, which has undertaken, belatedly the Ninth Circuit might conclude, the defense of this matter.

The Court reviewed the record de novo. The age of the case and the absence of a decision by the United States whether or not to prosecute strengthened Lion's argument that the government's delay in acting suggested that there is no ongoing criminal investigation. The concern

was that the government was reluctant to turn over unredacted copies of the reports in an effort to aid its position in the ongoing administrative proceedings, which have progressed beyond the point where the government could shield the documents as part of a civil or administrative investigation. While the law enforcement exception might shield civil as well as criminal investigations, the Ninth Circuit's remand directs the government to justify failure to release the documents by reference to the oft mentioned criminal investigation, and the status of the administrative proceedings would appear to justify considering only criminal investigations. The Court therefore accepted Lion's suggestion and directed the government to provide unredacted copies of the two reports together with a detailed affidavit from someone responsible for the "criminal investigation" explaining how disclosure of the redacted materials would hinder that investigation. Docket No. 68. The government was directed to submit the materials in camera on or before Monday, September 12, 2005. The order provided that if the government has in fact abandoned any intent to proceed criminally against Lion it should be forthright and disclose that fact. The government has timely complied with the order and has submitted copies of the original unredacted AMS and OIG. *See* Docket Nos. 69; 70. Having reviewed the expanded record, the Court concludes that the government has satisfied the mandate of the Ninth Circuit and justified withholding the redacted information. The government has established that reasonable men and women could not differ that disclosure of the withheld information could jeopardize an ongoing criminal investigation. The Court is satisfied that the criminal investigation is ongoing and that Lion recognizes that fact, as it appears that Lion is currently conducting settlement negotiations with the government regarding the criminal matter, and has stipulated to extend the criminal statute of limitations until December of 2005 to aid those negotiations and delay any decision to prosecute. The government is therefore entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED:

Judge Coyle's order at Docket No. 27 is reinstated. Plaintiff's renewed motion for summary judgment at **Docket No. 56** is **DENIED**.

Defendant's counter motion for summary judgment at **Docket No. 59** is **GRANTED**.

PLANT QUARANTINE AND RELATED ACTS

DEPARTMENTAL DECISIONS

In re: ALLIANCE AIRLINES.
P.Q. Docket No. 04-0009.
Decision and Order.
Filed July 5, 2005.

PQ – Plant quarantine – Default – Failure to file timely answer – Assembly for inspection – Callaloo – Peppers – Civil penalty.

The Judicial Officer affirmed in part the Default Decision by Administrative Law Judge Peter M. Davenport (ALJ) concluding Respondent failed to assemble imported callaloo and peppers for inspection, in violation of 7 C.F.R. § 319.56-6(b). The Judicial Officer stated Respondent is deemed, by its failure to file a timely answer, to have admitted the allegations of the Complaint (7 C.F.R. § 1.136(c)). The Judicial Officer found the Complaint contained no allegation that Respondent violated 7 C.F.R. § 319.56-5(a) and reversed the ALJ's finding that Respondent imported callaloo and peppers and failed to provide the Animal and Plant Health Inspection Service with advance notice of arrival, in violation of 7 C.F.R. § 319.56-5(a). The Judicial Officer assessed Respondent a $9,000 civil penalty.

Krishna G. Ramaraju, for Complainant.
Patti S. Levinson, Chicago, Illinois, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on May 11, 2004. 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 (2001)); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Proceedings Under Certain

Acts (7 C.F.R. pt. 380) [hereinafter the Rules of Practice].[1]

Complainant alleges that, on or about March 25, 2001, Alliance Airlines, Inc. [hereinafter Respondent], failed to assemble for inspection approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers from Jamaica, in violation of 7 C.F.R. § 319.56-6(b) (2001) (Compl. ¶ IV).

On March 8, 2005, Samuel Santiago, a senior investigator, personally served Respondent with the Complaint.[2] 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 29, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Second Motion for Adoption of Proposed Default Decision and Order and a Second Proposed Default Decision and Order. The Hearing Clerk served Respondent with Complainant's Second Motion for Adoption of Default Decision and Order, Complainant's Second Proposed Default Decision and Order, and a service letter on April 8, 2005.[3] Respondent failed to file objections to Complainant's Second Motion for Adoption of Default Decision and Order and Complainant's Second 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).

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[1]Complainant also references the Rules of Practice Governing Proceedings Under Certain Acts (9 C.F.R. pt. 99) (Compl. at first unnumbered page); however, the Rules of Practice Governing Proceedings Under Certain Acts (9 C.F.R. pt. 99) have no relevance to proceedings under the Plant Protection Act. 9 C.F.R. § 99.1.

[2]See United States Department of Agriculture Certificate of Personal Service, which indicates on March 8, 2005, Samuel Santiago, senior investigator, served Respondent with "P.Q. Docket # 04-0009." (Based solely on the United States Department of Agriculture Certificate of Personal Service, I cannot determine the nature of the document served on Respondent. However, the record reveals Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] ordered Complainant to cause the Complaint to be delivered to Respondent and Samuel Santiago delivered the Complaint in accordance with the ALJ's Order (Order filed January 19, 2005; Complainant's March 9, 2005, "Filing of Certificate of Service on Alliance Airlines"). Moreover, Respondent concedes Complainant caused Eduardo F. Sanchez, a regional manager with Alliance Airlines, Inc., to be served with the Complaint on March 8, 2005 (Respondent's Appeal Pet. ¶ 5)).

[3]United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0001 9221 3854.

On May 2, 2005, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ issued a Decision and Order [hereinafter Initial Decision and Order]: (1) finding, on or about March 25, 2001, Respondent imported approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers into the United States and failed to provide advance notice of their arrival to the Animal and Plant Health Inspection Service, in violation of 7 C.F.R. § 319.56-5(a) (2001); (2) finding, on or about March 25, 2001, Respondent failed to assemble for inspection approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers from Jamaica, in violation of 7 C.F.R. § 319.56-6(b) (2001); (3) concluding Respondent violated the Plant Protection Act and 7 C.F.R. § 319.56 *et seq.*; and (4) assessing Respondent a $20,000 civil penalty (Initial Decision and Order at 2-3).

On June 3, 2005, Respondent appealed to the Judicial Officer. On June 27, 2005, Complainant filed Complainant's Response to Respondent's Appeal Petition, and on June 30, 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, except that I disagree with the ALJ's finding that Respondent violated 7 C.F.R. § 319.56-5(a) (2001) and the ALJ's assessment of a $20,000 civil penalty. Therefore, I adopt the Initial Decision and Order as the final Decision and Order, with exceptions. Additional conclusions by the Judicial Officer follow the ALJ's conclusion of law, 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.

. . . .

(4) Finality of orders

The order of the Secretary assessing a civil penalty shall be treated as a final order reviewable under chapter 158 of title 28. The validity of the Secretary's order may not be reviewed in an action to collect the civil penalty. Any civil penalty not paid in full when due under an order assessing the civil penalty shall thereafter accrue interest until paid at the rate of interest applicable to civil judgments of the courts of the United States.

7 U.S.C. § 7734(b)(1)-(2), (4).

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

. . . .

RULES AND REGULATIONS

. . . .

§ 319.56-5 Notice of arrival by permittee.

(a) Immediately upon the arrival of fruits or vegetables, from the countries specified in § 319.56, at the port of first arrival, the permittee or his agent shall submit a notice, in duplicate, to the Plant Protection and Quarantine Programs, through the United States Collector of Customs, or, in the case of Guam, through the Customs officer of the Government of Guam, on forms provided for that purpose, stating the number of the permit; the kinds of fruits or vegetables; the quantity or the number of crates or other containers included in the shipment; the country or locality where the fruits or vegetables were grown; the date of arrival; the name of the vessel, the name and the number, if any, of the dock where the fruits or vegetables are to be unloaded, and the name of the importer or broker at the port of first arrival, or, if shipped by rail, the name of the railroad, the car numbers, and the terminal where the fruits or vegetables are to be unloaded.

. . . .

§ 319.56-6 Inspection and other requirements at the port of first arrival.

. . . .

(b) *Assembly for inspection*. The owner or agent of the owner shall assemble imported fruits and vegetables for inspection at the port of first arrival, or at any other place designated by an inspector, at a place and time and in a manner designated by an inspector.

7 C.F.R. §§ 319.56-5(a), .56-6(b) (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 a business whose mailing address is 1950 NW 66th Avenue, Miami, Florida 33122.

2. On or about March 25, 2001, Respondent failed to assemble for inspection approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers from Jamaica, in violation of 7 C.F.R. § 319.56-6(b) (2001).

Conclusion of Law

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.*).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's Appeal Petition

Respondent raises three issues in Respondent's Appeal Petition. First, Respondent requests an opportunity to respond to the Complaint (Respondent's Appeal Pet. ¶¶ 5-9.)

Respondent concedes it was served with the Complaint on March 8, 2005, and failed to file a timely response to the Complaint (Respondent's Appeal Pet. ¶¶ 5, 8). Respondent's request to file an answer comes far too late to be granted. Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> § 1.136 Answer.
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.
>
> § 1.139 Procedure upon failure to file an answer or admission of facts.
>
> The failure to file an answer, or the admission by the

> answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.
>
> § 1.141 Procedure for hearing.
>
> (a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

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

> [T]his complaint shall be served upon the respondents. The respondents must 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 Rules of Practice governing proceedings under the Acts (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer within the prescribed time shall constitute an admission of all material allegations of this complaint and a waiver of hearing.

Compl. ¶ V.

Respondent's answer was due no later than March 28, 2005. Respondent's first filing in this proceeding was filed June 3, 2005, 2 months 6 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)).

On March 29, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Second Motion for Adoption of Default Decision and Order and Complainant's Second Proposed Default Decision and Order. The Hearing Clerk served Respondent with Complainant's Second Motion for Adoption of Default Decision and Order, Complainant's Second Proposed Default Decision and Order, and a service letter on April 8, 2005.[4]

The Hearing Clerk informed Respondent in the April 4, 2005, service letter that objections to Complainant's Second Motion for Adoption of Default Decision and Order must be filed within 20 days after service, as follows:

CERTIFIED RECEIPT REQUESTED

April 4, 2005

Mr. Edurado [sic] F. Sanchez
Regional Manager
Alliance Airlines
1950 NW 66th Avenue
Suite 226
Miami, Florida 33126

Dear Mr. Sanchez:

Subject: In re: Alliance Airlines, Respondent-
P.Q. Docket No. -04-0009

Enclosed is a copy of Complainant's Second Motion for Adoption

[4]See note 3.

of Proposed Default Decision and Order together with Proposed Default Decision and Order, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Motion for Decision.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Respondent failed to file objections to Complainant's Second Motion for Adoption of Proposed Default Decision and Order and Complainant's Second 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 May 2, 2005, the ALJ issued an 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 the complainant does not object to setting aside the default decision,[5] generally there is no basis for setting aside a default

[5]*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 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

(continued...)

decision that is based upon a respondent's failure to file a timely answer.[6]

Respondent's first filing in this proceeding was filed with the Hearing Clerk 2 months 6 days after Respondent's answer was due.

[5](...continued)
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).

[6]*See generally In re St. Johns Shipping Co.* (Decision as to Bobby L. Shields), 64 Agric. Dec. ___ (Mar. 1, 2005) (affirming the default decision where the respondent failed to respond to the complaint and stating the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Plant Protection Act and the regulations issued under the Plant Protection Act alleged in the complaint); *In re Miguel A. Hidalgo*, 64 Agric. Dec. 531 (2005) (holding the default decision was properly issued where the respondent's response to the complaint was filed 1 year 5 months 2 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Plant Protection Act and 7 C.F.R. §§ 319.56(c), .56-2(e), .56-2i alleged in the complaint); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default 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).

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, except for the ALJ's finding that Respondent violated 7 C.F.R. § 319.56-5(a) (2001).

Moreover, application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[7]

Second, Respondent asserts the ALJ erroneously found Respondent imported approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers into the United States and failed to provide advance notice of their arrival to the Animal and Plant Health Inspection Service, in violation of 7 C.F.R. § 319.56-5(a) (2001) (Respondent's Appeal Pet. ¶¶ 11-12).

I agree with Respondent's assertion that the ALJ erroneously found Respondent violated 7 C.F.R. § 319.56-5(a) (2001). Respondent is deemed, by its failure to file a timely answer, to have admitted the allegations of the Complaint. The Complaint contains no allegation that Respondent imported approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers into the United States and failed to provide advance notice of their arrival to the Animal and Plant Health Inspection Service, in violation of 7 C.F.R. § 319.56-5(a) (2001). Therefore, I do not adopt the ALJ's finding that Respondent violated 7 C.F.R. § 319.56-5(a) (2001).

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[7] *See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding 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 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).

Third, Respondent asserts the ALJ erroneously found Respondent failed to assemble for inspection approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers from Jamaica, in violation of 7 C.F.R. § 319.56-6(b). Respondent contends, in order to be found in violation of 7 C.F.R. § 319.56-6(b), Respondent must have been the person who moved the produce in question into the United States. As the Complaint contains no allegation that Respondent imported the produce in question, Respondent contends it could not have violated 7 C.F.R. § 319.56-6(b). (Respondent's Appeal Pet. ¶¶ 13-15.)

I disagree with Respondent's assertion that the ALJ erroneously found Respondent violated 7 C.F.R. § 319.56-6(b). The provision of 7 C.F.R. § 319.56-6(b) on which Respondent relies for its contention that only importers may be found to have violated 7 C.F.R. § 319.56-6(b) was added to the regulations after Respondent's March 25, 2001, violation of 7 C.F.R. § 319.56-6(b).[8] Moreover, the operative regulation, 7 C.F.R. § 319.56-6(b) (2001), requires the owner or the agent of the owner of imported fruits or vegetables to assemble the fruits or vegetables for inspection irrespective of whether the owner or the agent was the person who imported the fruits or vegetables.

Sanction

In determining the amount of the civil monetary penalty, the Secretary of Agriculture is required to take into account the nature, circumstance, extent, and gravity of the violation.[9]

Respondent is deemed to have admitted he failed to assemble for inspection 119 boxes of restricted callaloo and 18 boxes of restricted peppers from Jamaica, in violation of 7 C.F.R. § 319.56-6(b) (2001). The nature of Respondent's violation thwarts the ability of the Secretary of Agriculture to inspect fresh vegetables to prevent the introduction of plant pests into the United States. As for the extent of Respondent's violation, a large number of boxes of vegetables are involved; however, the violation occurred on a single day. Therefore, I find no ongoing pattern of violations. Further still, the limited record before me reveals

[8]See 68 Fed. Reg. 37,904, 37,922-23 (June 25, 2003).

[9]7 U.S.C. § 7734(b)(2).

no extenuating or aggravating circumstances.

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[10]

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[10]*In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec.364, 390 (2005); *In re Dennis Hill*, 64 Agric. Dec.91, 150 (2004), *appeal docketed*, No. 05-1154 (7th Cir. Jan. 24, 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 Fed. Appx. 706, 2003 WL 21259771 (9th Cir. 2003); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, 33 Fed. Appx. 784, 2002 WL 649102 (6th Cir. 2002) (unpublished); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (continued...)

Complainant recommends I assess Respondent a $20,000 civil penalty. Complainant contends the recommended $20,000 civil penalty was very carefully determined by the Animal and Plant Health Inspection Service based solely on the allegation that Respondent violated 7 C.F.R. § 319.56-6(b) (2001). (Complainant's Response to Respondent's Appeal Pet. at 8). However, in Complainant's Second Motion for Adoption of Default Decision and Order, Complainant appears to base his recommendation on Complainant's contention that Respondent violated 7 C.F.R. § 319.56-5(a) (2001), as well as 7 C.F.R. § 319.56-6(b) (2001), as follows:

> Therefore, Respondent is deemed to have admitted that on or about March 25, 2001, Respondent failed to provide advance notice of and failed to assemble for inspection, approximately one hundred and nineteen boxes of callaloo and approximately eighteen boxes of restricted peppers, in violation of 7 C.F.R. §§ 319.56-5(a) and 319.56-6(b) because advance notice of and assembly for inspection of such items is required.
>
> . . . In order to deter Respondent and others similarly situated from committing *violations* of this nature in the future, Complainant believes that assessment of a civil penalty of twenty thousand dollars ($20,000), is warranted and appropriate.

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[10](...continued)
(Table); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

Complainant's Second Motion for Adoption of Proposed Default Decision and Order at 2-3 (emphasis added). Based upon Complainant's apparent inconsistent positions regarding the basis for his recommendation that I assess Respondent a $20,000 civil penalty, I give Complainant's sanction recommendation very little weight.

After examining all the relevant circumstances and taking into account the requirements of section 424(b)(2) of the Plant Protection Act (7 U.S.C. § 7734(b)(2)) and the remedial purposes of the Plant Protection Act, I conclude assessment of a $9,000 civil penalty against Respondent is appropriate and necessary to ensure Respondent's compliance with the Plant Protection Act and 7 C.F.R. § 319.56-6(b) in the future, to deter others from violating the Plant Protection Act and 7 C.F.R. § 319.56-6(b), and to fulfill the remedial purposes of the Plant Protection Act.

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

ORDER

Respondent is assessed a $9,000 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
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. 04-0009.

RIGHT TO JUDICIAL REVIEW

The Order assessing Respondent a civil penalty is a final order

reviewable under 28 U.S.C. §§ 2341-2351.[11] Respondent must seek judicial review within 60 days after entry of the Order.[12] The date of entry of the Order is July 5, 2005.

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[11]7 U.S.C. § 7734(b)(4).

[12]28 U.S.C. § 2344.

SUGAR MARKETING ALLOTMENT

DEPARTMENTAL DECISION

In re: CARGILL, INC.
SMA Docket No. 03-0002.
Decision and Order.
Filed December 8, 2005.

SMA – Sugar beets – Adjustment to allocation – New entrant – Beet thick juice – Sugar.

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson's decision denying Petitioner's request for an allocation of the beet sugar marketing allotment. The Judicial Officer rejected Petitioner's contention that it was a sugar beet processor entitled to a beet sugar allocation under the "new entrant" provisions of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(H) (Supp. III 2003)). The Judicial Officer found Petitioner did not purchase sugar beets from growers and process those sugar beets through a "tolling agreement" with Southern Minnesota Beet Sugar Cooperative. Instead, the Judicial Officer found Petitioner received beet thick juice, "sugar" for the purposes of the Agricultural Adjustment Act of 1938, and, at Petitioner's Dayton, Ohio, facility, processed that beet thick juice into another form of sugar. As Petitioner was not a sugar beet processor, but rather a processor of one form of sugar into another form of sugar, Petitioner was not entitled to a beet sugar allocation under the "new entrant" provisions of the Agricultural Adjustment Act of 1938.

Jeffrey Kahn, for the Executive Vice President.
John M. Gross and John J. Richard, Atlanta, GA, for Petitioner.
Phillip L. Fraas and Matthew J. Clark, Washington, DC, for the Joint Intervenors.
Steven Adducci and Gina L. Allery, Washington, DC, for Southern Minnesota Beet Sugar Cooperative.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On January 6, 2003, Cargill, Inc. [hereinafter Cargill], requested that the Commodity Credit Corporation, United States Department of Agriculture, determine Cargill is a sugar beet processor entitled to an allocation of the beet sugar marketing allotment. On February 28, 2003, Daniel Colacicco, Director, Dairy and Sweeteners Analysis Group, Farm

Service Agency, United States Department of Agriculture, denied Cargill's request. On March 10, 2003, Cargill requested that the Executive Vice President, Commodity Credit Corporation, United States Department of Agriculture [hereinafter the Executive Vice President], reconsider the February 28, 2003, decision. On July 17, 2003, the Executive Vice President determined on reconsideration that Cargill is not a sugar beet processor entitled to an allocation of the beet sugar marketing allotment.

On August 6, 2003, Cargill filed a Petition for Review and Request for Hearing [hereinafter Petition for Review]. Cargill filed the Petition for Review pursuant to the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 [hereinafter the Agricultural Adjustment Act of 1938]; the Sugar Program regulations (7 C.F.R. pt. 1435); and the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Executive Vice President, Commodity Credit Corporation, Under 7 U.S.C. §§ 1359dd and 1359ff [hereinafter the Rules of Practice].

On August 26, 2003, the Executive Vice President filed an Answer, a certified copy of the record upon which the Executive Vice President based the July 17, 2003, determination, and a list of "affected persons."[1] The Hearing Clerk served the Petition for Review and Answer upon each affected person. One affected person, Southern Minnesota Beet Sugar Cooperative, intervened in favor of Cargill's Petition for Review. Seven affected persons, Amalgamated Sugar Company, American Crystal Sugar Company, Imperial Sugar, Inc., Michigan Sugar Company, Minn-Dak Farmers Cooperative, Monitor Sugar Company, and Western Sugar Cooperative [hereinafter the Joint Intervenors], intervened in opposition to Cargill's Petition for Review. On September 16, 2003, the Joint Intervenors filed a response to Cargill's Petition for Review.

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[1]Beet sugar allocations are a zero-sum situation. Any allocation of the beet sugar marketing allotment to Cargill would mean a corresponding reduction in allocations to existing sugar beet processors. Rule 2(c) of the Rules of Practice defines an "affected person" as a sugar beet processor, other than the petitioner, affected by the Executive Vice President's determination and identified by the Executive Vice President as an affected person. Rule 5(a) of the Rules of Practice requires that any answer filed by the Executive Vice President shall be accompanied by the names and addresses of affected persons.

On October 16, 2003, Cargill filed an Amended and Restated Petition for Review and Request for Hearing. The Executive Vice President and the Joint Intervenors moved to strike the Amended and Restated Petition for Review and Request for Hearing. At a February 12, 2004, conference call, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] denied the motion to strike and directed Cargill to file a revised version of its Amended and Restated Petition for Review and Request for Hearing specifically indicating the provisions of the August 6, 2003, Petition for Review that had been amended. On February 17, 2004, Cargill filed Petitioner's Notice of Filing Describing Additional Material in Amended and Restated Petition for Review and Request for Hearing. On March 8, 2004, the Executive Vice President filed a response to Petitioner's Notice of Filing Describing Additional Material in Amended and Restated Petition for Review and Request for Hearing, and on March 9, 2004, the Joint Intervenors filed a response to Petitioner's Notice of Filing Describing Additional Material in Amended and Restated Petition for Review and Request for Hearing.[2]

On June 15-17, 2004, the Chief ALJ conducted a hearing in Washington, DC. John M. Gross and John J. Richard, Powell, Goldstein, Frazer & Murphy, LLP, Atlanta, Georgia, represented Cargill. Jeffrey Kahn, Office of the General Counsel, United States Department of Agriculture, represented the Executive Vice President. Phillip L. Fraas, Washington, DC, and Matthew J. Clark, Arent Fox, PLLC, Washington, DC, represented the Joint Intervenors. Steven A. Adducci and Gina L. Allery, Dorsey & Whitney, LLP, Washington, DC, represented Southern Minnesota Beet Sugar Cooperative.

On September 10, 2004, the Executive Vice President filed Brief of Commodity Credit Corporation and Southern Minnesota Beet Sugar Cooperative filed Initial Post-Hearing Brief of Southern Minnesota Beef Sugar Cooperative. On September 13, 2004, Cargill filed Petitioner's First Post-Hearing Brief and Closing Statement. On September 17, 2004, the Joint Intervenors filed Initial Post-Hearing Brief of the Joint Intervenors in Opposition to the Petition for Review. On October 13,

[2]Cargill's operative pleading is Cargill's August 6, 2003, Petition for Review as amended by the Petitioner's Notice of Filing Describing Additional Material in Amended and Restated Petition for Review and Request for Hearing filed February 17, 2004. I refer to Cargill's operative pleading as Cargill's Amended Petition for Review.

2004, the Executive Vice President filed Reply Brief of Commodity Credit Corporation; the Joint Intervenors filed Brief of the Joint Intervenors in Response to the Initial Briefs Filed by the Petitioner, the Commodity Credit Corporation, and the Southern Minnesota Beet Sugar Cooperative; and Cargill filed Petitioner's Final Post-Hearing Brief and Closing Statement.

On June 27, 2005, the Chief ALJ filed a Decision [hereinafter Initial Decision]: (1) sustaining the Executive Vice President's July 17, 2003, denial of Cargill's request for a beet sugar allocation as a new entrant under the Agricultural Adjustment Act of 1938; and (2) denying Cargill's Amended Petition for Review (Initial Decision at 21).

On August 4, 2005, Cargill appealed to the Judicial Officer. On August 24, 2005: (1) the Executive Vice President filed a response in opposition to Cargill's appeal petition; (2) Southern Minnesota Beet Sugar Cooperative filed a response in support of Cargill's appeal petition; and (3) the Joint Intervenors filed a response in opposition to Cargill's appeal petition. On September 9, 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 Chief ALJ's June 27, 2005, Initial Decision. Therefore, except for minor modifications, I adopt the Chief ALJ's Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's findings and conclusions, as restated.

The Joint Intervenors' exhibits are designated by "JIX." Exhibits from the certified copy of the record upon which the Executive Vice President based the July 17, 2003, determination are designated by "AR." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 35—AGRICULTURAL ADJUSTMENT ACT OF 1938

. . . .

SUBPART VII—FLEXIBLE MARKETING ALLOTMENTS FOR SUGAR

. . . .

§ 1359dd. Allocation of marketing allotments

(a) Allocation to processors

Whenever marketing allotments are established for a crop year under section 1359cc of this title, in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.

(b) Hearing and notice

. . . .

(2) Beet sugar

(A) In general

Except as otherwise provided in this paragraph and sections 1359cc(g), 1359ee(b), and 1359ff(b) of this title, the Secretary shall make allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect on the basis of the adjusted weighted average quantity of beet sugar produced by the processors for each of the 1998 through 2000 crop years, as determined under this paragraph.

. . . .

(H) New entrants starting production or reopening factories

(i) In general

Except as provided in clause (ii), if an individual or entity that does not have an allocation of beet sugar under this subpart (referred to in this paragraph as a "new entrant") starts processing sugar beets after May 13, 2002, or acquires and reopens a factory that produced beet sugar during previous crop years that (at the time of acquisition) has no allocation associated with the factory under this subpart, the Secretary shall—

(I) assign an allocation for beet sugar to the new entrant that provides a fair and equitable distribution of the allocations for beet sugar; and

(II) reduce the allocations for beet sugar of all other processors on a pro rata basis to reflect the new allocation.

7 U.S.C. § 1359dd(a), (b)(2)(A), (H)(i) (Supp. III 2003).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER XIV—COMMODITY CREDIT CORPORATION, DEPARTMENT OF AGRICULTURE

. . . .

PART 1435—SUGAR PROGRAM

Subpart A—General Provisions

. . . . .

§ 1435.2 Definitions.

The definitions set forth in this section are applicable for all purposes of program administration. Terms defined in part 718 of this title are also applicable.

. . . .

Beet sugar means sugar that is processed directly or indirectly from sugar beets or sugar beet molasses.

Beet sugar allotment means that portion of the overall allotment quantity allocated to sugar beet processors.

. . .

In-process sugar means the intermediate sugar containing products, as CCC determines, produced in the processing of domestic sugar beets and sugarcane. It does not include raw sugar, liquid sugar, invert sugar, invert syrup, or other finished products that are otherwise eligible for a loan.

. . .

Overall allotment quantity means, on a national basis, the total quantity of sugar, raw value, processed from domestically produced sugarcane or domestically produced sugar from sugar beets, and the raw value equivalent of sugar in sugar products, that is permitted to be marketed by processors, during a crop year or other period in which marketing allotments are in effect.

. . .

Raw sugar means any sugar that is to be further refined or improved in quality other than in-process sugar.

. . .

Sugar means any grade or type of saccharine product derived, directly or indirectly, from sugarcane or sugar beets and consisting of, or containing, sucrose or invert sugar, including raw sugar, refined crystalline sugar, liquid sugar, edible molasses, and edible cane syrup. For allotments, *sugar* means any grade or type of saccharine product processed, directly or indirectly, from sugarcane or sugar beets (including sugar produced from sugar beet or sugarcane molasses), produced for human consumption, and consisting of, or containing, sucrose or invert sugar, including raw sugar, refined crystalline sugar, edible molasses, edible cane syrup, and liquid sugar.

Sugar beet processor means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year.

. . . .

Subpart D—Flexible Marketing Allotments For Sugar

. . . .

§ 1435.308 Transfer of allocation, new entrants.

. . . .

(f) New entrants, not acquiring existing facilities, may apply to the Executive Vice President, CCC, for an allocation.

(1) Applicants must demonstrate their ability to process, produce, and market sugar for the applicable crop year.

(2) CCC will consider adverse effects of the allocation upon existing processors and producers.

7 C.F.R. §§ 1435.2, .308(f)(1)-(2) (2004).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Decision Summary

The July 17, 2003, determination issued by the Executive Vice President is in accord with the new entrant provisions of the Agricultural Adjustment Act of 1938. Cargill's Amended Petition for Review, in which Cargill seeks to overturn the July 17, 2003, determination issued by the Executive Vice President concluding Cargill is not a new entrant entitled to an allocation of the beet sugar marketing allotment, is denied.

Statutory and Regulatory Background

The United States government has regulated sugar beets, along with other commodities, for many years. In 2002, Congress passed the Farm Security and Rural Investment Act of 2002, which requires the Secretary of Agriculture to establish, by the beginning of each crop year, the "overall allotment quantity" of sugar produced from sugar beets and domestically-produced sugar cane. The "overall allotment quantity" is divided so that 54.35 percent is allotted to producers of sugar derived from sugar beets and 45.65 percent is allotted to producers of sugar derived from sugar cane. The allocations for beet sugar among sugar beet processors for each crop year that allotments are in effect are based on the weighted average quantity of beet sugar produced by each sugar beet processor during the 1998 through 2000 crop years. Thus, these allocations are intended to apply to processors already in the sugar beet processing business.

