AGRICULTURE DECISIONS

Volume 73

Book One

Part One (General)

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

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AGRICULTURAL COMMODITIES PROMOTION ACT

DEPARTMENTAL DECISIONS

In re: RESOLUTE FOREST PRODUCTS.
Docket No. 12-0040.
Decision and Order.
Filed April 30, 2014.

ACPA.

Elliot J. Feldman, Esq.; David B. Rivkin, Jr., Esq.; Michael S. Snarr, Esq.; and Andrew M. Grossman, Esq. for Petitioner.
Frank Martin, Jr., Esq. and Brian T. Hill, Esq. for Complainant.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

Decision Summary

The Petition of Resolute Forest Products is DENIED, because the Softwood Lumber Order and its authorizing statute, as-written and as-administered, are in accordance with law. The authorizing statute is The Commodity, Promotion, Research, and Information Act of 1996, 7 U.S.C. §§ 7411-7425. The Order's full name is Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order. 7 C.F.R. Part 1217. The Order's nickname is "Check-off." The Softwood Lumber Order is a federal regulation; the final rule to implement the program was published in the Federal Register on August 2, 2011. 76 Fed. Reg. 46185 (Aug. 2, 2011). RX 35. 7 C.F.R. Part 1217.

Parties and Pleadings

The Petitioner is Resolute Forest Products (formerly "AbitibiBowater, Inc."), an American company, incorporated under the laws of Delaware ("Resolute" or "Petitioner"). Resolute filed the "First Amended Petition to Terminate or Amend USDA's Softwood Marketing Order or, In the Alternative, to Exempt Petitioner from USDA's Softwood Marketing Order" on June 22, 2012. The Respondent is the Administrator, Agricultural Marketing Service, United States Department of Agriculture

("AMS" or "Respondent"). AMS filed the "Respondent's Answer To Petitioner's First Amended Petition" on July 3, 2012. For additional procedural history (exhibits, briefs, and witnesses), *see* Appendix A.

The Appointments Clause

The Petitioner Resolute asks me to find the Commodity, Promotion, Research, and Information Act of 1996 unconstitutional on its face. Petitioner Resolute argues that, IF the majority voting in a referendum voted to suspend or terminate an order[1] that had been authorized under the Commodity, Promotion, Research, and Information Act of 1996 (*see* 7 U.S.C. § 7421), private parties would impermissibly be making the decision. Under the Appointments Clause of Article II of the Constitution, states the Petitioner Resolute, such a significant decision should be made by one whose authority comes from having been appointed by the President. Petitioner Resolute reasons that since the statute binds the Secretary of Agriculture by the majority decision of the private parties voting in the referendum, the Secretary is deprived of discretion.

Petitioner Resolute is correct in stating that, if the Secretary determines that an order or a provision of an order is not favored by persons voting in a referendum conducted under section 7417 (7 U.S.C. § 7417), the Secretary is required to suspend or terminate: "the Secretary shall . . ." 7 U.S.C. § 7421. Does the Secretary's required acquiescence to a referendum majority vote to suspend or terminate an order or a provision of an order constitute an impermissible delegation of authority? I say no, for two reasons. First, the Secretary of Agriculture has (a) the authority to control the referendum process; (b) the discretion to determine whether, indeed, there is a majority decision of the private parties voting in the referendum to suspend or terminate an order or a provision of an order; and (c) the authority to implement the suspension or termination that he, the Secretary, would be required to implement. 7

[1] No such vote has yet occurred regarding the Softwood Lumber Order. If private parties were to decide through a referendum to suspend or terminate the Softwood Lumber Order, and the Secretary of Agriculture were to suspend or terminate the Softwood Lumber Order based on that referendum majority vote, Petitioner Resolute might find the wording of The Commodity, Promotion, Research, and Information Act of 1996 in that regard to be acceptable.

U.S.C. § 7421. Second, The Commodity, Promotion, Research, and Information Act of 1996 has tightly controlled the entire process, reasonably limiting the Secretary's discretion: it is reasonable that all concerned by a marketing order will experience a predictable outcome if there is a majority decision of the private parties voting in the referendum to suspend or terminate an order or a provision of an order. *See also* AMS Brief filed June 7, 2013, at pp. 12-17.

The Secretary's Discretion in Issuing an Order

The Petitioner Resolute asks me to find that the Softwood Lumber Order was not properly developed because, the Petitioner Resolute states, among other things, following approval in the referendum (7 U.S.C. § 7417), the Secretary of Agriculture failed to use his discretion as directed in 7 U.S.C. § 7413 to decide whether to implement the Softwood Lumber Order.

Petitioner Resolute is correct in stating that the Secretary uses his discretion in the issuance of orders under The Commodity, Promotion, Research, and Information Act of 1996 because he must determine whether "a proposed order is consistent with and will effectuate the purpose of this subchapter." 7 U.S.C. § 7413. Where I disagree with Petitioner Resolute is that if, while developing the proposed order, the Secretary has already evaluated whether the "proposed order is consistent with and will effectuate the purpose of this subchapter," I think the Secretary may, without renewing his evaluation, proceed to implement the proposed order, especially following approval in a referendum, such as did occur with the Softwood Lumber Order. In other words, the Secretary's exercise of discretion came before the referendum; if there were no change of circumstances during the referendum, the Secretary of Agriculture, in his discretion, was free to choose to agree with the majority vote in support of the proposed Softwood Lumber Order. 7 U.S.C. § 7413.

Subpoena Duces Tecum

The issues concerning Petitioner Resolute's Subpoena Duces Tecum were decided at the hearing level by the USDA Judicial Officer, an authority higher than the administrative law judge. (I certified the

question to the Judicial Officer; *see* Ruling on Certified Question, issued January 22, 2013, ALJX 2). The Subpoena Duces Tecum that I issued, ALJX 1, I then quashed, pursuant to the Judicial Officer's ruling. Tr. 12. Petitioner Resolute has preserved on appeal to the Judicial Officer the issues concerning the Subpoena Duces Tecum. *See* Pet'r Resolute's April Br., esp. 88-92.

What Constitutes Majority Vote?

The Commodity, Promotion, Research, and Information Act of 1996 provides for approval of an order in a referendum. 7 U.S.C. § 7417. If an initial referendum is undertaken, as was done for the Softwood Lumber Order, the referendum is done "among persons to be subject to an assessment" . . . 7 U.S.C. § 7417(a)(1). These persons were engaged during a representative period determined by the Secretary in the production OR handling OR importation of the agricultural commodity. 7 U.S.C. § 7417(a)(1). The Secretary of Agriculture chose the option for the initial referendum that required approval "by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity" (softwood lumber). 7 U.S.C. § 7417(e)(3); 76 Fed. Reg. 46185, 46193 (August 2, 2011); Tr. 637.

Does a "majority" of persons as contemplated by the Act mean (a) a majority of persons-to-be-subject-to-an-assessment? or (b) a majority of persons-to-be-subject-to-an- assessment who voted? Does a "majority" of the volume of softwood lumber as contemplated by the Act mean (a) a majority of the-volume-of-softwood-lumber-to-be- subject-to-an-assessment? or (b) a majority of the-volume-of-softwood-lumber-to-be-subject-to-an-assessment that "was voted"?

Petitioner Resolute is certain of the Act's meaning regarding what constitutes majority vote. I do not share Petitioner Resolute's certitude, mindful that Sonia Jimenez testified that it would be impossible to know the total softwood lumber volume. Tr. 421. Sonia Jimenez is the Director, Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture. Ms. Jimenez was on the witness stand for about 10 hours (about 3 hours the first day; about 6 hours the second day; and about an hour the third day). Ms. Jimenez testified in part as follows. Tr. 420-21.

> Judge Clifton: Do the ballots specify -- tell me what the ballots specify. When the ballot comes back, what does it say about volume?
>
> Ms. Jimenez: It has a blank for the voter to write down the volume that they produce and shipped, or imported, for the representative period.
>
> Judge Clifton: Okay. So until you get the ballots, you can't do this calculation.
>
> Ms. Jimenez: Correct.
>
> Judge Clifton: Okay. All right. Mr. Feldman, go ahead.
>
> Mr. Feldman: Do you know what the volume of the agricultural commodity is in this case; the total volume of the commodity?
>
> Ms. Jimenez: No.
>
> Mr. Feldman: Did you ever know?
>
> Ms. Jimenez: It's impossible for us to know the total volume.
>
> Mr. Feldman: So do you know how much of the agricultural commodity, by volume, was exempted?
>
> Ms. Jimenez: No, I do not.

Tr. 420-21.

Petitioner Resolute's evaluation is expressed in the following quotation, with footnotes omitted, from Petitioner Resolute's April Brief, pages 64-65:

> The statute specifies that the "majority of those persons voting for approval" must "represent a majority of the volume of the agricultural commodity." The statute does not provide for the "majority of those persons voting for approval" to "represent a majority of the volume of the agricultural commodity of those voting for approval." The difference in language and consequent meaning is plain and unambiguous, and the agency's non-conforming interpretation is due no deference. [footnote omitted]
>
> USDA never established whether the "majority of those persons voting for approval" also "represent[ed] a majority of the volume of the agricultural commodity." Instead, following the proposal and preference of the proponent group, USDA concluded that the "majority of those persons voting for approval" represented the majority of the commodity of those voting. [footnote omitted]
>
> USDA officials admitted at the hearing that they still, nineteen months later, did not know whether the persons voting for approval also represented a majority of the volume of the agricultural commodity as required by the statute. [footnote omitted]
>
> USDA could not lawfully accept the results of the referendum without satisfying the requirements of the statute. Whether the majority of the volume of the agricultural commodity was represented in the vote in favor of the check-off was unknown when the referendum was conducted, after the votes were counted, after the Final Rule was published, after the check-off was implemented, after assessments began being collected, and still. Acceptance of the referendum results without knowledge of the volume of the agricultural commodity represented by the vote is contrary to law. Implementation without satisfying the criteria of 7 U.S.C. § 7417(e)(3) is contrary to law.

from Pet'r Resolute's April Br. 64-65.

To the contrary, states AMS: The Softwood Lumber Order was implemented in the referendum vote by the most stringent method that can be used to approve an Order under the Commodity, Promotion, Research, and Information Act of 1996. *See* 7 U.S.C. § 7417(e)(3); 76 Fed. Reg. 46185, 46193 (Aug. 2, 2011); RX 35; 7 C.F.R. Part 1217.

The Secretary's interpretation is that a "majority" of persons as contemplated by the Act means a majority of persons-to-be-subject-to-an- assessment who voted; a "majority" of the volume of softwood lumber as contemplated by the Act means a majority of the-volume-of-softwood-lumber-to-be-subject-to-an-assessment that "was voted". The Secretary's interpretation of "majority" as contemplated by the Act is reasonable, in part because there is no other way to determine majority. Using his interpretation, the Secretary reported the referendum results in the Final Rule implementing the Softwood Lumber Order, including in pertinent part the following, paragraph 14.

Quoting from the Final Rule in the Federal Register (76 Fed. Reg. 46185, 46190 (Aug. 2, 2011), RX 35, 7 C.F.R. Part 1217:

> Entities that domestically ship or import less than 15 million board feet are exempt along with shipments exported outside of the United States. No entity will pay assessments on the first 15 million board feet domestically shipped or imported. The purpose of the program is to strengthen the position of softwood lumber in the marketplace, maintain and expand markets for softwood lumber, and develop new uses for softwood lumber within the United States. A referendum was held May 23 through June 10, 2011, among eligible domestic manufacturers and importers to determine whether they favor implementation of the program prior to it going into effect. Sixty-seven percent of those voting in the referendum, representing 80 percent of the volume of softwood lumber represented in the referendum, favored implementation of the program.

76 Fed. Reg. 46185, 46190 (Aug. 2, 2011). RX 35. 7 C.F.R. Part 1217.

Choice of the *De Minimis* Volume

Petitioner Resolute complains that AMS encouraged the proponent group to use a *de minimis* volume exemption to keep persons from voting against the Softwood Lumber Order. Petitioner Resolute complains that the referendum might have yielded a different result if more persons had voted, especially those persons who were not eligible to vote because their volume was less-than-15-million-board-feet during 2010 (the representative period chosen by the Secretary). Even if I were to assume Petitioner Resolute's arguments to be true, I would find that the Secretary has done nothing contrary to law, nothing arbitrary and capricious.

Petitioner Resolute does not accept 2010 as representative, when softwood lumber volumes were extraordinarily low, in part because many persons whose volumes were less-than-15-million-board-feet in 2010 would likely generate higher volumes in subsequent years and would pay assessments, after having been not eligible to vote.

Mr. Richard Garneau is the President and CEO of Resolute Forest Products, the Petitioner. Mr. Garneau testified in part as follows. Tr. 696-700.

> Mr. Feldman: Could you explain what a board foot is and how much 15 million board feet represent?
>
> Mr. Garneau: Yes. Well, I can get -- it's easy. It's 1 inch in thickness by 1 foot long. It's probably like that. It's almost 1 foot wide. So, by using this as an example you can have pretty good idea of what is a board feet of lumber.
>
> Mr. Feldman: And all the manufacturers and the importers of record, all the manufacturers in the United States producing under 15 million board feet were not permitted to vote in this referendum, is that correct?

Mr. Garneau: It's my understanding, yes.

Mr. Feldman: And in fact you were associated with one company that could not vote, that was under that threshold, right?

Mr. Garneau: Yes.

Mr. Feldman: And a typical house, how many houses could you build with 15 million board feet?

Mr. Garneau: Well, on average, and I think there are stats on this. A 2,400 square foot house needs about fifteen or sixteen thousand board feet. So, with 15 million you can build about 1,000 houses.

Mr. Feldman: About 1,000 houses. So enterprises producing enough wood to build 1,000 houses were exempted.

Mr. Garneau: You're correct.

Mr. Feldman: And therefore could not vote.

Mr. Garneau: You're correct.

Mr. Feldman: The exemption was made the same for domestic manufacturers and for importers, 15 million board feet applied to both. Is that the same thing for both?

Mr. Garneau: No, it's not the same thing. We have the company that just to give you an example and show our voice. So we have a company, we have an equity position in this company. And it is -- this company is an importer of record. But in 2010 because the demand was so depressed they were below the threshold, below the 15 million threshold and could not vote. But the

sawmill itself or this entity is -- has the capacity to produce about 17 million, 17 million board feet but was not allowed to vote because in 2010 they were below the 15 million exemption.

Mr. Feldman: Now, this use of 2010. You've been sitting through this hearing so you've heard discussion about the representative period. Could you describe the condition of the industry in the period from 2007 through 2010?

Mr. Garneau: Well, I can give you if I may a clearer picture. I think you have to go to 2005. That was the last year before the implementation of the SLA consumption of the national number in the U.S. was over 60 billion board feet. And by 2010 was about 33 or 34. That's from memory but about at that level. And it went down every year. So in 2007, `08, `09 and `10 was if I remember correctly one of the lowest in terms of consumption.

Mr. Feldman: Lowest in consumption during that period and one of the lowest in consumption over what period of time?

Mr. Garneau: Well, since basically I was born, since the end of the Second World War.

Mr. Feldman: So, the Department shows 2010 to be a representative period. And it is the year which may have been the lowest consumption since the Second World War.

Mr. Garneau: Yes. And I think that based on our own equity ownership in this company it's -- if you go back this company was exporting more than the exemption. So if the period would have ended different this company would not have been declared non-eligible.

Tr. 696-700.

The Secretary of Agriculture chose less-than-15-million-board-feet as the *de minimis* volume. *See* 7 U.S.C. § 7415(a) (Exemptions).Those persons whose volume during "the representative period" was regarded as *de minimis* would not vote in the referendum, because they would not, so long as their volume did not increase to a volume above *de minimis*, be subject to an assessment. The voting is done "among persons to be subject to an assessment" . . . 7 U.S.C. § 7417(a)(1).

The Secretary of Agriculture made a practical choice when he divided those persons who would be subject to an assessment (volume of 15 million board feet or higher) from those persons who would not be subject to an assessment (volume of less-than-15-million-board-feet). The practical choice was based on a calculation that sufficient assessment income to support an effective softwood lumber order would be generated if a 15 million board foot exemption were used. So the Secretary chose less-than-15-million-board-feet to be the *de minimis* volume. The Secretary extended this same exemption to those persons who would be assessed under the program: the first 15 million board feet would not be assessed.

Marketing orders typically include some exemption: often the smallest operators are not required to comply with marketing order requirements. Exemption from paying assessments under the Softwood Marketing Order is based on volume (not value, not weight, not quality). The Act specifies volume. 7 U.S.C. § 7415. [A board foot is a board foot: Petitioner Resolute is not required to pay a higher assessment based on the quality of the lumber it imports, such as black spruce from central Canada from the boreal forest.] The Secretary had the authority to choose the volume of less-than-15-million-board-feet to be the *de minimis* quantity. 7 U.S.C. § 7415(a). The Secretary's choice (based on a projection that, per entity, that volume of softwood lumber could be exempt from assessment, and there would remain adequate revenue from assessments to operate the order), is reasonable and entirely within the Secretary's discretion. 7 U.S.C. § 7415. Petitioner Resolute would apparently prefer that *de minimis* be very small, or inconsequential, or at least not exclude so many entities from voting. Such a preference is inadequate to challenge the validity of the Secretary's choice.

AGRICULTURAL COMMODITIES PROMOTION ACT

The Representative Period

Petitioner Resolute proved that 2010 was a year in which softwood lumber production was down. *See* ¶¶ 16 & 17. Petitioner Resolute proved that using 2010 as the Representative Period kept ballots from being sent to many entities that would probably be assessed in future years (by virtue of increasing volumes). The Secretary chose 2010 because it was recent. [The voting occurred in 2011.] (The one-year Representative Period should not be confused with the three-year period used for calculations required by the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA); *see* ¶ 22.) The choice of a recent year was reasonable and entirely within the Secretary's discretion. 7 U.S.C. § 7417. The Secretary has the authority to determine the representative period. 7 U.S.C. § 7417(a).

Impact on Small Entities

The Secretary of Agriculture complied with the requirements of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA), ensuring that small businesses would not be disproportionately burdened by the Softwood Lumber Order. 76 Fed. Reg. 46185, 46189 (Aug. 2, 2011). RX 35. 7 C.F.R. Part 1217. Some small entities [as defined by the Small Business Administration in 13 C.F.R. Part 121], are subject to assessment (as is generally true, in my experience, with marketing orders). But the impact on the small entities [as defined by the Small Business Administration] is less burdensome because neither they nor any other entity pays assessments on the first 15 million board feet shipped or imported. Some small entities have a low enough volume that they will pay no assessments: entities that ship or import less than 15 million board feet are exempt along with shipments exported outside of the United States. Not all entities considered small in accordance with the Small Business Administration in 13 C.F.R. Part 121 need be exempt. The *de minimis* volume need not match what is considered a small entity in accordance with the Small Business Administration.

Petitioner Resolute proved a disparity between domestic entities (considered small under the Small Business Administration guidelines if shipping less than 25 million board feet per year), and importer entities.

Importers of fewer than 15 million board feet may, in actuality, be large companies. Mr. Garneau testified that a Canadian sawmill, one with which he is familiar, generating 70 million board feet per year (not a small entity) could have an import volume of less than 15 million board feet per year. Tr. 790. (Importers of record, first handlers, subject to assessment, are deemed to be manufacturers through the application of 7 C.F.R. § 1217.14. Thus, 7 C.F.R. § 1217.11 must be read together with 7 C.F.R. § 1217.14. *See* Tr. 909-16.) When Petitioner Resolute ships to the United States, it is the importer of record for almost all of its lumber mills (except for some volume sold through the wholesalers). Tr. 792. Another disparity arises from the variety of business structuring: if one entity operates 3 sawmills, that entity's volume is the volume of all 3 sawmills combined, which, hypothetically, could keep it from being a small entity. The calculation of whether a small entity is involved would be different if each of those sawmills is operated by a different entity: hypothetically, each of the 3 might be considered a small entity. The comparison of one softwood lumber business to others is neither precise nor exact. The Secretary, to meet his obligation to determine the impact on small entities, need concern himself only with domestic entities; the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA) applies to businesses within the United States. The Secretary uses the tax I.D. number regarding assessments and exemptions. Tr. 1226. The Secretary complied with the Regulatory Flexibility Act (RFA).

Referendum Ballots

Resolute proved, through the testimony of Dr. Anna Greenberg, that survey techniques that include follow-up and reminders will probably yield a higher response. Dr. Greenberg's Ph.D. is in political science, and she specialized in political behavior, data analysis and survey research methodology at the University of Chicago. Tr. 799. Dr. Greenberg has extensive work experience using census and survey and voting methodology, and I accepted Dr. Greenberg as an expert witness in census, survey, and voting methodology. Tr. 802. Dr. Greenberg characterizes the referendum as a census. She explained that a census is a kind of survey where you gather information from every single unit, could be a person, could be a company, in the population that you're trying to represent. Tr. 804. Dr. Greenberg explained that one can look at the response coming back in from ballots sent out, to analyze the

characteristics of the ballots returned and the characteristics of those not returned: Is there some group that's systematically not returning their ballots? Tr. 812-13. Dr. Greenberg testified in part, as follows. Tr. 812-16.

> Mr. Feldman: How do you go about making sure that the results are representative?
>
> Dr. Greenberg: Well, when you get the results back, and in the case of a census it's actually pretty easy because you know who you've sent the ballots to. You look at the response coming in and you look at it and say well, I know there are known characteristics of this population. A certain percentage lives in a certain part of Canada or the U.S. Any range of different things you might know about these companies. And then you can see as the ballots are returned where are they coming from. And you can see is there some bias in the return rate and is it systematic. Is there some group that's systematically not returning their ballots.
>
> Mr. Feldman: Is there an expectation in the OMB guidelines at least as to being able to replicate the results?
>
> Dr. Greenberg: Yes. The OMB says that you should disclose enough information about your data collection so that the results can be replicated.
>
> Mr. Feldman: And have results been published or made available here that would enable you to replicate these results?
>
> Dr. Greenberg: No.
>
> Mr. Feldman: What kinds of information are missing?
>
> Dr. Greenberg: Well, very narrowly, just focusing on the 311 you would need to know who those ballots were

mailed to. If you -- there is a part -- what they say in the OMB guidelines is there may be some issues around confidentiality or promises of anonymity so you actually could have other information that would help you. So knowing the percentage that returned that were from say the west or the east or the percentage that returned that was from -- were importers or domestic producers. So even if you didn't have the specific names if you knew something about the characteristics of the respondents you wouldn't necessarily be able to replicate it but at least if you were going to go out and make your own list you'd have a sense of what you needed to be doing.

Mr. Feldman: And would it be important to know who returned the ballots?
Dr. Greenberg: Yes.

Mr. Feldman: Why?

Dr. Greenberg: Because you -- well, first if you want to replicate the study you need to know who it was sent to. And it would be helpful to know who returned it so that you can understand the kinds of biases, the non-response bias. If it's systematic you want to make sure that you correct for the non-response bias.

Mr. Feldman: How would you know whether it's systematic?

Dr. Greenberg: You can look for patterns. We usually know a lot about our populations. You know, there's very little new research under the sun. And so you look at the characteristics. And there are certain things that are known. You know from your list how many companies are from -- are importers and how many are domestic producers. So you know when the data come back if they're matching up or not.

Tr. 812-16.

AMS does not agree that the referendum was a census. Neither do I. One technique for better response in a census is to extend the time for response (keep the survey open) and then make contact with those who did not respond (go back into the field and gather more data) in order to a more complete overall response. Tr. 806-08. For the referendum, those techniques would have required departure from the announcement of the referendum (published in the Federal Register) and thus could have made the voting results suspect. Proposed rule and referendum order, 76 Fed. Reg. 22757, especially 22757 (April 22, 2011), RX 16. Dr. Greenberg observed that the announcement of the referendum was not short and not at the top and not easy to understand. Tr. 826-30. Dr. Greenberg observed, " . . . it really buries the lead and it buries the fact that there's going to be a referendum to the bottom and you've got to wade through this. And certainly the Federal Register, it would take a long time to understand what was going on from that." Tr. 830. *See* RX 16, Proposed rule and referendum order, 76 Fed. Reg. 22757, especially 22757 (April 22, 2011). I disagree with Dr. Greenberg. Information published in the Federal Register is difficult, yes, but here the information is clear from the very first column! The dates of the voting period are very easy to see: "**DATES**: The voting period is May 23 through June 10, 2011." Above that, very clearly in about six sentences, at the very beginning of the Federal Register publication, is clearly and concisely stated: what the rule proposes; that it would be financed by an assessment; what the assessment rate would be; who would pay it; and that "(t)he program would be implemented if it is favored by a majority of those voting in the referendum who also represent a majority of the volume of softwood lumber represented in the referendum."

The press release, RX 18, also dated April 22, 2011, is clear and sufficiently "urgent."

The Secretary was not required to conduct any referendum initially. If no referendum had been conducted initially, a referendum would have been required not later than three (3) years after assessments first began. 7 U.S.C. § 7417(b). Assessments first began January 1, 2012. 76 Fed. Reg. 46185, esp. 46185 (Aug. 2, 2011); RX 35. 7 C.F.R. Part 1217. Because the Secretary conducted an initial referendum, a subsequent referendum is required not later than seven (7) years after assessments

first began. 7 U.S.C. § 7417(c). If Petitioner Resolute is not content to wait for 7 years from January 1, 2012, there is the option in 7 U.S.C. § 7417(c): The Secretary shall conduct a subsequent referendum - - (3) at the request of 10 percent or more of the number of persons eligible to vote under subsection (b)(1) of this section.

Self Help

The degree to which the Softwood Marketing Order is a "self help" program is debatable and goes to the issue of whether the proponents, including the Blue Ribbon Commission, may have misled those who would later vote in a referendum. In describing orders such as the Softwood Marketing Order, AMS uses the term "self-help"; the following excerpt is from the AMS Brief, filed June 7, 2013, Introduction, at pages 1-2.

> The commodity check-off is a self-help, government speech concept, for strengthening a commodity industry's position in the market place to increase demand for its commodity, and to develop demand in new and existing markets and new uses for a commodity. Commodity promotion programs have a long history dating back as far as 1880, when states enacted laws to enable commodity groups to receive state funds to promote commodities. Because the amount of money from states was modest, commodity programs organized by various commodity groups began as voluntary, thus creating the "free rider" problem where persons who failed to pay assessments reaped the benefits of the program. The programs therefore did not achieve their full potential. As the concept of generic promotion programs evolved, Congress began enacting specific commodity statutes, and in 1996, it enacted a generic statute entitled the Commodity, Promotion, Research, and Information Act of 1996, 7 U.S.C. 7411-7425.[2] Under this statute any agricultural commodity

[2] *See Commodity Advertising & Promotion*, edited by Kinnucan, Thompson, and Chang, 1992 Iowa State University Press, Ames, Iowa 50010; *see also* 7 U.S.C. §§ 7411-7425. [Original citation as appears in Brief; no changes made by the Editor.]

> group can submit a proposed Order to the Secretary, and if the Secretary finds that it is consistent with and will effectuate the purpose of the statute, the Secretary will publish the proposed Order in the *Federal Register* and give due notice and opportunity for public comment on the proposed Order.

AMS Br., filed June 7, 2013, Introduction, at 1-2.

Proponent Groups' Statements Prior to Referendum

Promotional materials prepared and distributed prior to the Referendum by the Blue Ribbon Commission, a proponent group, contained statements that are wrong. *See, for example*, PX 10; Tr. 247-56. Even though the ideas and the objectives and the drafting and the projects may arise from private parties in the softwood lumber industry, the U.S. Secretary of Agriculture oversees and tightly controls the Softwood Lumber program and has veto power; and the authority to collect the assessments comes from the U.S. Government because the assessments are taxes, or government-compelled subsidies, or at least a form of government regulation. Compelled support of government - - even those programs of government one does not approve - - is of course perfectly constitutional, as every taxpayer must attest:

> "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.

[*Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000)].
Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 559 (2005), cited in *Gerawan Farming, Inc.*, 67 Agric. Dec. 45, 56 (U.S.D.A. 2008),

available at http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/gerawan.pdf.

The Blue Ribbon Commission and other industry groups would soon learn how controlling the Secretary is required to be. For example, the "reTHINK WOOD" proposed communication was edited by the Secretary (RX 50, p. 189). Edits included striking language comparing construction using wood, to construction using steel, or construction using concrete, because the proposed language could be perceived as disparaging to other commodities. RX 50, p. 189. Ms. Maureen Pello is a Marketing Specialist, Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture. Ms. Pello testified in part as follows. Tr. 1117-19.

> Mr. Martin: Ms. Pello.
>
> Ms. Pello: Yes.
>
> Mr. Martin: If you look at the same page Judge Clifton asked you to, Page 189 -
> [RX 50]
>
> Ms. Pello: Yes.
>
> Mr. Martin: - didn't you also make some other changes to that and would you explain for the record why you made those changes?
>
> Ms. Pello: Yes. In the fourth paragraph under Wood is Renewable, there was a sentence that was provided to me that said unlike other products that deplete the earth's resources, wood is the only major building material that grows naturally and is renewable. And I had suggested taking out language that talked about other products depleting the earth's resources, and also language where you're making a statement that it's absolute that wood is the only building material. Because, you know, sometimes hard absolutes like that are difficult to prove.

So, I suggested, you know, staying away from that absolute.

Mr. Martin: And how about the first sentence? What was your rationale behind that change?

Ms. Pello: Oh, North American Wood Products?

Mr. Martin: "Wood is renewable unlike other products that deplete the earth's resources," I see that's stricken.

Ms. Pello: Yes. You know, that could be perceived as disparaging to other commodities. So, I had suggested taking that out and just stating the positive. Wood grows naturally and is renewable.

Mr. Martin: And, Ms. Pello, if you look at the next paragraph entitled "Using Wood Helps Induce [*sic* - - should read Reduce, Tr. 1118] Environmental Impact" --

Ms. Pello: Yes.

Mr. Martin: - I see you also struck out some language in there. Would you explain for the record so it's clear, why that language was stricken?

Ms. Pello: Yes, that language would have read "Wood products are better for the environment than steel or concrete." And, again, that could be perceived as being disparaging to their competing industries. So, I suggested taking out that comparison and just stating wood products need less energy across their life cycle. They're responsible for less air and water pollution.

Mr. Martin: And did you make any other changes in this document?

Ms. Pello: Yes. Do you want me to go through them all?

> Mr. Martin: No, I don't think it's necessary. I just want the record to be clear that this document contained a number of changes.

Tr. 1117-19.

Industry groups lose some autonomy when regulated by a marketing order; they gain the enforceability of assessments.

Findings of Fact

1. Resolute Forest Products (formerly "AbitibiBowater, Inc.") is an American company, incorporated under the laws of Delaware.

2. When Resolute Forest Products ships softwood lumber to the United States, it is the importer of record for almost all of its lumber mills (except for some volume sold through the wholesalers). Tr. 792. Resolute Forest Products thereby subjects itself to the Softwood Lumber Order.

3. The Softwood Lumber Order and its authorizing statute, as-written and as-administered, are in accordance with law. The authorizing statute is The Commodity, Promotion, Research, and Information Act of 1996, 7 U.S.C. §§ 7411-7425. The Order's full name is Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order. 7 C.F.R. Part 1217.

Conclusion

In light of *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and *Gerawan Farming, Inc.*, 67 Agric. Dec. 45 (U.S.D.A. 2008), *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/gerawan.pdf, Resolute Forest Products's "First Amended Petition To Terminate Or Amend USDA's Softwood Marketing Order Or, In The Alternative, To Exempt Petitioner From USDA's Softwood Marketing Order," filed on June 22, 2012, must be denied.

AGRICULTURAL COMMODITIES PROMOTION ACT

ORDER

Resolute Forest Products' First Amended Petition is DENIED.

Finality

This Decision shall be final and effective 35 days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service. *See* 7 C.F.R. §§ 900.64 and 900.65.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

APPENDIX A

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	
Resolute Forest Products	12-0040
Petitioner	**Additional Procedural History**

Exhibits

The following Exhibits were admitted into evidence at the hearing.

PX 1 through PX 28. Tr. 979 (January 31, 2013).

RX 1 through RX 52. Tr. 979 (January 31, 2013).

ALJX 1 through 3. Tr. 12 (January 28, 2013); Tr. 215 (January 29, 2013); and Tr. 621 (January 30, 2013).

Briefs

Petitioner Resolute timely filed its opening brief on April 18, 2013, having delivered "four hard copies by courier to the Hearing Clerk." Inexplicably, very little of that opening brief was present in the Hearing Clerk's record file when I checked a year later: only the cover page, Table of Contents, and Table of Authorities. Petitioner Resolute graciously filed its opening brief again, on April 14, 2014, on the same day that I alerted counsel by email that the brief was

missing from the Hearing Clerk record. [I had been working from electronic versions of the opening brief, circulated to me and opposing counsel nearly a year earlier.] I refer to this brief as Petitioner Resolute's April brief.

Respondent AMS timely filed its only brief on June 7, 2013.

Petitioner Resolute timely filed its reply brief on July 12, 2013.

Witnesses

The 4-day Hearing was held January 28-31, 2013, in Washington, District of Columbia. The 1275-page transcript is in 4 volumes. The transcript pages are shown below for testimony of witnesses.

Day 1, January 28 (Mon), 2013, pages 1-208:

Ms. Sonia Jimenez (Tr. 28-186), called by Resolute
[Ms. Jimenez: Director, Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture]

Day 2, January 29 (Tues), 2013, pages 209-617:

Ms. Sonia Jimenez (Tr. 212-575), called by Resolute

Day 3, January 30 (Wed), 2013, pages 618-953:

Ms. Sonia Jimenez (Tr. 622-670), called by AMS for cross-examination

Mr. Richard Garneau (Tr. 673-795), called by Resolute
[Mr. Garneau: President and CEO of Resolute Forest Products]

Dr. Anna Greenberg (Tr. 796-905), called by Resolute
[Dr. Greenberg: Senior Vice President, Greenberg, Quinlan, Rosner Research]

Ms. Sonia Jimenez (Tr. 909-918), recalled by Judge Clifton

Day 4, January 31 (Thur), 2013, pages 954-1275:
Ms. Maureen Pello (Tr. 967-1231), called by AMS

AGRICULTURAL COMMODITIES PROMOTION ACT

[Ms. Pello: Marketing Specialist, Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture]

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

HORNE v. UNITED STATES DEPARTMENT OF AGRICULTURE.*
No. 10-15270.
Court Decision.
Filed May 9, 2014.

[Cite as: 750 F.3d 1128 (2014)].

AMAA – Civil penalties – Handler – Marketing orders – Monetary exaction – Raisin Marketing Order – Takings.

United States Court of Appeals,
Ninth Circuit.

On remand from the Supreme Court of the United States, the Court of Appeals held that the raisin Marketing Order's reserve requirements, including its provisions that authorize the Secretary to sanction those who fail to comply, did not constitute a taking under the Fifth Amendment. In so holding, the Court of Appeals found that Plaintiffs had standing to challenge the monetary penalty they had been assessed for noncompliance with the Marketing Order and that such penalty did not constitute a physical per se taking.

OPINION OF THE COURT

MICHAEL DALY HAWKINS, Senior Circuit Judge,
delivered the opinion of the Court.

To ensure stable market conditions, the Secretary of Agriculture, administering a complex regulatory program, requires California producers of certain raisins to divert a percentage of their annual crop to

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* **Editor's Note:**
This case was reversed by the Supreme Court in *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015), *available at* http://www.supremecourt.gov/opinions/14pdf/14-275_c0n2.pdf (last visited Feb. 2, 2016). The 2015 Supreme Court case will be included in Volume 74 of *Agriculture Decisions*.

a reserve. The percentage of raisins diverted to the reserve varies annually according to that year's crop output. Subject to administrative and judicial review, the Secretary can impose a penalty on producers who fail to comply with the diversion program. The program's goal is to keep raisin supply relatively constant from year to year, smoothing the raisin supply curve and thus bringing predictability to the market for producers and consumers alike. The diverted raisins are sold, oftentimes in noncompetitive markets, and raisin producers are entitled to a pro rata share of the sales proceeds less administrative costs. In some years, this "equitable distribution" is significant; in other years it is zero.

Eschewing any Commerce Clause or regulatory takings theory, Plaintiffs–Appellants Marvin and Laura Horne ("the Hornes") challenge this regulatory program and, in particular, the Secretary's ability to impose a penalty for noncompliance, as running afoul of the Takings Clause of the Fifth Amendment.[1] Specifically, the Hornes argue Defendant–Appellee the Department of Agriculture ("the Secretary"), charged with overseeing the diversion program, works a constitutional taking by depriving raisin producers of their personal property, the diverted raisins, without just compensation. The Secretary defends the constitutionality of the reserve requirement. Concluding the diversion program does not work a constitutional taking on the theory advanced by the Hornes, we affirm the judgment of the district court.[2]

Factual and Procedural Background

A.

Raisin prices rose rapidly between 1914 and 1920, peaking in 1921 at $235 per ton. This surge in prices spurred increased production, which in turn caused prices to plummet back down to between $40 and $60 per

[1] Collectively referred to as "the Hornes," the Plaintiffs–Appellants are Marvin and Laura Horne, d/b/a Raisin Valley Farms (a California general partnership), and d/b/a Raisin Valley Farms Marketing Association (a California unincorporated association), together with their business partners Don Durbahn and the Estate of Rena Durbahn, collectively d/b/a Lassen Vineyards (a California general partnership).

[2] In doing so, we note the Court of Federal Claims has also upheld the constitutionality of this regulatory program. *See Evans v. United States*, 74 Fed.Cl. 554, 558 (2006), *aff'd,* 250 Fed.Appx. 321 (Fed.Cir.2007) (unpub.).

ton, even while production continued to expand. As a result of this growing disparity between increasing production and decreasing prices, the industry became "compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production." *Parker v. Brown*, 317 U.S. 341, 364, 63 S.Ct. 307, 87 L.Ed. 315 (1943); *see id.* at 363–64 & nn. 9–10, 63 S.Ct. 307; *see also Zuber v. Allen*, 396 U.S. 168, 174–76, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969) (describing market conditions). *See generally* Daniel Bensing, *The Promulgation of Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L.Rev. 3 (1995) (describing the history of the AMAA and the structure of the regulatory program it authorizes).

This market upheaval pervaded the entire agriculture industry, prompting Congress to enact the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* ("AMAA"), to bring consistency and predictability to the Nation's agricultural markets. Pursuant to the AMAA, the Department of Agriculture implemented the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Part 989 ("Marketing Order"), in 1949 in direct response to the market conditions described in *Parker*.

The Marketing Order ensures "orderly" market conditions by regulating raisin supply. 7 U.S.C. § 602(1). The Secretary has delegated to the Raisin Administrative Committee ("RAC") the authority to set an annual "reserve tonnage" requirement, which is expressed as a percentage of the overall crop.[3] *See* 7 C.F.R. §§ 989.65–66. The remaining raisins are "free tonnage" and can be sold on the open market. The reserved raisins are diverted from the market to smooth the peaks of the raisin supply curve. *Id.* at § 989.67(a). To smooth the supply curve's valleys, reserved raisins are released when supply is low. By varying the reserve requirement annually, the RAC can adapt the program to address changing growing and market conditions. For example, in the 2002–03 and 2003–04 crop years at issue here, the reserve percentages were set at

[3] The RAC is currently comprised of forty-seven industry-nominated representatives appointed by the Secretary, of whom thirty-five represent producers, ten represent handlers, one represents the cooperative bargaining association, and one represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, and 989.30.

forty-seven percent and thirty percent of the annual crop, respectively.

The operation of the Marketing Order turns on a distinction between "producers" and "handlers." A "producer" is a "person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins...." 7 C.F.R. § 989.11. By contrast, included in the definition of a "handler," *id.* at 989.15, is any person who "stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins," *id.* at 989.14.[4] Raisin producers convey their entire crop to a handler, receiving a prenegotiated field price for the free tonnage. *Id.* at § 989.65. Handlers, who sell free tonnage raisins on the open market, bear the obligation of complying with the Marketing Order by diverting the required percentage of each producer's raisins to "the account of the [RAC]." *Id.* § 989.66(a). Handlers must also prepare the reserved raisins for market, and the RAC compensates them for providing this service. *Id.* at § 989.66(f).

The RAC tracks how many raisins each producer contributes to the reserve pool. When selling the raisins, the RAC has a regulatory duty to sell them in a way that "maxim[izes] producer returns." *Id.* at § 989.67(d)(1). The RAC, which receives no federal funding, finances its operations and the disposition of reserve raisins from the proceeds of the reserve raisin sales. Whatever net income remains is disbursed to producers, who retain a limited equity interest in the RAC's net income derived from reserved raisins. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h).

B.

Dissatisfied with what they view as an out-dated regulatory regime, the Hornes set out to restructure their raisin operation such that the Marketing Order would not operate against them. Put another way, the

[4] Specifically, any person who "stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins" is a "packer" of raisins, and all packers are handlers. 7 C.F.R. §§ 989.14 & 989.15. These definitions apply only to activities taking place within "the area," which simply refers to the State of California. *Id.* at § 989.4. Additionally, any producer who sorts and cleans his own raisins in their unstemmed form is not a packer with respect to those raisins. 7 C.F.R. § 989.14.

Hornes came up with a non-traditional packing program which, in their view, the Secretary had no authority to regulate. Instead of sending their raisins to a traditional packer, against whom the reserve requirement of the Marketing Order would clearly operate, the Hornes purchased their own handling equipment to clean, stem, sort, and package raisins. The Hornes then performed the traditional functions of a handler with respect to the raisins they produced. The Hornes believed that, by cleaning, stemming, sorting, and packaging their own raisins, they would not be "handlers" with respect to the raisins they produced. In addition, the Hornes performed the same functions for a number of other producers for a per-pound fee. Similarly, by not acquiring title to the raisins of other producers but rather charging those producers a per-pound fee, the Hornes believed they did not fall within the regulatory definition of "handler" with respect to the third-party producers' raisins. With this set-up, the Hornes believed the requirements of the Marketing Order would not apply to them, relieving them of the obligation to reserve any raisins.[5]

C.

The Secretary disagreed with the Hornes and applied the Marketing Order to their operation with respect to the raisins grown both by the Hornes and by third-party producers. At the end of protracted administrative proceedings, a U.S.D.A. Judicial Officer found the Hornes liable for numerous regulatory violations and imposed a monetary penalty of $695,226.92.[6] The Hornes then sought review of that final

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[5] The government contends the Hornes lack standing to assert a takings defense with respect to raisins they never owned, i.e., raisins produced by third parties. The government concedes the Hornes have standing to assert a takings defense with respect to raisins they produced themselves. We decline to decide what rights under California law a non-title holder has to challenge the "taking" of property in his possession. *See Vandevere v. Lloyd*, 644 F.3d 957, 963 (9th Cir. 2011) (holding that for the takings claim "whether a property right exists ... is a question of state law") (emphasis omitted). Here, it is enough to note the Hornes clearly have standing to assert a taking defense with respect to the raisins they produced themselves, entitling them to a decision on the merits for at least that property. Because we rule against the Hornes on the merits, we need not further address the standing issue.

[6] The Judicial Officer ordered the Hornes to pay (1) $8,783.39 in overdue assessments for the 2002–03 and 2003–04 crop years, (2) $483,843.53 as the dollar equivalent for the raisins not held in reserve, and (3) $202,600 as a civil penalty for failure to comply with the Marketing Order. The overdue assessments in their entirety and $25,000 of the civil

agency action in federal district court pursuant to 7 U.S.C. § 608c(14)(B). In district court, the Hornes alleged they were not "handlers" within the meaning of the regulation and further alleged the agency's order violated the Takings Clause and the Eighth Amendment's prohibition against excessive fines. The district court granted summary judgment in favor of the Secretary on all counts. *See Horne v. U.S. Dep't of Agric.*, No. CV–F–08–1549 LJO SMS, 2009 WL 4895362 (E.D. Cal. filed Dec. 11, 2009).

The Hornes appealed to this court. We affirmed the district court with respect to the Hornes' statutory claims, holding that even if the AMAA's definitions of "handler" and "producer" are ambiguous, the Secretary's application of the Marketing Order to the Hornes was neither arbitrary nor capricious, and it was supported by substantial evidence. *Horne v. U.S. Dep't of Agric.,* 673 F.3d 1071, 1078 (9th Cir. 2011) ("*Horne I* "). We also affirmed the district court's grant of summary judgment in favor of the Secretary on the Eighth Amendment claim. *Id.* at 1080–82. And we held we lacked jurisdiction over the Fifth Amendment claim. Specifically, we held the Hornes brought their takings claim as producers rather than handlers. Because the AMAA did not in our view displace the Tucker Act with respect to a producer's claim, we held that jurisdiction over the takings claim fell with the Court of Federal Claims rather than the district court. *Id.* at 1078–80.

The Hornes sought and the Supreme Court granted certiorari with respect to the jurisdictional issue.[7] Reversing our judgment on that issue alone, the Supreme Court held (1) the Hornes brought their takings claim

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penalty were imposed for violations of the Marketing Order unrelated to the reserve requirement. *See, e.g.,* 7 C.F.R. § 989.73 (requiring handlers to file certain reports); *id.* at § 989.77 (requiring handlers to allow the Agricultural Marketing Service access to records). The balance of the penalty and assessments pertain directly to the Hornes' failure to reserve raisins.

[7] Because the Hornes' certiorari petition only challenged our disposition of the Hornes' Fifth Amendment claim, *Horne I* is the final judgment of the Hornes' Eighth Amendment and statutory claims. Accordingly, because the statutory claims are no longer at bar, the Hornes concede they no longer challenge the Judicial Officer's imposition of $8,783.39 in overdue assessments or the related $25,000 in civil penalties. The Hornes' challenge is confined to the remaining dollar value equivalent and its attendant civil penalty (hereinafter, "the penalty"), because these are directly traceable to the Hornes' failure to reserve raisins. *See supra* n. 5.

as handlers, and (2) the Hornes, as handlers, may assert a constitutional defense to the underlying agency action in district court. *Horne v. Dep't of Agric.*, ——U.S. ——, 133 S.Ct. 2053, 2061, 2062, 186 L.Ed.2d 69 (2013). (The Supreme Court reserved the question of whether the Hornes could have sought relief in the Court of Federal Claims, instead holding only that handlers could obtain judicial review in district court. *Id.* at 1062 n.7.) The Supreme Court remanded for a determination of the merits of the Hornes' takings claim, which, having received supplementary briefing and additional oral argument, we now decide.

Standard of Review

We review de novo a district court's grant of summary judgment in a case involving a constitutional challenge to a federal regulation. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 962 (9th Cir. 2008); *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006).

Standing

The Secretary contends the Hornes lack standing to challenge the portion of the penalty attributable to the sale of any raisins produced by third-party firms, then handled by the Hornes (the "third-party raisins"). The Secretary argues the Hornes never owned these raisins and so cannot challenge their seizure.[8] We find this argument unpersuasive.

As the Supreme Court made clear, the injury suffered by the Hornes is not the obligation to reserve raisins for the RAC (which, of course, the Hornes did not do), but rather to pay the penalty imposed for the Hornes' failure to comply with the Marketing Order. *Horne*, 133 S.Ct. at 2061 n. 4. Thus, the government's contention that the Hornes would not have standing to challenge a government seizure of the third-party raisins (a seizure which, of course, never happened) is irrelevant to the standing inquiry here.[9]

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[8] The Secretary concedes the Hornes have standing to challenge the remainder of the penalty.

[9] Additionally, we doubt the government's contention that the Hornes would lack standing to challenge a seizure of property they held in bailment. In an analogous situation, we have held that individuals lacking an ownership interest in a given piece of property have standing to challenge the seizure of that property. *See United States v.*

Instead, we analyze whether the Hornes have standing to challenge the penalty. A monetary penalty is an actual, concrete and particularized injury-in-fact. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir.2006) (citing *Cent. Ariz. Water Conserv. Dist. v. EPA*, 990 F.2d 1531, 1537 (9th Cir.1993)); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The need to pay a penalty is obviously traceable to its imposition, and a favorable merits determination in this litigation would redress the Hornes' alleged injury, thereby satisfying the *Lujan* requirements. *See Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130. We thus hold the Hornes have standing to bring this constitutional challenge.

Constitutional Claim

The Takings Clause does not prohibit the government from taking property for public use; rather, it requires the government to pay "just compensation" for any property it takes. U.S. Const. amend. V. Thus, a takings challenge follows a two-step inquiry. First, we must determine whether a "taking" has occurred; that is, whether the complained-of government action constitutes a "taking," thus triggering the requirements of the Fifth Amendment. If so, we move to the second step and ask if the government provided just compensation to the former property owner. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32, 235–36, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

However, before turning to the first step of this formula, we must address a threshold issue and identify precisely which property was allegedly taken from the Hornes.

A.

$191,910 in U.S. Currency, 16 F.3d 1051, 1057 (9th Cir.1994) ("In order to contest a forfeiture, a claimant need only have some type of property interest in the forfeited items. This interest need not be an ownership interest; it can be any type of interest, including a possessory interest."), *superseded on other grounds by statute as stated in United States v. $80,180.00*, 303 F.3d 1182, 1184 (9th Cir.2002). In any event, because we hold the Hornes have established standing as the subjects of the penalty, we need not confront this question.

The Hornes declined to comply with the reserve requirement of the Marketing Order; at no time did the Hornes, either as producers or as handlers, ever physically convey raisins to the RAC. Instead, the Secretary imposed the penalty on the Hornes for their failure to comply with the Marketing Order. In general, the imposition and collection of penalties and fines does not run afoul of the Takings Clause. *See Koontz v. St. Johns River Water Management District*, —— U.S. ——, 133 S.Ct. 2586, 2601, 186 L.Ed.2d 697 (2013) (listing cases). Here, however, the Hornes link the Secretary's imposition of a penalty to a specific governmental action they allege to be a taking. In effect, the Hornes argue the constitutionality of the penalty rises or falls with the constitutionality of the Marketing Order's reserve requirement.

We agree that the penalty cannot be analyzed without reference to the reserve requirement, and we find *Koontz* instructive on this point. In *Koontz*, a permitting agency refused to grant a developer a building permit until the developer funded offsite environmental impact mitigation works. 133 S.Ct. at 2593. The developer sued, arguing the permitting agency's conditions for obtaining a permit violated the "nexus and rough proportionality" rule of *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).[10] The Supreme Court of Florida declined to apply *Nollan* and *Dolan*, because in those cases the permitting agencies granted the relevant permit subject to a condition subsequent. The Florida court did not believe *Nollan* and *Dolan* would apply to situations in which the permitting agency refused to issue a permit until the permittee met a condition precedent. The Supreme Court reversed, holding the distinction between conditions precedent and subsequent constitutionally irrelevant in this context. *See id.* at 2596.

Relevant to this case, *Koontz* confronts the issue of how to analyze a takings claim when a "monetary exaction," rather than a specific piece of property, is the subject of that claim. *Koontz* distinguished *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451

[10] We discuss *Nollan* and *Dolan* in more detail in Section D.

(1998), by noting that in *Koontz*, "unlike *Eastern Enterprises*, the monetary obligation burdened petitioner's ownership of a specific parcel of land." *Koontz*, 133 S.Ct. at 2599; *accord id.* at 2600 ("The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property."). This direct linkage between the monetary exaction and the piece of land guided the Court to invoke the substantive takings jurisprudence relevant to the *land* for the purpose of determining whether the related *monetary exaction* constituted a taking. *Id.*

Here, the Secretary specifically linked a monetary exaction (the penalty imposed for failure to comply with the Marketing Order) to specific property (the reserved raisins). The Hornes faced a choice: relinquish the raisins to the RAC or face the imposition of a penalty. There is no question the monetary exaction is linked to specific property because the Judicial Officer's order requires the Hornes to repay the market value of the unreserved raisins (plus an additional penalty for non-compliance). Because the Marketing Order is structured in this way, we follow *Koontz* to analyze the constitutionality of the penalty imposed on the Hornes against the backdrop of the reserve requirement. If the Secretary works a constitutional taking by accepting (through the RAC) reserved raisins, then, under the unconstitutional conditions doctrine, the Secretary cannot lawfully impose a penalty for non-compliance. But if the receipt of reserved raisins does not violate the Constitution, neither does imposition of the penalty. *See id.* at 2596 (discussing the unconstitutional conditions doctrine).[11]

B.

We return to the task of determining whether the imposition of the penalty for failure to comply with the reserve requirement constitutes a taking. A "paradigmatic taking" occurs when the government appropriates or occupies private property. *Lingle v. Chevron U.S.A., Inc.*,

[11] Contrary to the Hornes' suggestion, however, we read *Koontz* only to say this much. The Hornes argue *Koontz* somehow substantively altered the doctrinal landscape against which we evaluate takings claims. We disagree. *Koontz* simply clarifies the range of takings cases in which *Nollan* and *Dolan* provide the rule of decision. *See* 133 S.Ct. at 2598 (declining to address merits of petitioner's claim under *Nollan* and *Dolan*); *id.* at 2602–03 (declining to alter or overrule the holdings of *Nollan* and *Dolan*).

544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). *Lingle* gives as an example of this sort of taking the government's wartime seizure of a coal mine. *Id.; see United States v. Pewee Coal Co.,* 341 U.S. 114, 115–16, 71 S.Ct. 670, 95 L.Ed. 809 (1951). Because the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account, the Hornes cannot—and do not—argue they suffered this sort of "paradigmatic taking."

Instead, we must enter the doctrinal thicket of the Supreme Court's regulatory takings jurisprudence. Since *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court has recognized that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable...." *Lingle,* 544 U.S. at 538, 125 S.Ct. 2074. In general, regulatory takings are analyzed under the ad hoc framework announced in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The Hornes, however, have intentionally declined to pursue a *Penn Central* claim. Instead, they argue the Marketing Order, though a regulation, works a categorical taking.[12]

Since *Mahon,* the Supreme Court has identified three "relatively narrow categories" of regulations which work a categorical, or per se, taking. Each category has a paradigmatic or representative case. *Lingle,* 544 U.S. at 538, 125 S.Ct. 2074.[13] The representative case of the first category, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 427–38, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), holds that permanent physical invasions of real property work a per se taking. The second, represented by *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003,

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[12] Similarly, the Hornes concede the AMAA and Marketing Order fall within Congress's Commerce Clause authority. However, that a governmental action is authorized by the Commerce Clause does not immunize it from the requirements of the Takings Clause. *Lingle,* 544 U.S. at 543, 125 S.Ct. 2074; *Kaiser Aetna v. United States,* 444 U.S. 164, 172, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

[13] We read *Lingle* to elevate the land use exaction cases to a third category on par with permanent physical invasions and complete economic deprivation regulations. 544 U.S. at 538, 125 S.Ct. 2074 ("Outside these two categories (*and* the special context of land-use exactions discussed below), regulatory takings challenges are governed by *Penn Central Transp. Co. v. New York City.*") (citation omitted and emphasis added).

1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), teaches that regulations depriving owners of all economically beneficial use of their real property also work a per se taking. The third line of cases, represented by *Nollan* and *Dolan*, articulate a more nuanced rule. Together, *Nollan* and *Dolan* hold that a condition on the grant of a land use permit requiring the forfeiture of a property right constitutes a taking *unless* the condition (1) bears a sufficient nexus with and (2) is roughly proportional to the specific interest the government seeks to protect through the permitting process. If those two conditions are met, then the imposition of the conditional exaction is not a taking.

We must determine which analytical framework provides the proper point of departure for our inquiry into whether a taking has occurred here. The Hornes see a direct analogy between *Loretto's* occupation of land for the purpose of installing an antenna and the Marketing Order's reserve requirement. The Secretary argues *Nollan* and *Dolan* provide better guidance to evaluate the constitutionality of what the Secretary characterizes as a use restriction on raisins. We must first identify which of the categorical takings case lines, if any, the Marketing Order implicates. Second, we must apply that case line's substantive law to determine whether a taking has occurred.

C.

Loretto applies only to a total, permanent physical invasion of real property. Two independent reasons assure us that the Marketing Order does not fall within the "very narrow" scope of the *Loretto* rule, 458 U.S. at 441, 102 S.Ct. 3164: First, the Marketing Order operates on personal, rather than real property, and second, the Marketing Order is carefully crafted to ensure the Hornes are not completely divested of their property rights, even with respect to the reserved raisins.

1.

The Marketing Order operates against personal, rather than real, property. Because the Takings Clause undoubtedly protects personal property, *see Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (interest earned on lawyers' trust account is a protected private property); *Brown*, 538 U.S. at 235, 123

S.Ct. 1406 (same); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001–04, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (same for trade secrets), this distinction does not mean the Takings Clause is inapplicable. But, as the Supreme Court stated in *Lucas*, the Takings Clause affords less protection to personal than to real property:

> [O]ur "takings" jurisprudence ... has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied limitation and must yield to the police power. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Lucas, 505 U.S. at 1027–28, 112 S.Ct. 2886.

Lucas uses comparative language to make clear the Takings Clause affords more protection to real than to personal property. While the precise contours of these differing levels of protection are not entirely sharp, *Lucas* suggests the government's authority to regulate such property without working a taking is at its apex where, as here, the relevant governmental program operates against personal property and is motivated by economic, or "commercial," concerns. Indeed, it is clear the holding of *Lucas* is limited to cases involving land. The sentence which rejects the State's contention that "the State may subsequently eliminate all economically valuable use" of the Lucas's property begins

with the phrase "[i]n the case of land" and is expressly contrasted against commercial personal property, over which the government exerts a "traditionally high degree of control." *Id.* at 1028, 112 S.Ct. 2886.

The real/personal property distinction also undergirds *Loretto.* Justifying its bright-line rule, *Loretto* states "whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on *land or real property* is an obvious fact that will rarely be subject to dispute." 458 U.S. at 437, 102 S.Ct. 3164 (emphasis added). This example underscores the narrow reach of *Loretto.* In reaching its decision, the Court discussed the evolution of its takings jurisprudence, citing virtually only cases pertaining to real property. *See id.* at 427–37, 102 S.Ct. 3164. And because the case unquestionably (and solely) concerned real property, the *Loretto* Court did not have occasion to consider the occupation of personal property. Given the Court's later discussion of personal property in *Lucas,* we see no reason to extend *Loretto* to govern controversies involving personal property. *See also Wash. Legal Found. v. Legal Found. of Wash.,* 271 F.3d 835, 854 (9th Cir.2001) (en banc), *aff'd sub nom., Brown v. Legal Found. of Wash.,* 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) ("The per se analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money.").

2.

Equally importantly, the Hornes did not lose all economically valuable use of their personal property. Unlike *Loretto,* which applies only when *each* " 'strand' from the 'bundle' of property rights" is "chop[ped] through ... taking a slice of every strand," 458 U.S. at 435, 102 S.Ct. 3164, the Hornes' rights with respect to the reserved raisins are not extinguished because the Hornes retain the right to the proceeds from their sale. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h). The Hornes essentially call this right meaningless because the equitable distribution may be zero.[14] But, the equitable distribution is not zero in every year,

[14] The parties dispute whether there was a distribution for the crop years in question and, if so, the value of that distribution. We do not consider this dispute material to the question of whether a taking occurred because the distribution reflects net revenue. For the reasons we give, we focus on the gross revenue generated by the reserve raisin pool.

and even in years with a zero distribution, there are gross proceeds from the sale of the reserved raisins; it just so happens that in those years, those gross proceeds are not greater than the operating expenses of the RAC.

Here, we pause to focus on the RAC's structure and purpose, as well as the benefits it secures for producers such as the Hornes. The RAC is governed by industry representatives including producers and handlers.[15] Its purpose is to stabilize market conditions for raisin producers. Thus, the Hornes' equitable stake in the reserved raisins, even in years in which they are not entitled to a cash distribution from the RAC, funds the administration of an industry committee tasked with (1) representing raisin producers, such as the Hornes, and (2) implementing the reserve requirement, the effect of which is to stabilize the field price of raisins. In light of this scheme, the Hornes cannot claim they lose all rights associated with the reserve raisins. Indeed, the structure of the diversion program ensures the reserved raisins continue to work to the Hornes' benefit after they are diverted to the RAC, even in years in which producers receive no equitable distribution of the RAC's net profits.[16]

For these reasons, the Hornes' reliance on *Loretto* is unavailing. *Loretto* specifically preserves the state's "substantial authority" and "broad power to impose appropriate restrictions upon an owner's use of his property." 458 U.S. at 441, 102 S.Ct. 3164. Here, the reserved raisins are not permanently occupied; rather, their disposition, while tightly controlled, inures to the Hornes' benefit. Coupled with *Lucas's* distinction between real and personal property, this assures us the diversion program does not work a per se taking.[17]

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[15] In fact, Mr. Horne has been an alternate member, though never a voting member, of the RAC.

[16] We must clarify that we do not hold the RAC's market intervention constitutes "just compensation" for a taking. Because we hold no taking occurs, we do not conduct a just compensation inquiry. We discuss the RAC's purpose and organization solely to show that the Hornes' rights to the reserved raisins, even if diminished by the Marketing Order, are not extinguished by it.

[17] Nor would the Hornes fare any better under a *Lucas* theory. *Lucas* plainly applies only when the owner is deprived of *all* economic benefit of the property. 505 U.S. at 1019 & n. 8, 112 S.Ct. 2886. If the property retains any residual value after the regulation's application, *Penn Central* applies. *Id.* The equitable stake, even in years where there is no monetary distribution, is clearly not valueless, and thus *Lucas* does not

D.

Instead of looking to *Loretto* for the rule of decision here, the Secretary urges us to apply the "nexus and rough proportionality" rule of *Nollan* and *Dolan* to this case, asking us in essence to hold that the reserve requirement constitutes a use restriction on the Hornes' personal property and then analogize that use restriction to the land use permitting context. We believe this approach is the most faithful way to apply the Supreme Court's precedents to the Hornes' claim.[18]

In *Nollan,* the California Coastal Commission conditioned the grant of a permit to build a beachfront home on the landowner's surrender of an easement along the coastal side of the property in order to link two public beaches by a publically accessible path. 483 U.S. at 828, 107 S.Ct. 3141. However, the Commission's proffered reason for imposing this condition was to mitigate the diminished "visual access" to the ocean from the *non*-coastal edge of the property caused by the Nollan's proposed improvement. *Id.* at 828–29, 107 S.Ct. 3141. The Supreme Court held there was no "nexus" between the exaction-by-condition and the Commission's asserted state interest, then held that, absent such a nexus, the imposition of the condition was a taking. *Id.* at 837, 107 S.Ct. 3141.

Dolan provides us the analytical framework to apply in cases where a legitimate nexus exists between the asserted state interest and the proposed exaction. In *Dolan,* a landowner sought permits to enlarge and improve her commercial property. As in *Nollan,* the permitting agency approved the permit subject to certain conditions. First, the agency required the dedication of certain creek-side land for the purpose of mitigating the increased water run-off that could potentially occur as a result of the landowner's plan to pave a parking lot. Second, the agency required the dedication of a 15–foot strip of land to be used for a

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apply.

[18] We do not mean to suggest that all use restrictions concerning personal property must comport with *Nollan* and *Dolan.* Rather, we hold *Nollan* and *Dolan* provide an appropriate framework to decide *this* case given the significant but not total loss of the Hornes' possessory and dispositional control over their reserved raisins.

pedestrian and bicycle pathway, the purpose of which was to mitigate the increased traffic flow spawned by the proposed commercial development. 512 U.S. at 380, 114 S.Ct. 2309. *Dolan* held there was an appropriate nexus between the state's legitimate interests and the proposed exactions. *Id.* at 387–88, 114 S.Ct. 2309.

But *Dolan* also held the proposed means and the ends in question were not "roughly proportional[ ]" to each other and thus the permit as issued constituted a taking. *Id.* at 391, 114 S.Ct. 2309; *see id.* at 394–96, 114 S.Ct. 2309. While not reducible to mathematical certainty, the *Dolan* "rough proportionality" requirement does require a permitting agency to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391, 114 S.Ct. 2309. Thus, the distillate of the *Nollan /Dolan* rule appears to be this: If the government seeks to obtain, through the issuance of a conditional land use permit, a property interest the outright seizure of which would constitute a taking, the government's imposition of the condition *also* constitutes a taking unless it: (1) bears a sufficient nexus with and (2) is roughly proportional to the specific interest the government seeks to protect through the permitting process.

We apply the *Nollan/Dolan* rule here because we believe it serves to govern this use restriction as well as it does the land use permitting process. At bottom, the reserve requirement is a use restriction applying to the Hornes insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. The Secretary did not authorize a forced seizure of the Hornes' crops, but rather imposed a condition on the Hornes' *use* of their crops by regulating their sale. As we explained in a similar context over seventy years ago, the Marketing Order "contains no absolute requirement of the delivery of [reserve-tonnage raisins] to the [RAC]" but rather only "a conditional one." *Wallace v. Hudson–Duncan & Co.,* 98 F.2d 985, 989 (9th Cir.1938) (rejecting a takings challenge to a reserve requirement under the walnut marketing order); *see also Yee v. City of Escondido*, 503 U.S. 519, 527–28, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) (holding municipal regulation of a mobile home park owners' ability to rent did not work a taking where park owners voluntarily rented their land and thus acquiesced in the regulation); *cf. Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1007, 104

S.Ct. 2862, 81 L.Ed.2d 815 (1984) ("a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking").

Moreover, there are important parallels between *Nollan* and *Dolan* on one hand and the raisin diversion program on the other. All involve a conditional exaction, whether it be the granting of an easement, as in *Nollan;* a transfer of title, as in *Dolan;* or the loss of possessory and dispositional control, as here. All conditionally grant a government benefit in exchange for an exaction. And, critically, all three cases involve choice. Just as the Nollans could have continued to lease their property with the existing bungalow and Ms. Dolan could have left her store and unpaved parking lot as they were, the Hornes, too, can avoid the reserve requirement of the Marketing Order by, as the Secretary notes, planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins. Given these similarities, we are satisfied the rule of *Nollan* and *Dolan* governs this case.

1. The Nexus Requirement

We now turn to the nexus requirement and ask if the reserve program "further[s] the end advanced as [its] justification." *Nollan,* 483 U.S. at 837, 107 S.Ct. 3141. Unquestionably, the AMAA aims to "establish and maintain ... orderly marketing conditions for agricultural commodities," 7 U.S.C. § 602(1), as well as to keep consumer prices stable, *id.* at § 602(2). By reserving a dynamic percentage of raisins annually such that the domestic raisin supply remains relatively constant, the Marketing Order program furthers the end advanced: obtaining orderly market conditions. The government represents (and the Hornes do not dispute) that by smoothing the peaks and valleys of the supply curve, the program has eliminated the severe price fluctuations common in the raisin industry prior to the implementation of the Marketing Order, making market conditions predictable for industry and consumers alike. On this basis, the Marketing Order satisfies the *Nollan* nexus requirement.

2. The Rough Proportionality Requirement

Dolan does not require a "precise mathematical calculation," instead obliging the permitting agency only to make an "individualized determination" that the condition imposed is "related both in nature and extent to the impact" of the permittee's activity. *Dolan,* 512 U.S. at 391, 114 S.Ct. 2309. The Marketing Order meets this requirement. The percentage of raisins to be reserved is revised annually to conform to current market conditions. While *Dolan* does not require a "mathematical calculation," neither does it prohibit the RAC from imposing a condition stated mathematically, i.e., as a percentage. Indeed, here the RAC's imposition of the reserve requirement is not just in "rough" proportion to the goal of the program, but in more or less *actual* proportion to the end of stabilizing the domestic raisin market.[19] By annually modifying the "extent," *id.,* of the reserve requirement to keep pace with changing market conditions, the RAC ensures its program does not overly burden the producer's ability to compete while reducing to the producer's benefit the potential instability of this particular market.

Nor do we believe *Dolan's* command that the condition imposed be "individualized" presents a problem here. As *Dolan* made clear, it was an adjudicative, not a legislative, decision being reviewed. 512 U.S. at 835, 114 S.Ct. 2552. Individualized review makes sense in the land use context because the development of each parcel is considered on a case-by-case basis. But here, the use restriction is imposed evenly across the industry; all producers must contribute an equal percentage of their overall crop to the reserve pool. At bottom, *Dolan's* individualized review ensures the government's implementation of the regulations is tailored to the interest the government seeks to protect. The Marketing Order accomplishes this goal by varying the reserve requirement annually in accordance with market and industry conditions. Given that raisins are fungible (as opposed to land, which is unique), we think this is enough to ensure the means of the Marketing Order's diversion program is at least roughly proportional to its goals.[20]

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[19] The Hornes do not challenge the adequacy or fairness of the RAC's decision to set the 2002–03 and 2003–04 reserve tonnage requirements at forty-seven percent and thirty percent, respectively. In other words, the Hornes' challenge is to the program itself, not the details of its implementation in the crop years at issue.

[20] We reiterate that we analyze the Hornes' challenge to the monetary penalty through the lens of the Marketing Order's reserve requirement because the monetary penalty is pegged directly to the extent of the Hornes' non-compliance with the Order, as measured by the ton and market value of the raisins. Accordingly, we hold the Secretary's

Conclusion

While the Hornes' impatience with a regulatory program they view to be out-dated and perhaps disadvantageous to smaller agricultural firms is understandable, the courts are not well-positioned to effect the change the Hornes seek, which is, at base, a restructuring of the way government regulates raisin production. The Constitution endows Congress, not the courts, with the authority to regulate the national economy. *See United States v. Rock Royal Co–op., Inc.*, 307 U.S. 533, 572, 59 S.Ct. 993, 83 L.Ed. 1446 (1939). Accordingly, it is to Congress and the Department of Agriculture to which the Hornes must address their complaints. The courts are not institutionally equipped to modify wholesale complex regulatory regimes such as this one.

Instead, our role is to answer the narrower question of whether the Marketing Order and its penalties work a physical per se taking. We hold they do not. There is a sufficient nexus between the means and ends of the Marketing Order. The structure of the reserve requirement is at least roughly proportional (and likely actually proportional) to Congress's stated goal of ensuring an orderly domestic raisin market. We reach these conclusions informed by the Supreme Court's acknowledgment that governmental regulation of personal property is more foreseeable, and thus less intrusive, than is the taking of real property. This, coupled with our observation that the Secretary has endeavored to preserve as much of the Hornes' ownership of the raisins as possible, leads us to conclude the Marketing Order's reserve requirements—and the provisions permitting the Secretary to penalize the Hornes for failing to comply with those requirements—do not constitute a taking under the Fifth Amendment.

AFFIRMED.

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imposition of the penalty satisfies any requirement *Koontz* may impose that we independently analyze the monetary exaction under *Nollan* and *Dolan*.

AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

In re: BURNETTE FOODS, INC., A MICHIGAN CORPORATION.
Docket No. 11-0334.
Decision and Order.
Filed March 18, 2014.

AMAA.

James J. ("Jay") Rosloniec, Esq. for Petitioner.
Sharlene Deskins, Esq. for Respondent.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

Decision Summary

The Petition of Burnette Foods, Inc. is DENIED in part and GRANTED in part, as follows. The Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930), as-written and as-administered, is in accordance with law EXCEPT in two respects:

A. To require handlers who are **not** exempt from restriction, to bear greater restriction requirements (volume control) by being required to absorb, in addition to their own share of restriction, the share of restriction that would have been the responsibility of other handlers were they not exempt, is arbitrary and capricious, and consequently not in accordance with law. The **exempt**-from-restriction-production must be subtracted from supply for purposes of volume control, including using the Optimum Supply Formula and calculating the restriction percentages that the **not**-exempt-from-restriction are required to comply with. That additional mathematical step must be employed. [Examples of handlers who are subject to the Tart Cherry Order but who are **exempt** from restriction requirements are handlers in Oregon and Pennsylvania, based on the size of production. Tr. 1612-13. Another example of handlers who are subject to the Tart Cherry Order but who were **exempt** from restriction requirements in

2010 were handlers in Northern Michigan because of crop failure (production fell below 50 per cent of average production). Tr. 1613-15.]

B. It is fiction to state that tart cherries processed into metal cans can be stored and carried over from crop year to crop year. [They **cannot**; the canned tart cherries need to reach the consumer promptly and cannot be maintained in the processor's inventory from crop year to crop year; the "best before" or "best by" date is roughly one year from harvest.] It would be arbitrary and capricious, and consequently not in accordance with law, to persist in that fiction. *See* ¶ 9. It is confiscatory to require the harvest-to-metal-can-tart- cherries-production that Mr. Sherman described in paragraph 9 to be maintained in inventory; it is equally confiscatory to require a canner to meet the restriction requirements by using the alternatives to inventory. Consequently, **tart cherries that are delivered from being harvested directly to a canner that are promptly canned with no processing other than canning having occurred shall be exempt from restriction requirements (volume control).** Like the requirements of paragraph 1.A., the **exempt**-from-restriction-tart-cherries-processed-into-metal-cans-production must be subtracted from supply for purposes of volume control, including using the Optimum Supply Formula and calculating the restriction percentages that the **not**-exempt-from-restriction are required to comply with.

Overview

In the United States tart cherry industry, the majority apparently find an advantage in **restricting** their commercial sales. Perry Hedin testified that no one wants (emphasis added) high restriction levels [restriction, under certain circumstances, is deemed by the majority to be necessary, for stability] (Tr. 1541-44):

> Ms. Deskins: . . . to your knowledge, is there anybody who wants the restriction levels to be, let me ask you, above 50 percent?
>
> Mr. Hedin: Absolutely not.

Ms. Deskins: Is there anyone who's advocating for high restriction levels?

Mr. Hedin: I don't think they're, they don't advocate for the high restriction levels. What discussion tends to be about is as I described earlier, if we have the restriction percentage too low and we end up with excess free tonnage, the concern is that in year two that's going to cause greater restriction in the subsequent year.

Mr. Hedin: So, a lot of them think we should deal with the issue in the year in which we're involved rather than to kick the can down the road. So, that sometimes will result in a higher restriction percentage than might be desired, but it's based on the Board's consideration of the consequences.

Ms. Deskins: Now, you've heard the testimony here today, I'm sorry, during the dates that you've been here that the frozen tart cherry industry has an interest in high restriction levels. In your experience, is that true?

Mr. Hedin: It's certainly not my opinion. I think that as I just said <u>no one wants the high restriction level but they sometimes feel that it's appropriate given the circumstances</u> (emphasis added) but I don't think it's categorized by frozen versus non-frozen, by CherrCo versus non-CherrCo. I think it's by their understanding and perception of what will happen in the industry during the crop year.

Ms. Deskins: Okay. And restriction, a restriction of the fruit that you can sell in the primary market, that only comes up in what type of years? In what type of years would you get a restriction, what event happens to cause a restriction?

Mr. Hedin: Under the formulation when the available supply exceeds the demand plus the market growth

> factor of ten percent, we have a restriction. If we are in a situation where the supplies are less than the demand, then there is no restriction. 2002, there was no restriction. In 2012, there will be no restriction.
>
> Ms. Deskins: So, are the restrictions caused by the size of the tart cherry crop in a particular year?
>
> Mr. Hedin: The restrictions are caused by the total supply which is both the crop and the carried over free tonnage. So, we have to look to both elements in making that determination. Generally, driven more by the size of the crop than the size of the carry-in.
>
> Ms. Deskins: Okay. So, in the years where the size of the crop is very close to what the demand is, is there any need for a restriction?
>
> Mr. Hedin: If your question assumes that it's less than the sales volume, no, there's no need for a restriction.

Tr. 1541-44.

The majority in the tart cherry industry restrict their commercial sales by the authority of a federal marketing order that they, the majority, vote for; that has the force of a federal regulation, because it IS a federal regulation: 7 CFR Part 930.[1] The theory that the restriction (volume control) is based on, is that tart cherries are processed and can be stored and carried over from crop year to crop year. William Sherman proved that the theory does <u>not</u> hold true for the canned segment [canners include but are not limited to Burnette Foods, Pinnacle Foods and Knouse Foods (*see* Tr. 979, 1110)]; William Sherman testified on cross-examination (Tr. 1060-61):

> Ms. Deskins: Well, isn't it unusual for you to promote a position on behalf of your competitors?

[1] *See* Title 7 of the Code of Federal Regulations, concerning Agriculture, specifically Part 930, concerning Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

> Mr. Sherman: As I look at this and what we're asking for, I, my opinion is the other, the canned segment in total should be exempted from this marketing order.

Tr. 1060-61.

The percentages of the tart cherry crop that have been restricted, from year to year, can be found in the Federal Register. These percentages are not small (look at the first two columns):

2011 Tart Cherry Crop [July 1, 2011 - June 30, 2012 Crop Year]

Restricted, Prelim known in June 2011	**Restricted**, Final known in Sept 2011	Free, Prelim known in June 2011	Free, Final known in Sept 2011
59% revised to **40%**	then **12%**	41% revised to 60%	then 88%

[*See* 77 Fed. Reg. 12748, esp. 12749-12750, 12752 (Mar. 2, 2012); and 77 Fed. Reg. 36115, esp. 36119 (June 18, 2012).]

2010 Tart Cherry Crop [July 1, 2010 - June 30, 2011 Crop Year]

Restricted, Prelim known in June 2010	**Restricted**, Final known in Sept 2010	Free, Prelim known in June 2010	Free, Final known in Sept 2010
40%	then **42%**	60%	then 58%

[*See* 76 Fed. Reg. 10471, esp. 10472 and 10476 (Feb. 25, 2011).]

2009 Tart Cherry Crop [July 1, 2009 through June 30, 2010]

Restricted, Prelim known in June 2009	**Restricted**, Final known in Sept 2009	Free, Prelim known in June 2009	Free, Final known in Sept 2009
49%	then **68%**	51%	then 32%

[*See* 75 Fed. Reg. 12702, esp. 12703-12704, and 12706-12707 (Mar. 17, 2010).]

2008 Tart Cherry Crop [July 1, 2008 through June 30, 2009]

Restricted, Prelim known in June 2008	**Restricted**, Final known in Sept 2008	Free, Prelim known in June 2008	Free, Final known in Sept 2008
10%	then **27%**	90%	then 73%

[*See* 73 Fed. Reg. 74073, esp. 74075 and 74078 (Dec. 5, 2008).]

2007 Tart Cherry Crop [July 1, 2007 through June 30, 2008]

Restricted, Prelim known in June 2010	**Restricted**, Final known in Sept 2010	Free, Prelim known in June 2010	Free, Final known in Sept 2010
52%	then **43%**	48%	then 57%

[*See* 73 Fed. Reg. 11323, esp. 11325 and 11328 (March 3, 2008).]

2006 Tart Cherry Crop [July 1, 2006 through June 30, 2007]

Restricted, Prelim known in June 2010	**Restricted**, Final known in Sept 2010	Free, Prelim known in June 2010	Free, Final known in Sept 2010
40%	then **45%**	60%	then 55%

[*See* 72 Fed. Reg. 13674, esp. 13675-13676 & 13679 (Mar. 23, 2007).]

2005 Tart Cherry Crop [July 1, 2005 through June 30, 2006]

Restricted, Prelim known in June 2005	**Restricted**, Final known in Sept 2005	Free, Prelim known in June 2005	Free, Final known in Sept 2005
36%	then **42%**	64%	then 58%

[*See* 70 Fed. Reg. 67375, esp. 67377 and 67380 (Nov. 7, 2005).]

How did William Sherman prove that tart cherries processed into metal cans **cannot** be stored and carried over from crop year to crop year? William Sherman testified (Tr. 1041-43):

> Mr. Rosloniec: Describe for me how the canned segment of the industry differs from the remainder of the cherry industry in terms of holding reserves.
>
> Mr. Sherman: Well, simply stated the canned product has a shelf life of a little over a year. And as you heard Mr. Hackert testify, five plus one, for example, has a, probably a four year shelf life for sure.
>
> Mr. Rosloniec: So it's just, it's the shelf life is the issue, okay. And what causes it to have that shelf life?
>
> Mr. Sherman: The product in the canned segment's

produced in a metal container. The acid in the fruit reacts with the container and causes deterioration of the container. It can cause literally spoilage, leakage, and believe me, everybody in the canned foods segment has seen it, by that I mean spoilage.

Mr. Rosloniec: Does this --

Judge Clifton: Let me inquire about that. Isn't there a lining inside metal cans?

Mr. Sherman: There is.

Judge Clifton: Okay. Tell me why that's not an effective barrier.

Mr. Sherman: Well, it is, but it only, it only, it's sort of like paint on your car, if you can imagine, I mean, you know, you drive it through the salt, and if you live in Michigan then pretty soon you see a few rust spots.

Mr. Sherman: Well, the acid in the fruit, I mean really it starts to, it starts to attack, and that's the word that people in the can-making business use, the acid in the fruit, it's not just cherries, but many, many products, and some are more difficult to pack than others, it starts to attack the, what's called the enamel almost immediately, and if it, but, and so if it would, and the enamel then would, I'll say, this is not how a can-making technician would describe it, but basically there's a hole in the enamel, and then the acid attacks the bare metal, and it literally can create a, like a pinpoint hole in the can.

Mr. Sherman: And in fact, we had some product recently that we, we being Burnette Foods, had shipped to Japan, and the only reason I'm telling this story, the containers failed, I'll put it that way. And so we were on the receiving end of, you know, complaint of, more the complaint of Bill.

(Tr. 1041-43).

Mr. Sherman identifed PX 42, which was admitted into evidence over AMS's objection. Tr. 1045. PX 42 is two pages which identify Burnette Foods' Ball Corporation specs for the 300 x 407 sized can, which Burnette uses for only water packed tart cherries, showing "Shelf Life Warranty: Cherries, Red Tart 15 M" (15 months). William Sherman testified (Tr. 1044-47):

> Mr. Rosloniec: Mr. Sherman, are you familiar with this document (PX 42)?
>
> Mr. Sherman: Yes.
>
> Mr. Rosloniec: Okay, and what is this document?
>
> Mr. Sherman: It's a, Ball Corporation is a major supplier of containers to Burnette Foods, and it's a spec sheet and it also includes their statement of shelf life warranty.
>
> Mr. Rosloniec: Okay. Is this an accurate representation of the --
>
> Mr. Sherman: Yes.
>
> * * * *
>
> Judge Clifton: What does 15m mean?
>
> Mr. Sherman: Months.
>
> Judge Clifton: 15 months. Now does it make a difference whether the cherries are packed in water?
>
> Mr. Sherman: This particular, let me see, oh, this is water-packed product.
>
> Judge Clifton: How do you know?

> Mr. Sherman: Well, I know, in the upper right corner, right below file name where it says 300 by 407.
>
> Judge Clifton: Yes.
>
> Mr. Sherman: We only use, we only use that container for water packed cherries.
>
> Judge Clifton: All right.
>
> Mr. Sherman: It's the retail sized can, it's 14 _ ounces.
>
> Judge Clifton: Okay. Thank you.
>
> Mr. Rosloniec: Mr. Sherman, how does this warranty impact Burnette's ability to hold reserves?
>
> Mr. Sherman: Well, we're required to hold, as I said, we produce four products, four tart cherry products, they're all in metal containers, when we have reserve requirements and we have had in the history of this order many years out of the last, I guess it's 16 years now, I would say in ten of those years at least we've had reserve requirements, so we're required to hold inventory reserves in a, or we hold our inventory reserves in a form that has a limited shelf life, and it's, I mean, it's recognized. Mr. Hackert recognizes it as well.

(Tr. 1044-47).

Parties and Counsel

The Petitioner, Burnette Foods, Inc., a Michigan corporation ("Burnette"), is represented by James J. ("Jay") Rosloniec, Esq., Grand Rapids, Michigan. Burnette's President and CEO is William Sherman. Burnette's COO is John Pelizzari.

The Respondent, the Administrator of the Agricultural Marketing Service, an agency of the United States Department of Agriculture

("AMS"), is represented by Sharlene Deskins, Esq., with the Office of the General Counsel, United States Department of Agriculture ("USDA"), Washington, District of Columbia. AMS's Agency Representative is Lois Tuttle. AMS's Marketing Specialist assigned to the Tart Cherry Marketing Order is Jennie Varela.

Procedural History

The Petition, filed on August 3, 2011, challenges the Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930), requesting relief under Section 15(A) of the AMAA (Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601-674), especially 7 U.S.C. § 608(c)(15)(A). The six-day Hearing was held May 15-22, 2012, in Grand Rapids, Michigan. Briefs were filed August 15, 2012 (Burnette); September 14, 2012 (AMS); and October 19, 2012 (Burnette).

Tart Cherries Canned, Different from Frozen

William Sherman testified on direct examination (Tr. 990-92):

> Mr. Sherman: . . . the cherries are harvested by the grower, and in our case I'll just talk about what happens at Burnette Foods, they're delivered, in most cases to our factories by the grower, and over the period of the next, usually 24 hours, those cherries will be processed into, in our case, either one of the four products that I mentioned, which are the two fruit filling products, one in the food service size can, one in the retail size can, or the retail water pack cherries or the food service size water pack cherries. So those are the four products for tart cherry products that we produce.
>
> Mr. Sherman: And we often, often label these products as we're producing this product for our various customers, and in some cases the, not enough, but in some cases the product is actually shipped to a retailer within 24 hours of the time it's harvested from the, by the grower.

Mr. Rosloniec: Where in this processing cycle does Burnette Foods product end up?

Mr. Sherman: It ends up at the retail grocery store. Is that an answer, is that what you're --

Mr. Rosloniec: Yeah, as a finished product?

Mr. Sherman: As a finished product, ready for the consumer to take home and make a cherry product, if that's what they want to do with it.

Mr. Rosloniec: If you --

Judge Clifton: I'd like to go back to what the grower does before delivering a harvest to your factory.

Mr. Sherman: Is the question --

Judge Clifton: Does the grower wash them?

Mr. Sherman: No.

Judge Clifton: No? The grower just --

Mr. Sherman: He harvests them, he harvests the cherries in a container that, and then it comes to our facility in that container.

Judge Clifton: Okay. Thank you.

Mr. Rosloniec: Mr. Sherman, if you know, where would the product that's produced by a member of CherrCo end in that cycle?

Mr. Sherman: Frozen cherries are ingredients. Burnette Foods is not in the ingredient business, and so, so a frozen cherry would be sold to possibly somebody like Burnette Foods, or Knouse Foods, or Pinnacle, I guess

> Foods, I guess that's what they call themselves, or a company like Sara Lee or various other industrial baking companies. And frozen cherries are also used to make dry cherries, as you heard in the testimony. And in fact, even tart cherry juice concentrate, even in the case of tart cherry juice concentrate as its produced in the United States, the cherries are frozen first and then they're, they go through a defrost process and then made into tart cherry juice concentrate.
>
> Mr. Sherman: So other than the canned segment, at one time or another, everything else in its product creation cycle is a frozen cherry.

Tr. 990-92.

Sales Constituency

1 **Sales Constituency**: Is the Capper-Volstead cooperative CherrCo, Inc. a sales constituency? Did Burnette Foods, Inc. meet its burden of proof to support its claim that CherrCo, Inc. is a sales constituency? If, not, does a single industry group dominate the actions of the Cherry Industry Administrative Board and exert improper control over the tart cherry industry? Sales constituency is defined in the Tart Cherry Order:

> **§ 930.16 Sales constituency**.
>
> Sales constituency means a common marketing organization or brokerage firm or individual representing a group of handlers and growers. An organization which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency.

9 C.F.R. § 930.16.

Being positioned economically and legally to profit in the tart cherry business is complicated. Many owners in the tart cherry industry have found it useful to form more than one entity - - including a grower

cooperative entity formed specifically to become a member of the Capper-Volstead cooperative CherrCo. The Capper-Volstead cooperative CherrCo has been effective in benefitting not only its members, but on occasion its members' affiliates such as packers. Burnette maintains that the federal regulations governing the marketing of tart cherries as-administered are not in accordance with law, in part because of CherrCo's influence and methods of operating.

Petitioner Burnette Foods, Inc. ("Burnette") is vertically integrated; that is, Burnette the grower is the same entity as Burnette the canner (packer). Burnette does not choose to be a member of the Capper-Volstead cooperative CherrCo, Inc. ("CherrCo"), but if Burnette did, a different entity (or entities) would be required. Burnette has its own sources of tart cherries (including growers such as James Von Holt and Dorance Munro Amos). Burnett has its own customers (especially in the retail grocery trade, including store brands such as Kroger, Target, Walmart, Spartan, and Meijer; and in the food service industry, including Sysco, U.S. Foodservice, and Gordon Food Service). Burnette does not need CherrCo's power or influence to operate in the marketplace. Burnette does object to CherrCo's power and influence regarding the administration of the Tart Cherry Order, from which Burnette asks that all canners be entirely exempt.

If Cherrco were not a Capper-Volstead cooperative, I might take Burnette's insistence that CherrCo **is** a sales constituency more to heart. But CherrCo **is** a Capper-Volstead cooperative, which necessitates that CherrCo do a lot of management on behalf of its members. I find that CherrCo is **not** a sales constituency. *See* ¶¶ 30 & 31.

Composition of the Board that Administers the Tart Cherry Order

Cherry Industry Administrative Board: Is the Cherry Industry Administrative Board (CIAB) properly formed and operated in accordance with the Tart Cherry Order? I find that it is. Burnette's arguments on this issue (composition of the CIAB) do not persuade me, although I certainly understand Burnette's frustration. *See* Tr. 744-47 regarding composition of the CIAB.

Findings of Fact

1. Burnette Foods, Inc., the Petitioner ("Burnette"), is a Michigan corporation, with a principal place of business in Elk Rapids, Michigan.

2. Burnette grows (produces) tart cherries (among other fruits), buys tart cherries from other growers, and processes tart cherries (among other fruits).

3. Burnette is subject to the Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930).

4. When the tart cherries domestic crop plus carried over free tonnage combined is plentiful, the Tart Cherry Order as-administered requires processors to hold tart cherries off the market. The theory is that (a) the price for tart cherries will not plummet because of over-supply if part of the supply is kept off the market; and (b) tart cherries held off the market will be available during scarcity (they keep well when frozen) so that purchasers can rely on tart cherries being available year-to-year. The theory is that this keeps the price from plummeting and keeps tart cherries available year-to-year and that both promote orderly marketing, which is the objective of the AMAA (Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq*.).

5. There is **no limit** on the percentage of restriction (keeping tart cherries off the market) that can be imposed. Tr. 1602-03.

6. Burnette processes tart cherries into four finished products, each in a metal can:

   (a) fruit filling (such as for cherry pie) in a number 10 can (food service size can) which holds about 7 pounds of net weight;

   (b) fruit filling (such as for cherry pie) in a number 2 can (retail size can) which holds about 21 ounces;

   (c) water pack (tart cherries and water) in a number 10 can (food

service size can) that holds about 107 ounces; and

(d) water pack (tart cherries and water) in a can (retail size can) that holds about 14-1/2 ounces. Tr. 978-79, 990-91.

7. For any individual **grower**, the tart cherry harvest takes place over a period of about 20 days. Each individual grower has probably a 20-day window to harvest his product. Tr. 987-88. For Burnette as a **processor**, the tart cherry harvest lasts longer because Burnette starts in southern Michigan around the 4th of July and by the time Burnette is done in northern Michigan, it's probably the 10th of August (roughly a 37-day window). Tr. 988.

8. Frozen tart cherries keep well (at least three years and up to four or five years)[1].

9. Burnette's competitors suggested a solution for Burnette so that Burnette need not hold tart cherries in cans off the market; they suggest that Burnette buy from its competitors sufficient frozen tart cherries to hold off the market to meet its obligation under the Tart Cherry Order as-administered.

10. Burnette's competitors' suggested solution is not at all practical, especially when the percentage of tart cherries to be held off the market is large. *See* the percentages in ¶ 4.

11. Perry Hedin suggested a solution for Burnette, too: switch out the cans. Perry Hedin's suggested solution is not at all practical: next year's tart cherries in cans would not be available for an entire year, when the "best by" date has already been reached.

12. Counsel for AMS emphasized on cross-examination that Burnette could use the alternatives to inventory; for example, Ms. Deskins inquired, "But you can sell product that's exported?" Mr. Sherman

---

[1] The same cannot be said of tart cherries processed into metal cans. Requiring Burnette or any other processor to hold tart cherries in cans off the market until close to the "best by" date (one year after canning) would be the equivalent of confiscation. It would be equally confiscatory to require a canner to meet the restriction requirements by using the alternatives to inventory.

explained that selling product that's exported is not Burnette's business; and that alternative does not include Canada, Mexico, Panama, or anywhere in North America. Tr. 1094-96. Ms. Deskins inquired, "Can you also meet your restriction requirements by developing new products?" Mr. Sherman explained that there's nothing new about the tart cherries in metal cans; the water packed products are probably 80 years old, maybe 90 or even older than that; the fruit filling the way Burnette does it is 40 or 50 years old. Tr. 1096-97.

13. Burnette argues that tart cherries growers' (producers') prices and crop values have not increased with the current Tart Cherry Order, contrary to an objective of the Tart Cherry Order. Burnette argues that the testimony of its economic expert Dr. Paul Edward Godek proves that the return to growers has not improved; even though the return to handlers of frozen product has improved. *But see* Mr. Hedin's testimony regarding the total farm gate value for the industry (Tr. 1549-59) and RX 7 and RX 8. The impact of the Tart Cherry Order on the return to tart cherry growers is not clear. Were I to conclude that the return to tart cherry growers has not increased under the Tart Cherry Order, I would also conclude that failure to meet an objective is not equivalent to "contrary to law."

14. Frozen tart cherries prices have probably increased with the current Tart Cherry Order, approximately 12 cents per pound. Whether the tart cherries processors' costs increased is not clear.

15. Burnette on occasion does buy frozen tart cherries (Tr. 1113). Under this Decision, frozen tart cherries thereafter put into metal cans would **not** be exempt from restriction requirements (volume control).

16. CherrCo, Inc. ("CherrCo") is a Capper-Volstead cooperative; that is, its members are producer cooperatives. CherrCo provides sales opportunities to its members (producer cooperatives) and also to its members' affiliates (processors). The impact of assisting not only its members but also its members' affiliates (processors) to the exclusion of others could be important to determine if this were some other case. Here, I find that neither the Tart Cherry Order nor the Tart Cherry Order as-administered is implicated for any such impact.

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17. CherrCo controls many aspects of the sales of its members' (producer cooperatives') tart cherries but NOT all aspects. For example:

    (a) CherrCo sets a minimum price; CherrCo may NOT determine the price.

    (b) Each sales agent must have a contract with CherrCo to be permitted to sell; CherrCo may NOT designate which of the sales agents in its "stable" will be chosen to do the selling.

    (c) CherrCo may designate eligible buyers; it is not clear whether CherrCo designates which of the eligible buyers will be chosen to do the buying.

As CherrCo manages on behalf of its members, CherrCo exerts control, and the control exerted does not make CherrCo a sales constituency; CherrCo is more correctly characterized as a Capper-Volstead cooperative.

Conclusions

1. The form of the tart cherries, frozen, canned in any form, dried, or concentrated juice, placed in the primary inventory reserve is at the option of the handler. 7 C.F.R. § 930.55(b). Although Burnette is not required to withhold cans of tart cherry fruit filling and cans of water pack tart cherries from the market, because Burnette could instead withhold from the market **an equivalent** (7 C.F.R. § 930.55); nevertheless, the requirement that a canner withhold from the market the same percentage as handlers who freeze (for example), is contrary to law because it is confiscatory: the tart cherries processed into metal cans **cannot** be stored and carried over from crop year to crop year. The frozen tart cherries **can** be stored and carried over from crop year to crop year.

2. It would be arbitrary and capricious to persist in the fiction of stating that tart cherries processed into metal cans can be stored and carried over from crop year to crop year.

3. The canned tart cherries need to reach the consumer promptly and

cannot be maintained in the processor's inventory from crop year to crop year. The "best before" or "best by" date is roughly one year from harvest.

4. Just as it is confiscatory to require the tart cherries processed into metal cans to be maintained in inventory; it is equally confiscatory to require a canner to meet the restriction requirements by using the alternatives to inventory. This Decision does not exempt all tart cherries processed into metal cans, but only those that (a) are delivered from being harvested directly to a canner and (b) are promptly processed into metal cans with no processing other than canning having occurred, such as William Sherman described in paragraph 9.

5. Perry Hedin testified that the Tart Cherry Order is a national marketing order, and it's a national market, and that the concern in the industry is supply versus demand and we have producers from all over the country and the competition at the handler level is for that fruit. Mr. Hedin testified that Burnette should not be relieved of any responsibility ["I think it presents the classic free rider issue from marketing orders."] Mr. Hedin continued: "The fact that I might put it in a can or I might put it in a frozen product or I might dry it, is a business choice that the individual handler has made. There still is the supply. It's still part of the production and I think to exempt them is an improper way to go because you can adjust as easily." Tr. 1606-08. Here, I disagree with Mr. Hedin. I conclude that Burnette - - and other canners - - cannot "adjust as easily" to the restriction (volume control) requirements of the Order; that the tart cherries they receive directly from the harvest and promptly process into metal cans, with no processing other than canning, must be exempt from restriction. I will agree with Mr. Hedin that the canners need not be relieved from the remaining responsibilities of the Tart Cherry Order. One of the 3 canners, Knouse, is already exempt from the restriction (volume control) requirements of the Order. All processors in Pennsylvania and Oregon are exempt from the restriction (volume control) requirements of the Order. Tr. 736. They could become restricted if their production increases. Processors in only 5 states, Michigan, New York, Utah, Washington, and Wisconsin, are subject to the restriction (volume control) requirements of the Order. The Tart Cherry Order may be a national marketing order, but 43 States have no handlers (processors) subject to it at all. Mr. Hedin testified that the

percentage of the tart cherry industry represented by the canned segment was "roughly 12% of last year's production. And back in 1997, it was close to, I would project about 17%. As you can see, it fluctuates year over year." Tr. 739. Mr. Sherman testified that "Burnette Foods selling, Burnette Foods selling more pie filling is not going to injure a frozen packer, whatsoever. I mean, it's about like us selling oranges. That's not going to hurt the frozen packer either." Tr. 1096. I agree with Mr. Sherman.

6. As of May 2012 (when the hearing was held), tart cherries imported into the United States had not been considered in determining "Optimum supply." 7 C.F.R. § 930.50. "The estimated total production of cherries" and "The estimated size of the crop to be handled" (*see* 7 C.F.R. § 930.50(e)) have been understood to refer to **domestic production** (not world-wide) and to the **domestic crop** (not world-wide). It was generally recognized (when the hearing was held) that tart cherries imports into the United States had been increasing, and the Cherry Industry Administrative Board (CIAB) had been discussing the impact of imported tart cherries on the supply. Measuring the imports is much less precise than measuring the domestic supply. It is not clear whether Customs' (U.S. Customs and Border Protection) figures would be useful. Burnette's Rebuttal Brief states at page 12: "Ignoring imported product results in a distorted view of sales of tart cherry products in the United States. By ignoring sales of imported products the demand component of the OSF (Optimum Supply Formula) is artificially decreased resulting in greater restrictions upon tart cherry production domestically. Thus, while the CIAB is increasing restrictions upon production of tart cherry products by domestic companies, foreign tart cherry products are being imported and sold in the United States. At the same time that severe restrictions are applied to domestic cherry products, there are no restrictions on the supply of imported cherry products which may be sold in the United States." Burnette Rebuttal Br. at 12.

7. The Optimum Supply Formula is unwieldy, and its failure to take into account tart cherries imported into the United States seems to be a deficiency. A deliberative process allows the CIAB to make recommendations to AMS regarding economic adjustments to the Optimum Supply Formula. The inputs are not at all precise, including the inputs even of expected domestic supply. Nevertheless, except as stated

in this Decision, I do **not** find use of the Optimum Supply Formula to be contrary to law. So long as the majority in the tart cherry industry continue to vote in favor of being regulated under the Tart Cherry Order, 7 CFR Part 930, absent an amendment, the tart cherry industry will continue to have the Optimum Supply Formula to look forward to. Tr. 775-76.

8. With the implementation of the Order below, the Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930), as-written and as-administered, will be in accordance with law.

ORDER

Beginning with the **2014 Tart Cherry Crop** [July 1, 2014 - June 30, 2015 Crop Year], tart cherries that (a) are delivered from being harvested directly to a canner and (b) are promptly processed into metal cans with no processing other than canning having occurred, such as William Sherman described in paragraph 9, shall be exempt from restriction requirements (volume control).

Beginning with the **2014 Tart Cherry Crop** [July 1, 2014 - June 30, 2015 Crop Year], **exempt**-from-restriction-tart-cherry-production [whether based on the size of production such as Perry Hedin described concerning Oregon and Pennsylvania and crop failure in Northern Michigan in 2010 (Tr. 1612-15); or whether the **exempt**-from-restriction-tart-cherries-processed-into-metal-cans-production] must be subtracted from supply for purposes of volume control, including using the Optimum Supply Formula and calculating the restriction percentages that the **not**-exempt-from-restriction are required to comply with. That additional mathematical step must be employed.

Burnette Foods, Inc. remains otherwise subject to the Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930); the remainder of Burnette's Petition is denied.

Finality

This Decision shall be final and effective 35 days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30

days after service. *See* 9 C.F.R. §§ 900.64 and 900.65. Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

APPENDIX A

In re:	)	
	)	[AMAA]
Burnette Foods, Inc.,	)	Docket No. **11-0334**
a Michigan corporation,	)	
	)	
Petitioner	)	**Witnesses**

The 6-day Hearing was held May 15-22, 2012, in Grand Rapids, Michigan.

