

# AGRICULTURE DECISIONS

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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

## AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in AGRICULTURE DECISIONS.

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

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**AGRICULTURAL MARKETING AGREEMENT ACT****COURT DECISIONS****CAL-ALMOND, INC. v. THE UNITED STATES DEPARTMENT OF AGRICULTURE.****No. CV-F-98-5049 REC SMS.****Filed August 13, 1998.****Almonds - First amendment - Freedom of speech - Freedom of association.**

Plaintiffs sought a declaration that assessments for funding almond advertising and promotion required by the Almond Marketing Order (7 C.F.R. pt. 981) violates plaintiffs' First Amendment rights to freedom of speech and freedom of association under the United States Constitution. The United States District Court for the Eastern District of California granted USDA's motion to dismiss plaintiffs' complaint on the ground that *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997), which held a similar marketing order program not to violate the First Amendment, controls the outcome of the case.

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA****ORDER GRANTING DEFENDANT'S MOTION TO DISMISS****I. Introduction**

On January 13, 1998, Plaintiff Cal-Almond, Inc. ("Cal-Almond") and eleven other almond handlers (collectively, "Plaintiffs") filed a complaint against the United States Department of Agriculture ("USDA" or "Defendant") seeking, inter alia, a declaration that the Almond Marketing Order ("AMO"), 7 C.F.R. Part 981, violates Plaintiffs' First Amendment rights under the United States Constitution. On May 4, 1998, this court heard Defendant USDA's motion to dismiss the complaint on the grounds that the recent Supreme Court decision in *Glickman v. Wileman Bros. & Elliot, Inc.*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 2130 (1997), which held a similar marketing order program not to violate the First Amendment, controls the outcome of this case. For the following reasons, this court grants the USDA's motion, and denies Plaintiffs leave to amend.

## II. Background

### A. The Almond Marketing Order

The Almond Marketing Order, 7 U.S.C. Part 981, was promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act (“AMAA”), 7 U.S.C. §§ 601, *et seq.*, with the goal of stabilizing the almond industry. *See* Defendant’s Opening Brief at 2. The Almond Order is administered by an Almond Board, consisting of ten members, who are nominated by almond growers and handlers and appointed by the Secretary of Agriculture. *See* 7 C.F.R. §§ 981.41; 981.441.

All handlers of almonds, who are regulated under the Order, are liable for assessments to finance the administrative expenses of the Board, and to cover the cost of research, generic advertising, and promotion. The assessment rate, which can vary annually, is currently set at 2 cents per pound of assessable almonds. *See* 7 C.F.R. § 981.343, 62 Fed. Reg. 43459.

Plaintiffs challenge that part of the AMO that imposes assessments for the funding of almond advertising and promotion. The promotion program is as follows. A portion of the assessment per pound of almonds went to the Almond Board, who then used it to fund generic promotion and advertisement of California almonds. However, at all relevant times, Plaintiffs could obtain credit against that portion of the assessment that went to fund generic advertising by spending money to promote their own brand of almonds in certain, specified ways. This program of advertising-promotion credits took two forms: (1) the “creditable” program, in place from 1986 - 1993; and (2) the “credit-back” program, in place from 1993 to the present.<sup>1</sup> The regulation governing the “creditable” program is 7 C.F.R. § 981.441 (1990). The regulation governing the “credit-back” program is 7 C.F.R. § 981.441 (1996). The court now turns to a discussion of these programs.

#### 1. The “Creditable” Program

Under the “creditable” program, almond handlers could obtain 100% credit against the generic-advertising assessment. However, certain kinds of advertising were not eligible for the credit. For example, under the “creditable” program, no credit was available for money spent to advertise products containing almonds, unless the product contained at least 50% raw shelled almonds by weight, and

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<sup>1</sup>Plaintiffs do not challenge assessments imposed after 1995.

unless the almond product displayed the handler's own brand. The program also gave no credit for money spent on advertising when more than two complimentary branded products were included in an advertisement, nor when the advertisement promoted not only California almonds, but also non-complementary commodities or products, or competing nuts. Finally, no credit was available for money spent promoting retail outlets.

## 2. The "Credit-Back" Program

The "credit-back" programs simultaneously expanded the ways in which almond handlers could receive credit for promoting their own brands and reduced the amount of credit it was possible to receive.

Generally, the "credit-back" program reduced the 100% credit to 2/3rds credit. The handlers therefore had to spend \$150,000 to earn the \$100,000 credit. The "credit-back" program removed the restrictions on credit for promoting almond-containing products, but limited the credit obtainable by the general 2/3rds, as well as by a function of the percentage of almonds in the product. For example, if a handler spent \$150,000 to promote a product containing 20% almonds, the amount of the credit would be as follows: \$150,000 reduced by 2/3rds = \$100,000 x 20% = \$20,000.

Although the "credit-back" program expanded the promotions that could receive credit, restrictions remained. For example, a handler could not obtain credit for advertising in a publication that targeting the farming or the grower trade. Also, there was no credit available for billboard advertisements, unless the advertisement directed consumers to a handler-operated outlet offering direct purchase of almonds. Finally, travel expenses were not creditable even if the travel involved meeting with a buyer to convince him to purchase almonds.

In addition to these specific restrictions, the program provided generally that a handler could not receive credit unless it was "appropriate when compared to accepted professional practices and rates for the type of activity conducted." 7 C.F.R. § 981.441(e)(1) (1996). "The clear and evident purpose of each activity [had to] be to promote the sale, consumption, or use of California almonds, and nothing . . . [could] detract from this purpose." *Id.* at (e)(2). Whether a particular promotion could be eligible for credit was decided initially by the Almond Board Staff. *See id.* at (e)(6). That initial decision could be appealed to the public relations and advertising committee of the Board, and then to the Secretary of Agriculture. *See id.*

## B. Plaintiffs' Claim For Relief

Plaintiffs allege that the assessment program violates their First Amendment rights for three reasons. First, they allege that the restrictions on Plaintiffs' advertising and promotion violated Plaintiffs' rights to freedom of speech and association. Second, they allege that Board approval of advertising constituted a prior restraint on speech. Third, both the "creditable" and the "credit-back" advertising programs placed unconstitutional conditions on a government benefit.

Plaintiffs' primary concern with both the "creditable" and the "credit-back" programs is that the types of advertising on which credit was allowed were essentially useless to them, because Plaintiffs sell mostly processed almonds to be used as ingredients in other products. The only handlers who can make good use of the credits are sellers of packaged snack almonds, such as Blue Diamond. Forcing them to contribute to the generic advertising fund, Plaintiffs allege, had two effects: (1) it reduced the overall assessments on handlers who sell mostly packaged snack almonds, such as Blue Diamond; and (2) it forced handlers who sell mostly ingredient almonds, such as Plaintiffs, to match the snack-almond producers' advertising budget. According to Plaintiffs, the powerful Blue Diamond company influenced the "creditable" and the "credit-back" advertising programs to serve exactly this purpose. Moreover, Plaintiffs are not the only ones that advance this theory. Both the Administrative Law Judge below and the Ninth Circuit found that the advertising programs at issue were designed to benefit Blue Diamond. See ALJ Opinion at 10-11, attached as exhibit to Plaintiffs' complaint; *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.3d 429, 438-440 (9th Cir. 1994).

## C. Cal-Almond I

The present matter does not represent the first time this court has heard a First Amendment challenge to this AMO. On February 20, 1991, a number of different almond handlers - plus some of the same handlers involved in this case, as will be discussed more fully below - filed a complaint that attacked the AMO on a number of grounds, including that it violated the First Amendment. The ALJ and the Judicial Officer for the Secretary of Agriculture both ruled that the AMO did not violate the First Amendment. This court affirmed that ruling based on the following reasoning:

The court concludes that the creditable advertising assessments do not implicate First Amendment rights because plaintiffs are not 'compelled' to

advertise. Section 608c(6)(I) authorizes marketing orders to provide for 'production research [and] marketing research and development projects,' including 'projects . . . provid[ing] for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . . The Almond Marketing Order contains regulations, duly promulgated through formal on-the-record rulemaking, which authorize the Almond Board to establish market development projects including paid advertising, 7 C.F.R. § 981.14, to credit a portion of a handler's direct expenditures for market promotion, including paid advertising, for the sale of almonds, and to prescribe appropriate rules and regulations as are necessary to effectively regulate the crediting of the pro rata expense assessment of handlers, 7 C.F.R. § 981.41(c). The regulations do not permit plaintiffs to receive a credit against their annual assessment unless their advertising complies with the regulations regarding creditable advertising, but do not compel plaintiffs to participate in advertising because plaintiffs are otherwise free to engage in any advertising they wish without interference with the Almond Board. As the Department argues, however, the Board is not obligated to subsidize any and all advertising that plaintiffs choose to engage in.

*Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, No. CV-F-91-122 REC, slip op. at 7 (E.D. Cal. June 3, 1992) (order affirming the decision of the Secretary of Agriculture).

The Ninth Circuit reversed this court's decision in a published opinion. See *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.3d 429 (9th Cir. 1993). The Ninth Circuit first found that the AMO regulations implicated the plaintiffs' First Amendment rights because they "compelled" the plaintiffs to speak, either by forcing them to subsidize generic advertising, or by forcing them to choose creditable advertising. See *id.* at 434-436. After finding that the plaintiffs' First Amendment rights were implicated, the Ninth Circuit subjected the regulations to the test announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). The Ninth Circuit concluded that the AMO regulations failed the *Central Hudson* test because the regulations did not directly advance the USDA's interests in assisting, improving, or promoting the marketing, distribution, and consumption of almonds. See *id.* at 436-439.

On October 6, 1996, the Supreme Court denied certiorari, see *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 117 S. Ct. 72 (1996), but after the *Wileman* decision, the Court granted certiorari, vacated the judgment of the Ninth Circuit, and

instructed the Ninth Circuit to reconsider its decision in light of *Wileman*. This court received what it thought was the official mandate of the Ninth Circuit instructing it to dismiss the First Amendment claim of the *Cal-Almond* plaintiffs. This court did so on September 16, 1997. However, this court reconsidered and vacated that order on October 1, 1997, because pursuant to Federal Rule of Appellate Procedure 41 and 42, this court did not have jurisdiction in this matter. The Ninth Circuit on March 24, 1998, issued an order granting the plaintiffs' motion for a stay of mandate until June 1, 1998. On July 22, 1998, the mandate from the Ninth Circuit issued, instructing this court to dismiss the First Amendment claims in *Cal-Almond I*. The Ninth Circuit cited *Wileman* in support of its mandate.

Four of the 12 Plaintiffs in this matter, Cal-Almond, Gold Hills Nut Co., Frazier Nut Farms, Inc., and Carlson Farms, are also parties to *Cal-Almond I*. For that reason, these four plaintiffs are not challenging the "creditable" program.

### III. Analysis

Although the Ninth Circuit did not issue a published opinion with its mandate, this court believes that it is clear that the Ninth Circuit has found that *Wileman* bars a First Amendment challenge to the "creditable" advertising program. Because the "creditable" program is legally indistinguishable from the "credit-back" program, as far as the *Wileman* analysis is concerned, this court concludes that the Ninth Circuit would also find that the *Wileman* case bars the challenges to the "credit-back" program. Accordingly, this court will dismiss the First Amendment challenges to both programs.

### IV. Conclusion

In accordance with the foregoing, IT IS ORDERED that Plaintiffs' complaint is DISMISSED. Leave to amend is DENIED, because in the face of a controlling Supreme Court decision, amendment would be futile. The Clerk of the court is directed to enter judgment in favor of Defendant.

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**MIDWAY FARMS v. UNITED STATES DEPARTMENT OF AGRICULTURE.****No. 98-16592.****Filed August 24, 1999.****(Cite as 188 F.3d 1136 (9<sup>th</sup> Cir.))****Raisin order - Handler - Administrative law judge powers.**

The United States Court of Appeals for the Ninth Circuit concluded that, where the Raisin Administrative Committee took the position that Midway Farms was a handler and subject to the Raisin Order (7 C.F.R. pt. 989), Midway Farms had standing to file an administrative petition with the Secretary of Agriculture under 7 U.S.C. § 608c(15)(A) despite Midway Farms' position that it was not a handler subject to the Agricultural Marketing Agreement Act. The Ninth Circuit remanded to the Secretary of Agriculture with instructions to rule on the merits of Midway Farms' 15(A) petition and held that, on remand, the administrative law judge has inherent powers to conduct hearings *in camera*, to allow Midway Farms to submit redacted materials, and to impose protective conditions upon any materials submitted by Midway Farms for *in camera* review.

**UNITED STATES COURT OF APPEALS  
NINTH CIRCUIT**

Before: REINHARDT, O'SCANNLAIN, and FLETCHER, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether a raisin processor has standing to file an administrative petition under the Agricultural Marketing Agreement Act challenging the Raisin Administrative Committee's determination that it is a "handler" subject to the Federal Raisin Marketing Order.

**I**

Midway Farms, Inc. ("Midway") is a California corporation that purchases off-grade raisins and various raisin residue matter that raisin handlers grade out of the raisins intended for human consumption. Midway processes these products into distillery material, cattle feed, and concentrate material. It does *not* sell

“raisins” as that term is defined in 7 C.F.R. § 989.5.<sup>1</sup>

The United States Department of Agriculture (“Department”) is responsible for the promulgation and enforcement of the Federal Raisin Marketing Order (“Raisin Marketing Order”) pursuant to 7 U.S.C. § 601, *et seq.* Under the Raisin Marketing Order, raisin handlers must account for the disposition of off-grade raisins, other failing raisins, and raisin residue material. To administer the marketing order regulating the handling of California raisins, *see* 7 C.F.R. Part 989, the Secretary of Agriculture (“Secretary”) established a Raisin Administrative Committee (“Committee”). *See id.* § 989.26.

On June 13, 1994, the Committee sent Midway a letter requiring it to complete and to submit certain forms because it was a processor and, as such, a “handler” subject to the Raisin Marketing Order. *See id.* §§ 989.13, 989.15.<sup>2</sup> Midway, however, took the position that it was not a raisin “handler” because that term encompasses only “first handlers,” and not those who purchase from handlers.<sup>3</sup> Nevertheless, to avoid possible penalties for non-compliance with the Marketing Order, *see* 7 U.S.C. § 608c(14), Midway began filling out the forms demanded by the Committee and has continued to comply with the Committee’s demands to the present date.

On July 1, 1994, Midway filed an administrative petition with the Secretary

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<sup>1</sup>“Raisins” means grapes of any variety grown in the area, from which a significant part of the natural moisture has been removed by sun-drying or artificial dehydration, either prior to or after such grapes have been removed from the vines.” *Id.*

<sup>2</sup>*Handler* means:

(a) Any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: *Provided*, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) A producer who, in his capacity as a producer, blends raisins entirely of his own production in the course of his usual and customary practices of preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels; or (3) a dehydrator who, in his capacity as a dehydrator, blends raisins entirely of his own manufacture.

7 C.F.R. § 989.15.

<sup>3</sup>Midway argued alternatively that the Raisin Marketing Order, to the extent it does cover Midway, is contrary to the Agricultural Marketing Agreement Act, 7 U.S.C. § 601, *et seq.*

pursuant to 7 U.S.C. § 608c(15) (A), seeking a declaration, *inter alia*, that it is not subject to the Raisin Marketing Order. Midway instituted this proceeding in part because the filing of an administrative petition tolls civil penalties pending its resolution so long as the petition is filed and prosecuted in good faith. *See id.* § 608c(14)(B). The Department filed a motion to dismiss the petition, arguing that the plain language of section 608c(15)(A) made clear that only a “handler” could file an administrative petition and that Midway did not qualify because it was claiming *not* to be a handler. Curiously, the Department did not discuss the Committee’s determination that it was indeed a “handler” for purposes of the Marketing Order.

The Secretary then subpoenaed various documents from Midway, which in turn provided them with the names of its customers and the sales prices redacted. Fearing that the Secretary’s representatives were untrustworthy, Midway refused to provide unredacted documents to the Secretary, explaining that, if the names of its buyers and its sales prices were made public, those from whom it purchased off-grade raisins would contract directly with those to whom it sold, thereby cutting it out as the middleman. The Secretary deemed the redacted documents nonresponsive. Midway then offered to allow the Administrative Law Judge (“ALJ”) to review the unredacted documents *in camera* and specifically agreed to permit the manager of the Committee to look at them. The ALJ initially approved this proposal, but later concluded that he lacked authority to review documents *in camera*.