The Farm Security and Rural Adjustment Act of 2002 provides for adjustments to the weighted average quantity of beet sugar produced by a sugar beet processor during the 1998 through 2000 crop years for opening or closing a sugar beet processing factory, for constructing a molasses desugarization facility, or for suffering substantial quality losses on stored sugar beets,[3] but these adjustments are not at issue in this proceeding. The Farm Security and Rural Investment Act of 2002 also makes specific provision for "new entrants" into the sugar beet

[3] 7 U.S.C. § 1359dd(b)(2)(D)(i) (Supp. III 2003).

processing business.[4] In order to qualify as a new entrant, an individual or entity must start processing sugar beets after the date the Farm Security and Rural Investment Act of 2002 was enacted, May 13, 2002, or acquire or reopen a factory that produced beet sugar during previous crop years that has no allocation associated with the factory. If an individual or entity satisfies this condition, the Secretary of Agriculture "shall" assign the new entrant an allocation for beet sugar that provides a fair and equitable distribution of the allocations for beet sugar.[5] The Secretary of Agriculture adopted the Sugar Program regulations to implement the Farm Security and Rural Investment Act of 2002.[6]

The legislative history concerning beet sugar allocation adjustment provisions is sparse. A statement by Senator Conrad, a co-sponsor of the Farm Security and Rural Investment Act of 2002, gives some perspective on Congress's intent in establishing the current allocation program, but has nothing specific to say about the new entrant provisions.

> The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future. This is an amendment that enjoys widespread support within the sugar beet industry. Producers in that industry recall, as I do, the very difficult and contentious period just a few years ago when the Department of Agriculture last attempted to establish beet sugar allotments with very little direction in the law.
>
> That experience left us all believing that there must be a better way, that we should seek a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. On that basis, I urged members of the industry to work together to see if they could agree on a reasonable formula.
>
> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge

[4] 7 U.S.C. § 1359dd(b)(2)(H) (Supp. III 2003).

[5] 7 U.S.C. § 1359dd(b)(2)(H)(i)(I) (Supp. III 2003).

[6] 7 C.F.R. pt. 1435 (2004).

> that consensus. It provides that any future allotments will be based on each processor's weighted-average production during the years 1998 through 2000 with authority for the Secretary of Agriculture to make adjustments in the formula if an individual processor experienced disaster related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets.

148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad).

Facts

Cargill is a large processor of agricultural commodities into food products. Among many other business interests, Cargill operates a sugar processing facility in Dayton, Ohio (AR-001). Cargill has considerable experience in producing sugar suitable for human consumption at the Dayton, Ohio, facility (Tr. 118-20). This facility, located on the site of an idle corn processing plant, began operating in August 2000 and primarily was used to manufacture sugar products from intermediate sugar products such as liquid cane molasses (Tr. 30-31). Although details of the cost of this facility were testified to in closed session, it is fair to state that the cost of adapting the Dayton, Ohio, facility to handle beet thick juice was dramatically less than the typical cost for starting up a full-scale sugar beet processing factory.

John Richmond, chief executive officer and president of Southern Minnesota Beet Sugar Cooperative, a beet sugar processing cooperative located in Renville, Minnesota, testified that Southern Minnesota Beet Sugar Cooperative has unused capacity at its sugar beet processing factory (Tr. 144-45, 151-52, 167). Cargill and Southern Minnesota Beet Sugar Cooperative representatives testified that an agreement exists between Cargill and Southern Minnesota Beet Sugar Cooperative under which Cargill effectively buys sugar beets from Southern Minnesota Beet Sugar Cooperative, pays Southern Minnesota Beet Sugar Cooperative to process the sugar beets into beet thick juice, and then arranges to have the beet thick juice transported from Renville, Minnesota, to Dayton, Ohio, where Cargill processes the beet thick juice

into other sugar products (Tr. 34-35, 44-45, 73-74, 76-77, 180-84). Although this agreement was mentioned numerous times during the proceeding by Cargill and Southern Minnesota Beet Sugar Cooperative, and there are several disparities between Cargill and Southern Minnesota Beet Sugar Cooperative as to what the agreement actually provides, no agreement was ever submitted as part of the record.

According to Cargill and Southern Minnesota Beet Sugar Cooperative, all processing of the sugar beets allegedly owned by Cargill at Southern Minnesota Beet Sugar Cooperative's sugar beet processing factory would be accomplished under the terms of a "tolling" agreement (Tr. 48-52, 58). Traditionally, in the sugar beet processing business, a tolling agreement provides for one processor to perform some processing functions on sugar beets owned by another processor. Tolling agreements are not uncommon in the sugar beet processing business.

The beet sugar allocation program is a form of zero-sum game, as the parties readily admit. Thus, when the Secretary of Agriculture issues the annual total beet sugar allotment, it is allocated among all the sugar beet processors according to the formula in the Agricultural Adjustment Act of 1938, based on beet sugar production during the 1998 through 2000 crop years and subject to the adjustments for opening or closing a sugar beet processing factory, for opening a molasses desugarization facility, and for substantial quality losses on stored sugar beets. Any addition to a sugar beet processor's allocation results in a proportional reduction of the allocations of the other sugar beet processors. Cargill has requested an allocation of 80,000 short tons of beet sugar as a "new entrant" in the sugar beet processing field (AR-001-AR-005). If granted, this allocation to Cargill would result in a combined 80,000 ton reduction of the allocations of the other sugar beet processors, to be shared on a pro rata basis. While Southern Minnesota Beet Sugar Cooperative would also share in this reduction, it would at the same time substantially profit from a beet sugar allocation to Cargill, since Southern Minnesota Beet Sugar Cooperative's sugar beet processing factory would be more fully utilized.

One of the key factual determinations made in the Executive Vice President's July 17, 2003, determination is that, for the purposes of the Agricultural Adjustment Act of 1938, beet thick juice is sugar. Since Cargill is receiving sugar in the form of beet thick juice at its Dayton,

Ohio, facility, Cargill is merely refining one form of sugar into another form of sugar. (AR-065.) Indeed, this determination is totally consistent with an earlier determination, sought by Southern Minnesota Beet Sugar Cooperative in September 2002, that beet thick juice is sugar for purposes of the Agricultural Adjustment Act of 1938 and that specifically selling of beet thick juice constitutes the selling of sugar (AR-006). John Richmond, Southern Minnesota Beet Sugar Cooperative's chief executive officer and president, acknowledged that the product his company is shipping to Cargill, in the form of beet thick juice, is sugar for purposes of the sugar program (Tr. 193).

The record contains considerable testimony on the financial impact of granting the requested beet sugar allocation to Cargill. Cargill and Southern Minnesota Beet Sugar Cooperative contended that the financial impact would not be significant, even stating that it would be de minimus and comparing the financial impact to the 2 percent discount for prompt payment that is prevalent in the industry. The Joint Intervenors portrayed the losses they would suffer as significant and asserted Southern Minnesota Beet Sugar Cooperative would receive approximately $138,000,000 of additional revenues over the period from 2004 to 2008 inclusive. While Southern Minnesota Beet Sugar Cooperative would have to suffer the same proportional loss in its allocation as the other sugar beet processors if Cargill were granted the requested allocation, the record establishes that, from a financial perspective, Southern Minnesota Beet Sugar Cooperative would benefit from the assignment of an allocation for beet sugar to Cargill.

Other financial testimony, including expert testimony, examined the alleged losses that would be suffered by various sugar beet processors and the gains that would be experienced by Southern Minnesota Beet Sugar Cooperative from a marginal cost perspective. In addition to losses in revenues and profits, the Joint Intervenors contended that granting Cargill's Amended Petition for Review would result in "a significant loss of asset values for other allotment holders" (JIX-9 at 8), while Southern Minnesota Beet Sugar Cooperative would achieve significant gains in revenues, profits, and asset values.

The Joint Intervenors also contended, if Cargill's Amended Petition for Review were granted and Southern Minnesota Beet Sugar Cooperative could have a tolling arrangement with someone who was

only a processor of a product that was already sugar, such as beet thick juice, everyone else in the industry could easily execute similar agreements, throwing the entire carefully crafted beet sugar allocation system into chaos. The Joint Intervenors contended, as did the Executive Vice President, that the ease of such "copycatting"—and there was no dispute that any of the Joint Intervenors who had available capacity and the ability to grow more sugar beets could enter into a similar arrangement to the one Cargill had with Southern Minnesota Beet Sugar Cooperative—would lead to a situation counter to the one anticipated by the Agricultural Adjustment Act of 1938, where sugar beet processors would be subject to numerous allocation changes, in a serial fashion, and the beet sugar allocation program would operate in a manner quite the opposite of the "certainty and predictability" anticipated by Senator Conrad.

Discussion

Cargill is not entitled to a beet sugar allocation as a new entrant. The Executive Vice President's July 17, 2003, determination that granting Cargill new entrant status would be inconsistent with the Agricultural Adjustment Act of 1938 is amply supported by the evidence, as well as by the Agricultural Adjustment Act of 1938, the Sugar Program regulations, and the limited legislative history.

Cargill does not process sugar beets as contemplated by the new entrant provisions of the Agricultural Adjustment Act of 1938. While the conversion of beet thick juice into edible sugar is a part of the process of making commercially useful sugar out of the sugar beet, the definitions and determinations of the Executive Vice President (AR-065) make clear that beet thick juice is already considered sugar under the Agricultural Adjustment Act of 1938, so that the processing of beet thick juice at a remote facility cannot be considered the processing of sugar beets so as to entitle Cargill to a beet sugar allocation as a new entrant.

While Cargill and Southern Minnesota Beet Sugar Cooperative contend Cargill is entitled to a beet sugar allocation based on the fact that Cargill is simply purchasing sugar beets from Southern Minnesota Beet Sugar Cooperative's growers and is having part of the processing performed through a tolling agreement with Southern Minnesota Beet Sugar Cooperative, the record contains no documentary evidence

supporting this contention and the testimony supporting the existence of such an agreement, not to mention its specific terms, is less than convincing. No agreement between Cargill and Southern Minnesota Beet Sugar Cooperative was ever introduced into evidence, and I have some doubt as to whether such a written agreement, with definite terms and fixed obligations, even exists. Cargill and Southern Minnesota Beet Sugar Cooperative had ample opportunity to submit such an agreement, and the agreement could have been kept under seal, as were other testimony and exhibits in this proceeding, but they chose not to do so. Further, the record contains markedly conflicting testimony from witnesses employed by Cargill and Southern Minnesota Beet Sugar Cooperative as to the terms of the agreement.

Indeed, in its request that the Executive Vice President determine that it is a new entrant sugar beet processor under the Agricultural Adjustment Act of 1938 (AR-001-AR-005), Cargill indicated it had entered into an agreement for the purchase of sugar beets from Southern Minnesota Beet Sugar Cooperative. Daniel R. Pearson, Cargill's assistant vice president for Public Affairs, testified before the Executive Vice President that the sugar beets were to be purchased from the growers of Southern Minnesota Beet Sugar Cooperative and that the beet thick juice would "[a]t no time" be the property of Southern Minnesota Beet Sugar Cooperative (AR-025). At the hearing, no evidence was introduced to substantiate these contentions. On the contrary, John Richmond, Southern Minnesota Beet Sugar Cooperative's chief executive officer and president, testified that it was Southern Minnesota Beet Sugar Cooperative as an entity, not the growers, who would contract with Cargill (Tr. 181-82). Rather than Cargill owning sugar beets it specifically purchases from growers, Southern Minnesota Beet Sugar Cooperative might just be selling "some portion of the beets that we have in the pile" and beets "owned" by Southern Minnesota Beet Sugar Cooperative and Cargill would likely be commingled (Tr. 182-86). Mr. Richmond further testified that it might be just as likely that the Southern Minnesota Beet Sugar Cooperative growers would receive their payments for the "Cargill" beets from Southern Minnesota Beet Sugar Cooperative as they would from Cargill (Tr. 202-03). The evidence, as well as the failure to produce any written contract, falls far short of convincing me that there

is a contract in effect whereby Cargill is buying sugar beets from growers and maintaining ownership and the inherent risks of ownership from harvest through the processing of the sugar beets into sugar.

I agree with the Executive Vice President and the Joint Intervenors that Cargill does not meet the statutory criteria for new entrant status. The new entrant provisions are designed so that an individual or entity that starts processing sugar beets after May 13, 2002, receives an allocation of the beet sugar marketing allotment to which the individual or entity would otherwise not be entitled, since the allotment, in the absence of a new entrant, is distributed among sugar beet processors on the basis of the adjusted weighted average quantity of beet sugar produced by the processors for each of the 1998 through 2000 crop years. The new entrant provisions are not designed to allow an entity, such as Southern Minnesota Beet Sugar Cooperative, to effectively increase its own allocation to utilize excess capacity by contracting with another individual or entity to perform a small part of the process.

In order to be a new entrant, Cargill must show it is a "sugar beet processor." To so qualify, Cargill must commercially produce sugar, directly or indirectly, from sugar beets (7 C.F.R. § 1435.2 (2004)). Yet, the product Cargill would receive from Southern Minnesota Beet Sugar Cooperative is already sugar, as Southern Minnesota Beet Sugar Cooperative is well aware, it having requested and received an interpretation that beet thick juice constitutes sugar under the Agricultural Adjustment Act of 1938. Thus, if Cargill is only processing one form of sugar into another form of sugar, Cargill could not be a sugar beet processor under the Agricultural Adjustment Act of 1938 or the Sugar Program regulations. However, Cargill and Southern Minnesota Beet Sugar Cooperative contend that, by purchasing sugar beets from Southern Minnesota Beet Sugar Cooperative growers and then having Southern Minnesota Beet Sugar Cooperative handle all aspects of the processing of the sugar beets through the beet thick juice stage by means of a tolling agreement, Cargill still qualifies as a new entrant. I disagree.

In the sugar beet industry, tolling is a process by which one processor pays another to handle a portion of the processing of sugar beets into sugar. Here, Cargill contends it had a contract with Southern Minnesota Beet Sugar Cooperative "to purchase beets to toll through the plant," and that "we have rented the plant for a certain percentage of their capacity"

for which Cargill pays a "toll fee" (Tr. 48). Cargill and Southern Minnesota Beet Sugar Cooperative have represented that their tolling agreement is similar to many others in the industry (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 17-19). However, the Executive Vice President and the Joint Intervenors have pointed out that the agreements of other entities cited by Cargill and Southern Minnesota Beet Sugar Cooperative give little support to the position that a non-sugar beet processor can achieve new entrant status by utilizing a tolling agreement as attempted here. None of the three examples cited involved a company seeking a new entrant allocation. Indeed, none of the three examples even took place in a time period where both new entrant and similar allocation provisions were present.

No evidence presented by Cargill or Southern Minnesota Beet Sugar Cooperative demonstrates that tolling has ever been utilized to bootstrap a non-sugar beet processor into processor status. Since Cargill, by processing beet thick juice, is only processing a product that has already been classified as sugar, the only real question is whether a tolling agreement can, in and of itself, propel Cargill into new entrant status. By attempting to classify itself as a sugar beet processor, through a tolling agreement that is not even a part of the record, and by its processing of a product that is already sugar, Cargill is no different from any entity which could enter into a contract to "toll" sugar beets through Southern Minnesota Beet Sugar Cooperative, and thereby be entitled to new entrant status. In other words, if I were to find that Cargill is entitled to new entrant status, there would be no bar on anyone entering into a tolling agreement with an existing sugar beet processor with unused capacity to grow and process sugar beets, and thereby attain a beet sugar allocation.

The real beneficiary of awarding new entrant status to Cargill would be Southern Minnesota Beet Sugar Cooperative. As discussed in *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. ___ (May 9, 2005), Southern Minnesota Beet Sugar Cooperative spent roughly $100,000,000 to renovate its sugar beet processing factory, a significant sum of money, but not inconsistent with funds expended by other sugar beet processors to modernize sugar beet processing factories (Tr. 129). The parties in *In re Southern Minnesota Beet Sugar Cooperative* expounded on the major expenditures necessary to engage

in the sugar beet processing industry.[7] At the same time, Cargill's expenditures to attempt to become a sugar beet processor were relatively minimal.[8] In *In re Southern Minnesota Beet Sugar Cooperative* and again in this proceeding, Southern Minnesota Beet Sugar Cooperative made clear that it had significant unused capacity as a result of the renovation and expansion, capacity which Southern Minnesota Beet Sugar Cooperative obviously seeks to utilize through its dealings with Cargill. While Southern Minnesota Beet Sugar Cooperative's efforts to increase its allocation in *In re Southern Minnesota Beet Sugar Cooperative* proved unsuccessful, the instant case was proceeding concurrently.

Cargill and Southern Minnesota Beet Sugar Cooperative rely on an "unused capacity" argument—that the capacity added by Southern Minnesota Beet Sugar Cooperative and not used to calculate Southern Minnesota Beet Sugar Cooperative's beet sugar allocation arguably constitutes a new facility, which Cargill can utilize as a new entrant. Such a contention is unconvincing and inconsistent with the Agricultural Adjustment Act of 1938, which provides that a sugar beet processor's allocation is calculated based on its actual production of beet sugar from sugar beets during the 1998 through 2000 crop years. Whether the capacity of a sugar beet processor was used or not, or increased or decreased, is simply not relevant to beet sugar allocations.

Cargill's Amended Petition for Review cannot be granted in the face of statutory language requiring that a new entrant be an individual or entity that "starts processing sugar beets after May 13, 2002[.]"[9] While Cargill claims it is just entering the sugar beet processing business, the entity that would be doing all the sugar beet processing for Cargill was

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[7]American Crystal Company committed $134,000,000 to two major expansions during the period 1996 through 2000; Western Sugar Cooperative spent $22,500,000 on an expansion project; and Minn-Dak Farmers Cooperative underwent a $93,000,000 expansion. *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 588-89, (2005).

[8]The costs of setting up operations at Cargill's Dayton, Ohio, facility to accommodate the receipt of beet thick juice were discussed in closed session, with that portion of the transcript under seal. Since Cargill's Dayton, Ohio, facility was already handling cane sugar products, the accommodation to handle the beet thick juice was relatively insignificant. (Tr. 115-17.)

[9]7 U.S.C. § 1359dd(b)(2)(H) (Supp. III 2003).

operating for several decades before May 13, 2002. Moreover, all the capacity that would be utilized by Cargill under the tolling agreement with Southern Minnesota Beet Sugar Cooperative was already in existence two crop years before May 13, 2002. That the very excess capacity that Southern Minnesota Beet Sugar Cooperative was not allowed to use in its own right could be used to entitle a non-sugar beet processor like Cargill to generate an allocation is inimical to the Agricultural Adjustment Act of 1938. As the Executive Vice President contends, interpreting the Agricultural Adjustment Act of 1938 in Cargill's (and thereby Southern Minnesota Beet Sugar Cooperative's) favor, "would totally undermine the statutory formula for making beet sugar allocations, opening up a free-for-all as all processors under various guises file for new entrant status on the basis of their unused capacity." (Brief of Commodity Credit Corporation at 13.)

While there is nothing wrong with exploiting a statutory or regulatory loophole for one's benefit, I agree with the Executive Vice President that there simply is not the loophole here that Cargill and Southern Minnesota Beet Sugar Cooperative insist exists. Cargill's and Southern Minnesota Beet Sugar Cooperative's interpretation of the Agricultural Adjustment Act of 1938 would likely lead not to the "certainty and predictability" that was in the minds of the drafters of the Farm Security and Rural Investment Act of 2002 as summarized by Senator Conrad, but would instead lead to a constant flow of petitions for adjustment of allocations as sugar beet processors with unused capacity and sugar beet farmers with unplanted land could engage in round after round of "contracts" with entities that are not even sugar beet processors to increase beet sugar allocations and to reduce market share of other sugar beet processors who are actually in the business of processing sugar beets.

Thus, I agree with the Executive Vice President "that granting Cargill a new entrant allocation under the proposed arrangement with the Southern Minnesota Beet Sugar Cooperative . . . is not consistent with the beet sugar allocation formula under the sugar marketing allotment program" (AR-063). Similarly, the Executive Vice President's holding that granting Cargill's petition would "subvert the carefully crafted beet sugar allocation formula for existing beet processors" (AR-063), is well supported by this record.

Granting Cargill's Amended Petition for Review and accepting Cargill's and Southern Minnesota Beet Sugar Cooperative's arguments could lead to bizarre outcomes that even more strongly illustrate the correctness of the Executive Vice President's interpretation. Thus, if Cargill simply purchased Southern Minnesota Beet Sugar Cooperative's entire operation, there is little question that Cargill would be entitled to nothing but Southern Minnesota Beet Sugar Cooperative's current beet sugar allocation, based on the Southern Minnesota Beet Sugar Cooperative 1998 through 2000 crop year production of beet sugar.[10] Yet, by not buying Southern Minnesota Beet Sugar Cooperative's sugar beet processing factory and effectively buying the unused capacity of the factory, Cargill and Southern Minnesota Beet Sugar Cooperative would create out of whole cloth an additional 80,000 tons of sugar production out of the exact same factory that has already been ruled not entitled to any additional allocation. Alternatively, if Cargill were awarded new entrant status and given a beet sugar allocation, there would be nothing stopping Southern Minnesota Beet Sugar Cooperative from purchasing Cargill's Dayton, Ohio, facility and its allocation, and thus, by gaming the system, effectively gaining an allocation for its unused capacity at the expense of the other sugar beet processors. This outcome would wreak havoc on the system carefully crafted by Congress and would greatly exacerbate the uncertainty that Congress sought to avoid in enacting the Farm Security and Rural Investment Act of 2002.

I find the clear language of the Agricultural Adjustment Act of 1938, the legislative history, and the Sugar Program regulations mandate the conclusions that Cargill is not entitled to new entrant status and the Executive Vice President properly denied Cargill's request. When one reads the requirements for determining the quantity of beet sugar allocations in conjunction with the new entrant provisions, the conclusion that an individual or entity must be a full-scale sugar beet processor, in order to achieve new entrant status, is inescapable. Construing the new entrant provisions to allow Cargill's Amended Petition for Review would undercut the detailed and balanced allocation system devised by Congress.

Moreover, while the legislative history is sparse, its principal theme, that the allocation process must be one that is "fair and open and

[10]See 7 C.F.R. § 1435.308(d) (2004).

provides some certainty and predictability to the industry,"[11] is fully embraced by the Executive Vice President's July 17, 2003, determination and would be utterly disregarded if the Cargill-Southern Minnesota Beet Sugar Cooperative interpretation prevailed. The uncertainties imposed upon the system, condoning artifice and encouraging bootstrapping, would be just the opposite of the system carefully crafted by Congress and managed by the Secretary of Agriculture.

Findings and Conclusions

1. Cargill, a large processor of agricultural commodities into food products, operates a sugar processing facility in Dayton, Ohio.

2. Among many products received for processing at Cargill's Dayton, Ohio, facility is beet thick juice, which is a form of sugar.

3. Cargill does not qualify as a new entrant under the Agricultural Adjustment Act of 1938 because it does not process sugar beets within the meaning of the Agricultural Adjustment Act of 1938.

4. Southern Minnesota Beet Sugar Cooperative is a processor of sugar beets which engaged in a significant and costly renovation of its Renville, Minnesota, sugar beet processing factory during the period 1996 through 2000. This renovation left Southern Minnesota Beet Sugar Cooperative with capacity to process sugar beets in excess of its beet sugar allocation under the Agricultural Adjustment Act of 1938.

5. Granting Cargill's Amended Petition for Review would result in Southern Minnesota Beet Sugar Cooperative being able to grow and process sugar beets which it would not be allowed to grow and process under its own beet sugar allocation and would constitute a circumvention of the carefully crafted beet sugar allocation program.

6. The preponderance of the evidence does not support a finding that there is a contract between Cargill and Southern Minnesota Beet Sugar Cooperative under which Cargill purchases sugar beets directly from Southern Minnesota Beet Sugar Cooperative growers and owns the sugar beets throughout their processing into sugar.

7. In the sugar beet processing industry, a tolling agreement is

[11] 148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad).

made between two processors where, for a fee, one processor will process the sugar beets of another processor. Since Cargill is not a sugar beet processor, it cannot bootstrap itself into new entrant status through a tolling agreement with an entity that is a sugar beet processor.

8. Granting Cargill's Amended Petition for Review would cause great uncertainty in the sugar beet processing industry, would inevitably result in significant copycatting by other processors who find they have unused capacity, and would be counter to the Agricultural Adjustment Act of 1938, the legislative history, and the Sugar Program regulations.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Cargill raises six issues in Petitioner Cargill, Inc.'s Appeal Petition to the Judicial Officer [hereinafter Appeal Petition] and Petitioner Cargill, Inc.'s Brief in Support of Its Appeal Petition to the Judicial Officer [hereinafter Appeal Brief]. First, Cargill contends the Chief ALJ erroneously found Cargill's tolling agreement with Southern Minnesota Beet Sugar Cooperative is insufficient to attain new entrant status. Cargill asserts, under its tolling agreement with Southern Minnesota Beet Sugar Cooperative, Cargill is a "sugar beet processor," as defined in the Sugar Program regulations because Cargill is "a person who commercially produces sugar, directly or indirectly, from sugar beets" (7 C.F.R. § 1435.2 (2004)). (Appeal Pet. at first unnumbered page; Appeal Brief at 5.)

I disagree with Cargill's contention that it is a "sugar beet processor" as defined in the Sugar Program regulations (7 C.F.R. § 1435.2 (2004)), based on its tolling agreement with Southern Minnesota Beet Sugar Cooperative. The Chief ALJ correctly found that Cargill does not process sugar beets, but, instead, at its Dayton, Ohio, facility, processes beet thick juice. Beet thick juice is sugar (AR-006). Thus, Cargill's Dayton, Ohio, facility processes sugar, not sugar beets, and Cargill is not entitled to an allocation of the beet sugar marketing allotment under the new entrant provisions of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(H) (Supp. III 2003)).

Second, Cargill contends the Chief ALJ erroneously found Cargill would be processing only beet thick juice received from Southern Minnesota Beet Sugar Cooperative. Cargill asserts the evidence establishes that, prior to processing by Southern Minnesota Beet Sugar

Cooperative, Cargill owns the sugar beets; therefore, Cargill is a sugar beet processor from the outset. (Appeal Pet. at first unnumbered page; Appeal Brief at 5.)

I agree with the Chief ALJ that the evidence falls far short of that necessary to establish Cargill's contention that it owns the sugar beets prior to processing by Southern Minnesota Beet Sugar Cooperative. The evidence establishes that Cargill never entered into contracts directly with Southern Minnesota Beet Sugar Cooperative's growers. Further, Cargill failed to produce any contract between it and Southern Minnesota Beet Sugar Cooperative and there is no other documentary evidence to support Cargill's contention that it owns the sugar beets processed by Southern Minnesota Beet Sugar Cooperative. Moreover, testimony by John Richmond, the chief executive officer and president of Southern Minnesota Beet Sugar Cooperative, does not establish that Cargill purchases sugar beets directly from sugar beet growers and Southern Minnesota Beet Sugar Cooperative merely processes Cargill-owned beets, as follows:

> [BY MR. FRAAS:]
>
> Q. You heard Cargill's witness testify that they have not entered into contracts with individual growers. How is that going to work?
>
> [BY MR. RICHMOND:]
>
> A. The concept is for to contract for those beets on Cargill's behalf.
>
> Q. You would be agent for Cargill?
>
> A. I don't know that I understand the meaning of that word. Contractually --
>
> . . . .
>
> A. We have agreed to contract the sugar

beets for Cargill.

Q. So, the grower, do they have any contact with Cargill at all?

A. They may or may not have contact with Cargill.

Q. What do you mean, may or may not?

A. That the contract that we have with Cargill allows us to have two different ways of obtaining sugar beets, which --

. . . .

Q. You said may or may not.

A. I did. Obviously you'd like to learn a lot more about the contract that we have between ourselves and Cargill for the beets. And I'll try to tell you what it is that I remember, if I remember it. But as I recall that the contract would call for us to either acquire on Cargill's behalf, in other words, act as an agent, or to sell them some portion of the beets that we have in the pile. Whichever they select. That, I believe, is what the arrangement would be.

Q. Yeah, it would be, do you have the contract with you? Did you bring it with you?

A. I did not, no.

Q. Would you be agreeable to supply it to the Administrative Law Judge?

A. I might be agreeable to show it to the Administrative Law Judge; we'll discuss that between Cargill and ourselves.

. . . .

Q. I may have to switch to the tolling contract, would you consider making the tolling contract available also?

A. Those contracts are one and the same.

Q. That's right, they're all - and do any growers sign those contracts as growers?

A. I don't believe that that's called for.

Q. Does the contract specify as to how Cargill's beets are to be segregated from Southern Minnesota beets?

A. I believe the contract specifically says they can be co-mingled.

Q. What does that mean, explain that, co-mingle.

A. That means if we bought sugar beets from someone else then we could co-mingle them with our own beets in a storage place.

Q. So, once that Cargill beet comes into the plant you can't - it doesn't have a C on it as it goes through?

A. That's correct.

Q. You have no idea what is going through that plant is Cargill and what's going is Southern Minnesota's?

A. Unless we elect to run those beets separately that would be correct.

Q. Is your assumption you will run the beets separately?

A. We haven't made that determination.

Q. Would this contract provide for Cargill's beets to be processed at a particular time of the year with the whole plant or the whole factory is just dedicated to Cargill beets?

A. It does not.

. . . .

Q. . . . Cargill says they own these things from the time these beets come out of the ground, or something to that effect. Yet what I hear you say, and correct me if I'm wrong, these are going to be beets harvested by Southern Minnesota growers, delivered to a Southern Minnesota factory, co-mingled with Southern Minnesota beets, processed without any separation, how could anybody determine, should they need to, where are the Cargill beets? How is USDA going to oversee this and determine if Cargill is meeting its allocation, exceed it and so on?