The transcript pages are shown below for testimony of witnesses:

Day 1, May 15 (Tues) 2012:

Mr. James Thomas Horton (Tr. 60-81) May 15, 2012 called by Burnette Foods

Ms. Cheryl Kroupa (Tr. 86-111) May 15, 2012 called by Burnette Foods

Mr. James Edward Nugent (Tr. 112-171) May 15, 2012 called by Burnette Foods

Mr. Glenn F. LaCross (Tr. 180-213) May 15, 2012 called by Burnette Foods

Mr. Roy Hackert (Tr. 214-280) May 15, 2012 called by Burnette Foods

Mr. Jonathan Tad (Jon) Veliquette (Tr. 281-312) May 15, 2012 called by Burnette Foods

Day 2, May 16 (Wed) 2012:

Dr. Paul Edward Godek (PhD) (Tr. 360-517) May 16, 2012 called by Burnette Foods

Mr. James Robert (Jim) Jensen (Tr. 519-607) May 16, 2012 called by Burnette Foods
[with counsel Christopher Breay]

Day 3, May 17 (Thur) 2012:

Mr. Perry Hedin (Tr. 650-810) May 17, 2012 called by Burnette Foods

Mr. Dorance Munro Amos (Tr. 812-839) May 17, 2012 called by Burnette Foods

Mr. Timothy Orr Brian (Tr. 840-876) May 17, 2012 called by Burnette Foods

Mr. James Von Holt (Tr. 876-929) May 17, 2012 called by Burnette Foods

Day 4, May 18 (Fri) 2012:

Mr. William Sherman (Tr. 971-1153) May 18, 2012 called by Burnette Foods

Mr. Thomas Facer (Tr. 1157-1225) May 18, 2012 called by AMS

Day 5, May 21 (Mon) 2012:

Mr. Steven Donald (Steve) Nugent (Tr. 1270-1374) May 21, 2012 called by Burnette Foods

Ms. Jennie (Jen) Varela (Tr. 1376-1401) May 21, 2012, called by AMS

Mr. Donald (Don) Gregory (Tr. 1401-1430) May 21, 2012, called by AMS

AGRICULTURAL MARKETING AGREEMENT ACT

Day 6, May 22 (Tues) 2012:

Mr. James Robert (Jim) Jensen RECALLED (Tr. 1466-1525) May 22, 2012, called by AMS
[with counsel Christopher Breay]

Mr. Perry Hedin RECALLED (Tr. 1525-1631) May 22, 2012, called by AMS

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ANIMAL WELFARE ACT

COURT DECISIONS

ASSOCIATED DOG CLUBS OF NEW YORK STATE, ET AL. v. VILSACK.
No. 1:13-cv-1982 (CRC).
Memorandum Opinion and Order.
Filed May 16, 2014.

[Cite as: 44 F. Supp. 3d 1 (D.D.C. 2014)].

AWA – Administrative rule – Licensing requirements – Intervene, motion to – Pet dealers – Retail pet store.

United States District Court,
District of Columbia

Court granted Humane Society of the United States's Motion to Intervene in a suit challenging a Department rule that redefined the term "retail pet store." The Court held that the Humane Society had standing and satisfied the requirements for intervention as a matter of right.

MEMORANDUM OPINION AND ORDER

CHRISTOPHER R. COOPER, U.S. District Judge,
delivered the opinion of the Court.

Plaintiffs brought suit to challenge a Department of Agriculture rule extending the licensing requirements of the Animal Welfare Act to certain on-line pet dealers. The Humane Society of the United States seeks to intervene in the action to defend the rule. Because the Humane Society has demonstrated that the challenge may impede its well established animal cruelty programs and that the USDA may not adequately represent its interests in defending the suit, the Court will grant the Humane Society's motion to intervene.

ANIMAL WELFARE ACT

I. Background

The Animal Welfare Act, ("AWA"), 7 U.S.C. § 2131, *et seq.*, establishes licensing and operational requirements for pet dealers. *Id.* § 2133. The AWA defines "dealer" as any person who for profit buys or sells dogs or other specified animals for use as pets, but it specifically excludes "retail pet store[s]" from that definition. *Id.* § 2132(f). The Act itself does not define the term "retail pet store." Congress left that to the Secretary of Agriculture, who administers the Act. *Id.* § 2151.

For over forty years, the USDA maintained a regulation that, with certain exceptions, broadly defined "retail pet store" as "any outlet" where dogs, cats and twelve other categories or species of animals are sold to the public for use as pets. 9 C.F.R. § 1.1 (2004). The agency defended that definition against a challenge from animal protection groups as recently as 2003. *See Doris Day Animal League v. Veneman*, 315 F.3d 297 (D.C.Cir.2003). In 2012, however, the USDA changed course. Responding to concerns raised by the animal protection community, including the Humane Society, over the alleged proliferation of on-line "puppy mills," the agency issued a proposed rule to revise the "definition of retail pet store and related regulations to bring more animals sold at retail under the protection" of the AWA. 77 Fed.Reg. 28799–01 (May 16, 2012). The new rule, which became final on September 18, 2013, redefined "retail pet store" to mean "a place of business or residence at which the seller, buyer and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase[.]" 9 C.F.R. § 1.1.[1]

Plaintiffs are a collection of dog and cat breeding clubs that object to the regulatory requirements they claim will result from the new retail pet store definition. Bringing suit under the Administrative Procedures Act

[1] Presumably to lessen the impact of the new definition on small breeders, the rule also widened an existing exemption based on the number of animals a breeder keeps on his or her premises. Under the expanded exemption, breeders are not subject to licensing if they maintain four or fewer breeding females on their premises and sell only the offspring of those animals for use as pets or for exhibition. *Id.* § 2.1.

("APA"), they contend that the USDA failed to justify the new rule, did not consider objections filed by the plaintiffs during the notice and comment period, and exceeded its authority under the AWA.

Apparently concerned that that the USDA "might agree to settle rather than litigate" the plaintiffs' challenge to the rule that it helped bring about, the Humane Society moved to intervene as a defendant in the case. Mot. to Intervene at 17. It argues that it will be forced to expend additional resources to respond to "animal cruelty emergencies at non-USDA licensed puppy mills" if the rule is set aside and questions whether USDA adequately represents its interests in defending the rule. The breeding clubs oppose the motion to intervene because, in their view, the Humane Society's voluntary expenditure of resources "to hound breeders acting within the bounds of the law" is not a "legally protected" interest justifying intervention and because the USDA adequately represents the Humane Society's interests, whatever they may be. Opp. to Mot. to Intervene at 4–6. The government takes no position on the motion.

II. Analysis

The Humane Society seeks to intervene both as of right and permissively under Federal Rules of Civil Procedure 24(a) and (b). Because the Court concludes that the Humane Society has met the requirements for intervention as of right, it need not reach the Humane Society's permissive intervention argument. Rule 24(a)(2) permits parties to intervene in a pending action if (1) the motion to intervene is timely; (2) the movant "claims an interest relating to the property or transaction that is the subject of the action"; (3) the movant "is so situated that disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and (4) the movant's interest is not adequately represented by existing parties. Fed. R. Civ. P. 24(a); *accord Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C.Cir.2003) (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C.Cir.1998)). Additionally, a party seeking to intervene as of right in this Circuit "must demonstrate that it has standing under Article III of the Constitution." *Fund for Animals*, 322 F.3d at 731–32 (citing *Military Toxics Project v. EPA)*, 146 F.3d 948, 953 (D.C.Cir.1998)). The Court will first address whether the Humane Society has standing.

ANIMAL WELFARE ACT

A. Standing

To satisfy the Article III standing requirements, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (footnote, citations, and quotations omitted). An organization "'may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.'" *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach,* 469 F.3d 129, 132 (D.C.Cir.2006) (quoting *Warth v. Seldin,* 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). To establish standing in its own right, an organization must demonstrate that that it has suffered a "concrete and demonstrable injury to [its] activities—with [a] consequent drain on the organization's resources—constitut[ing] ... more than simply a setback to the organization's abstract social interests." *Nat'l Taxpayers Union, Inc. v. United States,* 68 F.3d 1428, 1433 (D.C.Cir.1995) (quoting *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)).

The Humane Society has made this showing. The organization's animal cruelty programs are well established. *See Humane Society of U.S. v. Postal Serv.,* 609 F.Supp.2d 85, 89 (D.D.C.2009) (describing Humane Society programs). And it has demonstrated how invalidating the rule would require it to divert additional resources to police suspected animal cruelty by non-licensed breeders. *See* Mot. to Intervene at 13. Citing as examples the costs incurred treating animals captured in two federal raids, the Humane Society explains that "if the Final Rule remains in place, it is highly likely that [it] would no longer have to engage in so many raids of unlicensed breeding facilities." *Id.* at 13–14. The Humane Society also asserts that a successful challenge to the rule

would hamper its investigatory and educational programs by depriving it of information collected on licensed breeders. *Id.* at 14–16. Indeed, the breeding clubs themselves acknowledge that "the newly promulgated Rule saves HSUS money, enables HSUS to be more efficient in gathering information, and gives HSUS additional traction in its lobbying efforts." Opp. to Mot. to Intervene at 4. Case law in this Circuit firmly establishes that these types of impediments to an advocacy organization's activities constitute "concrete and demonstrable" injuries sufficient to confer standing. *See, e.g., Action Alliance of Senior Citizens of Greater Phila. v. Heckler,* 789 F.2d 931, 937–38 (D.C.Cir.1986) (elimination of compliance and information collecting services by government agency harmed private entity by increasing the burden on its "information-dispensing, counseling, and referral activities"); *People for the Ethical Treatment of Animals ("PETA") v. Dep't of Agric.,* 13–976, 7 F.Supp.3d 1, 8, 2013 WL 6571845, at *4 (D.D.C. Dec. 16, 2013) (USDA's alleged "failure to enforce the AWA with respect to birds" deprived the PETA "of key information that it relies on to educate the public" forcing it to "expend additional resources ... by pursuing complaints about bird mistreatment ... and by conducting its own investigations."); *Humane Society of U.S.,* 609 F.Supp.2d at 89 (Humane Society had standing to challenge postal service rule that increased costs of responding to animal cruelty raids).

The Humane Society's standing to intervene is not diminished, as the breeding clubs argue, because it seeks to defend, rather than challenge, the USDA rule. Opp. to Mot. to Intervene at 6.[2] Harm caused to an organization's programs by the invalidation of a rule is no less concrete or demonstrable than the same harm caused by an agency's failure to enforce a rule. Consistent with this principle, a number of decisions in this Circuit have permitted intervention by parties seeking to defend government action. *See Fund for Animals,* 322 F.3d at 733–34 (agency of

[2] While the breeding clubs direct this argument to the "legally protected interest" prong for intervention as of right, Opp. to Mot. to Intervene at 4–6, the Court will address it in discussing whether the Humane Society has standing because the inquiries are functionally identical under this Circuit's precedent. *See, e.g., Cal. Valley Miwok Tribe v. Salazar,* 281 F.R.D. 43, 47 (D.D.C.2012) (citing *Jones v. Prince George's Cnty.,* 348 F.3d 1014, 1019 (D.C.Cir.2003)); *Am. Horse Prot. Ass'n v. Veneman,* 200 F.R.D. 153, 157 (D.D.C.2001).

the Mongolian government and private groups could intervene to defend Department of the Interior regulation enabling hunters of Mongolian sheep to bring trophies to the United States); *Military Toxics Project,* 146 F.3d at 954 (trade association had standing to intervene to defend EPA rule because its members would be harmed if rule was set aside); *Wildearth Guardians v. Salazar,* 272 F.R.D. 4, 13–18 (D.D.C.2010) (coal mines intervened to defend Department of the Interior decision selling them land against a challenge by environmental groups). In *American Horse Protection Association v. Veneman,* 200 F.R.D. 153 (D.D.C.2001), for example, an animal protection organization brought suit to challenge USDA's allegedly lax enforcement of rules designed to protect show horses from training injuries. *Id.* at 155–56. A group of show horse trainers who were directly affected by the rules moved to intervene to defend the agency's enforcement regime. *Id.* at 156–57. The court ruled that the trainers had standing to intervene as of right because they demonstrated that they "will be injured in fact by the setting aside of the government's action it seeks to defend, that this injury will have been caused by that invalidation, and the injury would be prevented if the government action is upheld." *Id.* at 156. The same is true here.

Nor does it matter that the Humane Society voluntarily chooses to engage in its programs. *See* Opp. to Mot. to Intervene at 4. While "[a]n organization is not injured by expending resources to challenge [a] regulation," *Abigail Alliance,* 469 F.3d at 133, injuries to programs undertaken by choice may be sufficient to establish standing. *See Havens Realty,* 455 U.S. at 368, 102 S.Ct. 1114 (describing organization and program); *see also Humane Society of U.S.,* 609 F.Supp.2d at 89 (Humane Society had standing to challenge government actions that harmed voluntary program to address animal cruelty).

B. Timeliness

Moving to Rule 24(a)'s timeliness requirement, the Humane Society filed its motion to intervene 14 days after the breeding clubs filed their initial complaint. The motion is clearly timely, which the breeding clubs do not dispute. *See, e.g., Fund for Animals,* 322 F.3d at 735 (filing motion "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer" is timely).

C. Interest Related to the Action

A party seeking to intervene must next "claim[ ] an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a). The Humane Society has met this requirement because "in this Circuit, 'satisfying constitutional standing requirements demonstrates the existence of a legally protected interest.'" *Cal. Valley Miwok Tribe v. Salazar,* 281 F.R.D. 43, 47 (D.D.C.2012) (quoting *Jones v. Prince George's Cnty.,* 348 F.3d 1014, 1019 (D.C.Cir.2003)); *accord Am. Horse Prot. Ass'n,* 200 F.R.D. at 157.

D. Action Will Impede the Movant's Interest

The Humane Society also satisfies Rule 24(a)'s requirement that disposition of the action will impair the movant's ability to protect its interest. Whether the action will impede the movant's interest depends on the "'practical consequences of denying intervention, even where the possibility of future challenge to the regulation remain[s] available.'" *Fund for Animals,* 322 F.3d at 735 (quoting *Natural Res. Def. Council v. Costle,* 561 F.2d 904, 909 (D.C.Cir.1977)). As noted above, Plaintiffs acknowledge that the new rule benefits the Humane Society's programs and that vacating that rule would remove that benefit. Opp. to Mot. to Intervene at 4. This potential harm is not obviated by the Humane Society's ability to "reverse an unfavorable ruling by bringing a separate lawsuit," given the cost and delay of doing so. *See Fund for Animals,* 322 F.3d at 735 (citing *Natural Res. Def. Council,* 561 F.2d at 910); *accord Am. Horse Prot. Ass'n,* 200 F.R.D. at 158–59.

E. Adequate Representation

Finally, a party seeking to intervene under Rule 24(a)(2) must show that that its interests are not "adequately represented" by existing parties. This requirement is "'not onerous.'" *Fund for Animals,* 322 F.3d at 735 (quoting *Dimond v. Dist. of Columbia,* 792 F.2d 179, 192 (D.C.Cir.1986)). The movant need only show that the current representation "'may be inadequate[.]'" *Id.* (quoting *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972)). As a result, this Circuit "often conclude[s] that governmental entities do not adequately represent the interests of aspiring intervenors."

Id. at 736–37 (citing *Dimond,* 792 F.3d at 192–93) & n. 9 (collecting cases).

The Humane Society argues that, in light of the USDA's prior defense of the broader retail pet store definition, it might not defend the new rule as vigorously as the Humane Society would like, particularly because the government is "obligated to consider the desires of the entirety of the American public" over the Humane Society's narrower interests. Mot. to Intervene at 17. The breeding clubs assert that the USDA adequately represents the Humane Society's interests because "USDA [will] defend the Rule as being in [the] best interests of 'the entirety of the American public,' especially [the Humane Society]." Opp. to Mot. to Intervene at 7.

The Humane Society has overcome the low hurdle required to show inadequacy of present representation. "[M]erely because parties share a general interest in the legality of a program or regulation does not mean their particular interests coincide so that representation by the ***7** agency alone is justified." *Am. Horse Prot. Ass'n,* 200 F.R.D. at 159. The Humane Society has "a distinct and weighty interest" in furthering its investigatory and information-dissemination programs that is not equivalent to the government's broader concerns. *See, e.g., Cal. Valley Miwok Tribe,* 281 F.R.D. at 47–48; *see also, Fund for Animals,* 322 F.3d at 736 ("taking the [proposed intervenor's] efforts 'into account' does not mean giving them the kind of primacy that the [proposed intervenor] would give them").

III. Conclusion

For the foregoing reasons, the Humane Society has met the requirements for intervention as of right under Rule 24(a). It is hereby **ORDERED** that the Motion to Intervene by the Humane Society of the United States is GRANTED.

SO ORDERED.

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HORTON v. UNITED STATES DEPARTMENT OF AGRICULTURE.*
No. 13-3660.
Court Decision.
Filed May 19, 2014.

[Cite as: 559 Fed. Appx. 527 (2014)].

AWA – Civil penalty – Dealer – Good faith – Judicial Officer – Willfulness.

United States Court of Appeals,
Sixth Circuit

Court denied Petitioner's Petition for Review and affirmed Judicial Officer's Decision and Order, which held that Petitioner had violated the Animal Welfare Act by operating as a dealer without a license. The Court found that, because the Animal welfare Act does not require an Administrative Law Judge or Judicial Officer to determine willfulness before assessing civil penalties, the Judicial Officer did not abuse his discretion by failing to make a willfulness determination. The Court also held that the Judicial Officer's findings were supported by substantial evidence and that the civil penalty imposed was within the Judicial Officer's authority.

OPINION

CLAY, Circuit Judge, delivered the opinion of the Court.

Petitioner Lanzie Carroll Horton, Jr., was found to be in violation of the Animal Welfare Act ("AWA" or "the Act"), 7 U.S.C. §§ 2131–2159 (2006), by an Administrative Law Judge ("ALJ"), who issued a cease and desist order to prevent further violations of the Act and ordered Petitioner to pay $14,430 in civil penalties. Both Petitioner and Respondent, the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), appealed the ALJ's decision to a judicial officer ("JO"), acting for the Secretary of the Department of Agriculture (the "Department"), who increased the civil penalties amount from $14,430

* This case was not selected for publication in the Federal Reporter. *See* Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. *See also* Sixth Circuit Rule 28.

to $191,200. Petitioner appeals this decision, alleging that (1) the ALJ and JO erred by failing to determine the willfulness of his actions, and (2) the JO improperly applied the Department's criteria for assessing civil penalties.

For the reasons that follow, we **DENY** the petition for review and **AFFIRM** the Secretary's Decision and Order.

Background

I. Facts

During the time of the events described herein, Petitioner owned and operated Horton's Pups, a business located in Virginia, where Petitioner also lived. From November 9, 2006, through September 27, 2007, Petitioner sold dogs to William Pauley, a licensed dealer and owner of a retail pet store in Virginia called Pauley's Pups. Receipts in the record demonstrate that from November 9, 2006, through September 27, 2007, Pauley purchased a total of 914 puppies from Petitioner's business. Evidence also indicates that over a longer seven-to-eight-year period, Pauley purchased approximately 4,000 puppies from Petitioner. Resp.'s Br. at 11. When given the opportunity to review and contest Pauley's statements and records, Petitioner "stated that he was sure that Pauley's Pups' records were accurate, he did not want to review the records, and said that he sold all the dogs listed in the records." Pet'r's App. at 16.

On November 6, 2007, Petitioner received a letter from the APHIS Regional Director of Animal Care for the Eastern Region, Dr. Elizabeth Goldentyer, who warned that Petitioner likely needed to obtain a license to operate his business in compliance with the AWA. Her letter stated, "It has come to our attention that you may be conducting activities that would require you to be licensed or registered with us. Accordingly, we are enclosing a packet of AWA related information, including copies of the AWA regulations and standards and other materials." *Id.* at 12. Additionally, the letter welcomed Petitioner to "[c]ontact this office ... if you have any questions regarding this letter or the Animal Welfare Act." *Id.*

On June 8, 2008, without first obtaining an AWA license, Petitioner

sold forty-two dogs to Ervin Raber, a licensed dealer and owner of Golden View Kennels in Ohio. Later that year, on November 25, 2008, an APHIS investigator named Christopher Mina visited Petitioner, discussed Goldentyer's letter and the AWA licensing requirements, and inspected the premises. At that time, Mina asked whether Petitioner had received the letter and attached documents about licensing requirements from the Department, and Petitioner responded that he had. Petitioner also stated that he did not believe his transactions were of a nature that required him to obtain an AWA license. The inspector informed Petitioner that he did, in fact, need to obtain a license in order to continue engaging in the type of transactions his business regularly conducted; otherwise, he would have to cease and desist from operating as a dealer in violation of the AWA. At that time, Petitioner appears to have stopped the activity that violated the Act.[1]

II. Procedural History

On November 4, 2011, the APHIS Administrator filed a complaint against Petitioner. The complaint alleged that Petitioner, operating as Horton's Pups, violated the AWA by acting as a dealer as defined in 9 C.F.R. § 1.1 and 7 U.S.C. § 2132(f) from November 9, 2006, through September 20, 2009, without first obtaining a license from the United States Secretary of Agriculture (the "Secretary"). Petitioner filed an answer to this complaint on November 28, 2011.

After both parties conducted discovery, the Administrator filed a Motion for Summary Judgment on June 4, 2012. Petitioner filed his Memorandum in Opposition to the Motion for Summary Judgment, arguing that summary judgment would be improper because two genuine issues of material fact remained regarding whether Petitioner's AWA violations were willful and whether Petitioner operated as a dealer during the period from December 27, 2008, through September 30, 2009.

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[1] The record indicates that sometime between late December 2008 and January 17, 2009, Petitioner sold two dogs for use as pets to Harold Neuhart, a licensed dealer. Additionally, on or about September 30, 2009, Petitioner sold four dogs for use as pets to an unlicensed dealer named Pamela Knuckolls–Chappell. However, the JO found that these six sales did not constitute violations of the AWA, and that finding is not in dispute.

On January 2, 2013, the ALJ issued a decision granting in part and denying in part the Administrator's motion for summary judgment. The ALJ's order concluded that (1) from November 9, 2006, through September 27, 2007, Petitioner delivered for transportation, transported, sold, or negotiated the sale of 914 domesticated dogs for use as pets in violation of 9 C.F.R. § 2.1(a)(1)[22]; (2) on or about June 8, 2008, Petitioner delivered for transportation, transported, sold, or negotiated the sale of forty-two dogs in violation of 9 C.F.R. § 2.1(a)(1); (3) on or about December 27, 2008, Petitioner delivered for transportation, transported, sold, or negotiated the sale of two dogs in violation of 9 C.F.R. § 2.1(a)(1); and (4) on or about September 30, 2009, Petitioner delivered for transportation, transported, sold, or negotiated the sale of four dogs in violation of 9 C.F.R. § 2.1(a)(1). The ALJ also determined that 7 U.S.C. § 2149(b), which governs the assessment of civil penalties for violations of the Act, did not require that she make a willfulness determination before ordering Petitioner to cease and desist and pay civil penalties.

The ALJ applied the factors listed in § 2149(b) for assessing a civil penalty and found that Petitioner operated a large business, the gravity of his violations was serious due to the large number of violations he committed in a short period of time, and he failed to show good faith because he disregarded Goldentyer's letter and continued to conduct business as a dealer without an AWA license. The ALJ also found that Petitioner did not have a history of previous violations of the AWA and accepted as true his statement that he ceased acting in violation of the statute after receiving the APHIS investigator's warning in November 2008.[3] Based on these findings, the ALJ issued an order requiring that Petitioner cease and desist from further violations of the Act and pay $14,430 in civil penalties, which equates to $15 for each of the 962 violations.

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[2] The regulation provides that "any person operating or intending to operate as a dealer ... must have a valid license." 9 C.F.R. § 2.1(a)(1) (2013).

[3] This was inconsistent with the ALJ's finding that Petitioner violated the AWA on or about December 27, 2008, and on or about September 30, 2009. The six sales that occurred on those dates were factored into the ALJ's calculation of the civil penalty amount.

Both Petitioner and Respondent appealed the ALJ's decision to a JO, who issued a Decision and Order on May 30, 2013. In this Decision and Order, the JO adopted most of the ALJ's findings and conclusions, including the finding that a willfulness determination was unnecessary and would not affect the outcome of the case. However, unlike the ALJ, the JO found that Petitioner did not violate the AWA from December 27, 2008, through January 17, 2009, and on September 30, 2009, when he sold six additional dogs to two parties. Additionally, the JO applied the civil penalties factors differently and found that Petitioner's ongoing pattern of violations during the period in question demonstrated a history of previous violations. *See* 7 U.S.C. § 2149(b). In light of these findings, the JO concluded that the mere $15 penalty applied by the ALJ for each of the dogs sold in violation of the AWA was too insignificant to deter Petitioner and others from committing similar violations in the future. As a result, the JO increased the civil penalty from $15 per violation to $200 per violation, which corresponds with a total increase from $14,430 to $191,200. The JO based this increase on a number of factors, including his significant discretion under the statute, that the AWA authorized a civil penalty up to $3,750 per violation at the time of Petitioner's conduct, and that the Administrator recommended a total civil penalty of at least $1,792,500.

Petitioner timely appealed the JO's Decision and Order.

Discussion

I. The Judicial Officer Did Not Err by Failing to Determine Willfulness

A. *Standard of Review*

This Court's review of an administrative decision such as the one at issue here is highly deferential. Under the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706, this Court reviews an administrative decision to determine whether it was " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Volkman v. DEA*, 567 F.3d 215, 219–20 (6th Cir.2009) (quoting 5 U.S.C. § 706(a)(2)). To make this decision, "the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether

there has been a clear error of judgment.' " *Marsh v. Oreg. Nat. Res. Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (quoting *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). "Although the court's review is to be 'searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.' " *Northeast Ohio Reg. Sewer Dist. v. U.S. E.P.A.,* 411 F.3d 726, 732 (6th Cir.2005) (quoting *Volpe,* 401 U.S. at 416, 91 S.Ct. 814).

This Court reviews the JO's factual findings to determine whether they are supported by substantial evidence. *See Volpe Vito, Inc. v. Dep't of Agric.,* No. 97–3603, 1999 WL 16562, at *1 (6th Cir. Jan. 7, 1999) ("Our review of an administrative decision is narrow; we set aside an agency's action only if it is not supported by substantial evidence."). A reviewing court finds substantial evidence where there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moon v. Transp. Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir.1987) (internal quotation marks omitted). "Even if we were to reach a different conclusion from the agency, the agency's reasonable choice, supported by substantial evidence, may not be overturned." *Turner v. U.S. Dep't of Agric.,* 217 Fed.Appx. 462, 466 (6th Cir.2007) (internal quotation marks omitted).

In this case, "[b]ecause the judicial officer acts as the final deciding officer in lieu of the Secretary in Department administrative proceedings, we limit our review to his decision." *Pearson v. U.S. Dep't of Agric.,* 411 Fed.Appx. 866, 869–70 (6th Cir.2011) (internal quotation marks and citation omitted). Even where a JO disagrees with some of the conclusions of an ALJ, this Court applies the same standard of review and "[t]he ALJ's finding [sic] are simply part of the record to be weighed against other evidence supporting the agency." *Turner,* 217 Fed.Appx. at 466 (internal quotation marks omitted).

Petitioner asserts that his case requires *de novo* review, citing the language of 7 U.S.C. § 2149(c) and *Genecco Produce, Inc. v. Sandia Depot, Inc.,* 386 F.Supp.2d 165 (W.D.N.Y.2005), as authority for that proposition. Neither the statute nor *Genecco Produce* support Petitioner's argument. First, although § 2149(c) vests courts of appeals

with the authority to review the Secretary's orders[4], it does not suggest application of a *de novo* standard of review. Second, the Western District of New York stated that *de novo* review was only required in *Genecco Produce* because the case involved a trial *de novo* in the district court pursuant to 7 U.S.C. § 499g(c), not a "*direct appeal* of a final decision of the Secretary of Agriculture to the ... Court of Appeals," which is the procedural posture in this case. 386 F.Supp.2d at 171. Therefore, *Genecco Produce* is not analogous to the instant case and *de novo* review would be improper. Instead, this Court reviews the JO's decision for an abuse of discretion and substantial evidence.

B. *Analysis*

1. Willfulness Requirement

The ALJ and JO determined that 7 U.S.C. § 2149(b) does not include a willfulness requirement. Therefore, the JO held, the issuance of an order requiring a party to cease and desist activity in violation of the AWA and to pay civil penalties for those violations does not require a willfulness determination.

Petitioner asserts on appeal that because a willfulness requirement is clearly delineated in the complaint filed by APHIS against Petitioner, the ALJ and JO erred by not determining the willfulness of his conduct. Petitioner states, "By the plain language employed throughout its Complaint, APHIS makes a determination of willfulness an integral, rudimentary part of the whole and essentially elevates it to the very purpose of the Complaint." Pet'r's Br. at 13. Petitioner's entire argument that a willfulness determination is required before a civil penalty can be assessed against him is therefore based on the complaint's use of "willful" to describe his actions.

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[4] This section states that

[a] dealer ... aggrieved by a final order of the Secretary issued pursuant to this section may ... seek review of such order in the appropriate United States Court of Appeals ... 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.

7 U.S.C. § 2149(c).

Petitioner's argument fails because the plain language of the statute lacks a willfulness requirement, and Petitioner clearly violated the AWA by conducting business without a license, regardless of willfulness or knowledge.

Three sections of the AWA are at issue in this case. The first defines a dealer as "any person who ... 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 for research, teaching, exhibition, or use as a pet." 7 U.S.C. § 2132(f). Section 2134 states that each dealer must obtain a license before buying or selling any animal in this manner. Therefore, any individual who qualifies as a dealer and fails to obtain a license from the Secretary is in violation of the AWA. Section 2149(b) governs civil penalties and cease and desist orders for violators of the statute.[5] This section states as follows:

> Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale ... 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 $10,000 for each 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.

7 U.S.C. § 2149(b) (2013).[6] The plain language of this subsection does

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[5] Although this section is titled "Violations by Licensees," the plain language of the section extends its requirements to anyone who violates a part of Chapter 54, which contains the AWA. "[Headings and titles] are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 529, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). Here, the statutory language very clearly extends these penalties to all violators of requirements in the Chapter. Therefore, the title of this section need not be consulted for meaning.

[6] At the time Petitioner committed the violations, the maximum civil penalty was only $3,750 per violation, so this is the amount used by the JO to calculate an appropriate civil penalty. The statute was subsequently amended to raise the amount per violation to

not contain a willfulness requirement for the imposition of civil penalties or cease and desist orders, and Petitioner is unable to point to a place in the AWA that includes such a requirement.[7] Although there is no Sixth Circuit case law directly on point, the Ninth Circuit explicitly held in an unpublished decision that § 2149(b) does not contain a willfulness requirement. *Hickey v. Dep't of Agric.,* 878 F.2d 385, 1989 WL 71462 (9th Cir. June 26, 1989). That court stated that "7 U.S.C. § 2149(b) provides for penalties in the case of any violation, willful or not." *Id.* at *2. Petitioner only finds support for his argument in the complaint filed against him by the Secretary.

Because § 2149(b) does not require an ALJ or JO to make a willfulness determination before imposing civil penalties or a cease and desist order, the JO's failure to make a willfulness determination does not constitute an abuse of discretion.

2. Petitioner's Violation of the Statute

Petitioner asserts for the first time in his reply brief that the JO's factual findings were not based on substantial evidence. He appears to assert this argument as an alternative to his argument that a willfulness determination is required.

The JO's factual findings are reviewed by this Court for substantial evidence. A court finds substantial evidence where the JO's decision is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moon,* 836 F.2d at 229 (internal quotation marks omitted). According to Petitioner, the JO's finding that he violated the AWA is based on "mere bits and pieces of information."

$10,000. 7 C.F.R. § 3.91(b)(2)(ii) (2006).

[7] Section 2149(b) is distinguishable from Section 2149(d), which requires a willfulness or knowledge finding before a criminal penalty may be imposed for violations of the AWA. *See* 7 U.S.C. § 2149(d) ("Any dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, who knowingly violates any provision of this chapter shall, on conviction thereof, be subject to imprisonment for not more than 1 year."). Similarly, the APA requires a willfulness determination before the suspension of an administrative license can occur. *See Parchman v. U.S. Dep't of Agric.,* 852 F.2d 858, 865 (6th Cir.1988) (discussing a willfulness requirement when a license is suspended); *Hutto Stockyard, Inc. v. U.S. Dep't of Agric.,* 903 F.2d 299, 304 (4th Cir.1990) ("[U]nder the APA the suspension of Hutto was not proper unless it willfully violated the Act.").

Pet'r's Reply Br. at 5. He also states, "[T]he JO failed to 'take into account whatever in the record fairly detracts from its weight.' " *Id.* (quoting *Gray v. U.S. Dep't of Agric.,* 39 F.3d 670, 675 (6th Cir.1994)). It is unclear what Petitioner means by this last sentence because he merely concludes his argument by stating that the JO's findings were not supported by substantial evidence. He fails to point to "whatever in the record fairly detracts from [the] weight" of the evidence considered by the JO.

It is clear from the record that the JO's factual findings regarding Petitioner's dog sales are supported by substantial evidence. The JO based its factual findings on a great deal of evidence, including receipts of sale and records of acquisition obtained from individuals who purchased Petitioner's dogs. Petitioner clearly qualifies as a dealer as that term is defined under the AWA. Section 2132(f) defines a dealer as "any person who, in commerce, for compensation or profit, delivers for transportation, or transports ... buys, or sells, or negotiates the purchase or sale of, [ ] any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet." 7 U.S.C. § 2132(f). The extensive record establishes that Petitioner sold over 950 dogs for profit during the period in question. Because Petitioner does not fall under one of the exceptions for retail pet stores or for individuals who "do[ ] not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derive[ ] no more than $500 gross income from the sale of other animals during any calendar year," 7 U.S.C. § 2132(f)(i), (ii), he qualifies as a dealer. By operating as a dealer without a license, he violated the terms of the AWA and is subject to civil penalties and/or a cease and desist order.

II. Petitioner's Argument Regarding Lack of Good Faith and History of Previous Violations

A. *Standard of Review*

Where a petitioner challenges the imposition of sanctions by a JO, " '[t]he scope of our review ... is limited. Only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter.' " *Gray,* 39 F.3d at 677 (quoting *Stamper v. Sec'y of Agric.,* 722 F.2d 1483, 1489 (9th Cir.1984)) (internal

quotation marks omitted). "The fashioning of an appropriate and reasonable remedy is for the Secretary, not the court. The court may decide only whether under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in (his) choice of the remedy.' " *Butz v. Glover Livestock Comm'n Co., Inc.,* 411 U.S. 182, 188–89, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973) (quoting *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 612, 66 S.Ct. 758, 90 L.Ed. 888 (1946)).

B. *Analysis*

The AWA provides guidance to the Secretary for calculating an appropriate civil penalty. "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(b). In addition to these factors, a JO must also give weight to the recommendations of the administrators charged with enforcement of the statute. *See In re: S.S. Farms Linn Cnty., Inc.,* 50 Agric. Dec. 476, 497 (Feb. 8, 1991). "[R]ecommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the [ ] 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: Jerome Schmidt,* No. 05–0019, 2007 WL 959715, at *24 (Mar. 26, 2007). In the instant case, both the ALJ and the JO considered these factors when determining an appropriate amount for Petitioner's civil penalty.

Here, the JO found that Petitioner operated a large business based on the fact that he sold 956 dogs during a nineteen-month period, and found that the gravity of Petitioner's violations was severe due to the large number of dogs sold without a valid license. The JO also found that Petitioner's actions lacked good faith and that he had a history of previous violations of the Act. Believing a larger civil penalty would be necessary to have the proper deterrent and punitive effect, the JO increased the total amount of the civil penalty from $14,430 to $191,200.

The size of the civil penalty assessed against Petitioner is not unwarranted in law or without justification in fact. The JO's

determination that Petitioner's business is large is justified by the record because Petitioner moved a considerable number of dogs through the market in a fairly short period of time. Additionally, the JO's determination of the gravity of Petitioner's offenses is supported in law. The Secretary has issued a number of decisions stating that the failure to obtain an AWA license is a grave violation of the statute. *See, e.g., In re: Mary Bradshaw*, 50 Agric. Dec. 499, 509 (May 17, 1991) ("The licensing requirements of the Act are at the center of the remedial legislation .... [C]ontinuing to operate without a license[ ] with full knowledge of the licensing requirements [ ] strikes at the heart of the regulatory program."). Although perhaps not all of Petitioner's violations were committed knowingly, each transaction that followed receipt of Goldentyer's letter was done in direct contravention of the licensing requirements. Furthermore, operating without a license, especially after receipt of Goldentyer's letter, constitutes a grave violation that threatens the enforceability of the AWA.

In the instant case, analysis of the final two factors is slightly more complicated. The Secretary often finds a lack of good faith and a history of previous violations of the AWA, as would be expected, where an individual was involved in previous formal disciplinary proceedings yet continues to violate the statute. *See, e.g., In re: Karl Mitchell*, No. 09–0084, 2010 WL 5295429, at *8 (Dec. 21, 2009) ("In light of the previous proceedings against Mr. Mitchell that resulted in the issuance of cease and desist orders, civil penalties, and the revocation of Mr. Mitchell's Animal Welfare Act license, Mr. Mitchell has a history of previous violations and this fact demonstrates an absence of good faith.").[8] According to the record before us, Petitioner has never before been subject to formal disciplinary proceedings for violating the AWA. In fact, according to the record, the only interactions he has had with the Secretary were the letter he received from Goldentyer and his later visit from Mina, the APHIS investigator. Therefore, under this standard, it

[8] *See also Lancelot Kollman Ramos v. U.S. Dep't of Agric.,* 68 Agric. Dec. 60, at *8 (Apr. 7, 2009) (a history of previous violations stemmed from the fact that petitioner had previously admitted wrongdoing during another AWA disciplinary proceeding); *In re: Marilyn Shepherd*, 66 Agric. Dec. 1107, 1116 (Nov. 29, 2007) ("Ms. Shepherd apparently feels free to ignore the prior imposition of civil sanctions and to continue doing business without an Animal Welfare Act license. Refusing to comply with a lawful final order such as that issued by Administrative Law Judge Baker is unacceptable, to say the least.").

might be difficult to attribute to Petitioner bad faith and a history of previous violations.

However, bad faith and a history of previous violations can also be found where a petitioner receives notice of his violations yet continues to operate without a license. *See, e.g.*, *In re: William Richardson*, 66 Agric. Dec. 69, 88–89 (June 13, 2007) ("I have consistently held under the Animal Welfare Act that an ongoing pattern of violations over a period of time establishes a violator's 'history of previous violations,' even if the violator has not been previously found to have violated the Animal Welfare Act.").[9] For example, in *In re: Beverly Howser*, 68 Agric. Dec. 1141, 1143 (Oct. 15, 2009), the Secretary found a history of previous violations in the absence of formal complaints or penalties, after the petitioner was informed of the AWA's requirements and continued to operate her business without a license. Her conduct during the period in question established a history of previous violations and a lack of good faith. *Id.* Similarly, in *In re: Sam Mazzola*, 68 Agric. Dec. 822, 827 (Nov. 24, 2009), the petitioner's choice to disregard a clear warning, even in the absence of prior formal disciplinary proceedings, was sufficient to establish a history of previous violations and a lack of good faith.[10]

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[9] Although *In re: William Richardson* dealt with violations of the Commercial Transportation of Equine for Slaughter Act, the JO applied this reasoning from AWA cases. Richardson was fined for violations of the Act between August 26, 2003, and November 23, 2004. 66 Agric. Dec. at 87–90. These violations also served as the ongoing pattern of violations establishing a history of previous violations for purposes of § 2149(b). *Id.* at 89. Similarly, the JO in the instant case found that Petitioner's violations during the time in question, especially those following receipt of Goldentyer's letter, demonstrated a history of previous violations.

[10] *See also In re: Jerome Schmidt*, No. 05–0019, 2007 WL 959715, at *24 (Mar. 26, 2007), in which the JO found a history of previous violations based on "Dr. Schmidt's ongoing pattern of violations over a period of more than 3 years 4 months" and his "disregard for the requirements of the Regulations and Standards"; *In re: Judy Sarson*, 67 Agric. Dec. 419, 426 (Jan. 17, 2008) ("Despite knowing that her AWA license had expired ... Respondent continued to engage in regulated activity and sold numerous dogs.... Such an ongoing pattern of violations demonstrates a lack of good faith and establishes a 'history of previous violations'...."); *In re: Tracey Harrington*, 66 Agric. Dec. 1061, 1071 (Aug. 28, 2007) ("Ms. Harrington's ongoing pattern of violations on May 10, 2004, and February 3, 2005, establishes a history of previous violations for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.").

In the instant case, while it is clear that each of Petitioner's over 950 sales constitutes a violation of the AWA, it is not clear that each occurred during a time when Petitioner was aware of his noncompliance. The JO found in this case that Petitioner had a history of previous violations based on his continuous pattern of conduct and his disregard for the AWA's requirements during part of the period in question. Although Petitioner may not have been aware of the regulations while perpetrating all of these violations, his pattern of violations, his disregard of Goldentyer's letter, and his continued sale of dogs following receipt of that letter are sufficient under many of the Secretary's decisions to support the JO's finding of a history of previous violations and a lack of good faith. While the history of previous violations and the lack of good faith may not be as severe as the JO indicated, the JO's decision is not unwarranted in law or without justification in fact. It was reasonable for the JO to assume knowledge, lack of good faith, and a history of previous violations once Petitioner received Goldentyer's letter, disregarded its contents, and continued to operate his business by selling dogs in violation of the statute. Petitioner committed over 950 violations of the statute, at times with knowledge or intentional ignorance of its requirements, which warrants application of civil penalties.

Although the penalty in this case is quite hefty, especially when compared with other cases, many of which are cited in Petitioner's briefs, the sanction is within the administrative agency's authority. This Court does not invalidate an administrative sanction simply because "it is more severe than sanctions imposed in other cases." *Butz,* 411 U.S. at 187, 93 S.Ct. 1455. *See also Volpe Vito,* 1999 WL 16562, at *2 (internal quotation marks omitted) ("[T]his court will not consider the severity of a sanction in a particular AWA case relative to sanctions imposed in other cases, provided that the sanction is permitted by the authorizing statute and the departmental regulation, and the statute and regulation themselves are not challenged."); *Garver v. United States,* 846 F.2d 1029, 1030 (6th Cir.1988) ("This court does not review administrative agency sanctions for reasonableness, or for whether they comport with our ideas of justice."). Instead, this Court defers to the Secretary's employment of a sanction so long as it is not unwarranted in law or without justification in fact, and it is permitted by the authorizing statute and regulation. *Garver,* 846 F.2d at 1030. Here, the AWA allowed a civil penalty up to $3,750 per violation, the Administrator recommended

$1,875 per violation, and the JO imposed a civil penalty of $200 per violation. This civil penalty is within the JO's authority and will not be disturbed.

CONCLUSION

For the foregoing reasons, we **DENY** the petition for review and **AFFIRM** the Secretary's Decision and Order.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: HOPE KNAUST, AN INDIVIDUAL; STAN KNAUST, AN INDIVIDUAL; & THE LUCKY MONKEY, A PARTNERSHIP.
Docket No. 12-0552.
Decision and Order.
Filed April 9, 2014.

AWA – Administrative procedure – Animal welfare – Evidence , admission of – Evidence, objections to – Evidence, photographic – Facilities – Recordkeeping – Summary judgment – Veterinary care.

Colleen A. Carroll, Esq. for Complainant.
John D. Nation, Esq. for Respondents.
Initial Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint on July 26, 2012. The Administrator 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 pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, on or about February 11, 2008, February 10, 2010, February 17, 2010, February 23, 2010, March 4, 2010, May 3, 2010, and September 7, 2010, Hope Knaust, Stan Knaust, and The Lucky Monkey [hereinafter Respondents] willfully violated the

Animal Welfare Act and the Regulations.[1] On August 22, 2012, Respondents filed an Answer to the Complaint Filed by the Administrator, Animal and Plant Health Inspection Service [hereinafter Answer], in which Respondents admit some of the allegations in the Complaint, deny some of the allegations in the Complaint, and explain some of the allegations in the Complaint.

Pursuant to Chief Administrative Law Judge Peter M. Davenport's [hereinafter the Chief ALJ] August 27, 2012, Order, the parties exchanged witness lists, exhibit lists, and copies of their exhibits. The Administrator's exhibits are identified as "CX" and the exhibit number. Respondents' sole exhibit is Hope Knaust's affidavit, dated April 6, 2010, which was prepared by Morris Smith, an Animal and Plant Health Inspection Service [hereinafter APHIS] investigator, as part of APHIS' investigation of Respondents' violations of the Animal Welfare Act and the Regulations; hence, Respondents' only exhibit is also one of the Administrator's exhibits and it is identified as "CX 7."

On May 16, 2013, the Administrator filed Complainant's Motion for Summary Judgment. On June 28, 2013, Respondents filed Respondents' Response to Complainant's Motion for Summary Judgment. On November 15, 2013, the Chief ALJ issued a Decision and Order in which the Chief ALJ: (1) granted Complainant's Motion for Summary Judgment in part and denied Complainant's Motion for Summary Judgment in part; (2) ordered Respondents to cease and desist from violating the Animal Welfare Act and the Regulations; and (3) revoked Hope Knaust and Stan Knaust's Animal Welfare Act license (Animal Welfare Act license number 74-C-0388).[2]

On December 20, 2013, Respondents appealed to the Judicial Officer. On January 6, 2014, the Administrator filed Complainant's Response to Respondents' Petition for Appeal, and on January 13, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

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[1] Compl. ¶¶ 5-21 at 2-7.
[2] Chief ALJ's Decision and Order at 15-17.

ANIMAL WELFARE ACT

Decision

Respondents' Appeal Petition

Respondents raise four issues in Respondents' Appeal to Judicial Officer [hereinafter Appeal Petition]. First, Respondents contend the Chief ALJ erroneously failed to rule on Respondents' objection to the Administrator's photographic evidence.[2] Respondents assert the photographs in question were not authenticated and argue unauthenticated documents cannot be considered on a motion for summary judgment. (Appeal Pet. at 2-3).

In Respondents' Response to Complainant's Motion for Summary Judgment, Respondents objected to the Administrator's photographic evidence, as follows:

> None of these photographs are authenticated. . . .
>
> Accordingly, Respondents object to each of these photographs and request that the Administrative Law Judge not consider them as summary judgment evidence or proof.

Resp'ts' Resp. to Complainant's Mot. for Summ. J. at 4. The Chief ALJ did not rule on Respondents' objection to the photographs in question; however, the Rules of Practice do not require the Chief ALJ to rule specifically on Respondents' objection. Therefore, I reject Respondents' contention that the Chief ALJ's failure to rule specifically on their objection to the Administrator's photographic evidence is error.[3] The Chief ALJ provides citations to the evidence he relied upon in connection with his consideration of Complainant's Motion for Summary Judgment.[4] I find nothing in the Chief ALJ's Decision and Order indicating the Chief ALJ considered or relied upon the Administrator's

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[2] CX 12, CX 15-CX 16, CX 18-CX 22, CX 28-CX 29, CX 53, CX 63, CX 67-CX 76, CX 78-CX 111, CX 115-CX 138.

[3] Respondents could have, but did not, advance their objection by means of a motion, which would have required the Chief ALJ to rule on Respondents' objection. *See* Greenly, 72 Agric. Dec. 586, 596, 596 n.18 (U.S.D.A. 2013).

[4] *See* the Chief ALJ's references to exhibits (Chief ALJ's Decision and Order at 5-15).

photographic evidence.

Second, Respondents contend the Chief ALJ erroneously failed to rule on Respondents' objection to an interview log prepared by an APHIS investigator, Morris Smith (CX 6). Respondents argue the interview log is hearsay and cannot be considered on a motion for summary judgment. (Appeal Pet. at 3).

In Respondents' Response to Complainant's Motion for Summary Judgment, Respondents objected to the interview log (CX 6) as follows:

> The content or substance of a summary judgment affidavit must be otherwise admissible and any hearsay contained in a summary-judgment affidavit remains hearsay, beyond the bounds of the court's consideration. *Johnson v. Weld County, Colorado*, 594 F.3d 1202, 1210 (10th Cir. 2010). Respondents therefore object to this exhibit and request that it not be considered in ruling upon Complainant's motion for summary judgment.

Resp'ts' Resp. to Complainant's Mot. for Summ. J. at 5. The Chief ALJ did not rule on Respondents' objection to the interview log (CX 6); however, the Rules of Practice do not require the Chief ALJ to rule specifically on Respondents' objection. Therefore, I reject Respondents' contention that the Chief ALJ's failure to rule specifically on their objection to the interview log (CX 6) is error.[5]

The Chief ALJ provides citations to the evidence he relied upon in connection with his consideration of Complainant's Motion for Summary Judgment.[6] The Chief ALJ considered and relied extensively on the interview log (CX 6);[7] however, I reject Respondents' contention that the Chief ALJ's consideration of and reliance on hearsay evidence is error. The Administrative Procedure Act provides for admission and exclusion of evidence, as follows:

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[5] *See* note 3.
[6] *See* note 4.
[7] *See* the Chief ALJ's references to CX 6 (Chief ALJ's Decision and Order at 6-10, 14).

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
> (d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Similarly, the Rules of Practice provides for exclusion of evidence, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
> (h) *Evidence*—(1) *In general*. . . .
> . . . .
> (iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv). Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act.[8] Moreover, responsible hearsay has long been admitted in United States Department of Agriculture administrative

[8] *See, e.g.*, Richardson v. Perales, 402 U.S. 389, 409-10 (1971) (stating, even though inadmissible under the rules of evidence applicable to court procedure, hearsay evidence is admissible under the Administrative Procedure Act); Bennett v. NTSB, 66 F.3d 1130, 1137 (10th Cir. 1995) (stating the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); Crawford v. U.S. Dep't of Agric., 50 F.3d 46, 49 (D.C. Cir. 1995) (stating administrative agencies are not barred from reliance on hearsay evidence, which need only bear satisfactory indicia of reliability), *cert. denied*, 516 U.S. 824 (1995); Gray v. U.S. Dep't of Agric., 39 F.3d 670, 676 (6th Cir. 1994) (holding documentary evidence which is reliable and probative is admissible in an administrative proceeding, even though it is hearsay).

proceedings.[9]

Third, Respondents assert, while the Chief ALJ conceded that a court should not make credibility determinations in a summary judgment proceeding, the Chief ALJ erroneously made credibility determinations throughout the Chief ALJ's Decision and Order (Appeal Pet. at 3-4).

Respondents do not cite any portion of the Chief ALJ's Decision and Order that supports their assertion that the Chief ALJ made impermissible credibility determinations, and I cannot locate any credibility determination in the Chief ALJ's Decision and Order. Therefore, I reject Respondents' contention that the Chief ALJ made impermissible credibility determinations in connection with his consideration of Complainant's Motion for Summary Judgment.

Fourth, Respondents contend the Chief ALJ erroneously discounted Hope Knaust's affidavit, dated April 6, 2010 (CX 7) (Appeal Pet. at 4). Respondents' basis for their assertion that the Chief ALJ discounted Hope Knaust's affidavit is the Chief ALJ correct observation that Hope Knaust's affidavit was prepared not by her attorney, but rather by Morris Smith, an APHIS investigator, as part of APHIS' investigation of Respondents' violations of the Animal Welfare Act and the Regulations (Chief ALJ's Decision and Order at 3-4). I do not find that the Chief ALJ's observation indicates that the Chief ALJ discounted Hope Knaust's affidavit. Moreover, the Chief ALJ repeatedly cites Hope

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[9] Post & Taback, Inc., 62 Agric. Dec. 802, 816-17 (U.S.D.A. 2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005); Hansen, 57 Agric. Dec. 1072, 1110-11 (U.S.D.A. 1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (U.S.D.A. 2000); Zimmerman, 57 Agric. Dec. 1038, 1066-67 (U.S.D.A. 1998); Saulsbury Enterprises, 56 Agric. Dec. 82, 86 (U.S.D.A. 1997) (Order Den. Pet. For Recons.); Gray, 55 Agric. Dec. 853, 868 (U.S.D.A. 1996) (Decision as to Glen Edward Cole); Thomas, 55 Agric. Dec. 800, 821 (U.S.D.A. 1996); Big Bear Farm, Inc., 55 Agric. Dec. 107, 136 (U.S.D.A. 1996); Fobber, 55 Agric. Dec. 60, 69 (U.S.D.A. 1996); Marion, 53 Agric. Dec. 1437, 1463 (U.S.D.A. 1994); Petty, 43 Agric. Dec. 1406, 1466 (U.S.D.A. 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); De Graaf Dairies, Inc., 41 Agric. Dec. 388, 427 n.39 (U.S.D.A. 1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); Thornton, 38 Agric. Dec. 1425, 1435, *final decision*, 38 Agric. Dec. 1539 (U.S.D.A. 1979) (Remand Order); Me. Potato Growers, Inc., 34 Agric. Dec. 773, 791-92 (U.S.D.A. 1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); Marvin Tragash Co., 33 Agric. Dec. 1884, 1894 (U.S.D.A. 1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

Knaust's affidavit (CX 7) as support for his findings[10] establishing that the Chief ALJ did not discount Hope Knaust's affidavit, but, instead, relied extensively on Hope Knaust's affidavit. Therefore, I reject Respondents' contention that the Chief ALJ erroneously discounted Hope Knaust's affidavit dated April 6, 2010.

After careful consideration of the record and the arguments raised by Respondents on appeal, except for minor modifications, I adopt, as the final decision and order in this proceeding, the Chief ALJ's Decision and Order granting Complainant's Motion for Summary Judgment in part and denying Complainant's Motion for Summary Judgment in part.

The Summary Judgment Standard

The Rules of Practice do not specifically provide for the use or exclusion of summary judgment; however, I have consistently held that hearings are futile and summary judgment is appropriate in proceedings in which there is no factual dispute of substance.[11] A factual dispute of substance is present if sufficient evidence exists on each side so that a rational trier of fact could resolve the dispute either way and resolution of the dispute is essential to the proper disposition of the claim. The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. The usual and primary purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses.[12]

If the moving party supports its motion for summary judgment, the burden shifts to the non-moving party who may not rest on mere allegation or denial in the pleadings, but must set forth facts showing

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[10] *See* the Chief ALJ's references to CX 7 (Chief ALJ's Decision and Order at 6-11, 14-15).

[11] *See* Pine Lake Enters., Inc., 69 Agric. Dec. 157, 162-63 (U.S.D.A. 2010); Bauck, 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); Animals of Mont., Inc., 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *see also* Veg-Mix, Inc. v. U.S. Dep't of Agric., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations).

[12] Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

there is a genuine issue of fact for trial.[13] In setting forth such facts, the non-moving party must identify the facts by reference to depositions, documents, electronically stored information, affidavits, declarations, stipulations, admissions, interrogatory answers, or other materials.[14] In ruling on a motion for summary judgment, all evidence must be considered in the light most favorable to the non-moving party with all justifiable inferences to be drawn in the non-movant's favor.[15] Although Respondents filed Respondents' Response to Complainant's Motion for Summary Judgment, the response is devoid of the type of supporting documentation necessary to show there is a genuine issue for trial, except for references to Hope Knaust's affidavit dated April 6, 2010 (CX 7).

Discussion

The first three paragraphs of the Complaint identify Hope Knaust, Stan Knaust, and The Lucky Monkey. Aside from correcting the mailing address for Stan Knaust, Respondents admit the allegations in paragraphs 1, 2, and 3 of the Complaint. The Administrator alleges in paragraph 4 of the Complaint that Respondents operate a zoo, which Respondents deny (Answer ¶ 4 at 1). Given the fact that the Animal Welfare Act license held by Hope Knaust and Stan Knaust is a Class C Animal Welfare Act license for an exhibitor (CX 1 at 2, 5, 7, 10), the characterization of Respondents' business is not material, and resolution of the issue of whether Respondents operate a zoo is not required.

The Administrator alleges in paragraph 5 of the Complaint that, on or about February 11, 2008, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(d) by failing to enclose their facilities for a zebra by a perimeter fence not less than six feet high. Respondents state: "When the zebra was a baby, the wall was four feet high. As the animal grew, Respondents built a six-foot high enclosure." (Answer ¶ 5 at 2).

The Regulations require exhibitors to enclose outdoor facilities with a perimeter fence, as follows:

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[13] Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 380 (5th Cir. 1998); Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994).
[14] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).
[15] Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

§ 3.127 Facilities, outdoor.

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

9 C.F.R. § 3.127(d). Respondents admit in their Answer that the perimeter fence for the zebra was only four feet high and Respondents make no assertion that they obtained written approval from the Administrator for a fence less than six feet high. Accordingly, the violation alleged in paragraph 5 of the Complaint is established. (CX 4 at 2, CX 7 at 1, CX 65).

The Administrator alleges in paragraph 6 of the Complaint that, on or about February 10, 2010, Respondents failed to employ an attending veterinarian under formal arrangements in willful violation of 9 C.F.R. § 2.40(a)(1), and, specifically, Respondents' arrangements did not include a current written program of veterinary care with regularly scheduled

visits to Respondents' facility, none having been made since 2008.[16] Respondents deny this allegation in their Answer, claiming Dr. Snyder was the attending veterinarian, who Respondents believed had come to Respondents' facility in 2008 for an on-site visit (Answer ¶ 6 at 2). While Respondents may have considered Dr. Snyder to have been their attending veterinarian, merely entertaining such a belief is not sufficient. The Regulations require that, in the case of a part-time attending veterinarian, formal arrangements include a written program of veterinary care and regularly scheduled visits to the exhibitor's premises.[17] Hope Knaust's affidavit states that on February 10, 2010, Donnovan Fox cited her for not having a written program of veterinary care and that she was given a week to get a veterinarian and to have the program of veterinary care signed (CX 7 at 2). Thus, at the time of the February 10, 2010 inspection, a current written program of veterinary care did not exist (CX 2 at 1, CX 4 at 2-3, CX 5). Dr. Snyder confirmed that he last signed a program of veterinary care for Respondents' facility in 2008 and that he had not visited Respondents' facility, except possibly to sell hay to Respondents in 2009 (CX 5, CX 6 at 2). The protracted hiatus between Dr. Snyder's professional visits to Respondents' facility cannot be considered sufficiently regular to comply with 9 C.F.R. § 2.40(a)(1). Accordingly, the violation alleged in paragraph 6 of the Complaint is established.

The Administrator also alleges recurring violations of 9 C.F.R. § 2.40(a)(1) on or about February 17, 2010,[18] February 23, 2010,[19] March 4, 2010,[20] and May 3, 2010.[21] Hope Knaust admits the violations of 9 C.F.R. § 2.40(a)(1) on February 10, 2010, and February 17, 2010, by stating Respondents were waiting for Dr. Snyder to visit Respondents' facility:[22]

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[16] Hope Knaust "thought" Dr. David Snyder had been to Respondents' facility in 2009 (CX 7 at 2). Dr. Snyder confirmed that he sold hay to Respondents in 2009 and presumably had been to Respondents' facility to deliver the hay (CX 6 at 2).

[17] *See* 9 C.F.R. § 2.40(a)(1).

[18] Compl. ¶ 10 at 3.

[19] Compl. ¶ 12 at 4.

[20] Compl. ¶ 15 at 5.

[21] Compl. ¶ 18 at 6.

[22] Dr. Snyder did go Respondents' facility at some point before February 19, 2010, but did not go to the residence because he could see from the driveway that the animals and the facility were in very bad condition (CX 6 at 3).

> Regarding the PVC, I told Don [Fox] we were still waiting for Dr. Snyder to come out and inspect the property. Dr. Snyder told Stanley he was coming on 02/17/10. Apparently, Don went and talked to Dr. Snyder and he told Don he was not going to be our vet. Dr. Snyder called Stanley the next day, on 02/18/10, and said he could not pass or sign our vet plan.

CX 7 at 5.[23] Hope Knaust also admitted the February 23, 2010, violation of 9 C.F.R. § 2.40(a)(1), as follows:

> Again, I was first again cited for not having a written program of veterinary care. It is true that Don Fox cited this on his inspection reports dated, 02/10/10 and 02/17/10. I did not know until 03/19/10 that Dr. Snyder was refusing to come back out[.[24]]

CX 7 at 8. The same extract implicitly admits the March 4, 2010 violation of 9 C.F.R. § 2.40(a)(1) alleged in paragraph 15 of the Complaint. Hope Knaust's affidavit further addresses Respondents' inability to secure services of a veterinarian, until arrangements were made for the services of Dr. Tim Holt on March 4, 2010. Dr. Holt first visited Respondents' facility on March 5, 2010 (CX 7 at 13). Even after Dr. Holt's visit, the evidence is clear that no written program of veterinary care was signed (CX 61 at 1).

Despite Respondents' professed belief that Dr. Snyder continued to be their attending veterinarian, the record establishes that Dr. Snyder had advised Stan Knaust that he (Dr. Snyder) could not sign a program of veterinary care and could not continue to serve as attending veterinarian for Respondents (CX 6 at 3). Moreover, a letter dated February 19, 2010, received by APHIS on February 22, 2010 from Dr. Snyder, makes clear that Dr. Snyder had no intention of serving as attending veterinarian for

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[23] I infer Hope Knaust's references to a "PVC" are references to a program of veterinary care.

[24] Dr. Snyder had communicated his intention not to continue as Respondents' veterinarian to Stan Knaust (CX 6 at 3); however, Stan Knaust apparently failed to share that information with Hope Knaust.

Respondents (CX 11). Indeed, Dr. Snyder's letter expressly states he could not endorse renewal of Hope Knaust and Stan Knaust's Animal Welfare Act license, citing the pain and suffering of Respondents' animals, the lack of feed for Respondents' animals, and the lack of manpower and funding to keep Respondents' animals in a satisfactory health status. Dr. Snyder's five-year relationship with Respondents and his observation of the severe deterioration of conditions at Respondents' facility, which is consistent with observations described by APHIS inspector Donnovan Fox, lends significant credence to the allegations concerning the failure of Respondents to provide adequate care for the animals at their facility (CX 4, CX 6, CX 11).

The Administrator alleges in paragraph 7 of the Complaint that, on or about February 10, 2010, Respondents failed to provide adequate veterinary care to a camel with extensive hair loss and visibly red and irritated skin, in willful violation of 9 C.F.R. §§ 2.40(a) and 2.40(b)(2). Respondents deny the allegation in their Answer, stating the camel had been taken to the veterinarian just prior to February 10, 2010, and treated (Answer ¶ 7 at 2). Respondents' assertion that the camel was treated prior to the February 10, 2010, inspection is refuted by Dr. Snyder's statement that the camel was not brought to his clinic until February 11, 2010 (CX 6 at 1-2). Moreover, as Dr. Snyder's account confirms that the camel required veterinary care, the February 10, 2010, violation of 9 C.F.R. § 2.40(b)(2) is established. Because Respondents took the camel to the veterinarian on February 11, 2010 and the camel received care, I decline to find a repeat violation of 9 C.F.R. § 2.40(b)(2) as to the camel on February 23, 2010, as alleged in paragraph 13 of the Complaint. Hope Knaust attempts to minimize the need for veterinary care as to the other animals (CX 7 at 8-9); however, the February 23, 2010, inspection report prepared by Donnovan Fox (CX 13 at 1-2) and the affidavit of APHIS veterinarian, Dr. Daniel Jones (CX 10 at 7) support the existence violations of 9 C.F.R. § 2.40(b)(2) as to a capybara, a kangaroo, two fallow deer, and a sheep on February 23, 2010.[25] Respondents were cited

[25] Hope Knaust's affidavit references an opinion given by Dr. Holt regarding need for veterinary care for the fallow deer on February 23, 2010 (CX 7 at 9); however, Respondents did not contact Dr. Holt until March 4, 2010, and Dr. Holt did not see Respondents' animals until March 5, 2010 (CX 7 at 13, 17). The lack of adequate veterinary care was confirmed when APHIS confiscated the animals on March 5, 2010 (CX 50-CX 52, CX 54-CX 55).

for repeat violations of 9 C.F.R. § 2.40(b)(2) on March 4, 2010, for the capybara, the kangaroo, and two fallow deer. Absent any factual evidence that the animals were treated, the March 4, 2010, violations of 9 C.F.R. § 2.40(b)(2), as alleged in paragraph 16 of the Complaint, are established (CX 50-52, CX 54-CX 55).

The Administrator alleges in paragraph 8 of the Complaint that, on or about February 10, 2010, Respondents failed to maintain accurate records of the acquisition and disposition of animals, in willful violation of 9 C.F.R. § 2.75(b). Respondents deny the allegation, but Respondents' Answer and Hope Knaust's affidavit inconsistently state the records were corrected on the date of the February 10, 2010, inspection (Answer ¶ 8 at 2; CX 7 at 2). Given that Respondents admit corrections were made, Respondents have admitted the existence of deficiencies, and the February 10, 2010, violation of 9 C.F.R. § 2.75(b)(2). While the correction of a violation can be taken into account when determining the sanction to be imposed, the correction does not alter the fact that a violation occurred.[26]

The Administrator alleges in paragraph 9(a)-(f) of the Complaint that, on or about February 10, 2010, Respondents failed to meet the minimum standards in 9 C.F.R. §§ 3.75(b), 3.75(c)(1), 3.75(c)(3), 3.125(a), 3.127(b), and 3.127(c), in willful violation of 9 C.F.R. § 2.100(a). Respondents deny the allegations in paragraph 9 of the Complaint averring Respondents' facilities had been cleaned consistent with existing seasonal conditions (Answer ¶ 9 at 2-3). However, Hope Knaust admits in her affidavit the existence of uninstalled cabinets in the primate building, the disrepair of the fences enclosing a camel and Axis deer, the failure to have a heat source for the capybaras, and the lack of shelter for eight alpacas (CX 7 at 2-4). Accordingly, the violation of 9 C.F.R. § 3.75(b) alleged in paragraph 9(a) of the Complaint is established, the violation of 9 C.F.R. § 3.125(a) alleged in paragraph 9(d) of the

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[26] Greenly, 72 Agric. Dec. 603, 623 (U.S.D.A. 2013); Tri-State Zoological Park of W. Md., Inc., 72 Agric. Dec. 128, 175 (U.S.D.A. 2013); Pearson, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Bond, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); Drogosch, 63 Agric. Dec. 623, 643 (U.S.D.A. 2004); Parr, 59 Agric. Dec. 601, 644 (U.S.D.A. 2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); DeFrancesco, 59 Agric. Dec. 97, 112 n.12 (U.S.D.A. 2000); Huchital, 58 Agric. Dec. 763, 805 n.6 (U.S.D.A. 1999); Stephens, 58 Agric. Dec. 149, 184-85 (U.S.D.A. 1999).

Complaint is established, and the violation of 9 C.F.R. § 3.127(b) alleged in paragraph 9(e) of the Complaint is established. Hope Knaust's affidavit affirms the content of the Answer and I find the affidavit to be sufficient to raise a factual dispute of substance as to the violation of 9 C.F.R. § 3.75(c)(1) alleged in paragraph 9(b) of the Complaint, the violation of 9 C.F.R. § 3.75(c)(3) alleged in paragraph 9(c) of the Complaint, and the violation of 9 C.F.R. § 3.127(c) alleged in paragraph 9(f) of the Complaint and additional evidence will be required if these alleged violations are to be established.

The Administrator alleges additional violations of the minimum standards in paragraphs 11, 14, 17, and 20 of the Complaint based upon inspections of Respondents' facility on February 17, 2010, February 23, 2010, March 4, 2010, and May 3, 2010 (CX 9, CX 13, CX 25, CX 61). Hope Knaust admits in her affidavit that certain of the violations cited on February 17, 2010, including the existence of tools in the food storage building and the fact that the facility's only full time employee had departed and had not been replaced, leaving the burden for caring for the significant number of animals primarily upon her, with only limited assistance from Stan Knaust who no longer resided on the premises (CX 7 at 5-8; Answer ¶ 2 at 1).[27] Accordingly, I find, on or about February 17, 2010, Respondents' food storage building contained tools, in violation of 9 C.F.R. § 3.75(b), as alleged in paragraph 11(a) of the Complaint; and Respondents failed to employ a sufficient number of trained personnel to care for Respondents' animals, in violation of 9 C.F.R. §§ 3.85 and 3.132, as alleged in paragraph 11(e) of the Complaint. Hope Knaust affirms in her affidavit the content of the Answer, and I find the affidavit to be sufficient to raise a factual dispute of substance as to the violation of 9 C.F.R. § 3.75(e) alleged in paragraph 11(a) of the Complaint; the violation of 9 C.F.R. § 3.75(c)(1) alleged in paragraph 11(b) of the Complaint; the violation of 9 C.F.R. § 3.75(c)(3) alleged in paragraph 11(c) of the Complaint; the violation of 9 C.F.R. § 3.84(b)(3) alleged in paragraph 11(d) of the Complaint; the violation of 9 C.F.R. § 3.127(b) alleged in paragraph 11(f) of the Complaint; and the violation of 9 C.F.R. § 3.127(c) alleged in paragraph 11(g) of the Complaint and additional evidence will be required if these alleged violations are to be established.

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[27] Dr. Snyder commented on the deterioration of Respondents' facility after "Stanley and Hope split up[.]" (CX 6 at 2).

The same insufficiency of staff was again cited on February 23, 2010 (CX 13 at 3); however, Hope Knaust states in her affidavit that by February 23, 2010, a number of the animals had been sold and a new employee had been hired (CX 7 at 10). While Hope Knaust admits the existence of a horse carcass, as alleged in paragraph 11(j) of the Complaint, she explains that the horse had died only the night before and that the APHIS inspectors arrived before Respondents had time to remove it (CX 7 at 12). The February 23, 2010 inspection report also cited Respondents with failing to provide sufficient food for the animals (CX 13 at 4-5). Respondents deny the allegation (Answer ¶ 14 at 5-6); however, given the malnourished condition of the animals confiscated on March 5, 2010, the only logical conclusion that can be reached is that the animals were not being fed adequate amounts of food (CX 50-CX 52, CX 54-CX 55, CX 112). Accordingly, I find, on or about February 23, 2010, Respondents failed to provide sufficient food to their animals, in violation of 9 C.F.R. § 3.129, as alleged in paragraph 14(h) of the Complaint; and Respondents failed to remove a bloated equine carcass adjacent to the llama enclosure, in violation of 9 C.F.R. § 3.131(c), as alleged in paragraph 14(j) of the Complaint. Hope Knaust affirms the content of the Answer in her affidavit, and I find the affidavit to be sufficient to raise a factual dispute of substance as to the violation of 9 C.F.R. § 3.75(a) alleged in paragraph 14(a) of the Complaint; the violation of 9 C.F.R. § 3.84(a) alleged in paragraph 14(b) of the Complaint; the violation of 9 C.F.R. § 3.85 alleged in paragraph 14(c) of the Complaint; the violation of 9 C.F.R. § 3.125(a) alleged in paragraph 14(d) of the Complaint; the violation of 9 C.F.R. § 3.125(c) alleged in paragraph 14(e) of the Complaint; the violation of 9 C.F.R. § 3.127(b) alleged in paragraph 14(f) of the Complaint; the violation of 9 C.F.R. § 3.127(c) alleged in paragraph 14(g) of the Complaint; and the violation of 9 C.F.R. § 3.130 alleged in paragraph 14(i) of the Complaint and additional evidence will be required if these alleged violations are to be established.

The violations cited on March 4, 2010 include an allegation in paragraph 17(b) of the Complaint that the primate structure was not constructed in a manner to provide adequate heat, in violation of 9 C.F.R. § 3.76(a). That allegation appears to be inartfully drawn as the evidence indicates that, rather than the problem being in the structure's construction, the problem was the lack of fuel for the heating element

which had to be replenished to raise the temperature to an acceptable level (CX 7 at 14). Hope Knaust fails to deny that fencing for a pig and llama was in disrepair and asserts the llama shelter violation was corrected that day (CX 7 at 14-15). The failure to provide sufficient food was also cited and is established by the examination of the animals following their confiscation on March 5, 2010 (CX 50-CX 52, CX 54-CX 55, CX 112). Accordingly, I find, on or about March 4, 2010, Respondents' fencing for animals, including fencing for Respondents' llamas and pig, was in disrepair in violation of 9 C.F.R. § 3.125(a), as alleged in paragraph 17(c) of the Complaint; Respondents failed to provide adequate shelter for llamas, in violation of 9 C.F.R. § 3.127(b), as alleged in paragraph 17(d) of the Complaint; and Respondents failed to provide sufficient food to Respondents' animals, in violation of 9 C.F.R. § 3.129, as alleged in paragraph 17(f) of the Complaint. Hope Knaust affirms the content of the Answer in her affidavit, and I find the affidavit to be sufficient to raise a factual issue of substance as to the violations of 9 C.F.R. §§ 3.75(a) and 3.75(e) alleged in paragraph 17(a) of the Complaint; the violation of 9 C.F.R. § 3.76(a) alleged in paragraph 17(b) of the Complaint; the violation of 9 C.F.R. § 3.127(b) (as it relates to adequate shelter for a camel and a capybara) alleged in paragraph 17(d) of the Complaint; the violation of 9 C.F.R. § 3.127(c) alleged in paragraph 17(e) of the Complaint; the violation of 9 C.F.R. § 3.130 alleged in paragraph 17(g) of the Complaint; and the violation of 9 C.F.R. § 3.132 alleged in paragraph 17(h) of the Complaint and additional evidence will be required if these alleged violations are to be established.

Respondents failed to submit any factual evidence concerning the violations cited in the May 3, 2010 and September 7, 2010 inspections reports (CX 39, CX 61), and, in Respondents' Response to Complainant's Motion for Summary Judgment, Respondents rely solely upon pleadings. Consistent with the burden shifting requirements,[28] the violations cited on May 3, 2010 and September 7, 2010 are deemed established. Accordingly, I find, on or about May 3, 2010, Respondents' failed to employ an attending veterinarian under formal arrangements that included a current written program of veterinary care, in violation of 9 C.F.R. § 2.40(a)(1), as alleged in paragraph 18 of the Complaint;

[28] *See* note 13.

Respondent failed to maintain accurate records of the acquisition and disposition of animals, in violation of 9 C.F.R. § 2.75(b), as alleged in paragraph 19 of the Complaint; and Respondents' enclosure for animals, including sheep, goats, and pigs, were in disrepair, in violation of 9 C.F.R. § 3.125(a), as alleged in paragraph 20 of the Complaint.[29] I also find, on or about September 7, 2010, Respondents failed to provide APHIS officials access to Respondents' facility in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126, as alleged in paragraph 21 of the Complaint.

The evidence compels the conclusion that Respondents lacked sufficient resources both in funding and personnel for continued operation of, or correction of the conditions at, Respondents' facility. The conditions observed reflect an appalling lack of adequate and necessary veterinary care and husbandry practices despite repeated citations, serious overall deterioration in the standard of care of Respondents' animals and physical facilities, and repeated deficiencies at Respondents facility. The seriousness of the conditions at Respondents' facility ultimately resulted in confiscation of some of the animals at Respondents' facility on March 5, 2010, including Hobo, a monkey that provided Hope Knaust with her main source of income.[30] The subsequent evaluation of the confiscated animals reflects unacceptable neglect in their care, with many animals observed as being malnourished and requiring immediate veterinary care for anemia, lice, and parasites (CX 50-CX 52, CX 54-CX 55).

Findings of Fact

1. Hope Knaust and Stan Knaust are individuals and are partners operating The Lucky Monkey, a general partnership also sometimes

[29] Paragraph 20 of the Complaint alleges, on or about March 4, 2010, Respondents' enclosures for animals, including sheep, goats, and pigs, were in disrepair in willful violation of 9 C.F.R. §§ 2.100(a) and 3.125(a). Subsequent to filing the Complaint, the Administrator asserted the date of the violation alleged in paragraph 20 of the Complaint is erroneous and the correct date is "May 3, 2010." (Correction of Complaint filed May 16, 2013).

[30] Confiscation was undertaken pursuant to 7 U.S.C. § 2146, which permits confiscation of any animal found to be suffering as a result of a failure to comply with any provision of the Animal Welfare Act or any regulation or standard issued under the Animal Welfare Act.

known as The Lucky Monkey Petting Zoo. Hope Knaust lives at [redacted]*and Stan Knaust lives in Irving, Texas. (Answer ¶¶ 1-3 at 1-2).

2. Hope Knaust and Stan Knaust hold a Class C Animal Welfare Act exhibitors license (Animal Welfare Act license number 74-C-0388). (Answer ¶¶ 1-3 at 1-2; CX 1).

3. On or about February 11, 2008, Respondents failed to enclose facilities for a zebra with a fence not less than six feet high. (Answer ¶ 5 at 2; CX 4 at 2, CX 7 at 1, CX 65).

4. On or about February 10, 2010, February 17, 2010, February 23, 2010, March 4, 2010, and May 3, 2010, Respondents failed to employ an attending veterinarian under formal arrangements and, specifically, Respondents' arrangements with their part-time attending veterinarian did not include a current written program of veterinary care and regularly scheduled visits to Respondents' premises. (CX 2, CX 4-CX 7, CX 9, CX 13, CX 25, CX 61).

5. On or about February 10, 2010, Respondents failed to provide adequate veterinary care to a camel with extensive hair loss and visibly red and irritated skin, later diagnosed to have external parasites and a secondary infection. (CX 2 at 1-2, CX 4 at 3, CX 6 at 1-2).

6. On or about February 10, 2010 and May 3, 2010, Respondents failed to maintain accurate records of the acquisition and disposition of the animals. (CX 2 at 2, CX 4 at 3, CX 7 at 2, CX 61 at 1-2).

7. On or about February 10, 2010, Respondents' nonhuman primate building contained uninstalled cabinets, the enclosures housing a camel and Axis deer were in disrepair, an enclosure for the capybaras lacked a heat source, and an enclosure for eight alpacas lacked adequate shelter. A heat source was provided for the capybaras that same day. (CX 2 at 2-5, CX 7 at 2-4).

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* Redacted by the Editor to protect individual privacy interests. *See* 5 U.S.C. § 552(b)(6).

ANIMAL WELFARE ACT

8. On or about February 17, 2010, Respondents' food storage building contained tools and Respondents failed to employ a sufficient number of trained personnel to care for the nonhuman primates and to provide minimally acceptable husbandry to the other animals. (CX 4 at 7-9, CX 7 at 5-8, CX 9 at 2, 4-6, CX 10 at 3, 5-6).

9. On or about February 23, 2010, Respondents failed to have an attending veterinarian provide adequate veterinary care to a capybara, a kangaroo, two fallow deer, and a sheep (CX 13 at 1-2). The failure to provide adequate veterinary care to the capybara, the kangaroo, and the two fallow deer continued until March 4, 2010. (CX 25 at 1-2, CX 50-CX 52, CX 54-CX 55).

10. On or about February 23, 2010, Respondents failed to provide sufficient food for their animals, and Respondents failed remove a bloated equine carcass from the area adjacent to the llama enclosure. (CX 7 at 12, CX 13 at 4-5, CX 14 at 5-6, CX 50-CX 52, CX 54-CX 55).

11. On or about March 4, 2010, Respondents failed to maintain fencing for animals in a state of repair, allowing a pig and a llama to escape their enclosures; failed to provide sufficient food for their animals; and failed to provide adequate shelter from inclement weather for llamas. (CX 7 at 14-16, CX 25 at 2-4, CX 50-CX 52, CX 54-CX 55).

12. Conditions observed on March 4, 2010, resulted in the confiscation of some of Respondents' animals by the APHIS on March 5, 2010. Subsequent examination of the confiscated animals reflected neglect in their care, with many animals being observed as being malnourished and requiring immediate veterinary care for anemia, lice, and parasites. (CX 50-CX 52, CX 54-CX 55).

13. On or about May 3, 2010, Respondents' enclosures for animals, including sheep, goats, and pigs, were in disrepair. (CX 61 at 2-3).

14. On or about September 7, 2010, Respondents failed to provide APHIS officials access to Respondents' facility. (CX 39).

Conclusions of Law

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

2. On or about February 11, 2008, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(d) by failing to enclose their facilities for a zebra with a fence not less than six feet high.

3. On or about February 10, 2010, February 17, 2010, February 23, 2010, March 4, 2010, and May 3, 2010, Respondents willfully violated 9 C.F.R. § 2.40(a)(1) by failing to employ an attending veterinarian under formal arrangements.

4. On or about February 10, 2010, February 23, 2010, and March 4, 2010, Respondents willfully violated 9 C.F.R. § 2.40(b)(2) by failing to obtain adequate veterinary care for Respondents' animals visibly exhibiting the need for veterinary care.

5. On or about February 10, 2010, and May 3, 2010, Respondents willfully violated 9 C.F.R. § 2.75(b) by failing to maintain accurate records of the acquisition and disposition of animals.

6. On or about February 10, 2010, Respondents' facility did not meet the minimum standards in willful violation of 9 C.F.R. §§ 2.100(a), 3.75(b), 3.125(a), and 3.127(b).

7. On or about February 17, 2010, Respondents' facility did not meet the minimum standards in willful violation of 9 C.F.R. §§ 2.100(a), 3.75(b), 3.85, and 3.132.

8. On or about February 23, 2010, Respondents' facility did not meet the minimum standards in willful violation of 9 C.F.R. §§ 2.100(a), 3.129, and 3.131(c).

9. On or about March 4, 2010, Respondents' facility did not meet the minimum standards in willful violation of 9 C.F.R. §§ 2.100(a), 3.125(a), 3.127(b), and 3.129.

ANIMAL WELFARE ACT

10. On or about May 3, 2010, Respondents' facility did not meet the minimum standards in willful violation of 9 C.F.R. §§ 2.100(a) and 3.125(a).

11. On September 7, 2010, Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 by failing to provide APHIS officials access to Respondents' facilities.

12. Factual disputes of substance exist as to the violations of the Animal Welfare Act and the Regulations alleged in paragraphs 9(b)-(c), 9(f), 11(a) (as it relates to Respondents' alleged violation of 9 C.F.R. § 3.75(e)), 11(b)-(d), 11(f)-(g), 13 (as it relates to Respondents' failing to obtain veterinary care for a camel), 14(a)-(g), 14(i), 17(a)-(b), 17(d) (as it relates to Respondents' failing to provide adequate shelter for a camel and a capybara), 17(e), and 17(g)-(h) of the Complaint.

13. An order revoking Hope Knaust and Stan Knaust's Animal Welfare Act license (Animal Welfare Act license number 74-C-0388) is appropriate.

14. An order instructing Respondents to cease and desist from violations of the Animal Welfare Act and the Regulations is appropriate.

For the foregoing reasons, the following Order is issued.

ORDER

1. Respondents and their agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, are ordered to cease and desist from violations of the Animal Welfare Act and the Regulations. Paragraph 1 of this Order shall become effective upon service of this Order on Respondents.

2. Hope Knaust and Stan Knaust's Animal Welfare Act license (Animal Welfare Act license number 74-C-0388) is revoked. Paragraph 2 of this Order shall become effective sixty (60) days after service of this Order on Respondents.

Right to Judicial Review

Respondents have 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. §§ 2341-2350. Respondents must seek judicial review within sixty (60) days after entry of the Order in this Decision and Order.[31] The date of entry of the Order in this Decision and Order is April 9, 2014.

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[31] 7 U.S.C. § 2149(c).

ANIMAL WELFARE ACT

In re: GUS WHITE, a/k/a GUSTAVE L. WHITE, III, d/b/a COLLINS EXOTIC ANIMAL ORPHANAGE.
Docket No. 12-0277.
Decision and Order.
Filed May 13, 2014.

AWA – Animal welfare – Burden of proof – Civil penalty – Employees – Facilities – Food and feeding – Handling – Veterinary care – Records – Sanctions.

Sharlene A. Deskins, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On March 9, 2012, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator 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 pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Administrator alleges, during the period May 24, 2007, to the date of the issuance of the Complaint on March 3, 2012, Gus White willfully violated the Animal Welfare Act and the Regulations.[1] On April 4, 2012, Mr. White filed an Answer to Complaint in which Mr. White denied the material allegations of the Complaint.

On December 11-13, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] conducted a hearing in Hattiesburg, Mississippi. Mr. White appeared pro se, but was assisted by his son, Gustave L. White, IV [hereinafter Mr. White, IV], Collins, Mississippi.

[1] Compl. ¶¶ II-XII at 2-10.

Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator.[2]

On April 26, 2013, after the parties had an opportunity to submit post-hearing briefs, the ALJ filed a Decision and Order in which the ALJ: (1) concluded Mr. White violated the Animal Welfare Act and the Regulations, as alleged in paragraphs III, IV(A), IV(B), IV(D)(2), IV(D)(6) as it relates to the structural integrity of animal enclosures, IV(D)(7), V(A), VI(A), VI(B), VI(C), VI(D)(1), VI(D)(2), VI(D)(3), VII(A)(1), VIII, IX(4), IX(5), IX(6), X, and XII of the Complaint; (2) concluded the Administrator failed to prove by a preponderance of the evidence that Mr. White violated the Animal Welfare Act and the Regulations, as alleged in paragraphs II(A), II(B), II(C), IV(C), IV(D)(1), IV(D)(3), IV(D)(4), IV(D)(5), IV(D)(6) as it relates to structural defects of the roof of a building, VI(D)(4), VI(D)(5), VII(A)(2), VII(A)(3), IX(1), IX(2), IX(3), IX(7), and XI of the Complaint; (3) ordered Mr. White to cease and desist from further violations of the Animal Welfare Act and the Regulations; and (4) revoked Animal Welfare Act license number 51-C-0064.[3]

On May 22, 2013, the Administrator filed "Complainant's Appeal Petition and Motion for Extension of Time" [hereinafter Administrator's Appeal Petition] in which the Administrator requested an extension of time to file a memorandum in support of the Administrator's Appeal Petition. I granted the Administrator's request for an extension of time,[4] and on July 19, 2013, the Administrator filed "Complainant's Brief in Support of Its Appeal Petition" [hereinafter Administrator's Appeal Brief]. On May 28, 2013, Mr. White filed "Respondent's Appeal Petition and Motion for Extension of Time" [hereinafter Mr. White's Appeal Petition] in which Mr. White requested an extension of time to file a memorandum in support of Mr. White's Appeal Petition. I granted

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[2] References to the transcript of the December 11-13, 2012, hearing are indicated as "Tr." and the page number. The Administrator's exhibits are identified as "CX" and the exhibit number.

[3] ALJ's Decision & Order at 38-41.

[4] "Order Extending Time for Filing a Memorandum in Support of the Administrator's Appeal Petition," filed May 23, 2013; and "Order Extending Time for Filing a Memorandum in Support of the Administrator's Appeal Petition," filed June 21, 2013.

Mr. White's request for an extension of time,[5] and on June 21, 2013, Mr. White filed "Memorandum in Support of Notice of the Respondent's Appeal Petition" [hereinafter Mr. White's Appeal Brief]. On July 24, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt the ALJ's Decision and Order as the final decision— except that: (1) I conclude Mr. White did not violate 9 C.F.R. § 3.125(a) on September 8, 2010, as alleged in paragraph IV(D)(6) of the Complaint; (2) I conclude Mr. White violated 9 C.F.R. § 3.131(a) on March 23, 2010, as alleged in paragraph VI(D)(5) of the Complaint; (3) I conclude Mr. White violated 9 C.F.R. § 3.125(a) on January 21, 2010, as alleged in paragraph VII(A)(2) of the Complaint; (4) I conclude Mr. White violated 9 C.F.R. § 2.131(c)(1) on July 11, 2008, as alleged in paragraph XI of the Complaint; (5) I assess Mr. White a $39,375 civil penalty; and (6) I revoke Animal Welfare Act license number 65-C-0012.

DECISION

A. Admissions

Mr. White admits he is an individual residing in Collins, Mississippi, and operates an animal exhibition under the business name Collins Exotic Animal Orphanage. Mr. White further admits, at all times material to this proceeding, he operated as an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations and he holds, and at all times material to this proceeding held, Animal Welfare Act license number 65-C-0012.

B. Summary of Factual History

Mr. White has worked with animals all of his life and has learned animal care from experience, lectures, books, and animal experts (Tr. at 918-19). Mr. White has exhibited animals at facilities in Slidell, Louisiana, and then at the current site in Collins, Mississippi, as well as at public lectures (Tr. at 624, 919). Mr. White has held an Animal

[5] "Order Extending Time for Filing a Memorandum in Support of Respondent's Appeal Petition," filed May 29, 2013.

Welfare Act license for 43 years (Tr. at 624-25, 919-20). Mr. White has experience with all kinds of animals, including exotic cats (Tr. at 931).

Mr. White [redacted][*] has limited his daily hands-on oversight of Collins Exotic Animal Orphanage, but he visits the site often, as his home is located on the property where the animal exhibit is situated (Tr. at 929). Mr. White's wife, Bettye White, is now the primary caretaker for the animals, and Mr. White, IV also is very involved in caring for the animals and maintaining buildings and structures (Tr. at 932-33). In addition to Mr. White's wife and son, three people regularly volunteer to work at Collins Exotic Animal Orphanage (Tr. at 932-33). Mr. White provides instructions to his wife, his son, and the volunteers regarding the operation of Collins Exotic Animal Orphanage (Tr. at 933).

Mrs. White was raised on a farm and is familiar with the care of typical farm animals (Tr. at 816). Mrs. White has worked with her husband at his animal exhibition facilities for more than 30 years and developed her animal-handling expertise through her experience (Tr. at 625-26). Mrs. White helped to hand-raise a variety of animals from birth (Tr. at 626). Mr. White, IV was raised in a home adjacent to Collins Exotic Animal Orphanage and has been around and worked with animals his entire life (Tr. at 978). Mr. White, IV was trained to feed and care for animals by his parents and the volunteers and learned the habits of animals and learned to observe animal behavior from his parents and the volunteers (Tr. at 978-79, 988). Mr. White, IV did not diagnose or treat animals, but discussed his observations with his parents, who would decide whether to consult a veterinarian to provide treatment to animals (Tr. at 991). One of the volunteers, Jennifer Farmer, is a biologist who has formal training in animal care and who has worked at Collins Exotic Animal Orphanage for years (Tr. at 1026-28).

Veterinary care for Mr. White's animals is provided by Dr. Melissa Ainsworth, who volunteers her services to Mr. White (CX 43). Dr. Ainsworth visits Collins Exotic Animal Orphanage several times a year, dropping by when she is in the area or coming to the facility when

[*] Redacted by the Editor pursuant to Exemption 6 of the Freedom of Information Act (FOIA). *See* 5 U.S.C. 552(b)(6).

Mrs. White asks for a visit (Tr. at 631).

On January 25, 2012, the Mississippi Department of Wildlife, Fisheries & Parks confiscated Mr. White's larger animals (Tr. at 728). Mr. White challenged the confiscation and a state court ruled the confiscation of Mr. White's animals was illegal (Tr. at 729); however, at the time of the hearing in this proceeding, the confiscated animals had not been returned to Mr. White and the only animals regulated under the Animal Welfare Act that were at Collins Exotic Animal Orphanage were one coyote-hybrid, rabbits, and a kinkajou (Tr. at 729).

C. The Animal Welfare Act and the Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to ensure that the animals are provided humane care and treatment. 7 U.S.C. § 2131. The Secretary of Agriculture is authorized to promulgate regulations to govern the humane handling, care, treatment, and transportation of animals. 7 U.S.C. §§ 2143(a), 2151. The Animal Welfare Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer, and transportation of regulated animals. 7 U.S.C. §§ 2133-34, 2140. Each exhibitor is required to allow inspection by Animal and Plant Health Inspection Service [hereinafter APHIS] employees to assure the exhibitor is complying with the Animal Welfare Act and the Regulations. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126.

Violations of the Animal Welfare Act or the Regulations by licensees may result in the assessment of civil penalties, the issuance of cease and desist orders, and the suspension or revocation of Animal Welfare Act licenses. 7 U.S.C. § 2149. Each exhibitor is liable for violations of the Animal Welfare Act by agents or employees of the exhibitor. 7 U.S.C. § 2139.

The Regulations provide requirements for licensing, recordkeeping, and veterinary care, as well as standards for the humane handling, care, treatment, and transportation of covered animals. The Regulations set forth specific requirements regarding facilities where animals are housed, feeding and watering of animals, and sanitation.

D. The Cited Violations

1. Handling Animals – 9 C.F.R. § 2.131(c)(1)

The Regulations require exhibitors to handle animals during public exhibition, as follows:

> **§ 2.131 Handling of animals.**
>
> . . . .
> (c)(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.

9 C.F.R. § 2.131(c)(1). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 2.131(c)(1) on July 11, 2008, March 23, 2010, and September 8, 2010.[1]

On July 11, 2008, APHIS inspector Dr. Tami Howard found the barrier fence in front of the leopard enclosure could be easily moved to allow the public access to the animals (Tr. at 173-74; CX 16-CX 17). Mrs. White explained that she and her son were replacing the railing in front of the leopard enclosure when the inspectors arrived and the railing may not have looked solid (Tr. at 689). The railing installation was completed immediately after the inspectors left (Tr. at 690). While Mr. White's immediate correction of the violation is commendable and I impose no civil penalty for the violation, I conclude the Administrator proved by a preponderance of the evidence that Mr. White willfully violated 9 C.F.R. § 2.131(c)(1) on July 11, 2008, as alleged in paragraph XI of the Complaint.

On September 8, 2010, Dr. Howard observed that the construction of the barrier next to the enclosure for a tiger named "Stave" was not sufficient to prevent the public from access to the tiger (Tr. at 149, 547; CX 7 at 3, CX 9 at 14). Dr. Howard explained that, although the

[1] Compl. ¶¶ IV(C), VI(C), XI at 4, 6, 10.

problem was with the construction of the fence, the potential for breach of a barrier brought the defect under a "handling" violation (Tr. at 547-48). Mrs. White testified that several fence posts and gates were at the back of the tiger's enclosure that restricted access to the tiger (Tr. at 653-54). I accord weight to Mrs. White's testimony and conclude the Administrator did not prove by a preponderance of the evidence that, on September 8, 2010, Mr. White violated 9 C.F.R. § 2.131(c)(1), as alleged in paragraph IV(C) of the Complaint.

On March 23, 2010, Dr. Howard cited Mr. White for the condition of the barrier fence in the coyote-mix area (Tr. at 209). Dr. Howard considered the fence flimsy and unstable and inadequate to prevent contact between the public and the animals (CX 26 at 3, CX 27 at 5). Dr. Kirsten, a supervisory animal care specialist for APHIS, recalled that wires were broken from the post, making the fence very unstable (Tr. at 379-80). Mrs. White disagreed that the fence could have been easily broken and asserted it would have been easier to climb over the fence than to have tampered with the fence (Tr. at 697-98).

The evidence supports the Administrator's contention that the barrier between the public and the coyotes was inadequate, and I conclude the Administrator proved by a preponderance of the evidence that Mr. White willfully violated 9 C.F.R. § 2.131(c)(1) on March 23, 2010, as alleged in paragraph VI(C) of the Complaint.

2. Housing Facilities – 9 C.F.R. §§ 3.1(a) and 3.125(a)

The Regulations require that housing facilities meet structural requirements, as follows:

> **§ 3.1 Housing facilities, general.**
>
> (a) *Structure; construction.* Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

> **§ 3.125 Facilities, general.**
>
> (a) *Structural strength*. The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

9 C.F.R. §§ 3.1(a), 3.125(a). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.1(a) on September 24, 2009, and January 21, 2010,[1] and alleges Mr. White willfully violated 9 C.F.R. § 3.125(a) on January 21, 2010, March 23, 2010, and September 8, 2010.[2]

On September 24, 2009, Dr. Howard observed insufficient substrate in the wolf-hybrid enclosure and cited Mr. White for a violation of 9 C.F.R. § 3.1(a) (Tr. at 183-84; CX 22 at 1, CX 23 at 3-4). Mrs. White testified she regularly added clay to the floor of the wolf-hybrid enclosure because wolf-hybrids liked to dig (Tr. at 721-22). Ms. Williamson testified that she helped Mrs. White put dirt in enclosures twice a week (Tr. at 577). However, Ms. Williamson testified that, since 2006, she only goes to Collins Exotic Animal Orphanage one or two days per week, and, while she is there, her work has been limited to supervisory work and work in the office (Tr. at 561).

I find Mrs. White's and Ms. Williamson's testimony regarding the standard operating procedure at Collins Exotic Animal Orphanage is not sufficiently specific to overcome the Administrator's evidence of the condition of the wolf-hybrid enclosure on September 24, 2009. Therefore, I conclude the Administrator proved by a preponderance of the evidence that, on September 24, 2009, Mr. White willfully violated 9 C.F.R. § 3.1(a), as alleged in paragraph IX(6) of the Complaint.

On the inspection conducted on January 21, 2010, Dr. Howard cited Mr. White for a violation of 9 C.F.R. § 3.125(a) for the condition of the

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[1] Compl. ¶¶ VII(A)(1), IX(6) at 7, 9.
[2] Compl. ¶¶ IV(D)(6), VI(D)(1), VII(A)(2) at 5-8.

floors in the tigers' enclosures. The tiger named "Stave" was lying in mud, and Dr. Howard believed the floor needed additional substrate to comply with 9 C.F.R. § 3.125(a) (Tr. at 195-96; CX 24 at 1, CX 25 at 4, 6-8). Dr. Howard found similar unsatisfactory conditions in the wolf-hybrid enclosure and cited Mr. White for a violation of 9 C.F.R. § 3.1(a) (Tr. at 195; CX 24 at 1, CX 25 at 1). On March 23, 2010, the enclosures for the tiger named "Stave" and the tiger named "India" needed additional substrate (Tr. at 209-13; CX 26 at 4, CX 27 at 13, 16). Dr. Kirsten agreed with Dr. Howard's assessment (Tr. at 398).

Mrs. White disagreed that the tigers' enclosures were hazardous to the tigers, as the tigers were responsible for creating pools of water when they finished swimming (Tr. at 727). She also did not agree with the citation for the floor of the tiger Stave's enclosure and explained, if she added too much dirt, it would run off because the enclosure was situated on an incline (Tr. at 727-28). She routinely put dirt in the cages with the help of volunteer Geraldine Williamson (Tr. at 577-78). Mrs. White considered moving Stave's enclosure, but the Mississippi Department of Wildlife, Fisheries & Parks confiscated Mr. White's big cats on January 25, 2012 (Tr. at 728). Mrs. White explained that the wolves liked to dig (Tr. at 728).

I conclude the Administrator proved by a preponderance of the evidence that, on January 21, 2010, Mr. White willfully violated 9 C.F.R. § 3.1(a), as alleged in paragraph VII(A)(1) of the Complaint and willfully violated 9 C.F.R. § 3.125(a), as alleged in paragraph VII(A)(2) of the Complaint.

On March 23, 2010, Dr. Howard cited Mr. White for multiple violations of structural requirements. Dr. Howard found rotted posts at the bottom of both cougars' (Delilah and Star) enclosures that were not anchored in the ground. Dr. Howard observed that a perch in the leopards' enclosure was broken. The cyclone fence around the tiger India's enclosure was on the outside of the vertical posts and not clamped to the posts, which compromised the strength of the fence. There was also a gap at the bottom of the left end of the enclosure big enough to allow the tiger to pass its paw through, presenting a hazard to passers-by. There were broken resting platforms in both the tiger Brother's and the jungle cat Gypsy's enclosures. Dr. Kirsten also

observed structural defects during the March 23, 2010, inspection (Tr. at 381-83).

Mrs. White admitted that posts at the bottom of the cougars' enclosures had some rot, but since they were not support posts, she did not believe there was a danger to structural integrity (Tr. at 702). Mrs. White also agreed that resting perches were broken (Tr. at 703). She explained that the cyclone fence was constructed as it was to allow an inside metal perch to be bolted to the fencing, but she had her son change the fencing to address the inspectors' concerns (Tr. at 703-04). Mrs. White did not disagree that there was a gap in fencing, but she did not think it presented a problem because no one generally went to that area of the enclosure (Tr. at 704).

The Administrator established that Mr. White violated the structural standards pertaining to broken perches, poorly constructed fencing, and compromised fence posts. I conclude the Administrator proved by a preponderance of the evidence that, on March 23, 2010, Mr. White willfully violated 9 C.F.R. § 3.125(a), as alleged in paragraph VI(D)(1).

Upon inspection conducted on September 8, 2010, Dr. Howard cited Mr. White for a violation of 9 C.F.R. § 3.125(a) because large dead trees within the exhibition space posed a danger to animal enclosures. Dr. Howard testified that Mrs. White acknowledged the trees had to come down, and the inspector believed that the attending veterinarian recommended the removal of the trees (Tr. at 151; CX 7 at 3, CX 9 at 8). Dr. Kirsten testified that Dr. Ainsworth's records documented the recommendation to remove the trees (Tr. at 396). Mrs. White denied that Dr. Ainsworth had recommended removal of the trees, but rather, offered assistance when Mrs. White told her that she had been cited for the trees (Tr. at 660). Dr. Ainsworth's friends removed the trees at no cost to Mr. White (Tr. at 661). I accord weight to the testimony that the trees were a danger to the structural integrity of animal enclosures, but find no evidence that, on September 8, 2010, the animal enclosures did not meet the requirements of 9 C.F.R. § 3.125(a).

Also, during the September 8, 2010 inspection, Dr. Howard observed holes in the ceiling of the building housing food storage freezers that she

believed could compromise the food. She also believed that the sagging ceiling presented a safety hazard to people who might hit their heads when entering the building (Tr. at 152; CX 7 at 4, CX 9 at 13).

At the time of the September 8, 2010 inspection, the structure had a second roof on top of the roof that had leaked in the past. There were no leaks, and if there were, the food was protected because it was kept in freezers (Tr. at 663). Animals were not kept in the building and the building did not present a danger to animals or to people (Tr. at 663-64). Despite his belief that there was no problem with the building, Mr. White covered freezers with tarps at Dr. Howard's suggestion and eventually moved the freezers to a new room at a different location (Tr. at 664-65).