On May 10, 1996, the ALJ dismissed the petition on the basis that Midway could not show that it was a “handler” under section 608c(15)(A). Midway appealed to the Secretary’s Judicial Officer, who determined that, because it denied being a handler subject to the Marketing Order, it lacked standing to bring an administrative petition. The Judicial Officer further concluded that the ALJ, in initially agreeing to review documents *in camera*, erred in giving credence to Midway’s claim that the Secretary’s agents were untrustworthy and would leak information to Midway’s competitors.

Midway subsequently filed a petition for review in the United States District Court of the Eastern District of California pursuant to 7 U.S.C. § 608c(15)(B). It argued that the ALJ and Judicial Officer erred in concluding that it lacked standing to file an administrative petition and also sought a declaration that the ALJ had the authority to review documents *in camera*.

Midway filed a motion for summary judgment in which it conceded that only a “handler” can file an administrative petition with the Secretary and argued that, for purposes of section 608c(15)(A), it *was* a “handler” because it was a person “to whom a marketing order is sought to be made applicable.” 7 C.F.R. § 900.51. The

district court denied this motion. Noting that section 608c(15)(A) limits its application not just to any handler, but more specifically to “any handler *subject to an order*,” 7 U.S.C. § 608c(15)(A) (emphasis added), the district court concluded that Midway was not a “handler subject to an order” because Midway itself claimed *not* to be subject to the Marketing Order and because, notwithstanding the Committee’s determination to the contrary, the Secretary had not yet determined that it was subject to the Marketing Order. The court also denied Midway’s motion for summary judgment on its claim that the ALJ had authority to review documents *in camera*, noting that Midway failed to cite any supporting legal authority. Acting *sua sponte*, and after giving Midway an opportunity to respond, the district court granted summary judgment in favor of the Department.

Midway appeals the grant of summary judgment in favor of the Department as well as the denial of its motion for summary judgment on its claim that the ALJ had authority to review documents *in camera*.

## II

The operative statute allows “[a]ny handler subject to an order” to file an administrative petition with the Secretary. 7 U.S.C. § 608c(15)(A).<sup>4</sup> The term “handler” is defined by regulation for purposes of section 608c(15)(A) as “any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable.” 7 C.F.R. § 900.51(i).<sup>5</sup> Neither party contends, for purposes of this action, that Midway is a “person who, by the terms of a marketing order, is subject thereto.” Thus, the sole question is whether Midway is a “person . . . to whom a marketing order is sought to be made applicable.” 7 C.F.R. § 900.51(i).

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<sup>4</sup>Section 608c(15)(A) provides in relevant part that:

Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

*Id.* § 608c(15)(A).

<sup>5</sup>Courts must defer to an agency regulation defining a statutory term unless contrary to clearly expressed congressional intent. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Midway contends that, notwithstanding the fact that it is seeking a declaration that it is *not* a “handler” as defined in 7 C.F.R. § 989.15, it is deemed a “handler” for purposes of 7 U.S.C. § 608c(15) and 7 C.F.R. § 900.15(i) because the Committee sought to make it subject to the Raisin Marketing Order. The Department concedes that the Committee sought to apply the Raisin Marketing Order to Midway, but regards that fact as irrelevant. According to the Department, the Committee is powerless to apply the Marketing Order because it is the Secretary, rather than the Committee, who makes the final determination on handler status. The Department contends that Midway is not a handler for purposes of section 608c(15)(A) unless the *Secretary* seeks to make the Raisin Marketing Order applicable to Midway.

The Department’s rather strained argument depends crucially on the curious contention that the Committee does not have authority to seek to apply the Raisin Marketing Order to Midway. However, the Department does not cite any evidence in the record or legal authority (other than the district court’s order) for this proposition. A review of the Secretary’s own regulations reveals that the Committee has the power to “administer the terms and provisions of [the Raisin Marketing Order],” 7 C.F.R. § 989.35(a). The authority to “administer” the Raisin Marketing Order is essentially the power to apply the Order. In addition, the Committee has the power to “make rules and regulations to effectuate the terms and provisions of,” to “recommend to the Secretary amendments to,” and to “receive, investigate, and report to the Secretary complaints of violations of” the Raisin Marketing Order. *Id.* § 989.35.<sup>6</sup>

The Secretary’s own regulations make clear that the Committee *does* have the authority to apply the Raisin Marketing Order. Because it cannot be controverted that the *Committee* did in fact seek to apply the Raisin Marketing Order to Midway, we conclude that Midway is a person to whom a Marketing Order has been sought to be made applicable and is thus a “handler,” if only for purposes of section 608c(15). Accordingly, we hold that Midway has standing to file an

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<sup>6</sup>Other of the Secretary’s regulations vest the Committee with similar authority to apply the Marketing Order: “Each handler shall, upon request of the committee, file promptly with a committee a certified report, showing such information as the committee shall specify with respect to any raisins which were held by him”; “Each handler shall submit to the committee in accordance with such rules and procedures as are prescribed by the committee, with the approval of the Secretary, certified reports, for such periods as the committee may require, with respect to his acquisitions of each varietal type of raisins during the particular period covered by such report . . . .” *Id.* § 989.73. Also, the Committee has the duty “to investigate compliance and to use means available to it to prevent violations of [the Raisin Marketing Order].” *Id.* § 989.36.

administrative petition with the Secretary under section 608c(15)(A). Of course, we express no views on the ultimate merits of whether Midway is a “handler” for purposes of the Raisin Marketing Order; our conclusion is limited to the narrow question of standing to petition.

### III

For the foregoing reasons, we remand to the Secretary with directions to rule on the merits of Midway’s petition. See 7 U.S.C. § 608c(15)(B) (“If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.”). Upon remand, it is within the inherent powers of the ALJ, in his discretion, to conduct hearings *in camera* upon showing of good cause. Cf. *Norinsberg Corp. v. United States Dep’t of Agric.*, 47 F.3d 1224, 1228 (D.C. Cir. 1995); *Morgan v. Secretary of Hous. & Urban Dev.*, 985 F.2d 1451, 1456 (10<sup>th</sup> Cir. 1993). To preserve the meaningfulness and efficacy of any *in camera* hearings, the ALJ may allow Midway to submit redacted materials or may impose protective conditions upon any materials submitted by Midway for *in camera* review. Cf. 7 C.F.R. § 900.55(c) (setting forth the powers of ALJs, authorizing them to rule upon motions and requests, to examine witnesses and receive evidence, to admit or exclude evidence, and to “[d]o all acts and take all measures necessary for the maintenance of order at the hearing and the efficient conduct of the proceeding”).

REVERSED and REMANDED.

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**KREIDER DAIRY FARMS, INC. v. GLICKMAN.**

**Nos. 98-1906, 98-1982, 98-1983.**

**Filed August 27, 1999.**

**(Cite as 190 F.3d 113 (3d Cir.))**

**Milk marketing order – Appellate jurisdiction – Remand order – Appeal of administrative law judge’s decision – Untimely appeal of Judicial Officer’s decision.**

Kreider Dairy Farms, Inc., appealed from a 1996 District Court order remanding the proceeding to the Secretary of Agriculture and the Secretary of Agriculture appealed from a 1998 District Court order vacating the Judicial Officer’s determination that Kreider’s administrative appeal on remand was

untimely and remanding the case to the Judicial Officer for a decision on the merits. The United States Court of Appeals for the Third Circuit stated that, while normally a remand order is not a final order subject to immediate appellate review under 28 U.S.C. § 1291, immediate appellate review is available when a District Court finally resolves an important legal issue and denial of appellate review before remand to the agency would foreclose appellate review. The Third Circuit dismissed Kreider's appeal of the 1996 District Court Order, holding that it had no jurisdiction because the District Court's 1996 remand order was not subject to immediate appeal. However, the Third Circuit held that it did have jurisdiction over the Secretary of Agriculture's appeal of the 1998 District Court Order because the District Court's 1998 decision resolves an issue of law that may evade review if immediate appeal is not permitted. On the merits, the Third Circuit found that the District Court did not have jurisdiction over Kreider's February 2, 1998, complaint in which Kreider sought review of the ALJ's decision because the ALJ's decision was not a final agency decision subject to judicial review. The Third Circuit found that the District Court did not have jurisdiction over Kreider's April 3, 1998, amended complaint because Kreider did not have a viable theory upon which to relate the amended complaint back to the February 2, 1998, complaint, and pursuant to 7 U.S.C. § 608c(15)(B), the amended complaint was an untimely appeal of the Judicial Officer's January 12, 1998, decision.

### UNITED STATES COURT OF APPEALS THIRD CIRCUIT

Before: SLOVTRER and MANSMANN, Circuit Judges, and WARD, \* District Judge.

#### OPINION OF THE COURT

MANSMANN, Circuit Judge.

These appeals implicate important issues related to our appellate jurisdiction in the context of a dispute over dairy regulations. Specifically, we must determine the extent to which our jurisdiction extends to District Court orders remanding for further factual findings in administrative proceedings in light of *Forney v. Apfel*, 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269 (1998). We hold today that because the discussion on appellate jurisdiction in *Forney* is founded upon specific language located within the Social Security Act, the holding in *Forney* does not extend to all District Court orders remanding for further administrative proceedings. We also reaffirm our longstanding rule that we lack jurisdiction over District Court orders remanding for further administrative findings unless an important legal issue has been finally determined which would evade appellate

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\*Honorable Robert J. Ward, United States District Judge for the Southern District of New York, sitting by designation.

review in the absence of an immediate appeal.

Applying these principles to the appeals before us, we find that we lack jurisdiction over the appeal filed by Kreider Dairy Farm, Inc. ("Kreider") in 1998 from a 1996 District Court order which remanded for further factual findings relating to the merits of the dairy dispute. Accordingly, we will dismiss Kreider's appeal (No. 98-1982) for lack of jurisdiction. Under these same principles, however, we find that we do have appellate jurisdiction over the timely appeal filed by the Secretary of the United States Department of Agriculture ("USDA") from the District Court's August 10, 1998 order reversing a USDA determination that Kreider's administrative appeal on remand was untimely (No. 98-1906) and remanding for further administrative proceedings on the merits.

With respect to the merits of the USDA's appeal, we hold that the District Court erred in exercising jurisdiction over Kreider's appeal and accordingly will vacate the District Court's 1998 Order. Finally, we will dismiss summarily Kreider's "cross-appeal" from the District Court's August 10, 1998 order (No. 98-1983) as Kreider has informed us that it never intended to cross-appeal from that order and has not pursued that cross-appeal in its briefing or at oral argument before us.

## I.

These appeals come to us after a long and tortured procedural history that spans nearly a decade. Because this procedural history is central to our decision, we shall discuss it in some detail. By contrast, because we do not reach the merits of the parties' dispute over the dairy regulations at issue in these appeals, the underlying factual background that forms the basis of that dispute will be discussed only generally.<sup>1</sup>

### A.

Kreider is a dairy farm corporation that produces and distributes packaged kosher fluid milk within the New York-New Jersey milk marketing area with the aid of two independent subdistributors. The production and sale of milk within the

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<sup>1</sup>For a more detailed discussion of the merits of the dairy regulation dispute see *Kreider Dairy Farms, Inc. v. Glickman*, No. Civ. A. 95-6648, 1996 WL 472414 (E.D. Pa. August 15, 1996); *In re: Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M-1-2, 1995 WL 598331 (U.S.D.A. September 28, 1995).

New York-New Jersey milk marketing area is regulated by Order 2 which was promulgated under the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 601 *et seq.* Under Order 2, certain milk producers can qualify for producer-handler status which entitles them to an exemption from paying certain fees in connection with the sales of milk. Kreider first applied for producer-handler status under Order 2 by letter dated December 19, 1990.

The Market Administrator ("MA") responsible for administering Order 2 denied Kreider's application for producer-handler status, finding that Kreider did not meet the producer-handler requirements due to Kreider's use of independent subdistributors. *See generally* 7 C.F.R. § 1002.12(b) (1999) (setting forth exclusive control requirements for producer-handler exemption). On December 23, 1993, Kreider challenged the MA's decision by filing a petition with the USDA pursuant to section 608c(15)(A) of the AMAA.

After a December 14, 1994 hearing, an Administrative Law Judge ("ALJ") issued a decision holding that Kreider was entitled to producer-handler status under Order 2. The Agricultural Marketing Service appealed to a Judicial Officer ("JO") of the USDA, who acts on behalf of the Secretary of Agriculture in all adjudicative matters. *See* 7 C.F.R. § 2.35 (1999). The JO reversed the ALJ's decision, holding that Kreider was not entitled to producer-handler status. *See In re: Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M-1-2, 1995 WL 598331 (U.S.D.A. September 28, 1995).

On October 18, 1995, Kreider filed a complaint pursuant to the AMAA in the District Court challenging the JO's decision. *See* AMAA, 7 U.S.C. § 608c(15)(B) (1994). By opinion and order filed August 15, 1996 ("1996 Order"), the District Court denied the parties' cross motions for summary judgment and remanded for further administrative findings on whether Kreider was "riding the pool," *i.e.*, whether Kreider was the type of dairy for which producer-handler status should be denied pursuant to the promulgation history of the producer-handler exemption. *See Kreider Dairy Farms, Inc. v. Glickman*, No. Civ. A. 95-6648, 1996 WL 472414 (E.D. Pa. August 15, 1996). Neither Kreider nor the USDA appealed the District Court's 1996 Order at that time.

## B.

On remand, the ALJ held a hearing and issued a decision on August 12, 1997 holding that Kreider was "riding the pool" and therefore was not entitled to producer-handler status. Under applicable regulations, the ALJ's decision becomes effective thirty-five (35) days after service upon the parties unless appealed to the JO thirty days (30) after service. *See* 7 C.F.R. §§ 900.64(c), 900.65(a) (1999). The

ALJ's decision was served on Kreider on August 15, 1997.

On September 12, 1997, Kreider moved for an extension of time to file its appeal from the ALJ's August 12, 1997 decision. The JO granted Kreider an extension until September 19, 1997. On September 19, 1997, Kreider sent its appeal via Federal Express next day delivery. The Office of the Hearing Clerk stamped Kreider's appeal as received on September 25, 1997.

On January 12, 1998, the JO issued an opinion denying Kreider's administrative appeal as untimely because, under applicable regulations, an administrative appeal is deemed to be filed "when it is postmarked, or when it is received by the hearing clerk." 7 C.F.R. § 900.69(d) (1999). The JO held that because the term "postmarked" requires a United States Postal Service postmark, a date label generated by Federal Express does not toll the appeal period. *See In re: Kreider Dairy Farms, Inc.*, No. 94 AMA Docket No. M-1-2, 1998 WL 25746, at \*8 (U.S.D.A. January 12, 1998). Kreider filed a timely motion for reconsideration.

While Kreider's motion for reconsideration was pending before the JO, Kreider filed a complaint with the District Court on February 2, 1998 challenging the ALJ's August 12, 1997 decision and noting that the JO had denied its appeal as untimely.<sup>2</sup> The JO denied Kreider's motion for reconsideration on February 20, 1998. On April 3, 1998, Kreider filed an amended complaint challenging the JO's January 12, 1998 and February 20, 1998 decisions. The USDA filed a motion to dismiss.