A. The contract that we have with Cargill allows us a quite a lot of flexibility in it, how we are going to process those beets. But essentially what happens is they share the risk of those beets disappearing in storage because those beets will most probably be co-mingled. Doesn't say that, I don't believe that the contract - but they could be co-mingled. For instance, half of the beets go bad, half of them belong to Cargill, half of the beets - they would lose half of the beets.

Is that what you're asking?

Q. That's - you've made your point, the risk of loss, for example, how is that handled?

A. That's it.

Q. How is that again, how the risk of loss?

A. If we choose to co-mingle the beets and if in co-mingling those beets in the pile disappears, and if those beets

were half purchased by us and half purchased by Cargill, then we each will have lost half the beets. That's - -

Q. But you can't determine that until the end of the year, I guess?

A. Of course not, or can we now.

. . . .

Q. . . . .

. . . When the negotiations were conducted between Cargill and people in Minnesota over this contract and this tolling arrangement, were growers at the table or did you do the negotiations?

A. I did the negotiations, but certainly other growers were involved in the discussions.

Q. Under this contract do you envision the Cargill paying the growers directly for their beets?

A. Under this provision Cargill will pay the growers for the sugar beets, whether it's [sic] directly or indirectly through us, I don't know what's been determined.

Q. So you don't know if they will get a check in the mail from Cargill? They might get a check from Southern Minnesota?

A. They will.

Q. Which is more likely?

A. I don't know that I know the answer to that.

Tr. 181-86, 202-03.

Therefore, I reject Cargill's contention that the Chief ALJ's finding that Cargill would be processing only beet thick juice received from Southern Minnesota Beet Sugar Cooperative, is error.

Third, Cargill contends the Chief ALJ's reliance on the Executive Vice President's and the Joint Intervenors' assertions that Cargill's agreement with Southern Minnesota Beet Sugar Cooperative would threaten the continuity of the beet sugar allocation structure, is error (Appeal Pet. at second unnumbered page). Cargill does not elaborate on this contention in its Appeal Brief.

I do not find the Chief ALJ erred by relying on the Executive Vice President's and the Joint Intervenors' arguments regarding the effect of granting Cargill's Amended Petition for Review on the beet sugar allocation structure. I agree with the Chief ALJ's discussion of the effect of granting Cargill's Amended Petition for Review.

Fourth, Cargill contends the Chief ALJ erroneously determined, without setting a standard, that Cargill did not spend enough money to become a new entrant. Cargill asserts there is no provision in the Agricultural Adjustment Act of 1938 or the Sugar Program regulations requiring an individual or entity to spend money in order to qualify as a new entrant. (Appeal Pet. at second unnumbered page; Appeal Brief at 8-9.)

I agree with Cargill's contention that the Agricultural Adjustment Act of 1938 does not require an individual or entity to spend money in order to be assigned a beet sugar allocation as a new entrant. The Chief ALJ states the new entrant provisions of the Agricultural Adjustment Act of 1938 "are designed so that an entity that has expanded [sic] the substantial funds necessary to purchase or build a sugar beet processing facility receives a fair allocation of the [overall allotment quantity]" and finds "Cargill's expenditures to attempt to become a sugar beet processing facility were relatively minimal." (Initial Decision at 13, 15 (footnote omitted).) However, the Chief ALJ did not conclude that the expenditure of money was a necessary prerequisite to the assignment of a beet sugar allocation as a new entrant, and the Chief ALJ did not deny Cargill's Amended Petition for Review based upon the sum of money Cargill spent in an attempt to become a sugar beet processor. I find the Chief ALJ's discussion of Cargill's expenditures supported by the

record. Therefore, I retain much of the Chief ALJ's discussion regarding Cargill's expenditures, but I do not conclude that Cargill is required by the Agricultural Adjustment Act of 1938 to expend a specific sum of money in order to be assigned a beet sugar allocation as a new entrant.

Fifth, Cargill contends the beet sugar allotment is not a "closed shop." Cargill contends the Agricultural Adjustment Act of 1938 explicitly provides that the Secretary of Agriculture shall assign an individual or entity that qualifies as a new entrant a beet sugar allocation. (Appeal Brief at 9-10.)

I agree with Cargill that the Agricultural Adjustment Act of 1938 explicitly provides that the Secretary of Agriculture shall assign an individual or entity that qualifies as a new entrant a beet sugar allocation; however, I also agree with the Chief ALJ's conclusion that Cargill does not qualify as a new entrant.

Sixth, Cargill contends its requested allocation of 80,000 short tons of beet sugar is reasonable and the resulting pro rata reductions of the allocations of the beet sugar allotment for all other sugar beet processors cannot be used to justify denial of Cargill's application to be designated as a new entrant (Appeal Brief at 10-13).

I conclude Cargill does not qualify as a new entrant. Therefore, the issue of the reasonableness of Cargill's requested allocation of 80,000 short tons of beet sugar and the resulting pro rata reductions of the allocations of the beet sugar allotment for all other sugar beet processors, is moot.

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

ORDER

1. The Executive Vice President's July 17, 2003, denial of Cargill's request for a beet sugar allocation as a new entrant under the Agricultural Adjustment Act of 1938 is sustained.

2. Cargill's Amended Petition for Review is denied.

3. This Order shall become effective on the day after service on Cargill.

RIGHT TO JUDICIAL REVIEW

Cargill has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Cargill must seek judicial review within 60 days after entry of the Order in this Decision and Order.[12] The date of entry of the Order in this Decision and Order is December 8, 2005.

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[12]See 28 U.S.C. § 2344.

MISCELLANEOUS ORDERS

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.
2005 AMA Docket No. F&V 989-1.
Ruling Striking Petitioner's Second Amended Petition.
Filed July 13, 2005.

AMAA – Agricultural Marketing Agreement Act – Raisin order – Petition struck – Judicial and agency resources – Confusing record.

The Judicial Officer issued a ruling stating proceedings for judicial review of *In re Lion Raisins, Inc.*, 64 Agric. Dec. 27 (2005), dismissing Petitioner's original petition, were not concluded and Petitioner's filing a second amended petition resulted in the Secretary of Agriculture and the United States District Court for the Eastern District of California simultaneously reviewing the proceeding. The Judicial Officer struck Petitioner's second amended petition in order to avoid wasting judicial and agency resources and in order to avoid a confusing and muddled record.

Colleen A. Carroll, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Initial Decision issued by Peter M. Davenport, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Petitioner's Petition and Petitioner's Amended Petition

Lion Raisins, Inc. [hereinafter Petitioner], instituted this proceeding by filing a petition[1] on November 10, 2004. Petitioner instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended; the federal marketing order regulating the handling of raisins produced from grapes grown in California (7 C.F.R. pt. 989); and

[1]Petitioner entitles its petition "Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Eliminate as Mandatory the Use of USDA Processed Products Inspection Branch Services for All Incoming and Outgoing Raisins, as Currently Required by 7 C.F.R. §§ 989.58 & 989.59, to Exempt Petitioners [sic] from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins and/or Any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Petition].

the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71). On December 29, 2004, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a motion to dismiss Petitioner's Petition.

On February 9, 2005, Petitioner filed an amended petition.[2] On February 14, 2005, Respondent filed a motion to strike Petitioner's Amended Petition. On March 3, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order: (1) granting Respondent's motion to strike Petitioner's Amended Petition; (2) granting Respondent's motion to dismiss Petitioner's Petition; and (3) stating Petitioner may file an amended petition within 20 days after service of the Order (ALJ's March 3, 2005, Order at 3).

On March 11, 2005, Respondent appealed the ALJ's March 3, 2005, Order to the Judicial Officer. On March 30, 2005, Petitioner filed a response opposing Respondent's appeal petition, and on April 25, 2005, I issued a Decision and Order dismissing Petitioner's November 10, 2004, Petition and striking, as premature, Petitioner's February 9, 2005, Amended Petition.[3] On May 13, 2005, Petitioner filed a complaint in the United States District Court for the Eastern District of California seeking judicial review of *In re Lion Raisins, Inc.*, 64 Agric. Dec. 27 (2005).[4]

Petitioner's Second Amended Petition

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[2]Petitioner entitles its amended petition "Amended Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations; To Exempt Petitioner from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins, To Preclude the Raisin Administrative Committee and/or USDA from Receiving the Otherwise Required Raisin Administrative Committee Forms; Petition to Allow Buyers and Producers to Call for Inspection Services, and to Delete Certain Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Amended Petition].

[3]*In re Lion Raisins, Inc.*, 64 Agric. Dec. 27, 46 (2005).

[4]*Lion Raisins, Inc. v. United States Dep't of Agric.*, No. CIV-F-05-00640-AWI-SMS (E.D. Cal. May 13, 2005).

On March 24, 2005, Petitioner filed a second amended petition.[5] On March 30, 2005, Respondent filed a motion to strike Petitioner's Second Amended Petition, and on April 22, 2005, Petitioner filed a response opposing Respondent's motion to strike Petitioner's Second Amended Petition. On May 3, 2005, the ALJ issued an initial decision and order denying Respondent's motion to strike Petitioner's Second Amended Petition and dismissing Petitioner's Second Amended Petition for failure to state a legally cognizable claim.

On June 3, 2005, Petitioner appealed the ALJ's May 3, 2005, initial decision and order to the Judicial Officer. On June 27, 2005, Respondent filed a response to Petitioner's appeal petition in which Respondent requests that I strike Petitioner's Second Amended Petition. On July 1, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

APPLICABLE STATUTORY PROVISION

7 U.S.C.:

TITLE—7 AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

[5]Petitioner entitles its second amended petition "Amended Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations; To Exempt Petitioner from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins, To Preclude the Raisin Administrative Committee and/or USDA from Receiving the Otherwise Required Raisin Administrative Committee Forms; Petition to Allow Buyers and Producers to Call for Inspection Services, and to Delete Certain Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Second Amended Petition].

§ 608c. Orders regulating handling of commodity

. . . .

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

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

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant

to this subsection (15).

7 U.S.C. § 608c(15).

CONCLUSIONS BY THE JUDICIAL OFFICER

The April 25, 2005, Decision and Order, dismissing Petitioner's November 10, 2004, Petition, is the final agency decision in this proceeding. Proceedings for judicial review of the April 25, 2005, Decision and Order are not concluded. Petitioner's filing Petitioner's Second Amended Petition has resulted in the Secretary of Agriculture and the United States District Court for the Eastern District of California simultaneously reviewing this proceeding.

Therefore, I do not adopt the ALJ's May 3, 2005, initial decision and order, dismissing Petitioner's March 24, 2005, Second Amended Petition, as the final Decision and Order in this proceeding. Instead, I conclude, in order to avoid wasting judicial and agency resources and in order to avoid a confusing and muddled record, Petitioner's Second Amended Petition should be struck.

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

ORDER

Petitioner's Second Amended Petition, filed March 24, 2005, is stricken.

This Order shall become effective on the day after service on Petitioner.

In re: JOZSET MOKOS.
A.Q. Docket No. 03-0003.
Order Denying Late Appeal.
Filed September 6, 2005.

AQ --Animal quarantine – Late appeal.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer concluded he had no jurisdiction to hear Respondent's appeal filed 6 days after Chief Administrative Law Judge Marc R. Hillson's decision became final.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on November 25, 2002. Complainant instituted the proceeding under the Animal Health Protection Act (7 U.S.C. §§ 8301-8320); regulations issued under the Animal Health Protection Act (9 C.F.R. pt. 94) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151 (2002)) [hereinafter the Rules of Practice].

Complainant alleges that on or about September 3, 2000, Jozset Mokos [hereinafter Respondent], imported approximately 5 kilograms of pork salami from Hungary into the United States at Miami, Florida, in violation of sections 94.9 and 94.13 of the Regulations (9 C.F.R. §§ 94.9, .13) (Compl. ¶ II).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on December 5, 2002.[1] On December 18, 2002, Respondent filed an answer to the Complaint.

On April 28, 2005, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a hearing in Washington, DC. James A. Booth, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondent declined the opportunity to participate in the hearing (Transcript at 4-11). Pursuant to section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1) (2002)), the Chief ALJ issued an oral decision at the close of the hearing in which the Chief ALJ: (1) concluded Respondent

[1]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0522.

violated sections 94.9 and 94.13 of the Regulations (9 C.F.R. §§ 94.9, .13), as alleged in the Complaint; and (2) assessed Respondent a $2,000 civil penalty (Transcript at 83-87).

On June 21, 2005, the Hearing Clerk served Respondent with a copy of the portion of the transcript containing the Chief ALJ's April 28, 2005, oral decision and a service letter.[2] On August 1, 2005, Respondent appealed to the Judicial Officer. On August 29, 2005, Complainant filed a response to Respondent's appeal petition. On September 1, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

The record establishes that, on June 21, 2005, the Hearing Clerk served Respondent with a copy of the portion of the transcript containing the Chief ALJ's April 28, 2005, oral decision.[3] Section 1.145(a) of the Rules of Practice applicable at the time Complainant instituted this proceeding, provided that an administrative law judge's decision must be appealed to the Judicial Officer within 30 days after service, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any

[2]Memorandum to the File by Regina Paris, Hearing Clerk's Office.

[3]See note 2.

alleged deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. 7 C.F.R. § 1.145(a) (2002).[4]

Therefore, Respondent was required to file his appeal petition with the Hearing Clerk no later than July 21, 2005. Respondent did not file his appeal petition with the Hearing Clerk until August 1, 2005.

The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.[5] The Chief ALJ's April 28,

[4]In *PMD v. United States Dep't of Agric.*, 234 F.3d 48 (2d Cir. 2000), the Court held a party's time for appeal of an oral decision in accordance with section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) runs from the date the Hearing Clerk serves the party with the administrative law judge's oral decision, not from the date the administrative law judge issues the oral decision. In response to *PMD*, the Secretary of Agriculture amended section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) to provide that a party must file an appeal of an administrative law judge's oral decision with the Hearing Clerk within 30 days after the issuance of the administrative law judge's oral decision (68 Fed. Reg. 6339-41 (Feb. 7, 2003)). This amendment to the Rules of Practice was not effective until well after the institution of this proceeding, and I do not find the February 7, 2003, amendment applies to this proceeding. Moreover, even if the February 7, 2003, amendment to the Rules of Practice were applicable to this proceeding, the amendment would not affect the disposition of this proceeding.

[5]*In re David Gilbert*, 63 Agric. Dec. 807 (2004) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Vega Nunez*, 63 Agric. Dec. 766 (2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final); *In re Ross Blackstock*, 63 Agric. Dec. 818 (2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); *In re David McCauley*, 63 Agric. Dec. 639 (2004) (dismissing the respondent's appeal petition filed 1 month 26 days after the administrative law judge's decision became final); *In re Belinda Atherton*, 62 Agric. Dec. 683 (2003) (dismissing the respondent's appeal petition filed the day the administrative law judge's decision became final); *In re Samuel K. Angel*, 61 Agric. Dec. 275 (2002) (dismissing the respondent's appeal petition filed 3 days after the administrative law judge's decision became final); *In re Paul Eugenio*, 60 Agric. Dec. 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the administrative law judge's decision became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the administrative law

(continued...)

[5](...continued)
judge's decision became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the administrative law judge's decision became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the administrative law judge's decision became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the administrative law judge's decision became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the administrative law judge's decision became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the administrative law judge's decision became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the administrative law judge's decision became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the administrative law judge's decision became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the administrative law judge's decision became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the administrative law judge's decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the administrative law judge's decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the administrative law judge's decision had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the administrative law judge's decision becomes final); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal (continued...)

2005, decision became final on July 26, 2005. Respondent filed an appeal petition with the Hearing Clerk on August 1, 2005, 6 days after the Chief ALJ's April 28, 2005, decision became final. Therefore, I have no jurisdiction to hear Respondent's appeal.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides, as follows:

> **Rule 4. Appeal as of Right—When Taken**
>
> **(a) Appeal in a Civil Case.**
>
> (1) **Time for Filing a Notice of Appeal.**
>
> (A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

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[5](...continued)
petition filed 5 days after the administrative law judge's decision became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the administrative law judge's decision became final, but not filed until 4 days after the administrative law judge's decision became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the administrative law judge's decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the administrative law judge's decision).

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.[6]

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an administrative law judge's decision has become final. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of

[6] *Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (stating under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (stating the filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (stating Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989) (stating the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding pro se does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (stating the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.[7] The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after the Chief ALJ's oral decision became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[8]

Accordingly, Respondent's appeal petition must be denied, since it is too late for the matter to be further considered. Moreover, the matter

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[7]Fed. R. App. P. 4(a)(5).

[8]*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

should not be considered by a reviewing court since, under section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4) (2002)), "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal."

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

ORDER

Respondent's appeal petition, filed August 1, 2005, is denied. Chief Administrative Law Judge Marc R. Hillson's oral decision issued April 28, 2005, is the final decision in this proceeding.

In re: DENNIS HILL, AN INDIVIDUAL, d/b/a WHITE TIGER FOUNDATION; AND WILLOW HILL CENTER FOR RARE & ENDANGERED SPECIES, LLC, AN INDIANA DOMESTIC LIMITED LIABILITY COMPANY, d/b/a HILL'S EXOTICS.
AWA Docket No. 04-0012.
Stay Order.
Filed January 27, 2005.[*]

Bernadette R. Juarez, for Complainant.
M. Michael Stephenson, Shelbyville, IN, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On October 8, 2004, I issued a Decision and Order: (1) concluding Dennis Hill, d/b/a White Tiger Foundation, and Willow Hill Center for Rare & Endangered Species, LLC, d/b/a Hill's Exotics [hereinafter Respondents], willfully violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; (2) ordering Respondents to cease and desist from violating the Animal

[*] This case was inadvertently omitted from 64 Agric. Dec. Jan. - Jun. (2005). We regret the omission. – Editor.

Welfare Act and the Regulations and Standards; (3) assessing Respondents a $20,000 civil penalty; and (4) revoking Respondent Dennis Hill's Animal Welfare Act license.[1] On October 27, 2004, Respondents filed a petition for reconsideration, which I denied.[2]

On January 24, 2005, Respondents filed a Motion for Stay Pending Review requesting a stay of the Orders in *In re Dennis Hill*, 64 Agric. Dec. 91 (2004), and *In re Dennis Hill*, 63 Agric. Dec. 788 (2004) (Order Denying Pet. for Recons.), pending the outcome of proceedings for judicial review. Respondents state they have filed a timely petition for review of *In re Dennis Hill*, 64 Agric. Dec. 91 (2004), and *In re Dennis Hill*, 63 Agric. Dec. 788 (2004) (Order Denying Pet. for Recons.), with the United States Court of Appeals for the Seventh Circuit.

On January 26, 2005, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Response to Respondents' Motion for Stay Pending Review in which Complainant disputes some of the assertions made by Respondents in Respondents' Motion for Stay Pending Review, but does not oppose my granting Respondents' Motion for Stay Pending Review. On January 26, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondents' Motion for Stay Pending Review.

In accordance with 5 U.S.C. § 705, Respondents' Motion for Stay Pending Review is granted.

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

ORDER

The Orders in *In re Dennis Hill*, 64 Agric. Dec. 91 (2004), and *In re Dennis Hill*, 63 Agric. Dec. 788 (2004) (Order Denying Pet. for Recons.), are stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until the Judicial Officer lifts it or a court of competent jurisdiction vacates it.

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[1]*In re Dennis Hill*, 64 Agric. Dec. 91 (2004).

[2]*In re Dennis Hill*, 63 Agric. Dec. 788 (2004) (Order Denying Pet. for Recons.).

In re: RICKY M. WATSON, AN INDIVIDUAL; CHERI WATSON, AN INDIVIDUAL; TIGER'S EYES, INC., A TEXAS DOMESTIC NONPROFIT CORPORATION, d/b/a NOAH'S LAND WILDLIFE PARK; AND RICHARD J. BURNS, AN INDIVIDUAL.
AWA Docket No. 04-0017.
Ruling Granting Complainant's Motion to Continue Time for Filing Amended Complaint and for Exchanging Documents.
Filed January 28, 2005.[*]

AWA – Animal Welfare Act – Deadline for amended complaint – Deadline for exchange of documents.

Bernadette R. Juarez, for Complainant.
Respondents Ricky M. Watson and Cheri Watson, Pro se.
Paul J. Coselli, Houston, Texas, for Respondent Richard J. Burns.
Ruling issued by William G. Jenson, Judicial Officer.

On September 3, 2004, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed a "Motion for Adoption of Proposed Decision and Order" and a proposed "Decision and Order as to Ricky M. Watson and Cheri Watson By Reason of Admission of Facts." On October 12, 2004, Respondents Ricky M. Watson and Cheri Watson filed objections to Complainant's Motion for Adoption of Proposed Decision and Order.

On November 22, 2004, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] filed a "Summary of Teleconference; Hearing Notice and Exchange Deadlines": (1) denying Complainant's Motion for Adoption of Proposed Decision and Order; (2) scheduling a hearing to commence in Houston, Texas, on June 28, 2005; (3) ordering that, by February 1, 2005, Complainant file an amended complaint with the Hearing Clerk and deliver to Respondents Ricky M. Watson, Cheri Watson, and Richard J. Burns copies of proposed exhibits, a list of proposed exhibits, and a list of anticipated witnesses; and (4) ordering that, by April 1, 2005, Respondents Ricky M. Watson, Cheri Watson, and Richard J. Burns deliver to Complainant copies of proposed

[*] This case was inadvertently omitted from 64 Agric. Dec. Jan. - Jun. (2005). We regret the omission. – Editor.

exhibits, a list of proposed exhibits, and a list of anticipated witnesses.

On November 26, 2004, Complainant appealed the ALJ's denial of Complainant's Motion for Adoption of Proposed Decision and Order to the Judicial Officer. On January 18, 2005, Complainant moved to continue, without date, the February 1, 2005, deadline for filing an amended complaint and the February 1, 2005, and April 1, 2005, deadlines for the exchange of proposed exhibits, lists of proposed exhibits, and lists of anticipated witnesses.[1]

Due to the short period between the time Complainant filed Complainant's Motion for Continuance and the February 1, 2005, deadlines, I requested that Respondents Ricky M. Watson, Cheri Watson, and Richard J. Burns file any responses to Complainant's Motion for Continuance no later than January 26, 2005.

Respondent Cheri Watson did not file a response to Complainant's Motion for Continuance; on January 25, 2005, Respondent Ricky M. Watson filed a response urging that I grant Complainant's Motion for Continuance; and on January 26, 2005, Respondent Richard J. Burns filed a response urging that I deny Complainant's Motion for Continuance. On January 27, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Complainant's Motion for Continuance.

I agree with Complainant's assertion that this matter will not be ready for hearing until the merits of Complainant's appeal of the ALJ's denial of Complainant's Motion for Adoption of Proposed Decision and Order have been resolved.[2] Moreover, any amended complaint Complainant files and the identity of the persons to whom Complainant must deliver copies of proposed exhibits, lists of proposed exhibits, and lists of anticipated witnesses may be affected by the disposition of Complainant's appeal. Therefore, based on the current posture of this proceeding, I find good reason to continue, without date, the February 1, 2005, deadline for Complainant to file an amended complaint and the

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[1]"Complainant's Motion to Continue Time for Complainant to File Amended Complaint and for Parties to Comply With Exchange Deadlines" [hereinafter Complainant's Motion for Continuance].

[2]See Memorandum of Points and Authorities at 2 attached to Complainant's Motion for Continuance.

February 1, 2005, and April 1, 2005, deadlines for the parties to exchange copies of proposed exhibits, lists of proposed exhibits, and lists of anticipated witnesses.

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

RULING

The February 1, 2005, deadline set by the ALJ for Complainant to file an amended complaint is continued, without date. The February 1, 2005, and April 1, 2005, deadlines set by the ALJ for the parties to exchange copies of proposed exhibits, lists of proposed exhibits, and lists of anticipated witnesses are continued, without date.

In re: DAVID HAMILTON, AND INDIVIDUAL, d/b/a MID-SOUTH DISTRIBUTORS OF ARKANSAS, LLC, AN ARKANSAS DOMESTIC LIMITED LIABILITY COMPANY; AND WILLIAM HAMILTON, AN INDIVIDUAL d/b/a MID-SOUTH DISTRIBUTORS.
AWA Docket No. 04-0016.
AWA Docket No. 05-0013.
Ruling.
Filed June 16, 2005.[*]

MEMORANDUM OPINION AND ORDER

This matter is before the Administrative Law Judge upon a number of pending Motions filed by the parties in both actions.

PROCEDURAL HISTORY

AWA Docket No. 04-0016 was initiated by the filing of a complaint by the Administrator of the Animal and Plant Health Inspection Service

[*] This case was inadvertently omitted from 64 Agric. Dec. Jan. - Jun. (2005). We regret the omission. – Editor.

on May 13, 2004 alleging that the Respondent David Hamilton had violated the Animal Welfare Act and the regulations and standards issued implementing the Act. On June 8, 2004, the Respondent David Hamilton filed a Motion to Dismiss, or in the alternative, Answer to the Complaint.

On November 5, 2004, the Complainant filed a Motion to Set Date for Oral Hearing and following a telephonic Pre-Hearing Conference on February 3, 2005, the matter was set for hearing on May 17, 2005 in Little Rock, Arkansas.[1]

On February 15, 2005, Complainant filed a Motion to Amend Complaint, Extend Exchange Deadlines, Lengthen Hearing, and Request to Shorten Respondent's Response Time and Expedited Decision.[2] The same day, after consulting with the undersigned, Judge Jill S. Clifton entered an Order granting the Motion to Amend the Complaint, Extending the Complainant's Exchange Deadline to March 9, 2005, vacating the Respondent's Exchange Deadline to a date to be set by further order and confirming the hearing date of May 17, 2005. On March 9, 2005, consistent with the Order of February 15, 2005, the Complainant filed its List of Exhibits and Witnesses.

On March 15, 2005, the Respondents David Hamilton and Mid-South Distributors, LLC filed a Motion to Extend Time in which to Respond to the Amended Complaint, indicating that counsel for the Complainant had been contacted and had no opposition to the Motion.[3] On March 16,

[1]A Notice of Hearing and Exchange Dates was entered on February 3, 2005.

[2]In the Motion, Complainant's counsel, apparently without checking the record, incorrectly stated that no order summarizing the teleconference had been entered inferring a violation of Rule 1.140(d). The Amended Complaint added William Hamilton as a party respondent and alleged a number of additional violations.

[3]In their Motion for the Extension of Time, respondents' counsel indicated that they had been in the process of drafting an answer to the Amended Complaint and had been advised that Complainant's counsel planned to file a Second Amended Complaint. The Motion continued that Respondents would not consent at that time to the filing of a Second Amended Complaint. In their prayer for relief, they requested thirty additional days in which to respond to the First Amended Complaint and if "USDA" in fact moved to amend its Complaint a second time, Respondents would respond to that Motion within the time set by the Rules and if so required, file a response to the Second

(continued...)

2005, I entered an Order granting the Respondents until April 14, 2005 in which to file their Answer to the Amended Complaint.

On March 29, 2005, Complainant filed its List of Witnesses and Supplemental Exhibits and a Motion to Amend Complaint and Request to Shorten Respondents' Response Time and To Expedite Decision.[4] On April 4, 2005, the Motion to Shorten the Response Time was denied.

On April 12, 2005, the Complainant moved to withdraw its Motion to Amend the Complaint and filed the complaint in AWA Docket No. 05-0013. A week later, on April 19, 2005, the Complainant filed its Motion for Adoption of Proposed Decision and Order, citing the failure of the Respondents to file an Answer to the Amended Complaint by April 14, 2005, the date specified in the March 16, 2005 Order. On April 27, 2005, unaware that a new action had been filed involving the same parties, I entered an Order granting the Complainant's Motion to Withdraw its Second Amended Complaint and canceling the hearing scheduled to commence on May 17, 2005.

The Respondents, apparently prior to receiving the April 27, 2005 Order, filed their Motion to Strike Complainant's Motion for Adoption of Proposed Decision and Order and Opposition to Complainant's Request to Withdraw Motion to Amend Complaint on April 29, 2005. Their motion claimed surprise and advanced the position that the tendered but not filed (second) amended complaint had "mooted" the April 14, 2005 deadline. In their Motion, the Respondents bitterly characterized the Motion for Adoption of Proposed Decision as "bewildering" and "gamesmanship" and without knowledge of the April 27, 2005 order noted that the motion to amend the complaint a second time had been filed and was still pending.

On May 6, 2005, the Complainant responded to the Motion to Strike, pointing out that the Federal Rules of Civil Procedure are not applicable to proceedings brought before the Secretary of Agriculture and indicating that the filing of a Motion to Amend Complaint in no way mooted or tolled the deadline to file an answer to the Amended

[3](...continued)
Amended Complaint.

[4]On March 29, 2005, the undersigned was out of the office hearing a case in Tennessee.

Complaint which had been set as April 14, 2005.

On May 6, 2005, the Respondents filed their Motion to Consolidate and Dismiss, or in the Alternative, Answer to the Complaint filed in AWA Docket No. 05-0013. On May 9, 2005, the Respondents filed a Motion for Reconsideration of the Order Granting Complainant's Request to Withdraw the Motion to Amend Complaint, and at the same time also asked that the Order of April 27, 2005 be reconsidered. On May 11, 2005, Respondents filed a Notice of Filing and Request for Hearing on the Motion for Reconsideration.

On June 1, 2005, the Respondents filed "Respondent's Motion to Dismiss and in the Alternative, Answer to the Amended Complaint" in AWA Docket No. 04-0016. On June 10, 2005, the Complainant moved to strike Respondents' Answer to the Amended Complaint and on June 14, 2005, filed a Response to the Respondent's Motion to Dismiss Amended Complaint. The Respondents responded to the Motion to Strike the Respondents' Answer by filing Respondents' Opposition to Complainant's Motion to Strike Respondents' Answer to the Amended Complaint on June 15, 2005.

On June 16, 2005, a hearing was held on all pending motions in both cases. Bernadette R. Juarez, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C. appeared for the Complainant and David M. Tafuri, Esquire, Patton Boggs, LLP, Washington, D.C. appeared for the Respondents.