I find the evidence fails to establish that the condition of the structure containing the freezers was unsound. The Administrator failed to prove by a preponderance of the evidence the allegation that, on September 8, 2010, Mr. White violated 9 C.F.R. § 3.125(a), as alleged in paragraph IV(D)(6) of the Complaint.

3. Storage of Food and Bedding – 9 C.F.R. § 3.125(c)

The Regulations require the storage of food and bedding, as follows:

> **§ 3.125 Facilities, general.**
>
> . . . .
> (c) *Storage*. Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

9 C.F.R. § 3.125(c). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.125(c) on September 8, 2010.[1]

Dr. Howard testified that on September 8, 2010, she observed that food stored in Mr. White's freezers had partially defrosted in violation of

[1] Compl. ¶ IV(D)(5) at 4-5.

9 C.F.R. § 3.125(c). Dr. Howard concluded that the freezers were not working properly, which placed food in danger of being spoiled. The thermometer on the cooler read 50° Fahrenheit, which is too warm. Dr. Howard also saw a dirty bucket of vitamins and items that were stored in disarray on a rack in the cooler (Tr. at 152-54; CX 7 at 4, CX 9 at 2, 5, 10). Dr. Kirsten recalled that someone explained that the circuit breaker had been inadvertently turned off (Tr. at 400).

Mrs. White believed the circuit breaker had been tripped because her son had been using a power washer. The meat was not entirely thawed out, and it was not her procedure to shut off power to the freezer to thaw meat. She usually cut meat up and moved it to the cooler to defrost. She never experienced problems with the quality of the meat (Tr. at 666-72). Mrs. White did not know why the thermometer showed the cooler temperature in the 50's, as it usually read in the 40's unless the door was left open during cleaning (Tr. at 671-72). She stored empty plastic bags in the freezer because she had nowhere else to store the empty plastic bags (Tr. at 673-74). Mrs. White explained that the bucket that the inspectors saw was used to mix vitamins and residue from the meat that was mixed with the vitamins sometimes got in the bucket. She washed the bucket several times a week (Tr. at 674-75).

The practices described by Dr. Howard in her inspection report reflect some careless handling of vitamins and storage of items; however, I conclude the Administrator did not prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. § 3.125(c), on September 8, 2010, as alleged in paragraph IV(D)(5) of the Complaint.

4. Waste Disposal – 9 C.F.R. § 3.125(d)

The Regulations require exhibitors to dispose of waste, as follows:

> **§ 3.125 Facilities, general.**
>
> . . . .
> (d) *Waste disposal*. Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal

> facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

9 C.F.R. § 3.125(d). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.125(d) on September 8, 2010.[2]

On September 8, 2010, Dr. Howard cited Mr. White for a failure to promptly remove food waste from the kinkajou enclosure (Tr. at 154; CX 7 at 4, CX 9 at 3). Dr. Kirsten believed the food was moldy and insect covered and the kinkajou enclosure should have been more promptly cleaned (Tr. at 400). Mrs. White disagreed that food for the kinkajou was moldy, though she had seen fruit left overnight get ripe (Tr. at 675-76). She cleaned the kinkajou's enclosure every morning (Tr. at 677).

The evidence is in equipoise, and I conclude the Administrator did not prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. § 3.125(d), on September 8, 2010, as alleged in paragraph IV(D)(4) of the Complaint.

5. Shelter from Sunlight and Inclement Weather – 9 C.F.R. § 3.127(a)-(b)

The Regulations require exhibitors to provide animals shelter from sunlight and inclement weather, as follows:

> **§ 3.127 Facilities, outdoor.**
>
> (a) *Shelter from sunlight*. When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect

[2] Compl. ¶ IV(D)(4) at 4.

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

9 C.F.R. § 3.127(a)-(b). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.127(a) on September 8, 2010,[3] and alleges Mr. White willfully violated 9 C.F.R. § 3.127(b) on March 23, 2010.[4]

At the inspection of March 23, 2010, Dr. Howard cited Mr. White for failing to provide appropriate shelter from inclement weather to two cougars (CX 26 at 4, CX 27 at 17-18). Dr. Howard testified that the overhang from roofing and a cover over a perch were not sufficient to allow the cougars to escape from driving rain. She also did not think that the opening in a rock formation provided comfortable space for a cougar to shelter (Tr. at 213-14). Dr. Kirsten agreed with Dr. Howard (Tr. at 385).

Mrs. White testified, until the March 23, 2010, inspection, no one had pointed out a problem with the cougars' habitat. She thought the tin overhang on the enclosure provided sufficient cover, but after being cited for violating 9 C.F.R. § 3.127(b), she installed a dog igloo in the enclosure for shelter (Tr. at 709-11). While Mr. White's correction of the violation is commendable and I impose no civil penalty for the violation, I conclude the Administrator proved by a preponderance of the evidence that Mr. White willfully violated 9 C.F.R. § 3.127(b) on March 23, 2010, as alleged in paragraph VI(D)(2) of the Complaint.

In paragraph IV(D)(1) of the Complaint, the Administrator alleges Mr. White violated 9 C.F.R. § 3.127(a) on September 8, 2010; however, the Complaint describes the violation as a failure to maintain structurally

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[3] Compl. ¶ IV(D)(1) at 4.
[4] Compl. ¶ VI(D)(2) at 6.

sound facilities. Since 9 C.F.R. § 3.127(a) pertains to providing shade to allow animals to protect themselves from sunlight, I dismiss paragraph IV(D)(1) of the Complaint.

6. Facilities and Primary Enclosures for Rabbits – 9 C.F.R. §§ 3.52 and 3.53

The Regulations require exhibitors to provide rabbits shelter, as follows:

> **§ 3.52 Facilities, outdoor.**
>
> . . . .
> (b) *Shelter from rain or snow*. Rabbits kept outdoors shall be provided with access to shelter to allow them to remain dry during rain or snow.
>
> **§ 3.53 Primary enclosures.**
>
> All primary enclosures for rabbits shall conform to the following requirements:
>
> (a) *General*. . . . .
> (2) Primary enclosures shall be constructed and maintained so as to enable the rabbits to remain dry and clean.
> . . . .
>
> (c) *Space requirements for primary enclosures acquired on or after August 15, 1990*. . . . .
> (2) Each rabbit housed in a primary enclosure shall be provided a minimum amount of floor space, exclusive of the space taken up by food and water receptacles, in accordance with the . . . table [in 9 C.F.R. § 3.53(c)(2).]

9 C.F.R. §§ 3.52(b), .53(a)(2), (c)(2).The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.52(b) and 9 C.F.R. § 3.53(a)(2)

and (c)(2) on September 24, 2009.[5]

On September 24, 2009, Dr. Howard cited Mr. White for violations of 9 C.F.R. § 3.53(a)(2) and (c)(2) because she believed the primary enclosure for rabbits did not allow the rabbits to remain dry and clean and did not meet the minimum floor space requirements (CX 22 at 2-3). Dr. Howard also cited Mr. White for a violation of 9 C.F.R. § 3.52(b) because she believed the outdoor enclosure for rabbits did not provide for dry ground for the rabbits (CX 22 at 2). Dr. Howard testified that the box that served as the rabbit enclosure was placed directly on the ground and did not protect the animals from recent rain accumulation and the box was too small for all of the rabbits to occupy comfortably (Tr. at 185). Mrs. White denied this contention because, in addition to the box, there was a concrete cage that the rabbits could enter (Tr. at 721-23). I find that the evidence is in equipoise, and I conclude the Administrator did not prove that Mr. White violated 9 C.F.R. § 3.52(b) or 9 C.F.R. § 3.53(a)(2) and (c)(2), on September 24, 2009, as alleged in paragraphs IX(1), IX(2), and IX(3) of the Complaint.

7. Drainage of Facilities – 9 C.F.R. § 3.127(c)

The Regulations require drainage of excess water from outdoor facilities, as follows:

> **§ 3.127 Facilities, outdoor.**
>
> . . . .
> (c) *Drainage*. A suitable method shall be provided to rapidly eliminate excess water. The method of drainage shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

9 C.F.R. § 3.127(c). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.127(c) on September 24, 2009, and January 21, 2010.[6]

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[5] Compl. ¶¶ IX(1), IX(2), IX(3) at 8-9.
[6] Compl. ¶¶ VII(A)(3), IX(7) at 8-9.

On September 24, 2009, Dr. Howard saw the tiger named "Stave" lying in mud and learned from Mrs. White that a drain may have been blocked (Tr. at 190-91). Dr. Howard conveyed her opinion that standing water presented a health hazard and proper drainage must be provided (Tr. at 191). Dr. Kirsten observed drainage problems when he was at Collins Exotic Animal Orphanage on March 23, 2010 (Tr. at 383-84).

Dr. Howard cited Mr. White for repeat violations of 9 C.F.R. § 3.127(c) on the inspection conducted on January 21, 2010 (CX 24 at 1-2, CX 25 at 3-4, 6). Dr. Howard testified that she suspected drainage problems at Mr. White's facility and intentionally scheduled an inspection after it had rained (Tr. at 318-20). She found significant pooling of water in the leopards' enclosure and observed one of the cats lying in water (Tr. at 196). Dr. Howard testified that standing water presents a health hazard for animals, and she directed Mr. White to correct the problem (Tr. at 196-97). On that date, Dr. Howard also observed pools of water in the tiger Stave's enclosure that needed to be resolved (Tr. at 197).

It is axiomatic that inspections of outdoor facilities conducted on rainy days will often reveal pools of water; however, the issue is whether the exhibitor has provided a suitable method to rapidly eliminate excess water. I conclude the Administrator failed to prove by a preponderance of the evidence that, on September 24, 2009, and on January 21, 2010, Mr. White failed to provide a suitable method to rapidly eliminate excess water in violation of 9 C.F.R. § 3.127(c), as alleged in paragraphs VII(A)(3) and IX(7) of the Complaint.

8. Perimeter Fence – 9 C.F.R. § 3.127(d)

The Regulations require exhibitors to enclose outdoor facilities with a perimeter fence, as follows:

> **§ 3.127 Facilities, outdoor.**
>
> . . . .
> (d) *Perimeter fence*. . . . [A]ll outdoor housing facilities . . . must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized

> persons out. Fences less than 8 feet high for potentially dangerous animals, such as, but not limited to, large felines (e.g., lions, tigers, leopards, cougars, etc.), bears, wolves, rhinoceros, and elephants, or less than 6 feet high for other animals must be approved in writing by the Administrator. The fence must be constructed so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility. It must be of sufficient distance from the outside of the primary enclosure to prevent physical contact between animals inside the enclosure and animals or persons outside the perimeter fence. Such fence less than 3 feet in distance from the primary enclosure must be approved in writing by the Administrator.

9 C.F.R. § 3.127(d). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.127(d) on March 23, 2010, and September 8, 2010.[1] On March 23, 2010, Dr. Howard cited Mr. White for failing to have a perimeter fence of sufficient height (CX 26 at 5, CX 27 at 19). The fence is required to be at least 8 feet in height to prevent animals from escaping as well as to prevent unauthorized individuals from having contact with the animals (Tr. at 385-86). Dr. Kirsten did not believe that Mr. White's fence adequately met those goals (Tr. at 386-87).

Dr. Howard recalled her inspection of September 8, 2010, which disclosed portions of Mr. White's perimeter fence that did not meet the 8-foot height required by 9 C.F.R. § 3.127(d) (Tr. at 154-55; CX 7 at 5, CX 9 at 6-7, 9, 17-19). In addition, Dr. Howard observed deficits in the fence, such as openings at the bottom and areas where the fence was not fixed to posts (Tr. at 155). Dr. Howard stated that she considered the problems a repeat violation because she had previously cited Mr. White for problems with the perimeter fence, even though the problems may not have been the same (Tr. at 157). Dr. Howard explained that she did not have the ability to measure the entire perimeter fence, but her sample

[1] Compl. ¶¶ IV(D)(2), VI(D)(3) at 4, 7.

measurements on September 8, 2010, revealed the perimeter fence was not the required height (Tr. at 287-88). The inspector also rejected Mr. White's contention that bamboo represented a natural perimeter fence (CX 11).

Mrs. White testified that the perimeter fence was inspected at every inspection, and Mr. White was not always cited for conditions that had never changed (Tr. at 676-78). She nevertheless did not contest that there were sections of the fence that buckled and that she considered bamboo an adequate perimeter fence. I conclude the Administrator proved by a preponderance of the evidence that Mr. White willfully violated 9 C.F.R. § 3.127(d) on March 23, 2010, and September 8, 2010, as alleged in paragraphs IV(D)(2) and VI(D)(3) of the Complaint.

9. Food – 9 C.F.R. § 3.129(a)

The Regulations require exhibitors to provide food to animals, as follows:

> **§ 3.129 Feeding.**
>
> (a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

9 C.F.R. § 3.129(a). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.129(a) on March 23, 2010, and September 8, 2010.[2] On March 23, 2010, Dr. Howard could not determine whether chicken parts in greenish liquid in an unmarked bucket were meant as food or were meant to be discarded (Tr. at 216-17). Although Mrs. White advised that the chicken was left over and would be thrown away, Dr. Howard believed there was the potential for someone to feed the

[2] Compl. ¶¶ IV(D)(3), VI(D)(4) at 4, 7.

chicken parts to animals because the bucket was not marked and she cited Mr. White for violating 9 C.F.R. § 3.129(a) (Tr. at 217; CX 26 at 5, CX 27 at 22).

I decline to accord substantial weight to Dr. Howard's conclusion and credit Mrs. White's testimony that she and her son fed the animals. I find it improbable that either of them would mistake good food for food that must be discarded. I conclude the Administrator failed to prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. § 3.129(a) on March 23, 2010, as alleged in paragraph VI(D)(4) of the Complaint. When Dr. Howard inspected Collins Exotic Animal Orphanage on September 8, 2010, she concluded Mr. White was feeding the big cats a diet comprised primarily of chicken backs, which are not nutritionally adequate for large cats (Tr. at 158). Mr. White was told by APHIS' big cat specialist, Dr. Laurie Gage, that chicken backs were not appropriate (Tr. at 158). Mrs. White assured Dr. Howard that they had run out of the usual feed of chicken legs and also advised that the diet was supplemented with venison, but Dr. Howard saw very little venison at the time of inspection and Dr. Howard observed that the cougars remained thin (Tr. at 159). Dr. Howard cited Mr. White for failure to provide appropriate food (CX 7 at 6, CX 9 at 11, 20).

Mrs. White asserted she fed the cats a variety of meat and chicken backs were just one source of food (Tr. at 684). On the day of the September 8, 2010, inspection, Mrs. White mistakenly believed that only chicken backs were available, but her son showed her other meat later that day. The following day, Mrs. White showed leg quarters in the freezer to Dr. Howard, who told her that the citation had already been included in the inspection report (Tr. at 684-85).

APHIS investigator Stevie Harris interviewed one of the Collins Exotic Animal Orphanage volunteers, Timothy Chisolm, who said chicken was the primary source of the cats' diet (CX 41). Mr. Chisolm obtained donated chicken from a chicken producer, and he believed the cats were fed primarily chicken backs in 2010.

I accord substantial weight to Mrs. White's explanation that the cougars' weight had fluctuated from the time they came to Collins Exotic

Animal Orphanage (Tr. at 686). I note that in a "Complaint Response" authored by Dr. Howard on July 11, 2008, Dr. Howard "found all of the animals in decent condition. In fact, most of the animals are more towards being overweight." (CX 18). I decline to accord substantial weight to a conclusion about the quality of food on September 8, 2010, which appears to be based upon a mistaken comment made by Mrs. White.

I accord no weight to Mr. Chisolm's statements made in 2010 because those statements may reflect bias against Mr. White. I credit Mrs. White's testimony that Mr. Chisolm lived on the White's property and volunteered at Collins Exotic Animal Orphanage until he and Mr. White, IV, argued in early 2010, whereupon, Mr. Chisolm left the facility (Tr. at 846-47).

I conclude the Administrator did not prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. § 3.129(a) on September 8, 2010, as alleged in paragraph IV(D)(3) of the Complaint.

10. Feeding Rabbits – 9 C.F.R. § 3.54

The Regulations require exhibitors to feed rabbits, as follows:

> **§ 3.54 Feeding.**
>
> (a) Rabbits shall be fed at least once each day except as otherwise might be required to provide adequate veterinary care. The food shall be free from contamination, wholesome, palatable and of sufficient quantity and nutritive value to meet the normal daily requirements for the condition and size of the rabbit.
>
> (b) Food receptacles shall be accessible to all rabbits in a primary enclosure and shall be located so as to minimize contamination by excreta. All food receptacles shall be kept clean and sanitized at least once every 2 weeks. If self feeders are used for the feeding of dry feed, measures must be taken to prevent molding, deterioration or caking of the feed.

9 C.F.R. § 3.54. The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.54(a) on September 24, 2009,[1] and willfully violated 9 C.F.R. § 3.54(b) on September 24, 2009, and September 8, 2010.[2]

The inspection of September 24, 2009, revealed the lack of a food receptacle for rabbits. Their food was left on the ground, which increased the risk of food contamination, and Dr. Howard cited Mr. White for violations of 9 C.F.R. § 3.54 (a) and (b) (Tr. at 187-88; CX 22 at 3). Dr. Howard cited Mr. White again on September 8, 2010, for violations pertaining to rabbit feed. Dr. Howard found old produce, pellets, and excreta in the food tray for five rabbits. She believed the trays were not positioned so as to minimize contamination (Tr. at 150; CX 7 at 3). Dr. Kirsten recalled that the food receptacles for the rabbits were contaminated (Tr. at 396).

Mrs. White speculated that her son had removed the rabbits' feeding tray from the enclosure when the inspectors conducted their inspection (Tr. at 725). She also explained that "[s]ome of [the feed] does fall on the ground sometimes when you throw it in there" (Tr. at 725).

Mr. White's explanation for the condition of the rabbits' enclosure and feeding methods does not demonstrate a reasonable effort to assure that the food is free from contamination. I conclude the Administrator proved by a preponderance of the evidence that, on September 24, 2009, Mr. White willfully violated 9 C.F.R. § 3.54(a), as alleged in paragraph IX(4) of the Complaint and that, on September 24, 2009, and September 8, 2010, Mr. White willfully violated 9 C.F.R. § 3.54(b), as alleged in paragraphs IV(D)(7) and IX(5) of the Complaint.

11. Sanitation – 9 C.F.R. § 3.131(a)

The Regulations require sanitation, as follows:

§ 3.131 Sanitation.

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[1] Compl. ¶ IX(4) at 9.
[2] Compl. ¶¶ IV(D)(7), IX(5) at 5, 9.

> (a) *Cleaning of enclosures*. Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

9 C.F.R. § 3.131(a).The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.131(a) on March 23, 2010.[3]

On March 23, 2010, Dr. Howard cited Mr. White for unsanitary conditions within the shelter box housing Mr. White's kinkajou because she found the enclosure was excessively soiled and stained (CX 26 at 5-6, CX 27 at 23). Dr. Howard testified that her inspection report and accompanying photograph adequately explained the conditions that led to the citation she issued (Tr. at 217-18). Dr. Kirsten similarly found the enclosure excessively dirty (Tr. at 389).

Ms. Williamson testified that the kinkajou's cage was cleaned every morning (Tr. at 569). I find Ms. Williamson's testimony regarding the standard operating procedure at Collins Exotic Animal Orphanage is not sufficiently specific to overcome the Administrator's evidence of the condition of the kinkajou enclosure on March 23, 2010. Moreover, Ms. Williamson testified that, since 2006, she only goes to Collins Exotic Animal Orphanage one or two days per week and her work has been limited to supervisory work and work in the office (Tr. at 561). Even more specifically, Ms. Williamson testified she was not at Collins Exotic Animal Orphanage in 2010 (Tr. at 606). Therefore, I conclude the Administrator proved by a preponderance of the evidence that, on March 23, 2010, Mr. White willfully violated 9 C.F.R. § 3.131(a), as alleged in paragraph VI(D)(5) of the Complaint.

12. Employees – 9 C.F.R. §§ 3.12, 3.85, and 3.132

The Regulations require that exhibitors utilize a sufficient number of

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[3] Compl. ¶ VI(D)(5) at 7.

trained employees, as follows:

> **§ 3.12 Employees**
>
> Each person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) maintaining dogs and cats must have enough employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide for husbandry and care, or handle animals, must be supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of dogs and cats to supervise others. The employer must be certain that the supervisor and other employees can perform to these standards.
>
> **§ 3.85 Employees**
>
> Every person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) maintaining nonhuman primates must have enough employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide husbandry practices and care, or handle nonhuman primates, must be trained and supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of nonhuman primates to supervise others. The employer must be certain that the supervisor can perform to these standards.
>
> **§ 3.132 Employees.**
>
> A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

9 C.F.R. §§ 3.12, 3.85, 3.132. The Administrator alleges from May 24,

2007, and continuing to the date of the issuance of the Complaint on March 3, 2012, Mr. White willfully violated 9 C.F.R. §§ 3.12,[1] 3.85,[2] and 3.132.[3]

Based upon her years of experience inspecting Collins Exotic Animal Orphanage, Dr. Howard concluded Mr. White did not have sufficient help to keep the facility well maintained (Tr. at 225-26). Although Dr. Howard acknowledged that the Regulations do not require a particular number of employees, she believed the repeated problems she observed with drainage, with the perimeter fence, and with structures and enclosures in disrepair would have been avoided with more help at Collins Exotic Animal Orphanage (Tr. at 226-27).

Dr. Howard further testified she was unable to ascertain the expertise of the few people she regularly saw at the facility (Tr. at 228). She knew that Mr. White had experience with animals, but she believed he directed Collins Exotic Animal Orphanage from his house, and Mrs. White was primarily responsible for the animals, with the help of her son (Tr. at 229). Dr. Howard observed some volunteers at the facility, but she had no knowledge of how volunteers were trained or their experience with animals (Tr. at 228).

Dr. Kirsten had only observed Mrs. White and Mr. White, IV, at Collins Exotic Animal Orphanage with the exception of one occasion when he saw another person helping (Tr. at 405-06). Dr. Kirsten believed that Mrs. White was not in the best of health, and Mr. White, IV, was very young when the doctor first visited the facility. Dr. Kirsten concluded that Collins Exotic Animal Orphanage was inadequately staffed for the amount of work required to maintain the facility, feed and care for the animals, and attend to the medical needs of the animals (Tr. at 406-07).

Volunteer Geraldine Williamson has worked at Collins Exotic Animal Orphanage since approximately 1986 (Tr. at 560). She had worked with animals for many years, beginning as a teenager helping her local veterinarian (Tr. at 559). She generally reported to Collins Exotic

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[1] Compl. ¶ II(C) at 2-3.
[2] Compl. ¶ II(B) at 2.
[3] Compl. ¶ II(A) at 2.

Animal Orphanage at about 8:00 a.m. and a number of volunteers would come later in the day and were assigned chores that did not involve feeding the animals (Tr. at 571-73). She was trained by Mr. White. Since 2006, Ms. Williamson no longer works at Collins Exotic Animal Orphanage eight hours a day or visits the facility every day.

Ms. Williamson continues to help the Collins Exotic Animal Orphanage's veterinarian, Dr. Ainsworth, at her office, and has treated animals at Collins Exotic Animal Orphanage pursuant to Dr. Ainsworth's instructions to Mrs. White (Tr. at 597-99). In recent years, Ms. Williamson has helped with paper work and administration and organizing volunteers (Tr. at 606). Ms. Williamson was not involved with Collins Exotic Animal Orphanage in 2010, but she estimated there were at least five other volunteers at the facility in 2009 (Tr. at 607).

Mr. White, who founded Collins Exotic Animal Orphanage, has worked with animals all of his life (Tr. at 918-19). He is self-taught, though he has read widely about animal care and attended classes and lectures (Tr. at 919). He worked with animal experts, such as Marlin Perkins, has trained fire and police departments about safety and animals, and has held an Animal Welfare Act license for 43 years (Tr. at 919). Mr. White's health no longer allows him to do daily maintenance, but he visits the facility, which is adjacent to his home, regularly and is in daily contact with his wife, who has primary responsibility for the daily functions of Collins Exotic Animal Orphanage (Tr. at 928-29, 932-33). His wife and son do most of the work at the facility with the help of volunteers (Tr. at 932-34). Mr. White testified that his wife worked with veterinarians to treat animals.

Dr. Kirsten hypothesized that many of the violations cited by Dr. Howard would not have occurred if Mr. White had employed more workers (Tr. at 465-66), but did not say how many employees would be considered sufficient to run a facility with an area of less than one acre. The record clearly establishes that the facility depended on volunteer workers and donations. Mr. Chisolm donated time and money to the facility, and Jonathan Cornwell hired itinerant workmen to remove trees at the facility and donated a used truck to the Mr. White. Mr. White relied upon the volunteer services of a veterinarian. The record also

establishes that, with the declining health of Mr. White and long-term volunteer worker Ms. Williamson, the facility lost resources during the period encompassed by the inspections at issue in this proceeding. At the same time, Mr. White, IV, was able to take on more chores as his adolescence advanced. With the exception of a brief absence, Mr. Chisolm continued to perform maintenance work at the facility. Other volunteers do work, and a biologist regularly volunteers.

Despite the perceived lack of resources, Mr. White was able to correct many of the structural and facility maintenance violations cited by inspectors. Dr. Howard was unable to articulate APHIS's expectation of what constitutes a well trained and experienced individual, but Dr. Howard conceded that individuals would not need as much training if experienced supervisors were on the premises (Tr. at 497-98). Dr. Howard's answers to repeated questions about whether Mrs. White's 32 years of experience represented adequate training were not responsive.

Dr. Howard appeared reluctant to acknowledge Mrs. White's experience, and she overlooked the significance of Mr. White's presence and his supervision of the facility. In alleging that Collins Exotic Animal Orphanage did not have adequate numbers of properly trained employees, the Administrator appears to have overlooked the one standard articulated by Dr. Howard—that individuals working for experienced supervisors could have less training. I find Mrs. White and Mr. White were very experienced supervisors; therefore, the persons working for them could have less training than otherwise would be required.

I conclude the Administrator did not establish by a preponderance of the evidence that Mr. White failed to employ an adequate number of trained employees during the period May 24, 2007, and continuing to March 3, 2012, in violation of 9 C.F.R. § 3.12, as alleged in paragraph II(C) of the Complaint, and in violation of 9 C.F.R. § 3.132, as alleged in paragraph II(A) of the Complaint.

The Administrator alleges Mr. White failed to employ adequate employees to care for nonhuman primates in violation of 9 C.F.R. § 3.85. Dr. Howard testified that there were nonhuman primates at Mr. White's

home but not on display at Collins Exotic Animal Orphanage (Tr. at 501); therefore, the allegation in paragraph II(B) of the Complaint that Mr. White violated 9 C.F.R. § 3.85 from May 24, 2007, and continuing to March 3, 2012, is dismissed.

13. Veterinary Care – 9 C.F.R. § 2.40

The Regulations require that each exhibitor have an attending veterinarian who provides adequate veterinary care, as follows:

> **§ 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;
>
> (3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;
>
> (4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and
>
> (5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

9 C.F.R. § 2.40. The Administrator alleges Mr. White willfully violated 9 C.F.R. § 2.40 on November 6, 2008, December 10-11, 2009, March 23, 2010, September 8, 2010, and April 19, 2011.[1]

The Administrator relied upon several incidents as evidence of Mr. White's violations of 9 C.F.R. § 2.40. On April 3, 2008, Dr. Howard observed a discharge from both eyes of a caracal that appeared to cause discomfort to the cat (CX 21). Mrs. White advised that the condition was long-standing and that she was treating the caracal as instructed by the veterinarian, but she agreed to call Dr. Ainsworth (CX 21). At a later inspection on November 6, 2008, the caracal's eyes had not improved (Tr. at 301). Mrs. White advised that she had called the veterinarian and was following treatment advice (Tr. at 301-02; CX 19). Dr. Howard acknowledged that the caracal had the problem for some time, but she believed that the condition had worsened based upon the caracal's

[1] Compl. ¶¶ III, IV(A), VI(A), VIII, X at 3, 5, 8-10.

behavior, and she felt it should be examined by a veterinarian (Tr. at 174-76, 302). Dr. Howard explained that the animal's temperament might have interfered with proper treatment (Tr. at 302-03).

During the November 6, 2008, inspection, Dr. Howard also observed what she believed to be a lesion on the skin of the wolf-hybrid named "Olive" (Tr. at 176, 303; CX 19). Mrs. White believed the skin condition was due to shedding, but Dr. Howard did not agree with that assessment, and believed the animal needed to be seen by a veterinarian (Tr. at 303-04).

On December 11, 2009, a volunteer at Collins Exotic Animal Orphanage observed Olive with a distended abdomen and in distress (Tr. at 202). The volunteer spoke to Mrs. White about the animal. Mrs. White stated she had observed the condition of the animal on December 10, 2009, and believed the wolf may have been pregnant. On December 12, 2009, Mrs. White reported the animal's condition to Dr. Ainsworth, who planned to examine Olive if her condition had not improved. Olive was found dead on Sunday, December 13, 2009 (Tr. at 202-03).

Dr. Howard testified that these circumstances demonstrated a violation of 9 C.F.R. § 2.40. Mrs. White did not contact Dr. Ainsworth until two days after she observed Olive's condition (Tr. at 203-04). Dr. Howard believed Mr. White should have called Dr. Ainsworth earlier and made sure that Olive was seen, particularly given the range of ailments that Dr. Ainsworth speculated as the cause of Olive's symptoms (Tr. at 205-08). No necropsy was performed, and it was impossible to ascertain the cause of Olive's death (Tr. at 208).

On September 8, 2010, Dr. Howard cited Mr. White with failing to provide proper veterinary care to a cougar named Delilah who was euthanized five days after euthanasia was recommended by the facility's veterinarian (Tr. at 141-43; CX 7 at 1). The tiger named "Sister" developed a limp, and Mrs. White advised that Dr. Ainsworth prescribed prednisone after examining the animal on May 26, 2010, though no records were maintained about how treatment was given (Tr. at 143, 392-93; CX 7 at 1). The leopard named "Amber" had a lesion on her

rump, and Mrs. White acknowledged she had not consulted the veterinarian about the condition because the lesion was observed on a holiday weekend (Tr. at 145-46, 394; CX 7 at 2, CX 9 at 15).

Dr. Kirsten visited Dr. Ainsworth to see her records, particularly those involving the cougar that Dr. Ainsworth had recommended euthanizing (Tr. at 390-91). Dr. Kirsten believed Mrs. White's delay in euthanizing the cougar constituted a violation of the Animal Welfare Act because it flaunted the authority of the attending veterinarian (Tr. at 392). Dr. Kirsten similarly found fault with Mrs. White's failure to call Dr. Ainsworth over a weekend to consult about a lesion on one of the leopard's tail (Tr. at 394). Dr. Kirsten observed that the Animal Welfare Act requires licensees to have access to emergency care at all times (Tr. at 394).

Dr. Howard, accompanied by APHIS investigator Stevie Harris, conducted an inspection of Mr. White's facility on April 19, 2011, and learned that an older jungle cat had died in December 2010, and an older leopard had died in February 2011, both of unknown causes (CX 1). In addition, a dingo died in January 2011. No necropsy was performed on any of the three animals to determine the cause of death (CX 1-CX 2). In a three-page report dated April 19, 2011, Dr. Howard summarized her findings, noting that Mr. White did not contact the veterinarian upon the death of any of the animals, which died without apparent illness or injury (CX 3).

On March 23, 2010, Dr. Howard was accompanied on inspection of the facility by Dr. Kirsten, Dr. Laurie Gage, and other APHIS employees in response to a complaint (Tr. at 199).[1] A discharge was observed on rabbits' ears; a leopard named "Smokey" had a three-inch lesion on his tail; and the caracal named "Sonny" appeared to be lame (Tr. at 199-201). Although Mrs. White had consulted Dr. Ainsworth by telephone about the leopard's lesion, she had not contacted Dr. Ainsworth about the rabbits or the caracal (Tr. at 201). Mr. White was given the deadline of March 26, 2010, for the animals to be examined and treated by a veterinarian. Dr. Howard also cited Mr. White for violating 9 C.F.R. § 2.40 for the events leading to Olive's

[1] Dr. Kirsten testified that the complaint that instigated this inspection was made by a volunteer who worked at Collins Exotic Animal Orphanage (Tr. at 374).

death (Tr. at 202).

Dr. Kirsten agreed with the conclusion that animals appeared in need of veterinary care when he was at Collins Exotic Animal Orphanage for the inspection of March 23, 2010 (Tr. at 372-79). Dr. Kirsten did not believe that Mr. White had an appropriate plan for veterinary care, noting that Mrs. White did not keep records of treatment of animals, but relied solely upon her memory (Tr. at 373). Dr. Kirsten and Dr. Howard visited Dr. Ainsworth to see her treatment records and to determine whether Mr. White communicated with the veterinarian about the condition of his animals (Tr. at 373-74). Dr. Kirsten recalled that Mrs. White expressed reluctance to call the veterinarian because Mr. White did not pay for veterinary services and Mrs. White felt guilty (Tr. at 377).

Dr. Kirsten upheld Dr. Howard's April 19, 2011, citations for failure to provide adequate veterinary care with respect to the animals that died without explanation when Mr. White appealed that citation (CX 4). Dr. Kirsten testified that a necropsy was necessary in a situation in which three animals died without explanation over a three-month period, considering that they had received no prior veterinary care (Tr. at 404). The Regulations require that each exhibitor establish and maintain programs of veterinary care that include the use of appropriate methods to diagnose diseases and injuries, and Mr. White failed to diagnose the cause of the deaths of these three animals (Tr. at 404-05).

The totality of the evidence demonstrates that Mr. White failed to maintain an adequate plan for veterinary care and failed to provide prompt and adequate treatment and care to animals. Dr. Ainsworth has donated her services as attending veterinarian to Collins Exotic Animal Orphanage since approximately 1994 (CX 43). Dr. Ainsworth visits Collins Exotic Animal Orphanage approximately four times annually. Dr. Ainsworth attends to animals in person, when necessary, but most issues raised by Mr. White are "handled over the phone or during [her] next visit." (CX 43). There was no formal plan for care for all of the facility's animals, since Dr. Ainsworth believed her "regular health maintenance program [was for] the cats and dogs." (CX 43).

Dr. Ainsworth's affidavit is consistent with the testimony.

Ms. Williamson and Mrs. White confirmed that Dr. Ainsworth did not come to the facility frequently. The record demonstrates that Mrs. White was slow to contact Dr. Ainsworth and did not contact her at all in some circumstances that seemed to require a consultation with or an examination by a veterinarian. The evidence establishes that certain conditions were not properly diagnosed (condition of Olive's skin and the ailment that led to her death); and certain conditions were not promptly treated (tail sucking of the leopard; rabbits' ear problems; caracal's eye problems; animals' limps) (CX 43a at 1). The treatment records kept by Dr. Ainsworth show only eight documented exchanges with Mr. White during the period from May 10, 2005, until March 25, 2010 (CX 43(a)).

I conclude Mr. White was less than vigilant about assuring that animals were provided adequate veterinary care. Mr. White's casual approach to animal care is manifested by sores on a rabbit's ear that were not timely treated; lesions on a leopard's rump that were not adequately treated; a caracal's ocular problems that were poorly treated for an extended period of time; and animals limping for no documented reason. Dr. Ainsworth's records reflect that some of the calls from Mr. White were obviously prompted by APHIS' inspection (e.g., call made about a rabbit's ear on March 23, 2010 (CX 26 at 1, CX 27 at 1, CX 43(a)).

Although the Regulations do not require necropsy to determine the cause of death of animals, the unexplained deaths of three animals in a three-month period, without any documented medical condition, cast suspicion on Mr. White's compliance with 9 C.F.R. § 2.40. Consultation with Dr. Ainsworth about the deaths would have been prudent, and Dr. Ainsworth's treatment records reflect that she had been consulted in the past about animal deaths (CX 43(a)).

I credit Mrs. White's testimony that she occasionally consulted a veterinarian with experience with exotic animals when Dr. Ainsworth could not be reached. Dr. Ainsworth confirmed as much in her affidavit (CX 43). The record indicates Mr. and Mrs. White believed they had the requisite expertise and experience to care for the animals without too much guidance from a veterinarian. In some instances, it appears Mrs. White made extra efforts to extend the life of an animal, such as when she delayed euthanizing the cougar, Delilah. However,

Mr. White's failure to develop, maintain, and follow a program of veterinary care is supported by a preponderance of the evidence, and I conclude that, on November 6, 2008, December 10-11, 2009, March 23, 2010, September 8, 2010, and April 19, 2011, Mr. White willfully violated 9 C.F.R. § 2.40, as alleged in paragraphs III, IV(A), VI(A), VIII, and X of the Complaint.

14. Records – 9 C.F.R. § 2.75(b)

The Regulations require exhibitors to make, keep, and maintain records, as follows:

> **§ 2.75 Records: Dealers and exhibitors.**
>
> . . . .
> (b)(1) Every . . . exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that . . . exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.
>
> (i) The name and address of the person from whom the animals were purchased or otherwise acquired;
>
> (ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;
>
> (iii) The vehicle license number and State, and the driver's license number (or photographic identification card for nondrivers issued by a State) and State of the person, if he or she is not licensed or registered under the Act;

> (iv) The name and address of the person to whom an animal was sold or given;
>
> (v) The date of purchase, acquisition, sale, or disposal of the animal(s);
>
> (vi) The species of the animal(s); and
>
> (vii) The number of animals in the shipment.

9 C.F.R. § 2.75(b)(1). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 2.75(b)(1) on May 24, 2007, March 23, 2010, March 26, 2010, and September 8, 2010.[1]

On March 23, 2010, Dr. Howard was accompanied by a number of other APHIS employees to inspect Collins Exotic Animal Orphanage in response to a complaint and observed a possum for which no records were kept (CX 31). On September 8, 2010, Dr. Howard cited Mr. White for failing to keep records for rabbits (Tr. at 146; CX 7 at 2). In addition, records for other animals were incomplete (Tr. at 147-48). Mr. White had documented on a record for a dingo "papers missing taken by USDA or Wildlife." (CX 9 at 12). Dr. Howard authored a memorandum in which she noted that Mrs. White acknowledged receiving copies of photocopied records from the previous inspection, but nevertheless maintained that records were missing, speculating that employees of the United States Department of Agriculture or the Mississippi Department of Wildlife, Fisheries & Parks took the records (CX 10 at 1). The records were incomplete and reconstructed, and Dr. Howard concluded that hardly any original records were available. The records did not match previously photographed records (CX 10).

In addition, Mr. White's acquisition records raised questions about the provenance of certain animals (CX 12-CX 14, CX 40). Acquisition records dated May 24, 2007, identified Barry Weddleton, Jr., from Slidell, Louisiana, as the donor of a wolf-hybrid (CX 13) and a coatimundi (CX 40).In an interview with APHIS investigator Bob Stiles,

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[1] Compl. ¶¶ IV(B), V(A), VI(B), XII at 3, 5-6, 10.

Mr. Weddleton admitted he knew Mr. White, but asserted he did not sell or donate any animals to Mr. White (Tr. at 470-73; CX 12).

Jonathan Cornwell testified that he donated a coatimundi that was less than one year old to Collins Exotic Animal Orphanage sometime in 2007 (Tr. at 70-72). Geraldine Williamson testified that an older coatimundi was donated to the facility by a man who identified himself as Mr. White's "friend from Slidell." (Tr. at 581-82). The donor was not Mr. Cornwell, whom Ms. Williamson knew (Tr. at 583). The male coatimundi that was left with Ms. Williamson was the only coatimundi kept by the facility (Tr. at 610). Mr. Cornwell promised to donate a female coatimundi to Collins Exotic Animal Orphanage but he never did (Tr. at 610, 843). Mr. White's only coatimundi was an older animal that was donated in 2007 and that died a few years later (Tr. at 843-45).

I am unable to determine the source of the coatimundi from the record. The preponderance of the evidence establishes that the coatimundi was not donated by the individual identified on the acquisition papers. Mr. White did not confirm the identity of the unnamed donor nor did Mr. White confirm any information about the animal, but conjectured that Mr. Weddleton had left the animal. Mr. Weddleton's father denied that assertion, explaining that his son had known Mr. White years before, but had lived in Oklahoma for 20 years (CX 14).

I need not determine whether the coatimundi was in fact donated by Mr. Cornwell to conclude the records were improperly maintained. His testimony was not entirely credible. Moreover, I cannot fully credit the testimony of Mrs. White or Ms. Williamson on this issue. Whatever the source of the animal, the evidence suggests that the acquisition record was fabricated in violation of 9 C.F.R. § 2.75(b)(1).

Mr. White's records regarding the source of rabbits are similarly unreliable. Mrs. White admitted she did not know the donor of the rabbits and instead used the name of a friend who raised rabbits (Tr. at 695-96), in violation of the recordkeeping requirements in 9 C.F.R. § 2.75(b)(1).

Other records were missing or reconstituted and Mr. White's contention that they were removed by employees of a government agency does not constitute a valid defense to the requirement to maintain records. Mr. White's recordkeeping system is deficient. In addition to the problems with animal acquisition records, incomplete records were kept of losses of animals when they left the facility or died. I conclude the Administrator proved by a preponderance of the evidence that on May 24, 2007, March 23, 2010, March 26, 2010, and September 8, 2010, Mr. White willfully violated 9 C.F.R. § 2.75(b)(1), as alleged in paragraphs IV(B), V(A), VI(B), and XII of the Complaint.

E. Sanctions

The purpose of assessing civil penalties is not to punish violators, but to deter the violator, as well as others, from similar behavior.[1] When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations, the Secretary of Agriculture is required to give due consideration to four factors: (1) the size of the business of the person involved, (2) the gravity of the violations, (3) the person's good faith, and (4) the history of previous violations.[2]

I find Mr. White operates a small business. Mr. White's violations of the Animal Welfare Act and the Regulations are grave. The record establishes that Mr. White willfully violated the Animal Welfare Act on repeated occasions. Mr. White failed to develop and follow a plan for veterinary care that led to the failure to diagnose the cause of a wolf-hybrid's symptoms and eventual death. Mr. White's approach to consulting the facility's attending veterinarian resulted in the failure of prompt diagnosis for a rabbit's ear condition, a caracal's eye condition, and lesions on a leopard's rump, as well as the proper treatment for a leopard's tail-sucking habit. Three animals died over a three-month period without consultation with a veterinarian. Mr. White's perimeter fence and other structures did not meet standards for soundness and, at times, Mr. White failed to meet the required feeding and sanitation standards.

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[1] Zimmerman, 56 Agric. Dec. 433, 461 (U.S.D.A. 1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), *printed in* 57 Agric. Dec. 46 (U.S.D.A. 1998).

[2] 7 U.S.C. § 2149(b).

Moreover, the record establishes that Mr. White repeatedly violated the Animal Welfare Act and the Regulations during almost a four-year period, May 24, 2007, through April 19, 2011, indicating a lack of good faith.

Finally, Mr. White has a history of previous violations. Mr. White's ongoing pattern of violations, established in this proceeding, constitutes a history of previous violations for the purposes of 7 U.S.C. § 2149(b). Further, in a previous proceeding, Mr. White was found to have violated the Animal Welfare Act and the Regulations and ordered to cease and desist from violating the Animal Welfare Act and the Regulations.[3]

The United States Department of Agriculture's sanction policy is set forth in *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (U.S.D.A. 1991) (Decision as to James Joseph Hickey and Shannon Hansen), *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 generally entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by

[3] White, 49 Agric. Dec. 123 (U.S.D.A. 1990).

administrative officials.[4]

The Administrator, one of the officials charged with administering the Animal Welfare Act, recommends that I issue an order requiring Mr. White to cease and desist from violations of the Animal Welfare Act and the Regulations, assessing Mr. White a $99,000 civil penalty, and revoking Mr. White's Animal Welfare Act license (Animal Welfare Act license number 65-C-0012).

Based upon the record before me, I agree with the Administrator that issuance of a cease and desist order against Mr. White and revocation of Mr. White's Animal Welfare Act license are necessary to ensure Mr. White's 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 thereby fulfill the remedial purposes of the Animal Welfare Act. Moreover, I find assessment of a civil penalty is warranted in law and justified by the facts.

I conclude Mr. White committed 22 violations of the Animal Welfare Act and the Regulations during the period May 24, 2007, through April 19, 2011.[5] Mr. White could be assessed a maximum civil penalty of $213,750 for 22 violations of the Animal Welfare Act and the Regulations.[6] After examining all the relevant circumstances, in light of

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[4] Perry, 72 Agric. Dec. 635, 651 (U.S.D.A. 2013) (Decision as to Craig A. Perry & Perry's Wilderness Ranch & Zoo, Inc.); Greenly, 72 Agric. Dec. 603, 636 (U.S.D.A. 2013) (Decision as to Lee Marvin Greenly & Minn. Wildlife Connection, Inc.), *appeal docketed*, No. 13-2882 (8th Cir. Aug. 23, 2013); Mazzola, 68 Agric. Dec. 822, 849 (U.S.D.A. 2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); Pearson, 68 Agric. Dec. 685, 731 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011).

[5] The Animal Welfare Act provides that each violation and each day during which a violation continues shall be a separate offense. 7 U.S.C. § 2149(b).

[6] Prior to June 18, 2008, the Animal Welfare Act authorized the Secretary of Agriculture to assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations (7 U.S.C. § 2149(b)). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency by increasing the maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. The Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the Animal Welfare Act and the Regulations occurring after June 23, 2005, by increasing the maximum civil penalty to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2008)). This maximum civil penalty was in effect

the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b) and the remedial purposes of the Animal Welfare Act, I conclude a $39,375 civil penalty is appropriate and necessary to ensure Mr. White's 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 thereby fulfill the remedial purposes of the Animal Welfare Act.[7]

F. Mr. White's Appeal Petition

Mr. White raises two issues in Mr. White's Appeal Petition. First, Mr. White asserts the ALJ's failure to dismiss all of the violations of the Animal Welfare Act and the Regulations alleged in the Complaint, is error (Mr. White's Appeal Pet. at 1).

As the proponent of an order, the Administrator has the burden of proof in this proceeding,[8] and the standard of proof by which the burden of persuasion is met in an administrative proceeding conducted under the Animal Welfare Act is preponderance of the evidence.[9] The ALJ concluded that the Administrator proved by a preponderance of the evidence that Mr. White violated the Animal Welfare Act and the Regulations, as alleged in paragraphs III, IV(A), IV(B), IV(D)(2),

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until June 18, 2008, when the Animal Welfare Act was amended to authorize the Secretary of Agriculture to assess a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act and the Regulations. Thus, the Secretary of Agriculture is authorized to assess Mr. White a civil penalty of not more than $3,750 for his violation of the Animal Welfare Act and the Regulations that occurred on May 24, 2007, and a civil penalty of not more than $10,000 for each of his 21 violations of the Animal Welfare Act and the Regulations that occurred after June 18, 2008.

[7] I assess Mr. White a civil penalty of $5,000 for each of his five violations of 9 C.F.R. § 2.40; a civil penalty of $1,000 for 14 of Mr. White's violations of the Regulations that occurred after June 18, 2008; and a civil penalty of $375 for Mr. White's violation of 9 C.F.R. § 2.75(b)(1) that occurred on May 24, 2007. I do not assess any civil penalty for Mr. White's July 11, 2008 violation of 9 C.F.R. § 2.131(c)(1) or for Mr. White's March 23, 2010 violation of 9 C.F.R. § 3.127(b).

[8] 5 U.S.C. § 556(d).

[9] Herman & MacLean v. Huddleston, 459 U.S. 375, 387-92 (1983); Steadman v. SEC, 450 U.S. 91, 92-104 (1981); Tri-State Zoological Park of W. Md., 72 Agric. Dec. 128, 174 (U.S.D.A. 2013); Pearson, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Schmidt, 66 Agric. Dec. 159, 178 (U.S.D.A. 2007).

IV(D)(6) as it relates to the structural integrity of animal enclosures, IV(D)(7), V(A), VI(A), VI(B), VI(C), VI(D)(1), VI(D)(2), VI(D)(3), VII(A)(1), VIII, IX(4), IX(5), IX(6), X, and XII of the Complaint.[10] Mr. White addresses each of these conclusions of law (Mr. White's Appeal Brief at 4-16); however, except for the ALJ's conclusion that Mr. White violated 9 C.F.R. § 3.125(a) on September 8, 2010,[11] as alleged in paragraph IV(D)(6) of the Complaint, I find Mr. White's contention that the ALJ's conclusions of law are error, have no merit.

The Administrator alleges Mr. White violated 9 C.F.R. § 3.125(a) on September 8, 2010.[12] The ALJ concluded Mr. White violated 9 C.F.R. § 3.125(a) on September 8, 2010, by failing to remove dead trees which "represent a danger to the structural integrity of fencing[.]"[13]The Regulations require that the facility must be constructed of such material and of such strength as appropriate for the animals involved.[14] I agree with Mr. White's contention that the existence of a danger to the structural integrity of animal enclosures is not sufficient to establish that, at the time of the September 8, 2010, inspection, the animal enclosures were not constructed of such material and of such strength as appropriate for the animals involved, in violation of 9 C.F.R. § 3.125(a). Therefore, I do not adopt the ALJ's conclusion that Mr. White violated 9 C.F.R. § 3.125(a) on September 8, 2010.

Second, Mr. White contends the ALJ's revocation of Mr. White's Animal Welfare Act license, is error (Mr. White's Appeal Pet. at 1). Mr. White argues the ALJ's revocation of his Animal Welfare Act license is a "severe overreaction" and the ALJ must have misunderstood the testimony of Mrs. White and the other witnesses (Mr. White's Appeal Brief at 16).

The ALJ did not revoke Mr. White's Animal Welfare Act license. Mr. White holds, and at all times material to this proceeding held, Animal Welfare Act license number 65-C-0012 (CX 39). The ALJ

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[10] ALJ's Decision & Order, Conclusions of Law ¶ 3(a)-(j) at 40.
[11] ALJ's Decision & Order, Conclusions of Law ¶ 3(d) at 40.
[12] Compl. ¶ IV(D)(6) at 5.
[13] ALJ's Decision & Order at 11.
[14] 9 C.F.R. § 3.125(a).

revoked Animal Welfare Act license number 51-C-0064.[15] I find no evidence that Mr. White holds or ever held Animal Welfare Act license number 51-C-0064. Therefore, I reject Mr. White's contention that the ALJ's revocation of Mr. White's Animal Welfare Act license, is error.

Even if I were to find that the ALJ revoked Mr. White's Animal Welfare Act license, I would reject Mr. White's contention that the revocation constitutes a "severe overreaction." As discussed in this Decision and Order, *supra*, I conclude revocation of Mr. White's Animal Welfare Act license is necessary to ensure Mr. White's 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 thereby fulfill the remedial purposes of the Animal Welfare Act.

G. The Administrator's Appeal Petition

The Administrator raises 10 issues in the Administrator's Appeal Petition. First, the Administrator contends the ALJ erroneously dismissed the allegation in paragraph XI of the Complaint that Mr. White violated 9 C.F.R. § 2.131(c)(1) on July 11, 2008, based upon Mr. White's subsequent correction of the violation (Administrator's Appeal Br. at 3).

The correction of a violation of the Animal Welfare Act or the Regulations is to be encouraged and may be taken into account when determining the sanction to be imposed for the violation. However, each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations and the correction of a violation does not eliminate the fact that the violation occurred.[16] Therefore, I reject the ALJ's basis for dismissing the allegation in paragraph XI of the Complaint that Mr. White violated 9 C.F.R. § 2.131(c)(1) on July 11, 2008.

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[15] ALJ's Decision & Order at 41.

[16] Greenly, 72 Agric. Dec. 603, 623, (U.S.D.A. 2013) (Decision as to Lee Marvin Greenly & Minn. Wildlife Connection), *appeal docketed*, No. 13-2882 (8th Cir. Aug. 23, 2013); Tri-State Zoological Park of W. Md., Inc., 72 Agric. Dec. 128, 175 (U.S.D.A. 2013); Pearson, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Bond, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008).

Second, the Administrator contends the ALJ erroneously dismissed the allegation in paragraph IV(D)(5) of the Complaint that Mr. White violated 9 C.F.R. § 3.125(c) on September 8, 2010, based upon Mr. White's explanation of the reasons for the violation (Administrator's Appeal Br. at 3-4).

An explanation of the reasons for a violation of the Animal Welfare Act or the Regulations may be taken into account when determining the sanction to be imposed for the violation of the Animal Welfare Act or the Regulations. However, each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations and an explanation of the reasons for a violation does not eliminate the fact that the violation occurred. However, the ALJ's Decision and Order does not indicate that she would have found Mr. White's storage of items in violation of 9 C.F.R. § 3.125(c), but for the explanation provided by Mr. White. Instead, the ALJ only found "the practices described by Dr. Howard in her inspection report [(CX 7)] reflect some careless handling of vitamins and storage of items[.][17] Some careless handling of vitamins and storage of items does not, by itself, constitute a violation of 9 C.F.R. § 3.125(c). Therefore, I do not find the ALJ's dismissal of the violation of 9 C.F.R. § 3.125(c), alleged in paragraph IV(D)(5) of the Complaint, is error.

Third, the Administrator contends the ALJ erroneously dismissed the allegation that, on September 24, 2009, Mr. White violated 9 C.F.R. § 3.125(a) (Administrator's Appeal Br. at 4-5).

The Administrator does not allege that Mr. White violated 9 C.F.R. § 3.125(a) on September 24, 2009.[18] Therefore, I reject the Administrator's contention that the ALJ erroneously dismissed the Administrator's allegation that Mr. White violated 9 C.F.R. § 3.125(a) on September 24, 2009.

Fourth, the Administrator contends the ALJ erroneously dismissed the allegations that, on September 24, 2009, Mr. White violated 9 C.F.R. §§ 3.52(b), 3.53(a)(2), 3.53(b), 3.53(c)(2), and 3.54(a) (Administrator's Appeal Br. at 5).

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[17] ALJ's Decision & Order at 13.
[18] Compl. ¶ IX at 8-9.

As an initial matter, the Administrator did not allege that Mr. White violated 9 C.F.R. § 3.53(b) on September 24, 2009.[19] Moreover, the ALJ concluded that Mr. White violated 9 C.F.R. § 3.54(a) on September 24, 2009.[20] Therefore, I reject the Administrator's contention that the ALJ erroneously dismissed the Administrator's allegations that Mr. White violated 9 C.F.R. §§ 3.53(b) and 3.54(a) on September 24, 2009.

As for the Administrator's contention that the ALJ erroneously dismissed the allegations in paragraphs IX(1), IX(2), and IX(3) of the Complaint that Mr. White violated 9 C.F.R. §§ 3.52(b), 3.53(a)(2), and 3.53(c)(2), the ALJ properly weighed the evidence and concluded the Administrator failed to prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. §§ 3.52(b), 3.53(a)(2), and 3.53(c)(2) on September 24, 2009; therefore, I reject the Administrator's contention that the ALJ's dismissal of the allegations in paragraphs IX(1), IX(2), and IX(3) of the Complaint, is error.

Fifth, the Administrator contends the ALJ erroneously dismissed the allegation in paragraph IV(D)(3) of the Complaint that, on September 8, 2010, in violation of 9 C.F.R. § 3.129(a), Mr. White failed to provide animals with wholesome and uncontaminated food (Administrator's Appeal Br. at 6).

Dr. Howard cited Mr. White for a violation of 9 C.F.R. § 3.129(a) on September 8, 2010, based upon her finding that the primary meat source for the big cats was chicken backs (CX 7 at 6). However, Mr. White introduced evidence that the cats were also fed venison and that chicken leg quarters were available on September 8, 2010. The ALJ properly weighed this conflicting evidence and concluded the Administrator failed to prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. § 3.129(a) on September 8, 2010. Therefore, I reject the Administrator's contention that the ALJ erroneously dismissed the allegation in paragraph IV(D)(3) of the Complaint that, on September 8, 2010, Mr. White violated 9 C.F.R. § 3.129(a).

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[19] Compl. ¶ IX at 8-9.
[20] ALJ's Decision & Order, Conclusions of Law ¶ 3(g) at 40.

Sixth, the Administrator contends the ALJ erroneously dismissed the allegation in paragraph VI(D)(4) of the Complaint that, on March 23, 2010, in violation of 9 C.F.R. § 3.129(a), Mr. White failed to provide animals with wholesome, palatable food that was free of contamination and of sufficient quantity and nutritive value to maintain the animals (Administrator's Appeal Br. at 7).

Dr. Howard cited Mr. White for a violation of 9 C.F.R. § 3.129(a) on March 23, 2010, based upon the existence of a plastic bucket in the food cooler that contained chicken leg quarters of questionable quality for feeding (Tr. 216-17; CX 26 at 5). The ALJ properly weighed this evidence against testimony that the chicken in the plastic bucket was not food for the animals, but was waste that would not be fed to animals and concluded that the Administrator failed to prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. § 3.129(a) on March 23, 2010. Therefore, I reject the Administrator's contention that the ALJ erroneously dismissed the allegation in paragraph VI(D)(4) of the Complaint that, on March 23, 2010, Mr. White violated 9 C.F.R. § 3.129(a). However, I agree with the Administrator's assertion that the ALJ's reliance on the fact that Mr. White was not regularly cited for a violation of 9 C.F.R. § 3.129(a) as a basis for dismissal of the allegation, is misplaced, and I do not adopt the ALJ's discussion regarding the frequency with which Mr. White was cited for violating 9 C.F.R. § 3.129(a).

Seventh, the Administrator urges removal of the ALJ's discussion of a violation of 9 C.F.R. § 3.131(c) on September 8, 2010, because the Administrator did not allege that Mr. White violated 9 C.F.R. § 3.131(c) on September 8, 2010 (Administrator's Appeal Br. at 7-8).

I agree with the Administrator's assertion that the Complaint contains no allegation that Mr. White failed to provide for removal of animal and food wastes in violation of 9 C.F.R. § 3.131(c) on September 8, 2010; however, the Administrator did allege that, on September 8, 2010, Mr. White failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris in violation of 9 C.F.R. § 3.125(d).[1] The ALJ's discussion, which the Administrator

[1] Compl. ¶ IV(D)(4) at 4.

believes must be removed, relates to the allegation in paragraph IV(D)(4) of the Complaint that Mr. White violated 9 C.F.R. § 3.125(d) on September 8, 2010. Therefore, I reject the Administrator's request that I remove the ALJ's discussion of the allegation in paragraph IV(D)(4) of the Complaint.

Eighth, the Administrator contends the ALJ erroneously dismissed the allegation in paragraph VI(D)(5) of the Complaint that, on March 23, 2010, in violation of 9 C.F.R. § 3.131(a), Mr. White failed to remove excreta from primary enclosures as often as necessary to prevent contamination of animals contained in the primary enclosures and to minimize disease hazards (Administrator's Appeal Brief at 8-9).

Dr. Howard cited Mr. White for a violation of 9 C.F.R. § 3.131(a) on March 23, 2010, based upon her observation that, in the kinkajou enclosure, a barrel in a shelter box was excessively soiled and stained (Tr. at 217-18; CX 26 at 5-6, CX 27 at 23). Dr. Howard testified that her inspection report and the accompanying photograph adequately explained the conditions that led to the citation she issued (Tr. at 217-18). Dr. Kirsten similarly found the kinkajou enclosure excessively dirty (Tr. at 389).

The ALJ based the dismissal of the allegation that Mr. White violated 9 C.F.R. § 3.131(a) on March 23, 2010, on Ms. Williamson's testimony that the kinkajou's cage was cleaned every morning (Tr. at 569). As an initial matter, Ms. Williamson's testimony regarding standard operating procedure at Collins Exotic Animal Orphanage is not sufficiently specific to overcome the Administrator's evidence of the condition of the kinkajou enclosure on March 23, 2010. Moreover, Ms. Williamson testified that, since 2006, she only goes to Collins Exotic Animal Orphanage one or two days per week and her work is limited to supervisory work and work in the office (Tr. at 561). Even more specifically, Ms. Williamson testified she was not at Collins Exotic Animal Orphanage in 2010 (Tr. at 606). Under these circumstances, I agree with the Administrator that the ALJ's dismissal of the allegation in paragraph VI(D)(5) of the Complaint that, on March 23, 2010, Mr. White violated 9 C.F.R. § 3.131(a), is error. I conclude the Administrator proved by a preponderance of the evidence that Mr. White violated

9 C.F.R. § 3.131(a) on March 23, 2010, as alleged in paragraph VI(D)(5) of the Complaint.

Ninth, the Administrator contends the ALJ erroneously dismissed the allegations in paragraphs II(A) and II(C) of the Complaint that, from May 24, 2007, and continuing to March 3, 2012, Mr. White failed to have a sufficient number of adequately trained employees under a supervisor who has a background in animal care to maintain the professionally acceptable level of husbandry practices set forth in the Regulations, in violation of 9 C.F.R. §§ 3.12 and 3.132 (Administrator's Appeal Br. at 9-13).

As an initial matter, the inspections of Collins Exotic Animal Orphanage that are the subject of this proceeding occurred during the period May 24, 2007, through April 19, 2011; therefore, I find no basis upon which to conclude that Mr. White violated 9 C.F.R. § 3.12 or 9 C.F.R. § 3.132 after April 19, 2011. Moreover, Mr. White was not cited for a violation of 9 C.F.R. § 3.12 or 9 C.F.R. § 3.132 on the inspection reports applicable to the inspections that are the subject of this proceeding.[1] Under these circumstances, despite the testimony regarding the general condition of Collins Exotic Animal Orphanage, I reject the Administrator's contention that the ALJ erroneously dismissed the alleged violation of 9 C.F.R. § 3.132 in paragraph II(A) of the Complaint and the alleged violation of 9 C.F.R. § 3.12 in paragraph II(C) of the Complaint.

Tenth, the Administrator contends the ALJ's failure to assess Mr. White a civil penalty, is error (Administrator's Appeal Pet. at 1).
I find assessment of a civil penalty is warranted in law and justified by the facts, and, after examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b) and the remedial purposes of the Animal Welfare Act, I

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[1] *See* CX 16 applicable to the July 11, 2008, inspection; CX 19 applicable to the November 6, 2008, inspection; CX 22 applicable to the September 24, 2009, inspection; CX 24 applicable to the January 21, 2010, inspection; CX 26 applicable to the March 23, 2010, inspection; CX 30 applicable to the March 26, 2010, inspection; CX 7 applicable to the September 8, 2010, inspection; and CX 1 and CX 2 applicable to the April 19, 2011, inspection.

conclude a $39,375 civil penalty is appropriate and necessary to ensure Mr. White's 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 thereby fulfill the remedial purposes of the Animal Welfare Act.

H. Findings of Fact

1. Gustave L. White, III, also known as Gus White, is an individual who holds, and at all times material to this proceeding held, Animal Welfare Act license number 65-C-0012 to exhibit animals under the Animal Welfare Act.

2. Mr. White operates a facility named Collins Exotic Animal Orphanage in Collins, Mississippi, at which Mr. White exhibits animals to the public.

3. Mr. White directs and supervises the operation of Collins Exotic Animal Orphanage, but no longer does the heavy manual work involved in maintaining the facility and caring for the animals.

4. Mr. White has a lifetime of experience caring for animals.

5. Mr. White's wife, Bettye White, and son, Gustave L. White, IV are the primary caretakers of Collins Exotic Animal Orphanage and the animals at the facility.

6. Mrs. White has cared for animals along with her husband for 32 years.

7. Mr. White, IV was raised in a home adjacent to Collins Exotic Animal Orphanage and has been around animals and worked with animals for his entire life. Mr. White, IV was trained to feed and care for animals by his parents and by volunteers at Collins Exotic Animal Orphanage.

8. A number of volunteers regularly assist with the maintenance and administration of Collins Exotic Animal Orphanage.

ANIMAL WELFARE ACT

9. Mrs. White is responsible for maintaining the records at Collins Exotic Animal Orphanage.

10. Dr. Melissa Ainsworth serves as the attending veterinarian at Collins Exotic Animal Orphanage on a volunteer basis and offers advice primarily over the telephone.

11. APHIS employees conducted inspections of Mr. White's facility, records, and animals on May 24, 2007, July 11, 2008, November 6, 2008, September 24, 2009, December 10-11, 2009, January 21, 2010, March 23, 2010, March 26, 2010, September 8, 2010, and April 19, 2011.

12. During each of the inspections identified in Finding of Fact number 11, APHIS inspectors cited Mr. White for violations of the Regulations.

13. On or about May 24, 2007, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals.

14. On or about July 11, 2008, Mr. White failed, during a public exhibition, to maintain a sufficient distance or barrier between the animals and the general viewing public to assure the safety of the animals and the viewing public.

15. On or about November 6, 2008, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, including, but not limited to, a wolf-hybrid named "Olive" that was observed with a brownish discharge in both eyes and a caracal named "Pretty Boy" that was observed to have an ocular condition.

16. On or about September 24, 2009, Mr. White failed to provide food for rabbits that was free of contamination, wholesome, palatable, and of sufficient quantity and nutritive value for the rabbits.

17. On or about September 24, 2009, Mr. White failed to keep food

receptacles for rabbits clean and sanitized and failed to locate food receptacles for rabbits so as to minimize contamination by excreta.

18. On or about September 24, 2009, Mr. White's housing facilities for dogs were not constructed so they were structurally sound and maintained in good repair.

19. On or about December 10-11, 2009, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to an animal in need of care. A wolf-hybrid named "Olive" was observed with a distended abdomen and in distress, but was not provided veterinary care. Olive was found dead on December 13, 2009.

20. On or about January 21, 2010, Mr. White's housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the dogs from injury, contain the dogs, and restrict other animals from entering.

21. On or about January 21, 2010, Mr. White's facility was not constructed of such material and such strength and was not maintained in good repair to protect animals from injury and to contain animals.

22. On or about March 23, 2010, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care.

23. On or about March 23, 2010, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals.

24. On or about March 23, 2010, Mr. White, during public exhibition, did not maintain a sufficient distance or barrier between coyotes and the general viewing public to assure the safety of the coyotes and the viewing public.

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25. On or about March 23, 2010, Mr. White's facilities for cougars and tigers were not structurally sound and maintained in good repair to protect the animals from injury and to contain the animals.

26. On or about March 23, 2010, Mr. White failed to provide natural or artificial shelter appropriate to the local climatic conditions for cougars kept outdoors to afford the cougars protection and to prevent discomfort to the cougars.

27. On or about March 23, 2010, Mr. White failed to enclose all outdoor housing facilities for animals with a perimeter fence of sufficient height.

28. On or about March 23, 2010, Mr. White failed to remove excreta from a primary enclosure as often as necessary to prevent contamination of a kinkajou contained in the primary enclosure and to minimize disease hazards.

29. On or about March 26, 2010, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals.

30. On or about September 8, 2010, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care.

31. On or about September 8, 2010, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals.

32. On or about September 8, 2010, Mr. White failed to enclose all outdoor housing facilities for animals with a perimeter fence of sufficient height.

33. On or about September 8, 2010, Mr. White failed to keep food receptacles for rabbits clean and sanitized and failed to locate food receptacles for rabbits so as to minimize contamination by excreta.

34. On or about April 19, 2011, Mr. White failed to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

I. Conclusions of Law

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

2. At all times material to this proceeding, Mr. White was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations.

3. The following violations alleged in the Complaint are dismissed for lack of proof by a preponderance of the evidence:

a. A violation of 9 C.F.R. § 3.132, alleged in paragraph II(A) of the Complaint to have occurred from May 24, 2007, and continuing to the date of the issuance of the Complaint on March 3, 2012;

b. A violation of 9 C.F.R. § 3.85, alleged in paragraph II(B) of the Complaint to have occurred from May 24, 2007, and continuing to the date of the issuance of the Complaint on March 3, 2012;

c. A violation of 9 C.F.R. § 3.12, alleged in paragraph II(C) of the Complaint to have occurred from May 24, 2007, and continuing to the date of the issuance of the Complaint on March 3, 2012;

d. A violation of 9 C.F.R. § 2.131(c)(1), alleged in paragraph IV(C) of the Complaint to have occurred on or about September 8, 2010;

e. A violation of 9 C.F.R. § 3.127(a), alleged in paragraph IV(D)(1) of the Complaint to have occurred on or about September 8, 2010;

f. Violations of 9 C.F.R. § 3.129(a), alleged in paragraph IV(D)(3) of the Complaint to have occurred on or about September 8, 2010, and alleged in paragraph VI(D)(4) of the Complaint to have occurred on or about March 23, 2010;

g. A violation of 9 C.F.R. § 3.125(d), alleged in paragraph IV(D)(4) of the Complaint to have occurred on or about September 8, 2010;

h. A violation of 9 C.F.R. § 3.125(c), alleged in paragraph IV(D)(5) of the Complaint to have occurred on or about September 8, 2010;

i A violation of 9 C.F.R. § 3.125(a), alleged in paragraph IV(D)(6) of the Complaint to have occurred on or about September 8, 2010;

j. Violations of 9 C.F.R. § 3.127(c), alleged in paragraph VII(A)(3) of the Complaint to have occurred on or about January 21, 2010, and alleged in paragraph IX(7) of the Complaint to have occurred on or about September 24, 2009;

k. A violation of 9 C.F.R. § 3.52(b), alleged in paragraph IX(1) of the Complaint to have occurred on or about September 24, 2009;

l. A violation of 9 C.F.R. § 3.53(a)(2), alleged in paragraph IX(2) of the Complaint to have occurred on or about September 24, 2009; and

m. A violation of 9 C.F.R. § 3.53(c)(2), alleged in paragraph IX(3) of the Complaint to have occurred on or about September 24, 2009.

4. The following violations alleged in the Complaint to have been committed by Mr. White are established by a preponderance of the evidence:

a. On or about May 24, 2007, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1);

b. On or about July 11, 2008, during public exhibition of an animal,

Mr. White did not maintain a sufficient distance or barrier between the animal and the general viewing public to assure the safety of the animal and the viewing public, in willful violation of 9 C.F.R. § 2.131(c)(1);

c. On or about November 6, 2008, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, including, but not limited to, a wolf-hybrid named "Olive" that was observed with a brownish discharge in both eyes and a caracal named "Pretty Boy" that was observed to have an ocular condition, in willful violation of 9 C.F.R. § 2.40;

d. On or about September 24, 2009, Mr. White failed to provide food for rabbits that was free of contamination, wholesome, palatable, and of sufficient quantity and nutritive value for the rabbits, in willful violation of 9 C.F.R. § 3.54(a);

e. On or about September 24, 2009, Mr. White failed to keep food receptacles for rabbits clean and sanitized and failed to locate food receptacles for rabbits so as to minimize contamination by excreta, in willful violation of 9 C.F.R. § 3.54(b);

f. On or about September 24, 2009, Mr. White's housing facilities for dogs were not constructed so that they were structurally sound and maintained in good repair, in willful violation of 9 C.F.R. § 3.1(a);

g. On or about December 10-11, 2009, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to an animal in need of care, in willful violation of 9 C.F.R. § 2.40;

h. On or about January 21, 2010, Mr. White's housing facilities for

dogs were not structurally sound and maintained in good repair so as to protect the dogs from injury, contain the dogs, and restrict other animals from entering, in willful violation of 9 C.F.R. § 3.1(a);

i. On or about January 21, 2010, Mr. White's facility was not constructed of such material and of such strength and was not maintained in good repair to protect the animals from injury and to contain the animals, in willful violation of 9 C.F.R. § 3.125(a);

j. On or about March 23, 2010, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of 9 C.F.R. § 2.40;

k. On or about March 23, 2010, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1);

l. On or about March 23, 2010, during public exhibition of coyotes, Mr. White did not maintain a sufficient distance or barrier between the coyotes and the general viewing public to assure the safety of the coyotes and the viewing public, in willful violation of 9 C.F.R. § 2.131(c)(1);

m. On or about March 23, 2010, Mr. White's facilities for cougars and tigers were not structurally sound and maintained in good repair to protect the animals from injury and to contain the animals, in willful violation of 9 C.F.R. § 3.125(a);

n. On or about March 23, 2010, Mr. White failed to provide natural or artificial shelter appropriate to the local climatic conditions for cougars kept outdoors to afford the cougars protection and to prevent discomfort to the cougars, in willful violation of 9 C.F.R. § 3.127(b);

o. On or about March 23, 2010, Mr. White failed to enclose all outdoor housing facilities for animals with a perimeter fence of sufficient height, in willful violation of 9 C.F.R. § 3.127(d);

p. On or about March 23, 2010, Mr. White failed to remove excreta from a primary enclosure as often as necessary to prevent contamination of a kinkajou contained in the primary enclosure and to minimize disease hazards, in willful violation of 9 C.F.R. § 3.131(a);

q. On or about March 26, 2010, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1);

r. On or about September 8, 2010, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of 9 C.F.R. § 2.40;

s. On or about September 8, 2010, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1);

t. On or about September 8, 2010, Mr. White failed to enclose all outdoor housing facilities for animals with a perimeter fence of sufficient height, in willful violation of 9 C.F.R. § 3.127(d);

u. On or about September 8, 2010, Mr. White failed to keep food receptacles for rabbits clean and sanitized and failed to locate food receptacles for rabbits so as to minimize contamination by excreta, in willful violation of 9 C.F.R. § 3.54(b); and

v. On or about April 19, 2011, Mr. White failed to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation

of 9 C.F.R. § 2.40(a)(2).

5. An order instructing Mr. White to cease and desist from violations of the Animal Welfare Act and the Regulations is appropriate.

6. An order assessing Mr. White a $39,375 civil penalty is appropriate.

7. Revocation of Mr. White's Animal Welfare Act license (Animal Welfare Act license number 65-C-0012) is appropriate.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. White, his agents and 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:

a. failing to maintain complete records showing the acquisition, disposition, and identification of animals;

b. failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

c. failing to provide veterinary care to animals in need of care;

d. failing to provide food for rabbits that is free of contamination, wholesome, palatable, and of sufficient quantity and nutritive value for the rabbits;

e. failing to keep food receptacles for rabbits clean and sanitized;

f. failing to locate food receptacles for rabbits so as to minimize contamination by excreta;

g. failing to construct housing facilities for animals so that they are

structurally sound;

h. failing to maintain housing facilities for animals in good repair;

i. failing, during public exhibition, to maintain a sufficient distance or barrier between animals and the general viewing public to assure the safety of the animals and the viewing public;

j. failing to provide natural or artificial shelter appropriate to the local climatic conditions for animals kept outdoors to afford the animals protection and to prevent discomfort to the animals;

k. failing to enclose all outdoor housing facilities for animals with a perimeter fence of sufficient height; and

l. failing to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the primary enclosures and to minimize disease hazards.

Paragraph one of this Order shall become effective upon service of this Order on Mr. White.

2. Mr. White's Animal Welfare Act license (Animal Welfare Act license number 65-C-0012) is revoked.

Paragraph two of this Order shall become effective 60 days after service of this Order on Mr. White.

3. Mr. White is assessed a $39,375 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:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing, Regulatory, and Food Safety 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, Ms. Deskins within 60 days after service of this Order on Mr. White. Mr. White shall state on the certified check or money order that payment is in reference to AWA Docket No. 12-0277.

RIGHT TO JUDICIAL REVIEW

Mr. White 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. §§ 2341-2350.

Mr. White must seek judicial review within 60 days after entry of the Order in this Decision and Order.[1]

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[1] 7 U.S.C. § 2149(c).

In re: BRIAN STAPLES, AN INDIVIDUAL D/B/A STAPLES SAFARI AND ZOO AND BRIAN STAPLES PRODUCTIONS.
Docket No. 14-0022.
Decision and Order.
Filed June 26, 2014.

AWA – Administrative procedure – Animal welfare – Answer, failure to timely file – Default – Sanction policy – Willful.

Colleen A. Carroll, Esq. for Complainant.
William J. Cook, Esq. for Respondent.
Initial Decision and Order entered by Jill S. Clifton.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding on November 5, 2013, by filing a Complaint. The Administrator 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 the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleged Brian Staples willfully violated the Regulations on October 6, 2010, January 10, 2011, January 22, 2011, January 27, 2011, and July 12, 2011.[1] The Hearing Clerk served Mr. Staples with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on November 14, 2013.[2] Mr. Staples

[1] Compl. ¶¶ 4-9 at 2-4.
[2] United States Postal Service Domestic Return Receipt for Article Number XXXX XXXX XXXX 8692.

failed to file a response to the Complaint with the Hearing Clerk within 20 days after service, as required by 7 C.F.R. § 1.136(a).

On December 26, 2013, in accordance with 7 C.F.R. § 1.139, the Administrator filed a Motion for Adoption of Decision and Order by Reason of Default [hereinafter Motion for Default Decision] and a proposed Decision and Order by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served Mr. Staples with the Administrator's Motion for Default Decision, the Administrator's Proposed Default Decision, and the Hearing Clerk's service letter on January 3, 2014.[3]

On January 8, 2014, Mr. Staples filed an Answer and Request for Hearing in which Mr. Staples denied the material allegations of the Complaint.[4] On January 23, 2014, Mr. Staples filed Respondent, Brian Staples, Verified Response and Objections to Complainant's Motion for Adoption of Decision by Reason of Default and Proposed Order [hereinafter Objections to the Motion for Default Decision]. On February 3, 2014, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Ruling Denying Motion for Default Judgment finding Mr. Staples had shown good cause for the ALJ's acceptance of his late-filed answer and denying the Administrator's Motion for Default Decision.

On March 14, 2014, the Administrator filed Complainant's Petition for Appeal [hereinafter Appeal Petition] seeking reversal of the ALJ's Ruling Denying Motion for Default Judgment or an order vacating the ALJ's Ruling Denying Motion for Default Judgment and remanding the proceeding to the ALJ for further proceedings in accordance with the Rules of Practice.[5] On April 18, 2014, Mr. Staples filed a response to the Administrator's Appeal Petition, and on April 21, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I reverse the ALJ's Ruling

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[3] United States Postal Service Domestic Return Receipt for Article Number XXXX XXXX XXXX 6947.

[4] Answer and Req. for Hr'g ¶¶ 4-9 at 1-2.

[5] Administrator's Appeal Pet. at 12.

Denying Motion for Default Judgment and adopt, with minor changes, the proposed findings of fact and the proposed conclusions of law in the Administrator's Proposed Default Decision.

DECISION

Statement of the Case

Mr. Staples failed to file a response to the Complaint with the Hearing Clerk within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer to a complaint with the Hearing Clerk within the time provided in 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 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 are adopted as findings of fact. I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Staples is an individual, d/b/a Staples Safari Zoo and Brian Staples Productions, whose address is [redacted][*] (Post Office Box 1189, Deer Park, Washington 99006).

2. At all times material to this proceeding, Mr. Staples operated as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations, and held Animal Welfare Act license number 91-C-0060.

3. Mr. Staples operates a moderately-large zoo and animal act. Mr. Staples exhibits wild and exotic animals at various locations. In March 2013, Mr. Staples reported to the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], that he held nineteen nonhuman primates (including three

[*] Address has been redacted by the Editor to protect Personally Identifiable Information. *See* 5 U.S.C. § 552(b)(6) (2006).

baboons), three large felids, camelids, marsupials, and other exotic, wild, and domestic mammals.

4. Mr. Staples resolved two previous Animal Welfare Act cases (WA 01085 and WA 07002) in accordance with the stipulation procedures set forth in 9 C.F.R. § 4.11.

5. Mr. Staples's violations of the Regulations, which are the subject of the instant proceeding, are serious and include the mishandling of a nonhuman primate that escaped and remained at large for two days.

6. APHIS inspectors inspected Mr. Staples's animals, facilities, and equipment on October 6, 2010, January 22, 2011, January 27, 2011, and July 12, 2011.

7. During each of the inspections referenced in Finding of Fact number 6, APHIS inspectors cited Mr. Staples for noncompliance with the Regulations.

8. On or about October 6, 2010, and July 12, 2011, in Ozark, Missouri, Mr. Staples failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to treat diseases and injuries. Specifically, Mr. Staples, while traveling with animals, maintained expired medications in his animal equipment storage areas, including antiseptic wound dressing spray that had expired nearly four years earlier, Baytril without any visible expiration date, Baytril that had expired two years earlier, Praxiquantel that had expired two years two months earlier, and Neo-Predel that had expired one year earlier.

9. On or about October 6, 2010, the surfaces of Mr. Staples's housing facilities for capuchin monkeys were not constructed of materials that allowed the surfaces to be readily cleaned and sanitized.

10. On or about January 10, 2011, at Meigs, Georgia, Mr. Staples failed to handle a nonhuman primate as carefully as possible in a manner that would not cause physical harm, stress, or unnecessary discomfort to the nonhuman primate. Specifically, a member of Mr. Staples's staff mishandled a capuchin monkey by attempting to transfer the capuchin monkey from one enclosure to another enclosure by carrying the

capuchin monkey in his arms, whereupon the capuchin monkey was able to, and did, escape and remained at large for two days, during which time the temperatures were near freezing.

11. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples failed to maintain accurate and complete records of the acquisition of two animals (a fennec fox and a bush baby) and did not have a current animal inventory.

12. On or about January 22, 2011, at Meigs, Georgia, the floors and walls of Mr. Staples's bush baby, ring-tailed lemur, and capuchin monkey shelter were deteriorated, with visible surface peeling.

13. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's food and bedding storage area contained trash, debris, and toxic substances, including, among other things, bleach, pesticides, and an open bag of lime.

14. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples failed to provide nine nonhuman primates (a macaque, six capuchin monkeys, and two spider monkeys) with adequate shelter from the elements.

15. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's travel enclosure housing a capuchin monkey, a bush baby, and a ring-tailed lemur did not have adequate lighting.

16. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's primary enclosure housing two nonhuman primates (two spider monkeys) did not have adequate space for the monkeys.

17. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's primary enclosure housing a capuchin monkey, a bush baby, and a ring-tailed lemur had not been cleaned and contained excreta and accumulated food waste on the floor and walls.

18. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a lion, a tiger, and a leopard was not constructed in a

manner that was sufficient to contain the animals securely. Specifically, sections of the portable fencing were affixed to each other with brackets that did not ensure the integrity of the enclosure.

19. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a kangaroo was maintained in a manner that could cause injury to the kangaroo. Specifically, there was a rusty, jagged hole in the gate on the interior of the trailer housing the kangaroo.

20. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing three large felids did not have adequate space for the felids to make normal postural adjustments.

21. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing three large felids was excessively caked with feces combined with urine.

22. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a kangaroo had an excessive accumulation of excreta caked with feces combined with urine.

23. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a fennec fox had an accumulation of excreta and food waste on the floor and walls.

24. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples failed to utilize a sufficient number of adequately trained employees to maintain an acceptable level of animal husbandry.

25. On or about January 27, 2011, at Walton County Fairgrounds, Florida, Mr. Staples stored metal pipes and portions of tent supports, with long straps, inside the compartment of a trailer in which Mr. Staples transported three camels, and the camels had access to these materials, which were stored in a manner that could injure the camels.

Conclusions of Law

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

2. At all times material to this proceeding, Mr. Staples was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations.

3. On or about October 6, 2010, in Ozark, Missouri, Mr. Staples failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to treat diseases and injuries, in willful violation of 9 C.F.R. § 2.40(b)(2).

4. On or about October 6, 2010, Mr. Staples's housing facilities for capuchin monkeys did not have surfaces constructed of materials that allowed the surfaces to be readily cleaned and sanitized, in willful violation of 9 C.F.R. § 3.75(c).

5. On or about January 10, 2011, at Meigs, Georgia, Mr. Staples failed to handle a nonhuman primate as carefully as possible in a manner that would not cause physical harm, stress, or unnecessary discomfort to the nonhuman primate, in willful violation of 9 C.F.R. § 2.131(b)(1).

6. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples failed to maintain accurate and complete records of the acquisition of two animals (a fennec fox and a bush baby) and did not have a current animal inventory, in willful violation of 9 C.F.R. § 2.75(b).

7. On or about January 22, 2011, at Meigs, Georgia, the floors and walls of Mr. Staples' bush baby, ring-tailed lemur, and capuchin monkey shelter were deteriorated, with visible surface peeling, in willful violation of 9 C.F.R. § 3.75(c)(2).

8. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's food and bedding storage area contained trash, debris, and toxic substances, including, among other things, bleach, pesticides, and an open bag of lime, in willful violation of 9 C.F.R. § 3.75(e).

9. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples failed to provide nine nonhuman primates (a macaque, six capuchin monkeys, and two spider monkeys) with adequate shelter from the elements, in willful violation of 9 C.F.R. § 3.78(b).

10. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's travel enclosure housing a capuchin monkey, a bush baby, and a ring-tailed lemur did not have adequate lighting, in willful violation of 9 C.F.R. § 3.79(c).

11. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's primary enclosure housing two nonhuman primates (two spider monkeys) did not have adequate space for the monkeys, in willful violation of 9 C.F.R. § 3.80.

12. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's primary enclosure housing a capuchin monkey, a bush baby, and a ring-tailed lemur had not been cleaned and contained excreta and accumulated food waste on the floor and walls, in willful violation of 9 C.F.R. § 3.84(a).

13. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a lion, a tiger, and a leopard was not constructed in a manner that was sufficient to contain the animals securely, in willful violation of 9 C.F.R. § 3.125(a).

14. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a kangaroo was maintained in a manner that could cause injury to the kangaroo, in willful violation of 9 C.F.R. § 3.125(a).

15. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing three large felids did not have adequate space for the felids to make normal postural adjustments, in willful violation of 9 C.F.R. § 3.128.

16. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing three large felids had an excessive accumulation of excreta, in willful violation of 9 C.F.R. § 3.131(a).

17. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a kangaroo had an excessive accumulation of excreta, in willful violation of 9 C.F.R. § 3.131(a).

18 . On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a fennec fox had an accumulation of excreta and food waste on the floor and walls, in willful violation of 9 C.F.R. § 3.131(a).

19. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples failed to utilize a sufficient number of adequately trained employees to maintain an acceptable level of animal husbandry, in willful violation of 9 C.F.R. § 3.132.

20. On or about January 27, 2011, at Walton County Fairgrounds, Florida, Mr. Staples stored metal pipes and portions of tent supports, with long straps, inside the compartment of a trailer in which Mr. Staples transported three camels, and the camels had access to these materials, which were stored in a manner that could injure the camels, in willful violation of 9 C.F.R. §§ 3.137(a)(2) and 3.138(f).

21. On or about July 12, 2011, in Ozark, Missouri, Mr. Staples failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to treat diseases and injuries, in willful violation of 9 C.F.R. § 2.40(b)(2).

The Administrator's Appeal Petition

The Administrator contends the ALJ erroneously denied the Administrator's Motion for Default Decision (Appeal Pet. at 7-10).

The ALJ denied the Administrator's Motion for Default Decision because the ALJ found Mr. Staples had shown good cause for the ALJ's acceptance of his late-filed Answer, as follows:

> 1. APHIS's Motion for Adoption of Decision and Order by Reason of Default (filed December 26, 2013, with proposed Decision and Order by Reason of Default) is DENIED, because the Respondent, Brian Staples, an individual, has shown good cause for me to accept, for now, the Answer he filed late. *See* Respondent Staples' Verified Response and Objections, including 5 Exhibits, filed January 23, 2014.

Ruling Den. Mot. for Default Judgment ¶ 1 at 1 (emphasis in original). The Rules of Practice provide, if meritorious objections to a motion for a default decision have been filed, the administrative law judge shall deny the complainant's motion for a default decision with supporting reasons, as follows:

> **§ 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.

7 C.F.R. § 1.139.

Mr. Staples raised five objections to the Administrator's Motion for Default Decision in his Objections to the Motion for Default Decision. While the ALJ did not identify any objection which she found to be meritorious, the ALJ's Ruling Denying Motion for Default Judgment specifically references Mr. Staples's Objections to the Motion for Default Decision; therefore, I infer the ALJ found meritorious some or all of the objections raised in Mr. Staples' Objections to the Motion for Default Decision. I do not find that Mr. Staples raised any meritorious objection to the Administrator's Motion for Default Decision. Consequently, I conclude the ALJ's Ruling Denying Motion for Default Judgment is error, and I reverse the ALJ's ruling.

First, Mr. Staples asserts, on July 16, 2011, he requested amendment of APHIS' January 2011 inspection reports, which reports serve as the basis for most of the violations alleged in the Complaint, and, on August 29, 2011, Gregory S. Gaj, D.V.M., an APHIS supervisory animal care specialist, responded to Mr. Staples' request. Based upon this exchange, coupled with subsequent inspections, during which no violations were found, Mr. Staples believed the issues arising from the January 2011 inspections had been resolved. (Objs. to Mot. for Default Decision at 1; Ex. 1 & Ex. 2).

Dr. Gaj's August 29, 2011 response to Mr. Staples's July 16, 2011 request establishes that, except for minor modifications, APHIS rejected Mr. Staples' request for amendment of the January 2011 inspection reports. Moreover, findings during inspections subsequent to January 2011 that Mr. Staples was fully compliant with the Animal Welfare Act and the Regulations are not relevant to the January 2011 citations for noncompliance with the Regulations which are the subject of this proceeding. In short, Mr. Staples's Objections to the Motion for Default Decision contain no support for his belief that the issues in the January 2011 inspection reports had been resolved, and I reject Mr. Staples' contention that his belief constitutes a meritorious basis for denial of the Administrator's Motion for Default Decision.

Second, Mr. Staples contends the Complaint sent by the Hearing Clerk to his address in Clayton, Washington, was not delivered and was returned to the Hearing Clerk (Objs. to Mot. for Default Decision at 1-2).

The record establishes and the Administrator concedes that the Hearing Clerk sent the Complaint to Mr. Staples' address in Clayton, Washington, and the United States Postal Service returned the Complaint to the Hearing Clerk marked as undeliverable because of the lack of a mail receptacle at the [redacted][*] address.[1] However, the Hearing Clerk's inability to serve Mr. Staples with the Complaint at the

[*] Location has been redacted by the Editor to protect Personally Identifiable Information.

[1] Objs. to Mot. for Default Decision Ex. 3; Administrator's Appeal Pet. CX 3.

[redacted][*] address is not relevant because, on November 14, 2013, the Hearing Clerk served Mr. Staples with the Complaint at Mr. Staples's other address, Post Office Box 1189, Deer Park, Washington 99006.[2] While Mr. Staples states the Deer Park, Washington address is actually the mailing address for J. Craig Barrile, Mr. Staples concedes that Post Office Box 1189, Deer Park, Washington 99006, is also his address and describes his relationship with Mr. Barrile, as follows:

> The [Deer Park, Washington,] address is listed as Respondent's address on his [Animal Welfare Act] license. It actually is the mailing address for J. Craig Barrile, the registered agent for Staples Safari Zoo, a Washington nonprofit corporation. Mr. Barrile is an attorney and longtime friend of Respondent who had handled various matters for Respondent over the years. As Respondent spends a great deal of time on the road, he entrusted Mr. Barrile to accept his mail and notify him of items related to his [Animal Welfare Act] license.

Objs. to Mot. for Default Decision at 2. Therefore, I reject Mr. Staples's contention that the Hearing Clerk's inability to serve Mr. Staples with the Complaint at his Clayton, Washington address constitutes a meritorious basis for denying the Administrator's Motion for Default Decision.

Third, Mr. Staples contends J. Craig Barrile, who signed the certified return receipt for the Complaint at Mr. Staples's Deer Park, Washington, address, on November 14, 2013, neglected to give the Complaint to Mr. Staples until December 31, 2013, 27 days after Mr. Staples's answer was required to be filed with the Hearing Clerk (Objs. to Mot. for Default Decision at 2-4).

I have long held that proper service by certified mail is made when a respondent is served with a certified mailing at his or her address and

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[*] Location has been redacted by the Editor to protect Personally Identifiable Information. *See* 5 U.S.C. § 552(b)(6) (2006).

[2] *See* note 2.

someone signs for the document.[3] Mr. Staples states that the Deer Park, Washington, address is his address and that he specifically designated Mr. Barrile, who signed for the Complaint, to accept his mail, including mail related to Mr. Staples's Animal Welfare Act license. Therefore, Mr. Barrile's failure to convey the Complaint to Mr. Staples until after the time for filing an answer had expired does not constitute a meritorious basis for denying the Administrator's Motion for Default Decision.

Fourth, Mr. Staples, citing *Sewnanan*, 60 Agric. Dec. 688 (U.S.D.A. 2001) (Order Vacating Decision), and *Gallop*, 40 Agric. Dec. 217 (U.S.D.A. 1981), contends his late-filed response to the Complaint constitutes a meritorious basis for denying the Administrator's Motion for Default Decision (Objections to the Mot. for Default Decision at 4).

The Hearing Clerk served Mr. Staples with the Complaint on November 14, 2013;[4] therefore, pursuant to 7 C.F.R. § 1.136(a), Mr. Staples was required to file a response to the Complaint with the Hearing Clerk no later than December 4, 2013. Mr. Staples filed a

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[3] Ow Duk Kwon, 55 Agric. Dec. 78, 93 (U.S.D.A. 1996) (stating proper service is made when a respondent is served with a certified mailing at his or her last known address and someone signs for the document); ENA Meat Packing Corp., 51 Agric. Dec. 669, 671 (U.S.D.A. 1992) (stating a default is not inappropriate where the respondent's employee, who signed the receipt for the certified letter enclosing the complaint, did not advise the respondent's officials of the document); Kaplinsky, 47 Agric. Dec. 613, 619 (U.S.D.A. 1988) (stating the excuse, occasionally given in an attempt to justify the failure to file a timely answer, that the person who signed the certified receipt card failed to give the complaint to the respondent in time to file a timely answer has been and will be routinely rejected); Bejarano, 46 Agric. Dec. 925, 929 (U.S.D.A. 1987) (stating a default order is proper where the respondent's sister signed the certified receipt card and forgot to give the complaint to the respondent when she saw him two weeks later); Carter, 46 Agric. Dec. 207, 211 (U.S.D.A. 1987) (stating a default order is proper where a timely answer is not filed; the respondent was properly served where his mother signed the certified receipt card but failed to deliver the complaint to the respondent); Cuttone, 44 Agric. Dec. 1573, 1576 (U.S.D.A. 1985) (stating Carl D. Cuttone was properly served where the complaint was sent to his last known business address and was signed for by Joseph A. Cuttone, who failed to deliver the complaint to the respondent), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); Buzun, 43 Agric. Dec. 751, 754-56 (U.S.D.A. 1984) (Joseph Buzun was properly served where the complaint sent by certified mail to his residence was signed for by someone named Buzun, who failed to deliver the complaint to the respondent).

[4] *See* note 2.

response to the Complaint on January 8, 2014, one month four days after his answer to the Complaint was due. Mr. Staples's failure to file a timely answer to the Complaint is deemed, for the purposes of this proceeding, an admission of the allegations of the Complaint and constitutes a waiver of hearing.[5]

Moreover, the cases cited by Mr. Staples do not support his position that a late-filed response to a complaint constitutes a meritorious basis for denying a motion for default decision. In *Sewnanan*, 60 Agric. Dec. 688 (U.S.D.A. 2001) (Order Vacating Decision), I vacated a default decision issued by an administrative law judge because the record contained no proof that Ms. Sewnanan had been served with the complaint. In *Gallop*, 40 Agric. Dec. 217 (U.S.D.A. 1981) (Order Vacating Default Decision and Remanding Proceeding), former Judicial Officer Donald A. Campbell vacated a default decision issued by an administrative law judge and remanded the proceeding to the administrative law judge to determine if just cause existed for affording Mr. Gallop an opportunity for a hearing based upon the possibility that Mr. Gallop's answer had been mishandled in the mail. Therefore, I reject Mr. Staples's contention that his late-filed answer to the Complaint constitutes a meritorious basis for denial of the Administrator's Motion for Default Decision.

Fifth, Mr. Staples, citing *Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (U.S.D.A. 1996), contends the Administrator's request for relief in the Complaint and the sanctions proposed by the Administrator in the Proposed Default Decision are inconsistent and the purported inconsistency constitutes a meritorious basis for denying the Administrator's Motion for Default Decision (Objs. to Mot. for Default Decision at 4).

In the Complaint, the Administrator requested issuance of an order authorized by the Animal Welfare Act,[6] whereas, in the Proposed Default Decision, the Administrator proposed issuance of an order requiring Mr. Staples to cease and desist from violating the Animal Welfare Act and the Regulations, suspending Mr. Staples's Animal Welfare Act license for a period of one year, and assessing Mr. Staples a $16,857 civil

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[5] 7 C.F.R. §§ 1.136(c), 1.139, 1.141(a).
[6] Compl. at 5.

penalty.[7] The Secretary of Agriculture is authorized to impose, on licensed exhibitors who violate the Animal Welfare Act or the Regulations, the sanctions proposed by the Administrator in the Proposed Default Decision;[8] therefore, I disagree with Mr. Staples's contention that the request for relief in the Complaint (an order authorized by the Animal Welfare Act) and the specific sanctions proposed in the Proposed Default Decision are inconsistent. Moreover, *Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (U.S.D.A. 1996), does not support Mr. Staples's contention that an inconsistency between the relief requested in a complaint and the sanction proposed in a proposed default decision constitutes a meritorious basis for denying a motion for a default decision. In *Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (U.S.D.A. 1996), I vacated a default decision issued by an administrative law judge and dismissed the complaint because the Secretary of Agriculture lacked jurisdiction.

Sanction

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

> [The 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

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[7] Mot. for Default Decision at 2; Proposed Default Decision at 5.
[8] *See* 7 U.S.C. § 2149(a)-(b).

officials during their day-to-day supervision of the regulated industry. However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[9]

When determining the amount of any civil monetary penalty to be assessed, the Animal Welfare Act requires the Secretary of Agriculture to give due consideration 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.[10]

The Administrator seeks assessment of a $16,857 civil penalty against Mr. Staples, an order requiring Mr. Staples to cease and desist from violating the Animal Welfare Act and the Regulations, and an order suspending Mr. Staples's Animal Welfare Act license for a period of one year.[11] Mr. Staples contends the Administrator's proposed sanction is "grossly excessive in light of the nature of the violations and [his] lack of history of prior violations."[12]

Mr. Staples is deemed to have admitted the allegations in the Complaint that he operated a moderately large zoo and animal act, that his violations are serious, and that he resolved two previous Animal Welfare Act cases in accordance with the stipulation procedures set forth in 9 C.F.R. § 4.11.[13] Moreover, Mr. Staples is deemed to have admitted that he committed the 19 violations of the Animal Welfare Act and the

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[9] Greenly, 72 Agric. Dec. 603, 626 (U.S.D.A. 2013) (Decision as to Lee Marvin Greenly & Minn. Wildlife Connection); Mazzola, 68 Agric. Dec. 822, 849 (U.S.D.A. 2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); Pearson, 68 Agric. Dec. 685, 731 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77, 89 (U.S.D.A. 2009); Alliance Airlines, 64 Agric. Dec. 1595, 1608 (U.S.D.A. 2005); Williams, 64 Agric. Dec. 364, 390 (U.S.D.A. 2005) (Decision as to Deborah Ann Milette); Geo. A. Heimos Produce Co., 62 Agric. Dec. 763, 787 (U.S.D.A. 2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); Excel Corp., 62 Agric. Dec. 196, 234 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); Bourk, 61 Agric. Dec. 25, 49 (U.S.D.A. 2002) (Decision as to Steven Bourk & Carmella Bourk).

[10] 7 U.S.C. § 2149(b).

[11] *See* note 12.

[12] Objs. to Mot. for Default Decision at 7.

[13] Compl. ¶ 2 at 1.

Regulations alleged in the Complaint. This ongoing pattern of violations establishes a "history of previous violations" for the purposes of 7 U.S.C. § 2149(b) and a lack of good faith.

Mr. Staples could be assessed a maximum civil penalty of $190,000 for his 19 violations of the Animal Welfare Act and the Regulations.[14] 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 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and the recommendations of the Administrator, I conclude a cease and desist order, suspension of Mr. Staples's Animal Welfare Act license for a period of nine months, and assessment of a $11,000 civil penalty against Mr. Staples[15] are appropriate and necessary to ensure Mr. Staples's 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.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Staples, his agents and 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:

a. failing to establish and maintain programs of adequate veterinary care that include the use of appropriate methods to treat diseases and injuries;

b. failing to construct housing facilities for nonhuman primates with

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[14] 7 U.S.C. § 2149(b) provides that the Secretary of Agriculture may assess a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act and the Regulations.

[15] I assess Mr. Staples a $2,000 civil penalty for his January 10, 2011, failure to handle a nonhuman primate as carefully as possible in a manner that would not cause physical harm, stress, or unnecessary discomfort to the nonhuman primate, in willful violation of 9 C.F.R. § 2.131(b)(1). I assess Mr. Staples a $500 civil penalty for each of his other 18 willful violations of the Regulations.

surfaces made of materials that can be readily cleaned and sanitized;

c. failing to maintain accurate and complete records showing the acquisition, disposition, and identification of animals;

d. failing to handle nonhuman primates as carefully as possible in a manner that will not cause physical harm, stress, or unnecessary discomfort to the nonhuman primates;

e. failing to store supplies of food and bedding in a manner that protects the supplies from spoilage, contamination, and vermin infestation;

f. failing to provide nonhuman primates with outdoor facilities that provide adequate shelter from the elements at all times;

g. failing to provide travel enclosures for nonhuman primates with lighting sufficient to permit routine inspection and cleaning of the enclosures and observation of the nonhuman primates;

h. failing to provide primary enclosures for nonhuman primates with sufficient space for the nonhuman primates in the enclosures;

i. failing to remove excreta and food waste from inside each indoor primary enclosure for nonhuman primates daily;

j. failing to maintain indoor and outdoor housing facilities in good repair to protect the animals from injury and to contain the animals;

k. failing to construct and maintain enclosures so as to provide sufficient space to allow each animal to make normal postural adjustments;

l. failing to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the primary enclosures, to minimize disease hazards, and to reduce odors; and

m. failing to utilize a sufficient number of adequately trained employees to maintain an acceptable level of husbandry practices.