By opinion and order entered August 10, 1998 ("1998 Order"), the District Court denied the USDA's motion to dismiss, vacated the JO's January 12, 1998 and February 20, 1998 decisions, and remanded for the JO to consider the merits of Kreider's appeal of the ALJ's August 12, 1997 decision. *See Kreider Dairy Farms, Inc. v. Glickman*, No. 98-518, 1998 WL 481926 (E.D. Pa. August 10, 1998). The District Court held that because Kreider's April 3, 1998 amended complaint challenging the JO's decisions related back to Kreider's initial complaint

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<sup>2</sup>An appeal to the District Court must be taken within twenty days of the entry of the administrative decision. *See* 7 U.S.C.A. § 608c(15)(B) (1994). If Kreider had filed a complaint on February 2, 1998 challenging the JO's January 12, 1998 decision rather than a motion for reconsideration, Kreider's February 2, 1998 complaint would have constituted a timely appeal of that decision because the twentieth day after entry, February 1, 1998, fell on a Sunday. As Kreider conceded before the District Court, however, the District Court lacked jurisdiction over Kreider's February 2, 1998 complaint challenging the ALJ's August 12, 1997 decision because that decision was not a final administrative determination. *See Kreider*, 1998 WL 481926 at \*7; *see also* 7 C.F.R. § 900.64(c) (1999) (stating that no decision is final for purposes of judicial review except a final decision issued by the Secretary pursuant to an appeal by a party to the ALJ proceeding).

filed on February 2, 1998, Kreider's appeal of the JO's January 12, 1998 decision was timely. The District Court further determined that because the JO erred in holding that a United States postmark was required under applicable regulations, Kreider's appeal to the JO from the ALJ's decision was timely and should have been considered by the JO. The District Court accordingly entered the 1998 Order remanding for the JO to consider the merits of Kreider's appeal from the ALJ's determination that Kreider was riding the pool and therefore was not entitled to producer-handler status.

### C.

On October 7, 1998, the USDA filed a timely appeal from the District Court's 1998 Order which was docketed with us at 98-1906. On October 21, 1998, Kreider filed a cross-appeal. In Kreider's notice of appeal, Kreider listed the docket numbers from the District Court's two prior proceedings hoping to bring an appeal from the District Court's 1996 Order. Kreider's cross-appeal was treated as two separate appeals: 1) a cross-appeal from the District Court's 1998 Order (docketed at 98-1983); and 2) an appeal from the District Court's 1996 Order (docketed at 98-1982).

On October 30, 1998, we sent a letter to the parties questioning our jurisdiction over Kreider's appeal from the District Court's 1996 Order. We invited submissions by the parties outlining the basis for our jurisdiction. Both parties submitted letters. In its letter, the USDA contends that we have jurisdiction over Kreider's appeal from the District Court's 1996 Order under *Forney v. Apfel*, 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269 (1998) and *Sullivan v. Finkelstein*, 496 U.S. 617, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990). In addition, both the USDA and Kreider cite *Forney* as the basis for our jurisdiction in their briefs. Kreider also asserts various other grounds for jurisdiction in its letter. Both parties seem to recognize that Kreider never intended to file a cross-appeal from the District Court's 1998 Order.

### II.

Even though Kreider and the USDA agree that we have jurisdiction over the appeals before us, it is well established that we have an independent duty to satisfy ourselves of our appellate jurisdiction regardless of the parties' positions. *See, e.g., Collinsgru v. Palmyra Bd. of Ed.*, 161 F.3d 225, 229 (3d Cir. 1998). The District Court orders from which both Kreider and the USDA have appealed are orders remanding for further administrative proceedings. Normally, an order remanding

for further proceedings is not a final order subject to immediate appellate review under 28 U.S.C. § 1291. See *AJA Assocs. v. Army Corps of Eng'rs*, 817 F.2d 1070, 1073 (3d Cir. 1987) (quoting *United Steelworkers of Am., Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 909 (3d Cir. 1981)). Naturally, however, this general rule is subject to several exceptions.<sup>3</sup>

#### A.

We traditionally have recognized an exception to the general finality rule for certain District Court orders remanding for further administrative proceedings. Specifically, we have exercised appellate review when a District Court finally resolves an important legal issue in reviewing an administrative agency action and denial of appellate review before remand to the agency would foreclose appellate review as a practical matter. See *AJA*, 817 F.2d at 1073 (citing *Horizons Int'l, Inc. v. Baldrige*, 811 F.2d 154 (3d Cir. 1987)); *Union R.R.*, 648 F.2d at 909.

An example of an immediately appealable remand under this exception is found in *AJA*, 817 F.2d 1070. After the Army Corps denied *AJA*'s application for a permit, *AJA* filed suit in District Court. *AJA*, 817 F.2d at 1071-72. The District Court denied the Corps' motion for summary judgment and remanded holding that *AJA* was entitled to an administrative hearing. *Id.* at 1072. The Corps appealed.

We exercised jurisdiction over the Corps' appeal even though the District Court's order remanding for further administrative proceedings was not a final order. We noted that the District Court had resolved an important legal issue opening the door to arguments by all applicants that they are entitled to a hearing prior to a permit denial. *Id.* at 1073. In addition, we found that the issue may evade appellate review; if the Corps granted *AJA* a permit on remand, the Corps would be unable to appeal the hearing issue and if the Corps denied *AJA* a permit, the issue of whether *AJA* is entitled to a hearing would be moot. *Id.* For these reasons, we held that the Corps' appeal fell within our previously recognized exception to the finality rule.

#### B.

In addition to our well established exception to the finality rule for certain

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<sup>3</sup>We refer to "exception" in its general sense that the order on appeal has not resolved all of the issues with respect to all of the parties. We agree with the concurrence that only Congress can set forth the jurisdiction of the federal courts.

District Court orders remanding for further administrative proceedings, the Supreme Court recently carved out a very specific exception to the finality rule for remand orders under the Social Security Act. See *Forney*, 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269, and *Finkelstein*, 496 U.S. 617, 110 S.Ct. 2658, 110 L.Ed.2d 563. In *Finkelstein*, the Court held that the District Court's order effectively holding that certain regulations were invalid and remanding for further administrative findings without resort to those regulations was immediately appealable. The Court relied heavily upon specific language within the Social Security Act in reaching this decision.<sup>4</sup> The Court, however, also noted that if benefits were awarded on remand under the inquiry mandated by the District Court "there would be grave doubt" as to whether the Secretary could appeal his own order. *Finkelstein*, 496 U.S. at 625.

As the Court's recent decision in *Forney* makes clear, however, the *Finkelstein* rationale is limited to the specific language found in the Social Security Act. In *Forney*, the Court held that not only can the Secretary appeal immediately an order remanding for further administrative proceedings, but that a claimant equally is entitled to appeal a District Court order remanding for further administrative proceedings. The Court reasoned that *Finkelstein* primarily was based on the language of the Social Security Act and that the reasoning in *Finkelstein* does not "permit an inference that 'finality' turns on the order's importance, or the availability (or lack of availability) of an avenue for appeal from the different, later, agency determination that might emerge after remand." *Forney*, 524 U.S. at 118 S.Ct. at 1987.

After *Forney*, it is clear that *Finkelstein* did not simply apply our general exception to finality to a social security case, but rather created a separate exception to the finality rule based on the language of the Social Security Act.

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<sup>4</sup>Specifically, the Court found that a District Court's order remanding for further administrative proceedings under the Social Security Act is a final judgment subject to immediate appeal under the following language:

[T]he district court shall have the power to enter "a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for rehearing."

\* \* \*

"[t]he judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions."

*Finkelstein*, 496 U.S. at 625, 110 S.Ct. 2658 (emphasis in original).

Accordingly, *Forney* cannot be read to extend appellate jurisdiction to all District Court orders remanding for further administrative proceedings as the parties contend, but rather speaks only to appellate jurisdiction under statutes containing language comparable to that found in the Social Security Act. This conclusion is supported by the fact that, to date, no court has applied *Forney* to a case not arising under the Social Security Act. As the USDA concedes, the AMAA does not contain language comparable to that found in the Social Security Act. *Forney* and *Finkelstein* therefore do not control our jurisdiction over these appeals.

### C.

Given that *Forney* and *Finkelstein* do not control our jurisdiction over these appeals, we return to our general exception to the finality rule to determine whether we have jurisdiction over either of the appeals before us. Specifically, we must determine whether either the 1996 Order or 1998 Order finally resolves an important legal issue over which appellate review would be foreclosed as a practical matter in the absence of an immediate appeal.

In its 1996 Order, the District Court determined that the language relating to producer-handler status was ambiguous and that it was appropriate to resort to the promulgation history of the provision at issue. The District Court then remanded for further factual findings as to whether Kreider was the type of dairy the provision was meant to include. On remand, the ALJ determined that Kreider was not entitled to producer-handler status. This determination was subject to review by a JO and then by the District Court.

Under our exception to the finality rule, the 1996 Order is not subject to immediate appeal. It does not finally resolve a particularly important legal issue and, more importantly, it is not an order that will evade appellate review. Absent an order that would evade review, our interest in avoiding piecemeal litigation and duplicative efforts overrides any interest we may have in entertaining the merits of Kreider's appeal at this juncture. Accordingly, our traditional exception to finality in agency proceedings does not afford us jurisdiction over Kreider's appeal from the 1996 Order.<sup>5</sup>

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<sup>5</sup>At oral argument, the USDA asserted that if we intended to examine the merits of Kreider's appeal, the USDA could file a cross-appeal from the District Court's 1996 Order at this juncture to bring its position on the merits before us. Setting aside the obvious problems with the timeliness of such an appeal at this late date, we wish to make clear that because the District Court's 1996 Order is not a final order over which we have appellate jurisdiction, the USDA is equally precluded from  
(continued...)

Our exception, however, does provide appellate jurisdiction over the USDA's timely appeal from the 1998 Order. This order vacated the JO's determination that Kreider's appeal was untimely and remanded for the JO to hear the merits of Kreider's appeal from the ALJ's decision. This decision resolves an issue of law that may evade review if immediate appeal is not permitted; should Kreider receive the relief it seeks on remand, it is doubtful that the USDA would be able to appeal its own decision in order to raise the procedural issues decided by the District Court in its 1998 Order. Therefore, under our exception for agency appeals, we have jurisdiction over the USDA's appeal from the 1998 Order.<sup>6</sup>

### III.

Having established that we have jurisdiction over the USDA's appeal of the District Court's 1998 Order, we turn now to the merits of that appeal. The USDA asserts that the District Court erred in exercising jurisdiction over Kreider's appeal and in holding that Kreider's administrative appeal was timely. Because we agree that it was improper for the District Court to exercise jurisdiction over Kreider's appeal, we will vacate the District Court's 1998 Order without reaching the issue of whether Kreider's administrative appeal was timely.

After the District Court's initial remand via the 1996 Order, Kreider first filed a complaint in the District Court on February 2, 1998. In this complaint, Kreider sought review of the ALJ's August 12, 1997 decision on the merits. At that time, Kreider's motion for reconsideration of the JO's January 12, 1998 order, which dismissed Kreider's administrative appeal as untimely, was still pending. It is clear to us that the District Court did not have jurisdiction over Kreider's February 2, 1998 complaint.

First, as the District Court recognized, it did not have jurisdiction to review the

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<sup>5</sup>(...continued)  
appealing the 1996 Order.

<sup>6</sup>Our exception to the finality doctrine for agency appeals mirrors to a large extent the collateral order doctrine, which Kreider has raised as a possible basis for our jurisdiction over its appeal. Under the collateral order doctrine, an otherwise non-final order is immediately appealable if it finally and conclusively determines the disputed question, resolves an important issue separate from the underlying merits, and is effectively unreviewable after final judgment. See *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 378 (3d Cir. 1997) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)). Under either exception to the finality rule, we have jurisdiction over the USDA's appeal but not Kreider's appeal. We likewise reject Kreider's other asserted grounds for our jurisdiction over its appeal as baseless.

ALJ's August 12, 1997 decision because that decision is not a final agency decision subject to judicial review. See *Kreider*, 1998 WL 481926 at \* 7. Second, even if *Kreider's* February 2, 1998 complaint had challenged the JO's January 12, 1998 decision, which it did not, the District Court would have lacked jurisdiction to review that decision at that time due to *Kreider's* pending motion for reconsideration. See *Stone v. INS*, 514 U.S. 386, 391, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) (noting the general rule that the timely filing of a motion to reconsider an agency's action generally renders the underlying order nonfinal for purposes of judicial review); *West Penn Power Co. v. United States Envtl. Protection Agency*, 860 F.2d 581, 584 (3d Cir. 1988) (same).<sup>7</sup>

Because the District Court lacked jurisdiction to entertain any appeal by *Kreider* on February 2, 1998, the date *Kreider* filed its first complaint, the District Court erred in exercising jurisdiction under the theory that *Kreider's* April 3, 1998 amended complaint related back to *Kreider's* February 2, 1998 complaint. An amended complaint that purports to relate back to an original complaint asserting an improper appeal which was filed on a date upon which the District Court would have lacked jurisdiction over the appeal raised in the amended complaint, must be dismissed for lack of jurisdiction. See, e.g., *Reynolds v. United States*, 748 F.2d 291, 293 (5<sup>th</sup> Cir. 1984) (holding that District Court properly dismissed for lack of jurisdiction amended complaint that could only relate back to pleading filed on a date upon which the District Court would have lacked jurisdiction over the issues asserted). Absent a viable relation back theory, *Kreider's* April 3, 1998 complaint is an untimely appeal of the JO's January 12, 1998 decision.<sup>8</sup> Accordingly, because the District Court lacked jurisdiction over *Kreider's* appeal of the JO's January 12, 1997 decision, we will vacate the District Court's 1998 Order.

#### IV.

For the foregoing reasons, we will dismiss summarily *Kreider's* cross-appeal

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<sup>7</sup>The courts have recognized a limited exception to this rule for immigration cases based upon language found in the Immigration and Naturalization Act. See *Stone*, 514 U.S. at 393-95, 115 S.Ct. 1537. Because the AMAA contains no comparable language, this exception does not apply to *Kreider's* appeal.

<sup>8</sup>*Kreider* does not dispute that its April 3, 1998 amended complaint was filed more than twenty days after the District Court's February 20, 1998 denial of *Kreider's* motion for reconsideration of the JO's January 12, 1998 decision and therefore is untimely absent a viable relation back theory. See 7 U.S.C. § 608c(15)(B) (1994).

from the District Court's 1998 Order (No. 98-1983), dismiss Kreider's appeal from the District Court's 1996 Order (No. 98-1982) for lack of jurisdiction, and vacate the judgment of the District Court in the USDA's appeal from the District Court's 1998 Order (No. 98-1906).

SLOVTRER, Circuit Judge, concurring.

I concur in the opinion of Judge Mansmann. I write separately to express my concern that our opinions, and those of other courts, dealing with the issue of appellate jurisdiction over district court orders remanding to an administrative agency have used language that is inconsistent with basic principles of federal jurisdiction. In particular, I take issue with language referring to our jurisdiction in that instance as an "exception" to the finality rule. See, e.g., *Bridge v. United States Parole Commission*, 981 F.2d 97, 101-02 (3d Cir. 1992); *United States v. Spears*, 859 F.2d 284, 287 (3d Cir. 1988); *Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991). In plain words, there can be no judicially created "exception" to the jurisdiction Congress has granted the courts of appeals.

## I.

Any analysis of the jurisdiction of the courts of appeals must begin with the recognition that under our Constitutional separation of powers it is Congress that sets the jurisdiction of the federal courts, and the judiciary has no power to make exceptions to the congressional determinations in that respect. See *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 264, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) (per curiam); see also 15A Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 3905, at 232 (2d ed. 1991).

When Congress made its initial division of the jurisdiction between the federal trial courts and the appellate courts, it drew the line at final decisions. "The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." *DiBella v. United States*, 369 U.S. 121, 124, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962) (citing First Judiciary Act, §§ 21, 22, 25, 1 Stat. 73, 83, 84, 85 (1789)); see also 15A Wright, Miller & Cooper, *supra*, § 3907, at 268 ("For two centuries, the final judgment rule has been the heart of appellate

jurisdiction in the federal system.”)<sup>9</sup>

With few exceptions, that remains the touchstone today. The Supreme Court has explained that the final judgment rule discourages piecemeal appeals which carry with them the potential for harassment and excessive costs for litigants, *see Cobbledick v. United States*, 309 U.S. 323, 325-26, 60 S.Ct. 540, 84 L.Ed. 783 (1940); 15A Wright, Miller & Cooper, *supra*, § 3905, at 239, and protects the independence of the district judge, *see Firestone*, 449 U.S. at 374, 101 S.Ct. 669. The final judgment rule has survived because it is generally believed that it “promot[es] efficient judicial administration.” *Id.* (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974)).