DISCUSSION

It is well established that the Rules of Practice, 7 C.F.R. § 1.130 *et seq.*, rather than the Federal Rules of Civil Procedure apply to adjudicatory proceedings under the regulations promulgated under the Animal Welfare Act.[5] The Rules of Practice differ from the Federal Rules of Civil Procedure in that an answer must be filed within 20 days after service of the complaint. Rule 1.136. That rule specifies the content

[5] *In re Anna Mae Noell,* 58 Agric. Dec. 130, 147 (1999) *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Department of Agriculture,* No. 00-10608-A (11th Circ. 2000) and the list of cases cited in Footnote 7 of the Complainant's Response to Respondents' Motion to Strike Complainant's Motion for Adoption of Proposed Decision and Order filed on May 6, 2005.

of an answer, requiring that an answer shall "clearly admit, deny, or explain each of the allegations" and set forth any defenses. *Id.* It further provides that "failure to file an answer within the time provided in paragraph (a) of this section shall be deemed, for the purposes of the proceeding, an admission of the allegations in the Complaint...." *Id.*

Rule 1.139 sets forth the procedure upon failure of a party to file an answer or admission of facts:

> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons..... 7 C.F.R. §1.139

Extensions may be permitted, as Rule 1.147 provides that the "time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge or the Judicial Officer...if...there is good reason for the extension." 7 C.F.R. §1.147(f).

Given the unusual procedural history and circumstances of this case, with amendments being made after a hearing date being set, the tendering of a second amended complaint and then the withdrawal of that complaint accompanied by the initiation of a new action, I find the respondents' counsels' failure to answer, while in error, to be understandable. The pleadings in the file make it abundantly clear that the Respondents intended to vigorously defend this case and did not intentionally "default,"[6] particularly in view of the significant civil

[6]In their Motion filed on March 15, 2005, the Respondents sought an extension of time in which to file their answer in part to avoid the time and expense of responding to a complaint that might be "mooted" and commented that if USDA moved to amend its complaint a second time, that they would respond to that motion within the time allowed by the Rules, and "if so required" file its Response to the Second Amended (continued...)

penalties sought as well as the potential loss of the Respondents' Animal Welfare Act licenses. Accordingly, I can easily understand and accept their statement that Complainant's Motion for Adoption of Proposed Decision did indeed take them by surprise.

While noting that the Rules of Practice would authorize, but not require the entry of the Proposed Decision and further noting that counsel for the Complainant is under no obligation to instruct opposing counsel in the requirements of the rules, I find it lamentable and manifestly unjust, given the procedural history of this case and the significant penalties sought, including the loss of the Respondents' Animal Welfare Act licenses for the Complainant to seek to forego a hearing on the merits by capitalizing on a procedural error of the nature as was made in this case, particularly as the Complainant will not be prejudiced in any way.

The Administrative Law Judges with this agency have previously sought to afford respondents a hearing on the merits where they felt there was good cause, noting the traditional preference for such disposition.[7] To do otherwise appears to lose sight of the basic tenet that

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[6](...continued)
Complaint. To the extent that my rulings precluded their response, that fault is mine.

[7]Not all such efforts have been approved by the Judicial Officer. *In re Chad Way, et al*,.HPA Docket No. 03-0005 (JO Decision and Order April 11, 2005). *See also: In re Diana R. McCourt, et al.,* AWA Docket No. 05-0003 (JO Decision and Order March 29, 2005; since vacated at the request of the Office of General Counsel). In that case, complainant sought a default where a counsel's father's death contributed to the filing of a late answer. Notwithstanding the circumstances of the case and the brief interval before the answer was filed, Chief Judge Hillson's acceptance of the late answer was considered error by the Judicial Officer. Similarly, Judge Clifton's denial of a motion for default was overturned by the Judicial Officer in *In re Lion Raisins, Inc., et al.,* 63 Agric. Dec. 211 (2004) In that case, rather than filing an answer, respondent's counsel filed a motion to dismiss. When the complainant's motion for default was filed for lack of a timely answer, respondent filed timely objection and which was found good cause by Judge Clifton who denied the motion for default. The Judicial Officer found the denial of the motion for default error and entered a decision and order adverse to the respondent. On appeal, the District Court for the Eastern District of California cited *Oberstar* with approval and remanded the case for further proceedings. *Lion Raisins, Inc., et al. v. United States Department of Agriculture*, CV-F-04-05844 REC DLB (May 12, 2005). All of these cases illustrate an unseemly, if not egregious rush to take
(continued...)

fairness concerns should be paramount where quasi-criminal sanctions may be imposed. In *Oberstar v. FDIC,* 987 F,2d 494, 504 (8th Cir. 1993), Oberstar sought to set aside a default that had been entered against him pursuant to the FDIC rules despite the fact that he had filed a late answer. In reversing the default, the Court wrote:

The judicial preference for adjudication on the merits goes to the fundamental fairness of the adjudicatory proceedings. Fairness concerns are especially important when a government agency proposes to assess a quasi-criminal monetary penalty on a private individual. By entering the default judgment against Oberstar because of his minor deviation from the FDIC's procedural rule, with no showing of prejudice to the agency, the Board unfairly deprived Oberstar of his right to a statutorily mandated hearing. We hold that the Board's application of the FDIC default regulation in this case was an abuse of discretion. *Id.*[8]

The Court in *Oberstar* found good cause for not filing the answer, in part, because, as in this case, FDIC had commenced a second action against Oberstar while the outcome of the first was still pending. Id.[9]

My perception of fairness likely has been strongly influenced by the experience of representing the United States for more than a decade as an Assistant United States Attorney in both civil and criminal cases and being mentored with the philosophy and purpose being expressed as not

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[7](...continued)
procedural advantage of a litigant.

[8]Cited with approval in *Lion Raisins, Inc., et al v. United States Department of Agriculture,* No. CV-F-04-5844 REC DLB, (E.D. Ca. 2005)

[9]The Court in *Oberstar* characterized the filing of a second action while the first was still pending "unfair harassment". The Court in *Lion Raisins* commented that it appeared contrary to all notions of judicial and administrative economy to bring a second action rather than amending its complaint to add additional allegations. In the instant case, the complainant first sought to amend its complaint a second time and then moved to withdraw the amendment only to bring another action without indication of the intended action in its Motion to Withdraw Second Amended Complaint.

merely to win cases, but to see that justice is done.[10] Government attorneys at all levels are charged with a very peculiar and awesome fiduciary responsibility when they are called upon to enforce the law or regulations, yet still being mindful of the fact that they are a servant of the people. While they indeed have an obligation to advance their cases with earnestness and vigor, every action taken must be in the context of seeing that justice is done. Measured against that yardstick, I cannot but express doubt that decisions to seek victories by procedural maneuvers thereby avoiding a hearing on the merits such as were done in this case and others that have been before me and my colleagues are inconsistent with the principles and objectives of this Department, much less being inconsistent with what I have been advised by senior attorneys of the Department is agency policy.

Accordingly, the following Order is entered:

1. The Complainant's Motion for Adoption of Proposed Decision and Order by reason of default is **DENIED.**

2. Good cause having been found for the filing of the untimely Answer of the Respondents, the same is Ordered **FILED** in AWA Docket No. 04-0016, as if timely.

3. The Respondents' Motion to Consolidate the cases of AWA Docket No. 04-0016 and AWA Docket No. 05-0013 is **GRANTED** and the cases are **CONSOLIDATED** for the purposes of hearing. All subsequent pleadings filed by the parties will bear both case numbers and will be filed by the Hearing Clerk in the case jacket of AWA Docket No. 04-0016.

4. The Respondents' Motion to Strike Complainant's Motion for Adoption of Proposed Decision and Order having been mooted is **DENIED.**

5. The Respondents' separate Motions to Dismiss filed in both actions are **DENIED.**

6. It previously having been ordered that the cases be consolidated, the Respondents' Motion for Reconsideration of the Order Granting Complainant's Request to Withdraw the Motion to Amend Complaint is **DENIED.**

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[10] *See: United States v. Berger,* 295 U.S. 78, 88 (1935) The decision also contains the oft quoted "he may strike hard blows, he is not at liberty to strike foul ones" language.

7. Complainant's Motion to Strike Respondent's Answer to Amended Complaint is **DENIED.**

8. By **Friday, July 15, 2005**, Counsel for the Complainant will file with the Hearing Clerk a list of exhibits and a list of witnesses. Counsel will also deposit for next day business day delivery to Counsel for the Respondents, by commercial carrier such as Fed Ex, UPS or other comparable service, copies of Complainant's proposed exhibits, a list of the exhibits and a list of anticipated witnesses together with a short statement as to the nature of their testimony.

9. By **Friday, August 12, 2005**, Counsel for the Respondents will file with the Hearing Clerk a list of exhibits and a list of witnesses. Counsel will also deposit for next day business day delivery to Counsel for the Complainant, by commercial carrier such as Fed Ex, UPS or other comparable service, copies of the Respondents' proposed exhibits, a list of exhibits and a list of anticipated witnesses together with a short statement as to the nature of their testimony.

10. Exhibits shall be pre-marked, on the lower right corner, as CX-1, CX-2 *et seq*. (for Complainant's exhibits[11]) and RX-1, RX-2 *et seq*. (for Respondents' exhibits). Multi-page exhibits shall be paginated with numbers placed at the bottom of the pages.

11. This matter will be set for oral hearing by separate order to be entered. Counsel for the respective parties will advise the Administrative Law Judge of the anticipated length of the hearing and of their available dates when the matters may be heard.

Copies of this Order shall be served upon counsel for the parties by the Hearing Clerk's Office.

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[11]Alternatively, standard Government Exhibit stickers may be used.

In re: BODIE S. KNAPP, AN INDIVIDUAL, d/b/a WAYNE'S WORLD SAFARI.
AWA Docket No. 04-0029.
Order Denying Motion for Reconsideration.
Filed July 5, 2005.

AWA – Animal Welfare Act – Order denying petition to reconsider – Opportunity to address response to appeal – Opportunity for oral argument.

The Judicial Officer denied Respondent's motion for reconsideration of *In re Bodie S. Knapp*, 64 Agric. Dec. 253 (2005). The Judicial Officer rejected Respondent's request that he reconsider the May 31, 2005, Decision and Order for the same reasons as set out in Respondent's appeal stating Respondent does not identify specific aspects of the May 31, 2005, Decision and Order that are error, and he found no error in the May 31, 2005, Decision and Order. The Judicial Officer also rejected Respondent's contention that the Hearing Clerk's failure to serve Respondent with Complainant's response to Respondent's appeal petition until after the Judicial Officer issued the May 31, 2005, Decision and Order unfairly deprived Respondent of an opportunity to address Complainant's response. The Judicial Officer noted that the Rules of Practice do not provide litigants an opportunity to address a response to an appeal petition (7 C.F.R. § 1.145(c), (i)). Finally, the Judicial Officer rejected Respondent's objection to the Judicial Officer's denial of Respondent's March 11, 2005, request for oral argument stating the Rules of Practice gives the Judicial Officer broad discretion to grant, refuse, or limit any request for oral argument (7 C.F.R. § 1.145(d)), Respondent did not identify the bases for his objection to the refusal to grant Respondent's request for oral argument, and the Judicial Officer's reexamination of the ruling on Respondent's request for oral argument revealed no error.

Colleen A. Carroll, for Complainant.
Phillip Westergren, Corpus Christi, Texas, for Respondent.
Initial Decision by Chief Administrative Law Judge Marc R. Hillson.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 31, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142)

[hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges, during the period March 13, 2002, through March 11, 2005, Bodie S. Knapp, d/b/a Wayne's World Safari [hereinafter Respondent], willfully violated the Regulations and Standards (Compl. ¶¶ 3-9). The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on September 4, 2004.[1] Respondent failed to file an answer to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On January 4, 2005, Chief Administrative Law Judge Marc R. Hillson issued a Decision and Order By Reason of Admission of Facts [hereinafter Initial Decision]: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) revoking Respondent's Animal Welfare Act license (Initial Decision at 21-23).

On March 11, 2005, Respondent filed a motion for leave to file an affidavit and appealed to, and requested oral argument before, the Judicial Officer. On March 30, 2005, Complainant filed Complainant's Response to Respondent's Appeal Petition, Request for Oral Argument, and Motion for Leave to File Affidavit. On May 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On May 31, 2005, I issued a Decision and Order: (1) granting Respondent's motion for leave to file affidavit; (2) denying Respondent's request for oral argument; (3) concluding Respondent willfully violated the Regulations and Standards; (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (5) revoking Respondent's Animal Welfare Act license.[2]

On June 14, 2005, Respondent filed a Motion for Reconsideration of

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[1]United States Postal Service Domestic Return Receipt for Article Number 7003 2260 0005 5721 4592.

[2]*In re Bodie S. Knapp*, 64 Agric. Dec. 253 (2005).

In re Bodie S. Knapp, 64 Agric. Dec. 253 (2005). On June 28, 2005, Complainant filed Complainant's Response to Respondent's Petition for Reconsideration of Decision of the Judicial Officer. On June 30, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for Reconsideration.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises three issues in his Motion for Reconsideration. First, Respondent requests that I reconsider my May 31, 2005, Decision and Order "for the same reasons as set out in his appeal" (Motion for Recons. at 1).

Respondent raised three issues in his Appeal to the Judicial Officer. I have reexamined each of the issues raised in Respondent's Appeal Petition to the Judicial Officer and my responses to those issues. Respondent does not identify specific aspects of the May 31, 2005, Decision and Order that are error, and I find no error in the May 31, 2005, Decision and Order.

Second, Respondent contends the Hearing Clerk did not serve him with Complainant's response to Respondent's Appeal to the Judicial Officer until after I issued the May 31, 2005, Decision and Order; thereby unfairly depriving Respondent of an opportunity to address Complainant's response (Motion for Recons. at 1).

The record reveals Complainant filed Complainant's Response to Respondent's Appeal Petition, Request for Oral Argument, and Motion for Leave to File Affidavit on March 30, 2005; however, the Hearing Clerk did not serve Respondent with Complainant's Response to Respondent's Appeal Petition, Request for Oral Argument, and Motion for Leave to File Affidavit until June 6, 2005, 6 days after I issued the May 31, 2005, Decision and Order.[3]

The Rules of Practice do not provide litigants an opportunity to address a response to an appeal petition. Instead, section 1.145 of the Rules of Practice requires that the Hearing Clerk transmit the record to

[3]Letter dated May 31, 2005, from Joyce A. Dawson to Phillip Westergren; United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8982 6015.

the Judicial Officer for consideration and decision immediately after an appeal petition and a response to the appeal petition have been filed and requires the Judicial Officer to rule on the appeal as soon as practicable after the Hearing Clerk's transmittal, as follows:

§ 1.145 Appeal to Judicial Officer.

. . . .

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. . . .

. . . .

(i) *Decision of the judicial officer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk . . ., the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal.

7 C.F.R. § 1.145(c), (i).

Therefore, while I do not approve of the Hearing Clerk's delay in serving Respondent with Complainant's Response to Respondent's Appeal Petition, Request for Oral Argument, and Motion for Leave to File Affidavit, I reject Respondent's contention that the delay unfairly deprived Respondent of an opportunity to address Complainant's Response to Respondent's Appeal Petition, Request for Oral Argument, and Motion for Leave to File Affidavit.

Third, Respondent objects to my denial of his March 11, 2005, request for oral argument (Motion for Recons. at 1-2).

Section 1.145(d) of the Rules of Practice gives the Judicial Officer broad discretion to grant, refuse, or limit any request for oral argument, as follows:

§ 1.145 Appeal to Judicial Officer.

. . . .

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. *The Judicial Officer may grant, refuse, or limit any request for oral argument.* Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

7 C.F.R. § 1.145(d) (emphasis added).

I considered Respondent's March 11, 2005, request for oral argument and refused to grant Respondent's request because Complainant and Respondent had thoroughly addressed the issues and because I found the issues were not complex.[4] Respondent does not identify the bases for his objection to my refusal to grant his request for oral argument and my reexamination of my ruling on Respondent's request for oral argument reveals no error.

For the foregoing reasons and the reasons set forth in *In re Bodie S. Knapp*, 64 Agric. Dec. 253 (2005), Respondent's Motion for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent's Motion for Reconsideration was timely filed and automatically stayed *In re Bodie S. Knapp*, 64 Agric. Dec. 253 (2005). Therefore, since Respondent's Motion for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Bodie S. Knapp*, 64 Agric. Dec. 253 (2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Motion for Reconsideration.

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

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[4] *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 288, (2005).

ORDER

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

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

2. Respondent's Animal Welfare Act license (Animal Welfare Act license number 74-C-0533) is revoked.

The license revocation provisions of this Order shall become effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent must seek judicial review within 60 days after entry of this Order.[5] The date of entry of this Order is July 5, 2005.

In re: MARY JEAN WILLIAMS, AN INDIVIDUAL; JOHN BRYAN WILLIAMS, AN INDIVIDUAL; AND DEBORAH ANN MILETTE, AN INDIVIDUAL.
AWA Docket No. 04-0023.
Order Denying Petition to Reconsider as to Deborah Ann Milette. Filed September 9, 2005.

AWA – Animal Welfare Act – Petition to reconsider – Failure to file timely answer – Default decision – Physical and mental incapacity – Civil penalty – Ability to pay.

The Judicial Officer denied Respondent's petition to reconsider *In re Mary Jean*

[5] 7 U.S.C. § 2149(c).

Williams (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364 (2005). The Judicial Officer rejected Respondent's contention that the default decision should be set aside because Respondent's physical and mental incapacity affected her ability to file a timely response to the Complaint. The Judicial Officer also rejected Respondent's denial of the allegations of the Complaint, stating Respondent was deemed by her failure to file a timely answer to have admitted the allegations of the Complaint (7 C.F.R. § 1.136(c)). Finally, the Judicial Officer rejected Respondent's request to reduce the civil penalty based on her inability to pay the civil penalty, stating a respondent's ability to pay a civil penalty is not one of the factors the Secretary of Agriculture must consider when determining the amount of a civil penalty.

Colleen A. Carroll, for Complainant.
Respondent Deborah Ann Milette, Pro se.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 19, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Mary Jean Williams, John Bryan Williams, and Deborah Ann Milette willfully violated the Regulations (Compl. ¶¶ 5-11). The Hearing Clerk served Respondent Deborah Ann Milette with the Complaint, the Rules of Practice, and a service letter on February 18, 2005.[1] Respondent Deborah Ann Milette 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 18, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Decision and Order as to Respondent Deborah Ann Milette [hereinafter

[1]United States Postal Service Track and Confirm for Article Number 7003 2260 0005 5721 3953.

Motion for Default Decision] and a proposed Decision and Order as to Respondent Deborah Ann Milette [hereinafter Proposed Default Decision]. On April 14, 2005, Respondent Deborah Ann Milette filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On April 28, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding Respondent Deborah Ann Milette willfully violated sections 2.40(a) and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.40(a), .131(a)(1)); (2) ordering Respondent Deborah Ann Milette to cease and desist from violating the Animal Welfare Act, the Regulations, and the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) [hereinafter the Standards]; and (3) revoking Respondent Deborah Ann Milette's Animal Welfare Act license (Animal Welfare Act license number 21-C-0218) (Initial Decision at 4-6).

On May 17, 2005, Respondent Deborah Ann Milette appealed the ALJ's Initial Decision to the Judicial Officer. On June 6, 2005, Complainant filed Complainant's Response to Respondent Deborah Ann Milette's Appeal Petition. On June 13, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to Respondent Deborah Ann Milette. On June 29, 2005, I issued a Decision and Order as to Deborah Ann Milette: (1) concluding Respondent Deborah Ann Milette willfully violated sections 2.40(a), 2.40(b)(1), and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.40(a), (b)(1); .131(a)(1) (2004)); (2) ordering Respondent Deborah Ann Milette to cease and desist from violating the Animal Welfare Act and the Regulations; and (3) assessing Respondent Deborah Ann Milette a $2,500 civil penalty.[2]

On July 18, 2005, Respondent Deborah Ann Milette filed a petition to reconsider *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364 (2005), and a request to supplement her petition to reconsider. On July 27, 2005, I granted Respondent Deborah Ann Milette's request to supplement her petition to reconsider. On

[2]*In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 378-79, 393-94 (2005).

August 18, 2005, Respondent Deborah Ann Milette supplemented her petition to reconsider. On August 25, 2005, Complainant filed Complainant's Response to Respondent Deborah Ann Milette's Petition for Reconsideration of Decision of the Judicial Officer [hereinafter Complainant's Response to Petition to Reconsider]. On August 31, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent Deborah Ann Milette's petition to reconsider.[3]

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent Deborah Ann Milette raises three issues in her petition to reconsider and the supplement to the petition to reconsider. First, Respondent Deborah Ann Milette contends *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364 (2005), should be set aside because physical and mental incapacity during the period January 2005 through July 8, 2005, affected her ability to file a timely response to the Complaint (Respondent Deborah Ann Milette's Pet. to Recons. at 1).

Respondent Deborah Ann Milette's assertion that physical and mental incapacity during the period January 2005 through July 8, 2005, affected her ability to file a timely response to the Complaint, is belied by Respondent Deborah Ann Milette's numerous filings during this period. On April 14, 2005, Respondent Deborah Ann Milette filed timely objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On May 17, 2005, Respondent Deborah Ann Milette filed a timely appeal of the ALJ's Initial Decision. On May 25, 2005, Respondent Deborah Ann Milette filed a letter, dated May 16, 2005, addressed to the ALJ, stating she did not violate the Regulations as alleged in the Complaint. On July 6,

[3]On September 8, 2005, Respondent Deborah Ann Milette filed a rebuttal to Complainant's Response to Petition to Reconsider. The Rules of Practice do not provide for filing a rebuttal to a response to a petition to reconsider and Respondent Deborah Ann Milette did not request an opportunity to rebut Complainant's Response to Petition to Reconsider. Therefore, I have not considered Respondent Deborah Ann Milette's rebuttal of Complainant's Response to Petition to Reconsider and Respondent Deborah Ann Milette's rebuttal of Complainant's Response to Petition to Reconsider forms no part of the record in this proceeding.

2005, Respondent Deborah Ann Milette filed a letter, dated June 28, 2005, addressed to the Hearing Clerk, stating she did not violate the Regulations as alleged in the Complaint.

Moreover, Respondent Deborah Ann Milette's April 14, 2005, May 17, 2005, and May 25, 2005, filings do not refer to any physical or mental incapacity as a basis for her failure to file a timely response to the Complaint.[4] Respondent Deborah Ann Milette's July 6, 2005, filing is the first filing in which she mentions a physical ailment in connection with her failure to file a timely response to the Complaint: "due to the fact I had 3 heart attacks, I more than answered in an extremely timely fashion" (Respondent Deborah Ann Milette's letter to the Hearing Clerk, dated June 28, 2005, and filed July 6, 2005, at 1). However, Respondent Deborah Ann Milette provides no detail regarding dates or seriousness of these three heart attacks. Moreover, Respondent Deborah Ann Milette's assertion that she did not file a timely answer because she suffered three heart attacks is not consistent with her petition to reconsider in which she states she did not file a timely response to the Complaint because she sustained physical injuries in an automobile accident and had an adverse reaction to a combination of medications, as follows:

> Although I acknowledge that it is not a common practice to reconsider a default decision, I hope that consideration would be given to the circumstances surrounding my inability to respond. Specifically, that I had sustained physical injuries resulting from an automobile accident compounded by being further incapacitated both physically and mentally, resulting from an adverse reaction to a combination of pain and neurological medications from the middle of January, 2005 through July 8, 2005. The reactions to

[4]Attached to Respondent Deborah Ann Milette's May 25, 2005, filing is a letter from Dr. Jerry G. Greene, dated March 17, 2005, which states removal of Respondent Deborah Ann Milette's pets from her care and supervision would cause Respondent Deborah Ann Milette significant mental stress. However, Dr. Greene's March 17, 2005, letter does not indicate Respondent Deborah Ann Milette was physically or mentally incapacitated between the time the Hearing Clerk served Respondent Deborah Ann Milette with the Complaint, February 18, 2005, and the time Respondent Deborah Ann Milette was required to file a response to the Complaint, March 10, 2005.

> these medications have impaired my daily functions and continued to increase in severity resulting in periods of serious drops in blood pressure and even unconsciousness and further emergency hospitalization. The situation has continued until only recently when it was concluded by my physicians that I was having an adverse reaction to the combination of medications and these were stopped.

Respondent Deborah Ann Milette's Pet. to Recons. at 1.

Further still, Respondent Deborah Ann Milette's supplement to her petition to reconsider does not support her assertion that physical and mental incapacity during the period January 2005 through July 8, 2005, affected her ability to file a timely response to the Complaint. Dr. Jerry G. Greene states Respondent Deborah Ann Milette was in a car accident in the late fall of 2004 and visited the emergency department and office on seven occasions between December 15, 2004, and February 1, 2005 (Respondent Deborah Ann Milette's Supplement to Pet. to Recons., Attach. 1). Jeffrey Berns states Respondent Deborah Ann Milette was in an automobile accident in June 2004 and he believes, because of her physical and mental condition following the accident, Respondent Deborah Ann Milette should not be held responsible for failing to file a timely response to the Complaint (Respondent Deborah Ann Milette's Supplement to Pet. to Recons., Attach. 2). Neither Dr. Greene nor Mr. Berns addresses Respondent Deborah Ann Milette's physical or mental condition between the time the Hearing Clerk served Respondent Deborah Ann Milette with the Complaint, February 18, 2005, and the time Respondent Deborah Ann Milette was required to file a response to the Complaint, March 10, 2005.

While each case must be examined on the merits, generally, physical and mental incapacity are not bases for setting aside a default decision.[5]

[5]*See In re Jim Aron*, 58 Agric. Dec. 451, 462 (1999) (stating the respondent's automobile accident and loss of memory are not bases for setting aside the default decision); *In re Anna Mae Noell*, 58 Agric Dec. 130, 146 (1999) (stating age, ill health, and hospitalization of one of the respondents are not bases for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of*

(continued...)

I reject Respondent Deborah Ann Milette's contention that *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364 (2005), should be set aside because physical and mental incapacity affected her ability to file a timely response to the Complaint based upon: (1) Respondent Deborah Ann Milette's failure to indicate physical or mental incapacity affected her ability to file a timely response to the Complaint in her objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision; (2) Respondent Deborah Ann Milette's numerous filings during the period she alleges she was incapacitated; (3) Respondent Deborah Ann Milette's failure to support her assertion that she was incapacitated between the time the Hearing Clerk served her with the Complaint, February 18, 2005, and the time she was required to file a response to the Complaint, March 10, 2005; and (4) Respondent Deborah Ann Milette's inconsistent assertions regarding the cause and nature of her incapacity.

Second, Respondent Deborah Ann Milette asserts she did not violate the Regulations as alleged in the Complaint (Respondent Deborah Ann Milette's Pet. to Recons. at 1-2).

Respondent Deborah Ann Milette's denial of the allegations in the Complaint comes far too late to be considered. As fully explained in *In re Mary Jean Williams* (Decision and Order as to Deborah Ann Milette), 64 Agric. Dec. 364 (2005), Respondent Deborah Ann Milette is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because she failed to file an answer to the Complaint within 20 days after the Hearing Clerk served her with the Complaint.

Third, Respondent Deborah Ann Milette states the $2,500 civil penalty assessed against her in *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364 (2005), should be reduced because she cannot pay the civil penalty (Respondent Deborah Ann Milette's Pet. to Recons. at 2).

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the

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[5](...continued)
Agric., No. 00-10608-A (11th Cir. July 20, 2000).

Animal Welfare Act and the Regulations, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondent Deborah Ann Milette's inability to pay the $2,500 civil penalty is not a basis for reducing the $2,500 civil penalty.[6]

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[6]The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *In re Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. *See In re J. Wayne Shaffer*, 60 Agric. Dec. 444, 475-76 (2001) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re Nancy M. Kutz* (Decision and Order as to Nancy M. Kutz), 58 Agric. Dec. 744, 757 (1999) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to pay the civil penalty is not one of those factors); *In re James E. Stephens*, 58 Agric. Dec. 149, 199 (1999) (stating the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (1998) (stating the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating the ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating the ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and

(continued...)

For the foregoing reasons and the reasons set forth in *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364 (2005), Respondent Deborah Ann Milette's petition to reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent Deborah Ann Milette's petition to reconsider was timely filed and automatically stayed *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364 (2005). Therefore, since Respondent Deborah Ann Milette's petition to reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364 (2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider as to Deborah Ann Milette.

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

ORDER

1. Respondent Deborah Ann Milette, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent Deborah Ann Milette.

2. Respondent Deborah Ann Milette is assessed a $2,500 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:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel

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[6](...continued)
it will not be considered in determining future civil penalties under the Animal Welfare Act).

Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Deborah Ann Milette. Respondent Deborah Ann Milette shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0023.

RIGHT TO JUDICIAL REVIEW

Respondent Deborah Ann Milette has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent Deborah Ann Milette must seek judicial review within 60 days after entry of this Order.[7] The date of entry of this Order is September 9, 2005.

In re: DAVID ZIMMERMAN.
AWA Docket No. D-05-0006.
Dismissal Order.
Filed September 14, 2005.

Frank Martin, Jr., for Complainant.
David Zimmerman, for Respondent.
Dismissal Order by Administrative Law Jude Peter. M. Davenport.

DISMISSAL ORDER

This matter is before the Administrative Law Judge upon the Request of the Petitioner to withdraw his Petition. It appearing that the Petitioner

[7] 7 U.S.C. § 2149(c).

was permanently disqualified from obtaining a license under the Animal Welfare Act by Decision and Order dated November 18, 1998, In re David Zimmerman, 57 Agric. Dec. 1038, 1072 (1998) and being sufficiently advised, the Petitioner's request will be **GRANTED** and this action will be DISMISSED.