Paragraph one of this Order shall become effective upon service of

this Order on Mr. Staples.

2. Mr. Staples's Animal Welfare Act license (Animal Welfare Act license number 91-C-0060) is suspended for a period of nine months and continuing thereafter until Mr. Staples has demonstrated compliance with the Animal Welfare Act and the Regulations.

Paragraph two of this Order shall become effective sixty (60) days after service of this Order on Mr. Staples.

3. Mr. Staples is assessed an $11,000 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:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing, Regulatory, and Food Safety 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, Ms. Carroll within sixty (60) days after service of this Order on Mr. Staples. Mr. Staples shall state on the certified check or money order that payment is in reference to AWA Docket No. 14-0022.

Right to Judicial Review

Mr. Staples 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. § 2341-2350. Mr. Staples must seek judicial review within sixty (60) days after entry of the Order in this Decision and Order.[16]

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[16] 7 U.S.C. § 2149(c).

ANIMAL WELFARE ACT

In re: JOSEPH M. ESTES.
Docket No. 11-0027.
Decision and Order.
Filed March 20, 2014.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

Decision Summary

This Decision does **not** turn on whether Respondent Estes donated the two bear cubs; rather, it turns on whether Respondent Estes, a person whose Animal Welfare Act license had been **revoked** in 2003, **delivered the two bear cubs for transportation** (even though Respondent Estes reasonably believed the two bear cubs were to be used as pets). Further, this Decision does **not** turn on whether Respondent Estes operated as a dealer or an exhibitor; rather, even though he did **not** operate as a dealer or an exhibitor, Respondent Estes violated 9 C.F.R. § 2.10(c), a regulation under the Animal Welfare Act, on or about February 26 or 27, 2010.

Agreed Procedure

The email from me to the parties, dated "Tue 11/20/2012 3:45 PM", outlined the agreed procedure for this Decision:

> Hello, Mr. Estes, and Ms. Carroll,
>
> This confirms what I told you (just now) in our teleconference in 11-0027 AWA Estes. Mr. Estes, you are NOT required to appear for next week's hearing, in Ft. Worth, Texas. Instead, the one count you are defending will be decided "on paper."
>
> I will GRANT Ms. Carroll's request to file for summary

judgment. After she files (on behalf of APHIS) (and her filing may not be anytime soon), you will have the opportunity to respond. Ordinarily you have only 20 days after receiving the APHIS Motion to file with the Hearing Clerk your response, so if you want more time, just ask for it before the 20 days ends. Email is fine for such requests.

Ms. Carroll states that whether you violated (the Animal Welfare Act) is a legal issue. I will decide the legal issue based on the paper submissions. Either APHIS wins or Mr. Estes wins. In other words, I will consider Mr. Estes' response his own motion for summary judgment (against APHIS).

If APHIS wins, I will need input from both sides regarding what a proper amount of civil penalty is. If Mr. Estes wins, the case ends; the one count Mr. Estes is defending is dismissed and cannot be brought again.

Thank you both for agreeing to this procedure, which simplifies things.

Jill Clifton
U.S. Administrative Law Judge

Mixed Findings of Fact and Conclusions

1. Respondent Joseph M. Estes violated 9 C.F.R. § 2.10(c), when, after his Animal Welfare Act license had been **revoked** in 2003 (revocation is permanent), he **delivered for transportation** two bear cubs to be used as pets on or about February 26 or 27, 2010. *See* Resp't Estes's Resp. & Ex. 2, submitted as part of Resp't Estes's Resp.

2. I conclude that Jay Riggs's statement submitted as part of Respondent Estes' response (Ex. 2 at 1: "Jay Riggs' statement") is true. I have evaluated Jay Riggs' testimony during several days of hearing in two cases; consistently he is a credible witness. Though Jay Riggs is Respondent Estes's friend, I believe Jay Riggs's statement and consider

what he stated therein to be the truth.

3. Respondent Estes was acting as agent for Safari Joe's Wildlife Ranch, Inc. *See* Resp't Estes's Resp. & Ex. 1, submitted as part of Resp't Estes's Resp.

4. The two bear cubs were used for exhibition within days after the donation, by Eric Drogosch (who worked for the licensee Jamie Palazzo).

5. Respondent Estes was told and reasonably believed that the two bear cubs were to be used as pets by Jamie Palazzo (the licensee). *See especially* Jay Riggs's statement submitted as part of Resp't Estes's Resp.

6. Respondent Estes did not sell the two bear cubs; he donated them.

7. Respondent Estes did not trade the two bear cubs; even though Respondent Estes acquired tigers close-in-time to when he donated the two bear cubs, the tigers were **not** compensation for the two bear cubs.

8. On behalf of APHIS, Ms. Carroll's analysis that whether Respondent Estes violated the Animal Welfare Act is a legal issue is correct: the issue before me is a legal issue, not a factual issue.

9. The scope of prohibition under 9 C.F.R. § 2.10(c) is broad, broader than that specified under 7 U.S.C. § 2134, especially here, where the evidence does **not** show that Respondent Estes was dealing or exhibiting; and the phrase "in commerce" is not included in 9 C.F.R. § 2.10(c).

10. The two bear cubs are warm-blooded animals that Respondent Estes **delivered for transportation** to be used as pets.

11. The definition of *Animal* includes any used as a **pet** (emphasis added). 9 C.F.R. § 2.1.

12. Any person whose license has been suspended or revoked shall not buy, sell, transport, exhibit, or **deliver for transportation** any **animal** (emphasis added) during the period of suspension or revocation. 9

C.F.R. § 2.10(c).

13. Respondent Estes's response includes: "USDA has told me repeatedly that it was Ok to take in and or place any regulated animal as long as it was not sold or bought or traded for by me or safarijoes. (I have taped phone conversation to USDA that states this.)"

14. The USDA Judicial Officer has held that "reliance on erroneous advice is not a defense" to a violation of 9 C.F.R. § 2.10(c). *International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 80 (U.S.D.A. 2002).

15. Respondent Estes and Safari Joe's Wildlife Ranch, Inc. are located in and do business in the Tenth Circuit.

16. The Judicial Officer has held that "willfulness" as used in 5 U.S.C. § 558(c) (Administrative Procedure Act) is defined in the Tenth Circuit as "an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed." *International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 80-81 (U.S.D.A. 2002).

17. APHIS claims that Respondent Estes' violation was "willful;" I do not find Respondent Estes's violation to be willful. Respondent Estes thought, wrongly, that if he <u>donated</u> the two bear cubs, he was not in violation. Respondent Estes did **not** commit an intentional misdeed or its equivalent.

18. Respondent Estes avoided acting as a dealer by not selling or trading the bear cubs, and instead <u>donating</u> the bear cubs; but, because Respondent Estes' Animal Welfare Act license had been revoked, he did not avoid a violation. 9 C.F.R. § 2.10(c).

19. Even though the two bear cubs were to be used as <u>pets</u>, Respondent Estes violated 9 C.F.R. § 2.10(c) when he, after his Animal Welfare Act license had been **revoked** in 2003, **delivered for transportation** the two bear cubs.

20. Willfulness is not required under the Animal Welfare Act to impose cease and desist orders or to order Respondent Estes to pay civil

penalties. 7 U.S.C. § 2149.

21. The maximum civil penalty for violations occurring from June 23, 2005 through June 17, 2008, was $3,750.[1] Since June 18, 2008, the maximum civil penalty for a violation has been $10,000.[2]

22. The factors regarding the appropriateness of a penalty under 7 U.S.C. § 2149(b) include size of the business, gravity of the violations, whether there is good faith, and the history of previous violations.

23. APHIS requests a $10,000.00 civil penalty, plus a $1,650.00 civil penalty for failure to obey a cease and desist order. Respondent Estes requests zero civil penalty.

24. Even though the scope of prohibition under 9 C.F.R. § 2.10(c) is broader than that specified under 7 U.S.C. § 2134, 9 C.F.R. § 2.10(c) furthers the objectives of the Animal Welfare Act and should be upheld in a case such as this, involving two bear cubs.

25. A person whose AWA license has been suspended or revoked is permitted to do **less**. If the prohibition against **delivering for transportation** any **animal**, even an animal to be used as a pet, even when there is no sale or trade, catches Respondent Estes by surprise, I have empathy for him; I, too, was not cognizant of that impact of 9 C.F.R. § 2.10(c) until this case.

26. Contrary to APHIS's argument, when I evaluate (a) Respondent Estes' lack of "willfulness"; (b) the newness of this concept that a violation of 9 C.F.R. § 2.10(c) can be committed when the person whose license has been suspended or revoked is acting as neither a dealer nor an exhibitor (APHIS's Motion for Summary Judgment at p. 12); (c) size of the business (unknown, and not relevant here); (d) gravity of the violations, moderate; (e) no proof of lack of good faith here; and (f) history of previous violations (revocation), I find $1,000.00 in civil

---

[1] 28 U.S.C. § 2461; 70 Fed. Reg. 29575 (May 24, 2005) (final rule effective June 23, 2005); 7 C.F.R. § 3.91(b)(2)(ii) ("Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $3,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.").

[2] 7 U.S.C. § 2149(b).

penalties to be an adequate remedy ($500.00 for each of the bear cubs), plus $1,650.00 in civil penalties for failure to obey cease and desist orders, plus a cease and desist order tailor-made for the circumstances here.

ORDER

The following **cease and desist** provisions of this Order (paragraph 30) shall be effective on the day after this Decision becomes final. [*See* ¶ 33.]

Respondent Joseph M. Estes, an individual and agent for Safari Joe's Wildlife Ranch, Inc., his agents and employees, successors and assigns, directly or indirectly, or through any corporate or other device or person, shall cease and desist from violating 9 C.F.R. § 2.10(c), including but not limited to **delivering for transportation** any **animal** (as defined in 9 C.F.R. § 2.1), even an animal to be used as a pet, even when there is no sale or trade.

Respondent Estes is assessed civil penalties totaling **$2,650.00** [which includes $1,650.00 for failure to obey a cease and desist order], which he shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**," within one year after this Decision becomes final. [*See* ¶ 33.]

Respondent Estes shall reference **AWA 11-0027** on his certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties shall be sent to, and received by, Colleen A. Carroll, at the following address, or at any other address specified by Colleen A. Carroll:

US Department of Agriculture
Office of the General Counsel
Attn: Colleen A. Carroll
South Building, Room 2314, Stop 1417
1400 Independence Ave SW
Washington DC 20250-1417

ANIMAL WELFARE ACT

Finality

This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145; *see* App. A).

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

—

In re: LANCELOT KOLLMAN, a/k/a LANCELOT RAMOS.
Docket No. 13-0293.
Decision and Order.
Filed April 4, 2014.

AWA.

William J. Cook, Esq. for Petitioner.
Colleen A. Carroll, Esq. for Respondent.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER
GRANTING SUMMARY JUDGMENT

Introduction

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("the Rules"), set forth at 7 C.F.R. subpart H, apply to the adjudication of the instant matter. The case was initiated by Lancelot Kollman, also known as Lancelot Ramos ("Petitioner"), who filed with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ"; "Hearing Clerk") a petition for review of the denial of his application for an exhibitor's license under the Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.* ("AWA"; "the Act") by the Administrator of the Animal Plant Health Inspection Service

("APHIS"), an agency of the United States Department of Agriculture ("USDA").

The AWA authorizes USDA through APHIS to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals subject to the Act. Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of the USDA. 7 U.S.C. § 2133. Further, the Act authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purposes of the AWA. 7. U.S.C. § 2151. The Act and regulations fall within the enforcement authority of APHIS, which is also tasked to issue and renew licenses under the AWA.

This Decision and Order[1] is based upon the pleadings, documentary evidence, and arguments of the parties.

Issue

The primary issue in controversy is whether, considering the record, summary judgment may be entered in favor of Respondent USDA and APHIS' denial of Petitioner's license application be affirmed.

Procedural History

On May 2, 2005, USDA filed a complaint against Petitioner, alleging violations of the AWA. On July 22, 2005, Petitioner filed an answer, which did not address the allegations of the complaint, but did request a hearing. On April 12, 2007, USDA moved for the adoption of a decision by reason of admission of facts, which under the Rules, results in default. *See* 9 C.F.R. §§ 1.136; 1.139. On May 9, 2007, Chief Administrative Law Judge Peter M. Davenport issued a Default Decision and Order against Petitioner. Petitioner sent correspondence to OALJ generally denying the complaint's charges. The correspondence was deemed timely request for an appeal of the Default Decision and Order. On

[1] In this Decision and Order, documents submitted by Petitioner with his petition shall be denoted as "PX-#"; documents submitted by Petitioner with his objection shall be denoted at "POX-#"; and documents submitted by Respondent shall be denoted as "RX-#".

October 2, 2007, the Judicial Officer for the Secretary of USDA affirmed Judge Davenport's Decision and Order. Petitioner appealed that determination to the United States Court of Appeals for the Eleventh Circuit, which issued a Decision and Order affirming the Judicial Officer's decision on April 7, 2009.

On May 20, 2013, Petitioner filed an application with APHIS for an exhibitor's license under the AWA. By letter dated July 2, 2013, APHIS denied the application. On July 22, 2013, Petitioner filed a petition for review of the denial. On February 7, 2014, Respondent USDA moved for the entry of summary judgment. On March 26, 2011, Respondent filed an objection to the motion.

Summary of the Evidence[2]

1. Admissions

In his Petition for Review, Petitioner admitted that his previously held AWA license number 58-C-0816 had been revoked.

2. Documentary Evidence

PX-1; 2; POX-9; 10: Portions of the "Animal Care Inspection Guide" and Appendix 1, Inspection Requirements

PX-3; 4; POX-11; 12: Correspondence regarding Petitioner's credentials
PX-5; POX-13: Arrest Report

PX-6; POX-14; 15: RX-1; RX-4; RX-5: Petitioner's AWA license application and correspondence

PX-7: Denial by USDA dated July 2, 2013

POX-1: Petitioner's affidavit and third party testimonials

POX-2: Affidavit of Thomas B. Schotman, D.V.M.

[2] This summary judgment relies upon the pleadings and upon declarations and documentary evidence attached to the motions and objections filed by the Parties.

POX-3-8; RX-3: Pleadings and evidence relating to initial complaint

DISCUSSION

Summary judgment is proper where there exists "no genuine issue as to any material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations).

An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and a fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U. S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a

request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

I find that the record establishes no genuine issue of material fact, and that summary judgment is appropriate. The scope of my review in this matter is limited to the question of whether APHIS properly denied Petitioner's 2013 application for an exhibitor's license under the AWA[3]. APHIS denied the license on the grounds that Petitioner's previous license was revoked.

The pertinent regulations state:

> **2.10 Licensees whose licenses have been suspended or revoked.**
>
> (b) Any person whose license has been revoked shall not be licensed in his or her own name or in any other manner; nor will any partnership, firm, corporation or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed.
>
> **2.11 Denial of initial license application.**
>
> (a) A license will not be issued to any applicant who:
>
> (3) Has had a license revoked or whose license is suspended, as set forth in § 2.10…

Petitioner has admitted that his license was revoked. See, POX-1. His challenge to the revocation upon default was rejected by the United States Court of Appeals for the Eleventh Circuit. Petitioner did not seek review of that determination, and I am not in a position to review decisions made by that body. I accept the court's ruling as final. Accordingly, Petitioner's license was revoked. The language of the

[3] Because the instant Decision and Order is confined to that question, I decline to address Petitioner's other arguments involving APHIS' conduct and the impact of the license revocation on his livelihood, although I appreciate the considerable advocacy demonstrated by both counsel with respect to those issues.

regulations prohibits the issuance of a license to a person whose AWA license was revoked. Although the regulations may produce harsh results, I have no authority to question their fairness or validity. I need not examine other regulations with specific temporal penalties to construe a clear and unambiguous ban on the issuance of a license to an applicant who has had a license revoked.

I find that APHIS denied Petitioner's application for an AWA license for good cause. Respondent's motion for summary judgment is hereby GRANTED.

Mixed Findings of Fact and Conclusions of Law

1. The Secretary, USDA, has jurisdiction in this matter.

2. The material facts involved in this matter are not in dispute and the entry of summary judgment in favor of USDA is appropriate.

3. Petitioner held AWA license 58-C-0816.

4. Petitioner's AWA license was revoked when default judgment was entered against him in an enforcement action initiated by APHIS and inadequately defended by Petitioner.

5. Petitioner filed an application for a new AWA license.

6. APHIS denied the license because Petitioner had held a previous license that was revoked, pursuant to 9 C.F.R. §§ 2.10(b) and 2.11(a)(3).

7. Petitioner timely filed a petition for review of APHIS's denial of his license application.

8. APHIS denied Petitioner's application for good cause.

ORDER

APHIS's denial of petitioner's license application is hereby AFFIRMED.

ANIMAL WELFARE ACT

This Decision and 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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EQUAL ACCESSS TO JUSTICE ACT

DEPARTMENTAL DECISIONS

In re: LE ANNE SMITH.
Docket No. 14-0020.
Decision and Order.
Filed May 5, 2014.

EAJA.

Larry J. Thorson, Esq. for the Applicant.
Colleen A. Carroll, Esq. for the Respondent.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER GRANTING EAJA FEES

Decision Summary

The Applicant, Le Anne Smith, timely filed her application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA) on December 6, 2013. Le Anne Smith is awarded EAJA attorney fees and expenses in accordance with 5 U.S.C. § 504 and 7 C.F.R. §§ 1.180 - 1.203. Beneath each heading that follows are my findings and conclusions that are required under the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. § 1.200), § 1.200 Decision.

Le Anne Smith Prevailed

Le Anne Smith became a prevailing party on September 11, 2013, when the Judicial Officer dismissed the Complaint as to her, as follows.

ORDER

> The Complaint, as it relates to Le Anne Smith, filed by the Administrator on July 14, 2005, is dismissed.

Smith, No. 05-0026, 72 Agric. Dec. ___, 2013 WL 8213619 (U.S.D.A. Sept. 11, 2013) (Decision & Order as to Le Anne Smith), *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/091113.Perry_.DO_.AWA05-0026.pdf (last visited Dec. 18, 2015).

December 12, 2013 Was the Filing Deadline for the EAJA Application

For purposes of computing the time for Le Anne Smith to file her application for an EAJA award of attorney fees and other expenses, theoretically the parties would have had sixty (60) days to seek review of the Judicial Officer's Order in the U.S. Court of Appeals (sixty (60) days from the date of the Judicial Officer's Order, 7 U.S.C. § 2149). Thus, from September 11, 2013, the parties would have had sixty (60) days: until November 12 (Tuesday), 2013. The sixtieth (60th) day falls on a Sunday; the Monday was a federal holiday; consequently, on November 12, 2013, the Judicial Officer's Order became final and unappealable within the meaning of 7 C.F.R. § 1.193. 4. As a practical matter, the Judicial Officer spoke for the Secretary of Agriculture in his Order issued September 11, 2013, so APHIS would not appeal the Judicial Officer's Order to the U.S. Court of Appeals. As a practical matter, Le Anne Smith won, so Le Anne Smith would not appeal the Judicial Officer's Order to the U.S. Court of Appeals. Nevertheless, for purposes of computing the time for Le Anne Smith to file her EAJA application, November 12, 2013 is the date the Judicial Officer's Order became final and unappealable within the meaning of 7 C.F.R. § 1.193.

From November 12, 2013, Le Anne Smith had thirty (30) days to file the EAJA application: December 12, 2013. 5 U.S.C. § 504; 7 C.F.R. § 1.193. Le Anne Smith filed the EAJA application on December 6, 2013, with time to spare.

APHIS argues that Le Anne Smith may not include the sixty (60) days from September 11, 2013 as part of her calculation of time for filing her EAJA application because she was not an exhibitor and thus did not have the right to appeal to the U.S. Court of Appeals. The principal issue as to Le Anne Smith in AWA Docket No. 05-0026 was whether, beginning approximately February 1, 2003, Le Anne Smith was an

exhibitor under the Animal Welfare Act. Had Le Anne Smith lost before the Judicial Officer, she would have had the right to appeal to the U.S. Court of Appeals within sixty (60) days. 7 U.S.C. § 2149. For purposes of computing the time for Le Anne Smith to file her EAJA application, she still had the sixty (60) 60 days before her thirty (30) days began to run. True, Le Anne Smith proved she was not an exhibitor, but APHIS claimed she was until the Judicial Officer found otherwise. Le Anne Smith will not now be deprived of that sixty (60) days as part of the calculation of time for filing, based on APHIS's erroneous assertion that Le Anne Smith had no right to appeal to the U.S. Court of Appeals because she was not an exhibitor.

Parties and Pleadings

The Applicant is Le Anne Smith, who successfully defended allegations against her in AWA Docket No. 05-0026. In that case, APHIS failed to prove that Le Anne Smith played a critical role in the operation of the business of Craig A. Perry or Perry's Wilderness Ranch & Zoo, Inc., an Iowa corporation; APHIS failed to prove that Le Anne Smith was a de facto partner of Craig A. Perry or Perry's Wilderness Ranch & Zoo, Inc.; and APHIS failed to prove that Le Anne Smith was a de facto principal in Perry's Wilderness Ranch & Zoo, Inc. The Judicial Officer dismissed APHIS's claims against Le Anne Smith. As a prevailing party in AWA Docket No. 05-0026, Le Anne Smith applied for an award of attorney fees and other expenses under the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504. Le Anne Smith is represented, both here and in AWA Docket No. 05-0026, by Larry J. Thorson, Esq., Cedar Rapids, Iowa. Le Anne Smith timely filed her EAJA application on December 6, 2013.

The Respondent here (Complainant in AWA Docket No. 05-0026) is the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS" or "Respondent"). APHIS objects, in accordance with 7 C.F.R. § 1.195, to the award requested in Le Anne Smith's EAJA application. APHIS is represented, both here and in AWA Docket No. 05-0026, by Colleen A. Carroll, Esq. with the Office of the General Counsel, United States Department of Agriculture. APHIS timely filed the Agency Answer on March 6, 2014.

Le Anne Smith timely filed Applicant's Response Brief on April 14, 2014.

APHIS's Position Was Not Substantially Justified

Repeatedly, from the beginning of my involvement in AWA Docket No. 05-0026, Mr. Thorson voiced opposition to the inclusion of Le Anne Smith as a party and asked that she be dismissed—perhaps every time he had the opportunity to speak to me and counsel for APHIS during telephone conferences. Mr. Thorson continued to object to the inclusion of Le Anne Smith as a party during the three segments of the thirteen (13)-day hearing: November 16-20, 2009; and December 7-11, 2009 in Chicago, Illinois; and January 11-13, 2010 in Cedar Rapids, Iowa. 11.

The basis of APHIS's claims against Le Anne Smith was unclear from the Complaint and unclear from the evidence. Dr. Bellin's incorrect assumptions about Le Anne Smith's relationship to Craig A. Perry and Dr. Bellin's completion of APHIS paperwork may have contributed to APHIS's initial impression that Le Anne Smith was part of the exhibitor operation, but the evidence, including Dr. Bellin's testimony, proved that she was not. Le Anne Smith was not named on the Animal Welfare Act license applications or renewals as "authorized to conduct business" or in any other capacity. CX 1. Le Anne Smith had no authority and no responsibility regarding Craig Perry's or the corporation's Animal Welfare Act undertakings. Le Anne Smith was not a shareholder, officer, director, or employee of the corporation. Le Anne Smith was not an employee of Craig Perry. Le Anne Smith did not own the animals. Le Anne Smith was not an owner, lessor, or lessee of the real property or personal property required by the zoo or the animals. If there were any "titles" given to Le Anne Smith on inspection reports (on the signature line which merely acknowledged receipt of an inspection report), such "titles" were chosen by Dr. Bellin to satisfy his requirements; they were not bestowed by Craig Perry or the corporation; they were not chosen by Le Anne Smith.

APHIS's persistence in APHIS's claims against Le Anne Smith was, to me, unreasonable. Mr. Thorson's Affidavit, at page 2, attached to Le Anne Smith's EAJA application filed on December 6, 2013, includes in

part the following:

> This action against her was pursued even though through her attorney she asked the Government dismiss its action at the very start of this case (Tr. pp. 42-56) and to voluntarily dismiss her at the close of evidence in the case that was tried for approximately three weeks (Tr. pp. 4302-4303). This took her completely away from her children for two weeks when trial was held in Chicago and was a hardship she never should have had to bear. This was a cynical attempt to put pressure on her significant other, Craig Perry, by bringing these groundless allegations against her.

APHIS's objective regarding the claims against Le Anne Smith is not clear; what is clear is that APHIS was not substantially justified in persisting in APHIS's claims against Le Anne Smith.

Attributing 1/3 of the Attorney Fee to Le Anne Smith is Just

The corporate entity, Perry's Wilderness Ranch & Zoo, Inc., required very little attention (work). Le Anne Smith required much more attention (work) than the corporate entity. Craig A. Perry required the most attention (work), better than half. Perhaps to put too fine a point on it, I conclude that Perry's Wilderness Ranch & Zoo, Inc. required 1/9 of the attention (work); Le Anne Smith required 3/9 of the attention (work); and Craig A. Perry required 5/9 of the attention (work). Mr. Thorson's allocation of the work done on behalf of Le Anne Smith (1/3) computes to the same fraction as my own allocation (3/9).

Net Worth

Le Anne Smith's net worth did not exceed two million dollars at the time of the adjudication. Evidence during the hearing proved this; Le Anne Smith's EAJA application, including her Affidavit executed December 5, 2013, further confirms this.

EQUAL ACCESS TO JUSTICE ACT

Maximum Hourly Rate Under EAJA

The $125.00 per hour maximum attorney fee under EAJA applies until March 3, 2011. The $150.00 per-hour maximum attorney fee under EAJA applies beginning March 3, 2011. 7 C.F.R. § 1.186. Mr. Thorson's work on behalf of Le Anne Smith merits the maximum rate authorized, given his experience, expertise, proficiency, efficiency, and effectiveness, and in accordance with the factors enumerated in 7 C.F.R. § 1.186. Based on my examination of the twenty-seven (27) pages of excerpts from the billing records attached to the Le Anne Smith EAJA application, Mr. Thorson charged little time for the amount of work he was required to do. This works to APHIS's advantage. The twenty-seven (27) pages of excerpts from the billing records, plus Mr. Thorson's Affidavit executed December 5, 2013, provide all the documentation for this case that is required by 7 C.F.R. § 1.192.

There Are No Special Circumstances That Make An Award Unjust

APHIS argues that prevailing against Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc. constitutes special circumstances that make the award sought by Ms. Smith unjust. "It would be unreasonable to award EAJA fees for work performed in connection with the violations that were found to have been committed." APHIS Agency Answer at 18. I agree that APHIS prevailed against all the respondents except Le Anne Smith.

(a) APHIS successfully obtained revocation of the Animal Welfare Act license of Jeff Burton and Shirley Stanley, individuals doing business as Backyard Safari, when they failed to appear on the first day of the hearing in November 2009. That decision is online. http://www.dm.usda.gov/oaljdecisions/091116_AWA_05-0026_do.pdf

(b) APHIS successfully obtained a cease and desist order and a civil penalty against American Furniture Warehouse, Inc. in April 2006. That Consent Decision is online. http://www.dm.usda.gov/oaljdecisions/AWA_05-0026_042106.pdf

(c) APHIS successfully obtained a cease and desist order and a civil penalty against Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc.

in September 2013. That Judicial Officer decision is online. http://nationalaglawcenter.org/wp-content/uploads//assets/decisions/090613.Perry_.DO_.AWA05-0026.pdf

I am confident that the attorney fee and expenses awarded to Applicant Le Anne Smith herein are attributable to the work done only on her behalf and not the other respondents in AWA Docket No. 05-0026. Consider, the case against Le Anne Smith was filed on July 14, 2005, and not until November 12, 2013 did the Judicial Officer's Order as to Le Anne Smith become final and unappealable within the meaning of 7 C.F.R. § 1.193. Consider, Mr. Thorson vigorously and vehemently argued throughout that roughly 8-year period that the case against Le Anne Smith should be dismissed. Consider, there were 13 days of hearing, in 3 separate segments, and the pursuit of the claims against Le Anne Smith, and the defense of those claims against Le Anne Smith, occupied a prominent portion of that hearing. Consider, the attorney fee and expenses have been cut to 1/3, to separate the work attributable to defense of Le Anne Smith, from the work performed in connection with the violations that were found to have been committed by Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc. There are no special circumstances that make an award unjust.

Calculation of Award

Le Anne Smith asks for an award of $17,450.00 for her share (1/3) of attorney fee; plus an award of $815.00 for her share (1/3) of expenses. The Attachment, at page 27, of the Le Anne Smith EAJA application filed on December 6, 2013, mistakenly shows 349 hours. When I added the time, I got 369 hours. My number, 369 hours, is confirmed by the $59,040.00 bill, which, at Mr. Thorson's $160.00 per hour which he billed for the case, required 369 hours. I divided the 369 hours into the two rates that maximum under the EAJA, as follows:

Beginning March 3, 2011 ($150.00 per hour maximum attorney fee):

See Le Anne Smith EAJA Appl. filed on December 6, 2013, beginning on page 25 of Attachment.

03/21/2011 - 09/14/2013
7.5 hours x $150.00 = $1,125.00 / 3 = $375.00

Beginning July 21, 2005 until March 3, 2011 ($125.00 per hour maximum attorney fee):

See Le Anne Smith EAJA Appl. filed on December 6, 2013, beginning on page 1 of Attachment (through much of page 25).

07/21/2005 - 02/09/2011
361.5 hours x $125.00 = $45,187.50 / 3 = $15,062.50

So, adding $375.00 to $15,062.50, I find that the maximum attorney fee for Le Anne Smith's 1/3 share is $15,437.50. Next I look to the Agency Answer filed March 6, 2014, pages 22-24, to evaluate the entries. Since the Complaint in AWA Docket No. 05-0026 was filed on July 14, 2005, I equate "situation" with the allegations contained in the Complaint. Every entry questioned by APHIS I find to have been performed in connection with the litigation and to be recoverable under the Equal Access to Justice Act except those on page 24 questioned, because they appear to be communications with legislators. I will subtract those.

1.9 hours x $125.00 = $237.50 / 3 = $79.17 to be subtracted
$15,437.50
- 79.17
$15,358.33
========
Next, the $2,445.00 in expenses (page 27 of Attach.), divided by 3 is **$815.00**, which should be awarded to Le Anne Smith.

ORDER

APHIS shall pay Le Anne Smith, through her attorney, Larry J. Thorson, Esq., a total of $16,173.33 for Le Anne Smith's share of the attorney fee ($15,358.33); plus Le Anne Smith's share of the expenses ($815.00), in accordance with 5 U.S.C. § 504 and 7 C.F.R. §§ 1.180 - 1.203. [Applicant has to comply with § 1.203.]

Finality

This Decision and Order shall be final and effective 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 "§ 1.201 Department review" of the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. § 1.201).

Copies of this Decision and Order Granting EAJA Fees shall be served by the Hearing Clerk upon each of the parties.

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FEDERAL MEAT INSPECTION ACT

DEPARTMENTAL DECISIONS

In re: PAUL ROSBERG & NEBRASKA'S FINEST MEATS, LLC.
Docket Nos. 14-0094; 14-0095.
Decision and Order.
Filed June 19, 2014.

FMIA.

Lisa Jabaily, Esq. for Complainant.
Respondents, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The instant matter involves a complaint filed by the United States Department of Agriculture ("Complainant"; "USDA") against Paul Rosberg and Nebraska's Finest Meats, L.L.C. ("Respondents"), alleging violations of the administration of the Federal Meat Inspection Act ("FMIA"; "the Act"). Complainant seeks an Order indefinitely suspending inspection service by the Food Safety Inspection Service ("FSIS") of any of Respondents' business operations.

Procedural History

On April 11, 2014, Complainant filed the complaint alleging violations of the FMIA. On May 7, 2014, Respondent Paul Rosberg filed a response on behalf of both Respondents and requested a continuance of the matter pending the results of an appeal of his guilty plea in a criminal matter related to this administrative proceeding. On May 14, 2014, Complainant objected to the continuance. On May 19, 2014, Complainant filed a motion for a Decision without Hearing by Reason of Admissions[1]. On June 10, 2014, Respondent filed an objection to Complainant's motion.

[1] I note that Respondent's answer was not timely and the entry of default would be permitted pursuant to 7 C.F.R. §1.139. However, in this matter, I concur that a Decision on the Record is appropriate.

Issues

1. Whether a Decision and Record on the Hearing should be issued, and if so;

2. Whether Respondents should be suspended from inspection under FMIA.

Findings of Fact and Conclusions of Law

A. Discussion

Pursuant to the Rules of Practice Governing Formal Adjudications Before the Secretary [of U.S.D.A.], 7 C.F.R. §§ 1.31 *et seq.* (the Rules), Respondents are required to file an answer within twenty days after the service of a complaint.7 C.F.R. § 1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default shall be appropriate. C.F.R. § 1.136(c).

7 C.F.R. § 1.1.39 provides, in pertinent part:

> 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 day 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…

7 C.F.R. § 1.1.39.

Further, an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. United States Dep't of Agric*., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations.)

In his answer filed May 7, 2014, Paul A. Rosberg asserted that he was 100 percent owner of the business, denied the allegations to which he had pleaded guilty, and asked that the matter be suspended pending a decision on his petition to dismiss the plea. In support of its motion for a Decision on the Record, Complainant filed a copy of Respondent Paul Rosberg's Plea Agreement (Complainant's exhibit "A"); a copy of felony conviction and Judgment against Respondent Paul Rosberg (Complainant's exhibit "B"); a copy of the cover of Respondent Paul Rosberg's motion to set aside the plea and judgment (Complainant's exhibit "C"); Memorandum and Order by Senior U.S. District Court Judge Richard G. Kopf, denying Respondent Paul Rosberg's motion (Complainant's exhibit "D"). In his response to Complainant's motion filed herein, Respondent Paul Rosberg again asserted that his conviction was invalid, and he asked the instant proceeding be stayed pending the results of his request for reconsideration of Judge Kopf's Order.

I find that there is no dispute of the facts in this matter and that no purpose would be served to delay the disposition of this case until Respondent Paul Rosberg's criminal appeals are exhausted. Mr. Rosberg's avenue of appeal is narrow, since his conviction was obtained through his guilty plea. The presiding judge in the criminal action has found the plea to be voluntary and knowing and denied his motion to set aside the plea with prejudice. The subject of the criminal action involved Respondent Paul Rosberg's selling of misbranded meat to Omaha Public Schools. Respondent admitted to intentionally mislabeling meat as federally inspected when it had not been inspected by FSIS.

The primary purpose of the FMIA is to protect public health, and to that end, only individuals deemed fit to be inspected by FSIS may

engage in business subject to the FMIA. 21 U.S.C. § 602. *See Apex Meat Co.*, 44 Agric. Dec. 1855, 1872 (U.S.D.A. 1985). The Secretary of USDA determined that the 'fitness' of individuals may be determined by characteristics of "honesty, dependability, and integrity." *Id.* at 1869. Respondent Paul Rosberg's criminal conduct involving his activities regulated by FSIS demonstrate that he lacks the trustworthiness, honesty, and integrity required to assure that his products are safe within the understanding of the FMIA.

The Secretary of USDA is authorized to withdraw inspection service from any business where anyone responsibly connected with the business has been convicted of any felony. 21 U.S.C. § 671; 9 C.F.R. § 500.6(i). An individual is deemed responsibly connected if he or she is a partner, officer, director, holder, or owner of ten percent or more of its voting stock or employee in a managerial or executive capacity. 21 U.S.C. § 671. Respondents admitted that they were subject to inspection, and Respondent Paul Rosberg asserted that he owned 100 percent of the corporate entity. Respondent Paul Rosberg pleaded guilty to a felony involving the handling of meat and is unfit to engage in a business requiring inspection services. Paul Rosberg is responsibly connected to Nebraska's Finest Meats, L.L.C., and the indefinite withdrawal of USDA inspection services from Nebraska's Finest Meats, L.L.C, and its affiliates, officers, operators, partners, successors, or assigns is an appropriate sanction. This sanction is consistent with sanctions imposed in other cases involving felony convictions[2].

I find that Respondent's wife, Kelly Rosberg, while not a Respondent herein, has admitted to being the manager of the business in an affidavit provided to USDA. *See* Aff. of Kelly Rosberg, ALJ Ex. 1. Accordingly, as an employee in a managerial capacity, I find her responsibly connected with a business whose owner is unfit to receive the inspection services of FSIS. Therefore, it is appropriate to indefinitely withdraw those services from Kelly Rosberg.

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[2] *See, e.g.*, Utica Packing Co. v. Block, 781 F.2d 71, 78 (6th Cir. 1986); Great Am. Veal Co., 45 Agric. Dec. 1770 (U.S.D.A. 1986); Norwich Beef Co., 38 Agric. Dec. 380 (U.S.D.A. 1979).

B. Findings of Fact

1. Nebraska's Finest Meats, L.L.C., is now and was at all times material to this adjudication, a corporation with a business address in Wausau, Nebraska.

2. Respondent Paul A. Rosberg, at all times material hereto, is and was at least a 50-percent owner of that Nebraska's Finest Meats, L.L.C.

3. Respondents' business operated under a grant of federal inspection pursuant to FMIA at all times material hereto.

4. Kelly Rosberg was and is the manager of Nebraska's Finest Meats.

5. On September 27, 2013, in the United States District Court for the District of Nebraska, Respondent Paul A. Rosberg pleaded guilty to a felony, Sale of Misbranded Meat and Meat Products; Aiding and Abetting, in violation of 21 U.S.C. § 610(c)(1) and 18 U.S.C. § 2.

6. Respondent admitted to violating FMIA as part of a guilty plea to a criminal indictment alleging criminal activity involving the sale of meat and meat products.

7. Judgment in the criminal action, *United States v. Rosberg*, Case No. 8:12CR271-001 was entered on December 27, 2013.

8. On May 9, 2014, U.S. Senior District Court Judge Richard G. Kopf denied and dismissed with prejudice Respondent Paul A. Rosberg's motion to set aside the guilty plea.

C. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent Paul Rosberg was and is at all times relevant herein responsibly connected with the Respondent Corporation, Nebraska's Finest Meats, L.L.C.

3. Kelly Rosberg, as manager and operator of the business, is responsibly connected with the Respondent Corporation.

4. Respondent Paul Rosberg committed a felony, which demonstrates his lack of integrity to conduct operations that affect the public safety.

5. Respondent Paul Rosberg is unfit to engage in any business requiring inspection under Title I of the FMIA, pursuant to 21 U.S.C. § 671.

6. Because Paul Rosberg is at least fifty-percent owner of Nebraska's Finest Meats, L.L.C., that entity is unfit to engage in any business requiring inspection under Title I of the FMIA, pursuant to 21 U.S.C. § 671.

7. The indefinite withdrawal of USDA inspection services from Respondent Paul Rosberg and Nebraska's Finest Meats, L.L.C, their affiliates, officers, operators, partners, successors, or assigns is an appropriate sanction.

8. The indefinite withdrawal of USDA inspection services from Kelly Rosberg is also appropriate, as she was and is the manager and operator of Nebraska's Finest at all times material hereto and is responsibly connected to a business whose owner is unfit to receive inspection services.

ORDER

Inspection services are hereby indefinitely withdrawn from Respondents Nebraska's Finest Meats, L.L.C and Paul Rosberg. This sanction extends by association to Kelly Rosberg, manager of Nebraska's Finest Meats, and inspection services are hereby indefinitely withdrawn from Kelly Rosberg.

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

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall become final without further proceedings

35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties and also upon Kelly Rosberg.

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ORGANIC FOODS PRODUCTION ACT

DEPARTMENTAL DECISIONS

In re: KRIEGEL, INC. & LAURANCE KRIEGEL.
Docket No. 14-0027.
Decision and Order.
Filed March 6, 2014.

OFPA – Administrative appeals – Jurisdiction.

Petitioners, pro se.
Buren W. Kidd, Esq. for Respondent.
Initial Decision entered by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Kriegel, Inc., and Laurance Kriegel [hereinafter Petitioners] applied to the Texas Department of Agriculture for organic certification.[1] On April 2, 2013, the Texas Department of Agriculture denied Petitioners' application for organic certification. On May 2, 2013, pursuant to 7 C.F.R. § 205.681(a), Petitioners appealed the Texas Department of Agriculture's denial of their application for organic certification to the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator]. On October 22, 2013, the Administrator denied Petitioners' appeal.

On November 5, 2013, Petitioners filed a pleading with the Office of Administrative Law Judges, United States Department of Agriculture, requesting review of the Administrator's denial of their appeal. On

[1] The Texas Department of Agriculture is an entity accredited by the Secretary of Agriculture as a certifying agent for the purpose of certifying production or handling operations as certified production or handling operations which comply with the Organic Foods Production Act of 1990, as amended (7 U.S.C. §§ 6501-6522) [hereinafter the Organic Foods Production Act], and the regulations issued under the Organic Foods Production Act (7 C.F.R. pt. 205).

December 4, 2013, Buren W. Kidd, Office of the General Counsel, United States Department of Agriculture,[2] filed a response to Petitioners' November 5, 2013, pleading contending the Office of Administrative Law Judges has no jurisdiction to consider Petitioners' November 5, 2013, request to review the Administrator's denial of their appeal.

On January 17, 2014, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued a Decision and Order Dismissing Petition for Appeal [hereinafter the ALJ's Decision and Order]: (1) concluding this proceeding is not yet ripe to be heard by the Office of Administrative Law Judges as no formal administrative proceeding to deny organic certification has been initiated by the United States Department of Agriculture, as required by 7 C.F.R. § 205.681(a)(2); (2) denying Petitioners' November 5, 2013, request for review of the Administrator's denial of Petitioners' appeal; and (3) dismissing the proceeding with prejudice.

On February 5, 2014, Petitioners appealed the ALJ's Decision and Order to the Judicial Officer. On February 20, 2014, the Agricultural Marketing Service filed a response to Petitioners' appeal petition. On February 26, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

The Organic Foods Production Act requires the Secretary of Agriculture to establish a procedure under which a person may appeal an adverse action under the Organic Foods Production Act, as follows:

> **§ 6520. Administrative appeal**
>
> **(a) Expedited appeals procedure**
>
> The Secretary shall establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State

[2] Mr. Kidd refers to himself as the "Agency Representative." Based upon the record, I infer Mr. Kidd represents the Agricultural Marketing Service, United States Department of Agriculture.

> official, or a certifying agent under this chapter that—
>
> (1) adversely affects such person; or
>
> (2) is inconsistent with the organic certification program established under this chapter.

7 U.S.C. § 6520(a). Pursuant to this requirement to establish an appeals procedure, the Secretary of Agriculture promulgated regulations which provide that an applicant for organic certification may appeal a certifying agent's denial of certification to the Administrator and which further provide that, if the Administrator denies the appeal, a formal administrative proceeding will be initiated to deny the certification, as follows:

> **§ 205.681 Appeals.**
>
> (a) *Certification appeals.* An applicant for certification may appeal a certifying agent's notice of denial of certification . . . to the Administrator[.]
> . . . .
> (2) If the Administrator . . . denies an appeal, a formal administrative proceeding will be initiated to deny . . . the certification. Such proceeding shall be conducted pursuant to the U.S. Department of Agriculture's Uniform Rules of Practice. . . .

7 C.F.R. § 205.681(a), (a)(2). The regulations do not provide that an applicant may initiate a proceeding to review the Administrator's denial of the applicant's appeal, as Petitioners have done in this proceeding. Instead, the regulations provide that the United States Department of Agriculture will initiate a formal administrative proceeding to deny organic certification. Therefore, I agree with the ALJ's Decision and Order dismissing this proceeding with prejudice, and I conclude Petitioners' February 5, 2014, appeal to the Judicial Officer must be dismissed for lack of jurisdiction.

For the foregoing reasons, the following Order is issued.

ORGANIC FOODS PRODUCTION ACT

ORDER

Petitioners' February 5, 2014, appeal to the Judicial Officer is dismissed.

This Order shall be effective upon service on Petitioners.

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In re: PAUL A. ROSBERG, d/b/a ROSBERG FARM.
Docket No. 12-0216.
Decision and Order.
Filed May 30, 2014.

OFPA.

Lisa Jabaily, Esq. for Complainant.
Respondents, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

AMENDED[1] DECISION AND ORDER ON SUMMARY JUDGMENT

The instant matter involves a complaint filed by the United States Department of Agriculture ("Complainant"; "USDA") against Paul A. Rosberg, d/b/a Rosberg Farm ("Respondent"), alleging violations of the Organic Foods Production Act of 1990 ("OFPA"), 7 U.S.C. §§ 6501-6522 and regulations implementing the OFPA and the National Organic Program ("NOP"), set forth at 7 C.F.R. § 205.1 – 205.699. The complaint alleged that Respondent failed to declare on two applications for certification under the NOP that he was previously certified under the NOP. The complaint further alleged that Respondent failed to provide with his applications to NOP copies of noncompliance letters, and failed to describe how compliance had been achieved.

[1] The parties were served with a Decision and Order in this matter on May 28, 2014, but clerical errors in that Decision required correction. Accordingly, on May 30, 2014, I vacated that Decision and Order and replaced it with the instant Amended Decision and Order.

This Decision and Order is issued on unopposed motion for summary judgment filed by Complainant.

Procedural History

On January 26, 2011, Complainant filed a complaint against Respondent alleging violations of the OFPA. On March 30, 2012, Respondent filed a general denial of the allegations and requested additional time to file an answer. By Order issued April 9, 2012, Chief Administrative Law Judge Peter M. Davenport extended the time within which an answer must be filed to May 9, 2012. On April 6, 2014, Respondent again requested additional time.[2]On May 9, 2014, Respondent filed a partial answer and supporting documentation and again requested additional time.

On May 14, 2012, Chief Administrative Law Judge Peter M. Davenport set deadlines for submissions and exchange of evidence. Complainant filed a list of exhibits and witnesses with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ"; "Hearing Clerk") on June 6, 2012. On July 11, 2012, Respondent filed a document in which he stated that he was not able to comply with the Order for exchange and submissions because he was denied discovery, and requested an Order compelling discovery.[3] On July 12, 2012, Complainant filed a status report and request for teleconference.

The case was reassigned to me, and on November 2, 2012 I issued an Order staying proceedings in the matter pending the result of actions in federal district court involving Respondent. On May 7, 2013, Complainant filed a Status Report, Request for Hearing, and Request for Teleconference. By Order issued May 14, 2013, I renewed my stay in this matter pending the results of criminal actions involving Respondent. In a status report filed on December 17, 2013, Complainant advised that

[2] It is likely that Respondent's second request for an extension of time and the Order granting the request crossed in the mail.

[3] The Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Initiated by the Secretary [of the United States Department of Agriculture] ("the Rules of Practice"), 7 C.F.R. §§ 1.130 *et seq.*, apply to this proceeding and do not provide for discovery.

Respondent had pled guilty to criminal charges. On December 27, 2013, Respondent was sentenced to imprisonment.

On January 30, 2014, Complainant filed a motion for summary judgment which was served upon Respondent by the Hearing Clerk. Respondent has failed to file a response to the motion.

On May 14, 2014, a motion filed in another administrative proceeding involving Respondent advised that Respondent's motion for habeas corpus and request to withdraw his guilty plea was denied by Senior United States District Court Judge Richard Kopf. Accordingly, this matter is ripe for adjudication.

I admit to the record the Attachments to Respondent's Answer, identified as RX-A through RX-Q and the Exhibits identified as CX-1, CX-7, CX-11, CX-14, CX-20, CX-21[4] and CX-22 attached to Complainant's motion.

Issue

The primary issue in controversy is whether, considering the record, summary judgment may be entered in favor of USDA.

Findings of Fact & Conclusions of Law

A. Summary of the Evidence

USDA established national standards for the production and handling of organically produced agricultural products pursuant to the OFPA. USDA, through the Agricultural Marketing Service ("AMS"), administers a program for certifying organic producers and handlers, whose practices are examined by State officials and/or authorized private agents for compliance with USDA standards. Once compliance is established, the producers and handlers may market their products with an official USDA organic label.

On June 27, 2005, Respondent was certified under NOP for soybeans

[4] Complainant's Exhibits "A" and "B" have been renamed "CX-21" and CX-22," respectively, for purposes of consistency.

and alfalfa by OCIA International, Inc. ("OCIA"), a certification agent that was accredited by USDA under NOP regulations on April 29, 2002. RX-C. On November 23, 2005, Respondent was certified for alfalfa under NOP by OCIA. CX-1; RX-F. On November 15, 2006, Respondent applied for certification with OneCert, which was accredited by USDA as a certifying agent under the NOP regulations on April 22, 2003. CX-7.

On February 2, 2007, OCIA issued a Notice of Noncompliance to Respondent. RX-I. On February 8, 2007, Respondent surrendered his organic certification with OCIA. CX-11. On May 24, 2007, OneCert issued to Respondent a Notice of Noncompliance and Denial of Certification for failing to disclose prior certifications and noncompliances, misrepresenting previous certifications, failing to maintain a record-keeping system, and withholding records. CX-11.

On August 28, 2007, Respondent applied for certification with International Certification Services, Inc. ("ICS"), which was accredited by USDA as a certifying agent under NOP regulations on April 29, 2002. CX-14. On October 30, 2007, ICS denied certification to Respondent because it determined that Respondent had provided contradictory information to ICS and USDA about his prior certifications. RX-P.

On September 10, 2007, Respondent applied for organic certification by the Ohio Ecological Food and Farm Association ("OEFFA"), which was accredited by USDA as a certifying agent under NOP regulations on April 29, 2002.CX-20; RX-O. Respondent was issued an organic certificate by OEFFA in 2007. Admis. of Resp't, last sentence of Aff. dated April 6, 2010, in partial Answer.

On March 8, 2010, the NOP issued Respondent a Notice of Noncompliance and Proposed Revocation (RX-A) for failing to disclose prior certifications, notice of non-compliance and notices of denial of application for organic certification, pursuant to 7 C.F.R. § 205.401(c), which provides:

> A person seeking certification of a production or handling operation under this subpart must submit an application for certification to a certifying agent. The

> application must include the following information:
>
> (c) The name(s) of any organic certifying agent(s) to which application has previously been made; the year(s) of application; the outcome of the application(s) submission, including, when available a copy of any notification of noncompliance or denial of certification issued to the applicant for certification; and a description of the actions taken by the applicant to correct the noncompliances noted in the notification of noncompliance, including evidence of such correction…

On February 13, 2012, Respondent filed a civil action in the District Court of Lancaster, Nebraska against Everett Lunquist, an inspector of organic producers and growers, alleging defamation of character. On May 7, 2012, Mr. Lunquist's attorney moved for summary judgment, which was granted by District Judge Paul D. Merritt, Jr. on August 5, 2013. CX-22.

B. Discussion

Pursuant to the Rules of Practice, Respondents are required to file an answer within twenty days after the service of a complaint. 7 C.F.R. §1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default shall be appropriate. 7 C.F.R. § 1.136(c). The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. §1.139) and further provide that "an opposing party may file a response to [a] motion" within twenty days after service (7 C.F.R. §1.143(d)).

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); Fed. R. Civ. P. 56(c). An issue is "genuine" if sufficient

evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U.S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

Respondent failed to file a timely answer that specifically addressed the allegations in the Complaint. His first filing with the Hearing Clerk asserted a general denial of the allegations. The documentation accompanying Respondent's partial Answer addressed the allegations to some degree. In affidavits that Respondent submitted during the course of investigation into his NOP practices, he lodged complaints that representatives and agents tasked with issuing NOP certification had lied, had not acted timely, and had failed to properly interpret his responses to questions about non-compliance. Respondent suggests that error and not fraud caused investigators to conclude that he had failed to truthfully respond to questions regarding whether he had been previously certified on subsequent applications. Respondent failed to respond to the Motion

for Summary Judgment.

Respondent's assertions of fraud and dishonesty have been rejected by Judge Merritt of the District Court of Nebraska, who granted summary judgment against Respondent in his civil action against Mr. Lunquist. CX-22. Judge Merritt found that "reasonable minds can draw but one conclusion from all of the evidence-Rosberg failed to comply with § 205.401(c)." *Id.*

I agree with Judge Merritt's determination and find that none of Respondent's statements support his compliance with regulations controlling applications for organic certification. There is nothing vague or ambiguous about the requirement that applicants identify all information about prior applications for certification, including the outcome of those applications. Respondent's applications reveal that he failed to comply with those requirements. He applied for organic certification with OneCert while still holding certification by OCIA. On his application to OneCert, Respondent did not disclose that information and instead wrote "unknown" when required to identify other certifying agents to which he had applied. Respondent also wrote "none" when required to list the years in which he had applied for certification. Respondent wrote "unknown" when required to respond to questions regarding the outcome of previous applications. *See* CX-7 at 2. On his application to ICS, Respondent denied having previous certifications. Respondent failed to include any required documentation with his applications.

In his partial Answer, Respondent submitted affidavits and supporting documents[5] that summarize his efforts to secure organic certification for various agricultural products. Respondent charged inspectors with failing to make timely inspections, with falsifying information, and with failing to properly interpret his applications for certification. Respondent contended that he told inspectors about his applications, and therefore his status with previous certifying agents should have been apparent. However, Respondent admitted that he "did not necessarily follow ICS paper." *See* partial Answer. Respondent included documents pertaining

[5] Respondent expressed concerns that I would not read his affidavit or documents because "it is so long". I hereby assure Respondent that I have assiduously read every word of his, and the government's, submissions.

to inspections in which non-compliant procedures had been identified. He explained that his attention was diverted by the illness of his son, and that he had little time to devote to paperwork.

I credit Respondent's contention that the process for organic certification is lengthy and complicated. However, the scope of the instant adjudication is limited to whether Respondent's applications for organic certification met the requirements set forth at 7 C.F.R. § 401(c). Regardless of what Mr. Rosberg told individuals representing certifying agents, the onus was on him to complete the applications accurately, and the evidence establishes, prima facie, that he failed to do so. I find that there is no genuine dispute of material fact. Accordingly, Complainant's motion for summary judgment is GRANTED.

Two additional assertions were made by Complainant but not substantiated by documentary evidence. Complainant alleged that on March 16, 2010, OEFFA issued Respondent a Notice of Noncompliance and Denial of Certification for Livestock. The record does not contain supporting documentation in the form of a copy of that notice. However, because the record does not allege that Respondent made additional applications for organic certification after this date, this assertion is not material to my findings.

Complainant additionally alleged that on July 29, 2011, the AMS Administrator issued a decision denying the Respondent's appeal and proposed to revoke Respondent's organic certification under 7 C.F.R. § 205.662(f)(2) of the prevailing NOP regulations for a period of five (5) years. Although a copy of this decision is not in evidence, it is not crucial to my determinations, as I infer that the Administrator's decision was the basis for the complaint that initiated the instant adjudication.

C. Findings of Fact

1. Respondent Paul A. Rosberg is an individual doing business as Rosberg Farm with a mailing address in Wausau, Nebraska.

2. At all times material hereto, Respondent was engaged in business as a certified organic producer, crop operation, as defined in the OFPA.

ORGANIC FOODS PRODUCTION ACT

3. On June 27, 2005, Respondent was certified under NOP for soybeans and alfalfa by OCIA International, Inc. ("OCIA").

4. On November 23, 2005, Respondent was issued another organic certificate by Organic Crop Improvement Association ("OCIA").

5. OCIA was accredited by USDA as a certifying agent under NOP Regulations on April 29, 2002.

6. On February 2, 2007, OCIA issued a Notice of Noncompliance to Respondent.

7. On February 8, 2007, Respondent surrendered his organic certificate with OCIA.

8. On November 15, 2006, Respondent applied for certification with OneCert.

9. OneCert was accredited by USDA as a certifying agent on April 23, 2003.

10. On May 24, 2007, OneCert issued to Respondent a Notice of Noncompliance and Denial of Certification for failing to disclose prior certifications and noncompliances; misrepresenting previous certifications; failing to maintain records; and withholding records.

11. On August 28, 2007, Respondent applied for certification with Internal Certification Services, Inc. ("ICS").

12. On April 29, 2002, ICS was accredited by USDA as a certifying agent under the NOP.

13. On October 30, 2007, ICS issued to Respondent a Notice of Denial because of contradictory information that Respondent provided to ICS and USDA regarding prior certification applications.

14. On September 10, 2007, Respondent applied for organic certification by the Ohio Ecological Food and Farm Association ("OEFFA").

15. OEFFA was accredited by USDA as a certifying agent under NOP regulations on April 29, 2002.

16. On November 12, 2007, Respondent was issued an organic certificate by OEFFA.

17. On March 8, 2010, the NOP issued Respondent a Notice of Noncompliance and Proposed Revocation for failing to disclose prior certifications and noncompliance notice and failing to disclose notices of denial of application for organic certification.

D. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. There are no genuine issues of material fact presented in this adjudication.

3. Entry of summary judgment in favor of Complainant is appropriate.

4. Respondent violated 7 C.F.R. § 401(c) by failing to disclose prior organic certification applications and designations; by failing to disclose notices of non-compliances; and by failing to maintain records; and by failing to produce records on other applications for certification under the NOP.

ORDER

Respondent Paul A. Rosberg, doing business as Rosberg Farm, shall cease and desist from violating the NOP regulations. Respondent's certification under NOP is hereby revoked for a period of five (5) years, pursuant to 7 C.F.R. § 205.681(a)(2). Respondent is hereby disqualified from being eligible to be certified as an organic operation under the OFPA for a period of five (5) years.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall become final without further proceedings

thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

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MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

AGRICULTURAL MARKETING AGREEMENT ACT

In re: BURNETTE FOODS, INC., A MICHIGAN CORPORATION.
Docket No. 11-0334.
Miscellaneous Order.
Filed April 9, 2014.

AMAA – Administrative procedure – Stay.

James J. ("Jay") Rosloniec, Esq. for Petitioner.
Sharlene A. Deskins, Esq. for Respondent.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

RULING DENYING THE ADMINISTRATOR'S MOTION FOR STAY

On March 25, 2014, the Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed a Motion to Stay Decision and Order, Pending Appeal in which the Administrator requests a stay of *Burnette Foods, Inc.*, 73 Agric. Dec. ___ (U.S.D.A. Mar. 18, 2014), pending completion of the appeal process. On April 4, 2014, Burnette Foods, Inc. filed an Objection to Respondent's Motion to Stay Decision and Order, Pending Appeal.

The rules of practice applicable to this proceeding[1] provide that an administrative law judge's decision shall become final without further procedure 35 days after service of the administrative law judge's decision, unless the decision is appealed to the Secretary of Agriculture by a party to the proceeding.[2]On April 3, 2014, the Administrator appealed Administrative Law Judge Jill S. Clifton's [hereinafter the ALJ] decision, *Burnette Foods, Inc.*, 73 Agric. Dec. ___ (U.S.D.A. Mar. 18, 2014), to the Judicial Officer. As the Administrator is a party to this proceeding[3] and has filed a timely appeal of the ALJ's decision to the Judicial Officer,[4] *Burnette Foods, Inc.*, 73 Agric. Dec. ___ (U.S.D.A. Mar. 18, 2014), will not become final and will have no effect pending final disposition of this proceeding by the Judicial Officer.[5] Therefore, a stay of *Burnette Foods, Inc.*, 73 Agric. Dec. ___ (U.S.D.A. Mar. 18, 2014), pending completion of the appeal process, would be mere surplusage, and I deny the Administrator's Motion to Stay Decision and Order, Pending Appeal.

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[1] The rules of practice applicable to this proceeding are 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].

[2] 7 C.F.R. § 900.64(c).

[3] *See* Answer of Resp't at 1, 8; Burnette Foods, Inc., 73 Agric. Dec. ___, slip op. ¶ 7 at 10 (U.S.D.A. Mar. 18, 2014).

[4] The Judicial Officer has been delegated authority to act for the Secretary of Agriculture in proceedings subject to the Rules of Practice. *See* 7 C.F.R. §§ 2.35(a)(11), 900.51(c).

[5] The ALJ specifically addressed the issue of the finality of *Burnette Foods, Inc.*, 73 Agric. Dec. ___ (U.S.D.A. Mar. 18, 2014), as follows:

> **Finality**
>
> 43. This Decision shall be final and effective 35 days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service. *See* 9 [sic] C.F.R. §§ 900.64 and 900.65.

Burnette Foods, Inc., 73 Agric. Dec. ___, slip op. ¶ 43 at 22-23 (U.S.D.A. Mar. 18, 2014).

ANIMAL QUARANTINE ACT

UNITED CONTINENTAL HOLDINGS, INC.
Docket No. 14-0063.
Order of Dismissal.
Filed June 17, 2014.

CONTINENTAL AIRLINES, INC.
Docket No. 14-0065.
Order of Dismissal.
Filed June 17, 2014.

ANIMAL WELFARE ACT

In re: JAMES G. WOUDENBERG, d/b/a R&R RESEARCH.
Docket No. 12-0538.
Miscellaneous Order.
Filed March 27, 2014.

AWA – Administrative procedure – Denial of request for reconsideration.

Sharlene A. Deskins, Esq. for Complainant.
Nancy Kahn, Esq. for Respondent.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER DENYING REQUEST TO RECONSIDER THE MARCH 25, 2014 ORDER EXTENDING TIME FOR FILING COMPLAINANT'S APPEAL BRIEF

On March 19, 2014, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed an appeal petition and a motion requesting that I extend to April 18, 2014, the time for filing the Administrator's brief in support of the appeal petition. On March 25, 2014, I issued an Order Extending Time for Filing Complainant's Appeal Brief, and on March 26, 2014, James G. Woudenberg filed Respondent's Objections to Complainant's March 19, 2014 Motion for Extension of Time. As I previously granted the Administrator's March 19, 2014, request for an extension of time, I treat Mr. Woudenberg's objections to

the Administrator's March 19, 2014 request for an extension time as a request that I reconsider the March 25, 2014 Order Extending Time for Filing Complainant's Appeal Brief.

Mr. Woudenberg raises no meritorious basis for granting his request for reconsideration of the March 25, 2014 Order Extending Time for Filing Complainant's Appeal Brief; therefore, I deny Mr. Woudenberg's request for reconsideration.

However, I find troubling Mr. Woudenberg's assertions that the Hearing Clerk failed to serve Mr. Woudenberg with the Administrator's March 19, 2014, motion for extension of time and the Administrator's appeal petition. Therefore, the Hearing Clerk is ordered, contemporaneous with service of this Order on Mr. Woudenberg, to serve Mr. Woudenberg with a copy of the Administrator's March 19, 2014, motion for extension of time and the Administrator's appeal petition.

As for Mr. Woudenberg's assertion that the Administrator's appeal petition was not timely filed, Mr. Woudenberg may address that issue in any response he may have to the Administrator's appeal petition. The time for filing a response to the Administrator's appeal petition does not begin to run until Mr. Woudenberg is served either with the Administrator's appeal brief or with a filing by the Administrator stating that no appeal brief will be filed.

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KYLE THOMAS TAITT, AN INDIVIDUAL, d/b/a MONKEY BUSINESS.
Docket No. 12-0446.
Order of Dismissal.
Filed May 13, 2014.

* * *

In re: JOSEPH M. ESTES, AN INDIVIDUAL.
Docket No. 11-0027.
Miscellaneous Order.
Filed May 14, 2014.

AWA – Administrative procedure – Cross-appeal – Service.

Colleen A. Carroll, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER REQUIRING THE HEARING CLERK TO SERVE THE ADMINISTRATOR'S CROSS-APPEAL ON MR. ESTES

On April 28, 2014, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Response to Respondent's Petition for Appeal." I find the Administrator's April 28, 2014 response to Joseph M. Estes' appeal petition includes a cross-appeal.

The rules of practice applicable to this proceeding[1] allow inclusion of a cross-appeal in a response to an appeal petition, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> . . . .
> (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*.

7 C.F.R. § 1.145(b) (emphasis added).

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The emphasized language was included in 7 C.F.R. § 1.145(b) so that neither party would have to file a protective notice of appeal (to be dropped if no appeal were filed by the other party) but could, instead, file the equivalent of a cross-appeal in response to the appeal petition filed by the other party.[2]

As the Administrator has included a cross-appeal in "Complainant's Response to Respondent's Petition for Appeal," I order the Hearing Clerk to serve Mr. Estes with a copy of "Complainant's Response to Respondent's Petition for Appeal" and inform Mr. Estes that, within 20 days after service of "Complainant's Response to Respondent's Petition for Appeal," he may file with the Hearing Clerk a response in support of or in opposition to the Administrator's cross-appeal.[3]

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[2] Excel Corp., 62 Agric. Dec. 196, 248-49 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); White, 47 Agric. Dec. 229, 262-63 (U.S.D.A. 1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); Thornton, 41 Agric. Dec. 870, 900 (U.S.D.A. 1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983), *reprinted in* 51 Agric. Dec. 295 (1992); Magic Valley Potato Shippers, Inc., 40 Agric. Dec. 1557, 1558 (U.S.D.A. 1981), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); Rowland, 40 Agric. Dec. 1934, 1953 (U.S.D.A. 1981), *aff'd*, 713 F.2d. 179 (6th Cir. 1983).

[3] The title of the Administrator's April 28, 2014 filing, "Complainant's Response to Respondent's Petition for Appeal," does not indicate that the filing includes a cross-appeal. A response to an appeal petition that includes a cross-appeal should be titled to clearly indicate that the response includes a cross-appeal.

In re: JENNIFER CAUDILL, a/k/a JENNIFER WALKER, a/k/a JENNIFER HERRIOTT WALKER, AN INDIVIDUAL; BRENT TAYLOR & WILLIAM BEDFORD, INDIVIDUALS d/b/a ALLEN BROTHERS CIRCUS; & MITCHELL KALMANSON.
Docket No. 10-0416.
Miscellaneous Order.
Filed May 16, 2014.

AWA – Administrative procedure – Dismissal – License, termination of – Petition to reopen hearing.

Colleen A. Carroll, Esq. for Complainant.
William J. Cook, Esq. for Respondents.
Initial Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

RULING GRANTING PETITION TO REOPEN AND RULING GRANTING REQUEST TO ISSUE AN ORDER DISMISSING THE PROCEEDING

Ruling Granting Petition to Reopen

On April 29, 2014, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Petition to Reopen Hearing as to Respondent Jennifer Caudill" [hereinafter Petition to Reopen] requesting that I reopen the hearing and receive in evidence a letter, dated November 13, 2013, sent from Elizabeth Goldentyer, D.V.M., Regional Director, Animal Care, Animal and Plant Health Inspection Service, to Ms. Caudill[1] and requesting that I issue an order dismissing this proceeding.

On May 2, 2014, the Hearing Clerk served Ms. Caudill with the Administrator's Petition to Reopen[2] and, in the Hearing Clerk's April 30, 2014 service letter, informed Ms. Caudill that she had 10 days from the

[1] The Administrator attached a copy of the letter, dated November 13, 2013, from Dr. Goldentyer to Ms. Caudill, to the Petition to Reopen.
[2] United States Postal Service Domestic Return Receipt for Article Number [redacted] 4664.

date of service within which to file a response to the Petition to Reopen. Ms. Caudill failed to file a response to the Petition to Reopen, and, on May 15, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration.

The rules of practice applicable to this proceeding[3] set forth the requirements for a petition to reopen a hearing, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
>
> (2) *Petition to reopen hearing*. A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2). The Administrator filed the Petition to Reopen prior to the issuance of a decision by the Judicial Officer. The Administrator's Petition to Reopen identifies the nature and purpose of the evidence to be adduced. Moreover, the evidence to be adduced is not merely cumulative and could not have been adduced during the June 11-13, 2012, hearing conducted in this proceeding, as the November 13, 2013, letter from Dr. Goldentyer to Ms. Caudill did not exist at the time of the hearing. Under these circumstances, I reopen the hearing and receive in evidence the November 13, 2013, letter from Dr. Goldentyer to Ms. Caudill.

Ruling Granting Request to Issue an Order Dismissing the Proceeding

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[3] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

On September 7, 2010, the Administrator instituted this adjudicatory proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; and the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations] by filing an Order to Show Cause Why Animal Welfare Licenses 58-C-0947, 55-C-0146, and 58-C-0505 Should Not Be Terminated [hereinafter Order to Show Cause].[4] The Administrator seeks an order terminating Ms. Caudill's Animal Welfare Act license (Animal Welfare Act license number 58-C-0947), pursuant to 9 C.F.R. § 2.12,[5] which provides for termination of an Animal Welfare Act license after a hearing, as follows:

> **§ 2.12 Termination of a license.**
>
> A license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to § 2.11 after a hearing in accordance with the applicable rules of practice.

The Regulations also provide for automatic termination of an Animal Welfare Act license if the annual license fee is not timely paid, as follows:

> **§ 2.5 Duration of license and termination of license.**
>
> (a) A license issued under this part shall be valid and effective unless:
>
> . . . .

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[4] This proceeding, as it relates to the termination of Animal Welfare Act license number 55-C-0146 held by Brent Taylor and William Bedford and to the termination of Animal Welfare Act license number 58-C-0505 held by Mitchell Kalmanson, is concluded. *See* Withdrawal of Order to Show Cause as to Brent Taylor & William Bedford filed by the Administrator on June 4, 2012; Order of Dismissal filed by Chief Administrative Law Judge Peter M. Davenport on June 15, 2012; and Caudill, 71 Agric. Dec. 1007 (U.S.D.A. 2012) (Decision & Order as to Mitchel Kalmanson).

[5] Order to Show Cause at 14-15.

> (3) The license has expired or been terminated under this part.
>
> (4) The annual license fee has not been paid to the appropriate Animal Care regional office as required. There will not be a refund of the annual license fee if a license is terminated prior to its expiration date.
>
> (b) Any person who is licensed must file an application for a license renewal and an annual report form (APHIS Form 7003), as required by § 2.7 of this part, and pay the required annual license fee. The required annual license fee must be received in the appropriate Animal Care regional office on or before the expiration date of the license or the license will expire and automatically terminate. Failure to comply with the annual reporting requirements or pay the required annual license fee on or before the expiration date of the license will result in automatic termination of the license.

9 C.F.R. § 2.5(a)(3)-(4), (b). The letter, dated November 13, 2013, from Dr. Goldentyer to Ms. Caudill establishes that, pursuant to 9 C.F.R. § 2.5, Ms. Caudill's Animal Welfare Act license (Animal Welfare Act license number 58-C-0947) automatically terminated on its expiration date, October 16, 2013, because Ms. Caudill failed to pay the annual license fee on or before the expiration of Animal Welfare Act license number 58-C-0947.

Based upon the record before me, I find the automatic termination of Animal Welfare Act license number 58-C-0947, pursuant to 9 C.F.R. § 2.5, renders moot the instant proceeding in which the Administrator seeks termination of Animal Welfare Act license number 58-C-0947, pursuant to 9 C.F.R. § 2.12.

For the foregoing reasons, the following Ruling and Order are issued.

RULING

The Administrator's Petition to Reopen, filed April 29, 2014, is

granted, and the letter, dated November 13, 2013, from Dr. Goldentyer to Ms. Caudill, a copy of which is attached to the Administrator's Petition to Reopen, is received in evidence.

ORDER

1. The instant proceeding is dismissed as moot.

2. All motions pending before me in this proceeding are rendered moot and are dismissed.

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In re: CHINA CARGO ARILINES, CO., LTD., a/k/a CHINA CARGO AIRLINES, LTD., A SUBSIDIARY OF CHINA EASTERN EARLINES CORPORATION LIMITED, A CORPORATION CHARTERED IN THE PEOPLE'S REPUBLIC OF CHINA.
Docket No. 14-0041.
Miscellaneous Order.
Filed August 6, 2014.

AWA – Administrative procedure – Answer – Deferral of ruling.

Colleen A. Carroll, Esq. for Complainant.
Edward J. Longosz, II, Esq. for Respondent.
Memorandum Opinion and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

MEMORANDUM OPINION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) [hereinafter "the Act"], and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.*) [hereinafter "Regulations and Standards"]. The matter initiated on November 18, 2013 with a Complaint filed by the Administrator of the Animal Plant and Health Inspection Service of the United States Department of Agriculture [hereinafter "USDA"; "Complainant"] against China Cargo Airlines, Co., Ltd., also known as China Cargo Airlines,

Ltd. [hereinafter "China Cargo"; "Respondent"]. The Complaint alleges that, on or about March 10, 2010, Respondent committed numerous violations of the Act and the Regulations and Standards during its acceptance and transportation of 566 live guinea pigs from Shanghai, People's Republic of China to Los Angeles, California (Compl. ¶¶ 1-2).

On December 3, 2013, Respondent filed a Consent Motion for an Extension of Time to File an Answer. On December 4, 2013, I entered an Order granting the Consent Motion and allowing Respondent until January 23, 2014 to file an answer. On January 23, 2014, Respondent filed its Answer to the Complaint.

On February 25, 2014, I entered an Order directing Complainant to file with the Hearing Clerk by March 27, 2014 a list of exhibits and list of witnesses; directing Respondent to file with the Hearing Clerk by April 24, 2014 a list of exhibits and list of witnesses; and directing the parties to consult with each other and, no later than one week after the date of Respondent's exchange deadline, to file a Status Report with the Hearing Clerk. On March 18, 2014, Complainant filed its List of Exhibits and List of Witnesses with the Hearing Clerk. On April 24, 2014, Respondent filed its List of Exhibits and List of Witnesses with the Hearing Clerk.

On May 13, 2014, Complainant filed a Status Report requesting a two-day hearing. On June 11, 2014, Complainant filed: (1) a Motion for Adoption of Decision and Order by Reason of Default [hereinafter "Motion for Adoption"]; and (2) a Proposed Decision and Order by Reason of Default. On July 1, 2014, Respondent filed its Response and Objections to Complainant's Motion for Adoption of Decision and Order by Reason of Default [hereinafter "Response and Objections"]. In its Response, Respondent requested an oral argument "on all issues presented" (Resp., "Oral Argument Requested").

Presently before me are: (1) Complainant's "Motion for Adoption of Decision and Order by Reason of Default"; (2) Respondent's "Response and Objections to Complainant's Motion for Adoption of Decision and Order by Reason of Default;" and (3) a request for oral argument filed by Respondent.

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."[1] Pertinent to the case at bar, the Rules of Practice for the U.S. Department of Agriculture[2] [hereinafter "Rules of Practice"] establish that "an answer must be filed within 20 days after service of the complaint."[3] The Rules of Practice also provide that an answer "shall . . . [c]learly admit, deny, *or explain* each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent."[4] Per Rule 1.136, "failure to file an answer within [20 days] shall be deemed, for the 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."[5]

Rule 1.139 establishes the procedure upon a party's 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

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[1] Hamilton, 64 Agric. Dec. 1659, 1662 (U.S.D.A. 2005) (internal citations omitted); *see* Noell, 58 Agric. Dec. 130, No. 98-0033, 1999 WL 11230, at *9 (U.S.D.A. Jan. 6, 1999) ("The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act, in accordance with the Rules of Practice.").

[2] 7 C.F.R. §§ 1.130-1.151 (2013).

[3] Hamilton, 64 Agric. Dec. at 1662 (citing 7 C.F.R. § 1.136); *cf.* FED. R. CIV. P. 12(a)(1)(A) (requiring a defendant to serve answer within 21 days of being served a summons or complaint or, if defendant has waived service timely per FED. R. CIV. P. 2(d), within 60 days after a request for waiver was sent or within 90 days of being sent to a defendant outside the United States).

[4] Hamilton, 64 Agric. Dec. at 1662 (emphasis added).

[5] 7 C.F.R. § 1.136(c) (2013) (emphasis added). *See* Morrow v. Dep't Agric., 65 F.3d 168, 168 (6th Cir. 1995) ("7 C.F.R. Secs. 1.136(c) and 1.139 clearly describe the consequences of failing to answer a complaint in a timely fashion. These sections provide for default judgments to be entered [and] for admissions absent an answer . . . . Furthermore, the failure to answer constitutes the waiver of the right to a hearing.") (internal citations omitted).

> 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.

7 C.F.R. § 1.139.

With regard to the filing of answers, the Rules of Practice differ from the Federal Rules of Civil Procedure [hereinafter "Federal Rules"] in one technical yet significant aspect. While the Federal Rules provide that a responding party must "admit or deny the allegations asserted against it by an opposing party,"[6] they also establish that a "party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, *and the statement has the effect of a denial*."[7] The Rules of Practice, contrarily, make no reference to a lack of knowledge or information; they simply direct a respondent to (1) admit, deny, *or explain* each allegation of the complaint and set forth any defenses; (2) admit all facts alleged in the complaint; or (3) admit the jurisdictional allegations and neither admit nor deny the remaining allegations, while consenting to the "issuance of an order without further procedure."[8] The key distinction is that while a defendant in federal court may claim lack of information and in effect "deny" an allegation, a respondent in our administrative proceedings must clearly deny or "otherwise respond" to each allegation as any other response treated will be treated as an admission.[9]

Here, Complainant seeks to take advantage of the disparity between

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[6] FED. R. CIV. P. 7.1(b)(1)(B).
[7] FED. R. CIV. P. 7.1(b)(5) (emphasis added).
[8] 7 C.F.R. § 1.136(b)(1)(2)(3) (2013).
[9] *See* FED. R. CIV. P. 7(b); 7 C.F.R. § 1.136(b) (2013) (emphasis added).

the two rules by suggesting that, because Respondent did not explicitly deny each allegation in the Complaint, Respondent effectively admitted all claims. Specifically, Complainant asserts that Respondent's Answer "admitted, or did not deny, or did not otherwise respond to the material allegations of the complaint" and that "[p]ursuant to the Rules of Practice, those material allegations are deemed to be admitted by the respondent, for the purpose of the instant proceeding" (Mot. Adoption Decision ¶ I.A.), thereby "waiv[ing] the right to a hearing" (Mot. Adoption Decision ¶ I.A.4). Complainant's argument, however, lacks merit as Respondent did admit, deny, or *otherwise explain* each allegation of the Complaint pursuant to Rule 1.136.

The Complaint contains four material "Alleged Violations" not relating to jurisdiction, each of which Respondent either denied or explained. Accordingly, the allegations may not be treated as "admitted" in the current proceeding. In response to Alleged Violation # 3 (*i.e.*, Respondent violated Regulations by "failing to handle 566 guinea pigs as expeditiously and carefully as possible" in mislabeling the containers of guinea pigs as "perishables, not containing live animals"), Respondent conceded that the shipping entity misidentified the containers of guinea pigs but further stated that it was "without sufficient knowledge and information as to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the Complaint, and therefore, neither admits or denies the same, but demands strict proof thereof." With respect to Alleged Violation # 4 (*i.e.*, Respondent violated Regulations by failing to satisfy Standards for humane treatment of guinea pigs by accepting 566 live guinea pigs for shipment more than four hours prior to scheduled conveyance), Respondent answered that it was "without sufficient knowledge and information as to form a belief as to the truth of the allegations . . . and therefore, neither admits or denies the same, but demands strict proof thereof." Similarly, in responding to Alleged Violation # 5 (*i.e.*, Respondent violated Regulations by failing to meet Standards in transporting the animals in "nonconforming primary enclosures"), Respondent stated that it was "without sufficient knowledge and information as to form a belief as to the truth of the allegations . . . and therefore, neither admits or denies the same, but demands strict proof thereof." Respondent also answered to Alleged Violation # 6 (*i.e.*, Respondent violated Regulations by failing to meet

Standards in failing to place 566 live guinea pigs in animal cargo space; failing to place enclosures containing the guinea pigs in the primary conveyance in a way in which they could be removed as soon as possible in an emergency situation; failing to provide the guinea pigs access to food or water for approximately 24 hours; accepting 566 live guinea pigs for transport without adequate food; failing to visually observe the guinea pigs when they were unloaded to ensure that they were receiving enough air for normal breathing; failing to place guinea pigs in an animal holding area upon arrival to Los Angeles, California as quickly as possible) by stating that it was "without sufficient information and belief as to the truth of the allegations . . . and therefore, neither admits or denies the same, but demands strict proof thereof."

Respondent also provided nine "affirmative defenses," one of which ("Tenth Defense") states: "Respondent *denies all allegations not specifically responded to,* and reserves the right to interpose additional defenses, if appropriate." Based upon the substance of Respondent's statements, it is plain that the Answer has, at minimum, explained or otherwise responded to each material allegation of the Complaint.[10] Accordingly, Respondent's pleadings will not be treated as admissions, and Respondent will not be deemed to have waived its right to a hearing.

Complainant cites various cases that, upon analysis of each case in its

[10] In analyzing whether Respondent's statements constitute explanations or responses, the regular and ordinary definitions of the terms "explain," "respond," and "otherwise" will be used. *See* Nat'l Ass'n Home Builders v. Defenders Wildlife, 551 U.S. 644, 672 (2007) ("An agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation'. . .") (internal quotations omitted); Barnhart v. Walton, 535 U.S. 212, 212 (2002) ("Courts grant considerable leeway to an agency's interpretation of its own regulations . . .); Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 179 (1995) (stating that where an act does not define a certain term, that "term should be given its ordinary meaning"). The OALJ accepts the following definitions: (1) *explain* (verb): "to make known," "to make plain or understandable," "to give the reason for or cause of," or "to show the logical development or relationships of;"(2) *respond* (verb): "to say something in return: make an answer," "to react in response," "to show favorable reaction," or "to be answerable;" and (3) *otherwise* (adverb): "in a different way or manner," "in different circumstances," "in other respects," or "if not." *explain*, MERRIAM-WEBSTER.COM (2014), http://www.merriam-webster.com/dictionary/explain (last visited July 15, 2014); *answer*, MERRIAM-WESBTER.COM (2014), http://www.merriam-webster.com/dictionary/answer (last visited July 15, 2014); *otherwise*, MERRIAM-WEBSTER.COM (2014), http://www.merriam-webster.com/dictionary/otherwise (last visited July 15, 2014).

entirety, are either inapplicable or plainly distinguishable from the present case.[11] Complainant cites these cases to support its contention that because "the respondent admitted, or did not deny, or did not otherwise respond to the material allegations of the complaint. . . . those material allegations are deemed to be admitted by the respondent, for the purpose of the instant proceeding."[12] However, as Respondent correctly

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[11] Footnote 2 of Complainant's "Motion for Adoption of Decision and Order by Reason of Default" contains the following parenthetical citations: (1) Spring Valley Meats, Inc., 56 Agric. Dec. 1731 n.9 (U.S.D.A. 1997) (citing Kneeland, 50 Agric. Dec. 1571, 1572 (U.S.D.A. 1991) ("allegations of complaint are deemed admitted where answer does not deny material allegations of complaint"); (2) Henson, 45 Agric. Dec. 2246, 2260 (U.S.D.A. 1986) ("default decision was properly issued where answer failed to deny allegations of complaint"); (3) Guffy, 45 Agric. Dec. 1742, 1747 (U.S.D.A. 1986) ("where answer does not deny allegations of complaint, default decision is properly issued"); (4) Blaser, 45 Agric. Dec. 1727, 1728 (U.S.D.A. 1986) ("answer which admits one allegation of com plaint and fails to respond to other allegations is admission of all allegations in complaint"); (5) Stoltzfus, 44 Agric. Dec. 1161, 1162 (U.S.D.A. 1985) ("answer stating that 'no violation was intended' does not deny or otherwise respond to complaint and pursuant to 7 C.F.R. 1.136(c) is deemed admission of allegations of complaint"); (6) Lucas, 43 Agric. Dec. 1721, 1722, 1725 (U.S.D.A. 1984) ("answer fails to admit, deny, or otherwise respond to allegations of complaint and is deemed admission of allegations of complaint"); (7) Lema, 58 Agric. Dec. 291 (U.S.D.A. 1999) ("where respondent did not deny material allegations of Complaint and expressly admitted carrying 'acidic fruits' aboard aircraft on which he arrived in United States"); (8) Hardin Cnty. Stockyards, Inc., 53 Agric. Dec. 654, 656 (U.S.D.A. 1994) (quoting: "Therefore, as respondent did not deny the allegations in the complaint, that he engaged in the conduct alleged to be prohibited, he is found to have willfully violated the Act. The Secretary's Rules of Practice . . . provide that when a respondent admits the material allegations in the complaint, complainant may seek a decision, as the complainant has done here, without a hearing."); (9) Paul, 45 Agric. Dec. 556, 558-60 (U.S.D.A. 1986) ("default decision was properly issued where respondent failed to file timely answer and in his late answer did not deny material allegations of complaint; by failing to file timely answer and to deny allegations in complaint, respondent is deemed to have admitted violations of the AWA and Regulations alleged in complaint"); (10) Reece, 70 Agric. Dec. 1061 (U.S.D.A. 2011) ("late-filed answer admitted allegations by failing to specifically deny them"); (11) Aull, 50 Agric. Dec. 353 (U.S.D.A. 1991) ("answer did not deny allegations"). The facts in these cases are manifestly distinct from those of the present case. Here, Respondent filed a timely, properly formatted Answer that either denied or otherwise explained—at some points stating that it lacked sufficient information and knowledge to form a belief as to the allegation's truth, which is a commonly accepted response under the Federal Rules of Civil Procedure—each material allegation of the Complaint. The Answer did not expressly admit to any material allegations, and it included a request for hearing per Rule 1.41.

[12] Mot. for Adoption of Decision & Order by Reason Default at 2.

submits in its Response and Objections, the cases "largely address situations in which Respondents failed to respond to a Complaint, failed to timely respond to a Complaint, and/or did not respond to allegations contained within a Complaint."[13] Those situations are markedly different from the case at bar. In attempting to apply those specific, fact-oriented holdings to the present situation, Complainant has misconstrued the language of the Rules of Practice and erred in seeking to employ the cited cases to support a default judgment.

Even had Respondent's Answer lacked the degree of specificity preferred by Complainant, it may have been unethical for Respondent to answer in any other fashion. While the Rules of Practice instruct a respondent to explicitly admit, deny, or explain each material allegation of a complaint, the Model Rules of Professional Conduct and Federal Rules of Civil Procedure provide that a party *may not* admit or deny an allegation without sufficient information or evidence to do so.[14] The Federal Rules go so far as to permit a court to "impose an appropriate sanction on any attorney, law firm, or party that violate[s] the rule or is responsible for the violation."[15] Given that the present allegations occurred in China more than three years prior to the filing of the Complaint, it is unlikely that Respondent would have had the information and evidence necessary to provide a clear, specific, and definite admittance or denial without violating recognized ethical standards.

I find it inconceivable that Rule 1.136 was designed to afford parties an occasion to circumvent hearings via procedural tactics. As prior decisions have explained, "the requirement in the Rules of Practice that

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[13] Resp. & Objs. to Mot. for Adoption Decision & Order by Reason Default at ¶10.

[14] *Compare* 7 C.F.R. § 1.136(b)(1) (2013) (answer must "clearly admit, deny, or explain each of the allegations of the Complaint") *with* MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (1983) (an attorney "shall not knowingly . . . make a false statement of fact or law to a tribunal . . . or . . . offer evidence that the lawyer knows to be false") *and* FED. R. CIV. P. 11(b) (a party or representative "presenting to the court a pleading, written motion, or other paper . . . certifies that to the best of the person's knowledge, information, and belief . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and . . . the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a belief or lack of information").

[15] FED. R. CIV. P. 11(c)(1).

Respondents deny or explain any allegation of the Complaint and set forth any defense in a timely manner is necessary to enable USDA to handle its workload in an expeditious and economical matter."[16] Here, the method by which Respondent answered the Complaint does not hinder judicial efficiency. To the contrary, Complainant's attempt to evade a hearing on the basis of procedural technicalities does so. If, as is suggested by Respondent, Complainant's objective was to compel Respondent to settle by precluding the opportunity for a hearing, a motion for summary judgment might have been a more proper course of action.[17]

I have on several occasions expressed my "displeasure with the [Department's] attempt to 'end run' around the merits of the case with procedural maneuvers."[18] Such an approach is inconsistent with the judicial preference for adjudication and the disfavor of default judgments, and it offends notions of fairness when utilized to impede a

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[16] Noell, 58 Agric. Dec. 130, No. 98-0033, 1999 WL 11230, at *9 (U.S.D.A. Jan. 6, 1999).

[17] "A motion for summary adjudication carries the potential to dispose of an entire claim or portion of it with finality and without trial . . . . While the current rules do not specifically provide for either the use or exclusion of summary judgment, the Judicial Officer has consistently ruled that hearings are futile and summary judgment is appropriate where there is no factual dispute of substance." Peter M. Davenport, *The Department of Agriculture Rules of Practice: Do They Still Serve Both the Department's and the Public's Needs?*, 33 J. NAT'L ASS'N ADMIN. L.J. 567, 583 (2013). As little of the underlying facts in the case appear to be in dispute, the use of a motion for summary judgment would have required Respondent to come forward with its evidence to rebut that advanced by Complainant in support of its motion as once a moving party supports its motion, the burden shifts to the non-moving party, who may not rest upon mere allegation or denial in pleadings, but must set forth specific facts supported by documentary material showing there is a genuine issue for trial. T. W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F. 2d 626, 630 (9th Cir. 1987), Muck v. United States, 3 F. 3d 1378, 1380 (10th Cir. 1993).

[18] Ramos v. U.S. Dep't Agric., 68 Agric. Dec. 60, 74 (U.S.D.A. 2009) (citing Oberstar v. Fed. Deposit Ins. Co., 987 F.2d 494, 504 (8th Cir. 1993); Lion Raisins, Inc. v. U.S. Dep't Agric., 354 F.3d 1072, Case No. CV-F-04-5844 (E.D. Ca. May 12, 2005); *see also* Davenport, *supra* note 17, at 577 ("Despite the frequently expressed, traditional judicial preference for fundamental fairness of adjudicatory proceedings, the Department's reliance upon aggressive use of procedural rules to achieve resolution is generally successful, even where the Department's administrative law judges have sought to afford a respondent a hearing on the merits where they believe good cause existed.").

respondent's right to hearing.[19] Indeed, the Ninth Circuit has cautioned against "ignor[ing] the tenet that cases should be decided on their merits whenever possible" and "fail[ing] to consider the overall fairness of the proceedings given what [is] at stake."[20] Rather than dispose of proceedings on the basis of extraneous procedural issues, my fellow judges and I have repeatedly sought to "afford respondents a hearing on the merits where they felt there was good cause, noting the traditional preference for such disposition. To do otherwise loses sight of the basic tenet that fairness concerns should be paramount where quasi-criminal sanctions may be imposed."[21] As Complainant here requests a civil penalty of $290,000.00[22] for the loss of approximately 560 guinea pigs—a sum sufficiently large to constitute a "quasi-criminal" sanction—I will defer ruling on the motion seeking a default decision and schedule a hearing on the substantive issues.[23]

In deferring my ruling, I acknowledge that Complainant, as representative of the Department, has an obligation to initiate disciplinary proceedings in a fair and straightforward manner.[24] This is obviously consistent with the Model Rules of Professional Conduct,

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[19] "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." Oberstar v. Fed. Deposit Ins. Co., 987 F.2d 494, 504 (8th Cir. 1993).

[20] Lion Raisins, Inc., 66 Agric. Dec. at 541-42.

[21] Hamilton, 64 Agric. Dec. 1659, 1664-65 (U.S.D.A. 2005).

[22] While the value of the guinea pigs at the time of their flight is not readily available, current ads suggest a value of approximately $10-30 per animal.

[23] *See* Lion Raisins, Inc., 66 Agric. Dec. at 542 (holding that USDA Judicial Officer abused discretion in entering default judgment against respondent due to "minor deviation from the Rules of Practice with no showing of prejudice to the USDA"). "The refusal to allow the late answer . . . deprived Lion Raisins of the hearing to which it was entitled." *Id.*

[24] *See* Hamilton, 64 Agric. Dec. at 1662 ("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 . . . 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.").

which provide that attorneys have "a duty to use legal procedure to the fullest benefit of the client's case, but also a duty not to abuse legal procedure."[25]

ORDER

For the above reasons, it is ORDERED:

1. Complainant's Motion for Adoption of Decision and Order by Reason of Default is DEFERRED.

2. Respondent's Objections to the Complainant's Motion is also DEFERRED.

3. Respondent's Request for Oral Argument is DENIED.

4. This matter is set for oral hearing to commence at 9:00 AM Local Time on September 9, 2014 in the United States Department of Agriculture Courtroom, Room 1037 South Building, 1400 Independence Avenue, SW, Washington DC 20250 and will continue from day to day until concluded or recessed.

Copies of this Memorandum Opinion and Order shall be served upon the parties by the Hearing Clerk.

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[25] MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt (1983).

MISCELLANEOUS ORDERS & DISMISSALS

FEDERAL CROP INSURANCE ACT

ALVIN CLARK ATKINSON.
Docket No. 14-0061.
Order of Dismissal.
Filed April 22, 2014.

ADAM ATKINSON.
Docket No. 14-0062.
Order of Dismissal.
Filed April 22, 2014.

HORSE PROTECTION ACT

GARY OLIVER.
Docket No. 13-0113.
Order of Dismissal.
Filed January 17, 2014.

BRICE EDWIN "EDDIE" BAUCOM.
Docket No. 13-0019.
Order Dismissing Complaint.
Filed January 29, 2014.

CHAD BAUCOM.
Docket No. 13-0020.
Order Dismissing Complaint.
Filed January 29, 2014.

RANDALL JONES.
Docket No. 13-0021.
Order Dismissing Complaint.
Filed January 29, 2014.

JOSHUA CLAY MILLS.
Docket No. 13-0032.
Order Dismissing Complaint.
Filed February 6, 2014.

* * *

In re: NICHOLAUS PLAFCAN.[1]
Docket No. 13-0242.
Remand Order.
Filed April 18, 2014.

HPA – Administrative procedure – Remand.

Darlene M. Bolinger, Esq. for Complainant.
Thomas B. Kakassy, Esq. for Respondent.
Default Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.
Remand Order issued by William G. Jenson, Judicial Officer.

REMAND ORDER

On November 7, 2013, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] filed a Default Decision and Order: (1) concluding Mr. Plafcan violated 15 U.S.C. § 1824(2)(A)-(B); (2) assessing Mr. Plafcan a $2,200 civil penalty; and (3) disqualifying Mr. Plafcan for a period of one 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.[2]

The Hearing Clerk served Mr. Plafcan with the Chief ALJ's Default Decision and Order on February 10, 2014,[3] and on February 19, 2014, Mr. Plafcan filed a Petition to Reconsider the Chief ALJ's Default Decision and Order. On March 4, 2014, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed Complainant's Opposition to Petition to Reconsider. On March 4, 2014, Mr. Plafcan filed Appeal to Judicial Officer, and on March 11, 2014, the Administrator filed Complainant's Opposition Response to Appeal

[1] It appears that Mr. Plafcan spells his first name "Nicholas" (Affidavit of Nicholas Plafcan, dated February 19, 2014); however, as no motion to amend the caption of the case has been filed, I have retained the caption as it appears in the Complaint.
[2] Chief ALJ's Default Decision and Order at the second and third unnumbered pages.
[3] Domestic Return Receipt for article number [redacted] 7203.

Petition. On March 14, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon my review of the record, I find the Hearing Clerk did not transmit Mr. Plafcan's Petition to Reconsider the Chief ALJ's Default Decision and Order to the Chief ALJ for his consideration. Therefore, I remand this proceeding to the Chief ALJ to provide him an opportunity to consider and rule on Mr. Plafcan's February 19, 2014, Petition to Reconsider.

My consideration of Mr. Plafcan's timely filed March 4, 2014, Appeal to Judicial Officer is held in abeyance pending the Chief ALJ's consideration of and ruling on Mr. Plafcan's Petition to Reconsider the Chief ALJ's Default Decision and Order.

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ORGANIC FOODS PRODUCTION ACT

KRIEGEL, INC. & LAURANCE KRIEGEL.
Docket No. 14-0027.
Decision and Order Dismissing Petition for Appeal.
Filed January 17, 2014.

PLANT QUARANTINE ACT

UNITED CONTINENTAL HOLDINGS, INC.
Docket No. 14-0063.
Order of Dismissal.
Filed June 17, 2014.

CONTINENTAL AIRLINES, INC.
Docket No. 14-0065.
Order of Dismissal.
Filed June 17, 2014.

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Decisions and Orders] with the sparse case citation but without the body of the order. Default Decisions and Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

ANIMAL WELFARE ACT

KIRBY VANBURCH.
Docket No. 14-0084.
Default Decision and Order.
Filed June 27, 2014.

VANBURCH PRODUCTIONS, LLC, d/b/a KIRBY VANBURCH THEATRE.
Docket No. 14-0085.
Default Decision and Order.
Filed June 27, 2014.

FEDERAL MEAT INSPECTION ACT

BROOKSVILLE MEAT FABRICATION CENTER, INC.
Docket No. 14-0045.
Default Decision and Order.
Filed March 25, 2014.

DARRYL KEITH WRIGHT.
Docket No. 14-0046.
Default Decision and Order.
Filed March 25, 2014.

HORSE PROTECTION ACT

BRADLEY DAVIS.
Docket No. 13-0344.
Default Decision and Order.
Filed January 15, 2014.

DEFAULT DECISIONS

CHRISTOPHER ALEXANDER.
Docket No. 13-0370.
Default Decision and Order.
Filed February 19, 2014.

CONSENT DECISIONS

ANIMAL HEALTH PROTECTION ACT

United Airlines, Inc.
Docket No. 14-0064.
Filed June 17, 2014.

ANIMAL WELFARE ACT

Jammbas Ranch Tours, Inc.
Docket No. 13-0248.
Filed January 7, 2014.

Kenneth H. Schroeder.
Docket No. 13-0362.
Filed January 15, 2014.

Beverly Ann Fields, an individual D/B/A B & B Kennel.
Docket No. 14-0023.
Filed January 15, 2014.

Real Pets Corporation.
Docket No. 14-0001.
Filed March 6, 2014.

Rachel Kafka.
Docket No. 13-0202.
Filed March 11, 2014.

Gloria Lee Gilbert, an individual D/B/A A Little Petting Zoo and All Events Entertainment.
Docket No. 13-0294.
Filed March 19, 2014.

Roger Gilbert, an individual D/B/A A Little Petting Zoo and All Events Entertainment.
Docket No. 13-0295.
Filed March 19, 2014.

CONSENT DECISIONS

Jeffrey W. Ash, an individual D/B/A Ashville Game Farm; and Ashville Game Farm, Inc., a New York corporation.
Docket No. 12-0296.
Filed April 15, 2014.

The University of Alaska Fairbanks, a public educational institution.
Docket No. 14-0082.
Filed June 5, 2014.

FEDERAL MEAT INSPECTION ACT

Mongiello Italian Cheese Specialties, LLC, D/B/A Formaggio Italian Cheese Specialties.
Docket No. 14-0032.
Filed February 12, 2014.

HORSE PROTECTION ACT

Robert Jones.
Docket No. 13-0369.
Filed January 3, 2014.

Tim Gray, D/B/A Southern Comfort Facilities.
Docket No. 13-0296.
Filed January 9, 2014.

Jack G. Heffington.
Docket No. 12-0199.
Filed January 14, 2014.

Bill Gray.
Docket No. 13-0297.
Filed January 14, 2014.

James Wayne Dean, D/B/A Wayne Dean Stables.
Docket No. 13-0231.
Filed January 23, 2014.

Sandra L. Shumate-Tysor.
Docket No. 13-0298.
Filed January 23, 2014.

Kasey Kesselring.
Docket No. 13-0250.
Filed January 24, 2014.

Wilsene Moody.
Docket No. 12-0613.
Filed February 6, 2014.

O & W Moody, Ltd., Co.
Docket No. 12-0613.
Filed February 10, 2014.

McCleish C. Benham.
Docket No. 13-0345.
Filed February 12, 2014.

Richard Evans.
Docket No. 11-0214.
Filed March 10, 2014.

David Mullis & Rebeca Mullis.
Docket No. 13-0080.
Filed March 11, 2014.

Mark West.
Docket No. 14-0058.
Filed March 11, 2014.

Jeanne Ann Rea.
Docket No. 13-0253.
Filed April 17, 2014.

CONSENT DECISIONS

Dale Watts.
Docket No. 13-0254.
Filed April 17, 2014.

Pioneer Stables, LLC.
Docket No. 13-0255.
Filed April 17, 2014.

Nancy Groover.
Docket No. 14-0013.
Filed April 28, 2014.

Anthony D. Allen, D.B.M.
Docket No. 14-0081.
Filed May 2, 2014.

Samuel Martin & Rae Martin, D/B/A Rae Martin Stables.
Docket No. 13-0283.
Filed May 6, 2014.

William Bradley Beard.
Docket No. 13-0349.
Filed May 6, 2014.

Tom Ware.
Docket No. 13-0024.
Filed June 3, 2014.

Franklin LaRue McWaters.
Docket No. 12-0603.
Filed June 23, 2014.

PLANT PROTECTION ACT

Librado Pina, Inc.
Docket No. 14-0044.
Filed March 26, 2014.

United Airlines, Inc.
Docket No. 14-0064.
Filed June 17, 2014.

AGRICULTURAL COMMODITIES PROMOTION ACT

DEPARTMENTAL DECISIONS

In re: RESOLUTE FOREST PRODUCTS.
Docket No. 12-0040.
Decision and Order.
Filed April 30, 2014.

ACPA.