Over the years, Congress has made discrete decisions “that particular policies require that private rights be vindicable immediately.” *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 880 n. 7, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994) (discussing provision for immediate appeal under 9 U.S.C. § 16(a) when district court declines to send case to commercial arbitrator). However, such a decision is always characterized by an express congressional judgment. *See, e.g.*, 28 U.S.C. § 1292(a)(1) (authorizing appeal from interlocutory orders granting, modifying, denying etc. injunctions); 28 U.S.C. § 1292(b) (authorizing interlocutory appeal on certification). The Supreme Court has cautioned that the existence of those congressional policy judgments “by no means suggests that [the courts] should now be more ready to make similar judgments for themselves” and to expand the scope of appellate jurisdiction beyond that set by Congress. *Digital Equip. Corp.*, 511 U.S. at 880 n. 7.

## II.

It follows that the references to “exceptions” to our statutorily authorized jurisdiction are misguided. Even the Supreme Court has no power to make an exception to the finality rule that does not have a statutory predicate. Nonetheless, opinions of the lower federal courts repeatedly refer to the collateral order “exception” emanating from the holding of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), that the courts of appeals have jurisdiction over “a small class of orders” that, albeit not the final decision in the case, resolve important questions completely separate from the

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<sup>9</sup>A final judgment is “a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981).

merits, which would be effectively unreviewable were they to wait appeal from the final judgment in the underlying action. The notion of an “exception” to the finality doctrine is illogical as Congress alone establishes our appellate jurisdiction.

The collateral order doctrine was hardly a new theory of finality never previously comprehended. More than two decades earlier, the Court stated that although final judgments are the rule,

it is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation.

*United States v. River Rouge Improvement Co.*, 269 U.S. 411, 414, 46 S.Ct. 144, 70 L.Ed. 339 (1926).

A leading treatise observes that “[t]he most certain aspect of collateral order appeals is that they depend on 28 U.S.C. § 1291, and thus must be characterized as appeals from ‘final decisions.’” 15A Wright, Miller & Cooper, *supra*, § 3911, at 347; *see also id.* § 3911, at 349 (emphasizing that § 1291 “remains the only available foundation” for collateral orders doctrine). Indeed, the Supreme Court has repeatedly adopted the view that jurisdiction to hear an appeal from a collateral order falls within the authority conferred by § 1291.

In *Johnson v. Fankell*, 520 U.S. 911, 917, 117 S.Ct. 1800, 138 L.Ed.2d 108 (1997), the Court stated: “In [*Cohen*], as in all of our cases following it, we were construing the federal statutory language of 28 U.S.C. § 1291.” In his scholarly opinion in *Digital Equipment Corp.*, Justice Souter explained that “[t]he collateral order doctrine is best understood not as an exception to the ‘final decision’ rule laid down by Congress in § 1291, but as a ‘practical construction’ of it.” 511 U.S. at 867, 114 S.Ct. 1992. *See also Firestone*, 449 U.S. at 368, 101 S.Ct. 669 (“*Cohen* did not establish new law; rather, it continued a tradition of giving § 1291 a ‘practical rather than a technical construction.’”); *Coopers & Lybrand*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (“[T]he Court held [the *Cohen* order] appealable as a ‘final decision’ under § 1291.”); *Abney v. United States*, 431 U.S. 651, 658, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) (“[T]his Court held [in *Cohen*] that the Court of Appeals had jurisdiction *under § 1291* to entertain an appeal from the District Court’s pretrial order.” (emphasis added))).

I agree with the majority that the two cases arising under the Social Security Act, *Sullivan v. Finkelstein*, 496 U.S. 617, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990), and *Forney v. Apfel*, 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269 (1998), represent an exception to the final judgment rule. But the exception is one

made by Congress, not the courts.

In *Finkelstein*, the Court considered the jurisdiction of the courts of appeals to hear an appeal by the Secretary of Health and Human Services from a district court's order invalidating regulations issued by the Secretary and remanding to the agency for renewed consideration of the claim for benefits. The Court observed that the language of 42 U.S.C. § 405(g) in the Social Security Act permitted a district court to enter "'a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.'" *Id.* at 625, 110 S.Ct. 2658 (quoting § 405(g)) (emphasis omitted). Further, § 405(g) made clear that such a judgment was "'final except that it shall be subject to review in the same manner as a judgment in other civil actions.'" *Id.* (quoting § 405(g)) (emphasis omitted). In light of this language, the Court concluded that Congress had "define[d] a class of orders as 'final judgments' that by inference would be appealable under § 1291." *Id.* at 628, 110 S.Ct. 2658. Justice Blackmun concurred, but stated he would have treated the appeal as falling within the confines of the collateral order doctrine. *Id.* at 632, 110 S.Ct. 2658 (Blackmun, J., concurring).

The issue arose eight years later in *Forney v. Apfel*, 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269 (1998). There, it was an individual seeking benefits, rather than the government, who appealed the district court's decision following a remand to the agency under § 405(g). The Court rejected the collateral order theory as the basis for appellate jurisdiction and emphasized, in a unanimous opinion, that Congress had created a class of orders through § 405(g) that were appealable as final orders under § 1291. Thus, because the district court decisions at issue in *Finkelstein* and *Forney* were a class of orders declared "final" by Congress by construction of the language of the Social Security Act, they provide little assistance on the issue facing us now, the appealability of an order remanding to an agency under a statute that has no comparable provision for appeal.

Of course, it would have facilitated our decision as to our appellate jurisdiction over an order remanding to an administrative agency if Congress had explicitly provided for such, and it may be that cases such as this will lead it to consider doing so. In any event, the precedent allowing such an appeal in appropriate circumstances, including that from this court, precludes any retreat now.

The most obvious analog, and the one relied on by many courts of appeals, is the collateral order doctrine, notwithstanding the fact that most of the agency remand orders would not qualify because the remand would rarely be on an issue separate from the merits. See 15B Wright, Miller & Cooper, *supra*, § 3914.32, at 240 (asserting that "[a]n impressive number of cases" permit appeal under the doctrine). It has been suggested that the tendency is to accept the appeals of

government agencies, apparently because “administrative agencies, as more or less coordinate branches of government, deserve the protection of special appeal opportunities.” *Id.* at 56-57 n. 9 (Supp. 1999) (citing, *inter alia*, *Bergerco Canada v. United States Treasury Dep’t*, 129 F.3d 189, 191-92 (D.C. Cir. 1997); *Baca-Prieto v. Guigni*, 95 F.3d 1006, 1008-09 (10<sup>th</sup> Cir. 1996); *Hanauer v. Reich*, 82 F.3d 1304, 1306-07 (4<sup>th</sup> Cir. 1996); *Schuck v. Frank*, 27 F.3d 194, 196-97 (6<sup>th</sup> Cir. 1994)). *But see Cotton Petrol. Corp. v. United States Dep’t of the Interior*, 870 F.2d 1515, 1521-22 (10<sup>th</sup> Cir. 1989); *AJA Assocs. v. Army Corps of Eng’rs*, 817 F.2d 1070, 1072-73 (3<sup>d</sup> Cir. 1987).

Wright, Miller, and Cooper have summarized the reasons courts rely on the collateral orders doctrine. In some circumstances, an agency may be statutorily barred from appealing its own decision. In others, the agency’s decision will render the issue moot, because the agency has complied with the district court’s order. Additionally, agencies ought not face the risk of contempt to prompt an immediate appeal, or the danger that the agency will be unable to recapture later any benefits paid in the interim. *See* 15B Wright, Miller & Cooper, *supra*, § 3914.32, at 240-41.

I agree that a practical construction of finality suffices to justify review of an agency remand order in appropriate cases. Such an approach is a considerable improvement over viewing the basis of our jurisdiction as an “exception to finality.”

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**CAL-ALMOND, INC. v. UNITED STATES DEPARTMENT OF AGRICULTURE.**

**No. 98-16921.**

**Decided September 21, 1999.**

**(Cite as 192 F.3d 1272 (9<sup>th</sup> Cir.))**

**Almonds – First amendment.**

Almond handlers sought judicial review of the Judicial Officer’s denial of their First Amendment challenge to USDA’s Almond Marketing Order (7 C.F.R. pt. 981), which imposes mandatory assessments on almond handlers to fund generic almond advertising. The United States District Court for the Eastern District of California upheld USDA’s decision and the almond handlers appealed. The United States Court of Appeals for the Ninth Circuit found that the Almond Order does not compel speech or endorsement of messages that are not germane to the purposes of the Agricultural Marketing Agreement Act and the Almond Order and that almond handlers are free to advertise on their own. The Ninth Circuit concluded that the Almond Order is merely a species of economic regulation and does

not violate the almond handlers' First Amendment rights.

**UNITED STATES COURT OF APPEALS  
NINTH CIRCUIT**

Before: REINHARDT, O'SCANNLAIN and W. FLETCHER, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

**I**

Cal-Almond, Inc., *et al.* (collectively "Cal-Almond"), are almond handlers subject to an almond marketing order ("Almond Order") issued by the United States Department of Agriculture ("USDA") pursuant to the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601 *et seq.* ("Act"). The Almond Order imposes assessments upon handlers based on the tonnage of almonds handled, and a substantial portion of the assessments is used to fund generic advertising, promotion, and marketing of almonds. The Almond Order affords almond handlers the option of directly advertising their own products in certain specified ways, for which they can receive credit against their assessments. More specifically, credit can be received for promotional activities, such as advertising directed at "end users, trade or industrial users," 7 C.F.R. § 981.441(e)(4)(i), so long as "[t]he clear and evident purpose of each activity shall be to promote the sale, consumption or use of California almonds," *id.* § 981.441(e)(2). Prior to the 1993-94 crop year, handlers could receive 100% credit for their own direct advertising pursuant to the "creditable" advertising program. Beginning with the 1993-94 crop year, handlers could receive only two-thirds credit for their own direct advertising pursuant to the "credit-back" advertising program. *See id.* § 981.441(a).

Cal-Almond filed an administrative petition with the USDA alleging that the creditable and credit-back advertising programs violated its First Amendment rights. The ALJ upheld Cal-Almond's First Amendment challenge to the advertising programs, relying on our decision in *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.3d 429 (9th Cir. 1993) ("*Cal-Almond I*"), which held that the creditable almond advertising program constituted compelled speech that violated the almond handler's First Amendment rights, *see id.* at 440. Both parties appealed the ALJ's decision to the USDA's judicial officer, who stayed the proceedings pending the Supreme Court's decision in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) ("*Wileman*").

In *Wileman*, the Court upheld mandatory assessments for generic advertising of California tree fruits as “a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress.” *Id.*, 521 U.S. at 477, 117 S.Ct. 2130. In turn, the Supreme Court granted certiorari in *Cal-Almond I*, vacated this court’s decision, and remanded for reconsideration in light of *Wileman*. See *Dept. of Agriculture v. Cal-Almond, Inc.*, 521 U.S. 1113, 117 S.Ct. 2501, 138 L.Ed.2d 1007 (1997) (“*Cal-Almond I*”). We, in turn, remanded *Cal-Almond I* to the district court with instructions to dismiss the First Amendment challenges to the advertising programs, citing *Wileman*. See *Cal-Almond, Inc. v. Dept. of Agriculture*, No. 94-17160 (9th Cir. Sept. 4, 1997) (“*Cal-Almond II*”).

In light of the Supreme Court’s decision in *Wileman* and *Cal-Almond II*, and our remand for dismissal in *Cal-Almond III*, the USDA’s judicial officer reversed the ALJ’s decision in this case and held that *Wileman* foreclosed Cal-Almond’s First Amendment claims. Cal-Almond sought review in the United States District Court for the Eastern District of California, which also held that Cal-Almond’s claims were foreclosed by *Wileman*. Cal-Almond subsequently brought this appeal.

## II

Cal-Almond asserts that the *Wileman* analysis does not apply here because the Supreme Court considered the constitutional validity of purely mandatory assessments for generic advertising, while this case concerns the constitutional validity of assessments for generic advertising that are not purely mandatory because credit against the assessments is provided for certain forms of branded advertising. In *Gallo Cattle Co. v. California Milk Advisory Bd.*, 185 F.3d 969 (9th Cir. 1999) (“*Gallo*”), we explained that, in order “[t]o determine whether *Wileman* is dispositive of the claims asserted by [a party], we will go through the same analytical steps that the Court used in *Wileman*.” *Id.* at 974 (applying *Wileman* analysis and rejecting First Amendment challenge to mandatory assessments imposed under dairy promotion program that included generic and branded advertising). Thus, in order to determine whether *Wileman* is dispositive here, we must again go through the *Wileman* analytical steps.

Following *Gallo*’s lead, we first examine the statutory scheme under which the mandatory assessments for almond marketing were imposed to determine whether constraints have been placed upon the handlers’ independent action. See *id.* at 974. After assessing the statutory context, we proceed to *Wileman*’s tripartite test, which determines whether the creditable and credit-back advertising programs abridge

Cal-Almond's First Amendment rights, or are "instead part of a 'regulatory scheme' subject to review only as an economic regulation." *Id.* We must consider (1) whether the advertising programs impose a restraint on Cal-Almond's freedom to communicate any message to any audience; (2) whether the advertising programs compel Cal-Almond to engage in any actual or symbolic speech; and (3) whether the advertising programs compel Cal-Almond to endorse or finance any political or ideological views that are not germane to the purposes for which the compelled association is justified. *See id.*

### A

The Act confers on the Secretary of Agriculture the power "to establish and maintain [ ] orderly marketing conditions for agricultural commodities." 7 U.S.C. § 602(1). Pursuant to this mandate, the Secretary is empowered to "[e]stablish or provid[e] for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of" almonds, among other commodities. *See id.* § 608c(6)(1). Thus, as in *Gallo* and *Wileman*, it would appear that the almond handlers are "part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme," *id.*, 521 U.S. at 469, nor, indeed, does Cal-Almond dispute in its briefs on appeal whether handlers are so regulated.

### B

Cal-Almond asserts that the assessments imposed under the Almond Order restrict its freedom to communicate by limiting the money that it has for advertising; most of Cal-Almond's other objections to the creditable and credit-back advertising programs also boil down to the impact that the assessments imposed under those programs have on its advertising budget. Cal-Almond effectively concedes that purely mandatory assessments would be constitutional under *Wileman*, but asserts that the credit option renders the assessments here unconstitutional. Cal-Almond contends that because it is less likely to receive credit for advertising that suits its purposes, its advertising budget is limited as compared to its competitors.

In *Gallo*, however, we expressly rejected the argument that a decrease in a producer's advertising budget constitutes a limitation on speech, stating that "although the assessments made under the Marketing Order may, as Gallo argues, 'substantially reduce the amount of money Gallo has to spend on its own

advertising used to distinguish its own product,' this 'incidental effect of constraining the size of [Gallo's] advertising budget' does not itself amount to a restriction on speech." *Id.* at 975. This portion of our holding in *Gallo* followed necessarily from *Wileman*, wherein the Supreme Court made plain that "[t]he fact that an economic regulation may indirectly lead to a reduction in a handler's individual advertising budget does not itself amount to a restriction on speech." 521 U.S. at 470, 117 S.Ct. 2130.

The Almond Order does not impose a restraint on Cal-Almond's freedom to communicate because Cal-Almond remains "free to advertise or otherwise communicate any message that it desires in any manner that it desires to any audience that it desires." *Gallo*, 185 F.3d at 975. Cal-Almond's assertion that the credit programs have a disparate impact upon the various handlers' advertising budgets is not relevant to the *Wileman* analysis. As the Supreme Court made plain:

Similar criticisms might be directed at other features of the regulatory orders that impose restraints on competition that arguably disadvantage particular producers for the benefit of the entire market. Although one may indeed question the wisdom of such a program, its debatable features are insufficient to warrant special First Amendment scrutiny.

*Wileman*, 521 U.S. at 474, 117 S.Ct. 2130.

## C

Cal-Almond asserts that the creditable and credit-back programs compel speech because the Almond Board dictates how individual handlers must conduct their direct advertising if they wish to receive credit against their assessments. We are not persuaded, however. Because almond handlers remain free to choose whether and how to advertise directly, it cannot be said to constitute compelled speech. Handlers can decline to advertise directly and simply pay their assessments. They can directly advertise in an attempt to receive credit against their assessments. Or, they can directly advertise regardless of whether they will receive credit. *Cf. Gallo*, 185 F.3d at 975 (holding that the requirement that producers display promotional seal in order to fully benefit from generic advertising campaign did not constitute compelled speech because producers remained "free to choose not to carry the seal"). Rather than supporting Cal-Almond's assertion that *Wileman* is distinguishable, the flexibility provided by the creditable and credit-back programs instead supports the conclusion that the assessments here are indeed constitutional.