Copies of this Order will be served upon the parties by the hearing Clerk.

In re: HAROLD AGRESTI and DEBBIE ASSALI AGRESTI.
FCIA Docket No. 05-0005 and FCIA Docket No. 05-0006.
Dismissal Order.
Filed November 28, 2005.

Donald Brittenham, Jr. for Complainant.
Darin T. Judd, for Respondent.
Dismissal Order by Administrative Law Judge Peter M. Davenport.

ORDER

This matter is before the Administrative Law Judge upon the Complainant's Request for a Dismissal of the above styled actions as a result of settlement. Having reviewed the Settlement Agreements and being otherwise sufficiently advised, these actions are DISMISSED as settled. Copies of this Order shall be served upon the Parties by the Hearing Clerk's Office.

In re: CHAD WAY, AN INDIVIDUAL, AND CHAD WAY STABLES, INC., A TENNESSEE CORPORATION.
HPA Docket No. 03-0005.
Remand Order.
Filed July 15, 2005.

HPA – Horse Protection Act – Remand order.

The Judicial Officer stated the United States Court of Appeals for the Sixth Circuit

remanded the proceeding based upon the Secretary of Agriculture's certification that he would accept jurisdiction from the court to proceed with an administrative hearing sought by the parties. *Chad Way v. United States Dep't of Agric.*, No. 05-3536 (6th Cir. July 8, 2005) (Order). Therefore, the Judicial Officer vacated *In re Chad Way*, 64 Agric. Dec. 401 (2005), and remanded the proceeding to the administrative law judge to whom the case had been previously assigned for further proceedings in accordance with the Rules of Practice.

Bernadette R. Juarez, for Complainant.
Aubrey B. Harwell, III, Nashville, TN, for Respondents.
Remand Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on January 10, 2003. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11) [hereinafter the Horse Protection Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. On May 9, 2003, Complainant filed an Amended Complaint.

On April 11, 2005, I issued a Decision and Order: (1) finding Chad Way and Chad Way Stables, Inc. [hereinafter Respondents], failed to file a timely answer to the Amended Complaint; (2) holding Respondents are deemed, based on their failure to file a timely answer, to have admitted the allegations of the Amended Complaint; (3) concluding Respondents violated the Horse Protection Act and the Horse Protection Regulations as alleged in the Amended Complaint; and (4) assessing Respondents a civil penalty and disqualifying Respondents from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.[1]

Respondents sought judicial review of *In re Chad Way*, 64 Agric. Dec. 401 (2005). On July 8, 2005, the United States Court of Appeals for the Sixth Circuit remanded the proceeding to me based upon the Secretary of Agriculture's certification that he would accept jurisdiction

[1]*In re Chad Way*, 64 Agric. Dec. 401 (2005).

from the court to proceed with an administrative hearing sought by the parties (Attach. A).[2]

As the United States Court of Appeals for the Sixth Circuit has remanded the case to me for further proceedings, the April 11, 2005, Decision and Order should be vacated and the proceeding should be remanded to the administrative law judge to whom the case was previously assigned for further proceedings in accordance with the Rules of Practice.

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

ORDER

1. The Judicial Officer's April 11, 2005, Decision and Order is vacated.

2. This proceeding is remanded to Administrative Law Judge Peter M. Davenport for further proceedings in accordance with the Rules of Practice.

ATTACHMENT A

June 28, 2005

Ms. Jill Colyer
Office of the Clerk
United States Court of Appeals
for the Sixth Circuit
532 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, OH 45202-3988

Subject: Chad Way v. United States Department of Agriculture, No. 05-3536 (6th Cir).

I have been delegated authority by the Secretary of the United States

[2] *Chad Way v. United States Dep't of Agric.*, No. 05-3536 (6th Cir. July 8, 2005) (Order) (Attach. B).

Department of Agriculture (USDA), to act as the final deciding officer in USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557. 7 C.F.R. § 2.35. The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), reprinted in, 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

In accordance with the agreement reached between the parties to the above-captioned case, I certify that the Secretary will accept jurisdiction from the United States Court of Appeals for the Sixth Circuit to proceed with an administrative hearing on the merits in the case captioned In re Chad Way, an individual and Chad Way Stables, Inc., a Tennessee Corporation, HPA Docket No. 03-0005.

Sincerely,

William G. Jenson
Judicial Officer

cc: Aubrey B. Harwell, III, Esq.
Leslie K. Lagomarcino, Esq.

ATTACHMENT B

FILED JUL 0 8 2005
LEONARD GREEN, Clerk

No. 05-3536

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAD WAY and CHAD WAY)
STABLES, INC.)

	)	
Petitioners,	)	
v.	)	ORDER
	)	
UNITED STATES DEPARTMENT	)	
OF AGRICULTURE,	)	
	)	
Respondent.	)	

The parties in this appeal move jointly for a remand of this case to the Secretary, United States Department of Agriculture for further proceedings, the remand made pursuant to *First Nat'l Bank of Salem, OH. Hirsch,* 535 F.2d 343 (6th Cir. 1976). The Secretary, acting through the USDA Judicial Officer, has certified that he' will accept jurisdiction from this court to proceed with an administrative hearing sought by the parties. Accordingly this case is ORDERED remanded to the Secretary for such further proceedings as appropriate.

The parties further seek to voluntarily dismiss this appeal pursuant to Rule 42(b), Federal Rules of Appellate Procedure. There being no further action necessary in this appeal, the appeal is ORDERED dismissed; each party to bear its own costs.

ENTERED PURSUANT TO RULE 33(d)
RULES OF THE SIXTH CIRCUIT

_____

Leonard Green, Clerk

_____

In re: SAND CREEK FARMS, INC., A TENNESSEE CORPORATION.
HPA Docket No. 01-C022.
Ruling Denying Motion to Stay Sanctions.
Filed August 2, 2005.

HPA – Horse protection – Stay denied.

The Judicial Officer denied Respondent's motion to stay sanctions imposed by Administrative Law Judge Jill S. Clifton (ALJ). The Judicial Officer concluded the ALJ's decision was not final or effective because Respondent had appealed the decision to the Judicial Officer pursuant to 7 C.F.R. § 1.145. Consequently, Respondent's motion to stay sanctions was premature.

Colleen A. Carroll, for Complainant.
John H. Norton, III, Shelbyville, TN, for Respondent.
Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On April 11, 2005, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order Upon Admission of Facts concluding Sand Creek Farms, Inc. [hereinafter Respondent], violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) and imposing sanctions on Respondent for its violation. The ALJ issued the Decision and Order Upon Admission of Facts in accordance with 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] and, more specifically, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On July 1, 2005, Respondent appealed the ALJ's Decision and Order Upon Admission of Facts to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145) and filed a Motion to Stay Sanctions Pending Appeal. On July 5, 2005, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed a response to Respondent's appeal petition and a response to Respondent's Motion to

Stay Sanctions Pending Appeal. On July 11, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion to Stay Sanctions Pending Appeal.

CONCLUSION BY THE JUDICIAL OFFICER

The Rules of Practice provide that an administrative law judge's decision issued in accordance with section 1.139 the Rules of Practice (7 C.F.R. § 1.139) becomes final and effective without further proceedings 35 days after the date the decision is served on the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145). Moreover, the ALJ expressly states that the Decision and Order Upon Admission of Facts is not final if appealed to the Judicial Officer, as follows:

> This Decision and Order shall have the same force and effect as if entered after a full hearing. The Decision shall be final thirty five (35) days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145 . . .). The Order shall be effective on the first day after the Decision becomes final.

Decision and Order Upon Admission of Facts at 4.

Respondent appealed the ALJ's Decision and Order Upon Admission of Facts to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145). Consequently, the ALJ's April 11, 2005, Decision and Order Upon Admission of Facts is not final or effective. As the sanctions imposed by the ALJ on Respondent are not final or effective, Respondent's Motion to Stay Sanctions Pending Appeal is premature and should be denied.

For the foregoing reason, the following Ruling should be issued.

RULING

Respondent's July 1, 2005, Motion to Stay Sanctions Pending Appeal

is denied.

In re: SAND CREEK FARMS, INC., A TENNESSEE CORPORATION.
HPA Docket No. 01-C022.
Remand Order filed August 11, 2005.

HPA – Horse protection – Technical pleading defect – Remand.

The Judicial Officer vacated Administrative Law Judge Jill S. Clifton's (ALJ) Ruling Denying Motion to Amend First Amended Answer and remanded the proceeding to the ALJ for proceedings in accordance with the Rules of Practice. The Judicial Officer agreed with the ALJ that Respondent denied a statutory provision that was not alleged in the Complaint; nonetheless, the Judicial Officer found Respondent's incorrect citation of 15 U.S.C. § 1824(2)(A), rather than 15 U.S.C. § 1824(2)(B), was only a technical pleading defect and Respondent put Complainant on notice that Respondent denied the material allegations of the Complaint. The Judicial Officer stated he has long held technical defects, including incorrect citations to statutes and regulations, are not fatal to a complaint in an administrative proceeding before the Secretary of Agriculture, as long as the respondent is reasonably apprised of the issues in controversy. Similarly, technical defects should not be fatal to an answer as long as the complainant is not misled.

Colleen A. Carroll, for Complainant.
John H. Norton, III, Shelbyville, TN, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

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 June 28, 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) [hereinafter the Rules of Practice].

Complainant alleges that on or about May 27, 2000, Sand Creek Farms, Inc. [hereinafter Respondent], entered a horse known as "JFK All Over" in the 30th Annual Spring Fun Show in Shelbyville, Tennessee,

as entry number 252 in class number 34, while JFK All Over was sore, for the purpose of showing the horse, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ 7).

On July 27, 2001, Respondent filed an Answer in which Respondent denies violating the Horse Protection Act as alleged in the Complaint. On February 2, 2004, Respondent filed a motion to file an amended answer and "First Amended Answer of Sand Creek Farms, Inc." [hereinafter First Amended Answer], in which Respondent denies it showed JFK All Over in the 30th Annual Spring Fun Show in Shelbyville, Tennessee, as entry number 252 in class number 34, while JFK All Over was sore, in violation of section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)) (First Amended Answer ¶ 7). On February 27, 2004, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] granted Respondent's motion to file its First Amended Answer (Order Granting Respondents' Motions to File First Amended Answers; and Directive Regarding Any Sanction Witnesses at 1).

On March 3, 2005, Complainant filed "Complainant's Motion for Adoption of Proposed Decision and Order as to Respondent Sand Creek Farms, Inc." [hereinafter Motion for Default Decision], contending Respondent's First Amended Answer fails to deny the material allegations of the Complaint. On March 22, 2005, Respondent filed a response opposing Complainant's Motion for Default Decision, a motion to file a second amended answer, and "Second Amended Answer of Sand Creek Farms, Inc." [hereinafter Second Amended Answer], in which Respondent denies it entered JFK All Over in the 30th Annual Spring Fun Show in Shelbyville, Tennessee, as entry number 252 in class number 34, while JFK All Over was sore, in violation of section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)). On April 4, 2005, Complainant filed Complainant's Opposition to Respondent's Motion to File Second Amended Answer.

On April 7, 2005, the ALJ issued a Ruling Denying Motion to Amend First Amended Answer stating, although Respondent's Second Amended Answer denies Respondent entered JFK All Over in the 30th Annual Spring Fun Show in Shelbyville, Tennessee, while JFK All Over was sore, Respondent persists in denying a statutory section which was not alleged in the Complaint.

On April 11, 2005, the ALJ issued a Decision and Order Upon Admission of Facts: (1) concluding Respondent's First Amended Answer fails to deny the material allegations of the Complaint; (2) concluding Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); and (3) imposing sanctions against Respondent for its violation of the Horse Protection Act (Initial Decision at 2-4).

On July 1, 2005, Respondent appealed to the Judicial Officer. On July 5, 2005, Complainant filed a response to Respondent's appeal petition. On July 12, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

I agree with the ALJ that Respondent persists in denying that it violated section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)) despite the allegation in the Complaint that Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Nonetheless, I find Respondent put Complainant on notice that Respondent denies that it entered JFK All Over in the 30th Annual Spring Fun Show in Shelbyville, Tennessee, while JFK All Over was sore.

The Judicial Officer has long held technical defects, including incorrect citations to statutes and regulations, are not fatal to a complaint in an administrative proceeding before the Secretary of Agriculture, as long as the respondent is reasonably apprised of the issues in controversy.[1] Similarly, technical defects should not be fatal to an answer as long as the complainant is not misled.[2] I find Respondent's

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[1]*In re J. Wayne Shaffer*, 60 Agric. Dec. 444, 445 n.1, n.2 (2001) (inferring incorrect references in the complaint to 7 U.S.C. § 2.4 and 9 C.F.R. § 2.1(1)(1) are merely harmless typographical errors); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1460 n.1 (1997) (Order Denying Pet. for Recons.) (finding complainant's incorrect reference in the complaint to 7 U.S.C. § 2141 to be a harmless typographical error), *aff'd*, 173 F.3d 422 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 869 (1998); *In re Micheal McCall*, 52 Agric. Dec. 986, 1001 (1993) (finding incorrect Code of Federal Regulations citations in the complaint to be harmless technical errors); *In re SSG Boswell, II*, 49 Agric. Dec. 210, 212 (1990) (finding the failure to cite the statute authorizing the civil penalty in the complaint, harmless error).

[2]*Bowman v. United States Dep't of Agric.*, 352 F.2d 281, 284 (5th Cir. 1965). *See also Local 802, Associated Musicians of Greater New York v. Parker Meridien Hotel*,

(continued...)

citation in Respondent's Second Amended Answer to section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)), rather than to section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), is a technical pleading defect, and I find nothing on the record before me indicating Complainant was misled by this technical pleading defect. Therefore, I conclude the ALJ's Ruling Denying Motion to Amend First Amended Answer is error.

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

ORDER

1. Administrative Law Judge Jill S. Clifton's April 7, 2005, Ruling Denying Motion to Amend First Amended Answer is vacated.

2. Administrative Law Judge Jill S. Clifton's April 11, 2005, Decision and Order Upon Admission of Facts is vacated.

3. Respondent's March 22, 2005, motion to file its Second Amended Answer is granted.

4. Respondent's March 22, 2005, Second Amended Answer is accepted as filed, except that Administrative Law Judge Jill S. Clifton shall provide Respondent a reasonable period within which to correct citations to the Horse Protection Act in Respondent's Second Amended Answer.

5. This proceeding is remanded to Administrative Law Judge Jill S. Clifton for further proceedings in accordance with the Rules of Practice.

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IN RE: GWAIN WILSON, d/b/a DREAM STABLES; WILLIAM RUSSELL HYNEMAN; AND JOHN R. LEGATE, SR., AND JUSTIN LEGATE, d/b/a GATEWAY FARMS.
HPA Docket No. 02-0003.
Remand Order as to William Russell Hyneman.

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[2](...continued)
145 F.3d 85, 90 (2d Cir. 1998) (stating justice weighs heavily in favor of permitting correction of a typographical error in an answer); *In re Riggan*, 102 B.R. 677, 679 (Bankr. W.D. Tenn. 1989) (holding a timely responsive pleading, which controverted the issues and placed the creditors on notice, to be an answer despite technical defects).

Filed September 27, 2005.

HPA – Horse Protection Act – Remand order – Default decision – Consent decision.

The Judicial Officer remanded the proceeding to Administrative Law Judge Peter M. Davenport (ALJ) to issue a Consent Decision and Order as to William Russell Hyneman. The Judicial Officer stated voluntary settlements are highly favored in proceedings under the Rules of Practice. The Judicial Officer further stated, under 7 C.F.R. § 1.138, the parties may agree to the entry of a consent decision at any time before the administrative law judge files a decision; therefore, prior to the ALJ's entry of the Consent Decision and Order as to William Russell Hyneman, the ALJ must vacate his previously issued default decision.

Robert A. Ertman, for Complainant.
Brenda S. Bramlett, Shelbyville, Tennessee, for Respondent William Russell Hyneman.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 5, 2002. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11); 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 March 24, 2001, William Russell Hyneman [hereinafter Respondent Hyneman] violated the Horse Protection Act. Respondent Hyneman failed to file a timely answer to the Complaint. On December 15, 2004, in accordance section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of a Proposed Decision and Order and a proposed Decision and Order Upon Admission of Facts by Reason of Default.

On June 8, 2005, in accordance section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] filed a Decision and Order Upon Admission of

Facts by Reason of Default: (1) concluding Respondent Hyneman violated the Horse Protection Act as alleged in the Complaint; (2) assessing Respondent Hyneman a $2,200 civil penalty; and (3) disqualifying Respondent Hyneman from showing, exhibiting, or entering any horse and from participating in any horse show, horse exhibition, horse sale, or horse auction for 1 year.

On July 29, 2005, Respondent Hyneman appealed to the Judicial Officer. On September 21, 2005, Complainant and Respondent Hyneman filed a Joint Motion and Request for Remand requesting that I: (1) remand the proceeding to the ALJ for the purpose of vacating the June 8, 2005, Decision and Order Upon Admission of Facts by Reason of Default as it relates to Respondent Hyneman and entering the proposed Consent Decision and Order as to William Russell Hyneman attached to the Joint Motion and Request for Remand; and (2) dismiss Respondent Hyneman's appeal petition as moot, upon the ALJ's entry of the proposed Consent Decision and Order as to William Russell Hyneman. On September 23, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on the Joint Motion and Request for Remand.

CONCLUSION BY THE JUDICIAL OFFICER

Voluntary settlements are highly favored in proceedings instituted under the Rules of Practice. Therefore, I conclude that Complainant's and Respondent Hyneman's proposed Consent Decision and Order as to William Russell Hyneman should be entered by the ALJ, unless the ALJ finds an error is apparent on the face of the proposed Consent Decision and Order as to William Russell Hyneman. Section 1.138 of the Rules of Practice (7 C.F.R. § 1.138) provides that the parties may agree to the entry of a consent decision at any time before the administrative law judge files a decision. Therefore, prior to the ALJ's entry of the proposed Consent Decision and Order as to William Russell Hyneman, the ALJ must vacate his June 8, 2005, Decision and Order Upon Admission of Facts by Reason of Default as it relates to Respondent Hyneman.

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

ORDER

1. a. This proceeding is remanded to Administrative Law Judge Peter M. Davenport for entry of Complainant's and Respondent Hyneman's proposed Consent Decision and Order as to William Russell Hyneman, unless the ALJ finds an error is apparent on the face of the proposed Consent Decision and Order as to William Russell Hyneman. Prior to entry of the Consent Decision and Order as to William Russell Hyneman, the ALJ shall vacate the June 8, 2005, Decision and Order Upon Admission of Facts by Reason of Default as it relates to Respondent Hyneman.

b. As soon as practicable after Administrative Law Judge Peter M. Davenport files a Consent Decision and Order as to William Russell Hyneman, Complainant and Respondent Hyneman shall provide a copy of the Consent Decision and Order as to William Russell Hyneman to the Judicial Officer, at which time I will consider Complainant's and Respondent Hyneman's request that I dismiss Respondent Hyneman's appeal petition.

2. If Administrative Law Judge Peter M. Davenport finds an error is apparent on the face of the proposed Consent Decision and Order as to William Russell Hyneman: the ALJ shall issue a ruling denying Complainant's and Respondent Hyneman's request that the ALJ enter the Consent Decision and Order as to William Russell Hyneman; the Hearing Clerk shall transmit the record to the Judicial Officer; and jurisdiction of this proceeding shall revert to the Judicial Officer.

IN RE: GWAIN WILSON, d/b/a DREAM STABLES; WILLIAM RUSSELL HYNEMAN; AND JOHN R. LEGATE, SR., AND JUSTIN LEGATE, d/b/a GATEWAY FARMS.
HPA Docket No. 02-0003.
Remand Order as to John R. LeGate, Sr.
Filed October 3, 2005.

HPA – Horse Protection Act – Remand order – Default decision – Consent decision.

The Judicial Officer remanded the proceeding to Administrative Law Judge Peter M.

Davenport (ALJ) to issue a Consent Decision and Order as to John R. LeGate, Sr., unless the ALJ finds an error is apparent on its face. The Judicial Officer stated the entry of a consent decision is preferable to the issuance of a default decision. The Judicial Officer further stated, under 7 C.F.R. § 1.138, the parties may agree to the entry of a consent decision at any time before the administrative law judge files a decision; therefore, prior to the ALJ's entry of the Consent Decision and Order as to John R. LeGate, Sr., the ALJ must vacate his previously-issued default decision.

Robert A. Ertman, for Complainant.
Respondent John R. Legate, Sr., Pro se.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 5, 2002. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that, on March 24, 2001, John R. LeGate, Sr. [hereinafter Respondent LeGate], violated the Horse Protection Act and the Regulations. Respondent LeGate failed to file a timely answer to the Complaint. On December 15, 2004, in accordance section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of a Proposed Decision and Order and a proposed Decision and Order Upon Admission of Facts by Reason of Default.

On June 8, 2005, in accordance section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] filed a Decision and Order Upon Admission of Facts by Reason of Default: (1) concluding Respondent LeGate violated the Horse Protection Act and the Regulations as alleged in the Complaint; (2) assessing Respondent LeGate a $2,200 civil penalty; and

(3) disqualifying Respondent LeGate from showing, exhibiting, or entering any horse and from participating in any horse show, horse exhibition, horse sale, or horse auction for 1 year.

On June 29, 2005, Respondent LeGate appealed to the Judicial Officer. On September 29, 2005, Complainant and Respondent LeGate filed a Joint Motion and Request for Remand requesting that I: (1) remand the proceeding to the ALJ for the purpose of vacating the June 8, 2005, Decision and Order Upon Admission of Facts by Reason of Default as it relates to Respondent LeGate and entering the proposed Consent Decision and Order as to John R. LeGate, Sr., attached to the Joint Motion and Request for Remand; and (2) dismiss Respondent LeGate's appeal petition as moot, upon the ALJ's entry of the proposed Consent Decision and Order as to John R. LeGate, Sr. On September 30, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on the Joint Motion and Request for Remand.

CONCLUSION BY THE JUDICIAL OFFICER

Voluntary settlements are highly favored in proceedings instituted under the Rules of Practice. Therefore, I conclude Complainant's and Respondent LeGate's proposed Consent Decision and Order as to John R. LeGate, Sr., should be entered by the ALJ, unless the ALJ finds an error is apparent on the face of the proposed Consent Decision and Order as to John R. LeGate, Sr. Section 1.138 of the Rules of Practice (7 C.F.R. § 1.138) provides that the parties may agree to the entry of a consent decision at any time before the administrative law judge files a decision. Therefore, prior to the ALJ's entry of the proposed Consent Decision and Order as to John R. LeGate, Sr., the ALJ must vacate his June 8, 2005, Decision and Order Upon Admission of Facts by Reason of Default as it relates to Respondent LeGate.

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

ORDER

1. a. This proceeding is remanded to Administrative Law Judge Peter M. Davenport for entry of Complainant's and Respondent

LeGate's proposed Consent Decision and Order as to John R. LeGate, Sr., unless the ALJ finds an error is apparent on the face of the proposed Consent Decision and Order as to John R. LeGate, Sr. Prior to entry of the Consent Decision and Order as to John R. LeGate, Sr., the ALJ shall vacate the June 8, 2005, Decision and Order Upon Admission of Facts by Reason of Default as it relates to Respondent LeGate.

b. As soon as practicable after Administrative Law Judge Peter M. Davenport files a Consent Decision and Order as to John R. LeGate, Sr., Complainant and Respondent LeGate shall provide a copy of the Consent Decision and Order as to John R. Legate, Sr., to the Judicial Officer, at which time I will consider Complainant's and Respondent LeGate's request that I dismiss Respondent LeGate's appeal petition.

2. If Administrative Law Judge Peter M. Davenport finds an error is apparent on the face of the proposed Consent Decision and Order as to John R. LeGate, Sr., the
ALJ shall issue a ruling denying Complainant's and Respondent LeGate's request that the ALJ enter the Consent Decision and Order as to John R. LeGate, Sr.; the Hearing Clerk shall transmit the record to the Judicial Officer; and jurisdiction of this proceeding shall revert to the Judicial Officer.

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In re: TIM GRAY, AN INDIVIDUAL.
HPA Docket No. 01-D022.
Order Denying Late Appeal.
Filed October 17, 2005.

HPA – Horse protection – Late appeal – Administrative law judge authority – Sever – Assignment of docket numbers.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer concluded he had no jurisdiction to hear Respondent's appeal filed the day after Administrative Law Judge Jill S. Clifton's (ALJ) decision became final. The Judicial Officer rejected Respondent's contention that the ALJ's decision was not final because she had no authority to sever the proceeding against Respondent and Sand Creek Farms, Inc., and as the proceeding as to Sand Creek Farms, Inc., is not yet final, the proceeding as to Respondent would not be final until it is final as to all issues and all respondents.

Colleen A. Carroll, for Complainant.
Ted W. Daniel, Murfreesboro, TN, for Respondent.
Decision issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on June 28, 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) [hereinafter the Rules of Practice].

Complainant alleges that on or about May 27, 2000, Tim Gray [hereinafter Respondent] entered a horse known as "JFK All Over" in the 30th Annual Spring Fun Show, in Shelbyville, Tennessee, as entry number 252 in class number 34, while the horse was sore, for the purpose of showing the horse, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ 8). On July 27, 2001, Respondent filed an Answer admitting he entered JFK All Over in the horse show as alleged in the Complaint, but denying that JFK All Over was entered while sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Answer ¶ 8).

On March 7, 2005, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] presided at a hearing in Shelbyville, Tennessee. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondent appeared pro se.[1] At the close of the hearing, the ALJ issued a decision orally pursuant to section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)): (1) concluding Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) as alleged in the

[1]On May 27, 2005, Ted W. Daniel, The Daniel Law Firm, Murfreesboro, Tennessee, filed an appearance on behalf of Respondent (Notice of Appearance, filed May 27, 2005).

Complaint; (2) assessing Respondent a $2,200 civil penalty; (3) disqualifying Respondent 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 for 2 years; and (4) ordering Respondent to cease and desist from violating the Horse Protection Act and the regulations issued under the Horse Protection Act (Transcript at 190-93).

On March 10, 2005, the ALJ filed a Confirmation of Oral Decision and Order, and on March 21, 2005, the Hearing Clerk served Respondent with the ALJ's Confirmation of the Oral Decision and Order.[2] On May 27, 2005, Respondent appealed the ALJ's March 7, 2005, decision to the Judicial Officer. On June 27, 2005, Complainant filed a response to Respondent's appeal petition. On September 13, 2005, Respondent filed a reply to Complainant's response to Respondent's appeal petition. On September 19, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

The record establishes that, on March 7, 2005, the ALJ issued a decision, on March 10, 2005, the ALJ filed a Confirmation of Oral Decision and Order, and on March 21, 2005, the Hearing Clerk served Respondent with the ALJ's Confirmation of the Oral Decision and Order.[3] Section 1.145(a) of the Rules of Practice applicable at the time Complainant instituted this proceeding, provided that an administrative law judge's decision must be appealed to the Judicial Officer within 30 days after service, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving

[2]United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0001 9221 4585.

[3]See note 2.

> service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a) (2002).[4] Therefore, Respondent was required to file his appeal petition with the Hearing Clerk no later than April 20, 2005.

On April 4, 2005, Respondent, by telephone, requested that I extend the time for filing his appeal petition to May 20, 2005. Complainant opposed Respondent's request for extension of time,[5] and on April 6, 2005, I granted Respondent's request for extension of time.[6] On May 19, 2005, Respondent, by telephone, requested that I extend the time for filing his appeal petition to May 26, 2005. On May 19, 2005, I granted Respondent's second request for an extension of time.[7] Respondent did not file his appeal petition with the Hearing Clerk until May 27, 2005.

The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes

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[4]In *PMD v. United States Dep't of Agric.*, 234 F.3d 48 (2d Cir. 2000), the Court held a party's time for appeal of an oral decision in accordance with section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) runs from the date the Hearing Clerk serves the party with the administrative law judge's oral decision, not from the date the administrative law judge issues the oral decision. In response to *PMD*, the Secretary of Agriculture amended section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) to provide that a party must file an appeal of an administrative law judge's oral decision with the Hearing Clerk within 30 days after the issuance of the administrative law judge's oral decision (68 Fed. Reg. 6339-41 (Feb. 7, 2003)). This amendment to the Rules of Practice was not effective until well after the institution of this proceeding, and I do not find the February 7, 2003, amendment applies to this proceeding. Moreover, even if the February 7, 2003, amendment to the Rules of Practice were applicable to this proceeding, the amendment would not affect the disposition of this proceeding.

[5]Complainant's Response to Respondent's Request for Extension of Time to File Appeal Petition filed April 5, 2005.

[6]Informal Order Extending Time for Filing Respondent's Appeal Petition filed April 6, 2005.

[7]Informal Order filed May 19, 2005.

final.[8] The ALJ's March 7, 2005, decision became final on

[8] *In re Jozset Mokos*, 64 Agric. Dec. ___ (Sept. 6, 2005) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); *In re David Gilbert*, 63 Agric. Dec. 803 (2004) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Vega Nunez*, 63 Agric. Dec. 766 (2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final); *In re Ross Blackstock*, 63 Agric. Dec. 818 (2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); *In re David McCauley*, 63 Agric. Dec. 639 (2004) (dismissing the respondent's appeal petition filed 1 month 26 days after the administrative law judge's decision became final); *In re Belinda Atherton*, 62 Agric. Dec. 683 (2003) (dismissing the respondent's appeal petition filed the day the administrative law judge's decision became final); *In re Samuel K. Angel*, 61 Agric. Dec. 275 (2002) (dismissing the respondent's appeal petition filed 3 days after the administrative law judge's decision became final); *In re Paul Eugenio*, 60 Agric. Dec. 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the administrative law judge's decision became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the administrative law judge's decision became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the administrative law judge's decision became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the administrative law judge's decision became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the administrative law judge's decision became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the administrative law judge's decision became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the administrative law judge's decision became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the administrative law judge's decision became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the administrative law judge's decision became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the (continued...)