Elliot J. Feldman, Esq.; David B. Rivkin, Jr., Esq.; Michael S. Snarr, Esq.; and Andrew M. Grossman, Esq. for Petitioner.
Frank Martin, Jr., Esq. and Brian T. Hill, Esq. for Complainant.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

Decision Summary

The Petition of Resolute Forest Products is DENIED, because the Softwood Lumber Order and its authorizing statute, as-written and as-administered, are in accordance with law. The authorizing statute is The Commodity, Promotion, Research, and Information Act of 1996, 7 U.S.C. §§ 7411-7425. The Order's full name is Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order. 7 C.F.R. Part 1217. The Order's nickname is "Check-off." The Softwood Lumber Order is a federal regulation; the final rule to implement the program was published in the Federal Register on August 2, 2011. 76 Fed. Reg. 46185 (Aug. 2, 2011). RX 35. 7 C.F.R. Part 1217.

Parties and Pleadings

The Petitioner is Resolute Forest Products (formerly "AbitibiBowater, Inc."), an American company, incorporated under the laws of Delaware ("Resolute" or "Petitioner"). Resolute filed the "First Amended Petition to Terminate or Amend USDA's Softwood Marketing Order or, In the Alternative, to Exempt Petitioner from USDA's Softwood Marketing Order" on June 22, 2012. The Respondent is the Administrator, Agricultural Marketing Service, United States Department of Agriculture

("AMS" or "Respondent"). AMS filed the "Respondent's Answer To Petitioner's First Amended Petition" on July 3, 2012. For additional procedural history (exhibits, briefs, and witnesses), *see* Appendix A.

The Appointments Clause

The Petitioner Resolute asks me to find the Commodity, Promotion, Research, and Information Act of 1996 unconstitutional on its face. Petitioner Resolute argues that, IF the majority voting in a referendum voted to suspend or terminate an order[1] that had been authorized under the Commodity, Promotion, Research, and Information Act of 1996 (*see* 7 U.S.C. § 7421), private parties would impermissibly be making the decision. Under the Appointments Clause of Article II of the Constitution, states the Petitioner Resolute, such a significant decision should be made by one whose authority comes from having been appointed by the President. Petitioner Resolute reasons that since the statute binds the Secretary of Agriculture by the majority decision of the private parties voting in the referendum, the Secretary is deprived of discretion.

Petitioner Resolute is correct in stating that, if the Secretary determines that an order or a provision of an order is not favored by persons voting in a referendum conducted under section 7417 (7 U.S.C. § 7417), the Secretary is required to suspend or terminate: "the Secretary shall . . ." 7 U.S.C. § 7421. Does the Secretary's required acquiescence to a referendum majority vote to suspend or terminate an order or a provision of an order constitute an impermissible delegation of authority? I say no, for two reasons. First, the Secretary of Agriculture has (a) the authority to control the referendum process; (b) the discretion to determine whether, indeed, there is a majority decision of the private parties voting in the referendum to suspend or terminate an order or a provision of an order; and (c) the authority to implement the suspension or termination that he, the Secretary, would be required to implement. 7

[1] No such vote has yet occurred regarding the Softwood Lumber Order. If private parties were to decide through a referendum to suspend or terminate the Softwood Lumber Order, and the Secretary of Agriculture were to suspend or terminate the Softwood Lumber Order based on that referendum majority vote, Petitioner Resolute might find the wording of The Commodity, Promotion, Research, and Information Act of 1996 in that regard to be acceptable.

U.S.C. § 7421. Second, The Commodity, Promotion, Research, and Information Act of 1996 has tightly controlled the entire process, reasonably limiting the Secretary's discretion: it is reasonable that all concerned by a marketing order will experience a predictable outcome if there is a majority decision of the private parties voting in the referendum to suspend or terminate an order or a provision of an order. *See also* AMS Brief filed June 7, 2013, at pp. 12-17.

The Secretary's Discretion in Issuing an Order

The Petitioner Resolute asks me to find that the Softwood Lumber Order was not properly developed because, the Petitioner Resolute states, among other things, following approval in the referendum (7 U.S.C. § 7417), the Secretary of Agriculture failed to use his discretion as directed in 7 U.S.C. § 7413 to decide whether to implement the Softwood Lumber Order.

Petitioner Resolute is correct in stating that the Secretary uses his discretion in the issuance of orders under The Commodity, Promotion, Research, and Information Act of 1996 because he must determine whether "a proposed order is consistent with and will effectuate the purpose of this subchapter." 7 U.S.C. § 7413. Where I disagree with Petitioner Resolute is that if, while developing the proposed order, the Secretary has already evaluated whether the "proposed order is consistent with and will effectuate the purpose of this subchapter," I think the Secretary may, without renewing his evaluation, proceed to implement the proposed order, especially following approval in a referendum, such as did occur with the Softwood Lumber Order. In other words, the Secretary's exercise of discretion came before the referendum; if there were no change of circumstances during the referendum, the Secretary of Agriculture, in his discretion, was free to choose to agree with the majority vote in support of the proposed Softwood Lumber Order. 7 U.S.C. § 7413.

Subpoena Duces Tecum

The issues concerning Petitioner Resolute's Subpoena Duces Tecum were decided at the hearing level by the USDA Judicial Officer, an authority higher than the administrative law judge. (I certified the

question to the Judicial Officer; *see* Ruling on Certified Question, issued January 22, 2013, ALJX 2). The Subpoena Duces Tecum that I issued, ALJX 1, I then quashed, pursuant to the Judicial Officer's ruling. Tr. 12. Petitioner Resolute has preserved on appeal to the Judicial Officer the issues concerning the Subpoena Duces Tecum. *See* Pet'r Resolute's April Br., esp. 88-92.

What Constitutes Majority Vote?

The Commodity, Promotion, Research, and Information Act of 1996 provides for approval of an order in a referendum. 7 U.S.C. § 7417. If an initial referendum is undertaken, as was done for the Softwood Lumber Order, the referendum is done "among persons to be subject to an assessment" . . . 7 U.S.C. § 7417(a)(1). These persons were engaged during a representative period determined by the Secretary in the production OR handling OR importation of the agricultural commodity. 7 U.S.C. § 7417(a)(1). The Secretary of Agriculture chose the option for the initial referendum that required approval "by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity" (softwood lumber). 7 U.S.C. § 7417(e)(3); 76 Fed. Reg. 46185, 46193 (August 2, 2011); Tr. 637.

Does a "majority" of persons as contemplated by the Act mean (a) a majority of persons-to-be-subject-to-an-assessment? or (b) a majority of persons-to-be-subject-to-an- assessment who voted? Does a "majority" of the volume of softwood lumber as contemplated by the Act mean (a) a majority of the-volume-of-softwood-lumber-to-be- subject-to-an-assessment? or (b) a majority of the-volume-of-softwood-lumber-to-be-subject-to-an-assessment that "was voted"?

Petitioner Resolute is certain of the Act's meaning regarding what constitutes majority vote. I do not share Petitioner Resolute's certitude, mindful that Sonia Jimenez testified that it would be impossible to know the total softwood lumber volume. Tr. 421. Sonia Jimenez is the Director, Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture. Ms. Jimenez was on the witness stand for about 10 hours (about 3 hours the first day; about 6 hours the second day; and about an hour the third day). Ms. Jimenez testified in part as follows. Tr. 420-21.

> Judge Clifton: Do the ballots specify -- tell me what the ballots specify. When the ballot comes back, what does it say about volume?
>
> Ms. Jimenez: It has a blank for the voter to write down the volume that they produce and shipped, or imported, for the representative period.
>
> Judge Clifton: Okay. So until you get the ballots, you can't do this calculation.
>
> Ms. Jimenez: Correct.
>
> Judge Clifton: Okay. All right. Mr. Feldman, go ahead.
>
> Mr. Feldman: Do you know what the volume of the agricultural commodity is in this case; the total volume of the commodity?
>
> Ms. Jimenez: No.
>
> Mr. Feldman: Did you ever know?
>
> Ms. Jimenez: It's impossible for us to know the total volume.
>
> Mr. Feldman: So do you know how much of the agricultural commodity, by volume, was exempted?
>
> Ms. Jimenez: No, I do not.

Tr. 420-21.

Petitioner Resolute's evaluation is expressed in the following quotation, with footnotes omitted, from Petitioner Resolute's April Brief, pages 64-65:

> The statute specifies that the "majority of those persons voting for approval" must "represent a majority of the volume of the agricultural commodity." The statute does not provide for the "majority of those persons voting for approval" to "represent a majority of the volume of the agricultural commodity of those voting for approval." The difference in language and consequent meaning is plain and unambiguous, and the agency's non-conforming interpretation is due no deference. [footnote omitted]
>
> USDA never established whether the "majority of those persons voting for approval" also "represent[ed] a majority of the volume of the agricultural commodity." Instead, following the proposal and preference of the proponent group, USDA concluded that the "majority of those persons voting for approval" represented the majority of the commodity of those voting. [footnote omitted]
>
> USDA officials admitted at the hearing that they still, nineteen months later, did not know whether the persons voting for approval also represented a majority of the volume of the agricultural commodity as required by the statute. [footnote omitted]
>
> USDA could not lawfully accept the results of the referendum without satisfying the requirements of the statute. Whether the majority of the volume of the agricultural commodity was represented in the vote in favor of the check-off was unknown when the referendum was conducted, after the votes were counted, after the Final Rule was published, after the check-off was implemented, after assessments began being collected, and still. Acceptance of the referendum results without knowledge of the volume of the agricultural commodity represented by the vote is contrary to law. Implementation without satisfying the criteria of 7 U.S.C. § 7417(e)(3) is contrary to law.

from Pet'r Resolute's April Br. 64-65.

To the contrary, states AMS: The Softwood Lumber Order was implemented in the referendum vote by the most stringent method that can be used to approve an Order under the Commodity, Promotion, Research, and Information Act of 1996. *See* 7 U.S.C. § 7417(e)(3); 76 Fed. Reg. 46185, 46193 (Aug. 2, 2011); RX 35; 7 C.F.R. Part 1217.

The Secretary's interpretation is that a "majority" of persons as contemplated by the Act means a majority of persons-to-be-subject-to-an- assessment who voted; a "majority" of the volume of softwood lumber as contemplated by the Act means a majority of the-volume-of-softwood-lumber-to-be-subject-to-an-assessment that "was voted". The Secretary's interpretation of "majority" as contemplated by the Act is reasonable, in part because there is no other way to determine majority. Using his interpretation, the Secretary reported the referendum results in the Final Rule implementing the Softwood Lumber Order, including in pertinent part the following, paragraph 14.

Quoting from the Final Rule in the Federal Register (76 Fed. Reg. 46185, 46190 (Aug. 2, 2011), RX 35, 7 C.F.R. Part 1217:

> Entities that domestically ship or import less than 15 million board feet are exempt along with shipments exported outside of the United States. No entity will pay assessments on the first 15 million board feet domestically shipped or imported. The purpose of the program is to strengthen the position of softwood lumber in the marketplace, maintain and expand markets for softwood lumber, and develop new uses for softwood lumber within the United States. A referendum was held May 23 through June 10, 2011, among eligible domestic manufacturers and importers to determine whether they favor implementation of the program prior to it going into effect. Sixty-seven percent of those voting in the referendum, representing 80 percent of the volume of softwood lumber represented in the referendum, favored implementation of the program.

76 Fed. Reg. 46185, 46190 (Aug. 2, 2011). RX 35. 7 C.F.R. Part 1217.

Choice of the *De Minimis* Volume

Petitioner Resolute complains that AMS encouraged the proponent group to use a *de minimis* volume exemption to keep persons from voting against the Softwood Lumber Order. Petitioner Resolute complains that the referendum might have yielded a different result if more persons had voted, especially those persons who were not eligible to vote because their volume was less-than-15-million-board-feet during 2010 (the representative period chosen by the Secretary). Even if I were to assume Petitioner Resolute's arguments to be true, I would find that the Secretary has done nothing contrary to law, nothing arbitrary and capricious.

Petitioner Resolute does not accept 2010 as representative, when softwood lumber volumes were extraordinarily low, in part because many persons whose volumes were less-than-15-million-board-feet in 2010 would likely generate higher volumes in subsequent years and would pay assessments, after having been not eligible to vote.

Mr. Richard Garneau is the President and CEO of Resolute Forest Products, the Petitioner. Mr. Garneau testified in part as follows. Tr. 696-700.

> Mr. Feldman: Could you explain what a board foot is and how much 15 million board feet represent?
>
> Mr. Garneau: Yes. Well, I can get -- it's easy. It's 1 inch in thickness by 1 foot long. It's probably like that. It's almost 1 foot wide. So, by using this as an example you can have pretty good idea of what is a board feet of lumber.
>
> Mr. Feldman: And all the manufacturers and the importers of record, all the manufacturers in the United States producing under 15 million board feet were not permitted to vote in this referendum, is that correct?

Mr. Garneau: It's my understanding, yes.

Mr. Feldman: And in fact you were associated with one company that could not vote, that was under that threshold, right?

Mr. Garneau: Yes.

Mr. Feldman: And a typical house, how many houses could you build with 15 million board feet?

Mr. Garneau: Well, on average, and I think there are stats on this. A 2,400 square foot house needs about fifteen or sixteen thousand board feet. So, with 15 million you can build about 1,000 houses.

Mr. Feldman: About 1,000 houses. So enterprises producing enough wood to build 1,000 houses were exempted.

Mr. Garneau: You're correct.

Mr. Feldman: And therefore could not vote.

Mr. Garneau: You're correct.

Mr. Feldman: The exemption was made the same for domestic manufacturers and for importers, 15 million board feet applied to both. Is that the same thing for both?

Mr. Garneau: No, it's not the same thing. We have the company that just to give you an example and show our voice. So we have a company, we have an equity position in this company. And it is -- this company is an importer of record. But in 2010 because the demand was so depressed they were below the threshold, below the 15 million threshold and could not vote. But the

sawmill itself or this entity is -- has the capacity to produce about 17 million, 17 million board feet but was not allowed to vote because in 2010 they were below the 15 million exemption.

Mr. Feldman: Now, this use of 2010. You've been sitting through this hearing so you've heard discussion about the representative period. Could you describe the condition of the industry in the period from 2007 through 2010?

Mr. Garneau: Well, I can give you if I may a clearer picture. I think you have to go to 2005. That was the last year before the implementation of the SLA consumption of the national number in the U.S. was over 60 billion board feet. And by 2010 was about 33 or 34. That's from memory but about at that level. And it went down every year. So in 2007, `08, `09 and `10 was if I remember correctly one of the lowest in terms of consumption.

Mr. Feldman: Lowest in consumption during that period and one of the lowest in consumption over what period of time?

Mr. Garneau: Well, since basically I was born, since the end of the Second World War.

Mr. Feldman: So, the Department shows 2010 to be a representative period. And it is the year which may have been the lowest consumption since the Second World War.

Mr. Garneau: Yes. And I think that based on our own equity ownership in this company it's -- if you go back this company was exporting more than the exemption. So if the period would have ended different this company would not have been declared non-eligible.

Tr. 696-700.

The Secretary of Agriculture chose less-than-15-million-board-feet as the *de minimis* volume. *See* 7 U.S.C. § 7415(a) (Exemptions).Those persons whose volume during "the representative period" was regarded as *de minimis* would not vote in the referendum, because they would not, so long as their volume did not increase to a volume above *de minimis*, be subject to an assessment. The voting is done "among persons to be subject to an assessment" . . . 7 U.S.C. § 7417(a)(1).

The Secretary of Agriculture made a practical choice when he divided those persons who would be subject to an assessment (volume of 15 million board feet or higher) from those persons who would not be subject to an assessment (volume of less-than-15-million-board-feet). The practical choice was based on a calculation that sufficient assessment income to support an effective softwood lumber order would be generated if a 15 million board foot exemption were used. So the Secretary chose less-than-15-million-board-feet to be the *de minimis* volume. The Secretary extended this same exemption to those persons who would be assessed under the program: the first 15 million board feet would not be assessed.

Marketing orders typically include some exemption: often the smallest operators are not required to comply with marketing order requirements. Exemption from paying assessments under the Softwood Marketing Order is based on volume (not value, not weight, not quality). The Act specifies volume. 7 U.S.C. § 7415. [A board foot is a board foot: Petitioner Resolute is not required to pay a higher assessment based on the quality of the lumber it imports, such as black spruce from central Canada from the boreal forest.] The Secretary had the authority to choose the volume of less-than-15-million-board-feet to be the *de minimis* quantity. 7 U.S.C. § 7415(a). The Secretary's choice (based on a projection that, per entity, that volume of softwood lumber could be exempt from assessment, and there would remain adequate revenue from assessments to operate the order), is reasonable and entirely within the Secretary's discretion. 7 U.S.C. § 7415. Petitioner Resolute would apparently prefer that *de minimis* be very small, or inconsequential, or at least not exclude so many entities from voting. Such a preference is inadequate to challenge the validity of the Secretary's choice.

AGRICULTURAL COMMODITIES PROMOTION ACT

The Representative Period

Petitioner Resolute proved that 2010 was a year in which softwood lumber production was down. *See* ¶¶ 16 & 17. Petitioner Resolute proved that using 2010 as the Representative Period kept ballots from being sent to many entities that would probably be assessed in future years (by virtue of increasing volumes). The Secretary chose 2010 because it was recent. [The voting occurred in 2011.] (The one-year Representative Period should not be confused with the three-year period used for calculations required by the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA); *see* ¶ 22.) The choice of a recent year was reasonable and entirely within the Secretary's discretion. 7 U.S.C. § 7417. The Secretary has the authority to determine the representative period. 7 U.S.C. § 7417(a).

Impact on Small Entities

The Secretary of Agriculture complied with the requirements of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA), ensuring that small businesses would not be disproportionately burdened by the Softwood Lumber Order. 76 Fed. Reg. 46185, 46189 (Aug. 2, 2011). RX 35. 7 C.F.R. Part 1217. Some small entities [as defined by the Small Business Administration in 13 C.F.R. Part 121], are subject to assessment (as is generally true, in my experience, with marketing orders). But the impact on the small entities [as defined by the Small Business Administration] is less burdensome because neither they nor any other entity pays assessments on the first 15 million board feet shipped or imported. Some small entities have a low enough volume that they will pay no assessments: entities that ship or import less than 15 million board feet are exempt along with shipments exported outside of the United States. Not all entities considered small in accordance with the Small Business Administration in 13 C.F.R. Part 121 need be exempt. The *de minimis* volume need not match what is considered a small entity in accordance with the Small Business Administration.

Petitioner Resolute proved a disparity between domestic entities (considered small under the Small Business Administration guidelines if shipping less than 25 million board feet per year), and importer entities.

Importers of fewer than 15 million board feet may, in actuality, be large companies. Mr. Garneau testified that a Canadian sawmill, one with which he is familiar, generating 70 million board feet per year (not a small entity) could have an import volume of less than 15 million board feet per year. Tr. 790. (Importers of record, first handlers, subject to assessment, are deemed to be manufacturers through the application of 7 C.F.R. § 1217.14. Thus, 7 C.F.R. § 1217.11 must be read together with 7 C.F.R. § 1217.14. *See* Tr. 909-16.) When Petitioner Resolute ships to the United States, it is the importer of record for almost all of its lumber mills (except for some volume sold through the wholesalers). Tr. 792. Another disparity arises from the variety of business structuring: if one entity operates 3 sawmills, that entity's volume is the volume of all 3 sawmills combined, which, hypothetically, could keep it from being a small entity. The calculation of whether a small entity is involved would be different if each of those sawmills is operated by a different entity: hypothetically, each of the 3 might be considered a small entity. The comparison of one softwood lumber business to others is neither precise nor exact. The Secretary, to meet his obligation to determine the impact on small entities, need concern himself only with domestic entities; the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA) applies to businesses within the United States. The Secretary uses the tax I.D. number regarding assessments and exemptions. Tr. 1226. The Secretary complied with the Regulatory Flexibility Act (RFA).

Referendum Ballots

Resolute proved, through the testimony of Dr. Anna Greenberg, that survey techniques that include follow-up and reminders will probably yield a higher response. Dr. Greenberg's Ph.D. is in political science, and she specialized in political behavior, data analysis and survey research methodology at the University of Chicago. Tr. 799. Dr. Greenberg has extensive work experience using census and survey and voting methodology, and I accepted Dr. Greenberg as an expert witness in census, survey, and voting methodology. Tr. 802. Dr. Greenberg characterizes the referendum as a census. She explained that a census is a kind of survey where you gather information from every single unit, could be a person, could be a company, in the population that you're trying to represent. Tr. 804. Dr. Greenberg explained that one can look at the response coming back in from ballots sent out, to analyze the

characteristics of the ballots returned and the characteristics of those not returned: Is there some group that's systematically not returning their ballots? Tr. 812-13. Dr. Greenberg testified in part, as follows. Tr. 812-16.

> Mr. Feldman: How do you go about making sure that the results are representative?
>
> Dr. Greenberg: Well, when you get the results back, and in the case of a census it's actually pretty easy because you know who you've sent the ballots to. You look at the response coming in and you look at it and say well, I know there are known characteristics of this population. A certain percentage lives in a certain part of Canada or the U.S. Any range of different things you might know about these companies. And then you can see as the ballots are returned where are they coming from. And you can see is there some bias in the return rate and is it systematic. Is there some group that's systematically not returning their ballots.
>
> Mr. Feldman: Is there an expectation in the OMB guidelines at least as to being able to replicate the results?
>
> Dr. Greenberg: Yes. The OMB says that you should disclose enough information about your data collection so that the results can be replicated.
>
> Mr. Feldman: And have results been published or made available here that would enable you to replicate these results?
>
> Dr. Greenberg: No.
>
> Mr. Feldman: What kinds of information are missing?
>
> Dr. Greenberg: Well, very narrowly, just focusing on the 311 you would need to know who those ballots were

mailed to. If you -- there is a part -- what they say in the OMB guidelines is there may be some issues around confidentiality or promises of anonymity so you actually could have other information that would help you. So knowing the percentage that returned that were from say the west or the east or the percentage that returned that was from -- were importers or domestic producers. So even if you didn't have the specific names if you knew something about the characteristics of the respondents you wouldn't necessarily be able to replicate it but at least if you were going to go out and make your own list you'd have a sense of what you needed to be doing.

Mr. Feldman: And would it be important to know who returned the ballots?
Dr. Greenberg: Yes.

Mr. Feldman: Why?

Dr. Greenberg: Because you -- well, first if you want to replicate the study you need to know who it was sent to. And it would be helpful to know who returned it so that you can understand the kinds of biases, the non-response bias. If it's systematic you want to make sure that you correct for the non-response bias.

Mr. Feldman: How would you know whether it's systematic?

Dr. Greenberg: You can look for patterns. We usually know a lot about our populations. You know, there's very little new research under the sun. And so you look at the characteristics. And there are certain things that are known. You know from your list how many companies are from -- are importers and how many are domestic producers. So you know when the data come back if they're matching up or not.

Tr. 812-16.

AMS does not agree that the referendum was a census. Neither do I. One technique for better response in a census is to extend the time for response (keep the survey open) and then make contact with those who did not respond (go back into the field and gather more data) in order to a more complete overall response. Tr. 806-08. For the referendum, those techniques would have required departure from the announcement of the referendum (published in the Federal Register) and thus could have made the voting results suspect. Proposed rule and referendum order, 76 Fed. Reg. 22757, especially 22757 (April 22, 2011), RX 16. Dr. Greenberg observed that the announcement of the referendum was not short and not at the top and not easy to understand. Tr. 826-30. Dr. Greenberg observed, " . . . it really buries the lead and it buries the fact that there's going to be a referendum to the bottom and you've got to wade through this. And certainly the Federal Register, it would take a long time to understand what was going on from that." Tr. 830. *See* RX 16, Proposed rule and referendum order, 76 Fed. Reg. 22757, especially 22757 (April 22, 2011). I disagree with Dr. Greenberg. Information published in the Federal Register is difficult, yes, but here the information is clear from the very first column! The dates of the voting period are very easy to see: "**DATES**: The voting period is May 23 through June 10, 2011." Above that, very clearly in about six sentences, at the very beginning of the Federal Register publication, is clearly and concisely stated: what the rule proposes; that it would be financed by an assessment; what the assessment rate would be; who would pay it; and that "(t)he program would be implemented if it is favored by a majority of those voting in the referendum who also represent a majority of the volume of softwood lumber represented in the referendum."

The press release, RX 18, also dated April 22, 2011, is clear and sufficiently "urgent."

The Secretary was not required to conduct any referendum initially. If no referendum had been conducted initially, a referendum would have been required not later than three (3) years after assessments first began. 7 U.S.C. § 7417(b). Assessments first began January 1, 2012. 76 Fed. Reg. 46185, esp. 46185 (Aug. 2, 2011); RX 35. 7 C.F.R. Part 1217. Because the Secretary conducted an initial referendum, a subsequent referendum is required not later than seven (7) years after assessments

first began. 7 U.S.C. § 7417(c). If Petitioner Resolute is not content to wait for 7 years from January 1, 2012, there is the option in 7 U.S.C. § 7417(c): The Secretary shall conduct a subsequent referendum - - (3) at the request of 10 percent or more of the number of persons eligible to vote under subsection (b)(1) of this section.

Self Help

The degree to which the Softwood Marketing Order is a "self help" program is debatable and goes to the issue of whether the proponents, including the Blue Ribbon Commission, may have misled those who would later vote in a referendum. In describing orders such as the Softwood Marketing Order, AMS uses the term "self-help"; the following excerpt is from the AMS Brief, filed June 7, 2013, Introduction, at pages 1-2.

> The commodity check-off is a self-help, government speech concept, for strengthening a commodity industry's position in the market place to increase demand for its commodity, and to develop demand in new and existing markets and new uses for a commodity. Commodity promotion programs have a long history dating back as far as 1880, when states enacted laws to enable commodity groups to receive state funds to promote commodities. Because the amount of money from states was modest, commodity programs organized by various commodity groups began as voluntary, thus creating the "free rider" problem where persons who failed to pay assessments reaped the benefits of the program. The programs therefore did not achieve their full potential. As the concept of generic promotion programs evolved, Congress began enacting specific commodity statutes, and in 1996, it enacted a generic statute entitled the Commodity, Promotion, Research, and Information Act of 1996, 7 U.S.C. 7411-7425.[2] Under this statute any agricultural commodity

[2] *See Commodity Advertising & Promotion*, edited by Kinnucan, Thompson, and Chang, 1992 Iowa State University Press, Ames, Iowa 50010; *see also* 7 U.S.C. §§ 7411-7425. [Original citation as appears in Brief; no changes made by the Editor.]

> group can submit a proposed Order to the Secretary, and if the Secretary finds that it is consistent with and will effectuate the purpose of the statute, the Secretary will publish the proposed Order in the *Federal Register* and give due notice and opportunity for public comment on the proposed Order.

AMS Br., filed June 7, 2013, Introduction, at 1-2.

Proponent Groups' Statements Prior to Referendum

Promotional materials prepared and distributed prior to the Referendum by the Blue Ribbon Commission, a proponent group, contained statements that are wrong. *See, for example*, PX 10; Tr. 247-56. Even though the ideas and the objectives and the drafting and the projects may arise from private parties in the softwood lumber industry, the U.S. Secretary of Agriculture oversees and tightly controls the Softwood Lumber program and has veto power; and the authority to collect the assessments comes from the U.S. Government because the assessments are taxes, or government-compelled subsidies, or at least a form of government regulation. Compelled support of government - - even those programs of government one does not approve - - is of course perfectly constitutional, as every taxpayer must attest:

> "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.

[*Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000)].
Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 559 (2005), cited in *Gerawan Farming, Inc.*, 67 Agric. Dec. 45, 56 (U.S.D.A. 2008),

available at http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/gerawan.pdf.

The Blue Ribbon Commission and other industry groups would soon learn how controlling the Secretary is required to be. For example, the "reTHINK WOOD" proposed communication was edited by the Secretary (RX 50, p. 189). Edits included striking language comparing construction using wood, to construction using steel, or construction using concrete, because the proposed language could be perceived as disparaging to other commodities. RX 50, p. 189. Ms. Maureen Pello is a Marketing Specialist, Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture. Ms. Pello testified in part as follows. Tr. 1117-19.

> Mr. Martin: Ms. Pello.
>
> Ms. Pello: Yes.
>
> Mr. Martin: If you look at the same page Judge Clifton asked you to, Page 189 -
> [RX 50]
>
> Ms. Pello: Yes.
>
> Mr. Martin: - didn't you also make some other changes to that and would you explain for the record why you made those changes?
>
> Ms. Pello: Yes. In the fourth paragraph under Wood is Renewable, there was a sentence that was provided to me that said unlike other products that deplete the earth's resources, wood is the only major building material that grows naturally and is renewable. And I had suggested taking out language that talked about other products depleting the earth's resources, and also language where you're making a statement that it's absolute that wood is the only building material. Because, you know, sometimes hard absolutes like that are difficult to prove.

So, I suggested, you know, staying away from that absolute.

Mr. Martin: And how about the first sentence? What was your rationale behind that change?

Ms. Pello: Oh, North American Wood Products?

Mr. Martin: "Wood is renewable unlike other products that deplete the earth's resources," I see that's stricken.

Ms. Pello: Yes. You know, that could be perceived as disparaging to other commodities. So, I had suggested taking that out and just stating the positive. Wood grows naturally and is renewable.

Mr. Martin: And, Ms. Pello, if you look at the next paragraph entitled "Using Wood Helps Induce [*sic* - - should read Reduce, Tr. 1118] Environmental Impact" --

Ms. Pello: Yes.

Mr. Martin: - I see you also struck out some language in there. Would you explain for the record so it's clear, why that language was stricken?

Ms. Pello: Yes, that language would have read "Wood products are better for the environment than steel or concrete." And, again, that could be perceived as being disparaging to their competing industries. So, I suggested taking out that comparison and just stating wood products need less energy across their life cycle. They're responsible for less air and water pollution.

Mr. Martin: And did you make any other changes in this document?

Ms. Pello: Yes. Do you want me to go through them all?

> Mr. Martin: No, I don't think it's necessary. I just want the record to be clear that this document contained a number of changes.

Tr. 1117-19.

Industry groups lose some autonomy when regulated by a marketing order; they gain the enforceability of assessments.

Findings of Fact

1. Resolute Forest Products (formerly "AbitibiBowater, Inc.") is an American company, incorporated under the laws of Delaware.

2. When Resolute Forest Products ships softwood lumber to the United States, it is the importer of record for almost all of its lumber mills (except for some volume sold through the wholesalers). Tr. 792. Resolute Forest Products thereby subjects itself to the Softwood Lumber Order.

3. The Softwood Lumber Order and its authorizing statute, as-written and as-administered, are in accordance with law. The authorizing statute is The Commodity, Promotion, Research, and Information Act of 1996, 7 U.S.C. §§ 7411-7425. The Order's full name is Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order. 7 C.F.R. Part 1217.

Conclusion

In light of *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and *Gerawan Farming, Inc.*, 67 Agric. Dec. 45 (U.S.D.A. 2008), *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/gerawan.pdf, Resolute Forest Products's "First Amended Petition To Terminate Or Amend USDA's Softwood Marketing Order Or, In The Alternative, To Exempt Petitioner From USDA's Softwood Marketing Order," filed on June 22, 2012, must be denied.

AGRICULTURAL COMMODITIES PROMOTION ACT

ORDER

Resolute Forest Products' First Amended Petition is DENIED.

Finality

This Decision shall be final and effective 35 days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service. *See* 7 C.F.R. §§ 900.64 and 900.65.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

APPENDIX A

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	
Resolute Forest Products	12-0040
Petitioner	**Additional Procedural History**

Exhibits

The following Exhibits were admitted into evidence at the hearing.

PX 1 through PX 28. Tr. 979 (January 31, 2013).

RX 1 through RX 52. Tr. 979 (January 31, 2013).

ALJX 1 through 3. Tr. 12 (January 28, 2013); Tr. 215 (January 29, 2013); and Tr. 621 (January 30, 2013).

Briefs

Petitioner Resolute timely filed its opening brief on April 18, 2013, having delivered "four hard copies by courier to the Hearing Clerk." Inexplicably, very little of that opening brief was present in the Hearing Clerk's record file when I checked a year later: only the cover page, Table of Contents, and Table of Authorities. Petitioner Resolute graciously filed its opening brief again, on April 14, 2014, on the same day that I alerted counsel by email that the brief was

missing from the Hearing Clerk record. [I had been working from electronic versions of the opening brief, circulated to me and opposing counsel nearly a year earlier.] I refer to this brief as Petitioner Resolute's April brief.

Respondent AMS timely filed its only brief on June 7, 2013.

Petitioner Resolute timely filed its reply brief on July 12, 2013.

Witnesses

The 4-day Hearing was held January 28-31, 2013, in Washington, District of Columbia. The 1275-page transcript is in 4 volumes. The transcript pages are shown below for testimony of witnesses.

Day 1, January 28 (Mon), 2013, pages 1-208:

Ms. Sonia Jimenez (Tr. 28-186), called by Resolute
[Ms. Jimenez: Director, Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture]

Day 2, January 29 (Tues), 2013, pages 209-617:

Ms. Sonia Jimenez (Tr. 212-575), called by Resolute

Day 3, January 30 (Wed), 2013, pages 618-953:

Ms. Sonia Jimenez (Tr. 622-670), called by AMS for cross-examination

Mr. Richard Garneau (Tr. 673-795), called by Resolute
[Mr. Garneau: President and CEO of Resolute Forest Products]

Dr. Anna Greenberg (Tr. 796-905), called by Resolute
[Dr. Greenberg: Senior Vice President, Greenberg, Quinlan, Rosner Research]

Ms. Sonia Jimenez (Tr. 909-918), recalled by Judge Clifton

Day 4, January 31 (Thur), 2013, pages 954-1275:
Ms. Maureen Pello (Tr. 967-1231), called by AMS

AGRICULTURAL COMMODITIES PROMOTION ACT

[Ms. Pello: Marketing Specialist, Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture]

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

HORNE v. UNITED STATES DEPARTMENT OF AGRICULTURE.*
No. 10-15270.
Court Decision.
Filed May 9, 2014.

[Cite as: 750 F.3d 1128 (2014)].

AMAA – Civil penalties – Handler – Marketing orders – Monetary exaction – Raisin Marketing Order – Takings.

United States Court of Appeals,
Ninth Circuit.

On remand from the Supreme Court of the United States, the Court of Appeals held that the raisin Marketing Order's reserve requirements, including its provisions that authorize the Secretary to sanction those who fail to comply, did not constitute a taking under the Fifth Amendment. In so holding, the Court of Appeals found that Plaintiffs had standing to challenge the monetary penalty they had been assessed for noncompliance with the Marketing Order and that such penalty did not constitute a physical per se taking.

OPINION OF THE COURT

MICHAEL DALY HAWKINS, Senior Circuit Judge,
delivered the opinion of the Court.

To ensure stable market conditions, the Secretary of Agriculture, administering a complex regulatory program, requires California producers of certain raisins to divert a percentage of their annual crop to

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* **Editor's Note:**
This case was reversed by the Supreme Court in *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015), *available at* http://www.supremecourt.gov/opinions/14pdf/14-275_c0n2.pdf (last visited Feb. 2, 2016). The 2015 Supreme Court case will be included in Volume 74 of *Agriculture Decisions*.

a reserve. The percentage of raisins diverted to the reserve varies annually according to that year's crop output. Subject to administrative and judicial review, the Secretary can impose a penalty on producers who fail to comply with the diversion program. The program's goal is to keep raisin supply relatively constant from year to year, smoothing the raisin supply curve and thus bringing predictability to the market for producers and consumers alike. The diverted raisins are sold, oftentimes in noncompetitive markets, and raisin producers are entitled to a pro rata share of the sales proceeds less administrative costs. In some years, this "equitable distribution" is significant; in other years it is zero.

Eschewing any Commerce Clause or regulatory takings theory, Plaintiffs–Appellants Marvin and Laura Horne ("the Hornes") challenge this regulatory program and, in particular, the Secretary's ability to impose a penalty for noncompliance, as running afoul of the Takings Clause of the Fifth Amendment.[1] Specifically, the Hornes argue Defendant–Appellee the Department of Agriculture ("the Secretary"), charged with overseeing the diversion program, works a constitutional taking by depriving raisin producers of their personal property, the diverted raisins, without just compensation. The Secretary defends the constitutionality of the reserve requirement. Concluding the diversion program does not work a constitutional taking on the theory advanced by the Hornes, we affirm the judgment of the district court.[2]

Factual and Procedural Background

A.

Raisin prices rose rapidly between 1914 and 1920, peaking in 1921 at $235 per ton. This surge in prices spurred increased production, which in turn caused prices to plummet back down to between $40 and $60 per

[1] Collectively referred to as "the Hornes," the Plaintiffs–Appellants are Marvin and Laura Horne, d/b/a Raisin Valley Farms (a California general partnership), and d/b/a Raisin Valley Farms Marketing Association (a California unincorporated association), together with their business partners Don Durbahn and the Estate of Rena Durbahn, collectively d/b/a Lassen Vineyards (a California general partnership).

[2] In doing so, we note the Court of Federal Claims has also upheld the constitutionality of this regulatory program. *See Evans v. United States*, 74 Fed.Cl. 554, 558 (2006), *aff'd,* 250 Fed.Appx. 321 (Fed.Cir.2007) (unpub.).

ton, even while production continued to expand. As a result of this growing disparity between increasing production and decreasing prices, the industry became "compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production." *Parker v. Brown*, 317 U.S. 341, 364, 63 S.Ct. 307, 87 L.Ed. 315 (1943); *see id.* at 363–64 & nn. 9–10, 63 S.Ct. 307; *see also Zuber v. Allen*, 396 U.S. 168, 174–76, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969) (describing market conditions). *See generally* Daniel Bensing, *The Promulgation of Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L.Rev. 3 (1995) (describing the history of the AMAA and the structure of the regulatory program it authorizes).

This market upheaval pervaded the entire agriculture industry, prompting Congress to enact the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* ("AMAA"), to bring consistency and predictability to the Nation's agricultural markets. Pursuant to the AMAA, the Department of Agriculture implemented the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Part 989 ("Marketing Order"), in 1949 in direct response to the market conditions described in *Parker*.

The Marketing Order ensures "orderly" market conditions by regulating raisin supply. 7 U.S.C. § 602(1). The Secretary has delegated to the Raisin Administrative Committee ("RAC") the authority to set an annual "reserve tonnage" requirement, which is expressed as a percentage of the overall crop.[3] *See* 7 C.F.R. §§ 989.65–66. The remaining raisins are "free tonnage" and can be sold on the open market. The reserved raisins are diverted from the market to smooth the peaks of the raisin supply curve. *Id.* at § 989.67(a). To smooth the supply curve's valleys, reserved raisins are released when supply is low. By varying the reserve requirement annually, the RAC can adapt the program to address changing growing and market conditions. For example, in the 2002–03 and 2003–04 crop years at issue here, the reserve percentages were set at

[3] The RAC is currently comprised of forty-seven industry-nominated representatives appointed by the Secretary, of whom thirty-five represent producers, ten represent handlers, one represents the cooperative bargaining association, and one represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, and 989.30.

forty-seven percent and thirty percent of the annual crop, respectively.

The operation of the Marketing Order turns on a distinction between "producers" and "handlers." A "producer" is a "person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins...." 7 C.F.R. § 989.11. By contrast, included in the definition of a "handler," *id.* at 989.15, is any person who "stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins," *id.* at 989.14.[4] Raisin producers convey their entire crop to a handler, receiving a prenegotiated field price for the free tonnage. *Id.* at § 989.65. Handlers, who sell free tonnage raisins on the open market, bear the obligation of complying with the Marketing Order by diverting the required percentage of each producer's raisins to "the account of the [RAC]." *Id.* § 989.66(a). Handlers must also prepare the reserved raisins for market, and the RAC compensates them for providing this service. *Id.* at § 989.66(f).

The RAC tracks how many raisins each producer contributes to the reserve pool. When selling the raisins, the RAC has a regulatory duty to sell them in a way that "maxim[izes] producer returns." *Id.* at § 989.67(d)(1). The RAC, which receives no federal funding, finances its operations and the disposition of reserve raisins from the proceeds of the reserve raisin sales. Whatever net income remains is disbursed to producers, who retain a limited equity interest in the RAC's net income derived from reserved raisins. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h).

B.

Dissatisfied with what they view as an out-dated regulatory regime, the Hornes set out to restructure their raisin operation such that the Marketing Order would not operate against them. Put another way, the

[4] Specifically, any person who "stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins" is a "packer" of raisins, and all packers are handlers. 7 C.F.R. §§ 989.14 & 989.15. These definitions apply only to activities taking place within "the area," which simply refers to the State of California. *Id.* at § 989.4. Additionally, any producer who sorts and cleans his own raisins in their unstemmed form is not a packer with respect to those raisins. 7 C.F.R. § 989.14.

Hornes came up with a non-traditional packing program which, in their view, the Secretary had no authority to regulate. Instead of sending their raisins to a traditional packer, against whom the reserve requirement of the Marketing Order would clearly operate, the Hornes purchased their own handling equipment to clean, stem, sort, and package raisins. The Hornes then performed the traditional functions of a handler with respect to the raisins they produced. The Hornes believed that, by cleaning, stemming, sorting, and packaging their own raisins, they would not be "handlers" with respect to the raisins they produced. In addition, the Hornes performed the same functions for a number of other producers for a per-pound fee. Similarly, by not acquiring title to the raisins of other producers but rather charging those producers a per-pound fee, the Hornes believed they did not fall within the regulatory definition of "handler" with respect to the third-party producers' raisins. With this set-up, the Hornes believed the requirements of the Marketing Order would not apply to them, relieving them of the obligation to reserve any raisins.[5]

C.

The Secretary disagreed with the Hornes and applied the Marketing Order to their operation with respect to the raisins grown both by the Hornes and by third-party producers. At the end of protracted administrative proceedings, a U.S.D.A. Judicial Officer found the Hornes liable for numerous regulatory violations and imposed a monetary penalty of $695,226.92.[6] The Hornes then sought review of that final

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[5] The government contends the Hornes lack standing to assert a takings defense with respect to raisins they never owned, i.e., raisins produced by third parties. The government concedes the Hornes have standing to assert a takings defense with respect to raisins they produced themselves. We decline to decide what rights under California law a non-title holder has to challenge the "taking" of property in his possession. *See Vandevere v. Lloyd*, 644 F.3d 957, 963 (9th Cir. 2011) (holding that for the takings claim "whether a property right exists ... is a question of state law") (emphasis omitted). Here, it is enough to note the Hornes clearly have standing to assert a taking defense with respect to the raisins they produced themselves, entitling them to a decision on the merits for at least that property. Because we rule against the Hornes on the merits, we need not further address the standing issue.

[6] The Judicial Officer ordered the Hornes to pay (1) $8,783.39 in overdue assessments for the 2002–03 and 2003–04 crop years, (2) $483,843.53 as the dollar equivalent for the raisins not held in reserve, and (3) $202,600 as a civil penalty for failure to comply with the Marketing Order. The overdue assessments in their entirety and $25,000 of the civil

agency action in federal district court pursuant to 7 U.S.C. § 608c(14)(B). In district court, the Hornes alleged they were not "handlers" within the meaning of the regulation and further alleged the agency's order violated the Takings Clause and the Eighth Amendment's prohibition against excessive fines. The district court granted summary judgment in favor of the Secretary on all counts. *See Horne v. U.S. Dep't of Agric.*, No. CV–F–08–1549 LJO SMS, 2009 WL 4895362 (E.D. Cal. filed Dec. 11, 2009).

The Hornes appealed to this court. We affirmed the district court with respect to the Hornes' statutory claims, holding that even if the AMAA's definitions of "handler" and "producer" are ambiguous, the Secretary's application of the Marketing Order to the Hornes was neither arbitrary nor capricious, and it was supported by substantial evidence. *Horne v. U.S. Dep't of Agric.,* 673 F.3d 1071, 1078 (9th Cir. 2011) ("*Horne I* "). We also affirmed the district court's grant of summary judgment in favor of the Secretary on the Eighth Amendment claim. *Id.* at 1080–82. And we held we lacked jurisdiction over the Fifth Amendment claim. Specifically, we held the Hornes brought their takings claim as producers rather than handlers. Because the AMAA did not in our view displace the Tucker Act with respect to a producer's claim, we held that jurisdiction over the takings claim fell with the Court of Federal Claims rather than the district court. *Id.* at 1078–80.

The Hornes sought and the Supreme Court granted certiorari with respect to the jurisdictional issue.[7] Reversing our judgment on that issue

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penalty were imposed for violations of the Marketing Order unrelated to the reserve requirement. *See, e.g.,* 7 C.F.R. § 989.73 (requiring handlers to file certain reports); *id.* at § 989.77 (requiring handlers to allow the Agricultural Marketing Service access to records). The balance of the penalty and assessments pertain directly to the Hornes' failure to reserve raisins.

[7] Because the Hornes' certiorari petition only challenged our disposition of the Hornes' Fifth Amendment claim, *Horne I* is the final judgment of the Hornes' Eighth Amendment and statutory claims. Accordingly, because the statutory claims are no longer at bar, the Hornes concede they no longer challenge the Judicial Officer's imposition of $8,783.39 in overdue assessments or the related $25,000 in civil penalties. The Hornes' challenge is confined to the remaining dollar value equivalent and its attendant civil penalty (hereinafter, "the penalty"), because these are directly traceable to the Hornes' failure to reserve raisins. *See supra* n. 5.

alone, the Supreme Court held (1) the Hornes brought their takings claim as handlers, and (2) the Hornes, as handlers, may assert a constitutional defense to the underlying agency action in district court. *Horne v. Dep't of Agric.*, ——U.S. ——, 133 S.Ct. 2053, 2061, 2062, 186 L.Ed.2d 69 (2013). (The Supreme Court reserved the question of whether the Hornes could have sought relief in the Court of Federal Claims, instead holding only that handlers could obtain judicial review in district court. *Id.* at 1062 n.7.) The Supreme Court remanded for a determination of the merits of the Hornes' takings claim, which, having received supplementary briefing and additional oral argument, we now decide.

Standard of Review

We review de novo a district court's grant of summary judgment in a case involving a constitutional challenge to a federal regulation. *Ariz. Life Coal., Inc. v. Stanton,* 515 F.3d 956, 962 (9th Cir. 2008); *Doe v. Rumsfeld,* 435 F.3d 980, 984 (9th Cir. 2006).

Standing

The Secretary contends the Hornes lack standing to challenge the portion of the penalty attributable to the sale of any raisins produced by third-party firms, then handled by the Hornes (the "third-party raisins"). The Secretary argues the Hornes never owned these raisins and so cannot challenge their seizure.[8] We find this argument unpersuasive.

As the Supreme Court made clear, the injury suffered by the Hornes is not the obligation to reserve raisins for the RAC (which, of course, the Hornes did not do), but rather to pay the penalty imposed for the Hornes' failure to comply with the Marketing Order. *Horne,* 133 S.Ct. at 2061 n. 4. Thus, the government's contention that the Hornes would not have standing to challenge a government seizure of the third-party raisins (a seizure which, of course, never happened) is irrelevant to the standing inquiry here.[9]

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[8] The Secretary concedes the Hornes have standing to challenge the remainder of the penalty.

[9] Additionally, we doubt the government's contention that the Hornes would lack standing to challenge a seizure of property they held in bailment. In an analogous situation, we have held that individuals lacking an ownership interest in a given piece of

Instead, we analyze whether the Hornes have standing to challenge the penalty. A monetary penalty is an actual, concrete and particularized injury-in-fact. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir.2006) (citing *Cent. Ariz. Water Conserv. Dist. v. EPA*, 990 F.2d 1531, 1537 (9th Cir.1993)); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The need to pay a penalty is obviously traceable to its imposition, and a favorable merits determination in this litigation would redress the Hornes' alleged injury, thereby satisfying the *Lujan* requirements. *See Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130. We thus hold the Hornes have standing to bring this constitutional challenge.

Constitutional Claim

The Takings Clause does not prohibit the government from taking property for public use; rather, it requires the government to pay "just compensation" for any property it takes. U.S. Const. amend. V. Thus, a takings challenge follows a two-step inquiry. First, we must determine whether a "taking" has occurred; that is, whether the complained-of government action constitutes a "taking," thus triggering the requirements of the Fifth Amendment. If so, we move to the second step and ask if the government provided just compensation to the former property owner. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32, 235–36, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

However, before turning to the first step of this formula, we must address a threshold issue and identify precisely which property was allegedly taken from the Hornes.

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property have standing to challenge the seizure of that property. *See United States v. $191,910 in U.S. Currency*, 16 F.3d 1051, 1057 (9th Cir.1994) ("In order to contest a forfeiture, a claimant need only have some type of property interest in the forfeited items. This interest need not be an ownership interest; it can be any type of interest, including a possessory interest."), *superseded on other grounds by statute as stated in United States v. $80,180.00*, 303 F.3d 1182, 1184 (9th Cir.2002). In any event, because we hold the Hornes have established standing as the subjects of the penalty, we need not confront this question.

A.

The Hornes declined to comply with the reserve requirement of the Marketing Order; at no time did the Hornes, either as producers or as handlers, ever physically convey raisins to the RAC. Instead, the Secretary imposed the penalty on the Hornes for their failure to comply with the Marketing Order. In general, the imposition and collection of penalties and fines does not run afoul of the Takings Clause. *See Koontz v. St. Johns River Water Management District*, —— U.S. ——, 133 S.Ct. 2586, 2601, 186 L.Ed.2d 697 (2013) (listing cases). Here, however, the Hornes link the Secretary's imposition of a penalty to a specific governmental action they allege to be a taking. In effect, the Hornes argue the constitutionality of the penalty rises or falls with the constitutionality of the Marketing Order's reserve requirement.

We agree that the penalty cannot be analyzed without reference to the reserve requirement, and we find *Koontz* instructive on this point. In *Koontz*, a permitting agency refused to grant a developer a building permit until the developer funded offsite environmental impact mitigation works. 133 S.Ct. at 2593. The developer sued, arguing the permitting agency's conditions for obtaining a permit violated the "nexus and rough proportionality" rule of *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).[10] The Supreme Court of Florida declined to apply *Nollan* and *Dolan*, because in those cases the permitting agencies granted the relevant permit subject to a condition subsequent. The Florida court did not believe *Nollan* and *Dolan* would apply to situations in which the permitting agency refused to issue a permit until the permittee met a condition precedent. The Supreme Court reversed, holding the distinction between conditions precedent and subsequent constitutionally irrelevant in this context. *See id.* at 2596.

Relevant to this case, *Koontz* confronts the issue of how to analyze a takings claim when a "monetary exaction," rather than a specific piece of property, is the subject of that claim. *Koontz* distinguished *Eastern*

[10] We discuss *Nollan* and *Dolan* in more detail in Section D.

Enterprises v. Apfel, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998), by noting that in *Koontz*, "unlike *Eastern Enterprises*, the monetary obligation burdened petitioner's ownership of a specific parcel of land." *Koontz*, 133 S.Ct. at 2599; *accord id.* at 2600 ("The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property."). This direct linkage between the monetary exaction and the piece of land guided the Court to invoke the substantive takings jurisprudence relevant to the *land* for the purpose of determining whether the related *monetary exaction* constituted a taking. *Id.*

Here, the Secretary specifically linked a monetary exaction (the penalty imposed for failure to comply with the Marketing Order) to specific property (the reserved raisins). The Hornes faced a choice: relinquish the raisins to the RAC or face the imposition of a penalty. There is no question the monetary exaction is linked to specific property because the Judicial Officer's order requires the Hornes to repay the market value of the unreserved raisins (plus an additional penalty for non-compliance). Because the Marketing Order is structured in this way, we follow *Koontz* to analyze the constitutionality of the penalty imposed on the Hornes against the backdrop of the reserve requirement. If the Secretary works a constitutional taking by accepting (through the RAC) reserved raisins, then, under the unconstitutional conditions doctrine, the Secretary cannot lawfully impose a penalty for non-compliance. But if the receipt of reserved raisins does not violate the Constitution, neither does imposition of the penalty. *See id.* at 2596 (discussing the unconstitutional conditions doctrine).[11]

B.

We return to the task of determining whether the imposition of the penalty for failure to comply with the reserve requirement constitutes a taking. A "paradigmatic taking" occurs when the government

[11] Contrary to the Hornes' suggestion, however, we read *Koontz* only to say this much. The Hornes argue *Koontz* somehow substantively altered the doctrinal landscape against which we evaluate takings claims. We disagree. *Koontz* simply clarifies the range of takings cases in which *Nollan* and *Dolan* provide the rule of decision. *See* 133 S.Ct. at 2598 (declining to address merits of petitioner's claim under *Nollan* and *Dolan*); *id.* at 2602–03 (declining to alter or overrule the holdings of *Nollan* and *Dolan*).

appropriates or occupies private property. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). *Lingle* gives as an example of this sort of taking the government's wartime seizure of a coal mine. *Id.; see United States v. Pewee Coal Co.*, 341 U.S. 114, 115–16, 71 S.Ct. 670, 95 L.Ed. 809 (1951). Because the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account, the Hornes cannot—and do not—argue they suffered this sort of "paradigmatic taking."

Instead, we must enter the doctrinal thicket of the Supreme Court's regulatory takings jurisprudence. Since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court has recognized that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable...." *Lingle*, 544 U.S. at 538, 125 S.Ct. 2074. In general, regulatory takings are analyzed under the ad hoc framework announced in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The Hornes, however, have intentionally declined to pursue a *Penn Central* claim. Instead, they argue the Marketing Order, though a regulation, works a categorical taking.[12]

Since *Mahon*, the Supreme Court has identified three "relatively narrow categories" of regulations which work a categorical, or per se, taking. Each category has a paradigmatic or representative case. *Lingle*, 544 U.S. at 538, 125 S.Ct. 2074.[13] The representative case of the first category, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427–38, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), holds that permanent physical invasions of real property work a per se taking. The second,

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[12] Similarly, the Hornes concede the AMAA and Marketing Order fall within Congress's Commerce Clause authority. However, that a governmental action is authorized by the Commerce Clause does not immunize it from the requirements of the Takings Clause. *Lingle*, 544 U.S. at 543, 125 S.Ct. 2074; *Kaiser Aetna v. United States*, 444 U.S. 164, 172, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

[13] We read *Lingle* to elevate the land use exaction cases to a third category on par with permanent physical invasions and complete economic deprivation regulations. 544 U.S. at 538, 125 S.Ct. 2074 ("Outside these two categories (*and* the special context of land-use exactions discussed below), regulatory takings challenges are governed by *Penn Central Transp. Co. v. New York City.*") (citation omitted and emphasis added).

represented by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), teaches that regulations depriving owners of all economically beneficial use of their real property also work a per se taking. The third line of cases, represented by *Nollan* and *Dolan*, articulate a more nuanced rule. Together, *Nollan* and *Dolan* hold that a condition on the grant of a land use permit requiring the forfeiture of a property right constitutes a taking *unless* the condition (1) bears a sufficient nexus with and (2) is roughly proportional to the specific interest the government seeks to protect through the permitting process. If those two conditions are met, then the imposition of the conditional exaction is not a taking.

We must determine which analytical framework provides the proper point of departure for our inquiry into whether a taking has occurred here. The Hornes see a direct analogy between *Loretto's* occupation of land for the purpose of installing an antenna and the Marketing Order's reserve requirement. The Secretary argues *Nollan* and *Dolan* provide better guidance to evaluate the constitutionality of what the Secretary characterizes as a use restriction on raisins. We must first identify which of the categorical takings case lines, if any, the Marketing Order implicates. Second, we must apply that case line's substantive law to determine whether a taking has occurred.

C.

Loretto applies only to a total, permanent physical invasion of real property. Two independent reasons assure us that the Marketing Order does not fall within the "very narrow" scope of the *Loretto* rule, 458 U.S. at 441, 102 S.Ct. 3164: First, the Marketing Order operates on personal, rather than real property, and second, the Marketing Order is carefully crafted to ensure the Hornes are not completely divested of their property rights, even with respect to the reserved raisins.

1.

The Marketing Order operates against personal, rather than real, property. Because the Takings Clause undoubtedly protects personal property, *see Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (interest earned on lawyers' trust

account is a protected private property); *Brown*, 538 U.S. at 235, 123 S.Ct. 1406 (same); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001–04, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (same for trade secrets), this distinction does not mean the Takings Clause is inapplicable. But, as the Supreme Court stated in *Lucas*, the Takings Clause affords less protection to personal than to real property:

> [O]ur "takings" jurisprudence ... has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied limitation and must yield to the police power. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Lucas, 505 U.S. at 1027–28, 112 S.Ct. 2886.

Lucas uses comparative language to make clear the Takings Clause affords more protection to real than to personal property. While the precise contours of these differing levels of protection are not entirely sharp, *Lucas* suggests the government's authority to regulate such property without working a taking is at its apex where, as here, the relevant governmental program operates against personal property and is motivated by economic, or "commercial," concerns. Indeed, it is clear the holding of *Lucas* is limited to cases involving land. The sentence which rejects the State's contention that "the State may subsequently

eliminate all economically valuable use" of the Lucas's property begins with the phrase "[i]n the case of land" and is expressly contrasted against commercial personal property, over which the government exerts a "traditionally high degree of control." *Id.* at 1028, 112 S.Ct. 2886.

The real/personal property distinction also undergirds *Loretto.* Justifying its bright-line rule, *Loretto* states "whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on *land or real property* is an obvious fact that will rarely be subject to dispute." 458 U.S. at 437, 102 S.Ct. 3164 (emphasis added). This example underscores the narrow reach of *Loretto.* In reaching its decision, the Court discussed the evolution of its takings jurisprudence, citing virtually only cases pertaining to real property. *See id.* at 427–37, 102 S.Ct. 3164. And because the case unquestionably (and solely) concerned real property, the *Loretto* Court did not have occasion to consider the occupation of personal property. Given the Court's later discussion of personal property in *Lucas,* we see no reason to extend *Loretto* to govern controversies involving personal property. *See also Wash. Legal Found. v. Legal Found. of Wash.,* 271 F.3d 835, 854 (9th Cir.2001) (en banc), *aff'd sub nom., Brown v. Legal Found. of Wash.,* 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) ("The per se analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money.").

2.

Equally importantly, the Hornes did not lose all economically valuable use of their personal property. Unlike *Loretto,* which applies only when *each* " 'strand' from the 'bundle' of property rights" is "chop[ped] through ... taking a slice of every strand," 458 U.S. at 435, 102 S.Ct. 3164, the Hornes' rights with respect to the reserved raisins are not extinguished because the Hornes retain the right to the proceeds from their sale. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h). The Hornes essentially call this right meaningless because the equitable distribution may be zero.[14] But, the equitable distribution is not zero in every year,

[14] The parties dispute whether there was a distribution for the crop years in question and, if so, the value of that distribution. We do not consider this dispute material to the

and even in years with a zero distribution, there are gross proceeds from the sale of the reserved raisins; it just so happens that in those years, those gross proceeds are not greater than the operating expenses of the RAC.

Here, we pause to focus on the RAC's structure and purpose, as well as the benefits it secures for producers such as the Hornes. The RAC is governed by industry representatives including producers and handlers.[15] Its purpose is to stabilize market conditions for raisin producers. Thus, the Hornes' equitable stake in the reserved raisins, even in years in which they are not entitled to a cash distribution from the RAC, funds the administration of an industry committee tasked with (1) representing raisin producers, such as the Hornes, and (2) implementing the reserve requirement, the effect of which is to stabilize the field price of raisins. In light of this scheme, the Hornes cannot claim they lose all rights associated with the reserve raisins. Indeed, the structure of the diversion program ensures the reserved raisins continue to work to the Hornes' benefit after they are diverted to the RAC, even in years in which producers receive no equitable distribution of the RAC's net profits.[16]

For these reasons, the Hornes' reliance on *Loretto* is unavailing. *Loretto* specifically preserves the state's "substantial authority" and "broad power to impose appropriate restrictions upon an owner's use of his property." 458 U.S. at 441, 102 S.Ct. 3164. Here, the reserved raisins are not permanently occupied; rather, their disposition, while tightly controlled, inures to the Hornes' benefit. Coupled with *Lucas's* distinction between real and personal property, this assures us the diversion program does not work a per se taking.[17]

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question of whether a taking occurred because the distribution reflects net revenue. For the reasons we give, we focus on the gross revenue generated by the reserve raisin pool.

[15] In fact, Mr. Horne has been an alternate member, though never a voting member, of the RAC.

[16] We must clarify that we do not hold the RAC's market intervention constitutes "just compensation" for a taking. Because we hold no taking occurs, we do not conduct a just compensation inquiry. We discuss the RAC's purpose and organization solely to show that the Hornes' rights to the reserved raisins, even if diminished by the Marketing Order, are not extinguished by it.

[17] Nor would the Hornes fare any better under a *Lucas* theory. *Lucas* plainly applies only when the owner is deprived of *all* economic benefit of the property. 505 U.S. at 1019 & n. 8, 112 S.Ct. 2886. If the property retains any residual value after the

D.

Instead of looking to *Loretto* for the rule of decision here, the Secretary urges us to apply the "nexus and rough proportionality" rule of *Nollan* and *Dolan* to this case, asking us in essence to hold that the reserve requirement constitutes a use restriction on the Hornes' personal property and then analogize that use restriction to the land use permitting context. We believe this approach is the most faithful way to apply the Supreme Court's precedents to the Hornes' claim.[18]

In *Nollan,* the California Coastal Commission conditioned the grant of a permit to build a beachfront home on the landowner's surrender of an easement along the coastal side of the property in order to link two public beaches by a publically accessible path. 483 U.S. at 828, 107 S.Ct. 3141. However, the Commission's proffered reason for imposing this condition was to mitigate the diminished "visual access" to the ocean from the *non*-coastal edge of the property caused by the Nollan's proposed improvement. *Id.* at 828–29, 107 S.Ct. 3141. The Supreme Court held there was no "nexus" between the exaction-by-condition and the Commission's asserted state interest, then held that, absent such a nexus, the imposition of the condition was a taking. *Id.* at 837, 107 S.Ct. 3141.

Dolan provides us the analytical framework to apply in cases where a legitimate nexus exists between the asserted state interest and the proposed exaction. In *Dolan,* a landowner sought permits to enlarge and improve her commercial property. As in *Nollan,* the permitting agency approved the permit subject to certain conditions. First, the agency required the dedication of certain creek-side land for the purpose of mitigating the increased water run-off that could potentially occur as a

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regulation's application, *Penn Central* applies. *Id.* The equitable stake, even in years where there is no monetary distribution, is clearly not valueless, and thus *Lucas* does not apply.

[18] We do not mean to suggest that all use restrictions concerning personal property must comport with *Nollan* and *Dolan.* Rather, we hold *Nollan* and *Dolan* provide an appropriate framework to decide *this* case given the significant but not total loss of the Hornes' possessory and dispositional control over their reserved raisins.

result of the landowner's plan to pave a parking lot. Second, the agency required the dedication of a 15–foot strip of land to be used for a pedestrian and bicycle pathway, the purpose of which was to mitigate the increased traffic flow spawned by the proposed commercial development. 512 U.S. at 380, 114 S.Ct. 2309. *Dolan* held there was an appropriate nexus between the state's legitimate interests and the proposed exactions. *Id.* at 387–88, 114 S.Ct. 2309.

But *Dolan* also held the proposed means and the ends in question were not "roughly proportional[ ]" to each other and thus the permit as issued constituted a taking. *Id.* at 391, 114 S.Ct. 2309; *see id.* at 394–96, 114 S.Ct. 2309. While not reducible to mathematical certainty, the *Dolan* "rough proportionality" requirement does require a permitting agency to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391, 114 S.Ct. 2309. Thus, the distillate of the *Nollan /Dolan* rule appears to be this: If the government seeks to obtain, through the issuance of a conditional land use permit, a property interest the outright seizure of which would constitute a taking, the government's imposition of the condition *also* constitutes a taking unless it: (1) bears a sufficient nexus with and (2) is roughly proportional to the specific interest the government seeks to protect through the permitting process.

We apply the *Nollan/Dolan* rule here because we believe it serves to govern this use restriction as well as it does the land use permitting process. At bottom, the reserve requirement is a use restriction applying to the Hornes insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. The Secretary did not authorize a forced seizure of the Hornes' crops, but rather imposed a condition on the Hornes' *use* of their crops by regulating their sale. As we explained in a similar context over seventy years ago, the Marketing Order "contains no absolute requirement of the delivery of [reserve-tonnage raisins] to the [RAC]" but rather only "a conditional one." *Wallace v. Hudson–Duncan & Co.,* 98 F.2d 985, 989 (9th Cir.1938) (rejecting a takings challenge to a reserve requirement under the walnut marketing order); *see also Yee v. City of Escondido,* 503 U.S. 519, 527–28, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) (holding municipal regulation of a mobile home park owners' ability to rent did not work a taking where

park owners voluntarily rented their land and thus acquiesced in the regulation); *cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) ("a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking").

Moreover, there are important parallels between *Nollan* and *Dolan* on one hand and the raisin diversion program on the other. All involve a conditional exaction, whether it be the granting of an easement, as in *Nollan;* a transfer of title, as in *Dolan;* or the loss of possessory and dispositional control, as here. All conditionally grant a government benefit in exchange for an exaction. And, critically, all three cases involve choice. Just as the Nollans could have continued to lease their property with the existing bungalow and Ms. Dolan could have left her store and unpaved parking lot as they were, the Hornes, too, can avoid the reserve requirement of the Marketing Order by, as the Secretary notes, planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins. Given these similarities, we are satisfied the rule of *Nollan* and *Dolan* governs this case.

1. The Nexus Requirement

We now turn to the nexus requirement and ask if the reserve program "further[s] the end advanced as [its] justification." *Nollan*, 483 U.S. at 837, 107 S.Ct. 3141. Unquestionably, the AMAA aims to "establish and maintain ... orderly marketing conditions for agricultural commodities," 7 U.S.C. § 602(1), as well as to keep consumer prices stable, *id.* at § 602(2). By reserving a dynamic percentage of raisins annually such that the domestic raisin supply remains relatively constant, the Marketing Order program furthers the end advanced: obtaining orderly market conditions. The government represents (and the Hornes do not dispute) that by smoothing the peaks and valleys of the supply curve, the program has eliminated the severe price fluctuations common in the raisin industry prior to the implementation of the Marketing Order, making market conditions predictable for industry and consumers alike. On this basis, the Marketing Order satisfies the *Nollan* nexus requirement.

2. The Rough Proportionality Requirement

Dolan does not require a "precise mathematical calculation," instead obliging the permitting agency only to make an "individualized determination" that the condition imposed is "related both in nature and extent to the impact" of the permittee's activity. *Dolan,* 512 U.S. at 391, 114 S.Ct. 2309. The Marketing Order meets this requirement. The percentage of raisins to be reserved is revised annually to conform to current market conditions. While *Dolan* does not require a "mathematical calculation," neither does it prohibit the RAC from imposing a condition stated mathematically, i.e., as a percentage. Indeed, here the RAC's imposition of the reserve requirement is not just in "rough" proportion to the goal of the program, but in more or less *actual* proportion to the end of stabilizing the domestic raisin market.[19] By annually modifying the "extent," *id.,* of the reserve requirement to keep pace with changing market conditions, the RAC ensures its program does not overly burden the producer's ability to compete while reducing to the producer's benefit the potential instability of this particular market.

Nor do we believe *Dolan's* command that the condition imposed be "individualized" presents a problem here. As *Dolan* made clear, it was an adjudicative, not a legislative, decision being reviewed. 512 U.S. at 835, 114 S.Ct. 2552. Individualized review makes sense in the land use context because the development of each parcel is considered on a case-by-case basis. But here, the use restriction is imposed evenly across the industry; all producers must contribute an equal percentage of their overall crop to the reserve pool. At bottom, *Dolan's* individualized review ensures the government's implementation of the regulations is tailored to the interest the government seeks to protect. The Marketing Order accomplishes this goal by varying the reserve requirement annually in accordance with market and industry conditions. Given that raisins are fungible (as opposed to land, which is unique), we think this is enough to ensure the means of the Marketing Order's diversion program is at least roughly proportional to its goals.[20]

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[19] The Hornes do not challenge the adequacy or fairness of the RAC's decision to set the 2002–03 and 2003–04 reserve tonnage requirements at forty-seven percent and thirty percent, respectively. In other words, the Hornes' challenge is to the program itself, not the details of its implementation in the crop years at issue.

[20] We reiterate that we analyze the Hornes' challenge to the monetary penalty through

Conclusion

While the Hornes' impatience with a regulatory program they view to be out-dated and perhaps disadvantageous to smaller agricultural firms is understandable, the courts are not well-positioned to effect the change the Hornes seek, which is, at base, a restructuring of the way government regulates raisin production. The Constitution endows Congress, not the courts, with the authority to regulate the national economy. *See United States v. Rock Royal Co–op., Inc.*, 307 U.S. 533, 572, 59 S.Ct. 993, 83 L.Ed. 1446 (1939). Accordingly, it is to Congress and the Department of Agriculture to which the Hornes must address their complaints. The courts are not institutionally equipped to modify wholesale complex regulatory regimes such as this one.

Instead, our role is to answer the narrower question of whether the Marketing Order and its penalties work a physical per se taking. We hold they do not. There is a sufficient nexus between the means and ends of the Marketing Order. The structure of the reserve requirement is at least roughly proportional (and likely actually proportional) to Congress's stated goal of ensuring an orderly domestic raisin market. We reach these conclusions informed by the Supreme Court's acknowledgment that governmental regulation of personal property is more foreseeable, and thus less intrusive, than is the taking of real property. This, coupled with our observation that the Secretary has endeavored to preserve as much of the Hornes' ownership of the raisins as possible, leads us to conclude the Marketing Order's reserve requirements—and the provisions permitting the Secretary to penalize the Hornes for failing to comply with those requirements—do not constitute a taking under the Fifth Amendment.

AFFIRMED.

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the lens of the Marketing Order's reserve requirement because the monetary penalty is pegged directly to the extent of the Hornes' non-compliance with the Order, as measured by the ton and market value of the raisins. Accordingly, we hold the Secretary's imposition of the penalty satisfies any requirement *Koontz* may impose that we independently analyze the monetary exaction under *Nollan* and *Dolan*.

AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

In re: BURNETTE FOODS, INC., A MICHIGAN CORPORATION.
Docket No. 11-0334.
Decision and Order.
Filed March 18, 2014.

AMAA.

James J. ("Jay") Rosloniec, Esq. for Petitioner.
Sharlene Deskins, Esq. for Respondent.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

Decision Summary

The Petition of Burnette Foods, Inc. is DENIED in part and GRANTED in part, as follows. The Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930), as-written and as-administered, is in accordance with law EXCEPT in two respects:

A. To require handlers who are **not** exempt from restriction, to bear greater restriction requirements (volume control) by being required to absorb, in addition to their own share of restriction, the share of restriction that would have been the responsibility of other handlers were they not exempt, is arbitrary and capricious, and consequently not in accordance with law. The **exempt**-from-restriction-production must be subtracted from supply for purposes of volume control, including using the Optimum Supply Formula and calculating the restriction percentages that the **not**-exempt-from-restriction are required to comply with. That additional mathematical step must be employed. [Examples of handlers who are subject to the Tart Cherry Order but who are **exempt** from restriction requirements are handlers in Oregon and Pennsylvania, based on the size of production. Tr. 1612-13. Another example of handlers who are subject to the Tart Cherry Order but who were **exempt** from restriction requirements in

2010 were handlers in Northern Michigan because of crop failure (production fell below 50 per cent of average production). Tr. 1613-15.]

B. It is fiction to state that tart cherries processed into metal cans can be stored and carried over from crop year to crop year. [They **cannot**; the canned tart cherries need to reach the consumer promptly and cannot be maintained in the processor's inventory from crop year to crop year; the "best before" or "best by" date is roughly one year from harvest.] It would be arbitrary and capricious, and consequently not in accordance with law, to persist in that fiction. *See* ¶ 9. It is confiscatory to require the harvest-to-metal-can-tart- cherries-production that Mr. Sherman described in paragraph 9 to be maintained in inventory; it is equally confiscatory to require a canner to meet the restriction requirements by using the alternatives to inventory. Consequently, **tart cherries that are delivered from being harvested directly to a canner that are promptly canned with no processing other than canning having occurred shall be exempt from restriction requirements (volume control).** Like the requirements of paragraph 1.A., the **exempt**-from-restriction-tart-cherries-processed-into-metal-cans-production must be subtracted from supply for purposes of volume control, including using the Optimum Supply Formula and calculating the restriction percentages that the **not**-exempt-from-restriction are required to comply with.

Overview

In the United States tart cherry industry, the majority apparently find an advantage in **restricting** their commercial sales. Perry Hedin testified that no one wants (emphasis added) high restriction levels [restriction, under certain circumstances, is deemed by the majority to be necessary, for stability] (Tr. 1541-44):

> Ms. Deskins: . . . to your knowledge, is there anybody who wants the restriction levels to be, let me ask you, above 50 percent?
>
> Mr. Hedin: Absolutely not.

Ms. Deskins: Is there anyone who's advocating for high restriction levels?

Mr. Hedin: I don't think they're, they don't advocate for the high restriction levels. What discussion tends to be about is as I described earlier, if we have the restriction percentage too low and we end up with excess free tonnage, the concern is that in year two that's going to cause greater restriction in the subsequent year.

Mr. Hedin: So, a lot of them think we should deal with the issue in the year in which we're involved rather than to kick the can down the road. So, that sometimes will result in a higher restriction percentage than might be desired, but it's based on the Board's consideration of the consequences.

Ms. Deskins: Now, you've heard the testimony here today, I'm sorry, during the dates that you've been here that the frozen tart cherry industry has an interest in high restriction levels. In your experience, is that true?

Mr. Hedin: It's certainly not my opinion. I think that as I just said <u>no one wants the high restriction level but they sometimes feel that it's appropriate given the circumstances</u> (emphasis added) but I don't think it's categorized by frozen versus non-frozen, by CherrCo versus non-CherrCo. I think it's by their understanding and perception of what will happen in the industry during the crop year.

Ms. Deskins: Okay. And restriction, a restriction of the fruit that you can sell in the primary market, that only comes up in what type of years? In what type of years would you get a restriction, what event happens to cause a restriction?

Mr. Hedin: Under the formulation when the available supply exceeds the demand plus the market growth

> factor of ten percent, we have a restriction. If we are in a situation where the supplies are less than the demand, then there is no restriction. 2002, there was no restriction. In 2012, there will be no restriction.
>
> Ms. Deskins: So, are the restrictions caused by the size of the tart cherry crop in a particular year?
>
> Mr. Hedin: The restrictions are caused by the total supply which is both the crop and the carried over free tonnage. So, we have to look to both elements in making that determination. Generally, driven more by the size of the crop than the size of the carry-in.
>
> Ms. Deskins: Okay. So, in the years where the size of the crop is very close to what the demand is, is there any need for a restriction?
>
> Mr. Hedin: If your question assumes that it's less than the sales volume, no, there's no need for a restriction.

Tr. 1541-44.

The majority in the tart cherry industry restrict their commercial sales by the authority of a federal marketing order that they, the majority, vote for; that has the force of a federal regulation, because it IS a federal regulation: 7 CFR Part 930.[1] The theory that the restriction (volume control) is based on, is that tart cherries are processed and can be stored and carried over from crop year to crop year. William Sherman proved that the theory does <u>not</u> hold true for the canned segment [canners include but are not limited to Burnette Foods, Pinnacle Foods and Knouse Foods (*see* Tr. 979, 1110)]; William Sherman testified on cross-examination (Tr. 1060-61):

> Ms. Deskins: Well, isn't it unusual for you to promote a position on behalf of your competitors?

[1] *See* Title 7 of the Code of Federal Regulations, concerning Agriculture, specifically Part 930, concerning Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

> Mr. Sherman: As I look at this and what we're asking for, I, my opinion is the other, the canned segment in total should be exempted from this marketing order.

Tr. 1060-61.

The percentages of the tart cherry crop that have been restricted, from year to year, can be found in the Federal Register. These percentages are not small (look at the first two columns):

2011 Tart Cherry Crop [July 1, 2011 - June 30, 2012 Crop Year]

Restricted, Prelim known in June 2011	**Restricted**, Final known in Sept 2011	Free, Prelim known in June 2011	Free, Final known in Sept 2011
59% revised to **40%**	then **12%**	41% revised to 60%	then 88%

[*See* 77 Fed. Reg. 12748, esp. 12749-12750, 12752 (Mar. 2, 2012); and 77 Fed. Reg. 36115, esp. 36119 (June 18, 2012).]

2010 Tart Cherry Crop [July 1, 2010 - June 30, 2011 Crop Year]

Restricted, Prelim known in June 2010	**Restricted**, Final known in Sept 2010	Free, Prelim known in June 2010	Free, Final known in Sept 2010
40%	then **42%**	60%	then 58%

[*See* 76 Fed. Reg. 10471, esp. 10472 and 10476 (Feb. 25, 2011).]

2009 Tart Cherry Crop [July 1, 2009 through June 30, 2010]

Restricted, Prelim known in June 2009	**Restricted**, Final known in Sept 2009	Free, Prelim known in June 2009	Free, Final known in Sept 2009
49%	then **68%**	51%	then 32%

[*See* 75 Fed. Reg. 12702, esp. 12703-12704, and 12706-12707 (Mar. 17, 2010).]

2008 Tart Cherry Crop [July 1, 2008 through June 30, 2009]

Restricted, Prelim known in June 2008	**Restricted**, Final known in Sept 2008	Free, Prelim known in June 2008	Free, Final known in Sept 2008
10%	then **27%**	90%	then 73%

[*See* 73 Fed. Reg. 74073, esp. 74075 and 74078 (Dec. 5, 2008).]

2007 Tart Cherry Crop [July 1, 2007 through June 30, 2008]

Restricted, Prelim known in June 2010	**Restricted**, Final known in Sept 2010	Free, Prelim known in June 2010	Free, Final known in Sept 2010
52%	then **43%**	48%	then 57%

[*See* 73 Fed. Reg. 11323, esp. 11325 and 11328 (March 3, 2008).]

2006 Tart Cherry Crop [July 1, 2006 through June 30, 2007]

Restricted, Prelim	**Restricted**, Final	Free, Prelim	Free, Final
known in June 2010	known in Sept 2010	known in June 2010	known in Sept 2010
40%	then **45%**	60%	then 55%

[*See* 72 Fed. Reg. 13674, esp. 13675-13676 & 13679 (Mar. 23, 2007).]

2005 Tart Cherry Crop [July 1, 2005 through June 30, 2006]

Restricted, Prelim	**Restricted**, Final	Free, Prelim	Free, Final
known in June 2005	known in Sept 2005	known in June 2005	known in Sept 2005
36%	then **42%**	64%	then 58%

[*See* 70 Fed. Reg. 67375, esp. 67377 and 67380 (Nov. 7, 2005).]

How did William Sherman prove that tart cherries processed into metal cans **cannot** be stored and carried over from crop year to crop year? William Sherman testified (Tr. 1041-43):

> Mr. Rosloniec: Describe for me how the canned segment of the industry differs from the remainder of the cherry industry in terms of holding reserves.
>
> Mr. Sherman: Well, simply stated the canned product has a shelf life of a little over a year. And as you heard Mr. Hackert testify, five plus one, for example, has a, probably a four year shelf life for sure.
>
> Mr. Rosloniec: So it's just, it's the shelf life is the issue, okay. And what causes it to have that shelf life?
>
> Mr. Sherman: The product in the canned segment's

produced in a metal container. The acid in the fruit reacts with the container and causes deterioration of the container. It can cause literally spoilage, leakage, and believe me, everybody in the canned foods segment has seen it, by that I mean spoilage.

Mr. Rosloniec: Does this --

Judge Clifton: Let me inquire about that. Isn't there a lining inside metal cans?

Mr. Sherman: There is.

Judge Clifton: Okay. Tell me why that's not an effective barrier.

Mr. Sherman: Well, it is, but it only, it only, it's sort of like paint on your car, if you can imagine, I mean, you know, you drive it through the salt, and if you live in Michigan then pretty soon you see a few rust spots.

Mr. Sherman: Well, the acid in the fruit, I mean really it starts to, it starts to attack, and that's the word that people in the can-making business use, the acid in the fruit, it's not just cherries, but many, many products, and some are more difficult to pack than others, it starts to attack the, what's called the enamel almost immediately, and if it, but, and so if it would, and the enamel then would, I'll say, this is not how a can-making technician would describe it, but basically there's a hole in the enamel, and then the acid attacks the bare metal, and it literally can create a, like a pinpoint hole in the can.

Mr. Sherman: And in fact, we had some product recently that we, we being Burnette Foods, had shipped to Japan, and the only reason I'm telling this story, the containers failed, I'll put it that way. And so we were on the receiving end of, you know, complaint of, more the complaint of Bill.

(Tr. 1041-43).

Mr. Sherman identifed PX 42, which was admitted into evidence over AMS's objection. Tr. 1045. PX 42 is two pages which identify Burnette Foods' Ball Corporation specs for the 300 x 407 sized can, which Burnette uses for only water packed tart cherries, showing "Shelf Life Warranty: Cherries, Red Tart 15 M" (15 months). William Sherman testified (Tr. 1044-47):

> Mr. Rosloniec: Mr. Sherman, are you familiar with this document (PX 42)?
>
> Mr. Sherman: Yes.
>
> Mr. Rosloniec: Okay, and what is this document?
>
> Mr. Sherman: It's a, Ball Corporation is a major supplier of containers to Burnette Foods, and it's a spec sheet and it also includes their statement of shelf life warranty.
>
> Mr. Rosloniec: Okay. Is this an accurate representation of the --
>
> Mr. Sherman: Yes.
>
> * * * *
>
> Judge Clifton: What does 15m mean?
>
> Mr. Sherman: Months.
>
> Judge Clifton: 15 months. Now does it make a difference whether the cherries are packed in water?
>
> Mr. Sherman: This particular, let me see, oh, this is water-packed product.
>
> Judge Clifton: How do you know?

> Mr. Sherman: Well, I know, in the upper right corner, right below file name where it says 300 by 407.
>
> Judge Clifton: Yes.
>
> Mr. Sherman: We only use, we only use that container for water packed cherries.
>
> Judge Clifton: All right.
>
> Mr. Sherman: It's the retail sized can, it's 14 _ ounces.
>
> Judge Clifton: Okay. Thank you.
>
> Mr. Rosloniec: Mr. Sherman, how does this warranty impact Burnette's ability to hold reserves?
>
> Mr. Sherman: Well, we're required to hold, as I said, we produce four products, four tart cherry products, they're all in metal containers, when we have reserve requirements and we have had in the history of this order many years out of the last, I guess it's 16 years now, I would say in ten of those years at least we've had reserve requirements, so we're required to hold inventory reserves in a, or we hold our inventory reserves in a form that has a limited shelf life, and it's, I mean, it's recognized. Mr. Hackert recognizes it as well.

(Tr. 1044-47).

Parties and Counsel

The Petitioner, Burnette Foods, Inc., a Michigan corporation ("Burnette"), is represented by James J. ("Jay") Rosloniec, Esq., Grand Rapids, Michigan. Burnette's President and CEO is William Sherman. Burnette's COO is John Pelizzari.

The Respondent, the Administrator of the Agricultural Marketing Service, an agency of the United States Department of Agriculture

("AMS"), is represented by Sharlene Deskins, Esq., with the Office of the General Counsel, United States Department of Agriculture ("USDA"), Washington, District of Columbia. AMS's Agency Representative is Lois Tuttle. AMS's Marketing Specialist assigned to the Tart Cherry Marketing Order is Jennie Varela.

Procedural History

The Petition, filed on August 3, 2011, challenges the Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930), requesting relief under Section 15(A) of the AMAA (Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601-674), especially 7 U.S.C. § 608(c)(15)(A). The six-day Hearing was held May 15-22, 2012, in Grand Rapids, Michigan. Briefs were filed August 15, 2012 (Burnette); September 14, 2012 (AMS); and October 19, 2012 (Burnette).

Tart Cherries Canned, Different from Frozen

William Sherman testified on direct examination (Tr. 990-92):

> Mr. Sherman: . . . the cherries are harvested by the grower, and in our case I'll just talk about what happens at Burnette Foods, they're delivered, in most cases to our factories by the grower, and over the period of the next, usually 24 hours, those cherries will be processed into, in our case, either one of the four products that I mentioned, which are the two fruit filling products, one in the food service size can, one in the retail size can, or the retail water pack cherries or the food service size water pack cherries. So those are the four products for tart cherry products that we produce.
>
> Mr. Sherman: And we often, often label these products as we're producing this product for our various customers, and in some cases the, not enough, but in some cases the product is actually shipped to a retailer within 24 hours of the time it's harvested from the, by the grower.

Mr. Rosloniec: Where in this processing cycle does Burnette Foods product end up?

Mr. Sherman: It ends up at the retail grocery store. Is that an answer, is that what you're --

Mr. Rosloniec: Yeah, as a finished product?

Mr. Sherman: As a finished product, ready for the consumer to take home and make a cherry product, if that's what they want to do with it.

Mr. Rosloniec: If you --

Judge Clifton: I'd like to go back to what the grower does before delivering a harvest to your factory.

Mr. Sherman: Is the question --

Judge Clifton: Does the grower wash them?

Mr. Sherman: No.

Judge Clifton: No? The grower just --

Mr. Sherman: He harvests them, he harvests the cherries in a container that, and then it comes to our facility in that container.

Judge Clifton: Okay. Thank you.

Mr. Rosloniec: Mr. Sherman, if you know, where would the product that's produced by a member of CherrCo end in that cycle?

Mr. Sherman: Frozen cherries are ingredients. Burnette Foods is not in the ingredient business, and so, so a frozen cherry would be sold to possibly somebody like Burnette Foods, or Knouse Foods, or Pinnacle, I guess

> Foods, I guess that's what they call themselves, or a company like Sara Lee or various other industrial baking companies. And frozen cherries are also used to make dry cherries, as you heard in the testimony. And in fact, even tart cherry juice concentrate, even in the case of tart cherry juice concentrate as its produced in the United States, the cherries are frozen first and then they're, they go through a defrost process and then made into tart cherry juice concentrate.
>
> Mr. Sherman: So other than the canned segment, at one time or another, everything else in its product creation cycle is a frozen cherry.

Tr. 990-92.

Sales Constituency

1 **Sales Constituency**: Is the Capper-Volstead cooperative CherrCo, Inc. a sales constituency? Did Burnette Foods, Inc. meet its burden of proof to support its claim that CherrCo, Inc. is a sales constituency? If, not, does a single industry group dominate the actions of the Cherry Industry Administrative Board and exert improper control over the tart cherry industry? Sales constituency is defined in the Tart Cherry Order:

> **§ 930.16 Sales constituency**.
>
> Sales constituency means a common marketing organization or brokerage firm or individual representing a group of handlers and growers. An organization which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency.

9 C.F.R. § 930.16.

Being positioned economically and legally to profit in the tart cherry business is complicated. Many owners in the tart cherry industry have found it useful to form more than one entity - - including a grower

cooperative entity formed specifically to become a member of the Capper-Volstead cooperative CherrCo. The Capper-Volstead cooperative CherrCo has been effective in benefitting not only its members, but on occasion its members' affiliates such as packers. Burnette maintains that the federal regulations governing the marketing of tart cherries as-administered are not in accordance with law, in part because of CherrCo's influence and methods of operating.

Petitioner Burnette Foods, Inc. ("Burnette") is vertically integrated; that is, Burnette the grower is the same entity as Burnette the canner (packer). Burnette does not choose to be a member of the Capper-Volstead cooperative CherrCo, Inc. ("CherrCo"), but if Burnette did, a different entity (or entities) would be required. Burnette has its own sources of tart cherries (including growers such as James Von Holt and Dorance Munro Amos). Burnett has its own customers (especially in the retail grocery trade, including store brands such as Kroger, Target, Walmart, Spartan, and Meijer; and in the food service industry, including Sysco, U.S. Foodservice, and Gordon Food Service). Burnette does not need CherrCo's power or influence to operate in the marketplace. Burnette does object to CherrCo's power and influence regarding the administration of the Tart Cherry Order, from which Burnette asks that all canners be entirely exempt.

If Cherrco were not a Capper-Volstead cooperative, I might take Burnette's insistence that CherrCo **is** a sales constituency more to heart. But CherrCo **is** a Capper-Volstead cooperative, which necessitates that CherrCo do a lot of management on behalf of its members. I find that CherrCo is **not** a sales constituency. *See* ¶¶ 30 & 31.

Composition of the Board that Administers the Tart Cherry Order

Cherry Industry Administrative Board: Is the Cherry Industry Administrative Board (CIAB) properly formed and operated in accordance with the Tart Cherry Order? I find that it is. Burnette's arguments on this issue (composition of the CIAB) do not persuade me, although I certainly understand Burnette's frustration. *See* Tr. 744-47 regarding composition of the CIAB.

Findings of Fact

1. Burnette Foods, Inc., the Petitioner ("Burnette"), is a Michigan corporation, with a principal place of business in Elk Rapids, Michigan.

2. Burnette grows (produces) tart cherries (among other fruits), buys tart cherries from other growers, and processes tart cherries (among other fruits).

3. Burnette is subject to the Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930).

4. When the tart cherries domestic crop plus carried over free tonnage combined is plentiful, the Tart Cherry Order as-administered requires processors to hold tart cherries off the market. The theory is that (a) the price for tart cherries will not plummet because of over-supply if part of the supply is kept off the market; and (b) tart cherries held off the market will be available during scarcity (they keep well when frozen) so that purchasers can rely on tart cherries being available year-to-year. The theory is that this keeps the price from plummeting and keeps tart cherries available year-to-year and that both promote orderly marketing, which is the objective of the AMAA (Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq*.).

5. There is **no limit** on the percentage of restriction (keeping tart cherries off the market) that can be imposed. Tr. 1602-03.

6. Burnette processes tart cherries into four finished products, each in a metal can:

   (a) fruit filling (such as for cherry pie) in a number 10 can (food service size can) which holds about 7 pounds of net weight;

   (b) fruit filling (such as for cherry pie) in a number 2 can (retail size can) which holds about 21 ounces;

   (c) water pack (tart cherries and water) in a number 10 can (food

service size can) that holds about 107 ounces; and

(d) water pack (tart cherries and water) in a can (retail size can) that holds about 14-1/2 ounces. Tr. 978-79, 990-91.

7. For any individual **grower**, the tart cherry harvest takes place over a period of about 20 days. Each individual grower has probably a 20-day window to harvest his product. Tr. 987-88. For Burnette as a **processor**, the tart cherry harvest lasts longer because Burnette starts in southern Michigan around the 4th of July and by the time Burnette is done in northern Michigan, it's probably the 10th of August (roughly a 37-day window). Tr. 988.

8. Frozen tart cherries keep well (at least three years and up to four or five years)[1].

9. Burnette's competitors suggested a solution for Burnette so that Burnette need not hold tart cherries in cans off the market; they suggest that Burnette buy from its competitors sufficient frozen tart cherries to hold off the market to meet its obligation under the Tart Cherry Order as-administered.

10. Burnette's competitors' suggested solution is not at all practical, especially when the percentage of tart cherries to be held off the market is large. *See* the percentages in ¶ 4.

11. Perry Hedin suggested a solution for Burnette, too: switch out the cans. Perry Hedin's suggested solution is not at all practical: next year's tart cherries in cans would not be available for an entire year, when the "best by" date has already been reached.

12. Counsel for AMS emphasized on cross-examination that Burnette could use the alternatives to inventory; for example, Ms. Deskins inquired, "But you can sell product that's exported?" Mr. Sherman

---

[1] The same cannot be said of tart cherries processed into metal cans. Requiring Burnette or any other processor to hold tart cherries in cans off the market until close to the "best by" date (one year after canning) would be the equivalent of confiscation. It would be equally confiscatory to require a canner to meet the restriction requirements by using the alternatives to inventory.

explained that selling product that's exported is not Burnette's business; and that alternative does not include Canada, Mexico, Panama, or anywhere in North America. Tr. 1094-96. Ms. Deskins inquired, "Can you also meet your restriction requirements by developing new products?" Mr. Sherman explained that there's nothing new about the tart cherries in metal cans; the water packed products are probably 80 years old, maybe 90 or even older than that; the fruit filling the way Burnette does it is 40 or 50 years old. Tr. 1096-97.

13. Burnette argues that tart cherries growers' (producers') prices and crop values have not increased with the current Tart Cherry Order, contrary to an objective of the Tart Cherry Order. Burnette argues that the testimony of its economic expert Dr. Paul Edward Godek proves that the return to growers has not improved; even though the return to handlers of frozen product has improved. *But see* Mr. Hedin's testimony regarding the total farm gate value for the industry (Tr. 1549-59) and RX 7 and RX 8. The impact of the Tart Cherry Order on the return to tart cherry growers is not clear. Were I to conclude that the return to tart cherry growers has not increased under the Tart Cherry Order, I would also conclude that failure to meet an objective is not equivalent to "contrary to law."

14. Frozen tart cherries prices have probably increased with the current Tart Cherry Order, approximately 12 cents per pound. Whether the tart cherries processors' costs increased is not clear.

15. Burnette on occasion does buy frozen tart cherries (Tr. 1113). Under this Decision, frozen tart cherries thereafter put into metal cans would **not** be exempt from restriction requirements (volume control).

16. CherrCo, Inc. ("CherrCo") is a Capper-Volstead cooperative; that is, its members are producer cooperatives. CherrCo provides sales opportunities to its members (producer cooperatives) and also to its members' affiliates (processors). The impact of assisting not only its members but also its members' affiliates (processors) to the exclusion of others could be important to determine if this were some other case. Here, I find that neither the Tart Cherry Order nor the Tart Cherry Order as-administered is implicated for any such impact.

AGRICULTURAL MARKETING AGREEMENT ACT

17. CherrCo controls many aspects of the sales of its members' (producer cooperatives') tart cherries but NOT all aspects. For example:

    (a) CherrCo sets a minimum price; CherrCo may NOT determine the price.

    (b) Each sales agent must have a contract with CherrCo to be permitted to sell; CherrCo may NOT designate which of the sales agents in its "stable" will be chosen to do the selling.

    (c) CherrCo may designate eligible buyers; it is not clear whether CherrCo designates which of the eligible buyers will be chosen to do the buying.

As CherrCo manages on behalf of its members, CherrCo exerts control, and the control exerted does not make CherrCo a sales constituency; CherrCo is more correctly characterized as a Capper-Volstead cooperative.

Conclusions

1. The form of the tart cherries, frozen, canned in any form, dried, or concentrated juice, placed in the primary inventory reserve is at the option of the handler. 7 C.F.R. § 930.55(b). Although Burnette is not required to withhold cans of tart cherry fruit filling and cans of water pack tart cherries from the market, because Burnette could instead withhold from the market **an equivalent** (7 C.F.R. § 930.55); nevertheless, the requirement that a canner withhold from the market the same percentage as handlers who freeze (for example), is contrary to law because it is confiscatory: the tart cherries processed into metal cans **cannot** be stored and carried over from crop year to crop year. The frozen tart cherries **can** be stored and carried over from crop year to crop year.

2. It would be arbitrary and capricious to persist in the fiction of stating that tart cherries processed into metal cans can be stored and carried over from crop year to crop year.

3. The canned tart cherries need to reach the consumer promptly and

cannot be maintained in the processor's inventory from crop year to crop year. The "best before" or "best by" date is roughly one year from harvest.

4. Just as it is confiscatory to require the tart cherries processed into metal cans to be maintained in inventory; it is equally confiscatory to require a canner to meet the restriction requirements by using the alternatives to inventory. This Decision does not exempt all tart cherries processed into metal cans, but only those that (a) are delivered from being harvested directly to a canner and (b) are promptly processed into metal cans with no processing other than canning having occurred, such as William Sherman described in paragraph 9.

5. Perry Hedin testified that the Tart Cherry Order is a national marketing order, and it's a national market, and that the concern in the industry is supply versus demand and we have producers from all over the country and the competition at the handler level is for that fruit. Mr. Hedin testified that Burnette should not be relieved of any responsibility ["I think it presents the classic free rider issue from marketing orders."] Mr. Hedin continued: "The fact that I might put it in a can or I might put it in a frozen product or I might dry it, is a business choice that the individual handler has made. There still is the supply. It's still part of the production and I think to exempt them is an improper way to go because you can adjust as easily." Tr. 1606-08. Here, I disagree with Mr. Hedin. I conclude that Burnette - - and other canners - - cannot "adjust as easily" to the restriction (volume control) requirements of the Order; that the tart cherries they receive directly from the harvest and promptly process into metal cans, with no processing other than canning, must be exempt from restriction. I will agree with Mr. Hedin that the canners need not be relieved from the remaining responsibilities of the Tart Cherry Order. One of the 3 canners, Knouse, is already exempt from the restriction (volume control) requirements of the Order. All processors in Pennsylvania and Oregon are exempt from the restriction (volume control) requirements of the Order. Tr. 736. They could become restricted if their production increases. Processors in only 5 states, Michigan, New York, Utah, Washington, and Wisconsin, are subject to the restriction (volume control) requirements of the Order. The Tart Cherry Order may be a national marketing order, but 43 States have no handlers (processors) subject to it at all. Mr. Hedin testified that the

percentage of the tart cherry industry represented by the canned segment was "roughly 12% of last year's production. And back in 1997, it was close to, I would project about 17%. As you can see, it fluctuates year over year." Tr. 739. Mr. Sherman testified that "Burnette Foods selling, Burnette Foods selling more pie filling is not going to injure a frozen packer, whatsoever. I mean, it's about like us selling oranges. That's not going to hurt the frozen packer either." Tr. 1096. I agree with Mr. Sherman.

6. As of May 2012 (when the hearing was held), tart cherries imported into the United States had not been considered in determining "Optimum supply." 7 C.F.R. § 930.50. "The estimated total production of cherries" and "The estimated size of the crop to be handled" (*see* 7 C.F.R. § 930.50(e)) have been understood to refer to **domestic production** (not world-wide) and to the **domestic crop** (not world-wide). It was generally recognized (when the hearing was held) that tart cherries imports into the United States had been increasing, and the Cherry Industry Administrative Board (CIAB) had been discussing the impact of imported tart cherries on the supply. Measuring the imports is much less precise than measuring the domestic supply. It is not clear whether Customs' (U.S. Customs and Border Protection) figures would be useful. Burnette's Rebuttal Brief states at page 12: "Ignoring imported product results in a distorted view of sales of tart cherry products in the United States. By ignoring sales of imported products the demand component of the OSF (Optimum Supply Formula) is artificially decreased resulting in greater restrictions upon tart cherry production domestically. Thus, while the CIAB is increasing restrictions upon production of tart cherry products by domestic companies, foreign tart cherry products are being imported and sold in the United States. At the same time that severe restrictions are applied to domestic cherry products, there are no restrictions on the supply of imported cherry products which may be sold in the United States." Burnette Rebuttal Br. at 12.

7. The Optimum Supply Formula is unwieldy, and its failure to take into account tart cherries imported into the United States seems to be a deficiency. A deliberative process allows the CIAB to make recommendations to AMS regarding economic adjustments to the Optimum Supply Formula. The inputs are not at all precise, including the inputs even of expected domestic supply. Nevertheless, except as stated

in this Decision, I do **not** find use of the Optimum Supply Formula to be contrary to law. So long as the majority in the tart cherry industry continue to vote in favor of being regulated under the Tart Cherry Order, 7 CFR Part 930, absent an amendment, the tart cherry industry will continue to have the Optimum Supply Formula to look forward to. Tr. 775-76.

8. With the implementation of the Order below, the Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930), as-written and as-administered, will be in accordance with law.

ORDER

Beginning with the **2014 Tart Cherry Crop** [July 1, 2014 - June 30, 2015 Crop Year], tart cherries that (a) are delivered from being harvested directly to a canner and (b) are promptly processed into metal cans with no processing other than canning having occurred, such as William Sherman described in paragraph 9, shall be exempt from restriction requirements (volume control).

Beginning with the **2014 Tart Cherry Crop** [July 1, 2014 - June 30, 2015 Crop Year], **exempt**-from-restriction-tart-cherry-production [whether based on the size of production such as Perry Hedin described concerning Oregon and Pennsylvania and crop failure in Northern Michigan in 2010 (Tr. 1612-15); or whether the **exempt**-from-restriction-tart-cherries-processed-into-metal-cans-production] must be subtracted from supply for purposes of volume control, including using the Optimum Supply Formula and calculating the restriction percentages that the **not**-exempt-from-restriction are required to comply with. That additional mathematical step must be employed.

Burnette Foods, Inc. remains otherwise subject to the Tart Cherry Order (Federal Marketing Order 930, 7 C.F.R. Part 930); the remainder of Burnette's Petition is denied.

Finality

This Decision shall be final and effective 35 days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30

days after service. *See* 9 C.F.R. §§ 900.64 and 900.65. Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

APPENDIX A

In re:	)	
	)	[AMAA]
Burnette Foods, Inc.,	)	Docket No. **11-0334**
a Michigan corporation,	)	
	)	
Petitioner	)	**Witnesses**

The 6-day Hearing was held May 15-22, 2012, in Grand Rapids, Michigan.