The program upheld in *Wileman* imposed purely mandatory assessments and therefore provided little recourse to those producers who objected to the messages disseminated, questioned the wisdom of the way the assessments were spent, or doubted the efficacy of generic advertising. By contrast, the programs here potentially accommodate objectors: handlers who object to generic advertising or believe there is a more cost-effective means of promoting almonds have the option of performing their own direct advertising for which they may receive credit against their assessments. Thus, the creditable and credit-back programs potentially limit the extent to which almond handlers must fund advertising to which they object, and if the handlers cannot receive credit for their preferred form of direct advertising, they can simply pay the assessments and will be no worse off than the producers in *Wileman*.

## D

Cal-Almond attempts to distinguish *Wileman* based on its objection to the messages funded by the assessments and the messages for which credit may be received. As *Gallo* makes plain, however, regardless of whether Cal-Almond has legitimate ideological objections to those messages, those objections do not render the advertisements compelled speech in violation of the First Amendment so long as the messages are germane to the purposes of the Almond Order and the Act. *See id.*, 185 F.3d at 975. Here, there can be no dispute that messages, generic or branded, promoting almond sales are germane to the Almond Order's and the Act's purpose, which is "to assist, improve, or promote the marketing, distribution, and consumption" of almonds. 7 U.S.C. § 608c(6)(I); *cf. Wileman*, 521 U.S. at 476, 117 S.Ct. 2130 ("Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme."); *Gallo*, 185 F.3d at 976 ("The [ ] employment of a generic advertising campaign of California Milk and dairy products . . . is obviously 'germane' to [the California dairy marketing order's] purposes.").

Moreover, at base, Cal-Almond's objections to the advertising programs and the assessments imposed thereunder do not appear to be ideological or "to engender any crisis of conscience." *Wileman*, 521 U.S. at 472, 117 S.Ct. 2130. Instead, Cal-Almond questions the effectiveness of the advertising programs and the messages funded by the assessments. More specifically, Cal-Almond objects to the Almond Board's generic advertising for snack almonds, because Cal-Almond does not sell snack almonds. *Wileman*, however, makes plain that such challenges to the wisdom or effectiveness of a promotional program raise

questions of economic policy, rather than questions of constitutional import:

Neither the fact that respondents may prefer to foster [a] message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message. The mere fact that objectors believe their money is not being well spent “does not mean [that] they have a First Amendment complaint.”

*Id.* (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 456, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984)).

Cal-Almond also objects to the provision of credit against the assessments for branded direct advertising. In *Gallo*, we were presented with a similar objection to the use of assessments to fund promotional activities that were not generic, but rather branded, and thus promoted certain brands to the exclusion of others. Following *Wileman*, we rejected the objection as irrelevant to the constitutionality of the advertising program, stating that “[t]his claim, ‘while perhaps calling into question the administration of portions of the program, [has] no bearing on the validity of the entire program.’” *Gallo*, 185 F.3d at 976 n.9 (quoting *Wileman*, 521 U.S. at 468, 117 S.Ct. 2130).

Similarly here, Cal-Almond’s objections have no bearing on the constitutionality of the creditable and credit-back programs, but rather, call into question the administration of those programs. Because those programs do not compel speech or the endorsement of non-germane messages, leaving Cal-Almond free to advertise however it desires, the Almond Order is “a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress.” *Wileman*, 521 U.S. at 477, 117 S.Ct. 2130.

### III

Lastly, Cal-Almond asserts that *Cal-Almond I* is dispositive. However, in light of the Supreme Court’s remand in *Cal-Almond II* and our subsequent remand for dismissal in *Cal-Almond III*, *Cal-Almond I* has been implicitly overruled.

**IV**

For the foregoing reasons, the Almond Order does not abridge Cal- Almond's First Amendment rights.

**AFFIRMED.**

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**ANIMAL WELFARE ACT****COURT DECISION****PETER A. LANG; NANCY ANNE LANG, dba SAFARI WEST v. UNITED STATES DEPARTMENT OF AGRICULTURE.****No. 98-70807.****Filed July 16, 1999.****(Cite as 189 F.3d 473 (9<sup>th</sup> Cir.))(Table)****Animal Welfare Act – Handling animals – Substantial evidence – Due process – Amended complaint.**

The United States Court of Appeals for the Ninth Circuit denied petitioners' petition for review of the Judicial Officer's finding that Peter A. Lang violated 9 C.F.R. § 2.131(a). The Court held that the Judicial Officer's decision was supported by substantial evidence and that the petitioners' contention that the Judicial Officer's decision was arbitrary and capricious lacks merit. The Court rejected petitioners' contention that Lang's due process rights were violated when the government sought to amend its complaint against him and add additional violations. The Court stated that this contention lacks merit because the ALJ explicitly denied the request to amend the complaint and the Judicial Officer did not consider any evidence not relevant to the allegations in the complaint.

**UNITED STATES COURT OF APPEALS  
NINTH CIRCUIT****MEMORANDUM<sup>1</sup>****On Petition for Review of an Order of the Judicial Officer  
of the United States Department of Agriculture**Submitted July 12, 1999<sup>2</sup>

Before: FARRIS, HAWKINS, and GRABER, Circuit Judges.

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<sup>1</sup>This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

<sup>2</sup>The Langs' request for oral argument is denied. The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Peter A. Lang and Nancy A. Lang, doing business as Safari West, petition pro se for review of the order of the Judicial Officer (“JO”) dismissing their appeal from the administrative law judge’s (“ALJ”) assessment of a civil penalty and issuance of an order to cease and desist from handling animals in violation of the Animal Welfare Act, 7 U.S.C. §§ 2131-2159.<sup>3</sup> We have jurisdiction under 7 U.S.C. § 2149(c), and we deny the petition.

Our review of administrative decisions is narrow, and administrative agency decisions will be upheld unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See *Farley & Calfee, Inc. v. Department of Agric.*, 941 F.2d 964, 966 (9<sup>th</sup> Cir. 1991). The JO’s findings must be upheld if they are supported by substantial evidence. See *Spencer Livestock Comm’n Co. v. Department of Agric.*, 841 F.2d 1451, 1454 (9<sup>th</sup> Cir. 1988). Lang contends that the JO’s decision was arbitrary and capricious and his findings were not supported by substantial evidence. This contention lacks merit. Substantial evidence supports the JO’s finding that Lang failed to handle an animal in his care as “expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.” See 9 C.F.R. § 2.131(a)(1).

Lang contends that his due process rights were violated because the government sought to amend its complaint against him and add additional violations. This contention lacks merit because the ALJ explicitly denied the request to amend the complaint and the JO did not consider any evidence not relevant to the allegations in the complaint concerning the handling of the lechwes.

**PETITION FOR REVIEW DENIED.**

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<sup>3</sup>The Langs also appeal the ALJ’s original decision. The ALJ’s decision, however, is not a final appealable order. See 28 U.S.C. § 2342(2).

**ANIMAL WELFARE ACT****DEPARTMENTAL DECISIONS****In re: NANCY M. KUTZ AND STEVEN M. KUTZ.****AWA Docket No. 99-0001.****Decision and Order as to Nancy M. Kutz filed July 12, 1999.**

**Default — Failure to file timely answer — Failure to respond to complaint — Dealer — Operating without license — Ability to pay — Cease and desist order — Civil penalty — License suspension — License disqualification.**

The Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt assessing a civil penalty of \$16,000 against Respondent, suspending Respondent's Animal Welfare Act (Act) license, and directing Respondent to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondent's failure to file a timely answer is deemed an admission of the allegations in the complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The Judicial Officer stated that even if Respondent's late-filed answer had been timely filed, it would be deemed an admission of the allegations of the complaint because Respondent's answer did not respond to the allegations in the complaint. The Judicial Officer also concluded that Respondent's ability to pay the civil penalty is not a basis for setting aside or reducing the civil penalty assessed by the ALJ.

Robert A. Ertman, for Complainant.

Respondent, Pro se.

Initial decision issued by James W. Hunt, Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on October 15, 1998.

The Complaint alleges that Nancy M. Kutz and Steven M. Kutz [hereinafter Respondents] operated as a dealer, as defined in the Animal Welfare Act and the Regulations without obtaining an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1) (Compl. ¶ II).

The Hearing Clerk served Respondents with a copy of the Complaint, a copy of the Rules of Practice, and a service letter on October 22, 1998.<sup>1</sup> Respondents failed to answer the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On November 19, 1998, Respondent Nancy M. Kutz filed a late Answer, which does not respond to the allegations of the Complaint, as required by section 1.136(b) of the Rules of Practice (7 C.F.R. § 1.136(b)).

On March 2, 1999, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a Proposed Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served a copy of Complainant's Motion for Default Decision, a copy of Complainant's Proposed Default Decision, and a service letter on Respondent Nancy M. Kutz on March 11, 1999,<sup>2</sup> and on Respondent Steven M. Kutz on April 23, 1999.<sup>3</sup> Respondents did not file objections to Complainant's Motion for Default Decision or Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On May 19, 1999, Administrative Law Judge James W. Hunt [hereinafter the ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Initial Decision and Order]: (1) concluding that Respondents operated as a dealer, as defined in the Animal Welfare Act and the Regulations without obtaining an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1); (2) directing that Respondents cease and desist from violating the Animal Welfare Act, the Regulations, and the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) [hereinafter the Standards]; (3) assessing Respondents a \$16,000 civil penalty; and (4) suspending Respondents' Animal Welfare Act license for 90 days.

On June 1, 1999, Respondent Nancy M. Kutz appealed to the Judicial Officer; on June 21, 1999, Complainant filed Memorandum in Opposition to Appeal; and

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<sup>1</sup>See Domestic Return Receipt for Article Number P 368 427 000 and Domestic Return Receipt for Article Number P 368 427 0001 [sic].

<sup>2</sup>See Domestic Return Receipt for Article Number P 368 427 112.

<sup>3</sup>See memorandum of "TMFisher" dated April 23, 1999.

on June 23, 1999, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision as to Respondent Nancy M. Kutz.<sup>4</sup>

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order as to Nancy M. Kutz. Additional conclusions by the Judicial Officer follow the ALJ's Conclusions, as restated.

## **APPLICABLE STATUTORY PROVISIONS AND REGULATIONS**

7 U.S.C.:

### **TITLE 7—AGRICULTURE**

....

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

##### **§ 2131. Congressional statement of policy**

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

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

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

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<sup>4</sup>The Hearing Clerk served the Initial Decision and Order on Respondent Steven M. Kutz on June 3, 1999. (See memorandum of "TMFisher" dated June 3, 1999.) Respondent Steven M. Kutz did not appeal the Initial Decision and Order, and in accordance with section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the Initial Decision and Order became effective as to Respondent Steven M. Kutz on July 8, 1999.

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

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

### **§ 2132. Definitions**

When used in this chapter—

....

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

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

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

....

### **§ 2134. Valid license for dealers and exhibitors required**

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

....

### § 2149. Violations by licensees

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

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

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

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

....

### **§ 2151. Rules and regulations**

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

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

9 C.F.R.:

## **TITLE 9—ANIMALS AND ANIMAL PRODUCTS**

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

#### **SUBCHAPTER A—ANIMAL WELFARE**

#### **PART 1—DEFINITION OF TERMS**

### **§ 1.1 Definitions.**

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

....

*Dealer* means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding

purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than \$500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

....

## **PART 2—REGULATIONS**

### **SUBPART A—LICENSING**

#### **§ 2.1 Requirements and application.**

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. . . .

....

(f) The failure of any person to comply with any provision of the Act, or any of the provisions of the regulations or standards in this subchapter, shall constitute grounds for denial of a license; or for its suspension or revocation by the Secretary, as provided in the Act.

9 C.F.R. §§ 1.1; 2.1(a)(1), (f).

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

Respondents failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).<sup>5</sup> Section 1.136(c) of the

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<sup>5</sup>Respondent Nancy M. Kutz filed an Answer on November 19, 1998, 28 days after the Hearing Clerk served the Complaint on Respondent Nancy M. Kutz. Respondent Nancy M. Kutz's late-filed  
(continued...)

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

### **Findings of Fact and Conclusions of Law**

1. Respondents, Nancy M. Kutz and Steven M. Kutz, are individuals whose mailing address is P.O. Box 203, Highmore, South Dakota 57103.
2. Respondent Nancy M. Kutz was licensed as a dealer until she surrendered her Animal Welfare Act license effective March 3, 1997. Respondent Nancy M. Kutz was also the respondent in *In re Nancy Kutz* (Consent Decision), 55 Agric. Dec. 427 (1996).
3. Respondent Steven M. Kutz became licensed as a dealer under the Animal Welfare Act and the Regulations on August 12, 1998, and Respondent Nancy M. Kutz is a co-owner of the licensed business.
4. Respondents, during the period from at least March 21, 1997, through at least August 19, 1997, were operating as a dealer, as defined in the Animal Welfare Act and the Regulations, without having obtained a license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1). Respondents sold dogs in commerce for resale for use as pets and transported the dogs and offered the dogs for transportation. The purchase, transportation, offer for transportation, and sale of each dog constitutes a separate violation of the Animal Welfare Act and the Regulations. Respondents' violations include, but are not limited to, the sale and the transportation of at least 15 dogs (1 dog on March 21, 1997; 8 dogs on May 21, 1997; 2 dogs on July 24, 1997; and 4 dogs on August 19, 1997).

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<sup>5</sup>(...continued)

Answer does not respond to the allegations of the Complaint, as required by section 1.136(b) of the Rules of Practice (7 C.F.R. § 1.136(b)). Therefore, even if I found that Respondent Nancy M. Kutz's Answer was timely filed (which I do not find), I would deem her Answer to be an admission of the allegations of the Complaint, as provided in section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)).

### Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. The Order issued in this Decision and Order as to Nancy M. Kutz, *infra*, is authorized by the Animal Welfare Act and warranted under the circumstances.

#### ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Nancy M. Kutz states in a letter addressed to Robert Ertman, Complainant's counsel, dated May 28, 1999, and filed on June 1, 1999, that she has "done nothing wrong" and that she is unable to pay the \$16,000 civil penalty assessed by the ALJ in the Initial Decision and Order. I infer that Respondent Nancy M. Kutz's letter to Mr. Ertman, dated May 28, 1999, is Respondent Nancy M. Kutz's Appeal Petition.

Respondent Nancy M. Kutz's denial in her Appeal Petition of the allegations of the Complaint is the first filing in which Respondent Nancy M. Kutz denies the allegations of the Complaint. Respondent Nancy M. Kutz's denial is too late to be considered.

On October 22, 1998, the Hearing Clerk served a copy of the Complaint, a copy of the Rules of Practice, and a service letter on Respondents.<sup>6</sup> Sections 1.136(a), 1.136(c), and 1.139 of the Rules of Practice clearly state the consequences of failing to file a timely answer, as follows:

#### § 1.136 Answer.

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

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

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<sup>6</sup>See note 1.

**§ 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. §§ 1.136(a), (c), .139.

Moreover, the Complaint served on Respondents on October 22, 1998, informs Respondents of the consequences of failing to file a timely answer, as follows:

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

Compl. at 2-3.

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

**CERTIFIED RECEIPT REQUESTED**

October 16, 1998

Ms. Nancy M. Kutz  
Mr. Steven M. Kutz  
P.O. Box 203  
Highmore, South Dakota 57103

Dear Sir/Madam:

Subject: In re: Nancy M. and Steven M. Kutz - Respondents  
AWA Docket No. 99-0001

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

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

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

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

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

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

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

Sincerely,

/s/

Regina Paris

Acting Hearing Clerk

Letter dated October 16, 1998, from Regina Paris, Acting Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Nancy M. Kutz and Steven M. Kutz (emphasis in original).