May 26, 2005. Respondent filed an appeal petition with the Hearing

[8](...continued)
respondent's appeal petition filed after the administrative law judge's decision became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the administrative law judge's decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the administrative law judge's decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the administrative law judge's decision had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the administrative law judge's decision becomes final); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the administrative law judge's decision became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the administrative law judge's decision became final, but not filed until 4 days after the administrative law judge's decision became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the administrative law judge's decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the administrative law judge's decision).

Clerk on May 27, 2005, 1 day after the ALJ's March 7, 2005, decision became final. Therefore, I have no jurisdiction to hear Respondent's appeal.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides, as follows:

> **Rule 4. Appeal as of Right—When Taken**
>
> **(a) Appeal in a Civil Case.**
>
> (1) **Time for Filing a Notice of Appeal.**
>
> (A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.[9]

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[9] *Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (stating under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per

(continued...)

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an administrative law judge's decision has become final. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.[10] The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after the ALJ's decision became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

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[9](...continued)
curiam) (stating under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (stating the filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (stating Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989) (stating the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding pro se does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (stating the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

[10]Fed. R. App. P. 4(a)(5).

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[11]

Accordingly, Respondent's appeal petition must be denied, since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4), "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal."

In Complainant's June 27, 2005, response to Respondent's appeal petition, Complainant argues I have no jurisdiction to hear Respondent's late-filed appeal petition.[12] On July 12, 2005, Respondent requested an opportunity to reply to the jurisdictional argument raised by Complainant.[13] On July 14, 2005, I issued a Ruling Granting Respondent's Motion to Reply to Complainant's Response.

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[11]*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

[12]Complainant's Response to Respondent's Appeal Petition and Request for Oral Argument at 5-7.

[13]Respondent's Motion for Permission to File Reply Brief in Response to Complainant's Jurisdictional Argument in Part II of Complainant's Brief.

On September 13, 2005, Respondent filed Respondent's Reply Brief in which Respondent asserts the ALJ's March 7, 2005, decision is not yet final and the time for filing his appeal petition has not begun to run. Respondent argues the ALJ had no authority to sever the proceeding against Respondent and Sand Creek Farms, Inc., and, as the proceeding as to Sand Creek Farms, Inc., is not yet final, the proceeding as to Respondent is not yet final and will not be final until it is final for all issues and all respondents.[14]

I disagree with Respondent's contention that an administrative law judge to whom a proceeding is assigned has no authority to sever the proceeding. Respondent correctly asserts the Rules of Practice do not explicitly authorize severance of proceedings. However, the Rules of Practice provide that an administrative law judge may direct parties or their counsel to attend a conference when the administrative law judge finds the proceeding would be expedited by a conference.[15] At the conference, matters that may expedite or aid in the disposition of the proceeding may be considered.[16] Administrative law judges have explicit authority to take all actions authorized under the Rules of Practice.[17] I find the authority of an administrative law judge to take action authorized under the Rules of Practice includes action to implement matters considered during a conference. The ALJ conducted teleconferences on March 3 and 4, 2005. During the March 4, 2005, conference, the ALJ notified the parties that, in order to proceed in an orderly and efficient fashion, she would sever *In re Sand Creek Farms, Inc.*, HPA Docket No. 01-A022, and not require Sand Creek Farms, Inc.,

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[14]On March 3 and 4, 2005, the ALJ conducted teleconferences with Respondent, Sand Creek Farms, Inc., and Complainant. Following these teleconferences, the ALJ severed, *In re Sand Creek Farms, Inc.*, HPA Docket No. 01-A022. This severance resulted in two proceedings, *In re Sand Creek Farms, Inc.*, HPA Docket No. 01-C022, and the instant proceeding, *In re Tim Gray*, HPA Docket No. 01-D022. (Order Severing Cases, filed March 10, 2005.)

[15]7 C.F.R. § 1.140(a).

[16]7 C.F.R. § 1.140(a)(3)(ix).

[17]7 C.F.R. § 1.144(c)(14).

to participate in the March 7, 2005, hearing with Respondent.[18]

Moreover, I disagree with Respondent's contention that the ALJ cannot sever a proceeding because only the Hearing Clerk may assign a proceeding a docket number. Section 1.134 of the Rules of Practice provides for the Hearing Clerk's assignment of a docket number to each proceeding, as follows:

> **§ 1.134 Docket number**.
>
> Each proceeding, immediately following its institution, shall be assigned a docket number by the Hearing Clerk, and thereafter the proceeding shall be referred to by such number.

7 C.F.R. § 1.134. Immediately after Complainant filed the Complaint, the Hearing Clerk assigned a docket number to the proceeding, as required by the Rules of Practice. The record indicates that the parties and the ALJ referred to the proceeding by that docket number until the ALJ first severed the proceeding. Once the ALJ severed the original proceeding, the proceeding no longer existed in its original form and section 1.134 of the Rules of Practice (7 C.F.R. § 1.134) does not require that the resulting severed proceedings retain the docket number assigned to the original proceeding.

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

ORDER

Respondent's appeal petition, filed May 27, 2005, is denied. Administrative Law Judge Jill S. Clifton's decision issued March 7, 2005, is the final decision in this proceeding.

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[18]See Complainant's Response to Respondent's Appeal Petition and Request for Oral Argument at 3-4; Respondent's Reply Brief at 2.

In re: TIM GRAY, AN INDIVIDUAL.
HPA Docket No. 01-D022.
Order Denying Petition to Reconsider or for a Stay Pending Judicial Review.
Filed November 15, 2005.

HPA – Horse protection – Petition to reconsider – Petition for stay order.

The Judicial Officer denied Respondent's petition to reconsider *In re Tim Gray* (Order Denying Late Appeal), 64 Agric. Dec. ___ (Oct. 17, 2005). The Judicial Officer concluded that, under 7 C.F.R. § 1.146(a)(3), a party may file a petition to reconsider the Judicial Officer's decision, but that an order denying a late-filed appeal petition is not a *decision* as that word is defined in 7 C.F.R. § 1.132. Moreover, the Judicial Officer denied Respondent's petition for a stay pending judicial review stating an order denying late appeal is not a final decision of the Judicial Officer upon appeal and the matter should not be considered by a reviewing court since, under 7 C.F.R. § 1.142(c)(4)), no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

Colleen A. Carroll, for Complainant.
Ted W. Daniel, Murfreesboro, TN, for Respondent.
Decision issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on June 28, 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) [hereinafter the Rules of Practice].

Complainant alleges that on or about May 27, 2000, Tim Gray [hereinafter Respondent] entered a horse known as "JFK All Over" in the 30th Annual Spring Fun Show, in Shelbyville, Tennessee, as entry number 252 in class number 34, while the horse was sore, for the purpose of showing the horse, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ 8). On

July 27, 2001, Respondent filed an Answer admitting he entered JFK All Over in the horse show as alleged in the Complaint, but denying that JFK All Over was entered while sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Answer ¶ 8).

On March 7, 2005, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] presided at a hearing in Shelbyville, Tennessee. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondent appeared pro se.[1] At the close of the hearing, the ALJ issued a decision orally pursuant to section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)): (1) concluding Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) as alleged in the Complaint; (2) assessing Respondent a $2,200 civil penalty; (3) disqualifying Respondent 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 for 2 years; and (4) ordering Respondent to cease and desist from violating the Horse Protection Act and the regulations issued under the Horse Protection Act (Transcript at 190-93).

On March 10, 2005, the ALJ filed a Confirmation of Oral Decision and Order, and on March 21, 2005, the Hearing Clerk served Respondent with the ALJ's Confirmation of the Oral Decision and Order.[2] On May 27, 2005, Respondent appealed the ALJ's March 7, 2005, decision to the Judicial Officer. On June 27, 2005, Complainant filed a response to Respondent's appeal petition. On September 13, 2005, Respondent filed a reply to Complainant's response to Respondent's appeal petition. On September 19, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On October 17, 2005, I issued an Order Denying Late Appeal stating

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[1]On May 27, 2005, Ted W. Daniel, The Daniel Law Firm, Murfreesboro, Tennessee, filed an appearance on behalf of Respondent (Notice of Appearance, filed May 27, 2005).

[2]United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0001 9221 4585.

the ALJ's March 7, 2005, decision became final prior to Respondent's filing his appeal petition and concluding I have no jurisdiction to hear Respondent's appeal petition.[3] On November 3, 2005, Respondent filed a "Petition to Reconsider the Decision of the Judicial Officer or, Alternatively, for a Stay Pending Appeal." On November 10, 2005, Complainant filed "Complainant's Reply to 'Petition to Reconsider the Decision of the Judicial Officer or, Alternatively, for a Stay Pending Appeal.'" On November 14, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and a ruling on Respondent's petition to reconsider or, alternatively, for a stay pending judicial review.

CONCLUSIONS BY THE JUDICIAL OFFICER

Section 1.146(a)(3) of the Rules of Practice provides that a party to a proceeding may file a petition to reconsider the Judicial Officer's decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of decision of the Judicial Officer.**
>
> (a) *Petition requisite*—
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of* the Judicial Officer. A petition . . . to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Section 1.132 of the Rules of Practice defines the word *decision*, as follows:

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[3] *In re Tim Gray* (Order Denying Late Appeal), 64 Agric. Dec. ___ (Oct. 17, 2005).

§ 1.132 Definitions.

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

. . . .

Decision means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons and basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132. An order denying a late-filed appeal is not a *decision* as that word is defined in the Rules of Practice, and, under the Rules of Practice, a party may only file a petition to reconsider the Judicial Officer's decision.[4] Therefore, Respondent's petition to reconsider *In re Tim Gray* (Order Denying Late Appeal), 64 Agric. Dec. ___ (Oct. 17, 2005), cannot be considered.

Moreover, I deny Respondent's petition for a stay pending judicial review. An order denying late appeal is not a final decision of the Judicial Officer upon appeal and the matter should not be considered by a reviewing court since, under section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), "no decision shall be final for purposes

[4]*See In re William J. Reinhart* (Rulings Denying: (1) Mot. to Set Aside Order Lifting Stay; (2) Mot. for Permanent Stay; and (3) Mot. for Taking Depositions), 62 Agric. Dec. 699, 701 (2003) (holding respondent's petition to reconsider the Judicial Officer's order lifting stay, ruling denying a motion for permanent stay, and ruling granting a motion to amend the case caption cannot be considered pursuant to 7 C.F.R. § 1.146 because the order and rulings are not *decisions* as that word is defined in 7 C.F.R. § 1.132); *In re Kirby Produce Co.* (Order Denying Complainant's Request for Recons. of Remand Order), 60 Agric. Dec. 855, 859 (2001) (holding complainant's petition to reconsider the Judicial Officer's remand order could not be considered because the remand order is not a *decision* as that word is defined in 7 C.F.R. § 1.132).

of judicial review except a final decision of the Judicial Officer upon appeal."

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

ORDER

Respondent's Petition to Reconsider the Decision of the Judicial Officer or, Alternatively, for a Stay Pending Appeal, filed November 3, 2005, is denied.

In re: MIKE TURNER AND SUSIE HARMON.
HPA Docket No. 01-0023.
Stay Order.
Filed December 8, 2005.

Robert A. Ertman, for Complainant.
Brenda S. Bramlett, Shelbyville, Tennessee, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On October 26, 2005, I issued a Decision and Order: (1) concluding Mike Turner and Susie Harmon [hereinafter Respondents] violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); (2) assessing each Respondent a $2,200 civil penalty; and (3) disqualifying each Respondent for 1 year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.[1]

On November 30, 2005, Respondents filed a Motion for Stay of Judgment stating Respondents had filed a timely petition for review of *In re Mike Turner*, 64 Agric. Dec. ___ (Oct. 26, 2005), with the United States Court of Appeals for the Sixth Circuit and requesting a stay of the Order in *In re Mike Turner*, 64 Agric. Dec. ___ (Oct. 26, 2005), pending the outcome of proceedings for judicial review. On December 2, 2005, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed a

[1] *In re Mike Turner*, 64 Agric. Dec. ___ (Oct. 26, 2005).

response to Respondents' November 30, 2005, motion stating Complainant does not oppose Respondents' motion for stay.

In accordance with 5 U.S.C. § 705, Respondents' November 30, 2005, Motion for Stay of Judgment is granted.

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

ORDER

The Order in *In re Mike Turner*, 64 Agric. Dec. ___ (Oct. 26, 2005), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

_____

In re:LION RAISINS, INC., A CALIFORNIA CORPORATION, FORMERLY KNOWN AS LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION;LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION;ALFRED LION, JR., AN INDIVIDUAL; BRUCE LION, AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL;ISABEL LION, AN INDIVIDUAL; AND JEFFREY LION, AN INDIVIDUAL; AND LARRY LION, AN INDIVIDUAL
I & G Docket No. 03-0001.
Ruling on Motion to Dismiss.
Filed December 9, 2005.

I&G – Latches.

Collene Carroll,for Complainant.
Wesley Green, for Respondent.
Decision and Order by Administrative Law Judge Peter M. Davenport.

MEMORANDUM OPINION AND ORDER

This action is before the Administrative Law Judge for resolution of pending Motions. The procedural history of the case is quite extensive

with consideration on two occasions by the Judicial Officer[1] following two separate rulings by Judge Jill S. Clifton denying Complainant's Motion for Adoption of a Default Decision. The Judicial Officer faulted Judge Clifton's findings on both occasions and on his second consideration of the case entered a Default Decision against the Respondents debarring them for a period of a year from receiving inspection services under the Agricultural Marketing Act.[2] The Respondents sought review by the United States District Court for the Eastern District of California.[3] By decision entered on May 12, 2005, United States District Judge Robert E. Coyle found the Judicial Office had abused his discretion in entering the default judgment against the Respondents and remanded the case to the Judicial Officer for further proceedings.[4] By Remand Order dated June 30, 2005, the case was further remanded by the Judicial Officer to Judge Clifton. An Amended Complaint was filed on July 12, 2005 which has been answered by the Respondents. On October 6, 2005, the case was reassigned to me.

The Complaint filed on October 11, 2002 and the Amended Complaint filed on July 12, 2005 both seek debarment of the Respondents from inspection and grading services for violations of the Agricultural Marketing Act of 1946, (7 U.S.C. §§ 1621-1632 (1994)) [hereinafter the "Act"] alleged to have occurred on or about August 26, 1997.

The Respondents contend that the complaint is barred because 28 U.S.C. § 2462 requires that a proceeding for a civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless

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[1]*In re Lion Raisins, Inc.*, 63 Agric. Dec. 271 (2004); *In re Lion Raisins, Inc.*, 63 Agric. Dec. 211 (2004).

[2]*In re Lion Raisins, Inc.,* 63 Agric. Dec. 211 (2004).

[3]*Lion Raisins, Inc v. United States Department of Agriculture,* No. CV-F-04-5844 REC DLB (E.D. Cal. May 12, 2005).

[4]Judge Coyle *sua sponte* granted USDA summary judgment on Lion's assignment of error concerning lack of subject matter jurisdiction, indicating that the statute of limitations is an affirmative defense which is irrelevant to a court's subject matter jurisdiction. As affirmative defenses relate to the merits of a case, the JO did not lack jurisdiction on that basis. (Opinion at page 12)

brought within five years of the date the violation occurred. In this instance, although the violations are alleged to have occurred on or about August 26, 1997, the complaint was not filed until October 11, 2002, which is beyond the five year period. A telephonic hearing was held on December 2, 2005 in this and another action brought involving the Respondents on pending matters, including the issue of whether the Complaint in this action is time barred. During the hearing, government counsel was asked whether the evidence that would be introduced would involve conduct on any date other than August 26, 1997. As her response was in the negative, disposition of the limitation issue is appropriate at this time.

The applicability of the statute of limitations under 28 U.S.C. § 2462 to similar actions by the Secretary was previously considered by then Chief Judge James W. Hunt in *In re George A. Bargery*, 61 Agric. Dec. 772 (2002). There, the Complaint sought to disqualify the Respondent from purchasing catastrophic risk protection for one year and from receiving any other benefit under the Federal Crop Insurance Act (FCIA) for a period of five years. Concluding that the effects of the sanction sought in the complaint in that case was punitive, Judge Hunt found that the matter was a proceeding for the enforcement of a civil penalty which was barred by 28 U.S.C. § 2462.[5]

In the instant case, the Complainant has sought to distinguish this action from that in *Bargery* asserting that (1) *Bargery* was not an action under the Agricultural Marketing Act (the Act); (2*) Bargery* was an initial ALJ decision that was not appealed to the Judicial Officer and thus is not entitled to great weight as precedent; (3) *Bargery* was based upon the erroneous premise that the Department's purpose in seeking sanctions in its enforcement of federal statutes is to punish violators in order to deter them from future violations and that the "severe sanction policy" has not been the policy of the Department for over a decade.

28 U.S.C. § 2462 provides in pertinent part:

[A]n action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first

[5] *Id.* at 774.

accrued....

Complainant is correct that the underlying statute in *Bargery* was not an action under the Act, but rather was one brought under the Federal Crop Insurance Act ("FCIA"), 7 U.S.C. § 1506. The sanction sought in that case was disqualification from purchasing catastrophic risk insurance for a period of one year and participation in any other benefit under FCIA for a period of five years.[6] In the instant case, the Complainant seeks to disqualify the Respondents from being provided the inspection services which are considered necessary in order to do business in the markets in which this Respondent currently competes in the raisin industry. As the sanctions in both cases involve disqualification from receiving services, the fact that *Bargery* was brought under a different statute is not material.

Complainant is also correct that *Bargery* is an initial ALJ decision which was not appealed to the Judicial Officer; however, as the Secretary did not seek review, it remains the decision of the Secretary and is entitled to consideration as precedent.

Complainant's third argument that the earlier decision was based upon an erroneous premise and that the "severe sanction policy" implicit in *Bargery* has been abandoned for over a decade ignores the mandate of 28 U.S.C. § 2462 which requires actions for the enforcement of a forfeiture, pecuniary or otherwise, to be commenced within five years of the date the claim first accrues.[7] Complainant argues that contrary to Judge Hunt's conclusion that the sanction was punitive, i.e. a penalty,

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[6] The effect of the sanction sought in the instant case might be considered more severe than that in *Bargery* as the forfeiture of eligibility to participate in FCIA programs while requiring greater assumption of risk or coverage at a higher cost might not necessary put an individual out of business.

[7] A statute of limitations was enacted by the Fifth Congress which provided a three year statute of limitations on civil actions to enforce penalties in 1799. Acts Mar. 2, 1799, ch. 22, § 89, 1 Stat.695 The three years was extended to the current five years in a provision relating to violations of revenue laws enacted in 1804. Mar. 26, 1804, ch. 40, § 3, 2 Stat. 290. Other revisions have been made over the years in 1818, 1839, 1863, and 1868. The current language of 28 U.S.C. § 2462 was enacted in 1948. June 25, 1948, c. 646, 62 Stat. 974.

the sanction sought in this action is remedial in nature and hence is beyond the reach of the limitation statute.[8] Even if I were to agree that the sanction sought is not a "penalty" or "punitive" as Judge Hunt found, the sanction sought does operate as a forfeiture (not pecuniary in this case, but nonetheless otherwise) of services otherwise provided to entities in the raisin business. The clear and longstanding policy of Congress that enforcement actions be brought in a timely manner effectively limits the reach of governmental agencies and requires them to be diligent in bringing such actions.

Accordingly, I conclude that the action is barred by the operation of 28 U.S.C. § 2462 and the complaint should be dismissed.

ORDER

This action being commenced more than five years after the date when the claim first accrued, it is barred by 28 U.S.C. § 2462. Accordingly, the Complaint is **DISMISSED**.

Copies of this Order will be served upon the parties by the Hearing Clerk.

[8] The words "penalty or forfeiture" in the former § 791 were defined as something imposed for infraction of a public law. *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 35 S. Ct. 328, 59 L.Ed. 644 (1915).

DEFAULT DECISIONS

ANIMAL WELFARE ACT

In re: WAYNE P. OXFORD, AN INDIVIDUAL DOING BUSINESS AS HUG A TIGER AND ENDANGERED CATS OF THE WORLD; HEIDI RIGGS, AN INDIVIDUAL; CHRIS MCDONALD, AN INDIVIDUAL d/b/a MCDONALD'S FARM AND MCDONALD'S FARM EXOTIC CATS; AND BRIDGEPORT NATURE CENTER A TEXAS CORPORATION.
Docket AWA 04-0031.
Decision and Order as to Respondent Chris McDonald.
Filed August 10, 2005.

AWA – Default.

Colleen Carroll, for Complainant.
Respondent, Pro Se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson

DECISION

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act.

On September 29, 2004, the Hearing Clerk served on the respondent Chris McDonald copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151), pursuant to section 1.147(c) of the Rules of Practice (7 C.F.R. § 1.147(c)). The respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondent has failed to file an answer within the time prescribed in the Rules of Practice, or at all, and the material facts alleged in the complaint, which are all admitted by

the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

FINDINGS OF FACT

1. Respondent Chris McDonald is an individual whose address is 1822 South Palisade, Wichita, Kansas 67213. Said respondent does business as McDonald's Farm, and McDonald's Farm Exotic Cats. At all times mentioned herein, said respondent was operating as a dealer and exhibitor, as those terms are defined in the Regulations, and, until November 26, 2004, held Animal Welfare Act license number 48-C-0126.
2. Respondent exhibit exotic felines (lions, tigers and leopards) to the public. Respondents exhibition business is significant. Respondents have thousands of customers each year, and also solicit and accept donations from the public. The gravity of the violations alleged in this complaint is great, and involve willful, deliberate violations of the licensing and handling regulations. The violations demonstrate a lack of good faith on the part of respondent.
3. Respondent Chris McDonald is an respondent in AWA Docket No. 02-0025. Respondent Chris McDonald is also an respondent in AWA Docket No. 03-0012. Respondent received a Warning Notice from the complainant for alleged violations of the facilities requirements (KS 01-012-AC, August 9, 2001).
4. On or about the following dates, respondent failed to comply with the veterinary care regulations, as follows:
a. July 14-18, 2003. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel to comply with the Regulations and Standards, and specifically, employed untrained individuals to care for and handle tigers and leopards without supervision.
b. July 14-18, 2003. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling.
c. September 19, 2003. Respondent Chris McDonald failed to establish

and maintain a program of adequate veterinary care that included the availability of appropriate personnel to comply with the Regulations and Standards, and specifically, employed untrained individuals to care for and handle tigers and leopards without supervision.

d. September 19, 2003. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling.

e. March 5, 2004. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, in Fargo, North Dakota.

f. January 30, 2004. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities and equipment to comply with the Regulations and Standards, in Hoyt, Kansas.

g. April 15, 2004. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling. 9 C.F.R. § 2.40(b)(4).

5. On July 18, 2003, in Montgomery City, Missouri, respondent Chris McDonald failed to make, keep, and maintain records of animals held or otherwise in his possession or under his control.

6. On or about the following dates, respondent failed to comply with the handling regulations, as follows:

a. July 15-16, 2003. Respondent Chris McDonald failed to handle a juvenile tiger as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, respondents placed the tiger in a position that allowed the tiger to contact people directly, by walking it on a leash at a crowded fairground in Montgomery City, Missouri.

b. July 15-16, 2003. Respondent Chris McDonald failed to handle a juvenile tiger during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent placed the tiger in a position that allowed the tiger to contact people directly, on

a leash among members of the public, with zero distance or barriers between the animal and the public, in Montgomery City, Missouri.

c. July 15-18, 2003. Respondent Chris McDonald exhibited dangerous animals (tigers) to the public outside the direct control and supervision of a knowledgeable and experienced animal handler, and specifically, respondents had untrained, inexperienced "volunteers" acting as animal handlers during public exhibitions.

d. July 17, 2003. Respondent Chris McDonald failed to handle a fourteen-month-old tiger as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, respondent placed the tiger in a position that allowed the tiger to contact people directly, in Montgomery City, Missouri.

e. July 17, 2003. Respondent Chris McDonald used physical abuse to handle a tiger, and specifically, said respondents' agents, John Snipes and Natalie Menke, repeatedly struck a tiger in the face, in Montgomery City, Missouri.

f. July 18, 2003. Respondent Chris McDonald failed to handle infant tigers as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, respondents allowed their untrained personnel to handle the infant tigers, in Montgomery City, Missouri.

g. July 18, 2003. Respondent Chris McDonald failed to handle a seven-month tiger as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, respondent placed the tiger in a position that allowed the tiger to contact people directly, by handling the tiger on a leash among customers, in Montgomery City, Missouri.

h. July 17, 2003. Respondent Chris McDonald failed to handle a fourteen-month-old tiger during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent placed the tiger in a position that allowed the tiger to contact a three-year-old boy, and pull him to the bars of the tiger's enclosure, in Montgomery City, Missouri.

i. July 18, 2003. Respondent Chris McDonald failed to handle a

seven-month tiger during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent placed the tiger in a position that allowed the tiger to contact people directly, on a leash among members of the public, with zero distance or barriers between the animal and the public, in Montgomery City, Missouri.

j. July 18, 2003. Respondent Chris McDonald exhibited young and immature animals for periods of time that would be detrimental to their health and well-being, and specifically, respondent's untrained personnel handled infant tigers (four to ten weeks of age) during public exhibition, for periods of time that were detrimental to the infant animals' health and well-being, in Montgomery City, Missouri.

k. September 19, 2003. Respondent Chris McDonald failed to handle tigers as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, respondent allowed customers to handle tigers.

l. September 19, 2003. Respondent Chris McDonald , during public exhibition, failed to handle four tigers so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent placed the tigers in a position that allowed the tigers to contact respondents' customers directly, with zero distance or barriers between the animal and the public.

m. September 19, 2003. Respondent Chris McDonald, during public exhibition, failed to handle adult tigers so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent placed the tigers in a position that allowed customers to come into direct contact with them.

n. March 6, 2004. Respondent Chris McDonald, during public exhibition, failed to handle juvenile tigers so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to

assure the safety of the animals and the public, and specifically, respondent placed the tigers in a position that allowed customers to come into direct contact with them.

o. April 15, 2004. Respondent Chris McDonald failed to handle tigers as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, respondent placed tigers in a position that allowed the tiger to contact people directly, by allowing members of the public to handle the tigers directly, with no distance of barriers between the animals and the people.

p. April 15, 2004. Respondent Chris McDonald, during public exhibition, failed to handle tigers so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent allowed members of the public to handle the tigers directly, with no distance or barriers between the animals and the people.

q. April 15, 2004. Respondent Chris McDonald, during public exhibition, failed to handle tigers so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent placed the tigers in a position that allowed customers to come into direct contact with them, by requiring customers to walk directly in front of the tigers' enclosures.

7. On or about the following dates, respondent failed to meet the minimum requirements for facilities in the Standards, as follows:

a. July 18, 2003. Respondent Chris McDonald's housing facilities for tigers were not structurally sound and maintained in good repair to protect the animals from injury and to contain the animals securely, and specifically, there were ceiling panels missing from the main tiger enclosure, in Montgomery City, Missouri.

b. July 18, 2003. Respondent Chris McDonald's housing facilities for tigers were not maintained in good repair to protect the animals from injury, and specifically, there was an electrical cord hanging from the ceiling of the main tiger enclosure, and a tiger was chewing on it, in Montgomery City, Missouri.

c. July 18, 2003. Respondent Chris McDonald's housing facilities for tigers were not structurally sound and maintained in good repair to protect the animals from injury and to contain the animals securely, and specifically, the rear doors of the tiger trailer were rusted and coming apart, in Montgomery City, Missouri.
d. July 18, 2003. Respondent Chris McDonald's housing facilities for tigers were not structurally sound and maintained in good repair to protect the animals from injury and to contain the animals securely, and specifically, the floor of the tiger trailer was rusted and coming apart, in Montgomery City, Missouri.
e. July 18, 2003. Respondent Chris McDonald's housing facilities for tigers were not structurally sound and maintained in good repair to contain the animals securely, and specifically, the door to the outdoor exercise area cannot be completely closed, in Montgomery City, Missouri.
f. January 30, 2004. Respondent Chris McDonald failed to make provision for the removal and disposal of food waste, and specifically, had numerous empty meat boxes in piles on the grounds, where they can serve to invite vermin infestation, and create odors and disease hazards, in Hoyt, Kansas.
g. January 30, 2004. Respondent Chris McDonald failed to construct and maintain their housing facilities in good repair to contain the animals, and specifically, there was no top on the exercise area cage for four adult tigers, which allowed for escape, in Hoyt, Kansas.
h. January 30, 2004. Respondent Chris McDonald failed to construct and maintain their housing facilities in good repair to contain the animals, and specifically, there was no top on the exercise area cage for six juvenile tigers, which allowed for escape, in Hoyt, Kansas.
8. On or about the following dates, respondent failed to meet the minimum requirements for outdoor facilities in the Standards, as follows:
a. January 30, 2004. Respondent Chris McDonald failed to enclose their outdoor housing facilities in Hoyt, Kansas, by a perimeter fence.
b. January 30, 2003. Respondent Chris McDonald failed to provide appropriate shelter to four adult tigers and six adolescent tigers to afford them protection and prevent discomfort, in Hoyt, Kansas.
9. On or about the following dates, respondent failed to meet the

minimum transportation standards, as follows:

a. July 18, 2003. Respondent Chris McDonald's animal cargo space of the trailer used for transporting tigers was not designed and constructed to protect the health, and ensure the safety of the live animals contained therein at all times, and specifically, there were ceiling panels missing from the main tiger enclosure, in Montgomery City, Missouri.

b. July 18, 2003. Respondent Chris McDonald's animal cargo space of the trailer used for transporting tigers was not designed and constructed to protect the health, and ensure the safety of the live animals contained therein at all times, and specifically, there was an electrical cord hanging from the ceiling of the main tiger enclosure, and a tiger was chewing on it, in Montgomery City, Missouri.

c. July 18, 2003. Respondent Chris McDonald's animal cargo space of the trailer used for transporting tigers was not designed and constructed to protect the health, and ensure the safety of the live animals contained therein at all times, and specifically, the rear doors of the tiger trailer were rusted and coming apart, in Montgomery City, Missouri.

d. July 18, 2003. Respondent Chris McDonald's animal cargo space of the trailer used for transporting tigers was not designed and constructed to protect the health, and ensure the safety of the live animals contained therein at all times, and specifically, the floor of the tiger trailer was rusted and coming apart, in Montgomery City, Missouri.

e. July 18, 2003. The interior of respondent Chris McDonald's animal cargo space was not kept clean, and specifically, said respondents housed infant tigers and a seven-month-old tiger in a five-foot long storage area in respondents' transport trailer where respondents kept cleaning materials, and miscellaneous materials and debris, in Montgomery City, Missouri.

f. January 30, 2004. Respondent Chris McDonald's animal cargo space of the trailer used for transporting tigers was not designed and constructed to protect the health, and ensure the safety of the live animals contained therein at all times, and specifically, there were exposed broken, jagged boards on the top of the enclosure, in Hoyt, Kansas.