The transcript pages are shown below for testimony of witnesses:

Day 1, May 15 (Tues) 2012:

Mr. James Thomas Horton (Tr. 60-81) May 15, 2012 called by Burnette Foods

Ms. Cheryl Kroupa (Tr. 86-111) May 15, 2012 called by Burnette Foods

Mr. James Edward Nugent (Tr. 112-171) May 15, 2012 called by Burnette Foods

Mr. Glenn F. LaCross (Tr. 180-213) May 15, 2012 called by Burnette Foods

Mr. Roy Hackert (Tr. 214-280) May 15, 2012 called by Burnette Foods

Mr. Jonathan Tad (Jon) Veliquette (Tr. 281-312) May 15, 2012 called by Burnette Foods

Day 2, May 16 (Wed) 2012:

Dr. Paul Edward Godek (PhD) (Tr. 360-517) May 16, 2012 called by Burnette Foods

Mr. James Robert (Jim) Jensen (Tr. 519-607) May 16, 2012 called by Burnette Foods
[with counsel Christopher Breay]

Day 3, May 17 (Thur) 2012:

Mr. Perry Hedin (Tr. 650-810) May 17, 2012 called by Burnette Foods

Mr. Dorance Munro Amos (Tr. 812-839) May 17, 2012 called by Burnette Foods

Mr. Timothy Orr Brian (Tr. 840-876) May 17, 2012 called by Burnette Foods

Mr. James Von Holt (Tr. 876-929) May 17, 2012 called by Burnette Foods

Day 4, May 18 (Fri) 2012:

Mr. William Sherman (Tr. 971-1153) May 18, 2012 called by Burnette Foods

Mr. Thomas Facer (Tr. 1157-1225) May 18, 2012 called by AMS

Day 5, May 21 (Mon) 2012:

Mr. Steven Donald (Steve) Nugent (Tr. 1270-1374) May 21, 2012 called by Burnette Foods

Ms. Jennie (Jen) Varela (Tr. 1376-1401) May 21, 2012, called by AMS

Mr. Donald (Don) Gregory (Tr. 1401-1430) May 21, 2012, called by AMS

AGRICULTURAL MARKETING AGREEMENT ACT

Day 6, May 22 (Tues) 2012:

Mr. James Robert (Jim) Jensen RECALLED (Tr. 1466-1525) May 22, 2012, called by AMS
[with counsel Christopher Breay]

Mr. Perry Hedin RECALLED (Tr. 1525-1631) May 22, 2012, called by AMS

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ANIMAL WELFARE ACT

COURT DECISIONS

ASSOCIATED DOG CLUBS OF NEW YORK STATE, ET AL. v. VILSACK.
No. 1:13-cv-1982 (CRC).
Memorandum Opinion and Order.
Filed May 16, 2014.

[Cite as: 44 F. Supp. 3d 1 (D.D.C. 2014)].

AWA – Administrative rule – Licensing requirements – Intervene, motion to – Pet dealers – Retail pet store.

United States District Court,
District of Columbia

Court granted Humane Society of the United States's Motion to Intervene in a suit challenging a Department rule that redefined the term "retail pet store." The Court held that the Humane Society had standing and satisfied the requirements for intervention as a matter of right.

MEMORANDUM OPINION AND ORDER

CHRISTOPHER R. COOPER, U.S. District Judge,
delivered the opinion of the Court.

Plaintiffs brought suit to challenge a Department of Agriculture rule extending the licensing requirements of the Animal Welfare Act to certain on-line pet dealers. The Humane Society of the United States seeks to intervene in the action to defend the rule. Because the Humane Society has demonstrated that the challenge may impede its well established animal cruelty programs and that the USDA may not adequately represent its interests in defending the suit, the Court will grant the Humane Society's motion to intervene.

ANIMAL WELFARE ACT

I. Background

The Animal Welfare Act, ("AWA"), 7 U.S.C. § 2131, *et seq.*, establishes licensing and operational requirements for pet dealers. *Id.* § 2133. The AWA defines "dealer" as any person who for profit buys or sells dogs or other specified animals for use as pets, but it specifically excludes "retail pet store[s]" from that definition. *Id.* § 2132(f). The Act itself does not define the term "retail pet store." Congress left that to the Secretary of Agriculture, who administers the Act. *Id.* § 2151.

For over forty years, the USDA maintained a regulation that, with certain exceptions, broadly defined "retail pet store" as "any outlet" where dogs, cats and twelve other categories or species of animals are sold to the public for use as pets. 9 C.F.R. § 1.1 (2004). The agency defended that definition against a challenge from animal protection groups as recently as 2003. *See Doris Day Animal League v. Veneman*, 315 F.3d 297 (D.C.Cir.2003). In 2012, however, the USDA changed course. Responding to concerns raised by the animal protection community, including the Humane Society, over the alleged proliferation of on-line "puppy mills," the agency issued a proposed rule to revise the "definition of retail pet store and related regulations to bring more animals sold at retail under the protection" of the AWA. 77 Fed.Reg. 28799–01 (May 16, 2012). The new rule, which became final on September 18, 2013, redefined "retail pet store" to mean "a place of business or residence at which the seller, buyer and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase[.]" 9 C.F.R. § 1.1.[1]

Plaintiffs are a collection of dog and cat breeding clubs that object to the regulatory requirements they claim will result from the new retail pet store definition. Bringing suit under the Administrative Procedures Act

[1] Presumably to lessen the impact of the new definition on small breeders, the rule also widened an existing exemption based on the number of animals a breeder keeps on his or her premises. Under the expanded exemption, breeders are not subject to licensing if they maintain four or fewer breeding females on their premises and sell only the offspring of those animals for use as pets or for exhibition. *Id.* § 2.1.

("APA"), they contend that the USDA failed to justify the new rule, did not consider objections filed by the plaintiffs during the notice and comment period, and exceeded its authority under the AWA.

Apparently concerned that that the USDA "might agree to settle rather than litigate" the plaintiffs' challenge to the rule that it helped bring about, the Humane Society moved to intervene as a defendant in the case. Mot. to Intervene at 17. It argues that it will be forced to expend additional resources to respond to "animal cruelty emergencies at non-USDA licensed puppy mills" if the rule is set aside and questions whether USDA adequately represents its interests in defending the rule. The breeding clubs oppose the motion to intervene because, in their view, the Humane Society's voluntary expenditure of resources "to hound breeders acting within the bounds of the law" is not a "legally protected" interest justifying intervention and because the USDA adequately represents the Humane Society's interests, whatever they may be. Opp. to Mot. to Intervene at 4–6. The government takes no position on the motion.

II. Analysis

The Humane Society seeks to intervene both as of right and permissively under Federal Rules of Civil Procedure 24(a) and (b). Because the Court concludes that the Humane Society has met the requirements for intervention as of right, it need not reach the Humane Society's permissive intervention argument. Rule 24(a)(2) permits parties to intervene in a pending action if (1) the motion to intervene is timely; (2) the movant "claims an interest relating to the property or transaction that is the subject of the action"; (3) the movant "is so situated that disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and (4) the movant's interest is not adequately represented by existing parties. Fed. R. Civ. P. 24(a); *accord Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C.Cir.2003) (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C.Cir.1998)). Additionally, a party seeking to intervene as of right in this Circuit "must demonstrate that it has standing under Article III of the Constitution." *Fund for Animals*, 322 F.3d at 731–32 (citing *Military Toxics Project v. EPA)*, 146 F.3d 948, 953 (D.C.Cir.1998)). The Court will first address whether the Humane Society has standing.

ANIMAL WELFARE ACT

A. Standing

To satisfy the Article III standing requirements, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (footnote, citations, and quotations omitted). An organization "'may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.'" *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach,* 469 F.3d 129, 132 (D.C.Cir.2006) (quoting *Warth v. Seldin,* 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). To establish standing in its own right, an organization must demonstrate that that it has suffered a "concrete and demonstrable injury to [its] activities—with [a] consequent drain on the organization's resources—constitut[ing] ... more than simply a setback to the organization's abstract social interests." *Nat'l Taxpayers Union, Inc. v. United States,* 68 F.3d 1428, 1433 (D.C.Cir.1995) (quoting *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)).

The Humane Society has made this showing. The organization's animal cruelty programs are well established. *See Humane Society of U.S. v. Postal Serv.,* 609 F.Supp.2d 85, 89 (D.D.C.2009) (describing Humane Society programs). And it has demonstrated how invalidating the rule would require it to divert additional resources to police suspected animal cruelty by non-licensed breeders. *See* Mot. to Intervene at 13. Citing as examples the costs incurred treating animals captured in two federal raids, the Humane Society explains that "if the Final Rule remains in place, it is highly likely that [it] would no longer have to engage in so many raids of unlicensed breeding facilities." *Id.* at 13–14. The Humane Society also asserts that a successful challenge to the rule

would hamper its investigatory and educational programs by depriving it of information collected on licensed breeders. *Id.* at 14–16. Indeed, the breeding clubs themselves acknowledge that "the newly promulgated Rule saves HSUS money, enables HSUS to be more efficient in gathering information, and gives HSUS additional traction in its lobbying efforts." Opp. to Mot. to Intervene at 4. Case law in this Circuit firmly establishes that these types of impediments to an advocacy organization's activities constitute "concrete and demonstrable" injuries sufficient to confer standing. *See, e.g., Action Alliance of Senior Citizens of Greater Phila. v. Heckler,* 789 F.2d 931, 937–38 (D.C.Cir.1986) (elimination of compliance and information collecting services by government agency harmed private entity by increasing the burden on its "information-dispensing, counseling, and referral activities"); *People for the Ethical Treatment of Animals ("PETA") v. Dep't of Agric.,* 13–976, 7 F.Supp.3d 1, 8, 2013 WL 6571845, at *4 (D.D.C. Dec. 16, 2013) (USDA's alleged "failure to enforce the AWA with respect to birds" deprived the PETA "of key information that it relies on to educate the public" forcing it to "expend additional resources ... by pursuing complaints about bird mistreatment ... and by conducting its own investigations."); *Humane Society of U.S.,* 609 F.Supp.2d at 89 (Humane Society had standing to challenge postal service rule that increased costs of responding to animal cruelty raids).

The Humane Society's standing to intervene is not diminished, as the breeding clubs argue, because it seeks to defend, rather than challenge, the USDA rule. Opp. to Mot. to Intervene at 6.[2] Harm caused to an organization's programs by the invalidation of a rule is no less concrete or demonstrable than the same harm caused by an agency's failure to enforce a rule. Consistent with this principle, a number of decisions in this Circuit have permitted intervention by parties seeking to defend government action. *See Fund for Animals,* 322 F.3d at 733–34 (agency of

[2] While the breeding clubs direct this argument to the "legally protected interest" prong for intervention as of right, Opp. to Mot. to Intervene at 4–6, the Court will address it in discussing whether the Humane Society has standing because the inquiries are functionally identical under this Circuit's precedent. *See, e.g., Cal. Valley Miwok Tribe v. Salazar,* 281 F.R.D. 43, 47 (D.D.C.2012) (citing *Jones v. Prince George's Cnty.,* 348 F.3d 1014, 1019 (D.C.Cir.2003)); *Am. Horse Prot. Ass'n v. Veneman,* 200 F.R.D. 153, 157 (D.D.C.2001).

the Mongolian government and private groups could intervene to defend Department of the Interior regulation enabling hunters of Mongolian sheep to bring trophies to the United States); *Military Toxics Project,* 146 F.3d at 954 (trade association had standing to intervene to defend EPA rule because its members would be harmed if rule was set aside); *Wildearth Guardians v. Salazar,* 272 F.R.D. 4, 13–18 (D.D.C.2010) (coal mines intervened to defend Department of the Interior decision selling them land against a challenge by environmental groups). In *American Horse Protection Association v. Veneman,* 200 F.R.D. 153 (D.D.C.2001), for example, an animal protection organization brought suit to challenge USDA's allegedly lax enforcement of rules designed to protect show horses from training injuries. *Id.* at 155–56. A group of show horse trainers who were directly affected by the rules moved to intervene to defend the agency's enforcement regime. *Id.* at 156–57. The court ruled that the trainers had standing to intervene as of right because they demonstrated that they "will be injured in fact by the setting aside of the government's action it seeks to defend, that this injury will have been caused by that invalidation, and the injury would be prevented if the government action is upheld." *Id.* at 156. The same is true here.

Nor does it matter that the Humane Society voluntarily chooses to engage in its programs. *See* Opp. to Mot. to Intervene at 4. While "[a]n organization is not injured by expending resources to challenge [a] regulation," *Abigail Alliance,* 469 F.3d at 133, injuries to programs undertaken by choice may be sufficient to establish standing. *See Havens Realty,* 455 U.S. at 368, 102 S.Ct. 1114 (describing organization and program); *see also Humane Society of U.S.,* 609 F.Supp.2d at 89 (Humane Society had standing to challenge government actions that harmed voluntary program to address animal cruelty).

B. Timeliness

Moving to Rule 24(a)'s timeliness requirement, the Humane Society filed its motion to intervene 14 days after the breeding clubs filed their initial complaint. The motion is clearly timely, which the breeding clubs do not dispute. *See, e.g., Fund for Animals,* 322 F.3d at 735 (filing motion "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer" is timely).

C. Interest Related to the Action

A party seeking to intervene must next "claim[ ] an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a). The Humane Society has met this requirement because "in this Circuit, 'satisfying constitutional standing requirements demonstrates the existence of a legally protected interest.'" *Cal. Valley Miwok Tribe v. Salazar,* 281 F.R.D. 43, 47 (D.D.C.2012) (quoting *Jones v. Prince George's Cnty.,* 348 F.3d 1014, 1019 (D.C.Cir.2003)); *accord Am. Horse Prot. Ass'n,* 200 F.R.D. at 157.

D. Action Will Impede the Movant's Interest

The Humane Society also satisfies Rule 24(a)'s requirement that disposition of the action will impair the movant's ability to protect its interest. Whether the action will impede the movant's interest depends on the "'practical consequences of denying intervention, even where the possibility of future challenge to the regulation remain[s] available.'" *Fund for Animals,* 322 F.3d at 735 (quoting *Natural Res. Def. Council v. Costle,* 561 F.2d 904, 909 (D.C.Cir.1977)). As noted above, Plaintiffs acknowledge that the new rule benefits the Humane Society's programs and that vacating that rule would remove that benefit. Opp. to Mot. to Intervene at 4. This potential harm is not obviated by the Humane Society's ability to "reverse an unfavorable ruling by bringing a separate lawsuit," given the cost and delay of doing so. *See Fund for Animals,* 322 F.3d at 735 (citing *Natural Res. Def. Council,* 561 F.2d at 910); *accord Am. Horse Prot. Ass'n,* 200 F.R.D. at 158–59.

E. Adequate Representation

Finally, a party seeking to intervene under Rule 24(a)(2) must show that that its interests are not "adequately represented" by existing parties. This requirement is "'not onerous.'" *Fund for Animals,* 322 F.3d at 735 (quoting *Dimond v. Dist. of Columbia,* 792 F.2d 179, 192 (D.C.Cir.1986)). The movant need only show that the current representation "'may be inadequate[.]'" *Id.* (quoting *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972)). As a result, this Circuit "often conclude[s] that governmental entities do not adequately represent the interests of aspiring intervenors."

Id. at 736–37 (citing *Dimond,* 792 F.3d at 192–93) & n. 9 (collecting cases).

The Humane Society argues that, in light of the USDA's prior defense of the broader retail pet store definition, it might not defend the new rule as vigorously as the Humane Society would like, particularly because the government is "obligated to consider the desires of the entirety of the American public" over the Humane Society's narrower interests. Mot. to Intervene at 17. The breeding clubs assert that the USDA adequately represents the Humane Society's interests because "USDA [will] defend the Rule as being in [the] best interests of 'the entirety of the American public,' especially [the Humane Society]." Opp. to Mot. to Intervene at 7.

The Humane Society has overcome the low hurdle required to show inadequacy of present representation. "[M]erely because parties share a general interest in the legality of a program or regulation does not mean their particular interests coincide so that representation by the ***7** agency alone is justified." *Am. Horse Prot. Ass'n,* 200 F.R.D. at 159. The Humane Society has "a distinct and weighty interest" in furthering its investigatory and information-dissemination programs that is not equivalent to the government's broader concerns. *See, e.g., Cal. Valley Miwok Tribe,* 281 F.R.D. at 47–48; *see also, Fund for Animals,* 322 F.3d at 736 ("taking the [proposed intervenor's] efforts 'into account' does not mean giving them the kind of primacy that the [proposed intervenor] would give them").

III. Conclusion

For the foregoing reasons, the Humane Society has met the requirements for intervention as of right under Rule 24(a). It is hereby **ORDERED** that the Motion to Intervene by the Humane Society of the United States is GRANTED.

SO ORDERED.

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HORTON v. UNITED STATES DEPARTMENT OF AGRICULTURE.*
No. 13-3660.
Court Decision.
Filed May 19, 2014.

[Cite as: 559 Fed. Appx. 527 (2014)].

AWA – Civil penalty – Dealer – Good faith – Judicial Officer – Willfulness.

United States Court of Appeals,
Sixth Circuit

Court denied Petitioner's Petition for Review and affirmed Judicial Officer's Decision and Order, which held that Petitioner had violated the Animal Welfare Act by operating as a dealer without a license. The Court found that, because the Animal welfare Act does not require an Administrative Law Judge or Judicial Officer to determine willfulness before assessing civil penalties, the Judicial Officer did not abuse his discretion by failing to make a willfulness determination. The Court also held that the Judicial Officer's findings were supported by substantial evidence and that the civil penalty imposed was within the Judicial Officer's authority.

OPINION

CLAY, Circuit Judge, delivered the opinion of the Court.

Petitioner Lanzie Carroll Horton, Jr., was found to be in violation of the Animal Welfare Act ("AWA" or "the Act"), 7 U.S.C. §§ 2131–2159 (2006), by an Administrative Law Judge ("ALJ"), who issued a cease and desist order to prevent further violations of the Act and ordered Petitioner to pay $14,430 in civil penalties. Both Petitioner and Respondent, the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), appealed the ALJ's decision to a judicial officer ("JO"), acting for the Secretary of the Department of Agriculture (the "Department"), who increased the civil penalties amount from $14,430

* This case was not selected for publication in the Federal Reporter. *See* Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. *See also* Sixth Circuit Rule 28.

to $191,200. Petitioner appeals this decision, alleging that (1) the ALJ and JO erred by failing to determine the willfulness of his actions, and (2) the JO improperly applied the Department's criteria for assessing civil penalties.

For the reasons that follow, we **DENY** the petition for review and **AFFIRM** the Secretary's Decision and Order.

Background

I. Facts

During the time of the events described herein, Petitioner owned and operated Horton's Pups, a business located in Virginia, where Petitioner also lived. From November 9, 2006, through September 27, 2007, Petitioner sold dogs to William Pauley, a licensed dealer and owner of a retail pet store in Virginia called Pauley's Pups. Receipts in the record demonstrate that from November 9, 2006, through September 27, 2007, Pauley purchased a total of 914 puppies from Petitioner's business. Evidence also indicates that over a longer seven-to-eight-year period, Pauley purchased approximately 4,000 puppies from Petitioner. Resp.'s Br. at 11. When given the opportunity to review and contest Pauley's statements and records, Petitioner "stated that he was sure that Pauley's Pups' records were accurate, he did not want to review the records, and said that he sold all the dogs listed in the records." Pet'r's App. at 16.

On November 6, 2007, Petitioner received a letter from the APHIS Regional Director of Animal Care for the Eastern Region, Dr. Elizabeth Goldentyer, who warned that Petitioner likely needed to obtain a license to operate his business in compliance with the AWA. Her letter stated, "It has come to our attention that you may be conducting activities that would require you to be licensed or registered with us. Accordingly, we are enclosing a packet of AWA related information, including copies of the AWA regulations and standards and other materials." *Id.* at 12. Additionally, the letter welcomed Petitioner to "[c]ontact this office ... if you have any questions regarding this letter or the Animal Welfare Act." *Id.*

On June 8, 2008, without first obtaining an AWA license, Petitioner

sold forty-two dogs to Ervin Raber, a licensed dealer and owner of Golden View Kennels in Ohio. Later that year, on November 25, 2008, an APHIS investigator named Christopher Mina visited Petitioner, discussed Goldentyer's letter and the AWA licensing requirements, and inspected the premises. At that time, Mina asked whether Petitioner had received the letter and attached documents about licensing requirements from the Department, and Petitioner responded that he had. Petitioner also stated that he did not believe his transactions were of a nature that required him to obtain an AWA license. The inspector informed Petitioner that he did, in fact, need to obtain a license in order to continue engaging in the type of transactions his business regularly conducted; otherwise, he would have to cease and desist from operating as a dealer in violation of the AWA. At that time, Petitioner appears to have stopped the activity that violated the Act.[1]

II. Procedural History

On November 4, 2011, the APHIS Administrator filed a complaint against Petitioner. The complaint alleged that Petitioner, operating as Horton's Pups, violated the AWA by acting as a dealer as defined in 9 C.F.R. § 1.1 and 7 U.S.C. § 2132(f) from November 9, 2006, through September 20, 2009, without first obtaining a license from the United States Secretary of Agriculture (the "Secretary"). Petitioner filed an answer to this complaint on November 28, 2011.

After both parties conducted discovery, the Administrator filed a Motion for Summary Judgment on June 4, 2012. Petitioner filed his Memorandum in Opposition to the Motion for Summary Judgment, arguing that summary judgment would be improper because two genuine issues of material fact remained regarding whether Petitioner's AWA violations were willful and whether Petitioner operated as a dealer during the period from December 27, 2008, through September 30, 2009.

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[1] The record indicates that sometime between late December 2008 and January 17, 2009, Petitioner sold two dogs for use as pets to Harold Neuhart, a licensed dealer. Additionally, on or about September 30, 2009, Petitioner sold four dogs for use as pets to an unlicensed dealer named Pamela Knuckolls–Chappell. However, the JO found that these six sales did not constitute violations of the AWA, and that finding is not in dispute.

On January 2, 2013, the ALJ issued a decision granting in part and denying in part the Administrator's motion for summary judgment. The ALJ's order concluded that (1) from November 9, 2006, through September 27, 2007, Petitioner delivered for transportation, transported, sold, or negotiated the sale of 914 domesticated dogs for use as pets in violation of 9 C.F.R. § 2.1(a)(1)[22]; (2) on or about June 8, 2008, Petitioner delivered for transportation, transported, sold, or negotiated the sale of forty-two dogs in violation of 9 C.F.R. § 2.1(a)(1); (3) on or about December 27, 2008, Petitioner delivered for transportation, transported, sold, or negotiated the sale of two dogs in violation of 9 C.F.R. § 2.1(a)(1); and (4) on or about September 30, 2009, Petitioner delivered for transportation, transported, sold, or negotiated the sale of four dogs in violation of 9 C.F.R. § 2.1(a)(1). The ALJ also determined that 7 U.S.C. § 2149(b), which governs the assessment of civil penalties for violations of the Act, did not require that she make a willfulness determination before ordering Petitioner to cease and desist and pay civil penalties.

The ALJ applied the factors listed in § 2149(b) for assessing a civil penalty and found that Petitioner operated a large business, the gravity of his violations was serious due to the large number of violations he committed in a short period of time, and he failed to show good faith because he disregarded Goldentyer's letter and continued to conduct business as a dealer without an AWA license. The ALJ also found that Petitioner did not have a history of previous violations of the AWA and accepted as true his statement that he ceased acting in violation of the statute after receiving the APHIS investigator's warning in November 2008.[3] Based on these findings, the ALJ issued an order requiring that Petitioner cease and desist from further violations of the Act and pay $14,430 in civil penalties, which equates to $15 for each of the 962 violations.

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[2] The regulation provides that "any person operating or intending to operate as a dealer ... must have a valid license." 9 C.F.R. § 2.1(a)(1) (2013).

[3] This was inconsistent with the ALJ's finding that Petitioner violated the AWA on or about December 27, 2008, and on or about September 30, 2009. The six sales that occurred on those dates were factored into the ALJ's calculation of the civil penalty amount.

Both Petitioner and Respondent appealed the ALJ's decision to a JO, who issued a Decision and Order on May 30, 2013. In this Decision and Order, the JO adopted most of the ALJ's findings and conclusions, including the finding that a willfulness determination was unnecessary and would not affect the outcome of the case. However, unlike the ALJ, the JO found that Petitioner did not violate the AWA from December 27, 2008, through January 17, 2009, and on September 30, 2009, when he sold six additional dogs to two parties. Additionally, the JO applied the civil penalties factors differently and found that Petitioner's ongoing pattern of violations during the period in question demonstrated a history of previous violations. *See* 7 U.S.C. § 2149(b). In light of these findings, the JO concluded that the mere $15 penalty applied by the ALJ for each of the dogs sold in violation of the AWA was too insignificant to deter Petitioner and others from committing similar violations in the future. As a result, the JO increased the civil penalty from $15 per violation to $200 per violation, which corresponds with a total increase from $14,430 to $191,200. The JO based this increase on a number of factors, including his significant discretion under the statute, that the AWA authorized a civil penalty up to $3,750 per violation at the time of Petitioner's conduct, and that the Administrator recommended a total civil penalty of at least $1,792,500.

Petitioner timely appealed the JO's Decision and Order.

Discussion

I. The Judicial Officer Did Not Err by Failing to Determine Willfulness

A. *Standard of Review*

This Court's review of an administrative decision such as the one at issue here is highly deferential. Under the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706, this Court reviews an administrative decision to determine whether it was " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Volkman v. DEA*, 567 F.3d 215, 219–20 (6th Cir.2009) (quoting 5 U.S.C. § 706(a)(2)). To make this decision, "the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether

there has been a clear error of judgment.' " *Marsh v. Oreg. Nat. Res. Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (quoting *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). "Although the court's review is to be 'searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.' " *Northeast Ohio Reg. Sewer Dist. v. U.S. E.P.A.,* 411 F.3d 726, 732 (6th Cir.2005) (quoting *Volpe,* 401 U.S. at 416, 91 S.Ct. 814).

This Court reviews the JO's factual findings to determine whether they are supported by substantial evidence. *See Volpe Vito, Inc. v. Dep't of Agric.,* No. 97–3603, 1999 WL 16562, at *1 (6th Cir. Jan. 7, 1999) ("Our review of an administrative decision is narrow; we set aside an agency's action only if it is not supported by substantial evidence."). A reviewing court finds substantial evidence where there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moon v. Transp. Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir.1987) (internal quotation marks omitted). "Even if we were to reach a different conclusion from the agency, the agency's reasonable choice, supported by substantial evidence, may not be overturned." *Turner v. U.S. Dep't of Agric.,* 217 Fed.Appx. 462, 466 (6th Cir.2007) (internal quotation marks omitted).

In this case, "[b]ecause the judicial officer acts as the final deciding officer in lieu of the Secretary in Department administrative proceedings, we limit our review to his decision." *Pearson v. U.S. Dep't of Agric.,* 411 Fed.Appx. 866, 869–70 (6th Cir.2011) (internal quotation marks and citation omitted). Even where a JO disagrees with some of the conclusions of an ALJ, this Court applies the same standard of review and "[t]he ALJ's finding [sic] are simply part of the record to be weighed against other evidence supporting the agency." *Turner,* 217 Fed.Appx. at 466 (internal quotation marks omitted).

Petitioner asserts that his case requires *de novo* review, citing the language of 7 U.S.C. § 2149(c) and *Genecco Produce, Inc. v. Sandia Depot, Inc.,* 386 F.Supp.2d 165 (W.D.N.Y.2005), as authority for that proposition. Neither the statute nor *Genecco Produce* support Petitioner's argument. First, although § 2149(c) vests courts of appeals

with the authority to review the Secretary's orders[4], it does not suggest application of a *de novo* standard of review. Second, the Western District of New York stated that *de novo* review was only required in *Genecco Produce* because the case involved a trial *de novo* in the district court pursuant to 7 U.S.C. § 499g(c), not a "*direct appeal* of a final decision of the Secretary of Agriculture to the ... Court of Appeals," which is the procedural posture in this case. 386 F.Supp.2d at 171. Therefore, *Genecco Produce* is not analogous to the instant case and *de novo* review would be improper. Instead, this Court reviews the JO's decision for an abuse of discretion and substantial evidence.

B. *Analysis*

1. Willfulness Requirement

The ALJ and JO determined that 7 U.S.C. § 2149(b) does not include a willfulness requirement. Therefore, the JO held, the issuance of an order requiring a party to cease and desist activity in violation of the AWA and to pay civil penalties for those violations does not require a willfulness determination.

Petitioner asserts on appeal that because a willfulness requirement is clearly delineated in the complaint filed by APHIS against Petitioner, the ALJ and JO erred by not determining the willfulness of his conduct. Petitioner states, "By the plain language employed throughout its Complaint, APHIS makes a determination of willfulness an integral, rudimentary part of the whole and essentially elevates it to the very purpose of the Complaint." Pet'r's Br. at 13. Petitioner's entire argument that a willfulness determination is required before a civil penalty can be assessed against him is therefore based on the complaint's use of "willful" to describe his actions.

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[4] This section states that

[a] dealer ... aggrieved by a final order of the Secretary issued pursuant to this section may ... seek review of such order in the appropriate United States Court of Appeals ... 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.

7 U.S.C. § 2149(c).

Petitioner's argument fails because the plain language of the statute lacks a willfulness requirement, and Petitioner clearly violated the AWA by conducting business without a license, regardless of willfulness or knowledge.

Three sections of the AWA are at issue in this case. The first defines a dealer as "any person who ... 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 for research, teaching, exhibition, or use as a pet." 7 U.S.C. § 2132(f). Section 2134 states that each dealer must obtain a license before buying or selling any animal in this manner. Therefore, any individual who qualifies as a dealer and fails to obtain a license from the Secretary is in violation of the AWA. Section 2149(b) governs civil penalties and cease and desist orders for violators of the statute.[5] This section states as follows:

> Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale ... 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 $10,000 for each 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.

7 U.S.C. § 2149(b) (2013).[6] The plain language of this subsection does

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[5] Although this section is titled "Violations by Licensees," the plain language of the section extends its requirements to anyone who violates a part of Chapter 54, which contains the AWA. "[Headings and titles] are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 529, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). Here, the statutory language very clearly extends these penalties to all violators of requirements in the Chapter. Therefore, the title of this section need not be consulted for meaning.

[6] At the time Petitioner committed the violations, the maximum civil penalty was only $3,750 per violation, so this is the amount used by the JO to calculate an appropriate civil penalty. The statute was subsequently amended to raise the amount per violation to

not contain a willfulness requirement for the imposition of civil penalties or cease and desist orders, and Petitioner is unable to point to a place in the AWA that includes such a requirement.[7] Although there is no Sixth Circuit case law directly on point, the Ninth Circuit explicitly held in an unpublished decision that § 2149(b) does not contain a willfulness requirement. *Hickey v. Dep't of Agric.,* 878 F.2d 385, 1989 WL 71462 (9th Cir. June 26, 1989). That court stated that "7 U.S.C. § 2149(b) provides for penalties in the case of any violation, willful or not." *Id.* at *2. Petitioner only finds support for his argument in the complaint filed against him by the Secretary.

Because § 2149(b) does not require an ALJ or JO to make a willfulness determination before imposing civil penalties or a cease and desist order, the JO's failure to make a willfulness determination does not constitute an abuse of discretion.

2. Petitioner's Violation of the Statute

Petitioner asserts for the first time in his reply brief that the JO's factual findings were not based on substantial evidence. He appears to assert this argument as an alternative to his argument that a willfulness determination is required.

The JO's factual findings are reviewed by this Court for substantial evidence. A court finds substantial evidence where the JO's decision is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moon,* 836 F.2d at 229 (internal quotation marks omitted). According to Petitioner, the JO's finding that he violated the AWA is based on "mere bits and pieces of information."

$10,000. 7 C.F.R. § 3.91(b)(2)(ii) (2006).

[7] Section 2149(b) is distinguishable from Section 2149(d), which requires a willfulness or knowledge finding before a criminal penalty may be imposed for violations of the AWA. *See* 7 U.S.C. § 2149(d) ("Any dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, who knowingly violates any provision of this chapter shall, on conviction thereof, be subject to imprisonment for not more than 1 year."). Similarly, the APA requires a willfulness determination before the suspension of an administrative license can occur. *See Parchman v. U.S. Dep't of Agric.,* 852 F.2d 858, 865 (6th Cir.1988) (discussing a willfulness requirement when a license is suspended); *Hutto Stockyard, Inc. v. U.S. Dep't of Agric.,* 903 F.2d 299, 304 (4th Cir.1990) ("[U]nder the APA the suspension of Hutto was not proper unless it willfully violated the Act.").

Pet'r's Reply Br. at 5. He also states, "[T]he JO failed to 'take into account whatever in the record fairly detracts from its weight.' " *Id.* (quoting *Gray v. U.S. Dep't of Agric.,* 39 F.3d 670, 675 (6th Cir.1994)). It is unclear what Petitioner means by this last sentence because he merely concludes his argument by stating that the JO's findings were not supported by substantial evidence. He fails to point to "whatever in the record fairly detracts from [the] weight" of the evidence considered by the JO.

It is clear from the record that the JO's factual findings regarding Petitioner's dog sales are supported by substantial evidence. The JO based its factual findings on a great deal of evidence, including receipts of sale and records of acquisition obtained from individuals who purchased Petitioner's dogs. Petitioner clearly qualifies as a dealer as that term is defined under the AWA. Section 2132(f) defines a dealer as "any person who, in commerce, for compensation or profit, delivers for transportation, or transports ... buys, or sells, or negotiates the purchase or sale of, [ ] any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet." 7 U.S.C. § 2132(f). The extensive record establishes that Petitioner sold over 950 dogs for profit during the period in question. Because Petitioner does not fall under one of the exceptions for retail pet stores or for individuals who "do[ ] not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derive[ ] no more than $500 gross income from the sale of other animals during any calendar year," 7 U.S.C. § 2132(f)(i), (ii), he qualifies as a dealer. By operating as a dealer without a license, he violated the terms of the AWA and is subject to civil penalties and/or a cease and desist order.

II. Petitioner's Argument Regarding Lack of Good Faith and History of Previous Violations

A. *Standard of Review*

Where a petitioner challenges the imposition of sanctions by a JO, " '[t]he scope of our review ... is limited. Only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter.' " *Gray,* 39 F.3d at 677 (quoting *Stamper v. Sec'y of Agric.,* 722 F.2d 1483, 1489 (9th Cir.1984)) (internal

quotation marks omitted). "The fashioning of an appropriate and reasonable remedy is for the Secretary, not the court. The court may decide only whether under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in (his) choice of the remedy.' " *Butz v. Glover Livestock Comm'n Co., Inc.,* 411 U.S. 182, 188–89, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973) (quoting *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 612, 66 S.Ct. 758, 90 L.Ed. 888 (1946)).

B. *Analysis*

The AWA provides guidance to the Secretary for calculating an appropriate civil penalty. "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(b). In addition to these factors, a JO must also give weight to the recommendations of the administrators charged with enforcement of the statute. *See In re: S.S. Farms Linn Cnty., Inc.,* 50 Agric. Dec. 476, 497 (Feb. 8, 1991). "[R]ecommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the [ ] 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: Jerome Schmidt,* No. 05–0019, 2007 WL 959715, at *24 (Mar. 26, 2007). In the instant case, both the ALJ and the JO considered these factors when determining an appropriate amount for Petitioner's civil penalty.

Here, the JO found that Petitioner operated a large business based on the fact that he sold 956 dogs during a nineteen-month period, and found that the gravity of Petitioner's violations was severe due to the large number of dogs sold without a valid license. The JO also found that Petitioner's actions lacked good faith and that he had a history of previous violations of the Act. Believing a larger civil penalty would be necessary to have the proper deterrent and punitive effect, the JO increased the total amount of the civil penalty from $14,430 to $191,200.

The size of the civil penalty assessed against Petitioner is not unwarranted in law or without justification in fact. The JO's

determination that Petitioner's business is large is justified by the record because Petitioner moved a considerable number of dogs through the market in a fairly short period of time. Additionally, the JO's determination of the gravity of Petitioner's offenses is supported in law. The Secretary has issued a number of decisions stating that the failure to obtain an AWA license is a grave violation of the statute. *See, e.g., In re: Mary Bradshaw*, 50 Agric. Dec. 499, 509 (May 17, 1991) ("The licensing requirements of the Act are at the center of the remedial legislation .... [C]ontinuing to operate without a license[ ] with full knowledge of the licensing requirements [ ] strikes at the heart of the regulatory program."). Although perhaps not all of Petitioner's violations were committed knowingly, each transaction that followed receipt of Goldentyer's letter was done in direct contravention of the licensing requirements. Furthermore, operating without a license, especially after receipt of Goldentyer's letter, constitutes a grave violation that threatens the enforceability of the AWA.

In the instant case, analysis of the final two factors is slightly more complicated. The Secretary often finds a lack of good faith and a history of previous violations of the AWA, as would be expected, where an individual was involved in previous formal disciplinary proceedings yet continues to violate the statute. *See, e.g., In re: Karl Mitchell*, No. 09–0084, 2010 WL 5295429, at *8 (Dec. 21, 2009) ("In light of the previous proceedings against Mr. Mitchell that resulted in the issuance of cease and desist orders, civil penalties, and the revocation of Mr. Mitchell's Animal Welfare Act license, Mr. Mitchell has a history of previous violations and this fact demonstrates an absence of good faith.").[8] According to the record before us, Petitioner has never before been subject to formal disciplinary proceedings for violating the AWA. In fact, according to the record, the only interactions he has had with the Secretary were the letter he received from Goldentyer and his later visit from Mina, the APHIS investigator. Therefore, under this standard, it

[8] *See also Lancelot Kollman Ramos v. U.S. Dep't of Agric.,* 68 Agric. Dec. 60, at *8 (Apr. 7, 2009) (a history of previous violations stemmed from the fact that petitioner had previously admitted wrongdoing during another AWA disciplinary proceeding); *In re: Marilyn Shepherd*, 66 Agric. Dec. 1107, 1116 (Nov. 29, 2007) ("Ms. Shepherd apparently feels free to ignore the prior imposition of civil sanctions and to continue doing business without an Animal Welfare Act license. Refusing to comply with a lawful final order such as that issued by Administrative Law Judge Baker is unacceptable, to say the least.").

might be difficult to attribute to Petitioner bad faith and a history of previous violations.

However, bad faith and a history of previous violations can also be found where a petitioner receives notice of his violations yet continues to operate without a license. *See, e.g.*, *In re: William Richardson*, 66 Agric. Dec. 69, 88–89 (June 13, 2007) ("I have consistently held under the Animal Welfare Act that an ongoing pattern of violations over a period of time establishes a violator's 'history of previous violations,' even if the violator has not been previously found to have violated the Animal Welfare Act.").[9] For example, in *In re: Beverly Howser*, 68 Agric. Dec. 1141, 1143 (Oct. 15, 2009), the Secretary found a history of previous violations in the absence of formal complaints or penalties, after the petitioner was informed of the AWA's requirements and continued to operate her business without a license. Her conduct during the period in question established a history of previous violations and a lack of good faith. *Id.* Similarly, in *In re: Sam Mazzola*, 68 Agric. Dec. 822, 827 (Nov. 24, 2009), the petitioner's choice to disregard a clear warning, even in the absence of prior formal disciplinary proceedings, was sufficient to establish a history of previous violations and a lack of good faith.[10]

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[9] Although *In re: William Richardson* dealt with violations of the Commercial Transportation of Equine for Slaughter Act, the JO applied this reasoning from AWA cases. Richardson was fined for violations of the Act between August 26, 2003, and November 23, 2004. 66 Agric. Dec. at 87–90. These violations also served as the ongoing pattern of violations establishing a history of previous violations for purposes of § 2149(b). *Id.* at 89. Similarly, the JO in the instant case found that Petitioner's violations during the time in question, especially those following receipt of Goldentyer's letter, demonstrated a history of previous violations.

[10] *See also In re: Jerome Schmidt*, No. 05–0019, 2007 WL 959715, at *24 (Mar. 26, 2007), in which the JO found a history of previous violations based on "Dr. Schmidt's ongoing pattern of violations over a period of more than 3 years 4 months" and his "disregard for the requirements of the Regulations and Standards"; *In re: Judy Sarson*, 67 Agric. Dec. 419, 426 (Jan. 17, 2008) ("Despite knowing that her AWA license had expired ... Respondent continued to engage in regulated activity and sold numerous dogs.... Such an ongoing pattern of violations demonstrates a lack of good faith and establishes a 'history of previous violations'...."); *In re: Tracey Harrington*, 66 Agric. Dec. 1061, 1071 (Aug. 28, 2007) ("Ms. Harrington's ongoing pattern of violations on May 10, 2004, and February 3, 2005, establishes a history of previous violations for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.").

In the instant case, while it is clear that each of Petitioner's over 950 sales constitutes a violation of the AWA, it is not clear that each occurred during a time when Petitioner was aware of his noncompliance. The JO found in this case that Petitioner had a history of previous violations based on his continuous pattern of conduct and his disregard for the AWA's requirements during part of the period in question. Although Petitioner may not have been aware of the regulations while perpetrating all of these violations, his pattern of violations, his disregard of Goldentyer's letter, and his continued sale of dogs following receipt of that letter are sufficient under many of the Secretary's decisions to support the JO's finding of a history of previous violations and a lack of good faith. While the history of previous violations and the lack of good faith may not be as severe as the JO indicated, the JO's decision is not unwarranted in law or without justification in fact. It was reasonable for the JO to assume knowledge, lack of good faith, and a history of previous violations once Petitioner received Goldentyer's letter, disregarded its contents, and continued to operate his business by selling dogs in violation of the statute. Petitioner committed over 950 violations of the statute, at times with knowledge or intentional ignorance of its requirements, which warrants application of civil penalties.

Although the penalty in this case is quite hefty, especially when compared with other cases, many of which are cited in Petitioner's briefs, the sanction is within the administrative agency's authority. This Court does not invalidate an administrative sanction simply because "it is more severe than sanctions imposed in other cases." *Butz*, 411 U.S. at 187, 93 S.Ct. 1455. *See also Volpe Vito*, 1999 WL 16562, at *2 (internal quotation marks omitted) ("[T]his court will not consider the severity of a sanction in a particular AWA case relative to sanctions imposed in other cases, provided that the sanction is permitted by the authorizing statute and the departmental regulation, and the statute and regulation themselves are not challenged."); *Garver v. United States*, 846 F.2d 1029, 1030 (6th Cir.1988) ("This court does not review administrative agency sanctions for reasonableness, or for whether they comport with our ideas of justice."). Instead, this Court defers to the Secretary's employment of a sanction so long as it is not unwarranted in law or without justification in fact, and it is permitted by the authorizing statute and regulation. *Garver*, 846 F.2d at 1030. Here, the AWA allowed a civil penalty up to $3,750 per violation, the Administrator recommended

$1,875 per violation, and the JO imposed a civil penalty of $200 per violation. This civil penalty is within the JO's authority and will not be disturbed.

CONCLUSION

For the foregoing reasons, we **DENY** the petition for review and **AFFIRM** the Secretary's Decision and Order.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: HOPE KNAUST, AN INDIVIDUAL; STAN KNAUST, AN INDIVIDUAL; & THE LUCKY MONKEY, A PARTNERSHIP.
Docket No. 12-0552.
Decision and Order.
Filed April 9, 2014.

AWA – Administrative procedure – Animal welfare – Evidence , admission of – Evidence, objections to – Evidence, photographic – Facilities – Recordkeeping – Summary judgment – Veterinary care.

Colleen A. Carroll, Esq. for Complainant.
John D. Nation, Esq. for Respondents.
Initial Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint on July 26, 2012. The Administrator 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 pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, on or about February 11, 2008, February 10, 2010, February 17, 2010, February 23, 2010, March 4, 2010, May 3, 2010, and September 7, 2010, Hope Knaust, Stan Knaust, and The Lucky Monkey [hereinafter Respondents] willfully violated the

Animal Welfare Act and the Regulations.[1] On August 22, 2012, Respondents filed an Answer to the Complaint Filed by the Administrator, Animal and Plant Health Inspection Service [hereinafter Answer], in which Respondents admit some of the allegations in the Complaint, deny some of the allegations in the Complaint, and explain some of the allegations in the Complaint.

Pursuant to Chief Administrative Law Judge Peter M. Davenport's [hereinafter the Chief ALJ] August 27, 2012, Order, the parties exchanged witness lists, exhibit lists, and copies of their exhibits. The Administrator's exhibits are identified as "CX" and the exhibit number. Respondents' sole exhibit is Hope Knaust's affidavit, dated April 6, 2010, which was prepared by Morris Smith, an Animal and Plant Health Inspection Service [hereinafter APHIS] investigator, as part of APHIS' investigation of Respondents' violations of the Animal Welfare Act and the Regulations; hence, Respondents' only exhibit is also one of the Administrator's exhibits and it is identified as "CX 7."

On May 16, 2013, the Administrator filed Complainant's Motion for Summary Judgment. On June 28, 2013, Respondents filed Respondents' Response to Complainant's Motion for Summary Judgment. On November 15, 2013, the Chief ALJ issued a Decision and Order in which the Chief ALJ: (1) granted Complainant's Motion for Summary Judgment in part and denied Complainant's Motion for Summary Judgment in part; (2) ordered Respondents to cease and desist from violating the Animal Welfare Act and the Regulations; and (3) revoked Hope Knaust and Stan Knaust's Animal Welfare Act license (Animal Welfare Act license number 74-C-0388).[2]

On December 20, 2013, Respondents appealed to the Judicial Officer. On January 6, 2014, the Administrator filed Complainant's Response to Respondents' Petition for Appeal, and on January 13, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

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[1] Compl. ¶¶ 5-21 at 2-7.
[2] Chief ALJ's Decision and Order at 15-17.

ANIMAL WELFARE ACT

Decision

Respondents' Appeal Petition

Respondents raise four issues in Respondents' Appeal to Judicial Officer [hereinafter Appeal Petition]. First, Respondents contend the Chief ALJ erroneously failed to rule on Respondents' objection to the Administrator's photographic evidence.[2] Respondents assert the photographs in question were not authenticated and argue unauthenticated documents cannot be considered on a motion for summary judgment. (Appeal Pet. at 2-3).

In Respondents' Response to Complainant's Motion for Summary Judgment, Respondents objected to the Administrator's photographic evidence, as follows:

> None of these photographs are authenticated. . . .
>
> Accordingly, Respondents object to each of these photographs and request that the Administrative Law Judge not consider them as summary judgment evidence or proof.

Resp'ts' Resp. to Complainant's Mot. for Summ. J. at 4. The Chief ALJ did not rule on Respondents' objection to the photographs in question; however, the Rules of Practice do not require the Chief ALJ to rule specifically on Respondents' objection. Therefore, I reject Respondents' contention that the Chief ALJ's failure to rule specifically on their objection to the Administrator's photographic evidence is error.[3] The Chief ALJ provides citations to the evidence he relied upon in connection with his consideration of Complainant's Motion for Summary Judgment.[4] I find nothing in the Chief ALJ's Decision and Order indicating the Chief ALJ considered or relied upon the Administrator's

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[2] CX 12, CX 15-CX 16, CX 18-CX 22, CX 28-CX 29, CX 53, CX 63, CX 67-CX 76, CX 78-CX 111, CX 115-CX 138.

[3] Respondents could have, but did not, advance their objection by means of a motion, which would have required the Chief ALJ to rule on Respondents' objection. *See* Greenly, 72 Agric. Dec. 586, 596, 596 n.18 (U.S.D.A. 2013).

[4] *See* the Chief ALJ's references to exhibits (Chief ALJ's Decision and Order at 5-15).

photographic evidence.

Second, Respondents contend the Chief ALJ erroneously failed to rule on Respondents' objection to an interview log prepared by an APHIS investigator, Morris Smith (CX 6). Respondents argue the interview log is hearsay and cannot be considered on a motion for summary judgment. (Appeal Pet. at 3).

In Respondents' Response to Complainant's Motion for Summary Judgment, Respondents objected to the interview log (CX 6) as follows:

> The content or substance of a summary judgment affidavit must be otherwise admissible and any hearsay contained in a summary-judgment affidavit remains hearsay, beyond the bounds of the court's consideration. *Johnson v. Weld County, Colorado*, 594 F.3d 1202, 1210 (10th Cir. 2010). Respondents therefore object to this exhibit and request that it not be considered in ruling upon Complainant's motion for summary judgment.

Resp'ts' Resp. to Complainant's Mot. for Summ. J. at 5. The Chief ALJ did not rule on Respondents' objection to the interview log (CX 6); however, the Rules of Practice do not require the Chief ALJ to rule specifically on Respondents' objection. Therefore, I reject Respondents' contention that the Chief ALJ's failure to rule specifically on their objection to the interview log (CX 6) is error.[5]

The Chief ALJ provides citations to the evidence he relied upon in connection with his consideration of Complainant's Motion for Summary Judgment.[6] The Chief ALJ considered and relied extensively on the interview log (CX 6);[7] however, I reject Respondents' contention that the Chief ALJ's consideration of and reliance on hearsay evidence is error. The Administrative Procedure Act provides for admission and exclusion of evidence, as follows:

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[5] *See* note 3.
[6] *See* note 4.
[7] *See* the Chief ALJ's references to CX 6 (Chief ALJ's Decision and Order at 6-10, 14).

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
> (d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Similarly, the Rules of Practice provides for exclusion of evidence, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
> (h) *Evidence*—(1) *In general*. . . .
> . . . .
> (iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv). Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act.[8] Moreover, responsible hearsay has long been admitted in United States Department of Agriculture administrative

[8] *See, e.g.*, Richardson v. Perales, 402 U.S. 389, 409-10 (1971) (stating, even though inadmissible under the rules of evidence applicable to court procedure, hearsay evidence is admissible under the Administrative Procedure Act); Bennett v. NTSB, 66 F.3d 1130, 1137 (10th Cir. 1995) (stating the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); Crawford v. U.S. Dep't of Agric., 50 F.3d 46, 49 (D.C. Cir. 1995) (stating administrative agencies are not barred from reliance on hearsay evidence, which need only bear satisfactory indicia of reliability), *cert. denied*, 516 U.S. 824 (1995); Gray v. U.S. Dep't of Agric., 39 F.3d 670, 676 (6th Cir. 1994) (holding documentary evidence which is reliable and probative is admissible in an administrative proceeding, even though it is hearsay).

proceedings.[9]

Third, Respondents assert, while the Chief ALJ conceded that a court should not make credibility determinations in a summary judgment proceeding, the Chief ALJ erroneously made credibility determinations throughout the Chief ALJ's Decision and Order (Appeal Pet. at 3-4).

Respondents do not cite any portion of the Chief ALJ's Decision and Order that supports their assertion that the Chief ALJ made impermissible credibility determinations, and I cannot locate any credibility determination in the Chief ALJ's Decision and Order. Therefore, I reject Respondents' contention that the Chief ALJ made impermissible credibility determinations in connection with his consideration of Complainant's Motion for Summary Judgment.

Fourth, Respondents contend the Chief ALJ erroneously discounted Hope Knaust's affidavit, dated April 6, 2010 (CX 7) (Appeal Pet. at 4). Respondents' basis for their assertion that the Chief ALJ discounted Hope Knaust's affidavit is the Chief ALJ correct observation that Hope Knaust's affidavit was prepared not by her attorney, but rather by Morris Smith, an APHIS investigator, as part of APHIS' investigation of Respondents' violations of the Animal Welfare Act and the Regulations (Chief ALJ's Decision and Order at 3-4). I do not find that the Chief ALJ's observation indicates that the Chief ALJ discounted Hope Knaust's affidavit. Moreover, the Chief ALJ repeatedly cites Hope

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[9] Post & Taback, Inc., 62 Agric. Dec. 802, 816-17 (U.S.D.A. 2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005); Hansen, 57 Agric. Dec. 1072, 1110-11 (U.S.D.A. 1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (U.S.D.A. 2000); Zimmerman, 57 Agric. Dec. 1038, 1066-67 (U.S.D.A. 1998); Saulsbury Enterprises, 56 Agric. Dec. 82, 86 (U.S.D.A. 1997) (Order Den. Pet. For Recons.); Gray, 55 Agric. Dec. 853, 868 (U.S.D.A. 1996) (Decision as to Glen Edward Cole); Thomas, 55 Agric. Dec. 800, 821 (U.S.D.A. 1996); Big Bear Farm, Inc., 55 Agric. Dec. 107, 136 (U.S.D.A. 1996); Fobber, 55 Agric. Dec. 60, 69 (U.S.D.A. 1996); Marion, 53 Agric. Dec. 1437, 1463 (U.S.D.A. 1994); Petty, 43 Agric. Dec. 1406, 1466 (U.S.D.A. 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); De Graaf Dairies, Inc., 41 Agric. Dec. 388, 427 n.39 (U.S.D.A. 1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); Thornton, 38 Agric. Dec. 1425, 1435, *final decision*, 38 Agric. Dec. 1539 (U.S.D.A. 1979) (Remand Order); Me. Potato Growers, Inc., 34 Agric. Dec. 773, 791-92 (U.S.D.A. 1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); Marvin Tragash Co., 33 Agric. Dec. 1884, 1894 (U.S.D.A. 1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

Knaust's affidavit (CX 7) as support for his findings[10] establishing that the Chief ALJ did not discount Hope Knaust's affidavit, but, instead, relied extensively on Hope Knaust's affidavit. Therefore, I reject Respondents' contention that the Chief ALJ erroneously discounted Hope Knaust's affidavit dated April 6, 2010.

After careful consideration of the record and the arguments raised by Respondents on appeal, except for minor modifications, I adopt, as the final decision and order in this proceeding, the Chief ALJ's Decision and Order granting Complainant's Motion for Summary Judgment in part and denying Complainant's Motion for Summary Judgment in part.

The Summary Judgment Standard

The Rules of Practice do not specifically provide for the use or exclusion of summary judgment; however, I have consistently held that hearings are futile and summary judgment is appropriate in proceedings in which there is no factual dispute of substance.[11] A factual dispute of substance is present if sufficient evidence exists on each side so that a rational trier of fact could resolve the dispute either way and resolution of the dispute is essential to the proper disposition of the claim. The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. The usual and primary purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses.[12]

If the moving party supports its motion for summary judgment, the burden shifts to the non-moving party who may not rest on mere allegation or denial in the pleadings, but must set forth facts showing

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[10] *See* the Chief ALJ's references to CX 7 (Chief ALJ's Decision and Order at 6-11, 14-15).

[11] *See* Pine Lake Enters., Inc., 69 Agric. Dec. 157, 162-63 (U.S.D.A. 2010); Bauck, 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); Animals of Mont., Inc., 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *see also* Veg-Mix, Inc. v. U.S. Dep't of Agric., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations).

[12] Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

there is a genuine issue of fact for trial.[13] In setting forth such facts, the non-moving party must identify the facts by reference to depositions, documents, electronically stored information, affidavits, declarations, stipulations, admissions, interrogatory answers, or other materials.[14] In ruling on a motion for summary judgment, all evidence must be considered in the light most favorable to the non-moving party with all justifiable inferences to be drawn in the non-movant's favor.[15] Although Respondents filed Respondents' Response to Complainant's Motion for Summary Judgment, the response is devoid of the type of supporting documentation necessary to show there is a genuine issue for trial, except for references to Hope Knaust's affidavit dated April 6, 2010 (CX 7).

Discussion

The first three paragraphs of the Complaint identify Hope Knaust, Stan Knaust, and The Lucky Monkey. Aside from correcting the mailing address for Stan Knaust, Respondents admit the allegations in paragraphs 1, 2, and 3 of the Complaint. The Administrator alleges in paragraph 4 of the Complaint that Respondents operate a zoo, which Respondents deny (Answer ¶ 4 at 1). Given the fact that the Animal Welfare Act license held by Hope Knaust and Stan Knaust is a Class C Animal Welfare Act license for an exhibitor (CX 1 at 2, 5, 7, 10), the characterization of Respondents' business is not material, and resolution of the issue of whether Respondents operate a zoo is not required.

The Administrator alleges in paragraph 5 of the Complaint that, on or about February 11, 2008, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(d) by failing to enclose their facilities for a zebra by a perimeter fence not less than six feet high. Respondents state: "When the zebra was a baby, the wall was four feet high. As the animal grew, Respondents built a six-foot high enclosure." (Answer ¶ 5 at 2).

The Regulations require exhibitors to enclose outdoor facilities with a perimeter fence, as follows:

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[13] Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 380 (5th Cir. 1998); Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994).
[14] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).
[15] Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

§ 3.127 Facilities, outdoor.

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

9 C.F.R. § 3.127(d). Respondents admit in their Answer that the perimeter fence for the zebra was only four feet high and Respondents make no assertion that they obtained written approval from the Administrator for a fence less than six feet high. Accordingly, the violation alleged in paragraph 5 of the Complaint is established. (CX 4 at 2, CX 7 at 1, CX 65).

The Administrator alleges in paragraph 6 of the Complaint that, on or about February 10, 2010, Respondents failed to employ an attending veterinarian under formal arrangements in willful violation of 9 C.F.R. § 2.40(a)(1), and, specifically, Respondents' arrangements did not include a current written program of veterinary care with regularly scheduled

visits to Respondents' facility, none having been made since 2008.[16] Respondents deny this allegation in their Answer, claiming Dr. Snyder was the attending veterinarian, who Respondents believed had come to Respondents' facility in 2008 for an on-site visit (Answer ¶ 6 at 2). While Respondents may have considered Dr. Snyder to have been their attending veterinarian, merely entertaining such a belief is not sufficient. The Regulations require that, in the case of a part-time attending veterinarian, formal arrangements include a written program of veterinary care and regularly scheduled visits to the exhibitor's premises.[17] Hope Knaust's affidavit states that on February 10, 2010, Donnovan Fox cited her for not having a written program of veterinary care and that she was given a week to get a veterinarian and to have the program of veterinary care signed (CX 7 at 2). Thus, at the time of the February 10, 2010 inspection, a current written program of veterinary care did not exist (CX 2 at 1, CX 4 at 2-3, CX 5). Dr. Snyder confirmed that he last signed a program of veterinary care for Respondents' facility in 2008 and that he had not visited Respondents' facility, except possibly to sell hay to Respondents in 2009 (CX 5, CX 6 at 2). The protracted hiatus between Dr. Snyder's professional visits to Respondents' facility cannot be considered sufficiently regular to comply with 9 C.F.R. § 2.40(a)(1). Accordingly, the violation alleged in paragraph 6 of the Complaint is established.

The Administrator also alleges recurring violations of 9 C.F.R. § 2.40(a)(1) on or about February 17, 2010,[18] February 23, 2010,[19] March 4, 2010,[20] and May 3, 2010.[21] Hope Knaust admits the violations of 9 C.F.R. § 2.40(a)(1) on February 10, 2010, and February 17, 2010, by stating Respondents were waiting for Dr. Snyder to visit Respondents' facility:[22]

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[16] Hope Knaust "thought" Dr. David Snyder had been to Respondents' facility in 2009 (CX 7 at 2). Dr. Snyder confirmed that he sold hay to Respondents in 2009 and presumably had been to Respondents' facility to deliver the hay (CX 6 at 2).

[17] *See* 9 C.F.R. § 2.40(a)(1).

[18] Compl. ¶ 10 at 3.

[19] Compl. ¶ 12 at 4.

[20] Compl. ¶ 15 at 5.

[21] Compl. ¶ 18 at 6.

[22] Dr. Snyder did go Respondents' facility at some point before February 19, 2010, but did not go to the residence because he could see from the driveway that the animals and the facility were in very bad condition (CX 6 at 3).

> Regarding the PVC, I told Don [Fox] we were still waiting for Dr. Snyder to come out and inspect the property. Dr. Snyder told Stanley he was coming on 02/17/10. Apparently, Don went and talked to Dr. Snyder and he told Don he was not going to be our vet. Dr. Snyder called Stanley the next day, on 02/18/10, and said he could not pass or sign our vet plan.

CX 7 at 5.[23] Hope Knaust also admitted the February 23, 2010, violation of 9 C.F.R. § 2.40(a)(1), as follows:

> Again, I was first again cited for not having a written program of veterinary care. It is true that Don Fox cited this on his inspection reports dated, 02/10/10 and 02/17/10. I did not know until 03/19/10 that Dr. Snyder was refusing to come back out[.[24]]

CX 7 at 8. The same extract implicitly admits the March 4, 2010 violation of 9 C.F.R. § 2.40(a)(1) alleged in paragraph 15 of the Complaint. Hope Knaust's affidavit further addresses Respondents' inability to secure services of a veterinarian, until arrangements were made for the services of Dr. Tim Holt on March 4, 2010. Dr. Holt first visited Respondents' facility on March 5, 2010 (CX 7 at 13). Even after Dr. Holt's visit, the evidence is clear that no written program of veterinary care was signed (CX 61 at 1).

Despite Respondents' professed belief that Dr. Snyder continued to be their attending veterinarian, the record establishes that Dr. Snyder had advised Stan Knaust that he (Dr. Snyder) could not sign a program of veterinary care and could not continue to serve as attending veterinarian for Respondents (CX 6 at 3). Moreover, a letter dated February 19, 2010, received by APHIS on February 22, 2010 from Dr. Snyder, makes clear that Dr. Snyder had no intention of serving as attending veterinarian for

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[23] I infer Hope Knaust's references to a "PVC" are references to a program of veterinary care.

[24] Dr. Snyder had communicated his intention not to continue as Respondents' veterinarian to Stan Knaust (CX 6 at 3); however, Stan Knaust apparently failed to share that information with Hope Knaust.

Respondents (CX 11). Indeed, Dr. Snyder's letter expressly states he could not endorse renewal of Hope Knaust and Stan Knaust's Animal Welfare Act license, citing the pain and suffering of Respondents' animals, the lack of feed for Respondents' animals, and the lack of manpower and funding to keep Respondents' animals in a satisfactory health status. Dr. Snyder's five-year relationship with Respondents and his observation of the severe deterioration of conditions at Respondents' facility, which is consistent with observations described by APHIS inspector Donnovan Fox, lends significant credence to the allegations concerning the failure of Respondents to provide adequate care for the animals at their facility (CX 4, CX 6, CX 11).

The Administrator alleges in paragraph 7 of the Complaint that, on or about February 10, 2010, Respondents failed to provide adequate veterinary care to a camel with extensive hair loss and visibly red and irritated skin, in willful violation of 9 C.F.R. §§ 2.40(a) and 2.40(b)(2). Respondents deny the allegation in their Answer, stating the camel had been taken to the veterinarian just prior to February 10, 2010, and treated (Answer ¶ 7 at 2). Respondents' assertion that the camel was treated prior to the February 10, 2010, inspection is refuted by Dr. Snyder's statement that the camel was not brought to his clinic until February 11, 2010 (CX 6 at 1-2). Moreover, as Dr. Snyder's account confirms that the camel required veterinary care, the February 10, 2010, violation of 9 C.F.R. § 2.40(b)(2) is established. Because Respondents took the camel to the veterinarian on February 11, 2010 and the camel received care, I decline to find a repeat violation of 9 C.F.R. § 2.40(b)(2) as to the camel on February 23, 2010, as alleged in paragraph 13 of the Complaint. Hope Knaust attempts to minimize the need for veterinary care as to the other animals (CX 7 at 8-9); however, the February 23, 2010, inspection report prepared by Donnovan Fox (CX 13 at 1-2) and the affidavit of APHIS veterinarian, Dr. Daniel Jones (CX 10 at 7) support the existence violations of 9 C.F.R. § 2.40(b)(2) as to a capybara, a kangaroo, two fallow deer, and a sheep on February 23, 2010.[25] Respondents were cited

[25] Hope Knaust's affidavit references an opinion given by Dr. Holt regarding need for veterinary care for the fallow deer on February 23, 2010 (CX 7 at 9); however, Respondents did not contact Dr. Holt until March 4, 2010, and Dr. Holt did not see Respondents' animals until March 5, 2010 (CX 7 at 13, 17). The lack of adequate veterinary care was confirmed when APHIS confiscated the animals on March 5, 2010 (CX 50-CX 52, CX 54-CX 55).

for repeat violations of 9 C.F.R. § 2.40(b)(2) on March 4, 2010, for the capybara, the kangaroo, and two fallow deer. Absent any factual evidence that the animals were treated, the March 4, 2010, violations of 9 C.F.R. § 2.40(b)(2), as alleged in paragraph 16 of the Complaint, are established (CX 50-52, CX 54-CX 55).

The Administrator alleges in paragraph 8 of the Complaint that, on or about February 10, 2010, Respondents failed to maintain accurate records of the acquisition and disposition of animals, in willful violation of 9 C.F.R. § 2.75(b). Respondents deny the allegation, but Respondents' Answer and Hope Knaust's affidavit inconsistently state the records were corrected on the date of the February 10, 2010, inspection (Answer ¶ 8 at 2; CX 7 at 2). Given that Respondents admit corrections were made, Respondents have admitted the existence of deficiencies, and the February 10, 2010, violation of 9 C.F.R. § 2.75(b)(2). While the correction of a violation can be taken into account when determining the sanction to be imposed, the correction does not alter the fact that a violation occurred.[26]

The Administrator alleges in paragraph 9(a)-(f) of the Complaint that, on or about February 10, 2010, Respondents failed to meet the minimum standards in 9 C.F.R. §§ 3.75(b), 3.75(c)(1), 3.75(c)(3), 3.125(a), 3.127(b), and 3.127(c), in willful violation of 9 C.F.R. § 2.100(a). Respondents deny the allegations in paragraph 9 of the Complaint averring Respondents' facilities had been cleaned consistent with existing seasonal conditions (Answer ¶ 9 at 2-3). However, Hope Knaust admits in her affidavit the existence of uninstalled cabinets in the primate building, the disrepair of the fences enclosing a camel and Axis deer, the failure to have a heat source for the capybaras, and the lack of shelter for eight alpacas (CX 7 at 2-4). Accordingly, the violation of 9 C.F.R. § 3.75(b) alleged in paragraph 9(a) of the Complaint is established, the violation of 9 C.F.R. § 3.125(a) alleged in paragraph 9(d) of the

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[26] Greenly, 72 Agric. Dec. 603, 623 (U.S.D.A. 2013); Tri-State Zoological Park of W. Md., Inc., 72 Agric. Dec. 128, 175 (U.S.D.A. 2013); Pearson, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Bond, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); Drogosch, 63 Agric. Dec. 623, 643 (U.S.D.A. 2004); Parr, 59 Agric. Dec. 601, 644 (U.S.D.A. 2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); DeFrancesco, 59 Agric. Dec. 97, 112 n.12 (U.S.D.A. 2000); Huchital, 58 Agric. Dec. 763, 805 n.6 (U.S.D.A. 1999); Stephens, 58 Agric. Dec. 149, 184-85 (U.S.D.A. 1999).

Complaint is established, and the violation of 9 C.F.R. § 3.127(b) alleged in paragraph 9(e) of the Complaint is established. Hope Knaust's affidavit affirms the content of the Answer and I find the affidavit to be sufficient to raise a factual dispute of substance as to the violation of 9 C.F.R. § 3.75(c)(1) alleged in paragraph 9(b) of the Complaint, the violation of 9 C.F.R. § 3.75(c)(3) alleged in paragraph 9(c) of the Complaint, and the violation of 9 C.F.R. § 3.127(c) alleged in paragraph 9(f) of the Complaint and additional evidence will be required if these alleged violations are to be established.

The Administrator alleges additional violations of the minimum standards in paragraphs 11, 14, 17, and 20 of the Complaint based upon inspections of Respondents' facility on February 17, 2010, February 23, 2010, March 4, 2010, and May 3, 2010 (CX 9, CX 13, CX 25, CX 61). Hope Knaust admits in her affidavit that certain of the violations cited on February 17, 2010, including the existence of tools in the food storage building and the fact that the facility's only full time employee had departed and had not been replaced, leaving the burden for caring for the significant number of animals primarily upon her, with only limited assistance from Stan Knaust who no longer resided on the premises (CX 7 at 5-8; Answer ¶ 2 at 1).[27] Accordingly, I find, on or about February 17, 2010, Respondents' food storage building contained tools, in violation of 9 C.F.R. § 3.75(b), as alleged in paragraph 11(a) of the Complaint; and Respondents failed to employ a sufficient number of trained personnel to care for Respondents' animals, in violation of 9 C.F.R. §§ 3.85 and 3.132, as alleged in paragraph 11(e) of the Complaint. Hope Knaust affirms in her affidavit the content of the Answer, and I find the affidavit to be sufficient to raise a factual dispute of substance as to the violation of 9 C.F.R. § 3.75(e) alleged in paragraph 11(a) of the Complaint; the violation of 9 C.F.R. § 3.75(c)(1) alleged in paragraph 11(b) of the Complaint; the violation of 9 C.F.R. § 3.75(c)(3) alleged in paragraph 11(c) of the Complaint; the violation of 9 C.F.R. § 3.84(b)(3) alleged in paragraph 11(d) of the Complaint; the violation of 9 C.F.R. § 3.127(b) alleged in paragraph 11(f) of the Complaint; and the violation of 9 C.F.R. § 3.127(c) alleged in paragraph 11(g) of the Complaint and additional evidence will be required if these alleged violations are to be established.

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[27] Dr. Snyder commented on the deterioration of Respondents' facility after "Stanley and Hope split up[.]" (CX 6 at 2).

The same insufficiency of staff was again cited on February 23, 2010 (CX 13 at 3); however, Hope Knaust states in her affidavit that by February 23, 2010, a number of the animals had been sold and a new employee had been hired (CX 7 at 10). While Hope Knaust admits the existence of a horse carcass, as alleged in paragraph 11(j) of the Complaint, she explains that the horse had died only the night before and that the APHIS inspectors arrived before Respondents had time to remove it (CX 7 at 12). The February 23, 2010 inspection report also cited Respondents with failing to provide sufficient food for the animals (CX 13 at 4-5). Respondents deny the allegation (Answer ¶ 14 at 5-6); however, given the malnourished condition of the animals confiscated on March 5, 2010, the only logical conclusion that can be reached is that the animals were not being fed adequate amounts of food (CX 50-CX 52, CX 54-CX 55, CX 112). Accordingly, I find, on or about February 23, 2010, Respondents failed to provide sufficient food to their animals, in violation of 9 C.F.R. § 3.129, as alleged in paragraph 14(h) of the Complaint; and Respondents failed to remove a bloated equine carcass adjacent to the llama enclosure, in violation of 9 C.F.R. § 3.131(c), as alleged in paragraph 14(j) of the Complaint. Hope Knaust affirms the content of the Answer in her affidavit, and I find the affidavit to be sufficient to raise a factual dispute of substance as to the violation of 9 C.F.R. § 3.75(a) alleged in paragraph 14(a) of the Complaint; the violation of 9 C.F.R. § 3.84(a) alleged in paragraph 14(b) of the Complaint; the violation of 9 C.F.R. § 3.85 alleged in paragraph 14(c) of the Complaint; the violation of 9 C.F.R. § 3.125(a) alleged in paragraph 14(d) of the Complaint; the violation of 9 C.F.R. § 3.125(c) alleged in paragraph 14(e) of the Complaint; the violation of 9 C.F.R. § 3.127(b) alleged in paragraph 14(f) of the Complaint; the violation of 9 C.F.R. § 3.127(c) alleged in paragraph 14(g) of the Complaint; and the violation of 9 C.F.R. § 3.130 alleged in paragraph 14(i) of the Complaint and additional evidence will be required if these alleged violations are to be established.

The violations cited on March 4, 2010 include an allegation in paragraph 17(b) of the Complaint that the primate structure was not constructed in a manner to provide adequate heat, in violation of 9 C.F.R. § 3.76(a). That allegation appears to be inartfully drawn as the evidence indicates that, rather than the problem being in the structure's construction, the problem was the lack of fuel for the heating element

which had to be replenished to raise the temperature to an acceptable level (CX 7 at 14). Hope Knaust fails to deny that fencing for a pig and llama was in disrepair and asserts the llama shelter violation was corrected that day (CX 7 at 14-15). The failure to provide sufficient food was also cited and is established by the examination of the animals following their confiscation on March 5, 2010 (CX 50-CX 52, CX 54-CX 55, CX 112). Accordingly, I find, on or about March 4, 2010, Respondents' fencing for animals, including fencing for Respondents' llamas and pig, was in disrepair in violation of 9 C.F.R. § 3.125(a), as alleged in paragraph 17(c) of the Complaint; Respondents failed to provide adequate shelter for llamas, in violation of 9 C.F.R. § 3.127(b), as alleged in paragraph 17(d) of the Complaint; and Respondents failed to provide sufficient food to Respondents' animals, in violation of 9 C.F.R. § 3.129, as alleged in paragraph 17(f) of the Complaint. Hope Knaust affirms the content of the Answer in her affidavit, and I find the affidavit to be sufficient to raise a factual issue of substance as to the violations of 9 C.F.R. §§ 3.75(a) and 3.75(e) alleged in paragraph 17(a) of the Complaint; the violation of 9 C.F.R. § 3.76(a) alleged in paragraph 17(b) of the Complaint; the violation of 9 C.F.R. § 3.127(b) (as it relates to adequate shelter for a camel and a capybara) alleged in paragraph 17(d) of the Complaint; the violation of 9 C.F.R. § 3.127(c) alleged in paragraph 17(e) of the Complaint; the violation of 9 C.F.R. § 3.130 alleged in paragraph 17(g) of the Complaint; and the violation of 9 C.F.R. § 3.132 alleged in paragraph 17(h) of the Complaint and additional evidence will be required if these alleged violations are to be established.

Respondents failed to submit any factual evidence concerning the violations cited in the May 3, 2010 and September 7, 2010 inspections reports (CX 39, CX 61), and, in Respondents' Response to Complainant's Motion for Summary Judgment, Respondents rely solely upon pleadings. Consistent with the burden shifting requirements,[28] the violations cited on May 3, 2010 and September 7, 2010 are deemed established. Accordingly, I find, on or about May 3, 2010, Respondents' failed to employ an attending veterinarian under formal arrangements that included a current written program of veterinary care, in violation of 9 C.F.R. § 2.40(a)(1), as alleged in paragraph 18 of the Complaint;

[28] *See* note 13.

Respondent failed to maintain accurate records of the acquisition and disposition of animals, in violation of 9 C.F.R. § 2.75(b), as alleged in paragraph 19 of the Complaint; and Respondents' enclosure for animals, including sheep, goats, and pigs, were in disrepair, in violation of 9 C.F.R. § 3.125(a), as alleged in paragraph 20 of the Complaint.[29] I also find, on or about September 7, 2010, Respondents failed to provide APHIS officials access to Respondents' facility in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126, as alleged in paragraph 21 of the Complaint.

The evidence compels the conclusion that Respondents lacked sufficient resources both in funding and personnel for continued operation of, or correction of the conditions at, Respondents' facility. The conditions observed reflect an appalling lack of adequate and necessary veterinary care and husbandry practices despite repeated citations, serious overall deterioration in the standard of care of Respondents' animals and physical facilities, and repeated deficiencies at Respondents facility. The seriousness of the conditions at Respondents' facility ultimately resulted in confiscation of some of the animals at Respondents' facility on March 5, 2010, including Hobo, a monkey that provided Hope Knaust with her main source of income.[30] The subsequent evaluation of the confiscated animals reflects unacceptable neglect in their care, with many animals observed as being malnourished and requiring immediate veterinary care for anemia, lice, and parasites (CX 50-CX 52, CX 54-CX 55).

Findings of Fact

1. Hope Knaust and Stan Knaust are individuals and are partners operating The Lucky Monkey, a general partnership also sometimes

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[29] Paragraph 20 of the Complaint alleges, on or about March 4, 2010, Respondents' enclosures for animals, including sheep, goats, and pigs, were in disrepair in willful violation of 9 C.F.R. §§ 2.100(a) and 3.125(a). Subsequent to filing the Complaint, the Administrator asserted the date of the violation alleged in paragraph 20 of the Complaint is erroneous and the correct date is "May 3, 2010." (Correction of Complaint filed May 16, 2013).

[30] Confiscation was undertaken pursuant to 7 U.S.C. § 2146, which permits confiscation of any animal found to be suffering as a result of a failure to comply with any provision of the Animal Welfare Act or any regulation or standard issued under the Animal Welfare Act.

known as The Lucky Monkey Petting Zoo. Hope Knaust lives at [redacted]*and Stan Knaust lives in Irving, Texas. (Answer ¶¶ 1-3 at 1-2).

2. Hope Knaust and Stan Knaust hold a Class C Animal Welfare Act exhibitors license (Animal Welfare Act license number 74-C-0388). (Answer ¶¶ 1-3 at 1-2; CX 1).

3. On or about February 11, 2008, Respondents failed to enclose facilities for a zebra with a fence not less than six feet high. (Answer ¶ 5 at 2; CX 4 at 2, CX 7 at 1, CX 65).

4. On or about February 10, 2010, February 17, 2010, February 23, 2010, March 4, 2010, and May 3, 2010, Respondents failed to employ an attending veterinarian under formal arrangements and, specifically, Respondents' arrangements with their part-time attending veterinarian did not include a current written program of veterinary care and regularly scheduled visits to Respondents' premises. (CX 2, CX 4-CX 7, CX 9, CX 13, CX 25, CX 61).

5. On or about February 10, 2010, Respondents failed to provide adequate veterinary care to a camel with extensive hair loss and visibly red and irritated skin, later diagnosed to have external parasites and a secondary infection. (CX 2 at 1-2, CX 4 at 3, CX 6 at 1-2).

6. On or about February 10, 2010 and May 3, 2010, Respondents failed to maintain accurate records of the acquisition and disposition of the animals. (CX 2 at 2, CX 4 at 3, CX 7 at 2, CX 61 at 1-2).

7. On or about February 10, 2010, Respondents' nonhuman primate building contained uninstalled cabinets, the enclosures housing a camel and Axis deer were in disrepair, an enclosure for the capybaras lacked a heat source, and an enclosure for eight alpacas lacked adequate shelter. A heat source was provided for the capybaras that same day. (CX 2 at 2-5, CX 7 at 2-4).

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* Redacted by the Editor to protect individual privacy interests. *See* 5 U.S.C. § 552(b)(6).

ANIMAL WELFARE ACT

8. On or about February 17, 2010, Respondents' food storage building contained tools and Respondents failed to employ a sufficient number of trained personnel to care for the nonhuman primates and to provide minimally acceptable husbandry to the other animals. (CX 4 at 7-9, CX 7 at 5-8, CX 9 at 2, 4-6, CX 10 at 3, 5-6).

9. On or about February 23, 2010, Respondents failed to have an attending veterinarian provide adequate veterinary care to a capybara, a kangaroo, two fallow deer, and a sheep (CX 13 at 1-2). The failure to provide adequate veterinary care to the capybara, the kangaroo, and the two fallow deer continued until March 4, 2010. (CX 25 at 1-2, CX 50-CX 52, CX 54-CX 55).

10. On or about February 23, 2010, Respondents failed to provide sufficient food for their animals, and Respondents failed remove a bloated equine carcass from the area adjacent to the llama enclosure. (CX 7 at 12, CX 13 at 4-5, CX 14 at 5-6, CX 50-CX 52, CX 54-CX 55).

11. On or about March 4, 2010, Respondents failed to maintain fencing for animals in a state of repair, allowing a pig and a llama to escape their enclosures; failed to provide sufficient food for their animals; and failed to provide adequate shelter from inclement weather for llamas. (CX 7 at 14-16, CX 25 at 2-4, CX 50-CX 52, CX 54-CX 55).

12. Conditions observed on March 4, 2010, resulted in the confiscation of some of Respondents' animals by the APHIS on March 5, 2010. Subsequent examination of the confiscated animals reflected neglect in their care, with many animals being observed as being malnourished and requiring immediate veterinary care for anemia, lice, and parasites. (CX 50-CX 52, CX 54-CX 55).

13. On or about May 3, 2010, Respondents' enclosures for animals, including sheep, goats, and pigs, were in disrepair. (CX 61 at 2-3).

14. On or about September 7, 2010, Respondents failed to provide APHIS officials access to Respondents' facility. (CX 39).

Conclusions of Law

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

2. On or about February 11, 2008, Respondents willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(d) by failing to enclose their facilities for a zebra with a fence not less than six feet high.

3. On or about February 10, 2010, February 17, 2010, February 23, 2010, March 4, 2010, and May 3, 2010, Respondents willfully violated 9 C.F.R. § 2.40(a)(1) by failing to employ an attending veterinarian under formal arrangements.

4. On or about February 10, 2010, February 23, 2010, and March 4, 2010, Respondents willfully violated 9 C.F.R. § 2.40(b)(2) by failing to obtain adequate veterinary care for Respondents' animals visibly exhibiting the need for veterinary care.

5. On or about February 10, 2010, and May 3, 2010, Respondents willfully violated 9 C.F.R. § 2.75(b) by failing to maintain accurate records of the acquisition and disposition of animals.

6. On or about February 10, 2010, Respondents' facility did not meet the minimum standards in willful violation of 9 C.F.R. §§ 2.100(a), 3.75(b), 3.125(a), and 3.127(b).

7. On or about February 17, 2010, Respondents' facility did not meet the minimum standards in willful violation of 9 C.F.R. §§ 2.100(a), 3.75(b), 3.85, and 3.132.

8. On or about February 23, 2010, Respondents' facility did not meet the minimum standards in willful violation of 9 C.F.R. §§ 2.100(a), 3.129, and 3.131(c).

9. On or about March 4, 2010, Respondents' facility did not meet the minimum standards in willful violation of 9 C.F.R. §§ 2.100(a), 3.125(a), 3.127(b), and 3.129.

ANIMAL WELFARE ACT

10. On or about May 3, 2010, Respondents' facility did not meet the minimum standards in willful violation of 9 C.F.R. §§ 2.100(a) and 3.125(a).

11. On September 7, 2010, Respondents willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 by failing to provide APHIS officials access to Respondents' facilities.

12. Factual disputes of substance exist as to the violations of the Animal Welfare Act and the Regulations alleged in paragraphs 9(b)-(c), 9(f), 11(a) (as it relates to Respondents' alleged violation of 9 C.F.R. § 3.75(e)), 11(b)-(d), 11(f)-(g), 13 (as it relates to Respondents' failing to obtain veterinary care for a camel), 14(a)-(g), 14(i), 17(a)-(b), 17(d) (as it relates to Respondents' failing to provide adequate shelter for a camel and a capybara), 17(e), and 17(g)-(h) of the Complaint.

13. An order revoking Hope Knaust and Stan Knaust's Animal Welfare Act license (Animal Welfare Act license number 74-C-0388) is appropriate.

14. An order instructing Respondents to cease and desist from violations of the Animal Welfare Act and the Regulations is appropriate.

For the foregoing reasons, the following Order is issued.

ORDER

1. Respondents and their agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, are ordered to cease and desist from violations of the Animal Welfare Act and the Regulations. Paragraph 1 of this Order shall become effective upon service of this Order on Respondents.

2. Hope Knaust and Stan Knaust's Animal Welfare Act license (Animal Welfare Act license number 74-C-0388) is revoked. Paragraph 2 of this Order shall become effective sixty (60) days after service of this Order on Respondents.

Right to Judicial Review

Respondents have 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. §§ 2341-2350. Respondents must seek judicial review within sixty (60) days after entry of the Order in this Decision and Order.[31] The date of entry of the Order in this Decision and Order is April 9, 2014.

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[31] 7 U.S.C. § 2149(c).

ANIMAL WELFARE ACT

In re: GUS WHITE, a/k/a GUSTAVE L. WHITE, III, d/b/a COLLINS EXOTIC ANIMAL ORPHANAGE.
Docket No. 12-0277.
Decision and Order.
Filed May 13, 2014.

AWA – Animal welfare – Burden of proof – Civil penalty – Employees – Facilities – Food and feeding – Handling – Veterinary care – Records – Sanctions.

Sharlene A. Deskins, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On March 9, 2012, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator 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 pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Administrator alleges, during the period May 24, 2007, to the date of the issuance of the Complaint on March 3, 2012, Gus White willfully violated the Animal Welfare Act and the Regulations.[1] On April 4, 2012, Mr. White filed an Answer to Complaint in which Mr. White denied the material allegations of the Complaint.

On December 11-13, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] conducted a hearing in Hattiesburg, Mississippi. Mr. White appeared pro se, but was assisted by his son, Gustave L. White, IV [hereinafter Mr. White, IV], Collins, Mississippi.

[1] Compl. ¶¶ II-XII at 2-10.

Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator.[2]

On April 26, 2013, after the parties had an opportunity to submit post-hearing briefs, the ALJ filed a Decision and Order in which the ALJ: (1) concluded Mr. White violated the Animal Welfare Act and the Regulations, as alleged in paragraphs III, IV(A), IV(B), IV(D)(2), IV(D)(6) as it relates to the structural integrity of animal enclosures, IV(D)(7), V(A), VI(A), VI(B), VI(C), VI(D)(1), VI(D)(2), VI(D)(3), VII(A)(1), VIII, IX(4), IX(5), IX(6), X, and XII of the Complaint; (2) concluded the Administrator failed to prove by a preponderance of the evidence that Mr. White violated the Animal Welfare Act and the Regulations, as alleged in paragraphs II(A), II(B), II(C), IV(C), IV(D)(1), IV(D)(3), IV(D)(4), IV(D)(5), IV(D)(6) as it relates to structural defects of the roof of a building, VI(D)(4), VI(D)(5), VII(A)(2), VII(A)(3), IX(1), IX(2), IX(3), IX(7), and XI of the Complaint; (3) ordered Mr. White to cease and desist from further violations of the Animal Welfare Act and the Regulations; and (4) revoked Animal Welfare Act license number 51-C-0064.[3]

On May 22, 2013, the Administrator filed "Complainant's Appeal Petition and Motion for Extension of Time" [hereinafter Administrator's Appeal Petition] in which the Administrator requested an extension of time to file a memorandum in support of the Administrator's Appeal Petition. I granted the Administrator's request for an extension of time,[4] and on July 19, 2013, the Administrator filed "Complainant's Brief in Support of Its Appeal Petition" [hereinafter Administrator's Appeal Brief]. On May 28, 2013, Mr. White filed "Respondent's Appeal Petition and Motion for Extension of Time" [hereinafter Mr. White's Appeal Petition] in which Mr. White requested an extension of time to file a memorandum in support of Mr. White's Appeal Petition. I granted

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[2] References to the transcript of the December 11-13, 2012, hearing are indicated as "Tr." and the page number. The Administrator's exhibits are identified as "CX" and the exhibit number.

[3] ALJ's Decision & Order at 38-41.

[4] "Order Extending Time for Filing a Memorandum in Support of the Administrator's Appeal Petition," filed May 23, 2013; and "Order Extending Time for Filing a Memorandum in Support of the Administrator's Appeal Petition," filed June 21, 2013.

Mr. White's request for an extension of time,[5] and on June 21, 2013, Mr. White filed "Memorandum in Support of Notice of the Respondent's Appeal Petition" [hereinafter Mr. White's Appeal Brief]. On July 24, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt the ALJ's Decision and Order as the final decision— except that: (1) I conclude Mr. White did not violate 9 C.F.R. § 3.125(a) on September 8, 2010, as alleged in paragraph IV(D)(6) of the Complaint; (2) I conclude Mr. White violated 9 C.F.R. § 3.131(a) on March 23, 2010, as alleged in paragraph VI(D)(5) of the Complaint; (3) I conclude Mr. White violated 9 C.F.R. § 3.125(a) on January 21, 2010, as alleged in paragraph VII(A)(2) of the Complaint; (4) I conclude Mr. White violated 9 C.F.R. § 2.131(c)(1) on July 11, 2008, as alleged in paragraph XI of the Complaint; (5) I assess Mr. White a $39,375 civil penalty; and (6) I revoke Animal Welfare Act license number 65-C-0012.

DECISION

A. Admissions

Mr. White admits he is an individual residing in Collins, Mississippi, and operates an animal exhibition under the business name Collins Exotic Animal Orphanage. Mr. White further admits, at all times material to this proceeding, he operated as an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations and he holds, and at all times material to this proceeding held, Animal Welfare Act license number 65-C-0012.

B. Summary of Factual History

Mr. White has worked with animals all of his life and has learned animal care from experience, lectures, books, and animal experts (Tr. at 918-19). Mr. White has exhibited animals at facilities in Slidell, Louisiana, and then at the current site in Collins, Mississippi, as well as at public lectures (Tr. at 624, 919). Mr. White has held an Animal

[5] "Order Extending Time for Filing a Memorandum in Support of Respondent's Appeal Petition," filed May 29, 2013.

Welfare Act license for 43 years (Tr. at 624-25, 919-20). Mr. White has experience with all kinds of animals, including exotic cats (Tr. at 931).

Mr. White [redacted][*] has limited his daily hands-on oversight of Collins Exotic Animal Orphanage, but he visits the site often, as his home is located on the property where the animal exhibit is situated (Tr. at 929). Mr. White's wife, Bettye White, is now the primary caretaker for the animals, and Mr. White, IV also is very involved in caring for the animals and maintaining buildings and structures (Tr. at 932-33). In addition to Mr. White's wife and son, three people regularly volunteer to work at Collins Exotic Animal Orphanage (Tr. at 932-33). Mr. White provides instructions to his wife, his son, and the volunteers regarding the operation of Collins Exotic Animal Orphanage (Tr. at 933).

Mrs. White was raised on a farm and is familiar with the care of typical farm animals (Tr. at 816). Mrs. White has worked with her husband at his animal exhibition facilities for more than 30 years and developed her animal-handling expertise through her experience (Tr. at 625-26). Mrs. White helped to hand-raise a variety of animals from birth (Tr. at 626). Mr. White, IV was raised in a home adjacent to Collins Exotic Animal Orphanage and has been around and worked with animals his entire life (Tr. at 978). Mr. White, IV was trained to feed and care for animals by his parents and the volunteers and learned the habits of animals and learned to observe animal behavior from his parents and the volunteers (Tr. at 978-79, 988). Mr. White, IV did not diagnose or treat animals, but discussed his observations with his parents, who would decide whether to consult a veterinarian to provide treatment to animals (Tr. at 991). One of the volunteers, Jennifer Farmer, is a biologist who has formal training in animal care and who has worked at Collins Exotic Animal Orphanage for years (Tr. at 1026-28).

Veterinary care for Mr. White's animals is provided by Dr. Melissa Ainsworth, who volunteers her services to Mr. White (CX 43). Dr. Ainsworth visits Collins Exotic Animal Orphanage several times a year, dropping by when she is in the area or coming to the facility when

[*] Redacted by the Editor pursuant to Exemption 6 of the Freedom of Information Act (FOIA). *See* 5 U.S.C. 552(b)(6).

Mrs. White asks for a visit (Tr. at 631).

On January 25, 2012, the Mississippi Department of Wildlife, Fisheries & Parks confiscated Mr. White's larger animals (Tr. at 728). Mr. White challenged the confiscation and a state court ruled the confiscation of Mr. White's animals was illegal (Tr. at 729); however, at the time of the hearing in this proceeding, the confiscated animals had not been returned to Mr. White and the only animals regulated under the Animal Welfare Act that were at Collins Exotic Animal Orphanage were one coyote-hybrid, rabbits, and a kinkajou (Tr. at 729).

C. The Animal Welfare Act and the Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to ensure that the animals are provided humane care and treatment. 7 U.S.C. § 2131. The Secretary of Agriculture is authorized to promulgate regulations to govern the humane handling, care, treatment, and transportation of animals. 7 U.S.C. §§ 2143(a), 2151. The Animal Welfare Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer, and transportation of regulated animals. 7 U.S.C. §§ 2133-34, 2140. Each exhibitor is required to allow inspection by Animal and Plant Health Inspection Service [hereinafter APHIS] employees to assure the exhibitor is complying with the Animal Welfare Act and the Regulations. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126.

Violations of the Animal Welfare Act or the Regulations by licensees may result in the assessment of civil penalties, the issuance of cease and desist orders, and the suspension or revocation of Animal Welfare Act licenses. 7 U.S.C. § 2149. Each exhibitor is liable for violations of the Animal Welfare Act by agents or employees of the exhibitor. 7 U.S.C. § 2139.

The Regulations provide requirements for licensing, recordkeeping, and veterinary care, as well as standards for the humane handling, care, treatment, and transportation of covered animals. The Regulations set forth specific requirements regarding facilities where animals are housed, feeding and watering of animals, and sanitation.

D. The Cited Violations

1. Handling Animals – 9 C.F.R. § 2.131(c)(1)

The Regulations require exhibitors to handle animals during public exhibition, as follows:

> **§ 2.131 Handling of animals.**
>
> . . . .
> (c)(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.

9 C.F.R. § 2.131(c)(1). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 2.131(c)(1) on July 11, 2008, March 23, 2010, and September 8, 2010.[1]

On July 11, 2008, APHIS inspector Dr. Tami Howard found the barrier fence in front of the leopard enclosure could be easily moved to allow the public access to the animals (Tr. at 173-74; CX 16-CX 17). Mrs. White explained that she and her son were replacing the railing in front of the leopard enclosure when the inspectors arrived and the railing may not have looked solid (Tr. at 689). The railing installation was completed immediately after the inspectors left (Tr. at 690). While Mr. White's immediate correction of the violation is commendable and I impose no civil penalty for the violation, I conclude the Administrator proved by a preponderance of the evidence that Mr. White willfully violated 9 C.F.R. § 2.131(c)(1) on July 11, 2008, as alleged in paragraph XI of the Complaint.

On September 8, 2010, Dr. Howard observed that the construction of the barrier next to the enclosure for a tiger named "Stave" was not sufficient to prevent the public from access to the tiger (Tr. at 149, 547; CX 7 at 3, CX 9 at 14). Dr. Howard explained that, although the

[1] Compl. ¶¶ IV(C), VI(C), XI at 4, 6, 10.

problem was with the construction of the fence, the potential for breach of a barrier brought the defect under a "handling" violation (Tr. at 547-48). Mrs. White testified that several fence posts and gates were at the back of the tiger's enclosure that restricted access to the tiger (Tr. at 653-54). I accord weight to Mrs. White's testimony and conclude the Administrator did not prove by a preponderance of the evidence that, on September 8, 2010, Mr. White violated 9 C.F.R. § 2.131(c)(1), as alleged in paragraph IV(C) of the Complaint.

On March 23, 2010, Dr. Howard cited Mr. White for the condition of the barrier fence in the coyote-mix area (Tr. at 209). Dr. Howard considered the fence flimsy and unstable and inadequate to prevent contact between the public and the animals (CX 26 at 3, CX 27 at 5). Dr. Kirsten, a supervisory animal care specialist for APHIS, recalled that wires were broken from the post, making the fence very unstable (Tr. at 379-80). Mrs. White disagreed that the fence could have been easily broken and asserted it would have been easier to climb over the fence than to have tampered with the fence (Tr. at 697-98).

The evidence supports the Administrator's contention that the barrier between the public and the coyotes was inadequate, and I conclude the Administrator proved by a preponderance of the evidence that Mr. White willfully violated 9 C.F.R. § 2.131(c)(1) on March 23, 2010, as alleged in paragraph VI(C) of the Complaint.

2. Housing Facilities – 9 C.F.R. §§ 3.1(a) and 3.125(a)

The Regulations require that housing facilities meet structural requirements, as follows:

> **§ 3.1 Housing facilities, general.**
>
> (a) *Structure; construction.* Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

> **§ 3.125 Facilities, general.**
>
> (a) *Structural strength*. The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

9 C.F.R. §§ 3.1(a), 3.125(a). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.1(a) on September 24, 2009, and January 21, 2010,[1] and alleges Mr. White willfully violated 9 C.F.R. § 3.125(a) on January 21, 2010, March 23, 2010, and September 8, 2010.[2]

On September 24, 2009, Dr. Howard observed insufficient substrate in the wolf-hybrid enclosure and cited Mr. White for a violation of 9 C.F.R. § 3.1(a) (Tr. at 183-84; CX 22 at 1, CX 23 at 3-4). Mrs. White testified she regularly added clay to the floor of the wolf-hybrid enclosure because wolf-hybrids liked to dig (Tr. at 721-22). Ms. Williamson testified that she helped Mrs. White put dirt in enclosures twice a week (Tr. at 577). However, Ms. Williamson testified that, since 2006, she only goes to Collins Exotic Animal Orphanage one or two days per week, and, while she is there, her work has been limited to supervisory work and work in the office (Tr. at 561).

I find Mrs. White's and Ms. Williamson's testimony regarding the standard operating procedure at Collins Exotic Animal Orphanage is not sufficiently specific to overcome the Administrator's evidence of the condition of the wolf-hybrid enclosure on September 24, 2009. Therefore, I conclude the Administrator proved by a preponderance of the evidence that, on September 24, 2009, Mr. White willfully violated 9 C.F.R. § 3.1(a), as alleged in paragraph IX(6) of the Complaint.

On the inspection conducted on January 21, 2010, Dr. Howard cited Mr. White for a violation of 9 C.F.R. § 3.125(a) for the condition of the

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[1] Compl. ¶¶ VII(A)(1), IX(6) at 7, 9.
[2] Compl. ¶¶ IV(D)(6), VI(D)(1), VII(A)(2) at 5-8.

floors in the tigers' enclosures. The tiger named "Stave" was lying in mud, and Dr. Howard believed the floor needed additional substrate to comply with 9 C.F.R. § 3.125(a) (Tr. at 195-96; CX 24 at 1, CX 25 at 4, 6-8). Dr. Howard found similar unsatisfactory conditions in the wolf-hybrid enclosure and cited Mr. White for a violation of 9 C.F.R. § 3.1(a) (Tr. at 195; CX 24 at 1, CX 25 at 1). On March 23, 2010, the enclosures for the tiger named "Stave" and the tiger named "India" needed additional substrate (Tr. at 209-13; CX 26 at 4, CX 27 at 13, 16). Dr. Kirsten agreed with Dr. Howard's assessment (Tr. at 398).

Mrs. White disagreed that the tigers' enclosures were hazardous to the tigers, as the tigers were responsible for creating pools of water when they finished swimming (Tr. at 727). She also did not agree with the citation for the floor of the tiger Stave's enclosure and explained, if she added too much dirt, it would run off because the enclosure was situated on an incline (Tr. at 727-28). She routinely put dirt in the cages with the help of volunteer Geraldine Williamson (Tr. at 577-78). Mrs. White considered moving Stave's enclosure, but the Mississippi Department of Wildlife, Fisheries & Parks confiscated Mr. White's big cats on January 25, 2012 (Tr. at 728). Mrs. White explained that the wolves liked to dig (Tr. at 728).

I conclude the Administrator proved by a preponderance of the evidence that, on January 21, 2010, Mr. White willfully violated 9 C.F.R. § 3.1(a), as alleged in paragraph VII(A)(1) of the Complaint and willfully violated 9 C.F.R. § 3.125(a), as alleged in paragraph VII(A)(2) of the Complaint.

On March 23, 2010, Dr. Howard cited Mr. White for multiple violations of structural requirements. Dr. Howard found rotted posts at the bottom of both cougars' (Delilah and Star) enclosures that were not anchored in the ground. Dr. Howard observed that a perch in the leopards' enclosure was broken. The cyclone fence around the tiger India's enclosure was on the outside of the vertical posts and not clamped to the posts, which compromised the strength of the fence. There was also a gap at the bottom of the left end of the enclosure big enough to allow the tiger to pass its paw through, presenting a hazard to passers-by. There were broken resting platforms in both the tiger Brother's and the jungle cat Gypsy's enclosures. Dr. Kirsten also

observed structural defects during the March 23, 2010, inspection (Tr. at 381-83).

Mrs. White admitted that posts at the bottom of the cougars' enclosures had some rot, but since they were not support posts, she did not believe there was a danger to structural integrity (Tr. at 702). Mrs. White also agreed that resting perches were broken (Tr. at 703). She explained that the cyclone fence was constructed as it was to allow an inside metal perch to be bolted to the fencing, but she had her son change the fencing to address the inspectors' concerns (Tr. at 703-04). Mrs. White did not disagree that there was a gap in fencing, but she did not think it presented a problem because no one generally went to that area of the enclosure (Tr. at 704).

The Administrator established that Mr. White violated the structural standards pertaining to broken perches, poorly constructed fencing, and compromised fence posts. I conclude the Administrator proved by a preponderance of the evidence that, on March 23, 2010, Mr. White willfully violated 9 C.F.R. § 3.125(a), as alleged in paragraph VI(D)(1).

Upon inspection conducted on September 8, 2010, Dr. Howard cited Mr. White for a violation of 9 C.F.R. § 3.125(a) because large dead trees within the exhibition space posed a danger to animal enclosures. Dr. Howard testified that Mrs. White acknowledged the trees had to come down, and the inspector believed that the attending veterinarian recommended the removal of the trees (Tr. at 151; CX 7 at 3, CX 9 at 8). Dr. Kirsten testified that Dr. Ainsworth's records documented the recommendation to remove the trees (Tr. at 396). Mrs. White denied that Dr. Ainsworth had recommended removal of the trees, but rather, offered assistance when Mrs. White told her that she had been cited for the trees (Tr. at 660). Dr. Ainsworth's friends removed the trees at no cost to Mr. White (Tr. at 661). I accord weight to the testimony that the trees were a danger to the structural integrity of animal enclosures, but find no evidence that, on September 8, 2010, the animal enclosures did not meet the requirements of 9 C.F.R. § 3.125(a).

Also, during the September 8, 2010 inspection, Dr. Howard observed holes in the ceiling of the building housing food storage freezers that she

believed could compromise the food. She also believed that the sagging ceiling presented a safety hazard to people who might hit their heads when entering the building (Tr. at 152; CX 7 at 4, CX 9 at 13).

At the time of the September 8, 2010 inspection, the structure had a second roof on top of the roof that had leaked in the past. There were no leaks, and if there were, the food was protected because it was kept in freezers (Tr. at 663). Animals were not kept in the building and the building did not present a danger to animals or to people (Tr. at 663-64). Despite his belief that there was no problem with the building, Mr. White covered freezers with tarps at Dr. Howard's suggestion and eventually moved the freezers to a new room at a different location (Tr. at 664-65).

I find the evidence fails to establish that the condition of the structure containing the freezers was unsound. The Administrator failed to prove by a preponderance of the evidence the allegation that, on September 8, 2010, Mr. White violated 9 C.F.R. § 3.125(a), as alleged in paragraph IV(D)(6) of the Complaint.