Respondents' Answer was required to be filed no later than November 12, 1998.<sup>7</sup> Respondent Nancy M. Kutz's first filing in this proceeding was filed on November 19, 1998, 28 days after the Hearing Clerk served the Complaint on Respondents. Respondents' failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Therefore, Respondents are deemed, for the purposes of this proceeding, to have admitted the allegations of the Complaint.

Moreover, Respondent Nancy M. Kutz's late-filed Answer does not respond to the allegations of the Complaint. Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that a failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for the purposes of the proceeding, an admission of the allegation. Therefore, even if I found that Respondent Nancy M. Kutz's Answer was timely filed (which I do not find), I would deem her Answer to be an admission of the allegations of the Complaint, as provided in section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)).

On March 2, 1999, in accordance with 7 C.F.R. § 1.139, Complainant filed Motion for Default Decision and Proposed Default Decision, based upon Respondents' failure to file a timely answer and Respondent Nancy M. Kutz's failure to respond to the allegations of the Complaint in her late-filed Answer. On March 11, 1999, the Hearing Clerk served a copy of Complainant's Motion for Default Decision, a copy of Complainant's Proposed Default Decision, and a

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<sup>7</sup>Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) provides that an answer must be filed within 20 days after the service of the complaint. The Hearing Clerk served the Complaint on Respondents on October 22, 1998, and 20 days after service would require Respondents to file an answer no later than November 11, 1998. However, November 11, 1998, was Veteran's Day, a legal public holiday. See 5 U.S.C. § 6103(a). Section 1.147(h) of the Rules of Practice (7 C.F.R. § 1.147(h)) provides that when the time for filing any document expires on a Saturday, Sunday, or Federal holiday, the time for filing shall be extended to include the next following business day. Therefore, Respondents' Answer was due November 12, 1998.

service letter dated March 3, 1999, on Respondent Nancy M. Kutz,<sup>8</sup> and on April 23, 1999, the Hearing Clerk served a copy of Complainant's Motion for Default Decision, a copy of Complainant's Proposed Default Decision, and a service letter dated March 3, 1999, on Respondent Steven M. Kutz.<sup>9</sup> The March 3, 1999, service letter from the Hearing Clerk states, as follows:

CERTIFIED RECEIPT REQUESTED

March 3, 1999

Ms. Nancy M. Kutz and  
Mr. Steven M. Kutz  
P.O. Box 203  
Highmore, South Dakota 57103

Dear Sir/Madam:

Subject: In re: Nancy M. and Steven M. Kutz - Respondent  
AWA Docket No. 99-0001

Enclosed is a copy of Complainant's Motion for Adoption of Proposed Decision and Order, together with a copy of the Proposed Decision and Order Upon Admission of Fact by Reason of Default, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

Sincerely,  
/s/  
Joyce A. Dawson  
Hearing Clerk

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<sup>8</sup>See note 2.

<sup>9</sup>See note 3.

March 3, 1999, letter from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Nancy M. Kutz and Steven M. Kutz.

Respondents failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as provided in 7 C.F.R. § 1.139, and on May 19, 1999, the ALJ filed the Initial Decision and Order.

On June 1, 1999, Respondent Nancy M. Kutz filed her Appeal Petition in which she asserts she has "done nothing wrong." I infer that Respondent Nancy M. Kutz's assertion that she has "done nothing wrong" is a general denial of the allegation in the Complaint that she willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1). Respondent Nancy M. Kutz's denial, which was filed more than 6 months after Respondent Nancy M. Kutz's answer was due and filed 42 days after Respondent Nancy M. Kutz's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were due, is filed too late to be considered.

Respondent Nancy M. Kutz also indicates in her Appeal Petition that she is unable to pay the \$16,000 civil penalty assessed by the ALJ. Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and Standards, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondent Nancy M. Kutz's inability to pay the \$16,000 civil penalty assessed by the ALJ is not a basis for setting aside or reducing the \$16,000 civil penalty assessed by the ALJ.<sup>10</sup>

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<sup>10</sup>The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. See *In re James E. Stephens*, 58 Agric. Dec. \_\_\_, slip op. at 66-67 (May 5, 1999) (stating that the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act and the Regulations and the Standards); *In re Judie Hansen*, 57 Agric. Dec. \_\_\_, slip op. at 94 (Dec. 14, 1998) (stating that a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed); *In re David M. Zimmerman*, 57 Agric. Dec. \_\_\_, slip op. at 16 n.1 (Nov. 18, 1998) (stating that the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration (continued...)

Although on rare occasions default decisions have been set aside for good cause shown or where the complainant did not object,<sup>11</sup> generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer<sup>12</sup> or based upon a respondent's failure in an answer to respond to

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<sup>10</sup>(...continued)

need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating that a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating that ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating that ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating that the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating that the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

<sup>11</sup>See *In re H. Schnell & Co.*, 57 Agric. Dec. \_\_\_\_ (Sept. 17, 1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the United States Constitution); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

<sup>12</sup>See generally *In re Anna Mae Noell*, 58 Agric. Dec. \_\_\_\_ (Jan. 6, 1999) (holding that the default decision was properly issued where the respondents filed an answer 49 days after service of the  
(continued...)

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<sup>12</sup>(...continued)

complaint on the respondents and that the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Jack D. Stowers*, 57 Agric. Dec. \_\_\_ (July 16, 1998) (holding that the default decision was properly issued where the respondent filed his answer 1 year and 12 days after service of the complaint on the respondent and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding that the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding that the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding that the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding that the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and that the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding that the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994, and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding that the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny material allegations of the complaint and that the respondent is deemed, by his failure to file a timely answer and failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding that the default decision was properly issued where the respondents failed to file a timely answer and that the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of

(continued...)

the allegations of the complaint.<sup>13</sup>

The Rules of Practice provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent Nancy M. Kutz's first filing in this proceeding was filed 28 days after the Hearing Clerk served Respondents with the Complaint, and Respondent Nancy M. Kutz's first filing does not respond to the allegations of the Complaint. Respondent Nancy M. Kutz's failure to file a timely answer is deemed, for the purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Moreover, even if Respondent Nancy M. Kutz's first filing had been timely, it would be deemed an admission of the allegations of the Complaint because it does not respond to the allegations of the Complaint.

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<sup>12</sup>(...continued)

the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

<sup>13</sup>See generally *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733 (1992) (stating that since the respondent failed to deny the allegation of interstate commerce in its answer, the allegation as to interstate commerce in the complaint is deemed admitted); *In re Rex Kneeland*, 50 Agric. Dec. 1571 (1991) (holding that the default decision was properly issued where the answer, filed late, does not deny the material allegations of the complaint); *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) (stating that the respondent's answer was filed late and fails to deny the material allegations of the complaint; either reason warrants a default decision); *In re Kathleen D. Warner*, 46 Agric. Dec. 763 (1987) (Ruling on Certified Question) (ruling that a default decision should be issued because the respondent's answer does not deny the material allegations of the complaint); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding that the default decision was properly issued where the answer admits or does not deny material allegations of the complaint); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding that the default decision was properly issued where an answer, filed late, does not deny material allegations of the complaint); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding that the default decision was properly issued where the answer does not deny material allegations of the complaint); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding that the default decision was properly issued where an answer, filed late, does not deny material allegations of the complaint); *In re Guiman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding that the default decision was properly issued where the answer does not deny material allegations of the complaint); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding that the default decision was properly issued where the answer, filed late, does not deny material allegations of the complaint); *In re Michael A. Lucas*, 43 Agric. Dec. 1721 (1984) (stating that since the respondent's answer fails to deny the allegations of the complaint, the administrative law judge's default decision was properly issued).

Further, the Rules of Practice require that any objections to a motion for a default decision and proposed default decision must be filed within 20 days after service of the motion and proposed default decision (7 C.F.R. § 1.139). Respondents did not file any objections to Complainant's Motion for Default Decision and Proposed Default Decision.

Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding.

Accordingly, the Initial Decision and Order was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent Nancy M. Kutz of her rights under the due process clause of the Fifth Amendment to the United States Constitution.<sup>14</sup>

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

### Order

1. Respondent Nancy M. Kutz, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and the Regulations, without being licensed.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent Nancy M. Kutz.

2. Respondent Nancy M. Kutz is assessed a civil penalty of \$16,000.<sup>15</sup> The

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<sup>14</sup>See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the United States Constitution where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). See also *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

<sup>15</sup>The ALJ assessed Respondents a \$16,000 civil penalty (Initial Decision and Order at 4). The ALJ's Initial Decision and Order became effective as to Respondent Steven M. Kutz on July 8, 1999. The Initial Decision and Order did not become effective as to Respondent Nancy M. Kutz due to her timely appeal. The \$16,000 civil penalty assessed against Respondent Nancy M. Kutz in paragraph (continued...)

civil penalty shall be paid by a certified check or money order, made payable to the "Treasurer of the United States," and sent to:

Robert A. Ertman  
United States Department of Agriculture  
Office of the General Counsel  
Marketing Division  
1400 Independence Avenue, SW  
Room 2014-South Building  
Washington, D.C. 20250-1417

Respondent Nancy M. Kutz's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 65 days after service of this Order on Respondent Nancy M. Kutz. Respondent Nancy M. Kutz shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 99-0001.

3. (a) If Respondent Nancy M. Kutz has an Animal Welfare Act license at the time this Order is issued, Respondent Nancy M. Kutz's Animal Welfare Act license is suspended for a period of 90 days and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and this Order, including the payment of the civil penalty assessed in paragraph 2 of this Order. When Respondent Nancy M. Kutz demonstrates to the Animal and Plant Health Inspection Service that she has satisfied the conditions in paragraph 3(a) of this Order, a Supplemental Order will be issued in this proceeding, upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent Nancy M. Kutz's Animal Welfare Act license.

The Animal Welfare Act license suspension provisions of this Order shall become effective on the 65th day after service of this Order on Respondent Nancy M. Kutz.

(b) If Respondent Nancy M. Kutz does not have an Animal Welfare Act license at the time this Order is issued, Respondent Nancy M. Kutz is disqualified

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<sup>15</sup>(...continued)

2 of this Order is not in addition to the civil penalty assessed by the ALJ against Respondent Steven M. Kutz. Instead, paragraph 2 of this Order has the effect of making Respondent Nancy M. Kutz jointly and severally liable with Respondent Steven M. Kutz for a single \$16,000 civil penalty.

from obtaining an Animal Welfare Act license for a period of 90 days and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and this Order, including the payment of the civil penalty assessed in paragraph 2 of this Order. When Respondent Nancy M. Kutz demonstrates to the Animal and Plant Health Inspection Service that she has satisfied the conditions in paragraph 3(b) of this Order, a Supplemental Order will be issued in this proceeding, upon the motion of the Animal and Plant Health Inspection Service, terminating the disqualification of Respondent Nancy M. Kutz from obtaining an Animal Welfare Act license.

The Animal Welfare Act license disqualification provisions of this Order shall become effective on the day after service of this Order on Respondent Nancy M. Kutz.

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**In re: MICHAEL A. HUCHITAL, Ph.D., d/b/a QUALITY ANTISERA  
DEVELOPMENT AND PRODUCTION.**

**AWA Docket No. 97-0020.**

**Decision and Order filed November 4, 1999.**

**Research facility – Dealer – Testing – Animal facilities – Housekeeping – Veterinary care –  
Ventilation – Inspection – Civil penalty – Sanction policy – Cease and desist order.**

The Judicial Officer affirmed the decision by Judge Hunt (ALJ) that Respondent failed to comply with the Standards of care for rabbits: that Respondent failed to provide interior building surfaces of indoor housing facilities that were substantially impervious to moisture and capable of being readily sanitized (9 C.F.R. § 3.51(d)); that Respondent failed to keep the premises (buildings and grounds) clean and in good repair to protect animals from injury and to facilitate prescribed husbandry practices (9 C.F.R. § 3.56(c)); that Respondent failed to sufficiently ventilate indoor housing facilities for rabbits to provide for the health and well-being of the rabbits and to minimize odors and ammonia levels (9 C.F.R. § 3.51(b)); that Respondent failed to sanitize primary enclosures for rabbits at least once every 30 days (9 C.F.R. § 3.56(b)(1)); and that Respondent failed to clean pans under primary enclosures for rabbits at least once each week (9 C.F.R. § 3.56(a)(3)). In addition, the Judicial Officer found that Respondent failed to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and to provide veterinary care to an animal in need of care (9 C.F.R. § 2.40) and that Respondent refused to permit Animal and Plant Health Inspection Service officials to document, by the taking of photographs, conditions of noncompliance in Respondent's facility (9 C.F.R. § 2.126(a)(5)). The Judicial Officer rejected Complainant's contention that Respondent operated a *research facility*, as defined in the Animal Welfare Act (AWA) and the regulations issued under the AWA. The Judicial Officer assessed a \$3,750 civil penalty against Respondent and ordered Respondent to cease and desist from violations of the AWA and the

regulations and standards issued under the AWA.

Colleen A. Carroll, for Complainant.

Respondent, Pro se.

Initial decision issued by James W. Hunt, Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on February 3, 1997.

The Complaint alleges that Michael A. Huchital [hereinafter Respondent] violated the Animal Welfare Act and the Regulations and Standards. On April 2, 1997, Respondent filed an Answer denying the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the ALJ] presided over a hearing on November 18, 1998, in New York, New York. Frank Martin, Jr., and Carla M. Wagner, Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], appeared on behalf of Complainant.<sup>1</sup> Respondent appeared pro se.

On January 19, 1999, Respondent filed a brief [hereinafter Respondent's Brief], and on January 21, 1999, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof [hereinafter Complainant's Brief]. On March 29, 1999, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondent violated the Animal Welfare Act and the Standards; (2) directed Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessed Respondent a \$1,200 civil penalty (Initial Decision and Order at 15-16).

On June 24, 1999, Complainant appealed to the Judicial Officer; on October 26, 1999, Respondent filed a response to Complainant's appeal; and on October 27,

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<sup>1</sup>On April 2, 1999, Colleen A. Carroll entered an appearance as counsel for Complainant (Notice of Appearance).

1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ's Initial Decision and Order, except that I disagree with the civil penalty assessed by the ALJ, and I find, in addition to the 13 violations of the Standards found by the ALJ, that Respondent violated 9 C.F.R. § 3.56(c) on April 18, 1995; 9 C.F.R. § 2.126(a)(5) on May 28 and May 29, 1996; and 9 C.F.R. § 2.40 on April 18, 1995, and October 16, 1996. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order with modifications, which reflect my disagreement with the ALJ. Additional conclusions by the Judicial Officer follow the ALJ's Conclusions of Law, as restated.

Complainant's exhibits are referred to as "CX" and the hearing transcript is referred to as "Tr."

**APPLICABLE STATUTORY PROVISIONS,  
REGULATIONS, AND STANDARDS**

7 U.S.C.:

**TITLE 7—AGRICULTURE**

....

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

**§ 2131. Congressional statement of policy**

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

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

- (2) to assure the humane treatment of animals during transportation in commerce; and
- (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

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

### § 2132. Definitions

When used in this chapter—

.....

(e) The term “research facility” means any school (except an elementary or secondary school), institution, or organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or transports live animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments: *Provided*, That the Secretary may exempt, by regulation, any such school, institution, organization, or person that does not use or intend to use live dogs or cats, except those schools, institutions, organizations, or persons, which use substantial numbers (as determined by the Secretary) of live animals the principal function of which schools, institutions, organizations, or persons is biomedical research or testing, when in the judgment of the Secretary, any such exemption does not vitiate the purpose of this chapter;

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

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

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

....

#### **§ 2134. Valid license for dealers and exhibitors required**

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

....

#### **§ 2146. Administration and enforcement by Secretary**

##### **(a) Investigations and inspections**

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

....

#### **§ 2149. Violations by licensees**

....

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

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

....

**§ 2151. Rules and regulations**

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

7 U.S.C. §§ 2131, 2132(e)-(f), 2134, 2146(a), 2149(b), 2151.

9 C.F.R.:

## TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

#### SUBCHAPTER A—ANIMAL WELFARE

##### PART 1—DEFINITION OF TERMS

###### § 1.1 Definitions.

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

....

*Dealer* means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than \$500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

....