CONCLUSIONS OF LAW

1. On or about the following dates, respondent willfully violated section 2.40(b)(4) of the Regulations (9 C.F.R. § 2.40(b)(4)), as follows:
a. July 14-18, 2003. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel to comply with the Regulations and Standards, and specifically, employed untrained individuals to care for and handle tigers and leopards without supervision. 9 C.F.R. § 2.40(b)(1).
b. July 14-18, 2003. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling. 9 C.F.R. § 2.40(b)(4).
c. September 19, 2003. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel to comply with the Regulations and Standards, and specifically, employed untrained individuals to care for and handle tigers and leopards without supervision. 9 C.F.R. § 2.40(b)(1).
d. September 19, 2003. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling. 9 C.F.R. § 2.40(b)(4).
e. March 5, 2004. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, in Fargo, North Dakota. 9 C.F.R. § 2.40(b)(4).
f. January 30, 2004. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities and equipment to comply with the Regulations and Standards, in Hoyt, Kansas. 9 C.F.R. § 2.40(b)(4).
g. April 15, 2004. Respondent Chris McDonald failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling. 9 C.F.R. § 2.40(b)(4).
2. On July 18, 2003, in Montgomery City, Missouri, respondent Chris McDonald failed to make, keep, and maintain records of animals held or otherwise in his possession or under his control, in willful violation

of section 2.75(b)(1) of the Regulations. 9 C.F.R. § 2.75(b)(1).

3. On or about the following dates, respondent willfully violated section 2.131 of the Regulations (9 C.F.R. § 2.131), as follows:

a. July 15-16, 2003. Respondent Chris McDonald failed to handle a juvenile tiger as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, respondents placed the tiger in a position that allowed the tiger to contact people directly, by walking it on a leash at a crowded fairground in Montgomery City, Missouri. 9 C.F.R. § 2.131(a)(1).

b. July 15-16, 2003. Respondent Chris McDonald failed to handle a juvenile tiger during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent placed the tiger in a position that allowed the tiger to contact people directly, on a leash among members of the public, with zero distance or barriers between the animal and the public, in Montgomery City, Missouri. 9 C.F.R. § 2.131(a)(1).

c. July 15-18, 2003. Respondent Chris McDonald exhibited dangerous animals (tigers) to the public outside the direct control and supervision of a knowledgeable and experienced animal handler, and specifically, respondents had untrained, inexperienced "volunteers" acting as animal handlers during public exhibitions. 9 C.F.R. § 2.131(c)(3)

d. July 17, 2003. Respondent Chris McDonald failed to handle a fourteen-month-old tiger as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, respondent placed the tiger in a position that allowed the tiger to contact people directly, in Montgomery City, Missouri. 9 C.F.R. § 2.131(a)(1).

e. July 17, 2003. Respondent Chris McDonald used physical abuse to handle a tiger, and specifically, said respondents' agents, John Snipes and Natalie Menke, repeatedly struck a tiger in the face, in Montgomery City, Missouri. 9 C.F.R. § 2.131(a)(2).

f. July 18, 2003. Respondent Chris McDonald failed to handle infant tigers as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, respondent allowed their untrained personnel to handle the

infant tigers, in Montgomery City, Missouri. 9 C.F.R. § 2.131(a)(1).

g. July 18, 2003. Respondent Chris McDonald failed to handle a seven-month tiger as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, respondent placed the tiger in a position that allowed the tiger to contact people directly, by handling the tiger on a leash among customers, in Montgomery City, Missouri. 9 C.F.R. § 2.131(a)(1).

h. July 17, 2003. Respondent Chris McDonald failed to handle a fourteen-month-old tiger during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondents placed the tiger in a position that allowed the tiger to contact a three-year-old boy, and pull him to the bars of the tiger's enclosure, in Montgomery City, Missouri. 9 C.F.R.§ 2.131(b)(1).

i. July 18, 2003. Respondent Chris McDonald failed to handle a seven-month tiger during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent placed the tiger in a position that allowed the tiger to contact people directly, on a leash among members of the public, with zero distance or barriers between the animal and the public, in Montgomery City, Missouri. 9 C.F.R. § 2.131(b)(1).

j. July 18, 2003. Respondent Chris McDonald exhibited young and immature animals for periods of time that would be detrimental to their health and well-being, and specifically, respondent's untrained personnel handled infant tigers (four to ten weeks of age) during public exhibition, for periods of time that were detrimental to the infant animals' health and well-being, in Montgomery City, Missouri. 9 C.F.R. § 2.131(b)(3).

k. September 19, 2003. Respondent Chris McDonald failed to handle tigers as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, respondent allowed customers to handle tigers. 9 C.F.R. § 2.131(a)(1).

l. September 19, 2003. Respondent Chris McDonald, during public exhibition, failed to handle four tigers so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent placed the tigers in a position that allowed the tigers to contact respondents' customers directly, with zero distance or barriers between the animal and the public. 9 C.F.R. § 2.131(b)(1).

m. September 19, 2003. Respondent Chris McDonald, during public exhibition, failed to handle adult tigers so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent placed the tigers in a position that allowed customers to come into direct contact with them. 9 C.F.R. § 2.131(b)(1).

n. March 6, 2004. Respondent Chris McDonald, during public exhibition, failed to handle juvenile tigers so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent placed the tigers in a position that allowed customers to come into direct contact with them. 9 C.F.R. § 2.131(b)(1).

o. April 15, 2004. Respondent Chris McDonald failed to handle tigers as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, respondent placed tigers in a position that allowed the tiger to contact people directly, by allowing members of the public to handle the tigers directly, with no distance of barriers between the animals and the people. 9 C.F.R. § 2.131(a)(1).

p. April 15, 2004. Respondent Chris McDonald, during public exhibition, failed to handle tigers so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent allowed members of the public to handle the tigers directly, with no distance or barriers between the animals and the people. 9 C.F.R. § 2.131(b)(1).

q. April 15, 2004. Respondent Chris McDonald, during public exhibition, failed to handle tigers so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, and specifically, respondent placed the tigers in a position that allowed customers to come into direct contact with them, by requiring customers to walk directly in front of the tigers' enclosures. 9 C.F.R. § 2.131(b)(1).

4. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for facilities in section 3.125 of the Standards (9 C.F.R. § 3.125), as follows:

a. July 18, 2003. Respondent Chris McDonald's housing facilities for tigers were not structurally sound and maintained in good repair to protect the animals from injury and to contain the animals securely, and specifically, there were ceiling panels missing from the main tiger enclosure, in Montgomery City, Missouri. 9 C.F.R. § 3.125(a).

b. July 18, 2003. Respondent Chris McDonald's housing facilities for tigers were not maintained in good repair to protect the animals from injury, and specifically, there was an electrical cord hanging from the ceiling of the main tiger enclosure, and a tiger was chewing on it, in Montgomery City, Missouri. 9 C.F.R. § 3.125(a).

c. July 18, 2003. Respondent Chris McDonald's housing facilities for tigers were not structurally sound and maintained in good repair to protect the animals from injury and to contain the animals securely, and specifically, the rear doors of the tiger trailer were rusted and coming apart, in Montgomery City, Missouri. 9 C.F.R. § 3.125(a).

d. July 18, 2003. Respondent Chris McDonald's housing facilities for tigers were not structurally sound and maintained in good repair to protect the animals from injury and to contain the animals securely, and specifically, the floor of the tiger trailer was rusted and coming apart, in Montgomery City, Missouri. 9 C.F.R. § 3.125(a).

e. July 18, 2003. Respondent Chris McDonald's housing facilities for tigers were not structurally sound and maintained in good repair to contain the animals securely, and specifically, the door to the outdoor exercise area cannot be completely closed, in Montgomery City, Missouri. 9 C.F.R. § 3.125(a).

f. January 30, 2004. Respondent Chris McDonald failed to make provision for the removal and disposal of food waste, and specifically, had numerous empty meat boxes in piles on the grounds, where they can serve to invite vermin infestation, and create odors and disease hazards, in Hoyt, Kansas. 9 C.F.R. § 3.125(d).

g. January 30, 2004. Respondent Chris McDonald failed to construct and maintain their housing facilities in good repair to contain the animals, and specifically, there was no top on the exercise area cage for four adult tigers, which allowed for escape, in Hoyt, Kansas. 9 C.F.R. § 3.125(a).

h. January 30, 2004. Respondent Chris McDonald failed to construct and maintain their housing facilities in good repair to contain the animals, and specifically, there was no top on the exercise area cage for six juvenile tigers, which allowed for escape, in Hoyt, Kansas. 9 C.F.R. § 3.125(a).

5. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Standards (9 C.F.R. § 3.127), as follows:

a. January 30, 2004. Respondent Chris McDonald failed to enclose their outdoor housing facilities in Hoyt, Kansas, by a perimeter fence. 9 C.F.R. § 3.127(d).

b. January 30, 2003. Respondent Chris McDonald failed to provide appropriate shelter to four adult tigers and six adolescent tigers to afford them protection and prevent discomfort, in Hoyt, Kansas. 9 C.F.R. § 3.127(b).

6. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum transportation standards (9 C.F.R. §' 3.136-3.142), as follows:

a. July 18, 2003. Respondent Chris McDonald's animal cargo space of the trailer used for transporting tigers was not designed and constructed to protect the health, and ensure the safety of the live animals contained therein at all times, and specifically, there were ceiling panels missing from the main tiger enclosure, in Montgomery City, Missouri. 9 C.F.R. § 3.138(a).

b. July 18, 2003. Respondent Chris McDonald's animal cargo space of the trailer used for transporting tigers was not designed and constructed

to protect the health, and ensure the safety of the live animals contained therein at all times, and specifically, there was an electrical cord hanging from the ceiling of the main tiger enclosure, and a tiger was chewing on it, in Montgomery City, Missouri. 9 C.F.R. § 3.138(a).

c. July 18, 2003. Respondent Chris McDonald's animal cargo space of the trailer used for transporting tigers was not designed and constructed to protect the health, and ensure the safety of the live animals contained therein at all times, and specifically, the rear doors of the tiger trailer were rusted and coming apart, in Montgomery City, Missouri. 9 C.F.R. § 3.138(a).

d. July 18, 2003. Respondent Chris McDonald's animal cargo space of the trailer used for transporting tigers was not designed and constructed to protect the health, and ensure the safety of the live animals contained therein at all times, and specifically, the floor of the tiger trailer was rusted and coming apart, in Montgomery City, Missouri. 9 C.F.R. § 3.138(a).

e. July 18, 2003. The interior of respondent Chris McDonald's animal cargo space was not kept clean, and specifically, said respondents housed infant tigers and a seven-month-old tiger in a five-foot long storage area in respondent's transport trailer where respondents kept cleaning materials, and miscellaneous materials and debris, in Montgomery City, Missouri. 9 C.F.R. § 3.138(a).

f. January 30, 2004. Respondent Chris McDonald's animal cargo space of the trailer used for transporting tigers was not designed and constructed to protect the health, and ensure the safety of the live animals contained therein at all times, and specifically, there were exposed broken, jagged boards on the top of the enclosure, in Hoyt, Kansas. 9 C.F.R. § 3.138(a).

ORDER

1. Respondent, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.

2. Respondent Chris McDonald is assessed a civil penalty of $22,550, which shall be due and payable 30 days after service of this decision and order on said respondent, by certified check or money order made

payable to the Treasurer of the United States.
The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

_____

In re: JANE HOS.
AWA Docket No. 05-0002.
Default Decision.
Filed October 17, 2005.

AWA – Default.

Robert Ertman, for Complainant.
Respondent, Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision and Order upon Admission of Facts by Reason of Default

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondent willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served on the Respondent by certified mail, return receipt requested, mailed on October 14, 2004, and signed for by the Respondent on October 22, 2004. The Respondent has failed to file an answer within the time prescribed. The material facts alleged in the complaint, which are admitted by the Respondent's failure to file an answer, are adopted and

set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1. Jane Hos, hereinafter referred to as respondent, is an individual whose mailing address is RR3, Box 118 C, Ava, MO 65608.
2. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations.
3. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations, without having being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Respondent's violations include, but are not limited to, the sale dogs for resale for use as pets on the following dates:

April 10, 2002	4 dogs
July 10, 2002	3 dogs
July 24, 2002	3 dogs
September 11, 2002	4 dogs
September 18, 2002	4 dogs
September 25, 2002	5 dogs
October 16, 2002	3 dogs

The sale of each dog constitutes a separate violation.

Conclusions

1. The Secretary has jurisdiction in this matter.
2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. The Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, from operating as a dealer as defined in the

Act and regulations without being licensed as required.

2. The Respondent is assessed a civil penalty of $2,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States and shall be sent to Robert A. Ertman, Attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

FEDERAL CROP INSURANCE ACT

DEFAULT DECISIONS

In re: TOM J. CLAUSSEN.
FCIA Docket No. 05-0007.
Decision and Order by Reason of Default.
Filed November 7, 2005.

FCIA – Default.

Donald J. Brittenham, Jr., for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Jill S. Clifton.

[1] This proceeding was initiated by a complaint filed on April 20, 2005, by the Manager of the Federal Crop Insurance Corporation, Complainant (frequently herein "the FCIC"). The complaint alleges that Respondent Tom J. Claussen (frequently herein "Respondent Claussen") violated the Federal Crop Insurance Act (7 U.S.C. § 1501 *et seq.*) (frequently herein "the Act") and the regulations promulgated thereunder governing the administration of the Federal crop insurance program (7 C.F.R. part 400).

[2] The FCIC requests that Respondent Claussen be required to pay a $5,000 civil fine, and that Respondent Claussen be disqualified for a period of two years from receiving any benefit from any program listed in section 515(h)(3)(B) of the Act. 7 U.S.C. § 1515(h)(3)(B).

[3] On April 21, 2005, the Hearing Clerk sent to Respondent Claussen, by certified mail, return receipt requested, a copy of the complaint and a copy of the Rules of Practice, together with a cover letter (service letter). Respondent Claussen was informed in the complaint and in the service letter that an answer to the complaint should be filed in accordance with the Rules of Practice within 20 days, and that failure to answer any allegation in the complaint would constitute an admission of that allegation. 7 C.F.R. § 1.136.

[4] The envelope containing the complaint, copy of the Rules of Practice, and service letter was sent to Mr. Tom J. Claussen, 29010-230th Avenue, Long Grove, IA 52756-9571, but was returned to the

Hearing Clerk's Office marked "Returned to Sender - UNCLAIMED" by the U.S. Postal Service. The Hearing Clerk staff then, on June 21, 2005, sent the complaint with accompanying documents to Respondent Claussen at that same address via ordinary mail. The complaint was thereby deemed to have been received by Respondent Claussen on June 21, 2005. 7 C.F.R. § 1.137.

[5] Consequently, Respondent Claussen had until July 11, 2005, to file an answer to the complaint. 7 C.F.R. § 1.136(a). Respondent Claussen failed to file an answer to the complaint by July 11, 2005, as required. [Now, nearly four months later, he still has not filed an answer.]

[6] The FCIC filed a Motion to Enter a Default Decision on August 10, 2005. The Motion was sent to Respondent Claussen by the Hearing Clerk on August 10, 2005, with the Hearing Clerk's cover letter; but the envelope was returned to the Hearing Clerk's Office on September 26, 2005, marked "Returned to Sender - UNCLAIMED" by the U.S. Postal Service. The Hearing Clerk staff then, on September 28, 2005, sent the Motion with the accompanying cover letter to Respondent Claussen via ordinary mail.

[7] The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

[8] Accordingly, the material allegations in the complaint, which are admitted by Respondent Claussen's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq*.

Findings Of Fact

[9] Respondent Tom J. Claussen has a mailing address of 29010 - 230th Avenue, Long Grove, Iowa 52756-9517.

[10] Respondent Claussen was a participant in the Federal crop insurance program under the Act and the regulations for the 2000 crop year.

[11] Respondent Claussen insured his 2000 corn crop located on Unit 101 of Farm Service Number (FSN) 3540, approximately 117 acres, with Acceptance Insurance Company (AIC) through American Growers Insurance Company, Inc. (American Growers). [12] For the 2000 crop year, AIC was an approved insurance provider as described in sections 515(h) and 502(b)(2) of the Act, and FCIC reinsured this policy.

[13] On September 1, 2000, Respondent Claussen filed a MPCI Notice of Loss with American Growers indicating that his corn crop on Unit 101 of FSN 3540 was damaged due to excessive rain.

[14] On October 31, 2000, Respondent Claussen certified and submitted to the Farm Service Agency (FSA) Form CCC-666-LDP, Loan Deficiency Application and Certification, that he produced approximately 16,000 bushels of corn from Unit 101 of FSN 3540.

[15] On November 14, 2000, Respondent Claussen certified and submitted to American Growers a Production Worksheet showing that his corn production from Unit 101 on FSN 3540 was approximately 11,455.8 bushels, approximately 4,500 bushels less than the number of bushels measured by FSA.

[16] Based on the November 14, 2000, Production Worksheet certification of 11,455.8 bushels of corn, Respondent Claussen received an indemnity payment.

[17] On August 7, 2001, American Growers performed a claims audit on Respondent Claussen's corn production from Unit 101 of FSN 3540. [18] Respondent Claussen signed an Adjuster Special Report on August 7, 2001, stating that the corn production from Unit 101 of FSN 3540 was all in one bin when measured by American Growers and that FSA measured two bins after the production was moved.

[19] Based upon the claims audit, American Growers determined that all of Respondent Claussen's corn production from Unit 101 of FSN 3540 could not fit into the one bin measured by its representative, so it reduced Respondent Claussen's overall indemnity amount that he received for his corn and soybean crops from $16,805 to $4,457.

[20] Therefore, as a result of the incorrect certification, Respondent Claussen received an indemnity overpayment from American Growers in the amount of $12,348 ($16,805 minus $4,457).

[21] Respondent Claussen either knew or should have known that the certification of production was obviously incorrect.

Conclusions

[22] Pursuant to section 515(h) of the Act (7 U.S.C. § 1515(h)) and subpart R of FCIC's Regulations (7 C.F.R. § 400.451-400.500), willfully and intentionally providing false or inaccurate information as detailed above is grounds for civil fines of up to $10,000 for each violation, or the amount of the pecuniary gain obtained as a result of the false or incorrect information, and disqualification from receiving any monetary or nonmonetary benefit that may be provided under each of the following for a period of up to five years:

(a) The Federal Crop Insurance Act (7 U.S.C. § 1501 *et seq.*);

(b) The Agricultural Market Transition Act (7 U.S.C. § 7201 *et seq.*), including the noninsured crop disaster assistance program under section 196 of that Act (7 U.S.C. § 7333);

(c) The Agricultural Act of 1949 (7 U.S.C. § 1421 *et seq.*);

(d) The Commodity Credit Corporation Charter Act (15 U.S.C. § 714 *et seq.*);

(e) The Agricultural Adjustment Act of 1938 (7 U.S.C. § 1281 *et seq.*);

(f) Title XII of the Food Security Act of 1985 (16 U.S.C. § 3801 *et seq.*);

(g) The Consolidated Farm and Rural Development Act (7 U.S.C. § 1921 *et seq.*); and

(h) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

[23] Disqualification under section 515(h) of the Act will affect a person's eligibility to participate in any programs or transactions offered under any of the statutes specified above.

[24] All persons who are disqualified will be reported to the U.S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505. GSA maintains and publishes a list of all persons who are determined ineligible from non-procurement or procurement programs

in its Excluded Parties List System.

[25] Respondent Claussen willfully and intentionally provided false information to American Growers regarding the amount of corn that he actually produced.

[26] Respondent Claussen knew or should have known that the information was false at the time that he provided it.

[27] Respondent Claussen has willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act. 7 U.S.C. 1515(h).

[28] It is appropriate that Respondent Claussen (a) be assessed a civil fine of $5,000; and (b) be disqualified from receiving any monetary or non-monetary benefit provided under each of the programs listed above for a period of two years. Consequently, the following Order is issued.

Order

[29] Respondent Claussen is hereby assessed a civil fine of $5,000, as authorized by section 515 of the Act. 7 U.S.C. 1515. Respondent Claussen shall pay the $5,000 civil fine by cashier's check or money order or certified check, made payable to the order of the "Federal Crop Insurance Corporation" and sent to

Federal Crop Insurance Corporation
Attn: Kathy Santora, Collection Examiner
Fiscal Operations Branch
6501 Beacon Road
Kansas City, Missouri 64133.

[30] Respondent Claussen is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of two years:

(i) The Federal Crop Insurance Act (7 U.S.C. § 1501 *et seq.*).

(ii) The Agricultural Market Transition Act (7 U.S.C. § 7201 *et seq.*), including the noninsured crop disaster assistance program under section 196 of that Act (7 U.S.C. § 7333).

(iii) The Agricultural Act of 1949 (7 U.S.C. § 1421 *et seq.*).

(iv) The Commodity Credit Corporation Charter Act (15 U.S.C. § 714

et seq.).
(v) The Agricultural Adjustment Act of 1938 (7 U.S.C. § 1281 *et seq.*).
(vi) Title XII of the Food Security Act of 1985 (16 U.S.C. § 3801 *et seq.*).
(vii) The Consolidated Farm and Rural Development Act (7 U.S.C. § 1921 *et seq.*).
(viii) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

[31] Unless this decision is appealed as set out below, Respondent Claussen shall be ineligible for all of the programs listed above beginning on January 4, 2006, and ending on January 3, 2008. As a disqualified individual, Respondent Claussen will be reported to the U.S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505. GSA publishes a list of all persons who are determined ineligible in its Excluded Parties List System (EPLS).

[32] This Order shall be effective on the first day after this Decision and Order becomes final. This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

* * *

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in

§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or

recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in

case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

In re: CARROLL ISLEY.
FCIA Docket No. 05-0011.
Decision and Order - Default.
Filed November 7, 2005.

FCIA – Default.

Krishna G. Ramaraju, for Complainant.
Respondent, Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

ORDER

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of Respondent, Carroll Isley, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraphs I and II of the

Complaint are deemed admitted, it is found that the Respondent has willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (Act) (7 U.S.C. §1515(h)).

It is further found that, pursuant to section 515 of the Act (7 U.S.C. § 1515), a civil fine of $1,000 will be imposed upon the Respondent. This civil fine shall be made payable to the Federal Crop Insurance Corporation, Attn: Kathy Santora, Collection Examiner, Fiscal Operations Branch, 6501 Beacon Road, Kansas City, Missouri 64133. This order shall be effective 35 days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

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In re: DANITA L. THOMPSON a/k/a DANITA HANNEY, a/k/a DANITA EVANS.
FCIA Docket No. 05-0012.
Decision and Order.
Filed November 7, 2005.

FCIA – Default.

David A. Brittenham, Jr., for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

ORDER

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of Respondent, Danita L. Thompson (aka Danita Hanney, aka Danita Evans), to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraphs I and II of the Complaint are deemed admitted, it is found that the Respondent has willfully and intentionally

provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (Act) (7 U.S.C. § 1515(h)).

It is further found that, pursuant to section 515 of the Act (7 U.S.C. § 1515), Respondent is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of one year:

(i) The Federal Crop Insurance Act (7 U.S.C. § 1501 *et seq.*).

(ii) The Agricultural Market Transition Act (7 U.S.C. § 7201 *et seq.*), including the noninsured crop disaster assistance program under section 196 of that Act (7 U.S.C. § 7333).

(iii) The Agricultural Act of 1949 (7 U.S.C. § 1421 *et seq.*).

(iv) The Commodity Credit Corporation Charter Act (15 U.S.C. § 714 *et seq.*).

(v) The Agricultural Adjustment Act of 1938 (7 U.S.C. §1281 *et seq.*).

(vi) Title XII of the Food Security Act of 1985 (16 U.S.C. § 3801 *et seq.*).

(vii) The Consolidated Farm and Rural Development Act (7 U.S.C. § 1921 *et seq.*).

(viii) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities;

Therefore, unless this decision is appealed as set out below, the period of ineligibility for all of the programs listed above shall commence on November __, 2005 and shall end on November __, 2006. As a disqualified individual, you will be reported to the U.S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505. GSA publishes a list of all persons who are determined ineligible in its Excluded Parties List System (EPLS).

It is further found that, pursuant to section 515 of the Act (7 U.S.C. § 1515), a civil fine of $1,000 will be imposed upon the Respondent. This civil fine shall be made payable to the Federal Crop Insurance Corporation, Attn: Kathy Santora, Collection Examiner, Fiscal Operations Branch, 6501 Beacon Road, Kansas City, Missouri 64133. This order shall be effective 35 days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

FEDERAL MEAT INSPECTION ACT

DEFAULT DECISION

In re: STEVEN MATTESON, KENNETH E. BARROWS, NORTH AMERICAN PACKERS d/b/a SCHALLERS MEATS.
FMIA Docket No. 04-0007 and PPIA Docket No. 04-0008.
Default Decision and Order.
Filed October 26, 2005.

FMIA – Default.

Tracey Manoff, for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

This is an administrative proceeding to withdraw federal inspection services from respondent North American Packers, d/b/a/ Schallers Meats, respondent Steven Matteson and respondent Kenneth E. Barrows (hereinafter respondents). This proceeding was instituted by an amended complaint filed on July 22, 2005, by the then Acting Administrator of the Food Safety and Inspection Service, United States Department of Agriculture. The complaint alleged that respondents had violated the Federal Meat Inspection Act (FMIA),(21 U.S.C. § 601 *et seq*.), and the Poultry Products Inspection Act (PPIA),(21 U.S.C. § 451 *et seq*.), the regulations issued thereunder and the provisions of the Stipulation and Consent Decision in FMIA Docket No. 04-0007 and PPIA Docket No. 04-0008. The proceeding is in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and Part 500 of Title 9 of the Code of Federal Regulations (9 C.F.R. Part 500).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 130 *et seq.)* governing proceedings under the Act were served upon respondents by the Hearing Clerk by certified mail. Respondents were informed in a letter of service than an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint,

which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. North American Packers, d/b/a Schallers Meats, respondent business, is a meat and poultry slaughtering and processing establishment (hereafter, establishment) located at 430 State Route 8, Bridgewater, New York 13313.

2. Respondent Steven Matteson, who resides at 13 Division Street, Richfield Springs, New York, 13439, is a co-owner of and a responsibly connected individual to North American Packers.

3. Respondent Kenneth E. Barrows, who resides at 431 State Route 8, Bridgewater, New York 13313 is a co-owner of and a responsibly connected individual to North American Packers.

4. Respondents are now, and at all times material herein were the recipients of inspection services under the PPIA and
Title I of the FMIA under Establishment number 31921/P-31921.

5. (a) On July 26, 2004, a complaint was filed, pursuant to section 401 of the FMIA (21 U.S.C. § 671) and section 18 of the PPIA (21 U.S.C. § 467a), by the Acting Administrator of the Food Safety and Inspection Service, seeking the denial of inspection services under the PPIA and Title I of the FMIA from respondents based on the two felony convictions of Respondent Kenneth E. Barrows.

(b) On January 29, 1997, in the Otsego County Court, Otsego County, Cooperstown, New York, Mr. Kenneth E. Barrows was convicted of the offense of Arson, 3rd degree, a Class C felony, sentenced on March 7, 1997, and served a term of incarceration.

(c) On March 11, 1997, in the Herkimer County Court, Herkimer County, Herkimer, New York, Mr. Kenneth E. Barrows was convicted of the offense of Criminal Possession of Stolen Property, a Class E felony, sentenced on March 11, 1997 and served a term of incarceration.

(d) On July 27, 2004, Administrative Law Judge Marc R. Hillson issued a Stipulation and Consent Decision in FMIA Docket No. 04-0007 and PPIA Docket No. 04-0008 denying inspection and holding the

denial of inspection services in abeyance for a period of three (3) years for so long as respondents complied with specified terms and conditions of the consent order.

6. Paragraph 1 of the Order provided: "Respondents ... shall not (A) violate any section of the FMIA, PPIA, or State or local statutes involving the preparation, sale, transportation or attempted distribution of any adulterated or misbranded meat or poultry products; (B) commit any felony or fraudulent criminal act; (C) violate any conditions of parole; (D) make or cause to be made, any false entry into any accounts, records, or memorandums kept by the Respondents."

7. Paragraph 3 of the Order provided: "Respondents shall maintain Sanitation Performance Standards (SPS), a Sanitation Standard Operating Procedure (SSOP), a Hazard Analysis and Critical Control Point (HACCP) system (ensuring that no adulterated product is produced or shipped), and maintain a *Listeria monocytogenes* sampling and testing program for ready-to-eat (RTE) products in compliance with regulatory requirements specified in Title 9, Code of Federal Regulations, Parts 416, 417 and 430 respectively."

8. Paragraph 6 of the Order provided: "Within one hundred and eighty (180) days of the effective date of this Order, Mr. Kenneth E. Barrows shall participate in and successfully complete a training program encompassing ethical business practices which has received prior approval of the Director."