3. Storage of Food and Bedding – 9 C.F.R. § 3.125(c)

The Regulations require the storage of food and bedding, as follows:

> **§ 3.125 Facilities, general.**
>
> . . . .
> (c) *Storage*. Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

9 C.F.R. § 3.125(c). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.125(c) on September 8, 2010.[1]

Dr. Howard testified that on September 8, 2010, she observed that food stored in Mr. White's freezers had partially defrosted in violation of

[1] Compl. ¶ IV(D)(5) at 4-5.

9 C.F.R. § 3.125(c). Dr. Howard concluded that the freezers were not working properly, which placed food in danger of being spoiled. The thermometer on the cooler read 50° Fahrenheit, which is too warm. Dr. Howard also saw a dirty bucket of vitamins and items that were stored in disarray on a rack in the cooler (Tr. at 152-54; CX 7 at 4, CX 9 at 2, 5, 10). Dr. Kirsten recalled that someone explained that the circuit breaker had been inadvertently turned off (Tr. at 400).

Mrs. White believed the circuit breaker had been tripped because her son had been using a power washer. The meat was not entirely thawed out, and it was not her procedure to shut off power to the freezer to thaw meat. She usually cut meat up and moved it to the cooler to defrost. She never experienced problems with the quality of the meat (Tr. at 666-72). Mrs. White did not know why the thermometer showed the cooler temperature in the 50's, as it usually read in the 40's unless the door was left open during cleaning (Tr. at 671-72). She stored empty plastic bags in the freezer because she had nowhere else to store the empty plastic bags (Tr. at 673-74). Mrs. White explained that the bucket that the inspectors saw was used to mix vitamins and residue from the meat that was mixed with the vitamins sometimes got in the bucket. She washed the bucket several times a week (Tr. at 674-75).

The practices described by Dr. Howard in her inspection report reflect some careless handling of vitamins and storage of items; however, I conclude the Administrator did not prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. § 3.125(c), on September 8, 2010, as alleged in paragraph IV(D)(5) of the Complaint.

4. Waste Disposal – 9 C.F.R. § 3.125(d)

The Regulations require exhibitors to dispose of waste, as follows:

> **§ 3.125 Facilities, general.**
>
> . . . .
> (d) *Waste disposal*. Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal

> facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

9 C.F.R. § 3.125(d). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.125(d) on September 8, 2010.[2]

On September 8, 2010, Dr. Howard cited Mr. White for a failure to promptly remove food waste from the kinkajou enclosure (Tr. at 154; CX 7 at 4, CX 9 at 3). Dr. Kirsten believed the food was moldy and insect covered and the kinkajou enclosure should have been more promptly cleaned (Tr. at 400). Mrs. White disagreed that food for the kinkajou was moldy, though she had seen fruit left overnight get ripe (Tr. at 675-76). She cleaned the kinkajou's enclosure every morning (Tr. at 677).

The evidence is in equipoise, and I conclude the Administrator did not prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. § 3.125(d), on September 8, 2010, as alleged in paragraph IV(D)(4) of the Complaint.

5. Shelter from Sunlight and Inclement Weather – 9 C.F.R. § 3.127(a)-(b)

The Regulations require exhibitors to provide animals shelter from sunlight and inclement weather, as follows:

> **§ 3.127 Facilities, outdoor.**
>
> (a) *Shelter from sunlight*. When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect

[2] Compl. ¶ IV(D)(4) at 4.

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

9 C.F.R. § 3.127(a)-(b). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.127(a) on September 8, 2010,[3] and alleges Mr. White willfully violated 9 C.F.R. § 3.127(b) on March 23, 2010.[4]

At the inspection of March 23, 2010, Dr. Howard cited Mr. White for failing to provide appropriate shelter from inclement weather to two cougars (CX 26 at 4, CX 27 at 17-18). Dr. Howard testified that the overhang from roofing and a cover over a perch were not sufficient to allow the cougars to escape from driving rain. She also did not think that the opening in a rock formation provided comfortable space for a cougar to shelter (Tr. at 213-14). Dr. Kirsten agreed with Dr. Howard (Tr. at 385).

Mrs. White testified, until the March 23, 2010, inspection, no one had pointed out a problem with the cougars' habitat. She thought the tin overhang on the enclosure provided sufficient cover, but after being cited for violating 9 C.F.R. § 3.127(b), she installed a dog igloo in the enclosure for shelter (Tr. at 709-11). While Mr. White's correction of the violation is commendable and I impose no civil penalty for the violation, I conclude the Administrator proved by a preponderance of the evidence that Mr. White willfully violated 9 C.F.R. § 3.127(b) on March 23, 2010, as alleged in paragraph VI(D)(2) of the Complaint.

In paragraph IV(D)(1) of the Complaint, the Administrator alleges Mr. White violated 9 C.F.R. § 3.127(a) on September 8, 2010; however, the Complaint describes the violation as a failure to maintain structurally

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[3] Compl. ¶ IV(D)(1) at 4.
[4] Compl. ¶ VI(D)(2) at 6.

sound facilities. Since 9 C.F.R. § 3.127(a) pertains to providing shade to allow animals to protect themselves from sunlight, I dismiss paragraph IV(D)(1) of the Complaint.

6. Facilities and Primary Enclosures for Rabbits – 9 C.F.R. §§ 3.52 and 3.53

The Regulations require exhibitors to provide rabbits shelter, as follows:

> **§ 3.52 Facilities, outdoor.**
>
> . . . .
> (b) *Shelter from rain or snow*. Rabbits kept outdoors shall be provided with access to shelter to allow them to remain dry during rain or snow.
>
> **§ 3.53 Primary enclosures.**
>
> All primary enclosures for rabbits shall conform to the following requirements:
>
> (a) *General*. . . . .
> (2) Primary enclosures shall be constructed and maintained so as to enable the rabbits to remain dry and clean.
> . . . .
>
> (c) *Space requirements for primary enclosures acquired on or after August 15, 1990*. . . . .
> (2) Each rabbit housed in a primary enclosure shall be provided a minimum amount of floor space, exclusive of the space taken up by food and water receptacles, in accordance with the . . . table [in 9 C.F.R. § 3.53(c)(2).]

9 C.F.R. §§ 3.52(b), .53(a)(2), (c)(2).The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.52(b) and 9 C.F.R. § 3.53(a)(2)

and (c)(2) on September 24, 2009.[5]

On September 24, 2009, Dr. Howard cited Mr. White for violations of 9 C.F.R. § 3.53(a)(2) and (c)(2) because she believed the primary enclosure for rabbits did not allow the rabbits to remain dry and clean and did not meet the minimum floor space requirements (CX 22 at 2-3). Dr. Howard also cited Mr. White for a violation of 9 C.F.R. § 3.52(b) because she believed the outdoor enclosure for rabbits did not provide for dry ground for the rabbits (CX 22 at 2). Dr. Howard testified that the box that served as the rabbit enclosure was placed directly on the ground and did not protect the animals from recent rain accumulation and the box was too small for all of the rabbits to occupy comfortably (Tr. at 185). Mrs. White denied this contention because, in addition to the box, there was a concrete cage that the rabbits could enter (Tr. at 721-23). I find that the evidence is in equipoise, and I conclude the Administrator did not prove that Mr. White violated 9 C.F.R. § 3.52(b) or 9 C.F.R. § 3.53(a)(2) and (c)(2), on September 24, 2009, as alleged in paragraphs IX(1), IX(2), and IX(3) of the Complaint.

7. Drainage of Facilities – 9 C.F.R. § 3.127(c)

The Regulations require drainage of excess water from outdoor facilities, as follows:

> **§ 3.127 Facilities, outdoor.**
>
> . . . .
> (c) *Drainage*. A suitable method shall be provided to rapidly eliminate excess water. The method of drainage shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

9 C.F.R. § 3.127(c). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.127(c) on September 24, 2009, and January 21, 2010.[6]

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[5] Compl. ¶¶ IX(1), IX(2), IX(3) at 8-9.
[6] Compl. ¶¶ VII(A)(3), IX(7) at 8-9.

On September 24, 2009, Dr. Howard saw the tiger named "Stave" lying in mud and learned from Mrs. White that a drain may have been blocked (Tr. at 190-91). Dr. Howard conveyed her opinion that standing water presented a health hazard and proper drainage must be provided (Tr. at 191). Dr. Kirsten observed drainage problems when he was at Collins Exotic Animal Orphanage on March 23, 2010 (Tr. at 383-84).

Dr. Howard cited Mr. White for repeat violations of 9 C.F.R. § 3.127(c) on the inspection conducted on January 21, 2010 (CX 24 at 1-2, CX 25 at 3-4, 6). Dr. Howard testified that she suspected drainage problems at Mr. White's facility and intentionally scheduled an inspection after it had rained (Tr. at 318-20). She found significant pooling of water in the leopards' enclosure and observed one of the cats lying in water (Tr. at 196). Dr. Howard testified that standing water presents a health hazard for animals, and she directed Mr. White to correct the problem (Tr. at 196-97). On that date, Dr. Howard also observed pools of water in the tiger Stave's enclosure that needed to be resolved (Tr. at 197).

It is axiomatic that inspections of outdoor facilities conducted on rainy days will often reveal pools of water; however, the issue is whether the exhibitor has provided a suitable method to rapidly eliminate excess water. I conclude the Administrator failed to prove by a preponderance of the evidence that, on September 24, 2009, and on January 21, 2010, Mr. White failed to provide a suitable method to rapidly eliminate excess water in violation of 9 C.F.R. § 3.127(c), as alleged in paragraphs VII(A)(3) and IX(7) of the Complaint.

8. Perimeter Fence – 9 C.F.R. § 3.127(d)

The Regulations require exhibitors to enclose outdoor facilities with a perimeter fence, as follows:

> **§ 3.127 Facilities, outdoor.**
>
> . . . .
> (d) *Perimeter fence*. . . . [A]ll outdoor housing facilities . . . must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized

> persons out. Fences less than 8 feet high for potentially dangerous animals, such as, but not limited to, large felines (e.g., lions, tigers, leopards, cougars, etc.), bears, wolves, rhinoceros, and elephants, or less than 6 feet high for other animals must be approved in writing by the Administrator. The fence must be constructed so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility. It must be of sufficient distance from the outside of the primary enclosure to prevent physical contact between animals inside the enclosure and animals or persons outside the perimeter fence. Such fence less than 3 feet in distance from the primary enclosure must be approved in writing by the Administrator.

9 C.F.R. § 3.127(d). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.127(d) on March 23, 2010, and September 8, 2010.[1] On March 23, 2010, Dr. Howard cited Mr. White for failing to have a perimeter fence of sufficient height (CX 26 at 5, CX 27 at 19). The fence is required to be at least 8 feet in height to prevent animals from escaping as well as to prevent unauthorized individuals from having contact with the animals (Tr. at 385-86). Dr. Kirsten did not believe that Mr. White's fence adequately met those goals (Tr. at 386-87).

Dr. Howard recalled her inspection of September 8, 2010, which disclosed portions of Mr. White's perimeter fence that did not meet the 8-foot height required by 9 C.F.R. § 3.127(d) (Tr. at 154-55; CX 7 at 5, CX 9 at 6-7, 9, 17-19). In addition, Dr. Howard observed deficits in the fence, such as openings at the bottom and areas where the fence was not fixed to posts (Tr. at 155). Dr. Howard stated that she considered the problems a repeat violation because she had previously cited Mr. White for problems with the perimeter fence, even though the problems may not have been the same (Tr. at 157). Dr. Howard explained that she did not have the ability to measure the entire perimeter fence, but her sample

[1] Compl. ¶¶ IV(D)(2), VI(D)(3) at 4, 7.

measurements on September 8, 2010, revealed the perimeter fence was not the required height (Tr. at 287-88). The inspector also rejected Mr. White's contention that bamboo represented a natural perimeter fence (CX 11).

Mrs. White testified that the perimeter fence was inspected at every inspection, and Mr. White was not always cited for conditions that had never changed (Tr. at 676-78). She nevertheless did not contest that there were sections of the fence that buckled and that she considered bamboo an adequate perimeter fence. I conclude the Administrator proved by a preponderance of the evidence that Mr. White willfully violated 9 C.F.R. § 3.127(d) on March 23, 2010, and September 8, 2010, as alleged in paragraphs IV(D)(2) and VI(D)(3) of the Complaint.

9. Food – 9 C.F.R. § 3.129(a)

The Regulations require exhibitors to provide food to animals, as follows:

> **§ 3.129 Feeding.**
>
> (a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

9 C.F.R. § 3.129(a). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.129(a) on March 23, 2010, and September 8, 2010.[2] On March 23, 2010, Dr. Howard could not determine whether chicken parts in greenish liquid in an unmarked bucket were meant as food or were meant to be discarded (Tr. at 216-17). Although Mrs. White advised that the chicken was left over and would be thrown away, Dr. Howard believed there was the potential for someone to feed the

[2] Compl. ¶¶ IV(D)(3), VI(D)(4) at 4, 7.

chicken parts to animals because the bucket was not marked and she cited Mr. White for violating 9 C.F.R. § 3.129(a) (Tr. at 217; CX 26 at 5, CX 27 at 22).

I decline to accord substantial weight to Dr. Howard's conclusion and credit Mrs. White's testimony that she and her son fed the animals. I find it improbable that either of them would mistake good food for food that must be discarded. I conclude the Administrator failed to prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. § 3.129(a) on March 23, 2010, as alleged in paragraph VI(D)(4) of the Complaint. When Dr. Howard inspected Collins Exotic Animal Orphanage on September 8, 2010, she concluded Mr. White was feeding the big cats a diet comprised primarily of chicken backs, which are not nutritionally adequate for large cats (Tr. at 158). Mr. White was told by APHIS' big cat specialist, Dr. Laurie Gage, that chicken backs were not appropriate (Tr. at 158). Mrs. White assured Dr. Howard that they had run out of the usual feed of chicken legs and also advised that the diet was supplemented with venison, but Dr. Howard saw very little venison at the time of inspection and Dr. Howard observed that the cougars remained thin (Tr. at 159). Dr. Howard cited Mr. White for failure to provide appropriate food (CX 7 at 6, CX 9 at 11, 20).

Mrs. White asserted she fed the cats a variety of meat and chicken backs were just one source of food (Tr. at 684). On the day of the September 8, 2010, inspection, Mrs. White mistakenly believed that only chicken backs were available, but her son showed her other meat later that day. The following day, Mrs. White showed leg quarters in the freezer to Dr. Howard, who told her that the citation had already been included in the inspection report (Tr. at 684-85).

APHIS investigator Stevie Harris interviewed one of the Collins Exotic Animal Orphanage volunteers, Timothy Chisolm, who said chicken was the primary source of the cats' diet (CX 41). Mr. Chisolm obtained donated chicken from a chicken producer, and he believed the cats were fed primarily chicken backs in 2010.

I accord substantial weight to Mrs. White's explanation that the cougars' weight had fluctuated from the time they came to Collins Exotic

Animal Orphanage (Tr. at 686). I note that in a "Complaint Response" authored by Dr. Howard on July 11, 2008, Dr. Howard "found all of the animals in decent condition. In fact, most of the animals are more towards being overweight." (CX 18). I decline to accord substantial weight to a conclusion about the quality of food on September 8, 2010, which appears to be based upon a mistaken comment made by Mrs. White.

I accord no weight to Mr. Chisolm's statements made in 2010 because those statements may reflect bias against Mr. White. I credit Mrs. White's testimony that Mr. Chisolm lived on the White's property and volunteered at Collins Exotic Animal Orphanage until he and Mr. White, IV, argued in early 2010, whereupon, Mr. Chisolm left the facility (Tr. at 846-47).

I conclude the Administrator did not prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. § 3.129(a) on September 8, 2010, as alleged in paragraph IV(D)(3) of the Complaint.

10. Feeding Rabbits – 9 C.F.R. § 3.54

The Regulations require exhibitors to feed rabbits, as follows:

> **§ 3.54 Feeding.**
>
> (a) Rabbits shall be fed at least once each day except as otherwise might be required to provide adequate veterinary care. The food shall be free from contamination, wholesome, palatable and of sufficient quantity and nutritive value to meet the normal daily requirements for the condition and size of the rabbit.
>
> (b) Food receptacles shall be accessible to all rabbits in a primary enclosure and shall be located so as to minimize contamination by excreta. All food receptacles shall be kept clean and sanitized at least once every 2 weeks. If self feeders are used for the feeding of dry feed, measures must be taken to prevent molding, deterioration or caking of the feed.

9 C.F.R. § 3.54. The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.54(a) on September 24, 2009,[1] and willfully violated 9 C.F.R. § 3.54(b) on September 24, 2009, and September 8, 2010.[2]

The inspection of September 24, 2009, revealed the lack of a food receptacle for rabbits. Their food was left on the ground, which increased the risk of food contamination, and Dr. Howard cited Mr. White for violations of 9 C.F.R. § 3.54 (a) and (b) (Tr. at 187-88; CX 22 at 3). Dr. Howard cited Mr. White again on September 8, 2010, for violations pertaining to rabbit feed. Dr. Howard found old produce, pellets, and excreta in the food tray for five rabbits. She believed the trays were not positioned so as to minimize contamination (Tr. at 150; CX 7 at 3). Dr. Kirsten recalled that the food receptacles for the rabbits were contaminated (Tr. at 396).

Mrs. White speculated that her son had removed the rabbits' feeding tray from the enclosure when the inspectors conducted their inspection (Tr. at 725). She also explained that "[s]ome of [the feed] does fall on the ground sometimes when you throw it in there" (Tr. at 725).

Mr. White's explanation for the condition of the rabbits' enclosure and feeding methods does not demonstrate a reasonable effort to assure that the food is free from contamination. I conclude the Administrator proved by a preponderance of the evidence that, on September 24, 2009, Mr. White willfully violated 9 C.F.R. § 3.54(a), as alleged in paragraph IX(4) of the Complaint and that, on September 24, 2009, and September 8, 2010, Mr. White willfully violated 9 C.F.R. § 3.54(b), as alleged in paragraphs IV(D)(7) and IX(5) of the Complaint.

11. Sanitation – 9 C.F.R. § 3.131(a)

The Regulations require sanitation, as follows:

§ 3.131 Sanitation.

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[1] Compl. ¶ IX(4) at 9.
[2] Compl. ¶¶ IV(D)(7), IX(5) at 5, 9.

> (a) *Cleaning of enclosures*. Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

9 C.F.R. § 3.131(a).The Administrator alleges Mr. White willfully violated 9 C.F.R. § 3.131(a) on March 23, 2010.[3]

On March 23, 2010, Dr. Howard cited Mr. White for unsanitary conditions within the shelter box housing Mr. White's kinkajou because she found the enclosure was excessively soiled and stained (CX 26 at 5-6, CX 27 at 23). Dr. Howard testified that her inspection report and accompanying photograph adequately explained the conditions that led to the citation she issued (Tr. at 217-18). Dr. Kirsten similarly found the enclosure excessively dirty (Tr. at 389).

Ms. Williamson testified that the kinkajou's cage was cleaned every morning (Tr. at 569). I find Ms. Williamson's testimony regarding the standard operating procedure at Collins Exotic Animal Orphanage is not sufficiently specific to overcome the Administrator's evidence of the condition of the kinkajou enclosure on March 23, 2010. Moreover, Ms. Williamson testified that, since 2006, she only goes to Collins Exotic Animal Orphanage one or two days per week and her work has been limited to supervisory work and work in the office (Tr. at 561). Even more specifically, Ms. Williamson testified she was not at Collins Exotic Animal Orphanage in 2010 (Tr. at 606). Therefore, I conclude the Administrator proved by a preponderance of the evidence that, on March 23, 2010, Mr. White willfully violated 9 C.F.R. § 3.131(a), as alleged in paragraph VI(D)(5) of the Complaint.

12. Employees – 9 C.F.R. §§ 3.12, 3.85, and 3.132

The Regulations require that exhibitors utilize a sufficient number of

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[3] Compl. ¶ VI(D)(5) at 7.

trained employees, as follows:

> **§ 3.12 Employees**
>
> Each person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) maintaining dogs and cats must have enough employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide for husbandry and care, or handle animals, must be supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of dogs and cats to supervise others. The employer must be certain that the supervisor and other employees can perform to these standards.
>
> **§ 3.85 Employees**
>
> Every person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) maintaining nonhuman primates must have enough employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide husbandry practices and care, or handle nonhuman primates, must be trained and supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of nonhuman primates to supervise others. The employer must be certain that the supervisor can perform to these standards.
>
> **§ 3.132 Employees.**
>
> A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

9 C.F.R. §§ 3.12, 3.85, 3.132. The Administrator alleges from May 24,

2007, and continuing to the date of the issuance of the Complaint on March 3, 2012, Mr. White willfully violated 9 C.F.R. §§ 3.12,[1] 3.85,[2] and 3.132.[3]

Based upon her years of experience inspecting Collins Exotic Animal Orphanage, Dr. Howard concluded Mr. White did not have sufficient help to keep the facility well maintained (Tr. at 225-26). Although Dr. Howard acknowledged that the Regulations do not require a particular number of employees, she believed the repeated problems she observed with drainage, with the perimeter fence, and with structures and enclosures in disrepair would have been avoided with more help at Collins Exotic Animal Orphanage (Tr. at 226-27).

Dr. Howard further testified she was unable to ascertain the expertise of the few people she regularly saw at the facility (Tr. at 228). She knew that Mr. White had experience with animals, but she believed he directed Collins Exotic Animal Orphanage from his house, and Mrs. White was primarily responsible for the animals, with the help of her son (Tr. at 229). Dr. Howard observed some volunteers at the facility, but she had no knowledge of how volunteers were trained or their experience with animals (Tr. at 228).

Dr. Kirsten had only observed Mrs. White and Mr. White, IV, at Collins Exotic Animal Orphanage with the exception of one occasion when he saw another person helping (Tr. at 405-06). Dr. Kirsten believed that Mrs. White was not in the best of health, and Mr. White, IV, was very young when the doctor first visited the facility. Dr. Kirsten concluded that Collins Exotic Animal Orphanage was inadequately staffed for the amount of work required to maintain the facility, feed and care for the animals, and attend to the medical needs of the animals (Tr. at 406-07).

Volunteer Geraldine Williamson has worked at Collins Exotic Animal Orphanage since approximately 1986 (Tr. at 560). She had worked with animals for many years, beginning as a teenager helping her local veterinarian (Tr. at 559). She generally reported to Collins Exotic

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[1] Compl. ¶ II(C) at 2-3.
[2] Compl. ¶ II(B) at 2.
[3] Compl. ¶ II(A) at 2.

Animal Orphanage at about 8:00 a.m. and a number of volunteers would come later in the day and were assigned chores that did not involve feeding the animals (Tr. at 571-73). She was trained by Mr. White. Since 2006, Ms. Williamson no longer works at Collins Exotic Animal Orphanage eight hours a day or visits the facility every day.

Ms. Williamson continues to help the Collins Exotic Animal Orphanage's veterinarian, Dr. Ainsworth, at her office, and has treated animals at Collins Exotic Animal Orphanage pursuant to Dr. Ainsworth's instructions to Mrs. White (Tr. at 597-99). In recent years, Ms. Williamson has helped with paper work and administration and organizing volunteers (Tr. at 606). Ms. Williamson was not involved with Collins Exotic Animal Orphanage in 2010, but she estimated there were at least five other volunteers at the facility in 2009 (Tr. at 607).

Mr. White, who founded Collins Exotic Animal Orphanage, has worked with animals all of his life (Tr. at 918-19). He is self-taught, though he has read widely about animal care and attended classes and lectures (Tr. at 919). He worked with animal experts, such as Marlin Perkins, has trained fire and police departments about safety and animals, and has held an Animal Welfare Act license for 43 years (Tr. at 919). Mr. White's health no longer allows him to do daily maintenance, but he visits the facility, which is adjacent to his home, regularly and is in daily contact with his wife, who has primary responsibility for the daily functions of Collins Exotic Animal Orphanage (Tr. at 928-29, 932-33). His wife and son do most of the work at the facility with the help of volunteers (Tr. at 932-34). Mr. White testified that his wife worked with veterinarians to treat animals.

Dr. Kirsten hypothesized that many of the violations cited by Dr. Howard would not have occurred if Mr. White had employed more workers (Tr. at 465-66), but did not say how many employees would be considered sufficient to run a facility with an area of less than one acre. The record clearly establishes that the facility depended on volunteer workers and donations. Mr. Chisolm donated time and money to the facility, and Jonathan Cornwell hired itinerant workmen to remove trees at the facility and donated a used truck to the Mr. White. Mr. White relied upon the volunteer services of a veterinarian. The record also

establishes that, with the declining health of Mr. White and long-term volunteer worker Ms. Williamson, the facility lost resources during the period encompassed by the inspections at issue in this proceeding. At the same time, Mr. White, IV, was able to take on more chores as his adolescence advanced. With the exception of a brief absence, Mr. Chisolm continued to perform maintenance work at the facility. Other volunteers do work, and a biologist regularly volunteers.

Despite the perceived lack of resources, Mr. White was able to correct many of the structural and facility maintenance violations cited by inspectors. Dr. Howard was unable to articulate APHIS's expectation of what constitutes a well trained and experienced individual, but Dr. Howard conceded that individuals would not need as much training if experienced supervisors were on the premises (Tr. at 497-98). Dr. Howard's answers to repeated questions about whether Mrs. White's 32 years of experience represented adequate training were not responsive.

Dr. Howard appeared reluctant to acknowledge Mrs. White's experience, and she overlooked the significance of Mr. White's presence and his supervision of the facility. In alleging that Collins Exotic Animal Orphanage did not have adequate numbers of properly trained employees, the Administrator appears to have overlooked the one standard articulated by Dr. Howard—that individuals working for experienced supervisors could have less training. I find Mrs. White and Mr. White were very experienced supervisors; therefore, the persons working for them could have less training than otherwise would be required.

I conclude the Administrator did not establish by a preponderance of the evidence that Mr. White failed to employ an adequate number of trained employees during the period May 24, 2007, and continuing to March 3, 2012, in violation of 9 C.F.R. § 3.12, as alleged in paragraph II(C) of the Complaint, and in violation of 9 C.F.R. § 3.132, as alleged in paragraph II(A) of the Complaint.

The Administrator alleges Mr. White failed to employ adequate employees to care for nonhuman primates in violation of 9 C.F.R. § 3.85. Dr. Howard testified that there were nonhuman primates at Mr. White's

home but not on display at Collins Exotic Animal Orphanage (Tr. at 501); therefore, the allegation in paragraph II(B) of the Complaint that Mr. White violated 9 C.F.R. § 3.85 from May 24, 2007, and continuing to March 3, 2012, is dismissed.

13. Veterinary Care – 9 C.F.R. § 2.40

The Regulations require that each exhibitor have an attending veterinarian who provides adequate veterinary care, as follows:

> **§ 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;
>
> (3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;
>
> (4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and
>
> (5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

9 C.F.R. § 2.40. The Administrator alleges Mr. White willfully violated 9 C.F.R. § 2.40 on November 6, 2008, December 10-11, 2009, March 23, 2010, September 8, 2010, and April 19, 2011.[1]

The Administrator relied upon several incidents as evidence of Mr. White's violations of 9 C.F.R. § 2.40. On April 3, 2008, Dr. Howard observed a discharge from both eyes of a caracal that appeared to cause discomfort to the cat (CX 21). Mrs. White advised that the condition was long-standing and that she was treating the caracal as instructed by the veterinarian, but she agreed to call Dr. Ainsworth (CX 21). At a later inspection on November 6, 2008, the caracal's eyes had not improved (Tr. at 301). Mrs. White advised that she had called the veterinarian and was following treatment advice (Tr. at 301-02; CX 19). Dr. Howard acknowledged that the caracal had the problem for some time, but she believed that the condition had worsened based upon the caracal's

[1] Compl. ¶¶ III, IV(A), VI(A), VIII, X at 3, 5, 8-10.

behavior, and she felt it should be examined by a veterinarian (Tr. at 174-76, 302). Dr. Howard explained that the animal's temperament might have interfered with proper treatment (Tr. at 302-03).

During the November 6, 2008, inspection, Dr. Howard also observed what she believed to be a lesion on the skin of the wolf-hybrid named "Olive" (Tr. at 176, 303; CX 19). Mrs. White believed the skin condition was due to shedding, but Dr. Howard did not agree with that assessment, and believed the animal needed to be seen by a veterinarian (Tr. at 303-04).

On December 11, 2009, a volunteer at Collins Exotic Animal Orphanage observed Olive with a distended abdomen and in distress (Tr. at 202). The volunteer spoke to Mrs. White about the animal. Mrs. White stated she had observed the condition of the animal on December 10, 2009, and believed the wolf may have been pregnant. On December 12, 2009, Mrs. White reported the animal's condition to Dr. Ainsworth, who planned to examine Olive if her condition had not improved. Olive was found dead on Sunday, December 13, 2009 (Tr. at 202-03).

Dr. Howard testified that these circumstances demonstrated a violation of 9 C.F.R. § 2.40. Mrs. White did not contact Dr. Ainsworth until two days after she observed Olive's condition (Tr. at 203-04). Dr. Howard believed Mr. White should have called Dr. Ainsworth earlier and made sure that Olive was seen, particularly given the range of ailments that Dr. Ainsworth speculated as the cause of Olive's symptoms (Tr. at 205-08). No necropsy was performed, and it was impossible to ascertain the cause of Olive's death (Tr. at 208).

On September 8, 2010, Dr. Howard cited Mr. White with failing to provide proper veterinary care to a cougar named Delilah who was euthanized five days after euthanasia was recommended by the facility's veterinarian (Tr. at 141-43; CX 7 at 1). The tiger named "Sister" developed a limp, and Mrs. White advised that Dr. Ainsworth prescribed prednisone after examining the animal on May 26, 2010, though no records were maintained about how treatment was given (Tr. at 143, 392-93; CX 7 at 1). The leopard named "Amber" had a lesion on her

rump, and Mrs. White acknowledged she had not consulted the veterinarian about the condition because the lesion was observed on a holiday weekend (Tr. at 145-46, 394; CX 7 at 2, CX 9 at 15).

Dr. Kirsten visited Dr. Ainsworth to see her records, particularly those involving the cougar that Dr. Ainsworth had recommended euthanizing (Tr. at 390-91). Dr. Kirsten believed Mrs. White's delay in euthanizing the cougar constituted a violation of the Animal Welfare Act because it flaunted the authority of the attending veterinarian (Tr. at 392). Dr. Kirsten similarly found fault with Mrs. White's failure to call Dr. Ainsworth over a weekend to consult about a lesion on one of the leopard's tail (Tr. at 394). Dr. Kirsten observed that the Animal Welfare Act requires licensees to have access to emergency care at all times (Tr. at 394).

Dr. Howard, accompanied by APHIS investigator Stevie Harris, conducted an inspection of Mr. White's facility on April 19, 2011, and learned that an older jungle cat had died in December 2010, and an older leopard had died in February 2011, both of unknown causes (CX 1). In addition, a dingo died in January 2011. No necropsy was performed on any of the three animals to determine the cause of death (CX 1-CX 2). In a three-page report dated April 19, 2011, Dr. Howard summarized her findings, noting that Mr. White did not contact the veterinarian upon the death of any of the animals, which died without apparent illness or injury (CX 3).

On March 23, 2010, Dr. Howard was accompanied on inspection of the facility by Dr. Kirsten, Dr. Laurie Gage, and other APHIS employees in response to a complaint (Tr. at 199).[1] A discharge was observed on rabbits' ears; a leopard named "Smokey" had a three-inch lesion on his tail; and the caracal named "Sonny" appeared to be lame (Tr. at 199-201). Although Mrs. White had consulted Dr. Ainsworth by telephone about the leopard's lesion, she had not contacted Dr. Ainsworth about the rabbits or the caracal (Tr. at 201). Mr. White was given the deadline of March 26, 2010, for the animals to be examined and treated by a veterinarian. Dr. Howard also cited Mr. White for violating 9 C.F.R. § 2.40 for the events leading to Olive's

[1] Dr. Kirsten testified that the complaint that instigated this inspection was made by a volunteer who worked at Collins Exotic Animal Orphanage (Tr. at 374).

death (Tr. at 202).

Dr. Kirsten agreed with the conclusion that animals appeared in need of veterinary care when he was at Collins Exotic Animal Orphanage for the inspection of March 23, 2010 (Tr. at 372-79). Dr. Kirsten did not believe that Mr. White had an appropriate plan for veterinary care, noting that Mrs. White did not keep records of treatment of animals, but relied solely upon her memory (Tr. at 373). Dr. Kirsten and Dr. Howard visited Dr. Ainsworth to see her treatment records and to determine whether Mr. White communicated with the veterinarian about the condition of his animals (Tr. at 373-74). Dr. Kirsten recalled that Mrs. White expressed reluctance to call the veterinarian because Mr. White did not pay for veterinary services and Mrs. White felt guilty (Tr. at 377).

Dr. Kirsten upheld Dr. Howard's April 19, 2011, citations for failure to provide adequate veterinary care with respect to the animals that died without explanation when Mr. White appealed that citation (CX 4). Dr. Kirsten testified that a necropsy was necessary in a situation in which three animals died without explanation over a three-month period, considering that they had received no prior veterinary care (Tr. at 404). The Regulations require that each exhibitor establish and maintain programs of veterinary care that include the use of appropriate methods to diagnose diseases and injuries, and Mr. White failed to diagnose the cause of the deaths of these three animals (Tr. at 404-05).

The totality of the evidence demonstrates that Mr. White failed to maintain an adequate plan for veterinary care and failed to provide prompt and adequate treatment and care to animals. Dr. Ainsworth has donated her services as attending veterinarian to Collins Exotic Animal Orphanage since approximately 1994 (CX 43). Dr. Ainsworth visits Collins Exotic Animal Orphanage approximately four times annually. Dr. Ainsworth attends to animals in person, when necessary, but most issues raised by Mr. White are "handled over the phone or during [her] next visit." (CX 43). There was no formal plan for care for all of the facility's animals, since Dr. Ainsworth believed her "regular health maintenance program [was for] the cats and dogs." (CX 43).

Dr. Ainsworth's affidavit is consistent with the testimony.

Ms. Williamson and Mrs. White confirmed that Dr. Ainsworth did not come to the facility frequently. The record demonstrates that Mrs. White was slow to contact Dr. Ainsworth and did not contact her at all in some circumstances that seemed to require a consultation with or an examination by a veterinarian. The evidence establishes that certain conditions were not properly diagnosed (condition of Olive's skin and the ailment that led to her death); and certain conditions were not promptly treated (tail sucking of the leopard; rabbits' ear problems; caracal's eye problems; animals' limps) (CX 43a at 1). The treatment records kept by Dr. Ainsworth show only eight documented exchanges with Mr. White during the period from May 10, 2005, until March 25, 2010 (CX 43(a)).

I conclude Mr. White was less than vigilant about assuring that animals were provided adequate veterinary care. Mr. White's casual approach to animal care is manifested by sores on a rabbit's ear that were not timely treated; lesions on a leopard's rump that were not adequately treated; a caracal's ocular problems that were poorly treated for an extended period of time; and animals limping for no documented reason. Dr. Ainsworth's records reflect that some of the calls from Mr. White were obviously prompted by APHIS' inspection (e.g., call made about a rabbit's ear on March 23, 2010 (CX 26 at 1, CX 27 at 1, CX 43(a)).

Although the Regulations do not require necropsy to determine the cause of death of animals, the unexplained deaths of three animals in a three-month period, without any documented medical condition, cast suspicion on Mr. White's compliance with 9 C.F.R. § 2.40. Consultation with Dr. Ainsworth about the deaths would have been prudent, and Dr. Ainsworth's treatment records reflect that she had been consulted in the past about animal deaths (CX 43(a)).

I credit Mrs. White's testimony that she occasionally consulted a veterinarian with experience with exotic animals when Dr. Ainsworth could not be reached. Dr. Ainsworth confirmed as much in her affidavit (CX 43). The record indicates Mr. and Mrs. White believed they had the requisite expertise and experience to care for the animals without too much guidance from a veterinarian. In some instances, it appears Mrs. White made extra efforts to extend the life of an animal, such as when she delayed euthanizing the cougar, Delilah. However,

Mr. White's failure to develop, maintain, and follow a program of veterinary care is supported by a preponderance of the evidence, and I conclude that, on November 6, 2008, December 10-11, 2009, March 23, 2010, September 8, 2010, and April 19, 2011, Mr. White willfully violated 9 C.F.R. § 2.40, as alleged in paragraphs III, IV(A), VI(A), VIII, and X of the Complaint.

14. Records – 9 C.F.R. § 2.75(b)

The Regulations require exhibitors to make, keep, and maintain records, as follows:

> **§ 2.75 Records: Dealers and exhibitors.**
>
> . . . .
> (b)(1) Every . . . exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that . . . exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.
>
> (i) The name and address of the person from whom the animals were purchased or otherwise acquired;
>
> (ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;
>
> (iii) The vehicle license number and State, and the driver's license number (or photographic identification card for nondrivers issued by a State) and State of the person, if he or she is not licensed or registered under the Act;

> (iv) The name and address of the person to whom an animal was sold or given;
>
> (v) The date of purchase, acquisition, sale, or disposal of the animal(s);
>
> (vi) The species of the animal(s); and
>
> (vii) The number of animals in the shipment.

9 C.F.R. § 2.75(b)(1). The Administrator alleges Mr. White willfully violated 9 C.F.R. § 2.75(b)(1) on May 24, 2007, March 23, 2010, March 26, 2010, and September 8, 2010.[1]

On March 23, 2010, Dr. Howard was accompanied by a number of other APHIS employees to inspect Collins Exotic Animal Orphanage in response to a complaint and observed a possum for which no records were kept (CX 31). On September 8, 2010, Dr. Howard cited Mr. White for failing to keep records for rabbits (Tr. at 146; CX 7 at 2). In addition, records for other animals were incomplete (Tr. at 147-48). Mr. White had documented on a record for a dingo "papers missing taken by USDA or Wildlife." (CX 9 at 12). Dr. Howard authored a memorandum in which she noted that Mrs. White acknowledged receiving copies of photocopied records from the previous inspection, but nevertheless maintained that records were missing, speculating that employees of the United States Department of Agriculture or the Mississippi Department of Wildlife, Fisheries & Parks took the records (CX 10 at 1). The records were incomplete and reconstructed, and Dr. Howard concluded that hardly any original records were available. The records did not match previously photographed records (CX 10).

In addition, Mr. White's acquisition records raised questions about the provenance of certain animals (CX 12-CX 14, CX 40). Acquisition records dated May 24, 2007, identified Barry Weddleton, Jr., from Slidell, Louisiana, as the donor of a wolf-hybrid (CX 13) and a coatimundi (CX 40).In an interview with APHIS investigator Bob Stiles,

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[1] Compl. ¶¶ IV(B), V(A), VI(B), XII at 3, 5-6, 10.

Mr. Weddleton admitted he knew Mr. White, but asserted he did not sell or donate any animals to Mr. White (Tr. at 470-73; CX 12).

Jonathan Cornwell testified that he donated a coatimundi that was less than one year old to Collins Exotic Animal Orphanage sometime in 2007 (Tr. at 70-72). Geraldine Williamson testified that an older coatimundi was donated to the facility by a man who identified himself as Mr. White's "friend from Slidell." (Tr. at 581-82). The donor was not Mr. Cornwell, whom Ms. Williamson knew (Tr. at 583). The male coatimundi that was left with Ms. Williamson was the only coatimundi kept by the facility (Tr. at 610). Mr. Cornwell promised to donate a female coatimundi to Collins Exotic Animal Orphanage but he never did (Tr. at 610, 843). Mr. White's only coatimundi was an older animal that was donated in 2007 and that died a few years later (Tr. at 843-45).

I am unable to determine the source of the coatimundi from the record. The preponderance of the evidence establishes that the coatimundi was not donated by the individual identified on the acquisition papers. Mr. White did not confirm the identity of the unnamed donor nor did Mr. White confirm any information about the animal, but conjectured that Mr. Weddleton had left the animal. Mr. Weddleton's father denied that assertion, explaining that his son had known Mr. White years before, but had lived in Oklahoma for 20 years (CX 14).

I need not determine whether the coatimundi was in fact donated by Mr. Cornwell to conclude the records were improperly maintained. His testimony was not entirely credible. Moreover, I cannot fully credit the testimony of Mrs. White or Ms. Williamson on this issue. Whatever the source of the animal, the evidence suggests that the acquisition record was fabricated in violation of 9 C.F.R. § 2.75(b)(1).

Mr. White's records regarding the source of rabbits are similarly unreliable. Mrs. White admitted she did not know the donor of the rabbits and instead used the name of a friend who raised rabbits (Tr. at 695-96), in violation of the recordkeeping requirements in 9 C.F.R. § 2.75(b)(1).

Other records were missing or reconstituted and Mr. White's contention that they were removed by employees of a government agency does not constitute a valid defense to the requirement to maintain records. Mr. White's recordkeeping system is deficient. In addition to the problems with animal acquisition records, incomplete records were kept of losses of animals when they left the facility or died. I conclude the Administrator proved by a preponderance of the evidence that on May 24, 2007, March 23, 2010, March 26, 2010, and September 8, 2010, Mr. White willfully violated 9 C.F.R. § 2.75(b)(1), as alleged in paragraphs IV(B), V(A), VI(B), and XII of the Complaint.

E. Sanctions

The purpose of assessing civil penalties is not to punish violators, but to deter the violator, as well as others, from similar behavior.[1] When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations, the Secretary of Agriculture is required to give due consideration to four factors: (1) the size of the business of the person involved, (2) the gravity of the violations, (3) the person's good faith, and (4) the history of previous violations.[2]

I find Mr. White operates a small business. Mr. White's violations of the Animal Welfare Act and the Regulations are grave. The record establishes that Mr. White willfully violated the Animal Welfare Act on repeated occasions. Mr. White failed to develop and follow a plan for veterinary care that led to the failure to diagnose the cause of a wolf-hybrid's symptoms and eventual death. Mr. White's approach to consulting the facility's attending veterinarian resulted in the failure of prompt diagnosis for a rabbit's ear condition, a caracal's eye condition, and lesions on a leopard's rump, as well as the proper treatment for a leopard's tail-sucking habit. Three animals died over a three-month period without consultation with a veterinarian. Mr. White's perimeter fence and other structures did not meet standards for soundness and, at times, Mr. White failed to meet the required feeding and sanitation standards.

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[1] Zimmerman, 56 Agric. Dec. 433, 461 (U.S.D.A. 1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), *printed in* 57 Agric. Dec. 46 (U.S.D.A. 1998).
[2] 7 U.S.C. § 2149(b).

Moreover, the record establishes that Mr. White repeatedly violated the Animal Welfare Act and the Regulations during almost a four-year period, May 24, 2007, through April 19, 2011, indicating a lack of good faith.

Finally, Mr. White has a history of previous violations. Mr. White's ongoing pattern of violations, established in this proceeding, constitutes a history of previous violations for the purposes of 7 U.S.C. § 2149(b). Further, in a previous proceeding, Mr. White was found to have violated the Animal Welfare Act and the Regulations and ordered to cease and desist from violating the Animal Welfare Act and the Regulations.[3]

The United States Department of Agriculture's sanction policy is set forth in *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (U.S.D.A. 1991) (Decision as to James Joseph Hickey and Shannon Hansen), *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 generally entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by

[3] White, 49 Agric. Dec. 123 (U.S.D.A. 1990).

administrative officials.[4]

The Administrator, one of the officials charged with administering the Animal Welfare Act, recommends that I issue an order requiring Mr. White to cease and desist from violations of the Animal Welfare Act and the Regulations, assessing Mr. White a $99,000 civil penalty, and revoking Mr. White's Animal Welfare Act license (Animal Welfare Act license number 65-C-0012).

Based upon the record before me, I agree with the Administrator that issuance of a cease and desist order against Mr. White and revocation of Mr. White's Animal Welfare Act license are necessary to ensure Mr. White's 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 thereby fulfill the remedial purposes of the Animal Welfare Act. Moreover, I find assessment of a civil penalty is warranted in law and justified by the facts.

I conclude Mr. White committed 22 violations of the Animal Welfare Act and the Regulations during the period May 24, 2007, through April 19, 2011.[5] Mr. White could be assessed a maximum civil penalty of $213,750 for 22 violations of the Animal Welfare Act and the Regulations.[6] After examining all the relevant circumstances, in light of

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[4] Perry, 72 Agric. Dec. 635, 651 (U.S.D.A. 2013) (Decision as to Craig A. Perry & Perry's Wilderness Ranch & Zoo, Inc.); Greenly, 72 Agric. Dec. 603, 636 (U.S.D.A. 2013) (Decision as to Lee Marvin Greenly & Minn. Wildlife Connection, Inc.), *appeal docketed*, No. 13-2882 (8th Cir. Aug. 23, 2013); Mazzola, 68 Agric. Dec. 822, 849 (U.S.D.A. 2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); Pearson, 68 Agric. Dec. 685, 731 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011).

[5] The Animal Welfare Act provides that each violation and each day during which a violation continues shall be a separate offense. 7 U.S.C. § 2149(b).

[6] Prior to June 18, 2008, the Animal Welfare Act authorized the Secretary of Agriculture to assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations (7 U.S.C. § 2149(b)). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency by increasing the maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. The Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the Animal Welfare Act and the Regulations occurring after June 23, 2005, by increasing the maximum civil penalty to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2008)). This maximum civil penalty was in effect

the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b) and the remedial purposes of the Animal Welfare Act, I conclude a $39,375 civil penalty is appropriate and necessary to ensure Mr. White's 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 thereby fulfill the remedial purposes of the Animal Welfare Act.[7]

F. Mr. White's Appeal Petition

Mr. White raises two issues in Mr. White's Appeal Petition. First, Mr. White asserts the ALJ's failure to dismiss all of the violations of the Animal Welfare Act and the Regulations alleged in the Complaint, is error (Mr. White's Appeal Pet. at 1).

As the proponent of an order, the Administrator has the burden of proof in this proceeding,[8] and the standard of proof by which the burden of persuasion is met in an administrative proceeding conducted under the Animal Welfare Act is preponderance of the evidence.[9] The ALJ concluded that the Administrator proved by a preponderance of the evidence that Mr. White violated the Animal Welfare Act and the Regulations, as alleged in paragraphs III, IV(A), IV(B), IV(D)(2),

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until June 18, 2008, when the Animal Welfare Act was amended to authorize the Secretary of Agriculture to assess a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act and the Regulations. Thus, the Secretary of Agriculture is authorized to assess Mr. White a civil penalty of not more than $3,750 for his violation of the Animal Welfare Act and the Regulations that occurred on May 24, 2007, and a civil penalty of not more than $10,000 for each of his 21 violations of the Animal Welfare Act and the Regulations that occurred after June 18, 2008.

[7] I assess Mr. White a civil penalty of $5,000 for each of his five violations of 9 C.F.R. § 2.40; a civil penalty of $1,000 for 14 of Mr. White's violations of the Regulations that occurred after June 18, 2008; and a civil penalty of $375 for Mr. White's violation of 9 C.F.R. § 2.75(b)(1) that occurred on May 24, 2007. I do not assess any civil penalty for Mr. White's July 11, 2008 violation of 9 C.F.R. § 2.131(c)(1) or for Mr. White's March 23, 2010 violation of 9 C.F.R. § 3.127(b).

[8] 5 U.S.C. § 556(d).

[9] Herman & MacLean v. Huddleston, 459 U.S. 375, 387-92 (1983); Steadman v. SEC, 450 U.S. 91, 92-104 (1981); Tri-State Zoological Park of W. Md., 72 Agric. Dec. 128, 174 (U.S.D.A. 2013); Pearson, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Schmidt, 66 Agric. Dec. 159, 178 (U.S.D.A. 2007).

IV(D)(6) as it relates to the structural integrity of animal enclosures, IV(D)(7), V(A), VI(A), VI(B), VI(C), VI(D)(1), VI(D)(2), VI(D)(3), VII(A)(1), VIII, IX(4), IX(5), IX(6), X, and XII of the Complaint.[10] Mr. White addresses each of these conclusions of law (Mr. White's Appeal Brief at 4-16); however, except for the ALJ's conclusion that Mr. White violated 9 C.F.R. § 3.125(a) on September 8, 2010,[11] as alleged in paragraph IV(D)(6) of the Complaint, I find Mr. White's contention that the ALJ's conclusions of law are error, have no merit.

The Administrator alleges Mr. White violated 9 C.F.R. § 3.125(a) on September 8, 2010.[12] The ALJ concluded Mr. White violated 9 C.F.R. § 3.125(a) on September 8, 2010, by failing to remove dead trees which "represent a danger to the structural integrity of fencing[.]"[13]The Regulations require that the facility must be constructed of such material and of such strength as appropriate for the animals involved.[14] I agree with Mr. White's contention that the existence of a danger to the structural integrity of animal enclosures is not sufficient to establish that, at the time of the September 8, 2010, inspection, the animal enclosures were not constructed of such material and of such strength as appropriate for the animals involved, in violation of 9 C.F.R. § 3.125(a). Therefore, I do not adopt the ALJ's conclusion that Mr. White violated 9 C.F.R. § 3.125(a) on September 8, 2010.

Second, Mr. White contends the ALJ's revocation of Mr. White's Animal Welfare Act license, is error (Mr. White's Appeal Pet. at 1). Mr. White argues the ALJ's revocation of his Animal Welfare Act license is a "severe overreaction" and the ALJ must have misunderstood the testimony of Mrs. White and the other witnesses (Mr. White's Appeal Brief at 16).

The ALJ did not revoke Mr. White's Animal Welfare Act license. Mr. White holds, and at all times material to this proceeding held, Animal Welfare Act license number 65-C-0012 (CX 39). The ALJ

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[10] ALJ's Decision & Order, Conclusions of Law ¶ 3(a)-(j) at 40.
[11] ALJ's Decision & Order, Conclusions of Law ¶ 3(d) at 40.
[12] Compl. ¶ IV(D)(6) at 5.
[13] ALJ's Decision & Order at 11.
[14] 9 C.F.R. § 3.125(a).

revoked Animal Welfare Act license number 51-C-0064.[15] I find no evidence that Mr. White holds or ever held Animal Welfare Act license number 51-C-0064. Therefore, I reject Mr. White's contention that the ALJ's revocation of Mr. White's Animal Welfare Act license, is error.

Even if I were to find that the ALJ revoked Mr. White's Animal Welfare Act license, I would reject Mr. White's contention that the revocation constitutes a "severe overreaction." As discussed in this Decision and Order, *supra*, I conclude revocation of Mr. White's Animal Welfare Act license is necessary to ensure Mr. White's 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 thereby fulfill the remedial purposes of the Animal Welfare Act.

G. The Administrator's Appeal Petition

The Administrator raises 10 issues in the Administrator's Appeal Petition. First, the Administrator contends the ALJ erroneously dismissed the allegation in paragraph XI of the Complaint that Mr. White violated 9 C.F.R. § 2.131(c)(1) on July 11, 2008, based upon Mr. White's subsequent correction of the violation (Administrator's Appeal Br. at 3).

The correction of a violation of the Animal Welfare Act or the Regulations is to be encouraged and may be taken into account when determining the sanction to be imposed for the violation. However, each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations and the correction of a violation does not eliminate the fact that the violation occurred.[16] Therefore, I reject the ALJ's basis for dismissing the allegation in paragraph XI of the Complaint that Mr. White violated 9 C.F.R. § 2.131(c)(1) on July 11, 2008.

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[15] ALJ's Decision & Order at 41.

[16] Greenly, 72 Agric. Dec. 603, 623, (U.S.D.A. 2013) (Decision as to Lee Marvin Greenly & Minn. Wildlife Connection), *appeal docketed*, No. 13-2882 (8th Cir. Aug. 23, 2013); Tri-State Zoological Park of W. Md., Inc., 72 Agric. Dec. 128, 175 (U.S.D.A. 2013); Pearson, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Bond, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008).

Second, the Administrator contends the ALJ erroneously dismissed the allegation in paragraph IV(D)(5) of the Complaint that Mr. White violated 9 C.F.R. § 3.125(c) on September 8, 2010, based upon Mr. White's explanation of the reasons for the violation (Administrator's Appeal Br. at 3-4).

An explanation of the reasons for a violation of the Animal Welfare Act or the Regulations may be taken into account when determining the sanction to be imposed for the violation of the Animal Welfare Act or the Regulations. However, each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations and an explanation of the reasons for a violation does not eliminate the fact that the violation occurred. However, the ALJ's Decision and Order does not indicate that she would have found Mr. White's storage of items in violation of 9 C.F.R. § 3.125(c), but for the explanation provided by Mr. White. Instead, the ALJ only found "the practices described by Dr. Howard in her inspection report [(CX 7)] reflect some careless handling of vitamins and storage of items[.][17] Some careless handling of vitamins and storage of items does not, by itself, constitute a violation of 9 C.F.R. § 3.125(c). Therefore, I do not find the ALJ's dismissal of the violation of 9 C.F.R. § 3.125(c), alleged in paragraph IV(D)(5) of the Complaint, is error.

Third, the Administrator contends the ALJ erroneously dismissed the allegation that, on September 24, 2009, Mr. White violated 9 C.F.R. § 3.125(a) (Administrator's Appeal Br. at 4-5).

The Administrator does not allege that Mr. White violated 9 C.F.R. § 3.125(a) on September 24, 2009.[18] Therefore, I reject the Administrator's contention that the ALJ erroneously dismissed the Administrator's allegation that Mr. White violated 9 C.F.R. § 3.125(a) on September 24, 2009.

Fourth, the Administrator contends the ALJ erroneously dismissed the allegations that, on September 24, 2009, Mr. White violated 9 C.F.R. §§ 3.52(b), 3.53(a)(2), 3.53(b), 3.53(c)(2), and 3.54(a) (Administrator's Appeal Br. at 5).

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[17] ALJ's Decision & Order at 13.
[18] Compl. ¶ IX at 8-9.

As an initial matter, the Administrator did not allege that Mr. White violated 9 C.F.R. § 3.53(b) on September 24, 2009.[19] Moreover, the ALJ concluded that Mr. White violated 9 C.F.R. § 3.54(a) on September 24, 2009.[20] Therefore, I reject the Administrator's contention that the ALJ erroneously dismissed the Administrator's allegations that Mr. White violated 9 C.F.R. §§ 3.53(b) and 3.54(a) on September 24, 2009.

As for the Administrator's contention that the ALJ erroneously dismissed the allegations in paragraphs IX(1), IX(2), and IX(3) of the Complaint that Mr. White violated 9 C.F.R. §§ 3.52(b), 3.53(a)(2), and 3.53(c)(2), the ALJ properly weighed the evidence and concluded the Administrator failed to prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. §§ 3.52(b), 3.53(a)(2), and 3.53(c)(2) on September 24, 2009; therefore, I reject the Administrator's contention that the ALJ's dismissal of the allegations in paragraphs IX(1), IX(2), and IX(3) of the Complaint, is error.

Fifth, the Administrator contends the ALJ erroneously dismissed the allegation in paragraph IV(D)(3) of the Complaint that, on September 8, 2010, in violation of 9 C.F.R. § 3.129(a), Mr. White failed to provide animals with wholesome and uncontaminated food (Administrator's Appeal Br. at 6).

Dr. Howard cited Mr. White for a violation of 9 C.F.R. § 3.129(a) on September 8, 2010, based upon her finding that the primary meat source for the big cats was chicken backs (CX 7 at 6). However, Mr. White introduced evidence that the cats were also fed venison and that chicken leg quarters were available on September 8, 2010. The ALJ properly weighed this conflicting evidence and concluded the Administrator failed to prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. § 3.129(a) on September 8, 2010. Therefore, I reject the Administrator's contention that the ALJ erroneously dismissed the allegation in paragraph IV(D)(3) of the Complaint that, on September 8, 2010, Mr. White violated 9 C.F.R. § 3.129(a).

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[19] Compl. ¶ IX at 8-9.
[20] ALJ's Decision & Order, Conclusions of Law ¶ 3(g) at 40.

Sixth, the Administrator contends the ALJ erroneously dismissed the allegation in paragraph VI(D)(4) of the Complaint that, on March 23, 2010, in violation of 9 C.F.R. § 3.129(a), Mr. White failed to provide animals with wholesome, palatable food that was free of contamination and of sufficient quantity and nutritive value to maintain the animals (Administrator's Appeal Br. at 7).

Dr. Howard cited Mr. White for a violation of 9 C.F.R. § 3.129(a) on March 23, 2010, based upon the existence of a plastic bucket in the food cooler that contained chicken leg quarters of questionable quality for feeding (Tr. 216-17; CX 26 at 5). The ALJ properly weighed this evidence against testimony that the chicken in the plastic bucket was not food for the animals, but was waste that would not be fed to animals and concluded that the Administrator failed to prove by a preponderance of the evidence that Mr. White violated 9 C.F.R. § 3.129(a) on March 23, 2010. Therefore, I reject the Administrator's contention that the ALJ erroneously dismissed the allegation in paragraph VI(D)(4) of the Complaint that, on March 23, 2010, Mr. White violated 9 C.F.R. § 3.129(a). However, I agree with the Administrator's assertion that the ALJ's reliance on the fact that Mr. White was not regularly cited for a violation of 9 C.F.R. § 3.129(a) as a basis for dismissal of the allegation, is misplaced, and I do not adopt the ALJ's discussion regarding the frequency with which Mr. White was cited for violating 9 C.F.R. § 3.129(a).

Seventh, the Administrator urges removal of the ALJ's discussion of a violation of 9 C.F.R. § 3.131(c) on September 8, 2010, because the Administrator did not allege that Mr. White violated 9 C.F.R. § 3.131(c) on September 8, 2010 (Administrator's Appeal Br. at 7-8).

I agree with the Administrator's assertion that the Complaint contains no allegation that Mr. White failed to provide for removal of animal and food wastes in violation of 9 C.F.R. § 3.131(c) on September 8, 2010; however, the Administrator did allege that, on September 8, 2010, Mr. White failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris in violation of 9 C.F.R. § 3.125(d).[1] The ALJ's discussion, which the Administrator

[1] Compl. ¶ IV(D)(4) at 4.

believes must be removed, relates to the allegation in paragraph IV(D)(4) of the Complaint that Mr. White violated 9 C.F.R. § 3.125(d) on September 8, 2010. Therefore, I reject the Administrator's request that I remove the ALJ's discussion of the allegation in paragraph IV(D)(4) of the Complaint.

Eighth, the Administrator contends the ALJ erroneously dismissed the allegation in paragraph VI(D)(5) of the Complaint that, on March 23, 2010, in violation of 9 C.F.R. § 3.131(a), Mr. White failed to remove excreta from primary enclosures as often as necessary to prevent contamination of animals contained in the primary enclosures and to minimize disease hazards (Administrator's Appeal Brief at 8-9).

Dr. Howard cited Mr. White for a violation of 9 C.F.R. § 3.131(a) on March 23, 2010, based upon her observation that, in the kinkajou enclosure, a barrel in a shelter box was excessively soiled and stained (Tr. at 217-18; CX 26 at 5-6, CX 27 at 23). Dr. Howard testified that her inspection report and the accompanying photograph adequately explained the conditions that led to the citation she issued (Tr. at 217-18). Dr. Kirsten similarly found the kinkajou enclosure excessively dirty (Tr. at 389).

The ALJ based the dismissal of the allegation that Mr. White violated 9 C.F.R. § 3.131(a) on March 23, 2010, on Ms. Williamson's testimony that the kinkajou's cage was cleaned every morning (Tr. at 569). As an initial matter, Ms. Williamson's testimony regarding standard operating procedure at Collins Exotic Animal Orphanage is not sufficiently specific to overcome the Administrator's evidence of the condition of the kinkajou enclosure on March 23, 2010. Moreover, Ms. Williamson testified that, since 2006, she only goes to Collins Exotic Animal Orphanage one or two days per week and her work is limited to supervisory work and work in the office (Tr. at 561). Even more specifically, Ms. Williamson testified she was not at Collins Exotic Animal Orphanage in 2010 (Tr. at 606). Under these circumstances, I agree with the Administrator that the ALJ's dismissal of the allegation in paragraph VI(D)(5) of the Complaint that, on March 23, 2010, Mr. White violated 9 C.F.R. § 3.131(a), is error. I conclude the Administrator proved by a preponderance of the evidence that Mr. White violated

9 C.F.R. § 3.131(a) on March 23, 2010, as alleged in paragraph VI(D)(5) of the Complaint.

Ninth, the Administrator contends the ALJ erroneously dismissed the allegations in paragraphs II(A) and II(C) of the Complaint that, from May 24, 2007, and continuing to March 3, 2012, Mr. White failed to have a sufficient number of adequately trained employees under a supervisor who has a background in animal care to maintain the professionally acceptable level of husbandry practices set forth in the Regulations, in violation of 9 C.F.R. §§ 3.12 and 3.132 (Administrator's Appeal Br. at 9-13).

As an initial matter, the inspections of Collins Exotic Animal Orphanage that are the subject of this proceeding occurred during the period May 24, 2007, through April 19, 2011; therefore, I find no basis upon which to conclude that Mr. White violated 9 C.F.R. § 3.12 or 9 C.F.R. § 3.132 after April 19, 2011. Moreover, Mr. White was not cited for a violation of 9 C.F.R. § 3.12 or 9 C.F.R. § 3.132 on the inspection reports applicable to the inspections that are the subject of this proceeding.[1] Under these circumstances, despite the testimony regarding the general condition of Collins Exotic Animal Orphanage, I reject the Administrator's contention that the ALJ erroneously dismissed the alleged violation of 9 C.F.R. § 3.132 in paragraph II(A) of the Complaint and the alleged violation of 9 C.F.R. § 3.12 in paragraph II(C) of the Complaint.

Tenth, the Administrator contends the ALJ's failure to assess Mr. White a civil penalty, is error (Administrator's Appeal Pet. at 1).
I find assessment of a civil penalty is warranted in law and justified by the facts, and, after examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b) and the remedial purposes of the Animal Welfare Act, I

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[1] *See* CX 16 applicable to the July 11, 2008, inspection; CX 19 applicable to the November 6, 2008, inspection; CX 22 applicable to the September 24, 2009, inspection; CX 24 applicable to the January 21, 2010, inspection; CX 26 applicable to the March 23, 2010, inspection; CX 30 applicable to the March 26, 2010, inspection; CX 7 applicable to the September 8, 2010, inspection; and CX 1 and CX 2 applicable to the April 19, 2011, inspection.

conclude a $39,375 civil penalty is appropriate and necessary to ensure Mr. White's 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 thereby fulfill the remedial purposes of the Animal Welfare Act.

H. Findings of Fact

1. Gustave L. White, III, also known as Gus White, is an individual who holds, and at all times material to this proceeding held, Animal Welfare Act license number 65-C-0012 to exhibit animals under the Animal Welfare Act.

2. Mr. White operates a facility named Collins Exotic Animal Orphanage in Collins, Mississippi, at which Mr. White exhibits animals to the public.

3. Mr. White directs and supervises the operation of Collins Exotic Animal Orphanage, but no longer does the heavy manual work involved in maintaining the facility and caring for the animals.

4. Mr. White has a lifetime of experience caring for animals.

5. Mr. White's wife, Bettye White, and son, Gustave L. White, IV are the primary caretakers of Collins Exotic Animal Orphanage and the animals at the facility.

6. Mrs. White has cared for animals along with her husband for 32 years.

7. Mr. White, IV was raised in a home adjacent to Collins Exotic Animal Orphanage and has been around animals and worked with animals for his entire life. Mr. White, IV was trained to feed and care for animals by his parents and by volunteers at Collins Exotic Animal Orphanage.

8. A number of volunteers regularly assist with the maintenance and administration of Collins Exotic Animal Orphanage.

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9. Mrs. White is responsible for maintaining the records at Collins Exotic Animal Orphanage.

10. Dr. Melissa Ainsworth serves as the attending veterinarian at Collins Exotic Animal Orphanage on a volunteer basis and offers advice primarily over the telephone.

11. APHIS employees conducted inspections of Mr. White's facility, records, and animals on May 24, 2007, July 11, 2008, November 6, 2008, September 24, 2009, December 10-11, 2009, January 21, 2010, March 23, 2010, March 26, 2010, September 8, 2010, and April 19, 2011.

12. During each of the inspections identified in Finding of Fact number 11, APHIS inspectors cited Mr. White for violations of the Regulations.

13. On or about May 24, 2007, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals.

14. On or about July 11, 2008, Mr. White failed, during a public exhibition, to maintain a sufficient distance or barrier between the animals and the general viewing public to assure the safety of the animals and the viewing public.

15. On or about November 6, 2008, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, including, but not limited to, a wolf-hybrid named "Olive" that was observed with a brownish discharge in both eyes and a caracal named "Pretty Boy" that was observed to have an ocular condition.

16. On or about September 24, 2009, Mr. White failed to provide food for rabbits that was free of contamination, wholesome, palatable, and of sufficient quantity and nutritive value for the rabbits.

17. On or about September 24, 2009, Mr. White failed to keep food

receptacles for rabbits clean and sanitized and failed to locate food receptacles for rabbits so as to minimize contamination by excreta.

18. On or about September 24, 2009, Mr. White's housing facilities for dogs were not constructed so they were structurally sound and maintained in good repair.

19. On or about December 10-11, 2009, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to an animal in need of care. A wolf-hybrid named "Olive" was observed with a distended abdomen and in distress, but was not provided veterinary care. Olive was found dead on December 13, 2009.

20. On or about January 21, 2010, Mr. White's housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the dogs from injury, contain the dogs, and restrict other animals from entering.

21. On or about January 21, 2010, Mr. White's facility was not constructed of such material and such strength and was not maintained in good repair to protect animals from injury and to contain animals.

22. On or about March 23, 2010, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care.

23. On or about March 23, 2010, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals.

24. On or about March 23, 2010, Mr. White, during public exhibition, did not maintain a sufficient distance or barrier between coyotes and the general viewing public to assure the safety of the coyotes and the viewing public.

ANIMAL WELFARE ACT

25. On or about March 23, 2010, Mr. White's facilities for cougars and tigers were not structurally sound and maintained in good repair to protect the animals from injury and to contain the animals.

26. On or about March 23, 2010, Mr. White failed to provide natural or artificial shelter appropriate to the local climatic conditions for cougars kept outdoors to afford the cougars protection and to prevent discomfort to the cougars.

27. On or about March 23, 2010, Mr. White failed to enclose all outdoor housing facilities for animals with a perimeter fence of sufficient height.

28. On or about March 23, 2010, Mr. White failed to remove excreta from a primary enclosure as often as necessary to prevent contamination of a kinkajou contained in the primary enclosure and to minimize disease hazards.

29. On or about March 26, 2010, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals.

30. On or about September 8, 2010, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care.

31. On or about September 8, 2010, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals.

32. On or about September 8, 2010, Mr. White failed to enclose all outdoor housing facilities for animals with a perimeter fence of sufficient height.

33. On or about September 8, 2010, Mr. White failed to keep food receptacles for rabbits clean and sanitized and failed to locate food receptacles for rabbits so as to minimize contamination by excreta.

34. On or about April 19, 2011, Mr. White failed to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

I. Conclusions of Law

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

2. At all times material to this proceeding, Mr. White was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations.

3. The following violations alleged in the Complaint are dismissed for lack of proof by a preponderance of the evidence:

a. A violation of 9 C.F.R. § 3.132, alleged in paragraph II(A) of the Complaint to have occurred from May 24, 2007, and continuing to the date of the issuance of the Complaint on March 3, 2012;

b. A violation of 9 C.F.R. § 3.85, alleged in paragraph II(B) of the Complaint to have occurred from May 24, 2007, and continuing to the date of the issuance of the Complaint on March 3, 2012;

c. A violation of 9 C.F.R. § 3.12, alleged in paragraph II(C) of the Complaint to have occurred from May 24, 2007, and continuing to the date of the issuance of the Complaint on March 3, 2012;

d. A violation of 9 C.F.R. § 2.131(c)(1), alleged in paragraph IV(C) of the Complaint to have occurred on or about September 8, 2010;

e. A violation of 9 C.F.R. § 3.127(a), alleged in paragraph IV(D)(1) of the Complaint to have occurred on or about September 8, 2010;

f. Violations of 9 C.F.R. § 3.129(a), alleged in paragraph IV(D)(3) of the Complaint to have occurred on or about September 8, 2010, and alleged in paragraph VI(D)(4) of the Complaint to have occurred on or about March 23, 2010;

g. A violation of 9 C.F.R. § 3.125(d), alleged in paragraph IV(D)(4) of the Complaint to have occurred on or about September 8, 2010;

h. A violation of 9 C.F.R. § 3.125(c), alleged in paragraph IV(D)(5) of the Complaint to have occurred on or about September 8, 2010;

i A violation of 9 C.F.R. § 3.125(a), alleged in paragraph IV(D)(6) of the Complaint to have occurred on or about September 8, 2010;

j. Violations of 9 C.F.R. § 3.127(c), alleged in paragraph VII(A)(3) of the Complaint to have occurred on or about January 21, 2010, and alleged in paragraph IX(7) of the Complaint to have occurred on or about September 24, 2009;

k. A violation of 9 C.F.R. § 3.52(b), alleged in paragraph IX(1) of the Complaint to have occurred on or about September 24, 2009;

l. A violation of 9 C.F.R. § 3.53(a)(2), alleged in paragraph IX(2) of the Complaint to have occurred on or about September 24, 2009; and

m. A violation of 9 C.F.R. § 3.53(c)(2), alleged in paragraph IX(3) of the Complaint to have occurred on or about September 24, 2009.

4. The following violations alleged in the Complaint to have been committed by Mr. White are established by a preponderance of the evidence:

a. On or about May 24, 2007, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1);

b. On or about July 11, 2008, during public exhibition of an animal,

Mr. White did not maintain a sufficient distance or barrier between the animal and the general viewing public to assure the safety of the animal and the viewing public, in willful violation of 9 C.F.R. § 2.131(c)(1);

c. On or about November 6, 2008, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, including, but not limited to, a wolf-hybrid named "Olive" that was observed with a brownish discharge in both eyes and a caracal named "Pretty Boy" that was observed to have an ocular condition, in willful violation of 9 C.F.R. § 2.40;

d. On or about September 24, 2009, Mr. White failed to provide food for rabbits that was free of contamination, wholesome, palatable, and of sufficient quantity and nutritive value for the rabbits, in willful violation of 9 C.F.R. § 3.54(a);

e. On or about September 24, 2009, Mr. White failed to keep food receptacles for rabbits clean and sanitized and failed to locate food receptacles for rabbits so as to minimize contamination by excreta, in willful violation of 9 C.F.R. § 3.54(b);

f. On or about September 24, 2009, Mr. White's housing facilities for dogs were not constructed so that they were structurally sound and maintained in good repair, in willful violation of 9 C.F.R. § 3.1(a);

g. On or about December 10-11, 2009, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to an animal in need of care, in willful violation of 9 C.F.R. § 2.40;

h. On or about January 21, 2010, Mr. White's housing facilities for

dogs were not structurally sound and maintained in good repair so as to protect the dogs from injury, contain the dogs, and restrict other animals from entering, in willful violation of 9 C.F.R. § 3.1(a);

i. On or about January 21, 2010, Mr. White's facility was not constructed of such material and of such strength and was not maintained in good repair to protect the animals from injury and to contain the animals, in willful violation of 9 C.F.R. § 3.125(a);

j. On or about March 23, 2010, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of 9 C.F.R. § 2.40;

k. On or about March 23, 2010, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1);

l. On or about March 23, 2010, during public exhibition of coyotes, Mr. White did not maintain a sufficient distance or barrier between the coyotes and the general viewing public to assure the safety of the coyotes and the viewing public, in willful violation of 9 C.F.R. § 2.131(c)(1);

m. On or about March 23, 2010, Mr. White's facilities for cougars and tigers were not structurally sound and maintained in good repair to protect the animals from injury and to contain the animals, in willful violation of 9 C.F.R. § 3.125(a);

n. On or about March 23, 2010, Mr. White failed to provide natural or artificial shelter appropriate to the local climatic conditions for cougars kept outdoors to afford the cougars protection and to prevent discomfort to the cougars, in willful violation of 9 C.F.R. § 3.127(b);

o. On or about March 23, 2010, Mr. White failed to enclose all outdoor housing facilities for animals with a perimeter fence of sufficient height, in willful violation of 9 C.F.R. § 3.127(d);

p. On or about March 23, 2010, Mr. White failed to remove excreta from a primary enclosure as often as necessary to prevent contamination of a kinkajou contained in the primary enclosure and to minimize disease hazards, in willful violation of 9 C.F.R. § 3.131(a);

q. On or about March 26, 2010, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1);

r. On or about September 8, 2010, Mr. White failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of 9 C.F.R. § 2.40;

s. On or about September 8, 2010, Mr. White failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1);

t. On or about September 8, 2010, Mr. White failed to enclose all outdoor housing facilities for animals with a perimeter fence of sufficient height, in willful violation of 9 C.F.R. § 3.127(d);

u. On or about September 8, 2010, Mr. White failed to keep food receptacles for rabbits clean and sanitized and failed to locate food receptacles for rabbits so as to minimize contamination by excreta, in willful violation of 9 C.F.R. § 3.54(b); and

v. On or about April 19, 2011, Mr. White failed to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation

of 9 C.F.R. § 2.40(a)(2).

5. An order instructing Mr. White to cease and desist from violations of the Animal Welfare Act and the Regulations is appropriate.

6. An order assessing Mr. White a $39,375 civil penalty is appropriate.

7. Revocation of Mr. White's Animal Welfare Act license (Animal Welfare Act license number 65-C-0012) is appropriate.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. White, his agents and 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:

a. failing to maintain complete records showing the acquisition, disposition, and identification of animals;

b. failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

c. failing to provide veterinary care to animals in need of care;

d. failing to provide food for rabbits that is free of contamination, wholesome, palatable, and of sufficient quantity and nutritive value for the rabbits;

e. failing to keep food receptacles for rabbits clean and sanitized;

f. failing to locate food receptacles for rabbits so as to minimize contamination by excreta;

g. failing to construct housing facilities for animals so that they are

structurally sound;

h. failing to maintain housing facilities for animals in good repair;

i. failing, during public exhibition, to maintain a sufficient distance or barrier between animals and the general viewing public to assure the safety of the animals and the viewing public;

j. failing to provide natural or artificial shelter appropriate to the local climatic conditions for animals kept outdoors to afford the animals protection and to prevent discomfort to the animals;

k. failing to enclose all outdoor housing facilities for animals with a perimeter fence of sufficient height; and

l. failing to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the primary enclosures and to minimize disease hazards.

Paragraph one of this Order shall become effective upon service of this Order on Mr. White.

2. Mr. White's Animal Welfare Act license (Animal Welfare Act license number 65-C-0012) is revoked.

Paragraph two of this Order shall become effective 60 days after service of this Order on Mr. White.

3. Mr. White is assessed a $39,375 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:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing, Regulatory, and Food Safety 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, Ms. Deskins within 60 days after service of this Order on Mr. White. Mr. White shall state on the certified check or money order that payment is in reference to AWA Docket No. 12-0277.

RIGHT TO JUDICIAL REVIEW

Mr. White 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. §§ 2341-2350.

Mr. White must seek judicial review within 60 days after entry of the Order in this Decision and Order.[1]

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[1] 7 U.S.C. § 2149(c).

In re: BRIAN STAPLES, AN INDIVIDUAL D/B/A STAPLES SAFARI AND ZOO AND BRIAN STAPLES PRODUCTIONS.
Docket No. 14-0022.
Decision and Order.
Filed June 26, 2014.

AWA – Administrative procedure – Animal welfare – Answer, failure to timely file – Default – Sanction policy – Willful.

Colleen A. Carroll, Esq. for Complainant.
William J. Cook, Esq. for Respondent.
Initial Decision and Order entered by Jill S. Clifton.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding on November 5, 2013, by filing a Complaint. The Administrator 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 the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleged Brian Staples willfully violated the Regulations on October 6, 2010, January 10, 2011, January 22, 2011, January 27, 2011, and July 12, 2011.[1] The Hearing Clerk served Mr. Staples with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on November 14, 2013.[2] Mr. Staples

[1] Compl. ¶¶ 4-9 at 2-4.
[2] United States Postal Service Domestic Return Receipt for Article Number XXXX XXXX XXXX 8692.

failed to file a response to the Complaint with the Hearing Clerk within 20 days after service, as required by 7 C.F.R. § 1.136(a).

On December 26, 2013, in accordance with 7 C.F.R. § 1.139, the Administrator filed a Motion for Adoption of Decision and Order by Reason of Default [hereinafter Motion for Default Decision] and a proposed Decision and Order by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served Mr. Staples with the Administrator's Motion for Default Decision, the Administrator's Proposed Default Decision, and the Hearing Clerk's service letter on January 3, 2014.[3]

On January 8, 2014, Mr. Staples filed an Answer and Request for Hearing in which Mr. Staples denied the material allegations of the Complaint.[4] On January 23, 2014, Mr. Staples filed Respondent, Brian Staples, Verified Response and Objections to Complainant's Motion for Adoption of Decision by Reason of Default and Proposed Order [hereinafter Objections to the Motion for Default Decision]. On February 3, 2014, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Ruling Denying Motion for Default Judgment finding Mr. Staples had shown good cause for the ALJ's acceptance of his late-filed answer and denying the Administrator's Motion for Default Decision.

On March 14, 2014, the Administrator filed Complainant's Petition for Appeal [hereinafter Appeal Petition] seeking reversal of the ALJ's Ruling Denying Motion for Default Judgment or an order vacating the ALJ's Ruling Denying Motion for Default Judgment and remanding the proceeding to the ALJ for further proceedings in accordance with the Rules of Practice.[5] On April 18, 2014, Mr. Staples filed a response to the Administrator's Appeal Petition, and on April 21, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I reverse the ALJ's Ruling

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[3] United States Postal Service Domestic Return Receipt for Article Number XXXX XXXX XXXX 6947.

[4] Answer and Req. for Hr'g ¶¶ 4-9 at 1-2.

[5] Administrator's Appeal Pet. at 12.

Denying Motion for Default Judgment and adopt, with minor changes, the proposed findings of fact and the proposed conclusions of law in the Administrator's Proposed Default Decision.

DECISION

Statement of the Case

Mr. Staples failed to file a response to the Complaint with the Hearing Clerk within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer to a complaint with the Hearing Clerk within the time provided in 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 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 are adopted as findings of fact. I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Staples is an individual, d/b/a Staples Safari Zoo and Brian Staples Productions, whose address is [redacted][*] (Post Office Box 1189, Deer Park, Washington 99006).

2. At all times material to this proceeding, Mr. Staples operated as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations, and held Animal Welfare Act license number 91-C-0060.

3. Mr. Staples operates a moderately-large zoo and animal act. Mr. Staples exhibits wild and exotic animals at various locations. In March 2013, Mr. Staples reported to the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], that he held nineteen nonhuman primates (including three

[*] Address has been redacted by the Editor to protect Personally Identifiable Information. *See* 5 U.S.C. § 552(b)(6) (2006).

baboons), three large felids, camelids, marsupials, and other exotic, wild, and domestic mammals.

4. Mr. Staples resolved two previous Animal Welfare Act cases (WA 01085 and WA 07002) in accordance with the stipulation procedures set forth in 9 C.F.R. § 4.11.

5. Mr. Staples's violations of the Regulations, which are the subject of the instant proceeding, are serious and include the mishandling of a nonhuman primate that escaped and remained at large for two days.

6. APHIS inspectors inspected Mr. Staples's animals, facilities, and equipment on October 6, 2010, January 22, 2011, January 27, 2011, and July 12, 2011.

7. During each of the inspections referenced in Finding of Fact number 6, APHIS inspectors cited Mr. Staples for noncompliance with the Regulations.

8. On or about October 6, 2010, and July 12, 2011, in Ozark, Missouri, Mr. Staples failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to treat diseases and injuries. Specifically, Mr. Staples, while traveling with animals, maintained expired medications in his animal equipment storage areas, including antiseptic wound dressing spray that had expired nearly four years earlier, Baytril without any visible expiration date, Baytril that had expired two years earlier, Praxiquantel that had expired two years two months earlier, and Neo-Predel that had expired one year earlier.

9. On or about October 6, 2010, the surfaces of Mr. Staples's housing facilities for capuchin monkeys were not constructed of materials that allowed the surfaces to be readily cleaned and sanitized.

10. On or about January 10, 2011, at Meigs, Georgia, Mr. Staples failed to handle a nonhuman primate as carefully as possible in a manner that would not cause physical harm, stress, or unnecessary discomfort to the nonhuman primate. Specifically, a member of Mr. Staples's staff mishandled a capuchin monkey by attempting to transfer the capuchin monkey from one enclosure to another enclosure by carrying the

capuchin monkey in his arms, whereupon the capuchin monkey was able to, and did, escape and remained at large for two days, during which time the temperatures were near freezing.

11. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples failed to maintain accurate and complete records of the acquisition of two animals (a fennec fox and a bush baby) and did not have a current animal inventory.

12. On or about January 22, 2011, at Meigs, Georgia, the floors and walls of Mr. Staples's bush baby, ring-tailed lemur, and capuchin monkey shelter were deteriorated, with visible surface peeling.

13. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's food and bedding storage area contained trash, debris, and toxic substances, including, among other things, bleach, pesticides, and an open bag of lime.

14. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples failed to provide nine nonhuman primates (a macaque, six capuchin monkeys, and two spider monkeys) with adequate shelter from the elements.

15. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's travel enclosure housing a capuchin monkey, a bush baby, and a ring-tailed lemur did not have adequate lighting.

16. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's primary enclosure housing two nonhuman primates (two spider monkeys) did not have adequate space for the monkeys.

17. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's primary enclosure housing a capuchin monkey, a bush baby, and a ring-tailed lemur had not been cleaned and contained excreta and accumulated food waste on the floor and walls.

18. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a lion, a tiger, and a leopard was not constructed in a

manner that was sufficient to contain the animals securely. Specifically, sections of the portable fencing were affixed to each other with brackets that did not ensure the integrity of the enclosure.

19. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a kangaroo was maintained in a manner that could cause injury to the kangaroo. Specifically, there was a rusty, jagged hole in the gate on the interior of the trailer housing the kangaroo.

20. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing three large felids did not have adequate space for the felids to make normal postural adjustments.

21. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing three large felids was excessively caked with feces combined with urine.

22. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a kangaroo had an excessive accumulation of excreta caked with feces combined with urine.

23. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a fennec fox had an accumulation of excreta and food waste on the floor and walls.

24. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples failed to utilize a sufficient number of adequately trained employees to maintain an acceptable level of animal husbandry.

25. On or about January 27, 2011, at Walton County Fairgrounds, Florida, Mr. Staples stored metal pipes and portions of tent supports, with long straps, inside the compartment of a trailer in which Mr. Staples transported three camels, and the camels had access to these materials, which were stored in a manner that could injure the camels.

Conclusions of Law

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

2. At all times material to this proceeding, Mr. Staples was an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations.

3. On or about October 6, 2010, in Ozark, Missouri, Mr. Staples failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to treat diseases and injuries, in willful violation of 9 C.F.R. § 2.40(b)(2).

4. On or about October 6, 2010, Mr. Staples's housing facilities for capuchin monkeys did not have surfaces constructed of materials that allowed the surfaces to be readily cleaned and sanitized, in willful violation of 9 C.F.R. § 3.75(c).

5. On or about January 10, 2011, at Meigs, Georgia, Mr. Staples failed to handle a nonhuman primate as carefully as possible in a manner that would not cause physical harm, stress, or unnecessary discomfort to the nonhuman primate, in willful violation of 9 C.F.R. § 2.131(b)(1).

6. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples failed to maintain accurate and complete records of the acquisition of two animals (a fennec fox and a bush baby) and did not have a current animal inventory, in willful violation of 9 C.F.R. § 2.75(b).

7. On or about January 22, 2011, at Meigs, Georgia, the floors and walls of Mr. Staples' bush baby, ring-tailed lemur, and capuchin monkey shelter were deteriorated, with visible surface peeling, in willful violation of 9 C.F.R. § 3.75(c)(2).

8. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's food and bedding storage area contained trash, debris, and toxic substances, including, among other things, bleach, pesticides, and an open bag of lime, in willful violation of 9 C.F.R. § 3.75(e).

9. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples failed to provide nine nonhuman primates (a macaque, six capuchin monkeys, and two spider monkeys) with adequate shelter from the elements, in willful violation of 9 C.F.R. § 3.78(b).

10. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's travel enclosure housing a capuchin monkey, a bush baby, and a ring-tailed lemur did not have adequate lighting, in willful violation of 9 C.F.R. § 3.79(c).

11. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's primary enclosure housing two nonhuman primates (two spider monkeys) did not have adequate space for the monkeys, in willful violation of 9 C.F.R. § 3.80.

12. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's primary enclosure housing a capuchin monkey, a bush baby, and a ring-tailed lemur had not been cleaned and contained excreta and accumulated food waste on the floor and walls, in willful violation of 9 C.F.R. § 3.84(a).

13. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a lion, a tiger, and a leopard was not constructed in a manner that was sufficient to contain the animals securely, in willful violation of 9 C.F.R. § 3.125(a).

14. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a kangaroo was maintained in a manner that could cause injury to the kangaroo, in willful violation of 9 C.F.R. § 3.125(a).

15. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing three large felids did not have adequate space for the felids to make normal postural adjustments, in willful violation of 9 C.F.R. § 3.128.

16. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing three large felids had an excessive accumulation of excreta, in willful violation of 9 C.F.R. § 3.131(a).

17. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a kangaroo had an excessive accumulation of excreta, in willful violation of 9 C.F.R. § 3.131(a).

18 . On or about January 22, 2011, at Meigs, Georgia, Mr. Staples's enclosure housing a fennec fox had an accumulation of excreta and food waste on the floor and walls, in willful violation of 9 C.F.R. § 3.131(a).

19. On or about January 22, 2011, at Meigs, Georgia, Mr. Staples failed to utilize a sufficient number of adequately trained employees to maintain an acceptable level of animal husbandry, in willful violation of 9 C.F.R. § 3.132.

20. On or about January 27, 2011, at Walton County Fairgrounds, Florida, Mr. Staples stored metal pipes and portions of tent supports, with long straps, inside the compartment of a trailer in which Mr. Staples transported three camels, and the camels had access to these materials, which were stored in a manner that could injure the camels, in willful violation of 9 C.F.R. §§ 3.137(a)(2) and 3.138(f).

21. On or about July 12, 2011, in Ozark, Missouri, Mr. Staples failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to treat diseases and injuries, in willful violation of 9 C.F.R. § 2.40(b)(2).

The Administrator's Appeal Petition

The Administrator contends the ALJ erroneously denied the Administrator's Motion for Default Decision (Appeal Pet. at 7-10).

The ALJ denied the Administrator's Motion for Default Decision because the ALJ found Mr. Staples had shown good cause for the ALJ's acceptance of his late-filed Answer, as follows:

> 1. APHIS's Motion for Adoption of Decision and Order by Reason of Default (filed December 26, 2013, with proposed Decision and Order by Reason of Default) is DENIED, because the Respondent, Brian Staples, an individual, has shown good cause for me to accept, for now, the Answer he filed late. *See* Respondent Staples' Verified Response and Objections, including 5 Exhibits, filed January 23, 2014.

Ruling Den. Mot. for Default Judgment ¶ 1 at 1 (emphasis in original). The Rules of Practice provide, if meritorious objections to a motion for a default decision have been filed, the administrative law judge shall deny the complainant's motion for a default decision with supporting reasons, as follows:

> **§ 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.

7 C.F.R. § 1.139.

Mr. Staples raised five objections to the Administrator's Motion for Default Decision in his Objections to the Motion for Default Decision. While the ALJ did not identify any objection which she found to be meritorious, the ALJ's Ruling Denying Motion for Default Judgment specifically references Mr. Staples's Objections to the Motion for Default Decision; therefore, I infer the ALJ found meritorious some or all of the objections raised in Mr. Staples' Objections to the Motion for Default Decision. I do not find that Mr. Staples raised any meritorious objection to the Administrator's Motion for Default Decision. Consequently, I conclude the ALJ's Ruling Denying Motion for Default Judgment is error, and I reverse the ALJ's ruling.

First, Mr. Staples asserts, on July 16, 2011, he requested amendment of APHIS' January 2011 inspection reports, which reports serve as the basis for most of the violations alleged in the Complaint, and, on August 29, 2011, Gregory S. Gaj, D.V.M., an APHIS supervisory animal care specialist, responded to Mr. Staples' request. Based upon this exchange, coupled with subsequent inspections, during which no violations were found, Mr. Staples believed the issues arising from the January 2011 inspections had been resolved. (Objs. to Mot. for Default Decision at 1; Ex. 1 & Ex. 2).

Dr. Gaj's August 29, 2011 response to Mr. Staples's July 16, 2011 request establishes that, except for minor modifications, APHIS rejected Mr. Staples' request for amendment of the January 2011 inspection reports. Moreover, findings during inspections subsequent to January 2011 that Mr. Staples was fully compliant with the Animal Welfare Act and the Regulations are not relevant to the January 2011 citations for noncompliance with the Regulations which are the subject of this proceeding. In short, Mr. Staples's Objections to the Motion for Default Decision contain no support for his belief that the issues in the January 2011 inspection reports had been resolved, and I reject Mr. Staples' contention that his belief constitutes a meritorious basis for denial of the Administrator's Motion for Default Decision.

Second, Mr. Staples contends the Complaint sent by the Hearing Clerk to his address in Clayton, Washington, was not delivered and was returned to the Hearing Clerk (Objs. to Mot. for Default Decision at 1-2).

The record establishes and the Administrator concedes that the Hearing Clerk sent the Complaint to Mr. Staples' address in Clayton, Washington, and the United States Postal Service returned the Complaint to the Hearing Clerk marked as undeliverable because of the lack of a mail receptacle at the [redacted][*] address.[1] However, the Hearing Clerk's inability to serve Mr. Staples with the Complaint at the

[*] Location has been redacted by the Editor to protect Personally Identifiable Information.

[1] Objs. to Mot. for Default Decision Ex. 3; Administrator's Appeal Pet. CX 3.

[redacted][*] address is not relevant because, on November 14, 2013, the Hearing Clerk served Mr. Staples with the Complaint at Mr. Staples's other address, Post Office Box 1189, Deer Park, Washington 99006.[2] While Mr. Staples states the Deer Park, Washington address is actually the mailing address for J. Craig Barrile, Mr. Staples concedes that Post Office Box 1189, Deer Park, Washington 99006, is also his address and describes his relationship with Mr. Barrile, as follows:

> The [Deer Park, Washington,] address is listed as Respondent's address on his [Animal Welfare Act] license. It actually is the mailing address for J. Craig Barrile, the registered agent for Staples Safari Zoo, a Washington nonprofit corporation. Mr. Barrile is an attorney and longtime friend of Respondent who had handled various matters for Respondent over the years. As Respondent spends a great deal of time on the road, he entrusted Mr. Barrile to accept his mail and notify him of items related to his [Animal Welfare Act] license.

Objs. to Mot. for Default Decision at 2. Therefore, I reject Mr. Staples's contention that the Hearing Clerk's inability to serve Mr. Staples with the Complaint at his Clayton, Washington address constitutes a meritorious basis for denying the Administrator's Motion for Default Decision.

Third, Mr. Staples contends J. Craig Barrile, who signed the certified return receipt for the Complaint at Mr. Staples's Deer Park, Washington, address, on November 14, 2013, neglected to give the Complaint to Mr. Staples until December 31, 2013, 27 days after Mr. Staples's answer was required to be filed with the Hearing Clerk (Objs. to Mot. for Default Decision at 2-4).

I have long held that proper service by certified mail is made when a respondent is served with a certified mailing at his or her address and

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[*] Location has been redacted by the Editor to protect Personally Identifiable Information. *See* 5 U.S.C. § 552(b)(6) (2006).

[2] *See* note 2.

someone signs for the document.[3] Mr. Staples states that the Deer Park, Washington, address is his address and that he specifically designated Mr. Barrile, who signed for the Complaint, to accept his mail, including mail related to Mr. Staples's Animal Welfare Act license. Therefore, Mr. Barrile's failure to convey the Complaint to Mr. Staples until after the time for filing an answer had expired does not constitute a meritorious basis for denying the Administrator's Motion for Default Decision.

Fourth, Mr. Staples, citing *Sewnanan*, 60 Agric. Dec. 688 (U.S.D.A. 2001) (Order Vacating Decision), and *Gallop*, 40 Agric. Dec. 217 (U.S.D.A. 1981), contends his late-filed response to the Complaint constitutes a meritorious basis for denying the Administrator's Motion for Default Decision (Objections to the Mot. for Default Decision at 4).

The Hearing Clerk served Mr. Staples with the Complaint on November 14, 2013;[4] therefore, pursuant to 7 C.F.R. § 1.136(a), Mr. Staples was required to file a response to the Complaint with the Hearing Clerk no later than December 4, 2013. Mr. Staples filed a

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[3] Ow Duk Kwon, 55 Agric. Dec. 78, 93 (U.S.D.A. 1996) (stating proper service is made when a respondent is served with a certified mailing at his or her last known address and someone signs for the document); ENA Meat Packing Corp., 51 Agric. Dec. 669, 671 (U.S.D.A. 1992) (stating a default is not inappropriate where the respondent's employee, who signed the receipt for the certified letter enclosing the complaint, did not advise the respondent's officials of the document); Kaplinsky, 47 Agric. Dec. 613, 619 (U.S.D.A. 1988) (stating the excuse, occasionally given in an attempt to justify the failure to file a timely answer, that the person who signed the certified receipt card failed to give the complaint to the respondent in time to file a timely answer has been and will be routinely rejected); Bejarano, 46 Agric. Dec. 925, 929 (U.S.D.A. 1987) (stating a default order is proper where the respondent's sister signed the certified receipt card and forgot to give the complaint to the respondent when she saw him two weeks later); Carter, 46 Agric. Dec. 207, 211 (U.S.D.A. 1987) (stating a default order is proper where a timely answer is not filed; the respondent was properly served where his mother signed the certified receipt card but failed to deliver the complaint to the respondent); Cuttone, 44 Agric. Dec. 1573, 1576 (U.S.D.A. 1985) (stating Carl D. Cuttone was properly served where the complaint was sent to his last known business address and was signed for by Joseph A. Cuttone, who failed to deliver the complaint to the respondent), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); Buzun, 43 Agric. Dec. 751, 754-56 (U.S.D.A. 1984) (Joseph Buzun was properly served where the complaint sent by certified mail to his residence was signed for by someone named Buzun, who failed to deliver the complaint to the respondent).

[4] *See* note 2.

response to the Complaint on January 8, 2014, one month four days after his answer to the Complaint was due. Mr. Staples's failure to file a timely answer to the Complaint is deemed, for the purposes of this proceeding, an admission of the allegations of the Complaint and constitutes a waiver of hearing.[5]

Moreover, the cases cited by Mr. Staples do not support his position that a late-filed response to a complaint constitutes a meritorious basis for denying a motion for default decision. In *Sewnanan*, 60 Agric. Dec. 688 (U.S.D.A. 2001) (Order Vacating Decision), I vacated a default decision issued by an administrative law judge because the record contained no proof that Ms. Sewnanan had been served with the complaint. In *Gallop*, 40 Agric. Dec. 217 (U.S.D.A. 1981) (Order Vacating Default Decision and Remanding Proceeding), former Judicial Officer Donald A. Campbell vacated a default decision issued by an administrative law judge and remanded the proceeding to the administrative law judge to determine if just cause existed for affording Mr. Gallop an opportunity for a hearing based upon the possibility that Mr. Gallop's answer had been mishandled in the mail. Therefore, I reject Mr. Staples's contention that his late-filed answer to the Complaint constitutes a meritorious basis for denial of the Administrator's Motion for Default Decision.

Fifth, Mr. Staples, citing *Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (U.S.D.A. 1996), contends the Administrator's request for relief in the Complaint and the sanctions proposed by the Administrator in the Proposed Default Decision are inconsistent and the purported inconsistency constitutes a meritorious basis for denying the Administrator's Motion for Default Decision (Objs. to Mot. for Default Decision at 4).

In the Complaint, the Administrator requested issuance of an order authorized by the Animal Welfare Act,[6] whereas, in the Proposed Default Decision, the Administrator proposed issuance of an order requiring Mr. Staples to cease and desist from violating the Animal Welfare Act and the Regulations, suspending Mr. Staples's Animal Welfare Act license for a period of one year, and assessing Mr. Staples a $16,857 civil

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[5] 7 C.F.R. §§ 1.136(c), 1.139, 1.141(a).
[6] Compl. at 5.

penalty.[7] The Secretary of Agriculture is authorized to impose, on licensed exhibitors who violate the Animal Welfare Act or the Regulations, the sanctions proposed by the Administrator in the Proposed Default Decision;[8] therefore, I disagree with Mr. Staples's contention that the request for relief in the Complaint (an order authorized by the Animal Welfare Act) and the specific sanctions proposed in the Proposed Default Decision are inconsistent. Moreover, *Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (U.S.D.A. 1996), does not support Mr. Staples's contention that an inconsistency between the relief requested in a complaint and the sanction proposed in a proposed default decision constitutes a meritorious basis for denying a motion for a default decision. In *Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (U.S.D.A. 1996), I vacated a default decision issued by an administrative law judge and dismissed the complaint because the Secretary of Agriculture lacked jurisdiction.

Sanction

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

> [The 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

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[7] Mot. for Default Decision at 2; Proposed Default Decision at 5.
[8] *See* 7 U.S.C. § 2149(a)-(b).

officials during their day-to-day supervision of the regulated industry. However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[9]

When determining the amount of any civil monetary penalty to be assessed, the Animal Welfare Act requires the Secretary of Agriculture to give due consideration 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.[10]

The Administrator seeks assessment of a $16,857 civil penalty against Mr. Staples, an order requiring Mr. Staples to cease and desist from violating the Animal Welfare Act and the Regulations, and an order suspending Mr. Staples's Animal Welfare Act license for a period of one year.[11] Mr. Staples contends the Administrator's proposed sanction is "grossly excessive in light of the nature of the violations and [his] lack of history of prior violations."[12]

Mr. Staples is deemed to have admitted the allegations in the Complaint that he operated a moderately large zoo and animal act, that his violations are serious, and that he resolved two previous Animal Welfare Act cases in accordance with the stipulation procedures set forth in 9 C.F.R. § 4.11.[13] Moreover, Mr. Staples is deemed to have admitted that he committed the 19 violations of the Animal Welfare Act and the

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[9] Greenly, 72 Agric. Dec. 603, 626 (U.S.D.A. 2013) (Decision as to Lee Marvin Greenly & Minn. Wildlife Connection); Mazzola, 68 Agric. Dec. 822, 849 (U.S.D.A. 2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); Pearson, 68 Agric. Dec. 685, 731 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77, 89 (U.S.D.A. 2009); Alliance Airlines, 64 Agric. Dec. 1595, 1608 (U.S.D.A. 2005); Williams, 64 Agric. Dec. 364, 390 (U.S.D.A. 2005) (Decision as to Deborah Ann Milette); Geo. A. Heimos Produce Co., 62 Agric. Dec. 763, 787 (U.S.D.A. 2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); Excel Corp., 62 Agric. Dec. 196, 234 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); Bourk, 61 Agric. Dec. 25, 49 (U.S.D.A. 2002) (Decision as to Steven Bourk & Carmella Bourk).

[10] 7 U.S.C. § 2149(b).

[11] *See* note 12.

[12] Objs. to Mot. for Default Decision at 7.

[13] Compl. ¶ 2 at 1.

Regulations alleged in the Complaint. This ongoing pattern of violations establishes a "history of previous violations" for the purposes of 7 U.S.C. § 2149(b) and a lack of good faith.

Mr. Staples could be assessed a maximum civil penalty of $190,000 for his 19 violations of the Animal Welfare Act and the Regulations.[14] 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 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and the recommendations of the Administrator, I conclude a cease and desist order, suspension of Mr. Staples's Animal Welfare Act license for a period of nine months, and assessment of a $11,000 civil penalty against Mr. Staples[15] are appropriate and necessary to ensure Mr. Staples's 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.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Staples, his agents and 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:

a. failing to establish and maintain programs of adequate veterinary care that include the use of appropriate methods to treat diseases and injuries;

b. failing to construct housing facilities for nonhuman primates with

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[14] 7 U.S.C. § 2149(b) provides that the Secretary of Agriculture may assess a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act and the Regulations.

[15] I assess Mr. Staples a $2,000 civil penalty for his January 10, 2011, failure to handle a nonhuman primate as carefully as possible in a manner that would not cause physical harm, stress, or unnecessary discomfort to the nonhuman primate, in willful violation of 9 C.F.R. § 2.131(b)(1). I assess Mr. Staples a $500 civil penalty for each of his other 18 willful violations of the Regulations.

surfaces made of materials that can be readily cleaned and sanitized;

c. failing to maintain accurate and complete records showing the acquisition, disposition, and identification of animals;

d. failing to handle nonhuman primates as carefully as possible in a manner that will not cause physical harm, stress, or unnecessary discomfort to the nonhuman primates;

e. failing to store supplies of food and bedding in a manner that protects the supplies from spoilage, contamination, and vermin infestation;

f. failing to provide nonhuman primates with outdoor facilities that provide adequate shelter from the elements at all times;

g. failing to provide travel enclosures for nonhuman primates with lighting sufficient to permit routine inspection and cleaning of the enclosures and observation of the nonhuman primates;

h. failing to provide primary enclosures for nonhuman primates with sufficient space for the nonhuman primates in the enclosures;

i. failing to remove excreta and food waste from inside each indoor primary enclosure for nonhuman primates daily;

j. failing to maintain indoor and outdoor housing facilities in good repair to protect the animals from injury and to contain the animals;

k. failing to construct and maintain enclosures so as to provide sufficient space to allow each animal to make normal postural adjustments;

l. failing to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the primary enclosures, to minimize disease hazards, and to reduce odors; and

m. failing to utilize a sufficient number of adequately trained employees to maintain an acceptable level of husbandry practices.