*Research facility* means any school (except an elementary or secondary school), institution, organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or

transports live animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments: *Provided*, That the Administrator may exempt, by regulation, any such school, institution, organization, or person that does not use or intend to use live dogs or cats, except those schools, institutions, organizations, or persons, which use substantial numbers (as determined by the Administrator) of live animals the principal function of which schools, institutions, organizations, or persons is biomedical research or testing, when in the judgment of the Administrator, any such exemption does not vitiate the purpose of the Act.

....

## PART 2—REGULATIONS

....

### SUBPART C—RESEARCH FACILITIES

....

#### § 2.31 Institutional Animal Care and Use Committee (IACUC).

(a) The Chief Executive Officer of the research facility shall appoint an Institutional Animal Care and Use Committee (IACUC), qualified through the experience and expertise of its members to assess the research facility's animal program, facilities, and procedures. Except as specifically authorized by law or these regulations, nothing in this part shall be deemed to permit the Committee or IACUC to prescribe methods or set standards for the design, performance, or conduct of actual research or experimentation by a research facility.

(b) IACUC Membership. . . .

....

(3) Of the members of the Committee:

....

(ii) At least one shall not be affiliated in any way with the facility other than as a member of the Committee, and shall not be a member of the immediate family of a person who is affiliated with the facility. The Secretary intends that such person will provide representation for general

community interests in the proper care and treatment of animals;

....  
(c) IACUC Functions. With respect to activities involving animals, the IACUC, as an agent of the research facility, shall:

(1) Review, at least once every six months, the research facility's program for humane care and use of animals, using title 9, chapter I, subchapter A—Animal Welfare, as a basis for evaluation;

(2) Inspect, at least once every six months, all of the research facility's animal facilities, including animal study areas, using title 9, chapter I, subchapter A—Animal Welfare, as a basis for evaluation; *Provided, however,* That animal areas containing free-living wild animals in their natural habitat need not be included in such inspection;

(3) Prepare reports of its evaluations conducted as required by paragraphs (c)(1) and (2) of this section, and submit the reports to the Institutional Official of the research facility; *Provided, however,* That the IACUC may determine the best means of conducting evaluations of the research facility's programs and facilities; and *Provided, further,* That no Committee member wishing to participate in any evaluation conducted under this subpart may be excluded. The IACUC may use subcommittees composed of at least two Committee members and may invite *ad hoc* consultants to assist in conducting the evaluations, however, the IACUC remains responsible for the evaluations and reports as required by the Act and regulations. The reports shall be reviewed and signed by a majority of the IACUC members and must include any minority views. The reports shall be updated at least once every six months upon completion of the required semi-annual evaluations and shall be maintained by the research facility and made available to APHIS and to officials of funding Federal agencies for inspection and copying upon request. The reports must contain a description of the nature and extent of the research facility's adherence to this subchapter, must identify specifically any departures from the provisions of title 9, chapter I, subchapter A—Animal Welfare, and must state the reasons for each departure. The reports must distinguish significant deficiencies from minor deficiencies. A significant deficiency is one which, with reference to Subchapter A, and, in the judgment of the IACUC and the Institutional Official, is or may be a threat to the health or safety of the animals. If program or facility deficiencies are noted, the reports must contain a reasonable and specific plan and schedule with dates for correcting each deficiency. Any failure to adhere to the plan and schedule that results in a significant deficiency remaining uncorrected shall

be reported in writing within 15 business days by the IACUC, through the Institutional Official, to APHIS and any Federal agency funding that activity;

....

(6) Review and approve, require modifications in (to secure approval), or withhold approval of those components of proposed activities related to the care and use of animals, as specified in paragraph (d) of this section[.]

....

(d) IACUC review of activities involving animals. (1) In order to approve proposed activities or proposed significant changes in ongoing activities, the IACUC shall conduct a review of those components of the activities related to the care and use of animals and determine that the proposed activities are in accordance with this subchapter unless acceptable justification for a departure is presented in writing; *Provided, however,* That field studies as defined in part 1 of this subchapter are exempt from this requirement. Further, the IACUC shall determine that the proposed activities or significant changes in ongoing activities meet the following requirements:

(i) Procedures involving animals will avoid or minimize discomfort, distress, and pain to the animals;

(ii) The principal investigator has considered alternatives to procedures that may cause more than momentary or slight pain or distress to the animals, and has provided a written narrative description of the methods and sources, *e.g.*, The Animal Welfare Information Center, used to determine that alternatives were not available;

(iii) The principal investigator has provided written assurance that the activities do not unnecessarily duplicate previous experiments;

(iv) Procedures that may cause more than momentary or slight pain or distress to the animals will:

(A) Be performed with appropriate sedatives, analgesics or anesthetics, unless withholding such agents is justified for scientific reasons, in writing, by the principal investigator and will continue for only the necessary period of time;

....

(viii) Personnel conducting procedures on the species being maintained or studied will be appropriately qualified and trained in those procedures;

....

(5) The IACUC shall conduct continuing reviews of activities covered by this subchapter at appropriate intervals as determined by the IACUC, but

not less than annually[.]

....

(e) A proposal to conduct an activity involving animals, or to make a significant change in an ongoing activity involving animals, must contain the following:

(1) Identification of the species and the approximate number of animals to be used;

(2) A rationale for involving animals, and for the appropriateness of the species and numbers of animals to be used;

(3) A complete description of the proposed use of the animals;

(4) A description of procedures designed to assure that discomfort and pain to animals will be limited to that which is unavoidable for the conduct of scientifically valuable research, including provision for the use of analgesic, anesthetic, and tranquilizing drugs where indicated and appropriate to minimize discomfort and pain to animals; and

(5) A description of any euthanasia method to be used.

### § 2.32 Personnel qualifications.

(a) It shall be the responsibility of the research facility to ensure that all scientists, research technicians, animal technicians, and other personnel involved in animal care, treatment, and use are qualified to perform their duties. This responsibility shall be fulfilled in part through the provision of training and instruction to those personnel.

(b) Training and instruction shall be made available, and the qualifications of personnel reviewed, with sufficient frequency to fulfill the research facility's responsibilities under this section and § 2.31.

(c) Training and instruction of personnel must include guidance in at least the following areas:

(1) Humane methods of animal maintenance and experimentation, including:

(i) The basic needs of each species of animal;

(ii) Proper handling and care for the various species of animals used by the facility;

(iii) Proper pre-procedural and post-procedural care of animals; and

(iv) Aseptic surgical methods and procedures;

(2) The concept, availability, and use of research or testing methods that limit the use of animals or minimize animal distress;

(3) Proper use of anesthetics, analgesics, and tranquilizers for any

species of animal used by the facility;

(4) Methods whereby deficiencies in animal care and treatment are reported, including deficiencies in animal care and treatment reported by any employee of the facility. No facility employee, Committee member, or laboratory personnel shall be discriminated against or be subject to any reprisal for reporting violations of any regulation or standards under the Act;

(5) Utilization of services (e.g., National Agricultural Library, National Library of Medicine) available to provide information:

- (i) On appropriate methods of animal care and use;
- (ii) On alternatives to the use of live animals in research;
- (iii) That could prevent unintended and unnecessary duplication of research involving animals; and
- (iv) Regarding the intent and requirements of the Act.

### **§ 2.33 Attending veterinarian and adequate veterinary care.**

(a) Each research facility shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section:

(1) Each research facility 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 research facility;

(2) Each research facility 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; and

(3) The attending veterinarian shall be a voting member of the IACUC; *Provided, however,* That a research facility with more than one Doctor of Veterinary Medicine (DVM) may appoint to the IACUC another DVM with delegated program responsibility for activities involving animals at the research facility.

(b) Each research facility 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) Guidance to principal investigators and other 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 current established veterinary medical and nursing procedures.

....

### **§ 2.35 Recordkeeping requirements.**

(a) The research facility shall maintain the following IACUC records:

(1) Minutes of IACUC meetings, including records of attendance, activities of the Committee, and Committee deliberations;

(2) Records of proposed activities involving animals and proposed significant changes in activities involving animals, and whether IACUC approval was given or withheld; and

(3) Records of semiannual IACUC reports and recommendations (including minority views), prepared in accordance with the requirements of § 2.31(c)(3) of this subpart, and forwarded to the Institutional Official.

....

### **§ 2.36 Annual report.**

(a) The reporting facility shall be that segment of the research facility, or that department, agency, or instrumentality of the United States, that uses or intends to use live animals in research, tests, experiments, or for teaching. Each reporting facility shall submit an annual report to the APHIS, REAC Sector Supervisor for the State where the facility is located on or before December 1 of each calendar year. The report shall be signed and certified by the CEO or Institutional Official, and shall cover the previous Federal fiscal year.

(b) The annual report shall:

(1) Assure that professionally acceptable standards governing the care, treatment, and use of animals, including appropriate use of anesthetic, analgesic, and tranquilizing drugs, prior to, during, and following actual research, teaching, testing, surgery, or experimentation were followed by the research facility;

(2) Assure that each principal investigator has considered alternatives to painful procedures;

(3) Assure that the facility is adhering to the standards and regulations under the Act, and that it has required that exceptions to the standards and regulations be specified and explained by the principal investigator and approved by the IACUC. A summary of all such exceptions must be attached to the facility's annual report. In addition to identifying the IACUC-approved exceptions, this summary must include a brief explanation of the exceptions, as well as the species and numbers of animals affected;

(4) State the location of all facilities where animals were housed or used in actual research, testing, teaching, or experimentation, or held for these purposes;

(5) State the common names and the numbers of animals upon which teaching, research, experiments, or tests were conducted involving no pain, distress, or use of pain-relieving drugs. Routine procedures (e.g., injections, tattooing, blood sampling) should be reported with this group;

(6) State the common names and the numbers of animals upon which experiments, teaching, research, surgery, or tests were conducted involving accompanying pain or distress to the animals and for which appropriate anesthetic, analgesic, or tranquilizing drugs were used;

(7) State the common names and the numbers of animals upon which teaching, experiments, research, surgery, or tests were conducted involving accompanying pain or distress to the animals and for which the use of appropriate anesthetic, analgesic, or tranquilizing drugs would have adversely affected the procedures, results, or interpretation of the teaching, research, experiments, surgery, or tests. An explanation of the procedures producing pain or distress in these animals and the reasons such drugs were not used shall be attached to the annual report;

(8) State the common names and the numbers of animals being bred, conditioned, or held for use in teaching, testing, experiments, research, or surgery but not yet used for such purposes.

....

**§ 2.38 Miscellaneous.**

....

(b) *Access and inspection of records and property.* (1) Each research facility shall, during business hours, allow APHIS officials:

....

(v) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

....

(k) *Compliance with standards and prohibitions.* (1) Each research facility shall comply in all respects with the regulations set forth in subpart C of this part and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals; *Provided, however,* That exceptions to the standards in part 3 and the provisions of subpart C of this part may be made only when such exceptions are specified and justified in the proposal to conduct the activity and are approved by the IACUC.

(2) No person shall obtain live random source dogs or cats by use of false pretenses, misrepresentation, or deception.

(3) No person shall acquire, buy, sell, exhibit, use for research, transport, or offer for transportation, any stolen animal.

(4) Each research facility shall comply with the regulations set forth in § 2.133 of subpart I of this part.

....

**SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE**

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

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

(1) Each dealer and exhibitor shall employ an attending veterinarian

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

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

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

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

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

(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.

....

## **SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD**

### **§ 2.100 Compliance with standards.**

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

....

**SUBPART I—MISCELLANEOUS**

....

**§ 2.126 Access and inspection of records and property.**

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

....

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

....

**PART 3—STANDARDS**

....

**SUBPART C—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE,  
TREATMENT AND TRANSPORTATION OF RABBITS**

**FACILITIES AND OPERATING STANDARDS**

....

**§ 3.51 Facilities, indoor.**

....

(b) *Ventilation*. Indoor housing facilities for rabbits shall be adequately ventilated to provide for the health and comfort of the animals at all times. Such facilities shall be provided with fresh air either by means of windows, doors, vents, or air conditioning and shall be ventilated so as to minimize drafts, odors, and moisture condensation. Auxiliary ventilation, such as exhaust fans and vents or air conditioning, shall be provided when the ambient temperature is 85° F. or higher.

....

(d) *Interior Surfaces*. The interior building surfaces of indoor housing facilities shall be constructed and maintained so that they are substantially impervious to moisture and may be readily sanitized.

....

### § 3.56 Sanitation.

(a) *Cleaning of primary enclosures.* . . .

(3) If primary enclosures are equipped with wire or mesh floors, the troughs or pans under such enclosures shall be cleaned at least once each week. If worm bins are used under such enclosures they shall be maintained in a sanitary condition.

(b) *Sanitization of primary enclosures.* (1) Primary enclosures for rabbits shall be sanitized at least once every 30 days in the manner provided in paragraph (b)(3) of this section.

. . . .

(c) *Housekeeping.* Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Premises shall remain free of accumulations of trash.

9 C.F.R. §§ 1.1; 2.31(a), (b)(3)(ii), (c)(1)-(c)(3), (c)(6), (d)(1)(i)-(d)(1)(iv)(A), (d)(1)(viii), (d)(5), (e)(1)-(e)(5), .32(a)-(c), .33, .35(a)(1)-(a)(3), .36, .38(b)(1)(v), (k), .40, .100(a), .126(a)(5); 3.51(b), (d), .56(a)(3), (b)(1), (c) (1997).

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

### Facts

Respondent is an individual doing business as Quality Antisera Development and Production at 29 Distillery Road, Warwick, New York 10990 (Answer ¶ II(A)). Respondent has a doctorate degree in bio-chemistry. He worked for 17 years as an immunologist and bio-chemist and as a researcher and developer of immunoassays, vaccines, and antisera. (Tr. 267-68.)

About 1990, Respondent opened his own facility to use rabbits to produce antisera for laboratories on a contract basis. The number of rabbits at the facility varies with the contracts with his customers. At the time of the hearing, Respondent had 80 rabbits. On the advice of his friend, Gary Monteith, a rabbit handler, Respondent registered with the Animal and Plant Health Inspection Service [hereinafter APHIS] as a research facility, when he opened the facility. (CX 1; Tr. 203-04, 214, 273, 277.)

Mr. Monteith has over 30 years' experience handling rabbits, including work for a company raising rabbits for laboratories and 10 years' experience as a laboratory technician handling rabbits for a company producing bacterial tagasera from rabbit antisera. Mr. Monteith is now a private contractor who provides services to Respondent for about one day every other week. (Tr. 197, 205.) His services include an examination of each of Respondent's rabbits to be injected with an immunogen<sup>2</sup> to determine that the rabbits are in good health (Tr. 198). The immunogen is provided by Respondent's customers (Tr. 200-01, 285). Each of Respondent's rabbits is then given multiple injections with a small volume of the immunogen to avoid the open sores that may be caused by fewer injections with a higher volume of the immunogen (Tr. 199). Each rabbit is later given a booster shot in the leg to raise the titer (Tr. 289). The rabbit responds to the immunogen by developing what the witnesses referred to as a lesion at the site of the injection. Mr. Monteith testified that the lesion is a "known response" to the immunogen injection and is similar to a child's reaction to a smallpox vaccination. (Tr. 199-201, 207-08.) A vaccine is an immunogen (Tr. 291). Mr. Monteith testified that he examines the lesions to determine whether they are open sores which, he says, does not occur with Respondent's rabbits after receiving injections. He testified that, based on his familiarization with handling rabbits, the rabbits do not suffer any pain.<sup>3</sup> The rabbit is then bled and the blood is refrigerated to allow the serum to separate from the blood. The serum is sent to the customer and the rabbit is euthanized. (Tr. 198-202, 286-87.)

Respondent testified that these procedures "are all proven, tried and true methods in the literature" and that "[t]he results are predictable" (Tr. 270). Respondent said he does not evaluate or test the serum before sending it to the customer (Tr. 267). Respondent said he is not familiar with all the uses to which his customers put the antisera, but knows that it is used to develop immunoassays,

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<sup>2</sup>Mr. Monteith referred to the substance injected in the rabbits as an "antigen." Two of Complainant's witnesses, an inspector and a doctor of veterinary medicine, also referred to the substance variously as "antigena," "agoven," and "antigen" (Tr. 93, 96, 189). Respondent, however, testified that the rabbits are injected with an immunogen and Freuns incomplete adjuvant rather than with an antigen. Respondent testified that the response by a rabbit to an antigen could be "extremely deleterious." (Tr. 285, 289.) Complainant also refers to the substance injected into rabbits by Respondent as an immunogen (Complainant's Brief at 2).