9. Paragraph 8 of the Order provided: "The Administrator, FSIS, shall have the right to summarily withdraw inspection services upon a determination by the Administrator, or his or her designee, that one or more conditions set forth in paragraphs 1 through 7 of this Order has been violated. It is acknowledged that Respondents retain the right to request an expedited hearing pursuant to the Rules of Practice concerning any violation alleged as the basis for a summary withdrawal of inspection services."

10. Respondents failed to maintain SPS, SSOP and HACCP systems in compliance with regulatory requirements specified in Title 9, Code of Federal Regulations, Parts 416 and 417 (9 C.F.R. 416 and 9 C.F.R. 417) in violation of paragraph 3 of the Order. On January 31, 2005, FSIS issued a Notice to Show Cause letter to respondents, based on the establishment's failure to maintain SPS, SSOP and HACCP systems and

to implement effective corrective actions and preventive measures to ensure compliance with 9 C.F.R. Parts 416 and 417. After respondents implemented corrective actions and measures, FSIS issued a Notice of Warning letter to respondents on April 26, 2005, advising respondents that future violations could result in an administrative action to summarily withdraw federal inspection services. On June 10, 2005, FSIS issued a second Notice of Show Cause letter to respondents, based on the establishment's failure to maintain SPS, SSOP and HACCP systems. FSIS also documented numerous deficiencies on non-compliance records issued to the establishment from October, 2004 through June, 2005.

11. Respondent Kenneth E. Barrows failed to participate in and successfully complete a training program encompassing ethical business practices in violation of paragraph 6 of the Order.

12. On September 3, 2004, February 17, 2005 and May 24, 2005, the New York State Department of Agriculture and Markets, Division of Food Safety Services issued Sanitary Inspection Reports to Respondent business, documenting deficiencies in sanitation at Respondent's state-licensed retail and New York State Article 5A slaughter operations. Respondents were also cited for conducting vacuum packaging operations at its retail operation without the proper license, resulting in the seizure and destruction of the vacuum packaged meat products. Respondents therefore failed to comply with paragraph 1(A) of the Order.

13. On June 30, 2005, FSIS delivered to respondents a Notice of Summary Withdrawal letter, based on respondents' inability to comply with the statutory requirements of the FMIA and PPIA, the federal regulations issued thereunder, and the terms of the Stipulation and Consent Decision. Also on June 30, 2005, federal inspection services were summarily withdrawn from respondents.

Conclusions

By reason of the facts found in the Findings of Fact respondents have violated the FMIA and PPIA, the regulations issued thereunder and the specified conditions of the Stipulation and Consent Decision issued on July 27, 2004.

Order

Federal inspection services to respondent North American Packers, d/b/a/ Schallers Meats, respondent Steven Matteson and respondent Kenneth E. Barrows are hereby withdrawn.

Copies of the Decision and Order shall be served by the Hearing Clerk upon respondents and may be appealed pursuant to 7 C.F.R. § 1.145. 7 C.F.R. § 1.139. Respondents have thirty (30) days from service of the Decision and Order to appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. 7 C.F.R. § 1.145. If no appeal is filed, the Decision and Order shall become final and effective without further proceedings thirty-five (35) days after the date of service. However, no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal. 7 C.F.R. § 1.139.

_____

DEFAULT DECISIONS

PLANT QUARANTINE ACT

In re: ST. JOHNS SHIPPING COMPANY, INC., AND BOBBY L. SHIELDS, a/k/a LEBRON SHIELDS, a/k/a L. SHIELDS, a/k/a BOBBY LEBRON SHIELDS, a/k/a COOTER SHIELDS, d/b/a BAHAMAS RO RO SERVICES, INC.
P.Q. Docket No. 03-0015.
Decision and Order as to Bobby L. Shields.
Filed March 1, 2005.[*]

PQ – Plant quarantine – Default – Failure to deny or respond to allegations of the complaint – Inspection for entry or transit.

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson's decision holding that Respondent Bobby L. Shields violated section 413(c) of the Plant Protection Act (7 U.S.C. § 7713(c)) by moving from a port of entry cargo from the Bahamas without inspection by, and authorization for entry or transit through the United States from, the United States Department of Agriculture. The Judicial Officer found Respondent Bobby L. Shields failed to file an answer that denied or otherwise responded to the Complaint; therefore, Respondent Bobby L. Shields was deemed to have admitted the allegations of the Complaint. The Judicial Officer assessed Respondent Bobby L. Shields a $1,000 civil penalty. The Judicial Officer held that Respondent Bobby L. Shields failed to prove, by producing documents, that he was not able to pay the civil penalty.

Thomas N. Bolick, for Complainant.
Respondent, Pro se.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 23, 2003. Complainant instituted this

[*]This case was inadvertently omitted from 64 Agric. Dec. Jan-Jun. (2005). We regret the omission- Editor.

proceeding under the Plant Protection Act (7 U.S.C. §§ 7701-7772) and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151; 380.1-.10) [hereinafter the Rules of Practice].

Complainant alleges that, on or about September 1, 2001, St. Johns Shipping Company, Inc., and Bobby L. Shields, a/k/a Lebron Shields, a/k/a L. Shields, a/k/a Bobby Lebron Shields, a/k/a Cooter Shields, d/b/a Bahamas RO RO Services, Inc. [hereinafter Respondents], violated section 413(c) of the Plant Protection Act (7 U.S.C. § 7713(c)) by moving from a port of entry cargo from the Bahamas manifested as "toys and crafts" (container number 2929862, bill of lading number 1) without inspection by, and authorization for entry or transit through the United States from, the United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine (Compl. ¶ II).

The Hearing Clerk served Respondent Bobby L. Shields with the Complaint, the Rules of Practice, and a service letter on October 23, 2003.[1] Respondent Bobby L. Shields was required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to file a response to the Complaint within 20 days after service. On October 29, 2003, Respondent Bobby L. Shields requested an extension of time within which to file an answer to the Complaint. On October 30, 2003, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] granted Respondent Bobby L. Shields an extension to November 14, 2003, within which to file an answer to the Complaint.[2] On November 19, 2003, Respondent Bobby L. Shields filed a letter stating discrepancies regarding the handling of the shipment referenced in the Complaint should be addressed to Respondent St. Johns Shipping Company, Inc.

On February 26, 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 Bobby L.

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[1]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 4015.

[2]Order Extending Time to File Answer to Complaint.

Shields 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 1, 2004.[3] Respondent Bobby L. Shields 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 December 22, 2004, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued a Default Decision and Order [hereinafter Initial Decision and Order]: (1) finding that on or about September 1, 2001, Respondent Bobby L. Shields violated section 413(c) of the Plant Protection Act (7 U.S.C. § 7713(c)) by moving from a port of entry cargo from the Bahamas manifested as "toys and crafts" (container number 2929862, bill of lading number 1) without inspection by, and authorization for entry or transit through the United States from, the United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine; (2) concluding that Respondent Bobby L. Shields violated the Plant Protection Act and the regulations issued under the Plant Protection Act; and (3) assessing Respondent Bobby L. Shields a $1,000 civil penalty (Initial Decision and Order at 3-4).

On January 21, 2005, Respondent Bobby L. Shields appealed to the Judicial Officer. On January 27, 2005, Complainant filed "Complainant's Response to Respondent's Appeal." On January 31, 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 Chief 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 as to Bobby L. Shields with minor modifications. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion of law, as restated.

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[3]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 7696.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 104—PLANT PROTECTION

. . . .

SUBCHAPTER I—PLANT PROTECTION

. . . .

§ 7713. Notification and holding requirements upon arrival

. . . .

(c) Prohibition on movement of items without authorization

No person shall move from a port of entry or interstate any imported plant, plant product, biological control organism, plant pest, noxious weed, article, or means of conveyance unless the imported plant, plant product, biological control organism, plant pest, noxious weed, article, or means of conveyance—

(1) is inspected and authorized for entry into or transit movement through the United States; or

(2) is otherwise released by the Secretary.

. . . .

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.

. . . .

(4) Finality of orders

The order of the Secretary assessing a civil penalty shall be treated as a final order reviewable under chapter 158 of title 28. The validity of the Secretary's order may not be reviewed in an action to collect the civil penalty. Any civil penalty not paid in full when due under an order assessing the civil penalty shall thereafter accrue interest until paid at the rate of interest applicable to civil judgments of the courts of the United States.

7 U.S.C. §§ 7713(c), 7734(b)(1)-(2), (4).

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

Respondent Bobby L. Shields failed to file an answer that denies or otherwise responds to the allegations of the Complaint, as required by section 1.136(b) of the Rules of Practice (7 C.F.R. § 1.136(b)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to deny or otherwise respond to the allegations of the complaint shall be deemed an admission of the allegations in the complaint. Further, the admission by the answer of all material allegations of the complaint 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 as to Bobby L. Shields is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Bobby L. Shields is a cargo agent operating a freight forwarding business incorporated in Florida with a mailing address of 437 N.E. Bayberry Lane, Jensen Beach, Florida 34957.

2. On or about September 1, 2001, Respondent Bobby L. Shields violated section 413(c) of the Plant Protection Act (7 U.S.C. § 7713(c)) by moving from a port of entry cargo from the Bahamas

manifested as "toys and crafts" (container number 2929862, bill of lading number 1), without inspection by, and authorization for entry into or transit through the United States from, the United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine.

3. Section 413(c) of the Plant Protection Act (7 U.S.C. § 7713(c)) prohibits any person from moving any imported plant, plant product, plant pest, noxious weed, or article from a port of entry unless the imported plant, plant product, plant pest, noxious weed, or article is inspected and authorized for entry into or transit through the United States or otherwise released by the Secretary of Agriculture.

Conclusion of Law

By reason of the findings of fact, Respondent Bobby L. Shields has violated the Plant Protection Act and the regulations issued under the Plant Protection Act.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Bobby L. Shields raises two issues in his appeal petition. First, Respondent Bobby L. Shields contends Bahamas RO RO Services, Inc., had no authority to handle articles of international trade; therefore, Bahamas RO RO Services, Inc., cannot be found to have violated section 413(c) of the Plant Protection Act (7 U.S.C. § 7713(c)), as alleged in the Complaint.

As an initial matter, a respondent's authority to handle articles of international trade is not relevant to whether that same respondent actually moved from a port of entry cargo without inspection by, and authorization for entry or transit through the United States from, the United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine. Moreover, Respondent Bobby L. Shields, by his failure to file an answer denying or otherwise responding to the allegations of the Complaint, is deemed to have admitted the allegations of the Complaint and waived opportunity for hearing.

Second, Respondent Bobby L. Shields requests that no civil penalty be assessed because Bahamas RO RO Services, Inc., is not able to pay the $1,000 civil penalty.

One of the factors the Secretary of Agriculture may consider in determining the amount of a civil penalty is the ability of the violator to pay the civil penalty.[4] As an initial matter, Respondent Bobby L. Shields' assertion that Bahamas RO RO Services, Inc., is not able to pay the $1,000 civil penalty is not relevant to the violator's ability to pay because the violator is not Bahamas RO RO Services, Inc., but rather Respondent Bobby L. Shields, d/b/a Bahamas RO RO Services, Inc. Moreover, even if Bahamas RO RO Services, Inc., were the violator, I would not reduce or eliminate the civil penalty based on Respondent Bobby L. Shields' assertion that Bahamas RO RO Services, Inc., is not able to pay the $1,000 civil penalty. A violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be assessed in plant quarantine cases; however, the burden is on the respondents in plant quarantine cases to prove, by producing documentation, the inability to pay the civil penalty.[5] Respondent Bobby L. Shields has failed to produce any documentation supporting his assertion that Bahamas RO RO Services, Inc., cannot pay a civil penalty, and Respondent Bobby L. Shields' undocumented assertion that Bahamas RO RO Services, Inc., is not able to pay the civil penalty falls far short of the proof necessary to establish an inability to pay the civil penalty.[6]

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[4]See 7 U.S.C. § 7734(b)(2)(A).

[5]*In re Herminia Ruiz Cisneros*, 60 Agric. Dec. 610, 634-35 (2001); *In re Rafael Dominguez*, 60 Agric. Dec. 199, 208-09 (2001); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 197-98 (2001); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

[6]*In re Herminia Ruiz Cisneros*, 60 Agric. Dec. 610, 635 (2001) (holding the undocumented assertion by the respondent that she was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Rafael Dominguez*, 60 Agric. Dec. 199, 209 (2001) (holding the undocumented assertion by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, (continued...)

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

ORDER

Respondent Bobby L. Shields is assessed a $1,000 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
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 Bobby L. Shields. Respondent Bobby L. Shields shall state on the certified check or money order that payment is in reference to P.Q. Docket No. 03-0015.

RIGHT TO JUDICIAL REVIEW

The Order assessing Respondent Bobby L. Shields a civil penalty is

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[6](...continued)
198 (2001) (holding undocumented assertions by the respondent that she was unable to pay the civil penalty fall far short of the proof necessary to establish inability to pay); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).

a final order reviewable under 28 U.S.C. §§ 2341-2351.[7] Respondent Bobby L. Shields must seek judicial review within 60 days after entry of the Order.[8] The date of entry of the Order is March 1, 2005.

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In re: ESMERALDA T. R. SHELLTRACK.
P.Q. Docket No. 05 - 0012.
Decision and Order.
Filed July 1, 2005.

PQ – Default.

Krishna G. Ramaraju, for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits from Hawaii into the Continental United States (7 C.F.R. § 318.13 *et seq*. and 330.200) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq*. and 7 C.F.R. § 380.1 *et seq*..

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701 *et seq*.)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on January 7, 2005, alleging that respondent Esmeralda T.R. Shelltrack violated the Act and regulations promulgated under the Acts (7 C.F.R. § 318.13 *et seq*. and 330.200).

The complaint sought civil penalties as authorized by 7 U.S.C. § 7734. This complaint specifically alleged that on or about July 28, 2003, the respondent knowingly attempted to move interstate from Hawaii to North Dakota approximately twenty (20) marungai pods,

[7]See 7 U.S.C. § 7734(b)(4).

[8]See 28 U.S.C. § 2344.

weighing approximately 2.2 pounds, which were infested with *Diaspididae Homoptera*, a plant pest, in violation of 7 C.F.R. § 330.200; and that on or about July 28, 2003, at Waianae, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service, approximately twenty (20) marungai pods, weighing approximately 2.2 pounds, for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. § 318.13(b) and 318.13-2(a).

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

Findings of Fact

1. Esmeralda T.R. Shelltrack, hereinafter referred to as respondent, is an individual with a mailing address of P.O. Box 1216, Waianae, Hawaii 96792.

2. On or about July 28, 2003, the respondent knowingly attempted to move interstate from Hawaii to North Dakota approximately twenty (20) marungai pods, weighing approximately 2.2 pounds, which were infested with *Diaspididae Homoptera*, a plant pest, in violation of 7 C.F.R. § 330.200

3. On or about July 28, 2003, at Waianae, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service, approximately twenty (20) marungai pods, weighing approximately 2.2 pounds, for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. § 318.13(b) and 318.13-2(a).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. §§ 318.13 et seq and 330.200). Therefore, the following Order is issued.

Order

Respondent Esmeralda T.R. Shelltrack is assessed a civil penalty of five hundred dollars ($500). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 05-0012.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

_____

In re: ESTER NOVAK.
P.Q. Docket No. 05-0015.
Decision and Order by Reason of Default.
Filed November 1, 2005.

PQ – Default.

Krishna G. Ramaraju, for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Jill S. Clifton.

[1] This proceeding was instituted under the Plant Protection Act (7 U.S.C. § 7701 *et seq.*) (hereinafter frequently "the Act"), by a complaint filed on January 12, 2005, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter frequently "APHIS"), alleging that respondent Ester Novak violated the Act and regulations promulgated under the Act.

[2] This is an administrative proceeding for the assessment of a civil penalty as authorized by 7 U.S.C. § 7734 for violations of the regulations governing the movement of plants, plant products including fruits, and plant pests from Hawaii into the continental United States (7 C.F.R. § 318.13 *et seq.*, specifically 7 C.F.R. §§ 318.13(b) and 318.13-2(a)); and the interstate movement of plant pests (7 C.F.R. § 330.200) (hereinafter frequently "the regulations").

[3] On January 13, 2005, the Hearing Clerk sent to respondent Ester Novak, by certified mail, return receipt requested, a copy of the complaint and a copy of the Rules of Practice, together with a cover letter (service letter). Respondent Ester Novak was informed in the service letter and in the complaint that an answer to the complaint should be filed in accordance with the Rules of Practice within 20 days and that failure to answer any allegation in the complaint would constitute an admission of that allegation. 7 C.F.R. § 1.136.

[4] The envelope containing the complaint, copy of the Rules of Practice, and service letter was addressed to Ester Novak, 86-259 Leihua Street, Waianae, Hawaii 96792, and was returned to the Hearing Clerk's Office on March 21, 2005 marked "Returned to Sender - UNCLAIMED" by the U.S. Postal Service. The Hearing Clerk staff then, on March 22, 2005, sent the complaint with accompanying documents to respondent Ester Novak at that same address via ordinary mail. The complaint was thereby deemed to have been received by respondent Ester Novak on March 22, 2005. 7 C.F.R. § 1.137.

[5] Also on March 22, 2005, APHIS provided the Hearing

Clerk's Office with another address that APHIS had for respondent Ester Novak, and the Hearing Clerk staff mailed the complaint, copy of the Rules of Practice, and service letter to that address as well. That address was Ester M. Novak, 89-210 Huikala Place, #89-210B, Waianae, Hawaii 96792-4145. On April 12, 2005, this second sent copy of the complaint was returned to the Hearing Clerk's Office marked "Returned to Sender - UNCLAIMED" by the U.S. Postal Service. The Hearing Clerk staff then, on April 13, 2005, sent the complaint with accompanying documents to respondent Ester Novak at that same address via ordinary mail. This second sent copy of the complaint was thereby deemed to have been received by respondent Ester Novak on April 13, 2005. 7 C.F.R. § 1.137.

[6] Consequently, respondent Ester Novak had until April 11, 2005, or until May 3, 2005, to file an answer to the complaint. 7 C.F.R. § 1.136(a). Respondent Ester Novak failed to file an answer to the complaint by April 11, 2005, or even by May 3, 2005, as required. Now, more than six months later, she still has not filed an answer. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

[7] Accordingly, the material allegations in the complaint, which are admitted by respondent Ester Novak's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq.*; *see also* 7 C.F.R. §380.1 *et seq.*

[8] APHIS filed a Motion for Adoption of Proposed Default Decision and Order on June 2, 2005, identifying APHIS's request for "a civil penalty of five hundred dollars ($500)". The Motion was sent to respondent Ester Novak by the Hearing Clerk on June 2, 2005, by certified mail, return receipt requested, together with a cover letter.

[9] APHIS's Motion states, among other things, that respondent Ester Novak's actions –

> undermine the United States Department of Agriculture's efforts

to prevent the introduction and/or spread of plant diseases and pests throughout the United States. The U.S. Department of Agriculture spends millions of dollars in efforts to control and eradicate these risks. Hawaii's unique ecosystem and environment contain plant pests and risks which are not present on the mainland and must be contained to avert serious plant pest and other plant health risks. In order to deter respondent and others similarly situated from committing violations of this nature in the future, Complainant (APHIS) believes that assessment of the requested civil penalty of five hundred dollars ($500) against respondent, is warranted and appropriate.

Findings Of Fact

[10] Respondent Ester Novak is an individual whose last known mailing addresses were Ester Novak, 86-259 Leihua Street, Waianae, Hawaii 96792; and Ester M. Novak, 89-210 Huikala Place, #89-210B, Waianae, Hawaii 96792-4145.

[11] On or about August 25, 2003, at Waianae, Hawaii, respondent Ester Novak offered to a common carrier, specifically the U.S. Postal Service, approximately 1.2 pounds of fresh marungai fruit, 2.2 pounds of ipomoea leaves, and 1.2 pounds of bittermelon leaves for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

[12] On or about August 25, 2003, respondent Ester Novak knowingly attempted to move interstate from Hawaii to California via the U.S. Postal Service approximately 2.2 pounds of ipomoea leaves infested with Thysanoptera, a plant pest, and 1.2 pounds of bittermelon leaves infested with sp. of Aphidae, a plant pest, in violation of 7 C.F.R. § 330.200.

Conclusions

[13] The Secretary of Agriculture has jurisdiction in this matter.

[14] On or about August 25, 2003, respondent Ester Novak violated the Plant Protection Act (7 U.S.C. § 7701 *et seq.*), and

regulations issued under the Act (7 C.F.R. § 318.13 *et seq.*, specifically 7 C.F.R. §§ 318.13(b) and 318.13-2(a); and 7 C.F.R. § 330.200).

[15] A civil penalty in the amount of five hundred dollars ($500) is appropriate, and the following Order is issued.

Order

[16] Respondent Ester Novak is hereby assessed a civil penalty of five hundred dollars ($500), as authorized by 7 U.S.C. § 7734. Respondent shall pay the $500 by cashier's check or money order or certified check, made payable to the order of the "Treasurer of the United States" and forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 05-0015.

[17] This Order shall be effective on the first day after this Decision and Order becomes final. This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties. Respondent Ester Novak's copies should be sent to both of her last known addresses.

* * *

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response

has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal

may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

In re: LILIANA JIMENEZ.
P.Q. Docket No. 05-0020.
Decision and Order - Default.
Filed November 29, 2005.

PQ – Default.

Krishna G. Ramaraju, for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION and ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of hits from Hawaii into the Continental United States (7 C.F.R. § 318.13 *et seq*.) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq*. and 7 C.F.R. § 380.1 *et seq*.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. § 7701 *et seq*.)(Act), by an amended complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on May 12,2005, alleging that respondent Liliana Jimenez violated the Act and regulations promulgated un19der the Acts (7 C.F.R. § 318.13 *et seq*.).

The complaint sought civil penalties as authorized by 7 U.S.C. § 7734. This complaint specifically alleged that on or about May 23,2003, at or near Pearl City, Hawaii, Respondent offered to a common carrier, specifically the U.S. Postal Service, approximately 3.0 pounds of mangoes (approximately 7 mangoes) for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

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

Findings of Fact

Liliana Jimenez, hereinafter referred to as respondent, is an individual who has a mailing address of 612 Huerta Street, Apt. #5, El Paso, Texas, 79905.

Respondent has a secondary mailing address of 909 Avenue E, Dodge City, KS, 67801.

On or about May 23, 2003, at or near Pearl City, Hawaii, respondent offered to a common carrier, specifically the U.S. Postal Service, approximately 3.0 pounds of mangoes (approximately 7 mangoes) for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. §§ 318.13 *et seq*). Therefore, the following Order is issued.

Order

Respondent Liliana Jimenez is assessed a civil penalty of five hundred dollars ($500). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 05-0020.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there

is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

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DEFAULT DECISION

VETERINARY SERVICES

In re: CHARLES JOHNSON.
V.S. Docket No. 05 - 0001.
Decision and Order.
Filed July 27, 2005.

V.S. – Swine diseases – Garbage, feeding pigs – Unsanitary accumulations .

Krishna G. Ramaraju, for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION and ORDER

This is an administrative proceeding for the assessment of a civil penalty for violations of the regulations governing the maintenance of swine/hogs, their conditions, their feeding, and the disposal of waste therefrom (9 C.F.R. § 166.1 *et seq*.) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq*. and 9 C.F.R. § 167.1 *et seq*..

This proceeding was instituted under the Swine Health Protection Act (7 U.S.C. § 3801 *et seq*.)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on January 26, 2005, alleging that respondent Charles Johnson violated the Act and regulations promulgated under the Acts (9 C.F.R. § 94.1 *et seq*.).

The complaint sought civil penalties as authorized by 7 U.S.C. § 3805. This complaint specifically alleged that on or about September 26, 2002, the respondent caused the accumulation of dead hogs at his facility, thereby causing the accumulation of material where insects and rodents may breed, in violation of 9 C.F.R.§ 166.5(a); on or about September 26, 2002, the respondent allowed untreated garbage in swine feeding areas, in violation of 9 C.F.R. § 166.6; on or about October 8, 2002, the respondent allowed swine access to the garbage handling and

treatment areas, in violation of 9 C.F.R. § 166.3(a); on or about October 8, 2002, the respondent allowed drainage from the handling and treatment of untreated garbage to run directly into hog pens, thereby becoming accessible to swine, in violation of 9 C.F.R. § 166.3(b); on or about October 8, 2002, the respondent caused the accumulation of dead hogs at his facility, thereby causing the accum4ulation of material where insects and rodents may breed, in violation of 9 C.F.R.§ 166.5(a); on or about October 8, 2002, the respondent allowed untreated garbage in swine feeding areas, in violation of 9 C.F.R. § 166.6.

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

Findings of Fact

1. Charles Johnson, hereinafter referred to as respondent, is an individual with a mailing address of Rt. 2, Box 75, Wanette, Oklahoma 74878.
2. On or about September 26, 2002, the respondent caused the accumulation of dead hogs at his facility, thereby causing the accumulation of material where insects and rodents may breed, in violation of 9 C.F.R. § 166.5(a).
3. On or about September 26, 2002, the respondent allowed untreated garbage in swine feeding areas, in violation of 9 C.F.R. § 166.6.
4. On or about October 8, 2002, the respondent allowed swine access to the garbage handling and treatment areas, in violation of 9 C.F.R. § 166.3(a).
5. On or about October 8, 2002, the respondent allowed drainage from the handling and treatment of untreated garbage to run directly into hog

pens, thereby becoming accessible to swine, in violation of 9 C.F.R. § 166.3(b).

6. On or about October 8, 2002, the respondent caused the accumulation of dead hogs at his facility, thereby causing the accumulation of material where insects and rodents may breed, in violation of 9 C.F.R. § 166.5(a).

7. On or about October 8, 2002, the respondent allowed untreated garbage in swine feeding areas, in violation of 9 C.F.R. § 166.6.

et seq.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. § 166.1 *et seq*.). Therefore, the following Order is issued.

Order

Respondent Charles Johnson is assessed a civil penalty of four thousand five hundred dollars ($4500). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to V.S. Docket No. 05-0001.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

CONSENT DECISIONS
(Not published herein - Editor)
See www.usda.gov/da/oaljdecisions

ANIMAL QUARANTINE ACT

Wilbert Volson, A.Q. Docket No. 05-0005 & P.Q. Docket No. 05-0009, 07/06/05.

Kiet Huy Tran A.Q. Docket No. 05-0011 09/30/05.

ANIMAL WELFARE ACT

Carolyn D. Atchison, an individual; Thomas W. Atchison, an individual; Animal House Zoological Park, a partnership or unincorporated association; and Animal House Zoological Society, Inc. an Alabama corporation, AWA Docket No. 05-0015 8/16/05.

Larry Darrell Winslow, et al. AWA Docket No 04-0035 08/19/05.

D&H Pet Farms, Inc. AWA Docket No 04-0028 08/24/05.

Lisa R. Whitaker, et al. AWA Docket No. 04-0026 09/01/05.

University of California, San Francisco AWA Docket No. 04-0027 09/23/05.

Antonio R. Alentado AWA Docket No 05-0028 10/07/05.

David Hamilton, et al. AWA Docket No. 04-0016 10/28/05.

David Hamilton, et al. AWA Docket No. 05-0013 10/28/05.

Delta Airlines, Inc. AWA Docket No 03-0031 11/10/05.

Delta Airlines, Inc. AWA Docket No 04-0011 11/10/05.

Delta Airlines, Inc. AWA Docket No 05-0001 11/10/05.

Delta Airlines, Inc. AWA Docket No 05-0020 11/10/05.

Delta Airlines, Inc. AWA Docket No 05-0023 11/10/05.

Delta Airlines, Inc. AWA Docket No 05-0025 11/10/05.

Delta Airlines, Inc. AWA Docket No 03-0029 11/10/05.

Deer Forest Fun Park, Inc. AWA Docket No 02-0023 11/17/05.

James Franklin Daniel AWA Docket No 02-0001 12/16/05.

FEDERAL MEAT INSPECTION ACT

Smokehouse Bar-B-Que FMIA Docket No. 05-0007 and PPIA Docket No. 05-0007 08/08/05.

Russell Stewart Grandshaw and Grizzly's Beef Jerky, Inc. Docket FMIA Docket No. 05-0008 08/18/05.

Werling and Sons, Inc. FMIA Docket No. 05-0003 09/09/05 and PPIA Docket No. 05-0004 09/09/05.

Skogland Meats and Locker, Inc. and Mark L. Skogland FMIA Docket 06-0002 and PPIA Docket 06-0002 11/22/05.

HORSE PROTECTION ACT

Jeffrey Street, HPA Docket No. 05-0004, 07/08/05.

Jacline Wampler, HPA Docket No. 05-0004, 07/20/05.

William Russell Hyneman . HPA Docket No. 02-0003.2 10/05/05.

John R. LeGate Sr. HPA Docket No. 02-0003.1 10/05/05.

Alex R. Taylor, Ricky Taylor, Justin Time Stables, Tim Holley, Tim

Holley Stables HPA 01-0029 10/31/05.

Bobby E. Richards HPA Docket No 04-0004 12/15/05.

Lisa K. Teel HPA Docket No 04-0004 12/20/05.

Dawn Mooney HPA Docket 06-0003 12/23/05.

PLANT QUARANTINE ACT

Barbara M. Pratt P.Q. Docket No. 05-0025 09/02/05.

Florida West International Airways PQ Docket 06-0007 11/22/05.

Merlin Airways, Inc PQ Docket No. 06-0006 11/28/05.

Deborah Jaques PQ Docket No 05-0028 12/01/05.

Texas Marine Agency, Inc. PQ Docket No 06-0008 12/02/05.

WATERMELON RESEARCH AND CONSUMER INFORMATION ACT

E. Vega and Sons and Rene Vega AMA WRPA Docket No 03-0002 09/19/05.

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