Paragraph one of this Order shall become effective upon service of

this Order on Mr. Staples.

2. Mr. Staples's Animal Welfare Act license (Animal Welfare Act license number 91-C-0060) is suspended for a period of nine months and continuing thereafter until Mr. Staples has demonstrated compliance with the Animal Welfare Act and the Regulations.

Paragraph two of this Order shall become effective sixty (60) days after service of this Order on Mr. Staples.

3. Mr. Staples is assessed an $11,000 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:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing, Regulatory, and Food Safety 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, Ms. Carroll within sixty (60) days after service of this Order on Mr. Staples. Mr. Staples shall state on the certified check or money order that payment is in reference to AWA Docket No. 14-0022.

Right to Judicial Review

Mr. Staples 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. § 2341-2350. Mr. Staples must seek judicial review within sixty (60) days after entry of the Order in this Decision and Order.[16]

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[16] 7 U.S.C. § 2149(c).

ANIMAL WELFARE ACT

In re: JOSEPH M. ESTES.
Docket No. 11-0027.
Decision and Order.
Filed March 20, 2014.

AWA.

Colleen A. Carroll, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

Decision Summary

This Decision does **not** turn on whether Respondent Estes donated the two bear cubs; rather, it turns on whether Respondent Estes, a person whose Animal Welfare Act license had been **revoked** in 2003, **delivered the two bear cubs for transportation** (even though Respondent Estes reasonably believed the two bear cubs were to be used as pets). Further, this Decision does **not** turn on whether Respondent Estes operated as a dealer or an exhibitor; rather, even though he did **not** operate as a dealer or an exhibitor, Respondent Estes violated 9 C.F.R. § 2.10(c), a regulation under the Animal Welfare Act, on or about February 26 or 27, 2010.

Agreed Procedure

The email from me to the parties, dated "Tue 11/20/2012 3:45 PM", outlined the agreed procedure for this Decision:

> Hello, Mr. Estes, and Ms. Carroll,
>
> This confirms what I told you (just now) in our teleconference in 11-0027 AWA Estes. Mr. Estes, you are NOT required to appear for next week's hearing, in Ft. Worth, Texas. Instead, the one count you are defending will be decided "on paper."
>
> I will GRANT Ms. Carroll's request to file for summary

judgment. After she files (on behalf of APHIS) (and her filing may not be anytime soon), you will have the opportunity to respond. Ordinarily you have only 20 days after receiving the APHIS Motion to file with the Hearing Clerk your response, so if you want more time, just ask for it before the 20 days ends. Email is fine for such requests.

Ms. Carroll states that whether you violated (the Animal Welfare Act) is a legal issue. I will decide the legal issue based on the paper submissions. Either APHIS wins or Mr. Estes wins. In other words, I will consider Mr. Estes' response his own motion for summary judgment (against APHIS).

If APHIS wins, I will need input from both sides regarding what a proper amount of civil penalty is. If Mr. Estes wins, the case ends; the one count Mr. Estes is defending is dismissed and cannot be brought again.

Thank you both for agreeing to this procedure, which simplifies things.

Jill Clifton
U.S. Administrative Law Judge

Mixed Findings of Fact and Conclusions

1. Respondent Joseph M. Estes violated 9 C.F.R. § 2.10(c), when, after his Animal Welfare Act license had been **revoked** in 2003 (revocation is permanent), he **delivered for transportation** two bear cubs to be used as pets on or about February 26 or 27, 2010. *See* Resp't Estes's Resp. & Ex. 2, submitted as part of Resp't Estes's Resp.

2. I conclude that Jay Riggs's statement submitted as part of Respondent Estes' response (Ex. 2 at 1: "Jay Riggs' statement") is true. I have evaluated Jay Riggs' testimony during several days of hearing in two cases; consistently he is a credible witness. Though Jay Riggs is Respondent Estes's friend, I believe Jay Riggs's statement and consider

what he stated therein to be the truth.

3. Respondent Estes was acting as agent for Safari Joe's Wildlife Ranch, Inc. *See* Resp't Estes's Resp. & Ex. 1, submitted as part of Resp't Estes's Resp.

4. The two bear cubs were used for exhibition within days after the donation, by Eric Drogosch (who worked for the licensee Jamie Palazzo).

5. Respondent Estes was told and reasonably believed that the two bear cubs were to be used as pets by Jamie Palazzo (the licensee). *See especially* Jay Riggs's statement submitted as part of Resp't Estes's Resp.

6. Respondent Estes did not sell the two bear cubs; he donated them.

7. Respondent Estes did not trade the two bear cubs; even though Respondent Estes acquired tigers close-in-time to when he donated the two bear cubs, the tigers were **not** compensation for the two bear cubs.

8. On behalf of APHIS, Ms. Carroll's analysis that whether Respondent Estes violated the Animal Welfare Act is a legal issue is correct: the issue before me is a legal issue, not a factual issue.

9. The scope of prohibition under 9 C.F.R. § 2.10(c) is broad, broader than that specified under 7 U.S.C. § 2134, especially here, where the evidence does **not** show that Respondent Estes was dealing or exhibiting; and the phrase "in commerce" is not included in 9 C.F.R. § 2.10(c).

10. The two bear cubs are warm-blooded animals that Respondent Estes **delivered for transportation** to be used as pets.

11. The definition of *Animal* includes any used as a **pet** (emphasis added). 9 C.F.R. § 2.1.

12. Any person whose license has been suspended or revoked shall not buy, sell, transport, exhibit, or **deliver for transportation** any **animal** (emphasis added) during the period of suspension or revocation. 9

C.F.R. § 2.10(c).

13. Respondent Estes's response includes: "USDA has told me repeatedly that it was Ok to take in and or place any regulated animal as long as it was not sold or bought or traded for by me or safarijoes. (I have taped phone conversation to USDA that states this.)"

14. The USDA Judicial Officer has held that "reliance on erroneous advice is not a defense" to a violation of 9 C.F.R. § 2.10(c). *International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 80 (U.S.D.A. 2002).

15. Respondent Estes and Safari Joe's Wildlife Ranch, Inc. are located in and do business in the Tenth Circuit.

16. The Judicial Officer has held that "willfulness" as used in 5 U.S.C. § 558(c) (Administrative Procedure Act) is defined in the Tenth Circuit as "an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed." *International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 80-81 (U.S.D.A. 2002).

17. APHIS claims that Respondent Estes' violation was "willful;" I do not find Respondent Estes's violation to be willful. Respondent Estes thought, wrongly, that if he <u>donated</u> the two bear cubs, he was not in violation. Respondent Estes did **not** commit an intentional misdeed or its equivalent.

18. Respondent Estes avoided acting as a dealer by not selling or trading the bear cubs, and instead <u>donating</u> the bear cubs; but, because Respondent Estes' Animal Welfare Act license had been revoked, he did not avoid a violation. 9 C.F.R. § 2.10(c).

19. Even though the two bear cubs were to be used as <u>pets</u>, Respondent Estes violated 9 C.F.R. § 2.10(c) when he, after his Animal Welfare Act license had been **revoked** in 2003, **delivered for transportation** the two bear cubs.

20. Willfulness is not required under the Animal Welfare Act to impose cease and desist orders or to order Respondent Estes to pay civil

penalties. 7 U.S.C. § 2149.

21. The maximum civil penalty for violations occurring from June 23, 2005 through June 17, 2008, was $3,750.[1] Since June 18, 2008, the maximum civil penalty for a violation has been $10,000.[2]

22. The factors regarding the appropriateness of a penalty under 7 U.S.C. § 2149(b) include size of the business, gravity of the violations, whether there is good faith, and the history of previous violations.

23. APHIS requests a $10,000.00 civil penalty, plus a $1,650.00 civil penalty for failure to obey a cease and desist order. Respondent Estes requests zero civil penalty.

24. Even though the scope of prohibition under 9 C.F.R. § 2.10(c) is broader than that specified under 7 U.S.C. § 2134, 9 C.F.R. § 2.10(c) furthers the objectives of the Animal Welfare Act and should be upheld in a case such as this, involving two bear cubs.

25. A person whose AWA license has been suspended or revoked is permitted to do **less**. If the prohibition against **delivering for transportation** any **animal**, even an animal to be used as a pet, even when there is no sale or trade, catches Respondent Estes by surprise, I have empathy for him; I, too, was not cognizant of that impact of 9 C.F.R. § 2.10(c) until this case.

26. Contrary to APHIS's argument, when I evaluate (a) Respondent Estes' lack of "willfulness"; (b) the newness of this concept that a violation of 9 C.F.R. § 2.10(c) can be committed when the person whose license has been suspended or revoked is acting as neither a dealer nor an exhibitor (APHIS's Motion for Summary Judgment at p. 12); (c) size of the business (unknown, and not relevant here); (d) gravity of the violations, moderate; (e) no proof of lack of good faith here; and (f) history of previous violations (revocation), I find $1,000.00 in civil

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[1] 28 U.S.C. § 2461; 70 Fed. Reg. 29575 (May 24, 2005) (final rule effective June 23, 2005); 7 C.F.R. § 3.91(b)(2)(ii) ("Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $3,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.").

[2] 7 U.S.C. § 2149(b).

penalties to be an adequate remedy ($500.00 for each of the bear cubs), plus $1,650.00 in civil penalties for failure to obey cease and desist orders, plus a cease and desist order tailor-made for the circumstances here.

ORDER

The following **cease and desist** provisions of this Order (paragraph 30) shall be effective on the day after this Decision becomes final. [*See* ¶ 33.]

Respondent Joseph M. Estes, an individual and agent for Safari Joe's Wildlife Ranch, Inc., his agents and employees, successors and assigns, directly or indirectly, or through any corporate or other device or person, shall cease and desist from violating 9 C.F.R. § 2.10(c), including but not limited to **delivering for transportation** any **animal** (as defined in 9 C.F.R. § 2.1), even an animal to be used as a pet, even when there is no sale or trade.

Respondent Estes is assessed civil penalties totaling **$2,650.00** [which includes $1,650.00 for failure to obey a cease and desist order], which he shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**," within one year after this Decision becomes final. [*See* ¶ 33.]

Respondent Estes shall reference **AWA 11-0027** on his certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties shall be sent to, and received by, Colleen A. Carroll, at the following address, or at any other address specified by Colleen A. Carroll:

US Department of Agriculture
Office of the General Counsel
Attn: Colleen A. Carroll
South Building, Room 2314, Stop 1417
1400 Independence Ave SW
Washington DC 20250-1417

ANIMAL WELFARE ACT

Finality

This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145; *see* App. A).

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

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In re: LANCELOT KOLLMAN, a/k/a LANCELOT RAMOS.
Docket No. 13-0293.
Decision and Order.
Filed April 4, 2014.

AWA.

William J. Cook, Esq. for Petitioner.
Colleen A. Carroll, Esq. for Respondent.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER
GRANTING SUMMARY JUDGMENT

Introduction

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("the Rules"), set forth at 7 C.F.R. subpart H, apply to the adjudication of the instant matter. The case was initiated by Lancelot Kollman, also known as Lancelot Ramos ("Petitioner"), who filed with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ"; "Hearing Clerk") a petition for review of the denial of his application for an exhibitor's license under the Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.* ("AWA"; "the Act") by the Administrator of the Animal Plant Health Inspection Service

("APHIS"), an agency of the United States Department of Agriculture ("USDA").

The AWA authorizes USDA through APHIS to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals subject to the Act. Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of the USDA. 7 U.S.C. § 2133. Further, the Act authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purposes of the AWA. 7. U.S.C. § 2151. The Act and regulations fall within the enforcement authority of APHIS, which is also tasked to issue and renew licenses under the AWA.

This Decision and Order[1] is based upon the pleadings, documentary evidence, and arguments of the parties.

Issue

The primary issue in controversy is whether, considering the record, summary judgment may be entered in favor of Respondent USDA and APHIS' denial of Petitioner's license application be affirmed.

Procedural History

On May 2, 2005, USDA filed a complaint against Petitioner, alleging violations of the AWA. On July 22, 2005, Petitioner filed an answer, which did not address the allegations of the complaint, but did request a hearing. On April 12, 2007, USDA moved for the adoption of a decision by reason of admission of facts, which under the Rules, results in default. *See* 9 C.F.R. §§ 1.136; 1.139. On May 9, 2007, Chief Administrative Law Judge Peter M. Davenport issued a Default Decision and Order against Petitioner. Petitioner sent correspondence to OALJ generally denying the complaint's charges. The correspondence was deemed timely request for an appeal of the Default Decision and Order. On

[1] In this Decision and Order, documents submitted by Petitioner with his petition shall be denoted as "PX-#"; documents submitted by Petitioner with his objection shall be denoted at "POX-#"; and documents submitted by Respondent shall be denoted as "RX-#".

October 2, 2007, the Judicial Officer for the Secretary of USDA affirmed Judge Davenport's Decision and Order. Petitioner appealed that determination to the United States Court of Appeals for the Eleventh Circuit, which issued a Decision and Order affirming the Judicial Officer's decision on April 7, 2009.

On May 20, 2013, Petitioner filed an application with APHIS for an exhibitor's license under the AWA. By letter dated July 2, 2013, APHIS denied the application. On July 22, 2013, Petitioner filed a petition for review of the denial. On February 7, 2014, Respondent USDA moved for the entry of summary judgment. On March 26, 2011, Respondent filed an objection to the motion.

Summary of the Evidence[2]

1. Admissions

In his Petition for Review, Petitioner admitted that his previously held AWA license number 58-C-0816 had been revoked.

2. Documentary Evidence

PX-1; 2; POX-9; 10: Portions of the "Animal Care Inspection Guide" and Appendix 1, Inspection Requirements

PX-3; 4; POX-11; 12: Correspondence regarding Petitioner's credentials
PX-5; POX-13: Arrest Report

PX-6; POX-14; 15: RX-1; RX-4; RX-5: Petitioner's AWA license application and correspondence

PX-7: Denial by USDA dated July 2, 2013

POX-1: Petitioner's affidavit and third party testimonials

POX-2: Affidavit of Thomas B. Schotman, D.V.M.

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[2] This summary judgment relies upon the pleadings and upon declarations and documentary evidence attached to the motions and objections filed by the Parties.

POX-3-8; RX-3: Pleadings and evidence relating to initial complaint

DISCUSSION

Summary judgment is proper where there exists "no genuine issue as to any material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations).

An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and a fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U. S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a

request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

I find that the record establishes no genuine issue of material fact, and that summary judgment is appropriate. The scope of my review in this matter is limited to the question of whether APHIS properly denied Petitioner's 2013 application for an exhibitor's license under the AWA[3]. APHIS denied the license on the grounds that Petitioner's previous license was revoked.

The pertinent regulations state:

> **2.10 Licensees whose licenses have been suspended or revoked.**
>
> (b) Any person whose license has been revoked shall not be licensed in his or her own name or in any other manner; nor will any partnership, firm, corporation or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed.
>
> **2.11 Denial of initial license application.**
>
> (a) A license will not be issued to any applicant who:
>
> (3) Has had a license revoked or whose license is suspended, as set forth in § 2.10…

Petitioner has admitted that his license was revoked. See, POX-1. His challenge to the revocation upon default was rejected by the United States Court of Appeals for the Eleventh Circuit. Petitioner did not seek review of that determination, and I am not in a position to review decisions made by that body. I accept the court's ruling as final. Accordingly, Petitioner's license was revoked. The language of the

[3] Because the instant Decision and Order is confined to that question, I decline to address Petitioner's other arguments involving APHIS' conduct and the impact of the license revocation on his livelihood, although I appreciate the considerable advocacy demonstrated by both counsel with respect to those issues.

regulations prohibits the issuance of a license to a person whose AWA license was revoked. Although the regulations may produce harsh results, I have no authority to question their fairness or validity. I need not examine other regulations with specific temporal penalties to construe a clear and unambiguous ban on the issuance of a license to an applicant who has had a license revoked.

I find that APHIS denied Petitioner's application for an AWA license for good cause. Respondent's motion for summary judgment is hereby GRANTED.

Mixed Findings of Fact and Conclusions of Law

1. The Secretary, USDA, has jurisdiction in this matter.

2. The material facts involved in this matter are not in dispute and the entry of summary judgment in favor of USDA is appropriate.

3. Petitioner held AWA license 58-C-0816.

4. Petitioner's AWA license was revoked when default judgment was entered against him in an enforcement action initiated by APHIS and inadequately defended by Petitioner.

5. Petitioner filed an application for a new AWA license.

6. APHIS denied the license because Petitioner had held a previous license that was revoked, pursuant to 9 C.F.R. §§ 2.10(b) and 2.11(a)(3).

7. Petitioner timely filed a petition for review of APHIS's denial of his license application.

8. APHIS denied Petitioner's application for good cause.

ORDER

APHIS's denial of petitioner's license application is hereby AFFIRMED.

ANIMAL WELFARE ACT

This Decision and 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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EQUAL ACCESSS TO JUSTICE ACT

DEPARTMENTAL DECISIONS

In re: LE ANNE SMITH.
Docket No. 14-0020.
Decision and Order.
Filed May 5, 2014.

EAJA.

Larry J. Thorson, Esq. for the Applicant.
Colleen A. Carroll, Esq. for the Respondent.
Decision and Order entered by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER GRANTING EAJA FEES

Decision Summary

The Applicant, Le Anne Smith, timely filed her application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA) on December 6, 2013. Le Anne Smith is awarded EAJA attorney fees and expenses in accordance with 5 U.S.C. § 504 and 7 C.F.R. §§ 1.180 - 1.203. Beneath each heading that follows are my findings and conclusions that are required under the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. § 1.200), § 1.200 Decision.

Le Anne Smith Prevailed

Le Anne Smith became a prevailing party on September 11, 2013, when the Judicial Officer dismissed the Complaint as to her, as follows.

ORDER

> The Complaint, as it relates to Le Anne Smith, filed by the Administrator on July 14, 2005, is dismissed.

Smith, No. 05-0026, 72 Agric. Dec. ___, 2013 WL 8213619 (U.S.D.A. Sept. 11, 2013) (Decision & Order as to Le Anne Smith), *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/091113.Perry_.DO_.AWA05-0026.pdf (last visited Dec. 18, 2015).

December 12, 2013 Was the Filing Deadline for the EAJA Application

For purposes of computing the time for Le Anne Smith to file her application for an EAJA award of attorney fees and other expenses, theoretically the parties would have had sixty (60) days to seek review of the Judicial Officer's Order in the U.S. Court of Appeals (sixty (60) days from the date of the Judicial Officer's Order, 7 U.S.C. § 2149). Thus, from September 11, 2013, the parties would have had sixty (60) days: until November 12 (Tuesday), 2013. The sixtieth (60th) day falls on a Sunday; the Monday was a federal holiday; consequently, on November 12, 2013, the Judicial Officer's Order became final and unappealable within the meaning of 7 C.F.R. § 1.193. 4. As a practical matter, the Judicial Officer spoke for the Secretary of Agriculture in his Order issued September 11, 2013, so APHIS would not appeal the Judicial Officer's Order to the U.S. Court of Appeals. As a practical matter, Le Anne Smith won, so Le Anne Smith would not appeal the Judicial Officer's Order to the U.S. Court of Appeals. Nevertheless, for purposes of computing the time for Le Anne Smith to file her EAJA application, November 12, 2013 is the date the Judicial Officer's Order became final and unappealable within the meaning of 7 C.F.R. § 1.193.

From November 12, 2013, Le Anne Smith had thirty (30) days to file the EAJA application: December 12, 2013. 5 U.S.C. § 504; 7 C.F.R. § 1.193. Le Anne Smith filed the EAJA application on December 6, 2013, with time to spare.

APHIS argues that Le Anne Smith may not include the sixty (60) days from September 11, 2013 as part of her calculation of time for filing her EAJA application because she was not an exhibitor and thus did not have the right to appeal to the U.S. Court of Appeals. The principal issue as to Le Anne Smith in AWA Docket No. 05-0026 was whether, beginning approximately February 1, 2003, Le Anne Smith was an

exhibitor under the Animal Welfare Act. Had Le Anne Smith lost before the Judicial Officer, she would have had the right to appeal to the U.S. Court of Appeals within sixty (60) days. 7 U.S.C. § 2149. For purposes of computing the time for Le Anne Smith to file her EAJA application, she still had the sixty (60) 60 days before her thirty (30) days began to run. True, Le Anne Smith proved she was not an exhibitor, but APHIS claimed she was until the Judicial Officer found otherwise. Le Anne Smith will not now be deprived of that sixty (60) days as part of the calculation of time for filing, based on APHIS's erroneous assertion that Le Anne Smith had no right to appeal to the U.S. Court of Appeals because she was not an exhibitor.

Parties and Pleadings

The Applicant is Le Anne Smith, who successfully defended allegations against her in AWA Docket No. 05-0026. In that case, APHIS failed to prove that Le Anne Smith played a critical role in the operation of the business of Craig A. Perry or Perry's Wilderness Ranch & Zoo, Inc., an Iowa corporation; APHIS failed to prove that Le Anne Smith was a de facto partner of Craig A. Perry or Perry's Wilderness Ranch & Zoo, Inc.; and APHIS failed to prove that Le Anne Smith was a de facto principal in Perry's Wilderness Ranch & Zoo, Inc. The Judicial Officer dismissed APHIS's claims against Le Anne Smith. As a prevailing party in AWA Docket No. 05-0026, Le Anne Smith applied for an award of attorney fees and other expenses under the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504. Le Anne Smith is represented, both here and in AWA Docket No. 05-0026, by Larry J. Thorson, Esq., Cedar Rapids, Iowa. Le Anne Smith timely filed her EAJA application on December 6, 2013.

The Respondent here (Complainant in AWA Docket No. 05-0026) is the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS" or "Respondent"). APHIS objects, in accordance with 7 C.F.R. § 1.195, to the award requested in Le Anne Smith's EAJA application. APHIS is represented, both here and in AWA Docket No. 05-0026, by Colleen A. Carroll, Esq. with the Office of the General Counsel, United States Department of Agriculture. APHIS timely filed the Agency Answer on March 6, 2014.

Le Anne Smith timely filed Applicant's Response Brief on April 14, 2014.

APHIS's Position Was Not Substantially Justified

Repeatedly, from the beginning of my involvement in AWA Docket No. 05-0026, Mr. Thorson voiced opposition to the inclusion of Le Anne Smith as a party and asked that she be dismissed—perhaps every time he had the opportunity to speak to me and counsel for APHIS during telephone conferences. Mr. Thorson continued to object to the inclusion of Le Anne Smith as a party during the three segments of the thirteen (13)-day hearing: November 16-20, 2009; and December 7-11, 2009 in Chicago, Illinois; and January 11-13, 2010 in Cedar Rapids, Iowa. 11.

The basis of APHIS's claims against Le Anne Smith was unclear from the Complaint and unclear from the evidence. Dr. Bellin's incorrect assumptions about Le Anne Smith's relationship to Craig A. Perry and Dr. Bellin's completion of APHIS paperwork may have contributed to APHIS's initial impression that Le Anne Smith was part of the exhibitor operation, but the evidence, including Dr. Bellin's testimony, proved that she was not. Le Anne Smith was not named on the Animal Welfare Act license applications or renewals as "authorized to conduct business" or in any other capacity. CX 1. Le Anne Smith had no authority and no responsibility regarding Craig Perry's or the corporation's Animal Welfare Act undertakings. Le Anne Smith was not a shareholder, officer, director, or employee of the corporation. Le Anne Smith was not an employee of Craig Perry. Le Anne Smith did not own the animals. Le Anne Smith was not an owner, lessor, or lessee of the real property or personal property required by the zoo or the animals. If there were any "titles" given to Le Anne Smith on inspection reports (on the signature line which merely acknowledged receipt of an inspection report), such "titles" were chosen by Dr. Bellin to satisfy his requirements; they were not bestowed by Craig Perry or the corporation; they were not chosen by Le Anne Smith.

APHIS's persistence in APHIS's claims against Le Anne Smith was, to me, unreasonable. Mr. Thorson's Affidavit, at page 2, attached to Le Anne Smith's EAJA application filed on December 6, 2013, includes in

part the following:

> This action against her was pursued even though through her attorney she asked the Government dismiss its action at the very start of this case (Tr. pp. 42-56) and to voluntarily dismiss her at the close of evidence in the case that was tried for approximately three weeks (Tr. pp. 4302-4303). This took her completely away from her children for two weeks when trial was held in Chicago and was a hardship she never should have had to bear. This was a cynical attempt to put pressure on her significant other, Craig Perry, by bringing these groundless allegations against her.

APHIS's objective regarding the claims against Le Anne Smith is not clear; what is clear is that APHIS was not substantially justified in persisting in APHIS's claims against Le Anne Smith.

Attributing 1/3 of the Attorney Fee to Le Anne Smith is Just

The corporate entity, Perry's Wilderness Ranch & Zoo, Inc., required very little attention (work). Le Anne Smith required much more attention (work) than the corporate entity. Craig A. Perry required the most attention (work), better than half. Perhaps to put too fine a point on it, I conclude that Perry's Wilderness Ranch & Zoo, Inc. required 1/9 of the attention (work); Le Anne Smith required 3/9 of the attention (work); and Craig A. Perry required 5/9 of the attention (work). Mr. Thorson's allocation of the work done on behalf of Le Anne Smith (1/3) computes to the same fraction as my own allocation (3/9).

Net Worth

Le Anne Smith's net worth did not exceed two million dollars at the time of the adjudication. Evidence during the hearing proved this; Le Anne Smith's EAJA application, including her Affidavit executed December 5, 2013, further confirms this.

EQUAL ACCESS TO JUSTICE ACT

Maximum Hourly Rate Under EAJA

The $125.00 per hour maximum attorney fee under EAJA applies until March 3, 2011. The $150.00 per-hour maximum attorney fee under EAJA applies beginning March 3, 2011. 7 C.F.R. § 1.186. Mr. Thorson's work on behalf of Le Anne Smith merits the maximum rate authorized, given his experience, expertise, proficiency, efficiency, and effectiveness, and in accordance with the factors enumerated in 7 C.F.R. § 1.186. Based on my examination of the twenty-seven (27) pages of excerpts from the billing records attached to the Le Anne Smith EAJA application, Mr. Thorson charged little time for the amount of work he was required to do. This works to APHIS's advantage. The twenty-seven (27) pages of excerpts from the billing records, plus Mr. Thorson's Affidavit executed December 5, 2013, provide all the documentation for this case that is required by 7 C.F.R. § 1.192.

There Are No Special Circumstances That Make An Award Unjust

APHIS argues that prevailing against Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc. constitutes special circumstances that make the award sought by Ms. Smith unjust. "It would be unreasonable to award EAJA fees for work performed in connection with the violations that were found to have been committed." APHIS Agency Answer at 18. I agree that APHIS prevailed against all the respondents except Le Anne Smith.

(a) APHIS successfully obtained revocation of the Animal Welfare Act license of Jeff Burton and Shirley Stanley, individuals doing business as Backyard Safari, when they failed to appear on the first day of the hearing in November 2009. That decision is online. http://www.dm.usda.gov/oaljdecisions/091116_AWA_05-0026_do.pdf

(b) APHIS successfully obtained a cease and desist order and a civil penalty against American Furniture Warehouse, Inc. in April 2006. That Consent Decision is online. http://www.dm.usda.gov/oaljdecisions/AWA_05-0026_042106.pdf

(c) APHIS successfully obtained a cease and desist order and a civil penalty against Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc.

in September 2013. That Judicial Officer decision is online. http://nationalaglawcenter.org/wp-content/uploads//assets/decisions/090613.Perry_.DO_.AWA05-0026.pdf

I am confident that the attorney fee and expenses awarded to Applicant Le Anne Smith herein are attributable to the work done only on her behalf and not the other respondents in AWA Docket No. 05-0026. Consider, the case against Le Anne Smith was filed on July 14, 2005, and not until November 12, 2013 did the Judicial Officer's Order as to Le Anne Smith become final and unappealable within the meaning of 7 C.F.R. § 1.193. Consider, Mr. Thorson vigorously and vehemently argued throughout that roughly 8-year period that the case against Le Anne Smith should be dismissed. Consider, there were 13 days of hearing, in 3 separate segments, and the pursuit of the claims against Le Anne Smith, and the defense of those claims against Le Anne Smith, occupied a prominent portion of that hearing. Consider, the attorney fee and expenses have been cut to 1/3, to separate the work attributable to defense of Le Anne Smith, from the work performed in connection with the violations that were found to have been committed by Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc. There are no special circumstances that make an award unjust.

Calculation of Award

Le Anne Smith asks for an award of $17,450.00 for her share (1/3) of attorney fee; plus an award of $815.00 for her share (1/3) of expenses. The Attachment, at page 27, of the Le Anne Smith EAJA application filed on December 6, 2013, mistakenly shows 349 hours. When I added the time, I got 369 hours. My number, 369 hours, is confirmed by the $59,040.00 bill, which, at Mr. Thorson's $160.00 per hour which he billed for the case, required 369 hours. I divided the 369 hours into the two rates that maximum under the EAJA, as follows:

Beginning March 3, 2011 ($150.00 per hour maximum attorney fee):

See Le Anne Smith EAJA Appl. filed on December 6, 2013, beginning on page 25 of Attachment.

03/21/2011 - 09/14/2013
7.5 hours x $150.00 = $1,125.00 / 3 = $375.00

Beginning July 21, 2005 until March 3, 2011 ($125.00 per hour maximum attorney fee):

See Le Anne Smith EAJA Appl. filed on December 6, 2013, beginning on page 1 of Attachment (through much of page 25).

07/21/2005 - 02/09/2011
361.5 hours x $125.00 = $45,187.50 / 3 = $15,062.50

So, adding $375.00 to $15,062.50, I find that the maximum attorney fee for Le Anne Smith's 1/3 share is $15,437.50. Next I look to the Agency Answer filed March 6, 2014, pages 22-24, to evaluate the entries. Since the Complaint in AWA Docket No. 05-0026 was filed on July 14, 2005, I equate "situation" with the allegations contained in the Complaint. Every entry questioned by APHIS I find to have been performed in connection with the litigation and to be recoverable under the Equal Access to Justice Act except those on page 24 questioned, because they appear to be communications with legislators. I will subtract those.

1.9 hours x $125.00 = $237.50 / 3 = $79.17 to be subtracted
$15,437.50
- 79.17
$15,358.33
========
Next, the $2,445.00 in expenses (page 27 of Attach.), divided by 3 is **$815.00**, which should be awarded to Le Anne Smith.

ORDER

APHIS shall pay Le Anne Smith, through her attorney, Larry J. Thorson, Esq., a total of $16,173.33 for Le Anne Smith's share of the attorney fee ($15,358.33); plus Le Anne Smith's share of the expenses ($815.00), in accordance with 5 U.S.C. § 504 and 7 C.F.R. §§ 1.180 - 1.203. [Applicant has to comply with § 1.203.]

Finality

This Decision and Order shall be final and effective 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 "§ 1.201 Department review" of the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. § 1.201).

Copies of this Decision and Order Granting EAJA Fees shall be served by the Hearing Clerk upon each of the parties.

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FEDERAL MEAT INSPECTION ACT

DEPARTMENTAL DECISIONS

In re: PAUL ROSBERG & NEBRASKA'S FINEST MEATS, LLC.
Docket Nos. 14-0094; 14-0095.
Decision and Order.
Filed June 19, 2014.

FMIA.

Lisa Jabaily, Esq. for Complainant.
Respondents, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The instant matter involves a complaint filed by the United States Department of Agriculture ("Complainant"; "USDA") against Paul Rosberg and Nebraska's Finest Meats, L.L.C. ("Respondents"), alleging violations of the administration of the Federal Meat Inspection Act ("FMIA"; "the Act"). Complainant seeks an Order indefinitely suspending inspection service by the Food Safety Inspection Service ("FSIS") of any of Respondents' business operations.

Procedural History

On April 11, 2014, Complainant filed the complaint alleging violations of the FMIA. On May 7, 2014, Respondent Paul Rosberg filed a response on behalf of both Respondents and requested a continuance of the matter pending the results of an appeal of his guilty plea in a criminal matter related to this administrative proceeding. On May 14, 2014, Complainant objected to the continuance. On May 19, 2014, Complainant filed a motion for a Decision without Hearing by Reason of Admissions[1]. On June 10, 2014, Respondent filed an objection to Complainant's motion.

[1] I note that Respondent's answer was not timely and the entry of default would be permitted pursuant to 7 C.F.R. §1.139. However, in this matter, I concur that a Decision on the Record is appropriate.

Issues

1. Whether a Decision and Record on the Hearing should be issued, and if so;

2. Whether Respondents should be suspended from inspection under FMIA.

Findings of Fact and Conclusions of Law

A. Discussion

Pursuant to the Rules of Practice Governing Formal Adjudications Before the Secretary [of U.S.D.A.], 7 C.F.R. §§ 1.31 *et seq.* (the Rules), Respondents are required to file an answer within twenty days after the service of a complaint.7 C.F.R. § 1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default shall be appropriate. C.F.R. § 1.136(c).

7 C.F.R. § 1.1.39 provides, in pertinent part:

> 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 day 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…

7 C.F.R. § 1.1.39.

Further, an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. United States Dep't of Agric*., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations.)

In his answer filed May 7, 2014, Paul A. Rosberg asserted that he was 100 percent owner of the business, denied the allegations to which he had pleaded guilty, and asked that the matter be suspended pending a decision on his petition to dismiss the plea. In support of its motion for a Decision on the Record, Complainant filed a copy of Respondent Paul Rosberg's Plea Agreement (Complainant's exhibit "A"); a copy of felony conviction and Judgment against Respondent Paul Rosberg (Complainant's exhibit "B"); a copy of the cover of Respondent Paul Rosberg's motion to set aside the plea and judgment (Complainant's exhibit "C"); Memorandum and Order by Senior U.S. District Court Judge Richard G. Kopf, denying Respondent Paul Rosberg's motion (Complainant's exhibit "D"). In his response to Complainant's motion filed herein, Respondent Paul Rosberg again asserted that his conviction was invalid, and he asked the instant proceeding be stayed pending the results of his request for reconsideration of Judge Kopf's Order.

I find that there is no dispute of the facts in this matter and that no purpose would be served to delay the disposition of this case until Respondent Paul Rosberg's criminal appeals are exhausted. Mr. Rosberg's avenue of appeal is narrow, since his conviction was obtained through his guilty plea. The presiding judge in the criminal action has found the plea to be voluntary and knowing and denied his motion to set aside the plea with prejudice. The subject of the criminal action involved Respondent Paul Rosberg's selling of misbranded meat to Omaha Public Schools. Respondent admitted to intentionally mislabeling meat as federally inspected when it had not been inspected by FSIS.

The primary purpose of the FMIA is to protect public health, and to that end, only individuals deemed fit to be inspected by FSIS may

engage in business subject to the FMIA. 21 U.S.C. § 602. *See Apex Meat Co.*, 44 Agric. Dec. 1855, 1872 (U.S.D.A. 1985). The Secretary of USDA determined that the 'fitness' of individuals may be determined by characteristics of "honesty, dependability, and integrity." *Id.* at 1869. Respondent Paul Rosberg's criminal conduct involving his activities regulated by FSIS demonstrate that he lacks the trustworthiness, honesty, and integrity required to assure that his products are safe within the understanding of the FMIA.

The Secretary of USDA is authorized to withdraw inspection service from any business where anyone responsibly connected with the business has been convicted of any felony. 21 U.S.C. § 671; 9 C.F.R. § 500.6(i). An individual is deemed responsibly connected if he or she is a partner, officer, director, holder, or owner of ten percent or more of its voting stock or employee in a managerial or executive capacity. 21 U.S.C. § 671. Respondents admitted that they were subject to inspection, and Respondent Paul Rosberg asserted that he owned 100 percent of the corporate entity. Respondent Paul Rosberg pleaded guilty to a felony involving the handling of meat and is unfit to engage in a business requiring inspection services. Paul Rosberg is responsibly connected to Nebraska's Finest Meats, L.L.C., and the indefinite withdrawal of USDA inspection services from Nebraska's Finest Meats, L.L.C, and its affiliates, officers, operators, partners, successors, or assigns is an appropriate sanction. This sanction is consistent with sanctions imposed in other cases involving felony convictions[2].

I find that Respondent's wife, Kelly Rosberg, while not a Respondent herein, has admitted to being the manager of the business in an affidavit provided to USDA. *See* Aff. of Kelly Rosberg, ALJ Ex. 1. Accordingly, as an employee in a managerial capacity, I find her responsibly connected with a business whose owner is unfit to receive the inspection services of FSIS. Therefore, it is appropriate to indefinitely withdraw those services from Kelly Rosberg.

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[2] *See, e.g.*, Utica Packing Co. v. Block, 781 F.2d 71, 78 (6th Cir. 1986); Great Am. Veal Co., 45 Agric. Dec. 1770 (U.S.D.A. 1986); Norwich Beef Co., 38 Agric. Dec. 380 (U.S.D.A. 1979).

B. Findings of Fact

1. Nebraska's Finest Meats, L.L.C., is now and was at all times material to this adjudication, a corporation with a business address in Wausau, Nebraska.

2. Respondent Paul A. Rosberg, at all times material hereto, is and was at least a 50-percent owner of that Nebraska's Finest Meats, L.L.C.

3. Respondents' business operated under a grant of federal inspection pursuant to FMIA at all times material hereto.

4. Kelly Rosberg was and is the manager of Nebraska's Finest Meats.

5. On September 27, 2013, in the United States District Court for the District of Nebraska, Respondent Paul A. Rosberg pleaded guilty to a felony, Sale of Misbranded Meat and Meat Products; Aiding and Abetting, in violation of 21 U.S.C. § 610(c)(1) and 18 U.S.C. § 2.

6. Respondent admitted to violating FMIA as part of a guilty plea to a criminal indictment alleging criminal activity involving the sale of meat and meat products.

7. Judgment in the criminal action, *United States v. Rosberg*, Case No. 8:12CR271-001 was entered on December 27, 2013.

8. On May 9, 2014, U.S. Senior District Court Judge Richard G. Kopf denied and dismissed with prejudice Respondent Paul A. Rosberg's motion to set aside the guilty plea.

C. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent Paul Rosberg was and is at all times relevant herein responsibly connected with the Respondent Corporation, Nebraska's Finest Meats, L.L.C.

3. Kelly Rosberg, as manager and operator of the business, is responsibly connected with the Respondent Corporation.

4. Respondent Paul Rosberg committed a felony, which demonstrates his lack of integrity to conduct operations that affect the public safety.

5. Respondent Paul Rosberg is unfit to engage in any business requiring inspection under Title I of the FMIA, pursuant to 21 U.S.C. § 671.

6. Because Paul Rosberg is at least fifty-percent owner of Nebraska's Finest Meats, L.L.C., that entity is unfit to engage in any business requiring inspection under Title I of the FMIA, pursuant to 21 U.S.C. § 671.

7. The indefinite withdrawal of USDA inspection services from Respondent Paul Rosberg and Nebraska's Finest Meats, L.L.C, their affiliates, officers, operators, partners, successors, or assigns is an appropriate sanction.

8. The indefinite withdrawal of USDA inspection services from Kelly Rosberg is also appropriate, as she was and is the manager and operator of Nebraska's Finest at all times material hereto and is responsibly connected to a business whose owner is unfit to receive inspection services.

ORDER

Inspection services are hereby indefinitely withdrawn from Respondents Nebraska's Finest Meats, L.L.C and Paul Rosberg. This sanction extends by association to Kelly Rosberg, manager of Nebraska's Finest Meats, and inspection services are hereby indefinitely withdrawn from Kelly Rosberg.

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

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall become final without further proceedings

35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties and also upon Kelly Rosberg.

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ORGANIC FOODS PRODUCTION ACT

DEPARTMENTAL DECISIONS

In re: KRIEGEL, INC. & LAURANCE KRIEGEL.
Docket No. 14-0027.
Decision and Order.
Filed March 6, 2014.

OFPA – Administrative appeals – Jurisdiction.

Petitioners, pro se.
Buren W. Kidd, Esq. for Respondent.
Initial Decision entered by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Kriegel, Inc., and Laurance Kriegel [hereinafter Petitioners] applied to the Texas Department of Agriculture for organic certification.[1] On April 2, 2013, the Texas Department of Agriculture denied Petitioners' application for organic certification. On May 2, 2013, pursuant to 7 C.F.R. § 205.681(a), Petitioners appealed the Texas Department of Agriculture's denial of their application for organic certification to the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator]. On October 22, 2013, the Administrator denied Petitioners' appeal.

On November 5, 2013, Petitioners filed a pleading with the Office of Administrative Law Judges, United States Department of Agriculture, requesting review of the Administrator's denial of their appeal. On

[1] The Texas Department of Agriculture is an entity accredited by the Secretary of Agriculture as a certifying agent for the purpose of certifying production or handling operations as certified production or handling operations which comply with the Organic Foods Production Act of 1990, as amended (7 U.S.C. §§ 6501-6522) [hereinafter the Organic Foods Production Act], and the regulations issued under the Organic Foods Production Act (7 C.F.R. pt. 205).

December 4, 2013, Buren W. Kidd, Office of the General Counsel, United States Department of Agriculture,[2] filed a response to Petitioners' November 5, 2013, pleading contending the Office of Administrative Law Judges has no jurisdiction to consider Petitioners' November 5, 2013, request to review the Administrator's denial of their appeal.

On January 17, 2014, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued a Decision and Order Dismissing Petition for Appeal [hereinafter the ALJ's Decision and Order]: (1) concluding this proceeding is not yet ripe to be heard by the Office of Administrative Law Judges as no formal administrative proceeding to deny organic certification has been initiated by the United States Department of Agriculture, as required by 7 C.F.R. § 205.681(a)(2); (2) denying Petitioners' November 5, 2013, request for review of the Administrator's denial of Petitioners' appeal; and (3) dismissing the proceeding with prejudice.

On February 5, 2014, Petitioners appealed the ALJ's Decision and Order to the Judicial Officer. On February 20, 2014, the Agricultural Marketing Service filed a response to Petitioners' appeal petition. On February 26, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

The Organic Foods Production Act requires the Secretary of Agriculture to establish a procedure under which a person may appeal an adverse action under the Organic Foods Production Act, as follows:

> **§ 6520. Administrative appeal**
>
> **(a) Expedited appeals procedure**
>
> The Secretary shall establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State

[2] Mr. Kidd refers to himself as the "Agency Representative." Based upon the record, I infer Mr. Kidd represents the Agricultural Marketing Service, United States Department of Agriculture.

> official, or a certifying agent under this chapter that—
>
> (1) adversely affects such person; or
>
> (2) is inconsistent with the organic certification program established under this chapter.

7 U.S.C. § 6520(a). Pursuant to this requirement to establish an appeals procedure, the Secretary of Agriculture promulgated regulations which provide that an applicant for organic certification may appeal a certifying agent's denial of certification to the Administrator and which further provide that, if the Administrator denies the appeal, a formal administrative proceeding will be initiated to deny the certification, as follows:

> **§ 205.681 Appeals.**
>
> (a) *Certification appeals.* An applicant for certification may appeal a certifying agent's notice of denial of certification . . . to the Administrator[.]
> . . . .
> (2) If the Administrator . . . denies an appeal, a formal administrative proceeding will be initiated to deny . . . the certification. Such proceeding shall be conducted pursuant to the U.S. Department of Agriculture's Uniform Rules of Practice. . . .

7 C.F.R. § 205.681(a), (a)(2). The regulations do not provide that an applicant may initiate a proceeding to review the Administrator's denial of the applicant's appeal, as Petitioners have done in this proceeding. Instead, the regulations provide that the United States Department of Agriculture will initiate a formal administrative proceeding to deny organic certification. Therefore, I agree with the ALJ's Decision and Order dismissing this proceeding with prejudice, and I conclude Petitioners' February 5, 2014, appeal to the Judicial Officer must be dismissed for lack of jurisdiction.

For the foregoing reasons, the following Order is issued.

ORGANIC FOODS PRODUCTION ACT

ORDER

Petitioners' February 5, 2014, appeal to the Judicial Officer is dismissed.

This Order shall be effective upon service on Petitioners.

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In re: PAUL A. ROSBERG, d/b/a ROSBERG FARM.
Docket No. 12-0216.
Decision and Order.
Filed May 30, 2014.

OFPA.

Lisa Jabaily, Esq. for Complainant.
Respondents, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

AMENDED[1] DECISION AND ORDER ON SUMMARY JUDGMENT

The instant matter involves a complaint filed by the United States Department of Agriculture ("Complainant"; "USDA") against Paul A. Rosberg, d/b/a Rosberg Farm ("Respondent"), alleging violations of the Organic Foods Production Act of 1990 ("OFPA"), 7 U.S.C. §§ 6501-6522 and regulations implementing the OFPA and the National Organic Program ("NOP"), set forth at 7 C.F.R. § 205.1 – 205.699. The complaint alleged that Respondent failed to declare on two applications for certification under the NOP that he was previously certified under the NOP. The complaint further alleged that Respondent failed to provide with his applications to NOP copies of noncompliance letters, and failed to describe how compliance had been achieved.

[1] The parties were served with a Decision and Order in this matter on May 28, 2014, but clerical errors in that Decision required correction. Accordingly, on May 30, 2014, I vacated that Decision and Order and replaced it with the instant Amended Decision and Order.

This Decision and Order is issued on unopposed motion for summary judgment filed by Complainant.

Procedural History

On January 26, 2011, Complainant filed a complaint against Respondent alleging violations of the OFPA. On March 30, 2012, Respondent filed a general denial of the allegations and requested additional time to file an answer. By Order issued April 9, 2012, Chief Administrative Law Judge Peter M. Davenport extended the time within which an answer must be filed to May 9, 2012. On April 6, 2014, Respondent again requested additional time.[2]On May 9, 2014, Respondent filed a partial answer and supporting documentation and again requested additional time.

On May 14, 2012, Chief Administrative Law Judge Peter M. Davenport set deadlines for submissions and exchange of evidence. Complainant filed a list of exhibits and witnesses with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ"; "Hearing Clerk") on June 6, 2012. On July 11, 2012, Respondent filed a document in which he stated that he was not able to comply with the Order for exchange and submissions because he was denied discovery, and requested an Order compelling discovery.[3] On July 12, 2012, Complainant filed a status report and request for teleconference.

The case was reassigned to me, and on November 2, 2012 I issued an Order staying proceedings in the matter pending the result of actions in federal district court involving Respondent. On May 7, 2013, Complainant filed a Status Report, Request for Hearing, and Request for Teleconference. By Order issued May 14, 2013, I renewed my stay in this matter pending the results of criminal actions involving Respondent. In a status report filed on December 17, 2013, Complainant advised that

[2] It is likely that Respondent's second request for an extension of time and the Order granting the request crossed in the mail.

[3] The Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Initiated by the Secretary [of the United States Department of Agriculture] ("the Rules of Practice"), 7 C.F.R. §§ 1.130 *et seq.*, apply to this proceeding and do not provide for discovery.

Respondent had pled guilty to criminal charges. On December 27, 2013, Respondent was sentenced to imprisonment.

On January 30, 2014, Complainant filed a motion for summary judgment which was served upon Respondent by the Hearing Clerk. Respondent has failed to file a response to the motion.

On May 14, 2014, a motion filed in another administrative proceeding involving Respondent advised that Respondent's motion for habeas corpus and request to withdraw his guilty plea was denied by Senior United States District Court Judge Richard Kopf. Accordingly, this matter is ripe for adjudication.

I admit to the record the Attachments to Respondent's Answer, identified as RX-A through RX-Q and the Exhibits identified as CX-1, CX-7, CX-11, CX-14, CX-20, CX-21[4] and CX-22 attached to Complainant's motion.

Issue

The primary issue in controversy is whether, considering the record, summary judgment may be entered in favor of USDA.

Findings of Fact & Conclusions of Law

A. Summary of the Evidence

USDA established national standards for the production and handling of organically produced agricultural products pursuant to the OFPA. USDA, through the Agricultural Marketing Service ("AMS"), administers a program for certifying organic producers and handlers, whose practices are examined by State officials and/or authorized private agents for compliance with USDA standards. Once compliance is established, the producers and handlers may market their products with an official USDA organic label.

On June 27, 2005, Respondent was certified under NOP for soybeans

[4] Complainant's Exhibits "A" and "B" have been renamed "CX-21" and CX-22," respectively, for purposes of consistency.

and alfalfa by OCIA International, Inc. ("OCIA"), a certification agent that was accredited by USDA under NOP regulations on April 29, 2002. RX-C. On November 23, 2005, Respondent was certified for alfalfa under NOP by OCIA. CX-1; RX-F. On November 15, 2006, Respondent applied for certification with OneCert, which was accredited by USDA as a certifying agent under the NOP regulations on April 22, 2003. CX-7.

On February 2, 2007, OCIA issued a Notice of Noncompliance to Respondent. RX-I. On February 8, 2007, Respondent surrendered his organic certification with OCIA. CX-11. On May 24, 2007, OneCert issued to Respondent a Notice of Noncompliance and Denial of Certification for failing to disclose prior certifications and noncompliances, misrepresenting previous certifications, failing to maintain a record-keeping system, and withholding records. CX-11.

On August 28, 2007, Respondent applied for certification with International Certification Services, Inc. ("ICS"), which was accredited by USDA as a certifying agent under NOP regulations on April 29, 2002. CX-14. On October 30, 2007, ICS denied certification to Respondent because it determined that Respondent had provided contradictory information to ICS and USDA about his prior certifications. RX-P.

On September 10, 2007, Respondent applied for organic certification by the Ohio Ecological Food and Farm Association ("OEFFA"), which was accredited by USDA as a certifying agent under NOP regulations on April 29, 2002.CX-20; RX-O. Respondent was issued an organic certificate by OEFFA in 2007. Admis. of Resp't, last sentence of Aff. dated April 6, 2010, in partial Answer.

On March 8, 2010, the NOP issued Respondent a Notice of Noncompliance and Proposed Revocation (RX-A) for failing to disclose prior certifications, notice of non-compliance and notices of denial of application for organic certification, pursuant to 7 C.F.R. § 205.401(c), which provides:

> A person seeking certification of a production or handling operation under this subpart must submit an application for certification to a certifying agent. The

> application must include the following information:
>
> (c) The name(s) of any organic certifying agent(s) to which application has previously been made; the year(s) of application; the outcome of the application(s) submission, including, when available a copy of any notification of noncompliance or denial of certification issued to the applicant for certification; and a description of the actions taken by the applicant to correct the noncompliances noted in the notification of noncompliance, including evidence of such correction…

On February 13, 2012, Respondent filed a civil action in the District Court of Lancaster, Nebraska against Everett Lunquist, an inspector of organic producers and growers, alleging defamation of character. On May 7, 2012, Mr. Lunquist's attorney moved for summary judgment, which was granted by District Judge Paul D. Merritt, Jr. on August 5, 2013. CX-22.

B. Discussion

Pursuant to the Rules of Practice, Respondents are required to file an answer within twenty days after the service of a complaint. 7 C.F.R. §1.136(a). Failure to file a timely answer or failure to deny or otherwise respond to an allegation in the Complaint shall be deemed admission of all the material allegations in the Complaint, and default shall be appropriate. 7 C.F.R. § 1.136(c). The Rules allow for a Decision Without Hearing by Reason of Admissions (7 C.F.R. §1.139) and further provide that "an opposing party may file a response to [a] motion" within twenty days after service (7 C.F.R. §1.143(d)).

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); Fed. R. Civ. P. 56(c). An issue is "genuine" if sufficient

evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U.S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

Respondent failed to file a timely answer that specifically addressed the allegations in the Complaint. His first filing with the Hearing Clerk asserted a general denial of the allegations. The documentation accompanying Respondent's partial Answer addressed the allegations to some degree. In affidavits that Respondent submitted during the course of investigation into his NOP practices, he lodged complaints that representatives and agents tasked with issuing NOP certification had lied, had not acted timely, and had failed to properly interpret his responses to questions about non-compliance. Respondent suggests that error and not fraud caused investigators to conclude that he had failed to truthfully respond to questions regarding whether he had been previously certified on subsequent applications. Respondent failed to respond to the Motion

for Summary Judgment.

Respondent's assertions of fraud and dishonesty have been rejected by Judge Merritt of the District Court of Nebraska, who granted summary judgment against Respondent in his civil action against Mr. Lunquist. CX-22. Judge Merritt found that "reasonable minds can draw but one conclusion from all of the evidence-Rosberg failed to comply with § 205.401(c)." *Id.*

I agree with Judge Merritt's determination and find that none of Respondent's statements support his compliance with regulations controlling applications for organic certification. There is nothing vague or ambiguous about the requirement that applicants identify all information about prior applications for certification, including the outcome of those applications. Respondent's applications reveal that he failed to comply with those requirements. He applied for organic certification with OneCert while still holding certification by OCIA. On his application to OneCert, Respondent did not disclose that information and instead wrote "unknown" when required to identify other certifying agents to which he had applied. Respondent also wrote "none" when required to list the years in which he had applied for certification. Respondent wrote "unknown" when required to respond to questions regarding the outcome of previous applications. *See* CX-7 at 2. On his application to ICS, Respondent denied having previous certifications. Respondent failed to include any required documentation with his applications.

In his partial Answer, Respondent submitted affidavits and supporting documents[5] that summarize his efforts to secure organic certification for various agricultural products. Respondent charged inspectors with failing to make timely inspections, with falsifying information, and with failing to properly interpret his applications for certification. Respondent contended that he told inspectors about his applications, and therefore his status with previous certifying agents should have been apparent. However, Respondent admitted that he "did not necessarily follow ICS paper." *See* partial Answer. Respondent included documents pertaining

[5] Respondent expressed concerns that I would not read his affidavit or documents because "it is so long". I hereby assure Respondent that I have assiduously read every word of his, and the government's, submissions.

to inspections in which non-compliant procedures had been identified. He explained that his attention was diverted by the illness of his son, and that he had little time to devote to paperwork.

I credit Respondent's contention that the process for organic certification is lengthy and complicated. However, the scope of the instant adjudication is limited to whether Respondent's applications for organic certification met the requirements set forth at 7 C.F.R. § 401(c). Regardless of what Mr. Rosberg told individuals representing certifying agents, the onus was on him to complete the applications accurately, and the evidence establishes, prima facie, that he failed to do so. I find that there is no genuine dispute of material fact. Accordingly, Complainant's motion for summary judgment is GRANTED.

Two additional assertions were made by Complainant but not substantiated by documentary evidence. Complainant alleged that on March 16, 2010, OEFFA issued Respondent a Notice of Noncompliance and Denial of Certification for Livestock. The record does not contain supporting documentation in the form of a copy of that notice. However, because the record does not allege that Respondent made additional applications for organic certification after this date, this assertion is not material to my findings.

Complainant additionally alleged that on July 29, 2011, the AMS Administrator issued a decision denying the Respondent's appeal and proposed to revoke Respondent's organic certification under 7 C.F.R. § 205.662(f)(2) of the prevailing NOP regulations for a period of five (5) years. Although a copy of this decision is not in evidence, it is not crucial to my determinations, as I infer that the Administrator's decision was the basis for the complaint that initiated the instant adjudication.

C. Findings of Fact

1. Respondent Paul A. Rosberg is an individual doing business as Rosberg Farm with a mailing address in Wausau, Nebraska.

2. At all times material hereto, Respondent was engaged in business as a certified organic producer, crop operation, as defined in the OFPA.

ORGANIC FOODS PRODUCTION ACT

3. On June 27, 2005, Respondent was certified under NOP for soybeans and alfalfa by OCIA International, Inc. ("OCIA").

4. On November 23, 2005, Respondent was issued another organic certificate by Organic Crop Improvement Association ("OCIA").

5. OCIA was accredited by USDA as a certifying agent under NOP Regulations on April 29, 2002.

6. On February 2, 2007, OCIA issued a Notice of Noncompliance to Respondent.

7. On February 8, 2007, Respondent surrendered his organic certificate with OCIA.

8. On November 15, 2006, Respondent applied for certification with OneCert.

9. OneCert was accredited by USDA as a certifying agent on April 23, 2003.

10. On May 24, 2007, OneCert issued to Respondent a Notice of Noncompliance and Denial of Certification for failing to disclose prior certifications and noncompliances; misrepresenting previous certifications; failing to maintain records; and withholding records.

11. On August 28, 2007, Respondent applied for certification with Internal Certification Services, Inc. ("ICS").

12. On April 29, 2002, ICS was accredited by USDA as a certifying agent under the NOP.

13. On October 30, 2007, ICS issued to Respondent a Notice of Denial because of contradictory information that Respondent provided to ICS and USDA regarding prior certification applications.

14. On September 10, 2007, Respondent applied for organic certification by the Ohio Ecological Food and Farm Association ("OEFFA").

15. OEFFA was accredited by USDA as a certifying agent under NOP regulations on April 29, 2002.

16. On November 12, 2007, Respondent was issued an organic certificate by OEFFA.

17. On March 8, 2010, the NOP issued Respondent a Notice of Noncompliance and Proposed Revocation for failing to disclose prior certifications and noncompliance notice and failing to disclose notices of denial of application for organic certification.

D. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. There are no genuine issues of material fact presented in this adjudication.

3. Entry of summary judgment in favor of Complainant is appropriate.

4. Respondent violated 7 C.F.R. § 401(c) by failing to disclose prior organic certification applications and designations; by failing to disclose notices of non-compliances; and by failing to maintain records; and by failing to produce records on other applications for certification under the NOP.

ORDER

Respondent Paul A. Rosberg, doing business as Rosberg Farm, shall cease and desist from violating the NOP regulations. Respondent's certification under NOP is hereby revoked for a period of five (5) years, pursuant to 7 C.F.R. § 205.681(a)(2). Respondent is hereby disqualified from being eligible to be certified as an organic operation under the OFPA for a period of five (5) years.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order shall become final without further proceedings

thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

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MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

AGRICULTURAL MARKETING AGREEMENT ACT

In re: BURNETTE FOODS, INC., A MICHIGAN CORPORATION.
Docket No. 11-0334.
Miscellaneous Order.
Filed April 9, 2014.

AMAA – Administrative procedure – Stay.

James J. ("Jay") Rosloniec, Esq. for Petitioner.
Sharlene A. Deskins, Esq. for Respondent.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

RULING DENYING THE ADMINISTRATOR'S MOTION FOR STAY

On March 25, 2014, the Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed a Motion to Stay Decision and Order, Pending Appeal in which the Administrator requests a stay of *Burnette Foods, Inc.*, 73 Agric. Dec. ___ (U.S.D.A. Mar. 18, 2014), pending completion of the appeal process. On April 4, 2014, Burnette Foods, Inc. filed an Objection to Respondent's Motion to Stay Decision and Order, Pending Appeal.

The rules of practice applicable to this proceeding[1] provide that an administrative law judge's decision shall become final without further procedure 35 days after service of the administrative law judge's decision, unless the decision is appealed to the Secretary of Agriculture by a party to the proceeding.[2] On April 3, 2014, the Administrator appealed Administrative Law Judge Jill S. Clifton's [hereinafter the ALJ] decision, *Burnette Foods, Inc.*, 73 Agric. Dec. ___ (U.S.D.A. Mar. 18, 2014), to the Judicial Officer. As the Administrator is a party to this proceeding[3] and has filed a timely appeal of the ALJ's decision to the Judicial Officer,[4] *Burnette Foods, Inc.*, 73 Agric. Dec. ___ (U.S.D.A. Mar. 18, 2014), will not become final and will have no effect pending final disposition of this proceeding by the Judicial Officer.[5] Therefore, a stay of *Burnette Foods, Inc.*, 73 Agric. Dec. ___ (U.S.D.A. Mar. 18, 2014), pending completion of the appeal process, would be mere surplusage, and I deny the Administrator's Motion to Stay Decision and Order, Pending Appeal.

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[1] The rules of practice applicable to this proceeding are 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].

[2] 7 C.F.R. § 900.64(c).

[3] *See* Answer of Resp't at 1, 8; Burnette Foods, Inc., 73 Agric. Dec. ___, slip op. ¶ 7 at 10 (U.S.D.A. Mar. 18, 2014).

[4] The Judicial Officer has been delegated authority to act for the Secretary of Agriculture in proceedings subject to the Rules of Practice. *See* 7 C.F.R. §§ 2.35(a)(11), 900.51(c).

[5] The ALJ specifically addressed the issue of the finality of *Burnette Foods, Inc.*, 73 Agric. Dec. ___ (U.S.D.A. Mar. 18, 2014), as follows:

> **Finality**
>
> 43. This Decision shall be final and effective 35 days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service. *See* 9 [sic] C.F.R. §§ 900.64 and 900.65.

Burnette Foods, Inc., 73 Agric. Dec. ___, slip op. ¶ 43 at 22-23 (U.S.D.A. Mar. 18, 2014).

ANIMAL QUARANTINE ACT

UNITED CONTINENTAL HOLDINGS, INC.
Docket No. 14-0063.
Order of Dismissal.
Filed June 17, 2014.

CONTINENTAL AIRLINES, INC.
Docket No. 14-0065.
Order of Dismissal.
Filed June 17, 2014.

ANIMAL WELFARE ACT

In re: JAMES G. WOUDENBERG, d/b/a R&R RESEARCH.
Docket No. 12-0538.
Miscellaneous Order.
Filed March 27, 2014.

AWA – Administrative procedure – Denial of request for reconsideration.

Sharlene A. Deskins, Esq. for Complainant.
Nancy Kahn, Esq. for Respondent.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER DENYING REQUEST TO RECONSIDER THE MARCH 25, 2014 ORDER EXTENDING TIME FOR FILING COMPLAINANT'S APPEAL BRIEF

On March 19, 2014, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed an appeal petition and a motion requesting that I extend to April 18, 2014, the time for filing the Administrator's brief in support of the appeal petition. On March 25, 2014, I issued an Order Extending Time for Filing Complainant's Appeal Brief, and on March 26, 2014, James G. Woudenberg filed Respondent's Objections to Complainant's March 19, 2014 Motion for Extension of Time. As I previously granted the Administrator's March 19, 2014, request for an extension of time, I treat Mr. Woudenberg's objections to

the Administrator's March 19, 2014 request for an extension time as a request that I reconsider the March 25, 2014 Order Extending Time for Filing Complainant's Appeal Brief.

Mr. Woudenberg raises no meritorious basis for granting his request for reconsideration of the March 25, 2014 Order Extending Time for Filing Complainant's Appeal Brief; therefore, I deny Mr. Woudenberg's request for reconsideration.

However, I find troubling Mr. Woudenberg's assertions that the Hearing Clerk failed to serve Mr. Woudenberg with the Administrator's March 19, 2014, motion for extension of time and the Administrator's appeal petition. Therefore, the Hearing Clerk is ordered, contemporaneous with service of this Order on Mr. Woudenberg, to serve Mr. Woudenberg with a copy of the Administrator's March 19, 2014, motion for extension of time and the Administrator's appeal petition.

As for Mr. Woudenberg's assertion that the Administrator's appeal petition was not timely filed, Mr. Woudenberg may address that issue in any response he may have to the Administrator's appeal petition. The time for filing a response to the Administrator's appeal petition does not begin to run until Mr. Woudenberg is served either with the Administrator's appeal brief or with a filing by the Administrator stating that no appeal brief will be filed.

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KYLE THOMAS TAITT, AN INDIVIDUAL, d/b/a MONKEY BUSINESS.
Docket No. 12-0446.
Order of Dismissal.
Filed May 13, 2014.

* * *

In re: JOSEPH M. ESTES, AN INDIVIDUAL.
Docket No. 11-0027.
Miscellaneous Order.
Filed May 14, 2014.

AWA – Administrative procedure – Cross-appeal – Service.

Colleen A. Carroll, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER REQUIRING THE HEARING CLERK TO SERVE THE ADMINISTRATOR'S CROSS-APPEAL ON MR. ESTES

On April 28, 2014, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Response to Respondent's Petition for Appeal." I find the Administrator's April 28, 2014 response to Joseph M. Estes' appeal petition includes a cross-appeal.

The rules of practice applicable to this proceeding[1] allow inclusion of a cross-appeal in a response to an appeal petition, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> . . . .
> (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*.

7 C.F.R. § 1.145(b) (emphasis added).

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The emphasized language was included in 7 C.F.R. § 1.145(b) so that neither party would have to file a protective notice of appeal (to be dropped if no appeal were filed by the other party) but could, instead, file the equivalent of a cross-appeal in response to the appeal petition filed by the other party.[2]

As the Administrator has included a cross-appeal in "Complainant's Response to Respondent's Petition for Appeal," I order the Hearing Clerk to serve Mr. Estes with a copy of "Complainant's Response to Respondent's Petition for Appeal" and inform Mr. Estes that, within 20 days after service of "Complainant's Response to Respondent's Petition for Appeal," he may file with the Hearing Clerk a response in support of or in opposition to the Administrator's cross-appeal.[3]

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[2] Excel Corp., 62 Agric. Dec. 196, 248-49 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); White, 47 Agric. Dec. 229, 262-63 (U.S.D.A. 1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); Thornton, 41 Agric. Dec. 870, 900 (U.S.D.A. 1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983), *reprinted in* 51 Agric. Dec. 295 (1992); Magic Valley Potato Shippers, Inc., 40 Agric. Dec. 1557, 1558 (U.S.D.A. 1981), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); Rowland, 40 Agric. Dec. 1934, 1953 (U.S.D.A. 1981), *aff'd*, 713 F.2d. 179 (6th Cir. 1983).

[3] The title of the Administrator's April 28, 2014 filing, "Complainant's Response to Respondent's Petition for Appeal," does not indicate that the filing includes a cross-appeal. A response to an appeal petition that includes a cross-appeal should be titled to clearly indicate that the response includes a cross-appeal.

In re: JENNIFER CAUDILL, a/k/a JENNIFER WALKER, a/k/a JENNIFER HERRIOTT WALKER, AN INDIVIDUAL; BRENT TAYLOR & WILLIAM BEDFORD, INDIVIDUALS d/b/a ALLEN BROTHERS CIRCUS; & MITCHELL KALMANSON.
Docket No. 10-0416.
Miscellaneous Order.
Filed May 16, 2014.

AWA – Administrative procedure – Dismissal – License, termination of – Petition to reopen hearing.

Colleen A. Carroll, Esq. for Complainant.
William J. Cook, Esq. for Respondents.
Initial Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

RULING GRANTING PETITION TO REOPEN AND RULING GRANTING REQUEST TO ISSUE AN ORDER DISMISSING THE PROCEEDING

Ruling Granting Petition to Reopen

On April 29, 2014, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Petition to Reopen Hearing as to Respondent Jennifer Caudill" [hereinafter Petition to Reopen] requesting that I reopen the hearing and receive in evidence a letter, dated November 13, 2013, sent from Elizabeth Goldentyer, D.V.M., Regional Director, Animal Care, Animal and Plant Health Inspection Service, to Ms. Caudill[1] and requesting that I issue an order dismissing this proceeding.

On May 2, 2014, the Hearing Clerk served Ms. Caudill with the Administrator's Petition to Reopen[2] and, in the Hearing Clerk's April 30, 2014 service letter, informed Ms. Caudill that she had 10 days from the

[1] The Administrator attached a copy of the letter, dated November 13, 2013, from Dr. Goldentyer to Ms. Caudill, to the Petition to Reopen.
[2] United States Postal Service Domestic Return Receipt for Article Number [redacted] 4664.

date of service within which to file a response to the Petition to Reopen. Ms. Caudill failed to file a response to the Petition to Reopen, and, on May 15, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration.

The rules of practice applicable to this proceeding[3] set forth the requirements for a petition to reopen a hearing, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
>
> (2) *Petition to reopen hearing*. A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2). The Administrator filed the Petition to Reopen prior to the issuance of a decision by the Judicial Officer. The Administrator's Petition to Reopen identifies the nature and purpose of the evidence to be adduced. Moreover, the evidence to be adduced is not merely cumulative and could not have been adduced during the June 11-13, 2012, hearing conducted in this proceeding, as the November 13, 2013, letter from Dr. Goldentyer to Ms. Caudill did not exist at the time of the hearing. Under these circumstances, I reopen the hearing and receive in evidence the November 13, 2013, letter from Dr. Goldentyer to Ms. Caudill.

Ruling Granting Request to Issue an Order Dismissing the Proceeding

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[3] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

On September 7, 2010, the Administrator instituted this adjudicatory proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; and the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations] by filing an Order to Show Cause Why Animal Welfare Licenses 58-C-0947, 55-C-0146, and 58-C-0505 Should Not Be Terminated [hereinafter Order to Show Cause].[4] The Administrator seeks an order terminating Ms. Caudill's Animal Welfare Act license (Animal Welfare Act license number 58-C-0947), pursuant to 9 C.F.R. § 2.12,[5] which provides for termination of an Animal Welfare Act license after a hearing, as follows:

> **§ 2.12 Termination of a license.**
>
> A license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to § 2.11 after a hearing in accordance with the applicable rules of practice.

The Regulations also provide for automatic termination of an Animal Welfare Act license if the annual license fee is not timely paid, as follows:

> **§ 2.5 Duration of license and termination of license.**
>
> (a) A license issued under this part shall be valid and effective unless:
>
> . . . .

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[4] This proceeding, as it relates to the termination of Animal Welfare Act license number 55-C-0146 held by Brent Taylor and William Bedford and to the termination of Animal Welfare Act license number 58-C-0505 held by Mitchell Kalmanson, is concluded. *See* Withdrawal of Order to Show Cause as to Brent Taylor & William Bedford filed by the Administrator on June 4, 2012; Order of Dismissal filed by Chief Administrative Law Judge Peter M. Davenport on June 15, 2012; and Caudill, 71 Agric. Dec. 1007 (U.S.D.A. 2012) (Decision & Order as to Mitchel Kalmanson).

[5] Order to Show Cause at 14-15.

> (3) The license has expired or been terminated under this part.
>
> (4) The annual license fee has not been paid to the appropriate Animal Care regional office as required. There will not be a refund of the annual license fee if a license is terminated prior to its expiration date.
>
> (b) Any person who is licensed must file an application for a license renewal and an annual report form (APHIS Form 7003), as required by § 2.7 of this part, and pay the required annual license fee. The required annual license fee must be received in the appropriate Animal Care regional office on or before the expiration date of the license or the license will expire and automatically terminate. Failure to comply with the annual reporting requirements or pay the required annual license fee on or before the expiration date of the license will result in automatic termination of the license.

9 C.F.R. § 2.5(a)(3)-(4), (b). The letter, dated November 13, 2013, from Dr. Goldentyer to Ms. Caudill establishes that, pursuant to 9 C.F.R. § 2.5, Ms. Caudill's Animal Welfare Act license (Animal Welfare Act license number 58-C-0947) automatically terminated on its expiration date, October 16, 2013, because Ms. Caudill failed to pay the annual license fee on or before the expiration of Animal Welfare Act license number 58-C-0947.

Based upon the record before me, I find the automatic termination of Animal Welfare Act license number 58-C-0947, pursuant to 9 C.F.R. § 2.5, renders moot the instant proceeding in which the Administrator seeks termination of Animal Welfare Act license number 58-C-0947, pursuant to 9 C.F.R. § 2.12.

For the foregoing reasons, the following Ruling and Order are issued.

RULING

The Administrator's Petition to Reopen, filed April 29, 2014, is

granted, and the letter, dated November 13, 2013, from Dr. Goldentyer to Ms. Caudill, a copy of which is attached to the Administrator's Petition to Reopen, is received in evidence.

ORDER

1. The instant proceeding is dismissed as moot.

2. All motions pending before me in this proceeding are rendered moot and are dismissed.

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In re: CHINA CARGO ARILINES, CO., LTD., a/k/a CHINCA CARGO AIRLINES, LTD., A SUBSIDIARY OF CHINA EASTERN EARLINES CORPORATION LIMITED, A CORPORATION CHARTERED IN THE PEOPLE'S REPUBLIC OF CHINA.
Docket No. 14-0041.
Miscellaneous Order.
Filed August 6, 2014.

AWA – Administrative procedure – Answer – Deferral of ruling.

Colleen A. Carroll, Esq. for Complainant.
Edward J. Longosz, II, Esq. for Respondent.
Memorandum Opinion and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

MEMORANDUM OPINION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) [hereinafter "the Act"], and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.*) [hereinafter "Regulations and Standards"]. The matter initiated on November 18, 2013 with a Complaint filed by the Administrator of the Animal Plant and Health Inspection Service of the United States Department of Agriculture [hereinafter "USDA"; "Complainant"] against China Cargo Airlines, Co., Ltd., also known as China Cargo Airlines,

Ltd. [hereinafter "China Cargo"; "Respondent"]. The Complaint alleges that, on or about March 10, 2010, Respondent committed numerous violations of the Act and the Regulations and Standards during its acceptance and transportation of 566 live guinea pigs from Shanghai, People's Republic of China to Los Angeles, California (Compl. ¶¶ 1-2).

On December 3, 2013, Respondent filed a Consent Motion for an Extension of Time to File an Answer. On December 4, 2013, I entered an Order granting the Consent Motion and allowing Respondent until January 23, 2014 to file an answer. On January 23, 2014, Respondent filed its Answer to the Complaint.

On February 25, 2014, I entered an Order directing Complainant to file with the Hearing Clerk by March 27, 2014 a list of exhibits and list of witnesses; directing Respondent to file with the Hearing Clerk by April 24, 2014 a list of exhibits and list of witnesses; and directing the parties to consult with each other and, no later than one week after the date of Respondent's exchange deadline, to file a Status Report with the Hearing Clerk. On March 18, 2014, Complainant filed its List of Exhibits and List of Witnesses with the Hearing Clerk. On April 24, 2014, Respondent filed its List of Exhibits and List of Witnesses with the Hearing Clerk.

On May 13, 2014, Complainant filed a Status Report requesting a two-day hearing. On June 11, 2014, Complainant filed: (1) a Motion for Adoption of Decision and Order by Reason of Default [hereinafter "Motion for Adoption"]; and (2) a Proposed Decision and Order by Reason of Default. On July 1, 2014, Respondent filed its Response and Objections to Complainant's Motion for Adoption of Decision and Order by Reason of Default [hereinafter "Response and Objections"]. In its Response, Respondent requested an oral argument "on all issues presented" (Resp., "Oral Argument Requested").

Presently before me are: (1) Complainant's "Motion for Adoption of Decision and Order by Reason of Default"; (2) Respondent's "Response and Objections to Complainant's Motion for Adoption of Decision and Order by Reason of Default;" and (3) a request for oral argument filed by Respondent.

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."[1] Pertinent to the case at bar, the Rules of Practice for the U.S. Department of Agriculture[2] [hereinafter "Rules of Practice"] establish that "an answer must be filed within 20 days after service of the complaint."[3] The Rules of Practice also provide that an answer "shall . . . [c]learly admit, deny, *or explain* each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent."[4] Per Rule 1.136, "failure to file an answer within [20 days] shall be deemed, for the 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."[5]

Rule 1.139 establishes the procedure upon a party's 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

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[1] Hamilton, 64 Agric. Dec. 1659, 1662 (U.S.D.A. 2005) (internal citations omitted); *see* Noell, 58 Agric. Dec. 130, No. 98-0033, 1999 WL 11230, at *9 (U.S.D.A. Jan. 6, 1999) ("The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act, in accordance with the Rules of Practice.").

[2] 7 C.F.R. §§ 1.130-1.151 (2013).

[3] Hamilton, 64 Agric. Dec. at 1662 (citing 7 C.F.R. § 1.136); *cf.* FED. R. CIV. P. 12(a)(1)(A) (requiring a defendant to serve answer within 21 days of being served a summons or complaint or, if defendant has waived service timely per FED. R. CIV. P. 2(d), within 60 days after a request for waiver was sent or within 90 days of being sent to a defendant outside the United States).

[4] Hamilton, 64 Agric. Dec. at 1662 (emphasis added).

[5] 7 C.F.R. § 1.136(c) (2013) (emphasis added). *See* Morrow v. Dep't Agric., 65 F.3d 168, 168 (6th Cir. 1995) ("7 C.F.R. Secs. 1.136(c) and 1.139 clearly describe the consequences of failing to answer a complaint in a timely fashion. These sections provide for default judgments to be entered [and] for admissions absent an answer . . . . Furthermore, the failure to answer constitutes the waiver of the right to a hearing.") (internal citations omitted).

> 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.

7 C.F.R. § 1.139.

With regard to the filing of answers, the Rules of Practice differ from the Federal Rules of Civil Procedure [hereinafter "Federal Rules"] in one technical yet significant aspect. While the Federal Rules provide that a responding party must "admit or deny the allegations asserted against it by an opposing party,"[6] they also establish that a "party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, *and the statement has the effect of a denial*."[7] The Rules of Practice, contrarily, make no reference to a lack of knowledge or information; they simply direct a respondent to (1) admit, deny, *or explain* each allegation of the complaint and set forth any defenses; (2) admit all facts alleged in the complaint; or (3) admit the jurisdictional allegations and neither admit nor deny the remaining allegations, while consenting to the "issuance of an order without further procedure."[8] The key distinction is that while a defendant in federal court may claim lack of information and in effect "deny" an allegation, a respondent in our administrative proceedings must clearly deny or "otherwise respond" to each allegation as any other response treated will be treated as an admission.[9]

Here, Complainant seeks to take advantage of the disparity between

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[6] FED. R. CIV. P. 7.1(b)(1)(B).
[7] FED. R. CIV. P. 7.1(b)(5) (emphasis added).
[8] 7 C.F.R. § 1.136(b)(1)(2)(3) (2013).
[9] *See* FED. R. CIV. P. 7(b); 7 C.F.R. § 1.136(b) (2013) (emphasis added).

the two rules by suggesting that, because Respondent did not explicitly deny each allegation in the Complaint, Respondent effectively admitted all claims. Specifically, Complainant asserts that Respondent's Answer "admitted, or did not deny, or did not otherwise respond to the material allegations of the complaint" and that "[p]ursuant to the Rules of Practice, those material allegations are deemed to be admitted by the respondent, for the purpose of the instant proceeding" (Mot. Adoption Decision ¶ I.A.), thereby "waiv[ing] the right to a hearing" (Mot. Adoption Decision ¶ I.A.4). Complainant's argument, however, lacks merit as Respondent did admit, deny, or *otherwise explain* each allegation of the Complaint pursuant to Rule 1.136.

The Complaint contains four material "Alleged Violations" not relating to jurisdiction, each of which Respondent either denied or explained. Accordingly, the allegations may not be treated as "admitted" in the current proceeding. In response to Alleged Violation # 3 (*i.e.*, Respondent violated Regulations by "failing to handle 566 guinea pigs as expeditiously and carefully as possible" in mislabeling the containers of guinea pigs as "perishables, not containing live animals"), Respondent conceded that the shipping entity misidentified the containers of guinea pigs but further stated that it was "without sufficient knowledge and information as to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the Complaint, and therefore, neither admits or denies the same, but demands strict proof thereof." With respect to Alleged Violation # 4 (*i.e.*, Respondent violated Regulations by failing to satisfy Standards for humane treatment of guinea pigs by accepting 566 live guinea pigs for shipment more than four hours prior to scheduled conveyance), Respondent answered that it was "without sufficient knowledge and information as to form a belief as to the truth of the allegations . . . and therefore, neither admits or denies the same, but demands strict proof thereof." Similarly, in responding to Alleged Violation # 5 (*i.e.*, Respondent violated Regulations by failing to meet Standards in transporting the animals in "nonconforming primary enclosures"), Respondent stated that it was "without sufficient knowledge and information as to form a belief as to the truth of the allegations . . . and therefore, neither admits or denies the same, but demands strict proof thereof." Respondent also answered to Alleged Violation # 6 (*i.e.*, Respondent violated Regulations by failing to meet

Standards in failing to place 566 live guinea pigs in animal cargo space; failing to place enclosures containing the guinea pigs in the primary conveyance in a way in which they could be removed as soon as possible in an emergency situation; failing to provide the guinea pigs access to food or water for approximately 24 hours; accepting 566 live guinea pigs for transport without adequate food; failing to visually observe the guinea pigs when they were unloaded to ensure that they were receiving enough air for normal breathing; failing to place guinea pigs in an animal holding area upon arrival to Los Angeles, California as quickly as possible) by stating that it was "without sufficient information and belief as to the truth of the allegations . . . and therefore, neither admits or denies the same, but demands strict proof thereof."

Respondent also provided nine "affirmative defenses," one of which ("Tenth Defense") states: "Respondent *denies all allegations not specifically responded to,* and reserves the right to interpose additional defenses, if appropriate." Based upon the substance of Respondent's statements, it is plain that the Answer has, at minimum, explained or otherwise responded to each material allegation of the Complaint.[10] Accordingly, Respondent's pleadings will not be treated as admissions, and Respondent will not be deemed to have waived its right to a hearing.

Complainant cites various cases that, upon analysis of each case in its

[10] In analyzing whether Respondent's statements constitute explanations or responses, the regular and ordinary definitions of the terms "explain," "respond," and "otherwise" will be used. *See* Nat'l Ass'n Home Builders v. Defenders Wildlife, 551 U.S. 644, 672 (2007) ("An agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation'. . .") (internal quotations omitted); Barnhart v. Walton, 535 U.S. 212, 212 (2002) ("Courts grant considerable leeway to an agency's interpretation of its own regulations . . .); Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 179 (1995) (stating that where an act does not define a certain term, that "term should be given its ordinary meaning"). The OALJ accepts the following definitions: (1) *explain* (verb): "to make known," "to make plain or understandable," "to give the reason for or cause of," or "to show the logical development or relationships of;"(2) *respond* (verb): "to say something in return: make an answer," "to react in response," "to show favorable reaction," or "to be answerable;" and (3) *otherwise* (adverb): "in a different way or manner," "in different circumstances," "in other respects," or "if not." *explain*, MERRIAM-WEBSTER.COM (2014), http://www.merriam-webster.com/dictionary/explain (last visited July 15, 2014); *answer*, MERRIAM-WESBTER.COM (2014), http://www.merriam-webster.com/dictionary/answer (last visited July 15, 2014); *otherwise*, MERRIAM-WEBSTER.COM (2014), http://www.merriam-webster.com/dictionary/otherwise (last visited July 15, 2014).

entirety, are either inapplicable or plainly distinguishable from the present case.[11] Complainant cites these cases to support its contention that because "the respondent admitted, or did not deny, or did not otherwise respond to the material allegations of the complaint. . . . those material allegations are deemed to be admitted by the respondent, for the purpose of the instant proceeding."[12] However, as Respondent correctly

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[11] Footnote 2 of Complainant's "Motion for Adoption of Decision and Order by Reason of Default" contains the following parenthetical citations: (1) Spring Valley Meats, Inc., 56 Agric. Dec. 1731 n.9 (U.S.D.A. 1997) (citing Kneeland, 50 Agric. Dec. 1571, 1572 (U.S.D.A. 1991) ("allegations of complaint are deemed admitted where answer does not deny material allegations of complaint"); (2) Henson, 45 Agric. Dec. 2246, 2260 (U.S.D.A. 1986) ("default decision was properly issued where answer failed to deny allegations of complaint"); (3) Guffy, 45 Agric. Dec. 1742, 1747 (U.S.D.A. 1986) ("where answer does not deny allegations of complaint, default decision is properly issued"); (4) Blaser, 45 Agric. Dec. 1727, 1728 (U.S.D.A. 1986) ("answer which admits one allegation of com plaint and fails to respond to other allegations is admission of all allegations in complaint"); (5) Stoltzfus, 44 Agric. Dec. 1161, 1162 (U.S.D.A. 1985) ("answer stating that 'no violation was intended' does not deny or otherwise respond to complaint and pursuant to 7 C.F.R. 1.136(c) is deemed admission of allegations of complaint"); (6) Lucas, 43 Agric. Dec. 1721, 1722, 1725 (U.S.D.A. 1984) ("answer fails to admit, deny, or otherwise respond to allegations of complaint and is deemed admission of allegations of complaint"); (7) Lema, 58 Agric. Dec. 291 (U.S.D.A. 1999) ("where respondent did not deny material allegations of Complaint and expressly admitted carrying 'acidic fruits' aboard aircraft on which he arrived in United States"); (8) Hardin Cnty. Stockyards, Inc., 53 Agric. Dec. 654, 656 (U.S.D.A. 1994) (quoting: "Therefore, as respondent did not deny the allegations in the complaint, that he engaged in the conduct alleged to be prohibited, he is found to have willfully violated the Act. The Secretary's Rules of Practice . . . provide that when a respondent admits the material allegations in the complaint, complainant may seek a decision, as the complainant has done here, without a hearing."); (9) Paul, 45 Agric. Dec. 556, 558-60 (U.S.D.A. 1986) ("default decision was properly issued where respondent failed to file timely answer and in his late answer did not deny material allegations of complaint; by failing to file timely answer and to deny allegations in complaint, respondent is deemed to have admitted violations of the AWA and Regulations alleged in complaint"); (10) Reece, 70 Agric. Dec. 1061 (U.S.D.A. 2011) ("late-filed answer admitted allegations by failing to specifically deny them"); (11) Aull, 50 Agric. Dec. 353 (U.S.D.A. 1991) ("answer did not deny allegations"). The facts in these cases are manifestly distinct from those of the present case. Here, Respondent filed a timely, properly formatted Answer that either denied or otherwise explained—at some points stating that it lacked sufficient information and knowledge to form a belief as to the allegation's truth, which is a commonly accepted response under the Federal Rules of Civil Procedure—each material allegation of the Complaint. The Answer did not expressly admit to any material allegations, and it included a request for hearing per Rule 1.41.

[12] Mot. for Adoption of Decision & Order by Reason Default at 2.

submits in its Response and Objections, the cases "largely address situations in which Respondents failed to respond to a Complaint, failed to timely respond to a Complaint, and/or did not respond to allegations contained within a Complaint."[13] Those situations are markedly different from the case at bar. In attempting to apply those specific, fact-oriented holdings to the present situation, Complainant has misconstrued the language of the Rules of Practice and erred in seeking to employ the cited cases to support a default judgment.

Even had Respondent's Answer lacked the degree of specificity preferred by Complainant, it may have been unethical for Respondent to answer in any other fashion. While the Rules of Practice instruct a respondent to explicitly admit, deny, or explain each material allegation of a complaint, the Model Rules of Professional Conduct and Federal Rules of Civil Procedure provide that a party *may not* admit or deny an allegation without sufficient information or evidence to do so.[14] The Federal Rules go so far as to permit a court to "impose an appropriate sanction on any attorney, law firm, or party that violate[s] the rule or is responsible for the violation."[15] Given that the present allegations occurred in China more than three years prior to the filing of the Complaint, it is unlikely that Respondent would have had the information and evidence necessary to provide a clear, specific, and definite admittance or denial without violating recognized ethical standards.

I find it inconceivable that Rule 1.136 was designed to afford parties an occasion to circumvent hearings via procedural tactics. As prior decisions have explained, "the requirement in the Rules of Practice that

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[13] Resp. & Objs. to Mot. for Adoption Decision & Order by Reason Default at ¶10.

[14] *Compare* 7 C.F.R. § 1.136(b)(1) (2013) (answer must "clearly admit, deny, or explain each of the allegations of the Complaint") *with* MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (1983) (an attorney "shall not knowingly . . . make a false statement of fact or law to a tribunal . . . or . . . offer evidence that the lawyer knows to be false") *and* FED. R. CIV. P. 11(b) (a party or representative "presenting to the court a pleading, written motion, or other paper . . . certifies that to the best of the person's knowledge, information, and belief . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and . . . the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a belief or lack of information").

[15] FED. R. CIV. P. 11(c)(1).

Respondents deny or explain any allegation of the Complaint and set forth any defense in a timely manner is necessary to enable USDA to handle its workload in an expeditious and economical matter."[16] Here, the method by which Respondent answered the Complaint does not hinder judicial efficiency. To the contrary, Complainant's attempt to evade a hearing on the basis of procedural technicalities does so. If, as is suggested by Respondent, Complainant's objective was to compel Respondent to settle by precluding the opportunity for a hearing, a motion for summary judgment might have been a more proper course of action.[17]

I have on several occasions expressed my "displeasure with the [Department's] attempt to 'end run' around the merits of the case with procedural maneuvers."[18] Such an approach is inconsistent with the judicial preference for adjudication and the disfavor of default judgments, and it offends notions of fairness when utilized to impede a

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[16] Noell, 58 Agric. Dec. 130, No. 98-0033, 1999 WL 11230, at *9 (U.S.D.A. Jan. 6, 1999).

[17] "A motion for summary adjudication carries the potential to dispose of an entire claim or portion of it with finality and without trial . . . . While the current rules do not specifically provide for either the use or exclusion of summary judgment, the Judicial Officer has consistently ruled that hearings are futile and summary judgment is appropriate where there is no factual dispute of substance." Peter M. Davenport, *The Department of Agriculture Rules of Practice: Do They Still Serve Both the Department's and the Public's Needs?*, 33 J. NAT'L ASS'N ADMIN. L.J. 567, 583 (2013). As little of the underlying facts in the case appear to be in dispute, the use of a motion for summary judgment would have required Respondent to come forward with its evidence to rebut that advanced by Complainant in support of its motion as once a moving party supports its motion, the burden shifts to the non-moving party, who may not rest upon mere allegation or denial in pleadings, but must set forth specific facts supported by documentary material showing there is a genuine issue for trial. T. W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F. 2d 626, 630 (9th Cir. 1987), Muck v. United States, 3 F. 3d 1378, 1380 (10th Cir. 1993).

[18] Ramos v. U.S. Dep't Agric., 68 Agric. Dec. 60, 74 (U.S.D.A. 2009) (citing Oberstar v. Fed. Deposit Ins. Co., 987 F.2d 494, 504 (8th Cir. 1993); Lion Raisins, Inc. v. U.S. Dep't Agric., 354 F.3d 1072, Case No. CV-F-04-5844 (E.D. Ca. May 12, 2005); *see also* Davenport, *supra* note 17, at 577 ("Despite the frequently expressed, traditional judicial preference for fundamental fairness of adjudicatory proceedings, the Department's reliance upon aggressive use of procedural rules to achieve resolution is generally successful, even where the Department's administrative law judges have sought to afford a respondent a hearing on the merits where they believe good cause existed.").

respondent's right to hearing.[19] Indeed, the Ninth Circuit has cautioned against "ignor[ing] the tenet that cases should be decided on their merits whenever possible" and "fail[ing] to consider the overall fairness of the proceedings given what [is] at stake."[20] Rather than dispose of proceedings on the basis of extraneous procedural issues, my fellow judges and I have repeatedly sought to "afford respondents a hearing on the merits where they felt there was good cause, noting the traditional preference for such disposition. To do otherwise loses sight of the basic tenet that fairness concerns should be paramount where quasi-criminal sanctions may be imposed."[21] As Complainant here requests a civil penalty of $290,000.00[22] for the loss of approximately 560 guinea pigs—a sum sufficiently large to constitute a "quasi-criminal" sanction—I will defer ruling on the motion seeking a default decision and schedule a hearing on the substantive issues.[23]

In deferring my ruling, I acknowledge that Complainant, as representative of the Department, has an obligation to initiate disciplinary proceedings in a fair and straightforward manner.[24] This is

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[19] "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." Oberstar v. Fed. Deposit Ins. Co., 987 F.2d 494, 504 (8th Cir. 1993).

[20] Lion Raisins, Inc., 66 Agric. Dec. at 541-42.

[21] Hamilton, 64 Agric. Dec. 1659, 1664-65 (U.S.D.A. 2005).

[22] While the value of the guinea pigs at the time of their flight is not readily available, current ads suggest a value of approximately $10-30 per animal.

[23] *See* Lion Raisins, Inc., 66 Agric. Dec. at 542 (holding that USDA Judicial Officer abused discretion in entering default judgment against respondent due to "minor deviation from the Rules of Practice with no showing of prejudice to the USDA"). "The refusal to allow the late answer . . . deprived Lion Raisins of the hearing to which it was entitled." *Id.*

[24] *See* Hamilton, 64 Agric. Dec. at 1662 ("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 . . . 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.").

obviously consistent with the Model Rules of Professional Conduct, which provide that attorneys have "a duty to use legal procedure to the fullest benefit of the client's case, but also a duty not to abuse legal procedure."[25]

ORDER

For the above reasons, it is ORDERED:

1. Complainant's Motion for Adoption of Decision and Order by Reason of Default is DEFERRED.

2. Respondent's Objections to the Complainant's Motion is also DEFERRED.

3. Respondent's Request for Oral Argument is DENIED.

4. This matter is set for oral hearing to commence at 9:00 AM Local Time on September 9, 2014 in the United States Department of Agriculture Courtroom, Room 1037 South Building, 1400 Independence Avenue, SW, Washington DC 20250 and will continue from day to day until concluded or recessed.

Copies of this Memorandum Opinion and Order shall be served upon the parties by the Hearing Clerk.

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[25] MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt (1983).

MISCELLANEOUS ORDERS & DISMISSALS

FEDERAL CROP INSURANCE ACT

ALVIN CLARK ATKINSON.
Docket No. 14-0061.
Order of Dismissal.
Filed April 22, 2014.

ADAM ATKINSON.
Docket No. 14-0062.
Order of Dismissal.
Filed April 22, 2014.

HORSE PROTECTION ACT

GARY OLIVER.
Docket No. 13-0113.
Order of Dismissal.
Filed January 17, 2014.

BRICE EDWIN "EDDIE" BAUCOM.
Docket No. 13-0019.
Order Dismissing Complaint.
Filed January 29, 2014.

CHAD BAUCOM.
Docket No. 13-0020.
Order Dismissing Complaint.
Filed January 29, 2014.

RANDALL JONES.
Docket No. 13-0021.
Order Dismissing Complaint.
Filed January 29, 2014.

JOSHUA CLAY MILLS.
Docket No. 13-0032.
Order Dismissing Complaint.
Filed February 6, 2014.

* * *

In re: NICHOLAUS PLAFCAN.[1]
Docket No. 13-0242.
Remand Order.
Filed April 18, 2014.

HPA – Administrative procedure – Remand.

Darlene M. Bolinger, Esq. for Complainant.
Thomas B. Kakassy, Esq. for Respondent.
Default Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.
Remand Order issued by William G. Jenson, Judicial Officer.

REMAND ORDER

On November 7, 2013, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] filed a Default Decision and Order: (1) concluding Mr. Plafcan violated 15 U.S.C. § 1824(2)(A)-(B); (2) assessing Mr. Plafcan a $2,200 civil penalty; and (3) disqualifying Mr. Plafcan for a period of one 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.[2]

The Hearing Clerk served Mr. Plafcan with the Chief ALJ's Default Decision and Order on February 10, 2014,[3] and on February 19, 2014, Mr. Plafcan filed a Petition to Reconsider the Chief ALJ's Default Decision and Order. On March 4, 2014, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed Complainant's Opposition to Petition to Reconsider. On March 4, 2014, Mr. Plafcan filed Appeal to Judicial Officer, and on March 11, 2014, the Administrator filed Complainant's Opposition Response to Appeal

[1] It appears that Mr. Plafcan spells his first name "Nicholas" (Affidavit of Nicholas Plafcan, dated February 19, 2014); however, as no motion to amend the caption of the case has been filed, I have retained the caption as it appears in the Complaint.
[2] Chief ALJ's Default Decision and Order at the second and third unnumbered pages.
[3] Domestic Return Receipt for article number [redacted] 7203.

Petition. On March 14, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon my review of the record, I find the Hearing Clerk did not transmit Mr. Plafcan's Petition to Reconsider the Chief ALJ's Default Decision and Order to the Chief ALJ for his consideration. Therefore, I remand this proceeding to the Chief ALJ to provide him an opportunity to consider and rule on Mr. Plafcan's February 19, 2014, Petition to Reconsider.

My consideration of Mr. Plafcan's timely filed March 4, 2014, Appeal to Judicial Officer is held in abeyance pending the Chief ALJ's consideration of and ruling on Mr. Plafcan's Petition to Reconsider the Chief ALJ's Default Decision and Order.

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ORGANIC FOODS PRODUCTION ACT

KRIEGEL, INC. & LAURANCE KRIEGEL.
Docket No. 14-0027.
Decision and Order Dismissing Petition for Appeal.
Filed January 17, 2014.

PLANT QUARANTINE ACT

UNITED CONTINENTAL HOLDINGS, INC.
Docket No. 14-0063.
Order of Dismissal.
Filed June 17, 2014.

CONTINENTAL AIRLINES, INC.
Docket No. 14-0065.
Order of Dismissal.
Filed June 17, 2014.

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Decisions and Orders] with the sparse case citation but without the body of the order. Default Decisions and Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

ANIMAL WELFARE ACT

KIRBY VANBURCH.
Docket No. 14-0084.
Default Decision and Order.
Filed June 27, 2014.

VANBURCH PRODUCTIONS, LLC, d/b/a KIRBY VANBURCH THEATRE.
Docket No. 14-0085.
Default Decision and Order.
Filed June 27, 2014.

FEDERAL MEAT INSPECTION ACT

BROOKSVILLE MEAT FABRICATION CENTER, INC.
Docket No. 14-0045.
Default Decision and Order.
Filed March 25, 2014.

DARRYL KEITH WRIGHT.
Docket No. 14-0046.
Default Decision and Order.
Filed March 25, 2014.

HORSE PROTECTION ACT

BRADLEY DAVIS.
Docket No. 13-0344.
Default Decision and Order.
Filed January 15, 2014.

DEFAULT DECISIONS

CHRISTOPHER ALEXANDER.
Docket No. 13-0370.
Default Decision and Order.
Filed February 19, 2014.

CONSENT DECISIONS

ANIMAL HEALTH PROTECTION ACT

United Airlines, Inc.
Docket No. 14-0064.
Filed June 17, 2014.

ANIMAL WELFARE ACT

Jammbas Ranch Tours, Inc.
Docket No. 13-0248.
Filed January 7, 2014.

Kenneth H. Schroeder.
Docket No. 13-0362.
Filed January 15, 2014.

Beverly Ann Fields, an individual D/B/A B & B Kennel.
Docket No. 14-0023.
Filed January 15, 2014.

Real Pets Corporation.
Docket No. 14-0001.
Filed March 6, 2014.

Rachel Kafka.
Docket No. 13-0202.
Filed March 11, 2014.

Gloria Lee Gilbert, an individual D/B/A A Little Petting Zoo and All Events Entertainment.
Docket No. 13-0294.
Filed March 19, 2014.

Roger Gilbert, an individual D/B/A A Little Petting Zoo and All Events Entertainment.
Docket No. 13-0295.
Filed March 19, 2014.

CONSENT DECISIONS

Jeffrey W. Ash, an individual D/B/A Ashville Game Farm; and Ashville Game Farm, Inc., a New York corporation.
Docket No. 12-0296.
Filed April 15, 2014.

The University of Alaska Fairbanks, a public educational institution.
Docket No. 14-0082.
Filed June 5, 2014.

FEDERAL MEAT INSPECTION ACT

Mongiello Italian Cheese Specialties, LLC, D/B/A Formaggio Italian Cheese Specialties.
Docket No. 14-0032.
Filed February 12, 2014.

HORSE PROTECTION ACT

Robert Jones.
Docket No. 13-0369.
Filed January 3, 2014.

Tim Gray, D/B/A Southern Comfort Facilities.
Docket No. 13-0296.
Filed January 9, 2014.

Jack G. Heffington.
Docket No. 12-0199.
Filed January 14, 2014.

Bill Gray.
Docket No. 13-0297.
Filed January 14, 2014.

James Wayne Dean, D/B/A Wayne Dean Stables.
Docket No. 13-0231.
Filed January 23, 2014.

Sandra L. Shumate-Tysor.
Docket No. 13-0298.
Filed January 23, 2014.

Kasey Kesselring.
Docket No. 13-0250.
Filed January 24, 2014.

Wilsene Moody.
Docket No. 12-0613.
Filed February 6, 2014.

O & W Moody, Ltd., Co.
Docket No. 12-0613.
Filed February 10, 2014.

McCleish C. Benham.
Docket No. 13-0345.
Filed February 12, 2014.

Richard Evans.
Docket No. 11-0214.
Filed March 10, 2014.

David Mullis & Rebeca Mullis.
Docket No. 13-0080.
Filed March 11, 2014.

Mark West.
Docket No. 14-0058.
Filed March 11, 2014.

Jeanne Ann Rea.
Docket No. 13-0253.
Filed April 17, 2014.

CONSENT DECISIONS

Dale Watts.
Docket No. 13-0254.
Filed April 17, 2014.

Pioneer Stables, LLC.
Docket No. 13-0255.
Filed April 17, 2014.

Nancy Groover.
Docket No. 14-0013.
Filed April 28, 2014.

Anthony D. Allen, D.B.M.
Docket No. 14-0081.
Filed May 2, 2014.

Samuel Martin & Rae Martin, D/B/A Rae Martin Stables.
Docket No. 13-0283.
Filed May 6, 2014.

William Bradley Beard.
Docket No. 13-0349.
Filed May 6, 2014.

Tom Ware.
Docket No. 13-0024.
Filed June 3, 2014.

Franklin LaRue McWaters.
Docket No. 12-0603.
Filed June 23, 2014.

PLANT PROTECTION ACT

Librado Pina, Inc.
Docket No. 14-0044.
Filed March 26, 2014.

United Airlines, Inc.
Docket No. 14-0064.
Filed June 17, 2014.