<sup>3</sup>Section 1.1 of the Regulations defines a *painful procedure* as "any procedure that would reasonably be expected to cause more than slight or momentary pain or distress in a human being to which that procedure was applied, that is, pain in excess of that caused by injections or other minor procedures" (9 C.F.R. § 1.1).

which could be used for diagnostic testing, and that one of his larger customers uses the antisera to detect low molecular allides in soil and ground water (Tr. 287-88). Respondent summed up his work as “[w]e do not evaluate the serum, we do not select the animals, we raise antisera on a contract basis. We immunize, we bleed, we ship.” (Tr. 267.)

APHIS officials have inspected Respondent’s facility. The Complaint alleges that APHIS officials found violations of the Regulations and Standards during inspections of Respondent’s facility conducted on April 18, 1995, March 5 and 7, 1996, May 28 and 29, 1996, and October 16, 1996. The alleged violations fall into two general categories. The first category relates to requirements for research facilities in sections 2.30 through 2.38 of the Regulations (9 C.F.R. §§ 2.30-.38). The second category relates to requirements for the humane handling, care, treatment, and transportation of rabbits in sections 3.50 through 3.66 of the Standards (9 C.F.R. §§ 3.50-.66). Complainant contends, and Respondent denies, that Respondent’s facility is a research facility.

### **Research Facilities**

The Animal Welfare Act applies to, *inter alia*, research facilities, dealers, and exhibitors. Dealers and exhibitors must be licensed by APHIS (9 C.F.R. § 2.1(a)). Research facilities must be registered with APHIS (9 C.F.R. § 2.30(a)). The term “research facility” is defined in section 2(e) of the Animal Welfare Act (7 U.S.C. § 2132(e)) and in section 1.1 of the Regulations (9 C.F.R. § 1.1).

Respondent contends that even though he had registered as a research facility, on the advice of Mr. Monteith, he later read the Regulations and determined that his facility was not a research facility because he does not perform any research, testing, or experiments on the rabbits according to the literal dictionary definition of those terms, but only “harvests” untested antisera serum from the rabbits which he forwards to customers with whom he has contracts (Tr. 287-91).

Mr. Monteith described his reason for advising Respondent to register his facility as a research facility, as follows:

To be quite honest with you, when I -- when Mike [Respondent] first approached me about possibly doing this antisera business because at the time I had the antisera production just after I finished up doing the antisera production at work, I told him if we’re going to do it, we have to do it right and we have to be -- we should abide by all the laws. We’re not going to do anything underhanded and I was actually the one that suggested that we file for USDA and Public Health.

Tr. 214.

Mr. Monteith, who was employed at the time with a registered research facility engaged in antisera production and research (Tr. 215, 221), referred to his rabbit handling as "testing," as follows:

[BY JUDGE HUNT:]

Q. Again about the procedure now, the rabbit receives all these injections at the same time?

[BY MR. MONTEITH:]

A. Yes.

Q. And then the lesion shows a reaction to the injection?

A. Yes.

Q. And then after that at some point in time they're then bled, the rabbits are then bled?

A. Yes.

Q. Is the rabbit destroyed after that?

A. After all the testing is completed, yes, but the rabbit is not bled out.

Q. Is not bled out?

A. The rabbit is not bled out to a point where it dies. The customer for some reason just wants a certain amount of blood. We provide the blood, the serum and then when they no longer need any more serum they take the rabbit off test.

Q. Then what happens to the rabbit at that point? What do you do with it?

A. Then Dr. Huchital euthanizes him.

Tr. 218.

However, neither Mr. Monteith nor other witnesses testified that this reference to “testing” at Respondent’s facility was anything more than to inject and bleed the rabbits. Respondent, in Respondent’s Brief at 2, states that “[i]n the field of antibody production the initial bleed is sometimes referred to as the test bleed, however, we do no testing of bleeds.” Mr. Monteith testified that rabbits respond in varying degrees to the immunogen and that the customer decides whether to do a “production” on a rabbit that did not respond to the immunogen in the way the customer desired (Tr. 206). Dr. Mary Ellen Geib, a veterinary medical officer employed by APHIS, evaded giving a direct answer when asked whether Respondent’s procedure constituted testing, except to call it the “first step” (Tr. 98-99).

Mr. Monteith testified he does not believe that Respondent’s activities constitute research, experimentation, or testing, as follows:

[BY DR. HUCHITAL:]

Q. How many years have you been working in the field of raising antibodies by the literature procedures that we’ve described?

[BY MR. MONTEITH:]

A. Close to twenty years.

Q. Would you say this is considered research?

A. No.

Q. Experimentation?

A. No.

Q. Testing?

A. No.

Q. Thank you. Since you have been in the field for years, what is your feeling with respect to the IACUC committee and the impact on the health

of the animals?

A. I understand the concept of the IACUC which I feel as far as research experiments is very necessary. I believe in that but when you're doing a procedure that is a known procedure, we only have the one procedure, we're not deviating from that. I don't feel that what we are doing in our facility constitutes research. We're just following what our customer wants us to do as far as they provide us with the antigen [immunogen], we inoculate the rabbits, we maintain them, then we bleed them and we ship out the serum and that's all we do.

JUDGE HUNT: The response is known beforehand or any unpredictability in this?

MR. MONTEITH: No. The antigen [immunogen], they've developed it so that they know they're going to get a response from the rabbits. So all we're doing is actually producing the antisera for the customer. It's a known response.

Tr. 200-01.

Complainant contends in Complainant's Brief that Respondent's activities in the production of antisera constitute "testing" within the meaning of the Animal Welfare Act and the Regulations. Dr. Geib testified that a facility, such as the facility operated by Respondent, is considered a research facility because it is engaged in a "collaborative" association with the person who supplies the immunogen and performs the testing even if the only procedures performed at the facility are injection of immunogen and drawing of blood:

When the customer provides the antigen [immunogen], we consider it a collaborative research effort between the person or persons responsible for caring for the rabbits, injecting the rabbits and drawing the blood and the person who is providing the antigen [immunogen]. We regulate that entity.

Tr. 96.

Dr. Geib testified that this interpretation of the Animal Welfare Act and the Regulations by APHIS is contained in a document called "Policy #10" (Tr. 96). It states in relevant part:

A facility that produces antibodies or antisera is “testing” animals for their immune response and selects animals for production based on the results of this testing. Therefore, the facility must be **registered** as a research facility.

CX 34 at 2 (emphasis in original).

Dr. Geib testified that Policy #10 was issued by APHIS to clarify the definition of the term “research facility” in the Animal Welfare Act and the Regulations, as follows:

The Code of [Federal] Regulations specifies that we do cover testing. Our policies were developed, they’re not in addition to our regulations but they kind of expand. We make policies where we hear the same questions over and over again or there may be a misunderstanding out in the field or the regulated community or the public and policy ten was developed to further clarify what activities actually fall under the jurisdiction of the Animal Welfare Act and it also along with policy ten specifying that we do cover antibody production because it involves testing the animal’s response to the antigen [immunogen] injection.

Tr. 96.

Dr. Geib testified that Policy #10, issued on April 14, 1997, is based on “correspondences [sic] and memos and policies that had been previously issued” (Tr. 100). Kay Carter-Corker, a supervisory animal care specialist employed by APHIS, testified that the interpretation of the term *research facility* that is articulated in Policy #10 had been in place since 1990 and, although not distributed, was available to the public (Tr. 241). The previous correspondence, memoranda, and policies, on which Policy #10 is purportedly based, were not offered as evidence at the hearing.

Complainant has the burden of proving its allegations by a preponderance of the evidence.<sup>4</sup> The evidence presented fails to establish that Respondent’s facility

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<sup>4</sup>The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re James E. Stephens*, 58 Agric. Dec. \_\_\_, slip op. at 3 (May 5, 1999); *In re Judie* (continued...)

was a research facility as defined in section 2(e) of the Animal Welfare Act (7 U.S.C. § 2132(e)) and section 1.1 of the Regulations (9 C.F.R. § 1.1), during the times relevant to the Complaint. Respondent's procedure of injecting a rabbit with a customer-provided immunogen and then bleeding the animal to collect untested serum to forward to the customer does not establish that Respondent was, himself, using rabbits or their blood in research, tests, or experiments. Although the procedure was referred to as a test bleed, the record does not show that Respondent performed any actual testing on the rabbits or their blood. The procedure was, as Respondent claimed, a production or harvesting operation. Dr. Geib also declined to call Respondent's procedure testing. However, she said that, according to the rationale for Policy #10, Respondent's operation is now considered to be a research facility because Respondent is engaged in the first step of what she described as a collaborative effort with his research customers. (Tr. 96-100.)

Complainant argues that deference must be accorded to APHIS' interpretation, in Policy #10, of the Animal Welfare Act and the Regulations that a facility that produces antisera is to be considered a research facility (Complainant's Brief at 43

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<sup>4</sup>(...continued)

*Hansen*, 57 Agric. Dec. 1072, 1107-08 (1998), *appeal docketed*, Nos. 99-2640, 99-2665 (8th Cir. June 1 and June 25, 1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1052 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1015 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *aff'd*, No. 98-70807 (9th Cir. July 16, 1999) (unpublished) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *aff'd*, No. 98-3100 (3d Cir. Dec. 21, 1998) (unpublished); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1246-47 n.\*\*\* (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

n.2). However, Policy #10 was not issued until April 14, 1997, after the violations alleged in the Complaint, and Complainant failed to introduce APHIS policy statements regarding antisera production that are applicable to the period during which the violations that are the subject of this proceeding are alleged to have occurred. The evidence is not sufficient to establish that such an interpretation existed before the promulgation of Policy #10 on April 14, 1997. I therefore find that APHIS did not adopt the interpretation that a facility engaged solely in the production of antisera was a research facility, until the issuance of Policy #10 on April 14, 1997, which was 2 months after Complainant filed the Complaint. Such an interpretation has no retroactive effect and is therefore inapplicable to this proceeding which covers a period of time prior to APHIS' issuance of Policy #10. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).

Complainant further argues that this proceeding is governed by *In re Lee Roach*, 51 Agric. Dec. 252 (1992) (Complainant's Brief at 45-46). However, the facts in *Roach* show, *inter alia*, that the facility in question was a research facility because the respondents in *Roach* not only sold blood extracted from animals for research and testing but also, unlike Respondent, conducted tests on the blood. *Roach* is therefore not applicable to this proceeding.

I find that Respondent did not operate a research facility during the times relevant to this proceeding. The Complaint is therefore dismissed to the extent it alleges violations which apply only to research facilities.

However, Respondent is still subject to the Regulations as a dealer. Section 1.1 of the Regulations (9 C.F.R. § 1.1) defines *dealer* as including any person who, in commerce, for compensation or profit, delivers for transportation or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of blood or serum of animals for research, teaching, testing, or experimentation.

On his registration form, Respondent indicated that his rabbits were covered by the Animal Welfare Act, i.e., in commerce (CX 1) and, as discussed in this Decision and Order, *supra*, he sold serum derived from the rabbits' blood to facilities engaged in research and testing. Accordingly, Respondent was a dealer and, as such, was required to comply with the Standards for the humane handling, care, treatment, and transportation of rabbits (9 C.F.R. §§ 3.50-.66) during the times covered by the Complaint.

### **Handling, Care, Treatment, and Transportation of Rabbits**

Sharon Fairchild, an APHIS-employed doctor of veterinary medicine, testified that she inspected Respondent's facility on April 18, 1995.

Paragraph II(L)(1) of the Complaint alleges that on April 18, 1995, APHIS

inspected Respondent's facility and found that the interior building surfaces of indoor housing facilities were not impervious to moisture and capable of being readily sanitized, in violation of section 3.51(d) of the Standards (9 C.F.R. § 3.51(d)). Dr. Fairchild testified that she inspected Respondent's facility on April 18, 1995, and found water-damaged ceiling tiles in a rabbit room which she said could not be cleaned and needed to be replaced (CX 6 at 10; Tr. 62-63).

Dr. Fairchild's testimony that tiles were water-damaged shows that surfaces were not impervious to moisture and thus supports a finding that Respondent violated 9 C.F.R. § 3.51(d) on April 18, 1995, as alleged in paragraph II(L)(1) of the Complaint.

Paragraph II(L)(2) of the Complaint alleges that on April 18, 1995, APHIS inspected Respondent's facility and found that the premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices, in violation of section 3.56(c) of the Standards (9 C.F.R. § 3.56(c)). Dr. Fairchild testified that, during her April 18, 1995, inspection of Respondent's facility, she found that two empty cages were dirty (Tr. 63-64). In addition, the April 18, 1995, Animal Care Inspection Report, completed by Dr. Fairchild, states:

# 37 Housekeeping 3.56(c)

Premises shall be kept clean in order to facilitate prescribed husbandry practices.

- (1) There were at least two empty but used, dirty cages that were not in use and had not been cleaned and sanitized. Empty cages that have been used and are dirty need to be cleaned and sanitized after use.
- (2) The walls of all the rabbit rooms had urine & feces on them and need to be kept clean & free of contaminating material.
- (3) There was pop & paint stored in the first rabbit room. Only materials needed for actual animal husbandry should be stored in animal areas.
- (4) The fans on both rabbit room doors had hair on the filter and must be cleaned.

CX 6 at 10-11.

Dr. Fairchild's testimony that two empty cages were dirty and the April 18, 1995, Animal Care Inspection Report support a finding that Respondent violated 9 C.F.R. § 3.56(c) on April 18, 1995, as alleged in paragraph II(L)(2) of the Complaint.

Paragraph II(M) of the Complaint alleges that on April 18, 1995, APHIS inspected Respondent's facility and found that Respondent had failed to maintain

programs of 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.

The April 18, 1995, Animal Care Inspection Report, completed by Dr. Fairchild, states, as follows:

#48 Veterinary care. 2.33(b)(2)

Each research facility shall maintain programs of adequate veterinary care.

Rabbit #13 had long nails that need to be trimmed.

CX 6 at 11.

Moreover, Dr. Fairchild testified regarding her finding that Respondent failed to provide veterinary care on April 18, 1995, as follows:

[MR. MARTIN:]

Q. Doctor, did you identify any other deficiencies during this inspection?

[DR. FAIRCHILD:]

A. Yes, I did.

Q. Would you tell us what the next one was, please.

A. The next one was veterinary care.

Q. What did that entail?

A. That was -- each research [sic] needs to maintain a program of adequate veterinary care and there was one rabbit that had long toe nails that needed to be trimmed.

Q. How would you characterize that deficiency?

A. As a significant deficiency.

Q. Why?

A. The rabbit[']s toe nails, if they get long, they could grow around or even just walking he could -- he can't put his pads down the way he should, it could cause pain.

Q. So could that affect the animal's health?

A. Yes, it could.

Q. How?

A. It could cause them to not be able to walk as well, maybe get their toes hooked in the cage and could if not taken care of, eventually grow around.

Tr. 64-65.

I find, based on the April 18, 1995, Animal Care Inspection Report and Dr. Fairchild's testimony that Complainant proved a preponderance of the evidence that, on April 18, 1995, Respondent failed to provide veterinary care to an animal in need of veterinary care, as alleged in paragraph II(M) of the Complaint.

John Lopinto, an APHIS-employed doctor of veterinary medicine, conducted inspections of Respondent's facility on March 5 and March 7, 1996.

Paragraph III(A) of the Complaint alleges that on March 5 and March 7, 1996, APHIS inspected Respondent's facility and found that Respondent had failed to maintain programs of 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.

While Complainant introduced some evidence which indicates that Respondent may have failed to maintain programs of adequate veterinary care on March 5 and March 7, 1996, Complainant has not proved by a preponderance of the evidence that Respondent failed to maintain programs of adequate veterinary care on March 5 and March 7, 1996, as alleged in paragraph III(A) of the Complaint.

Paragraph III(B)(1) of the Complaint alleges that on March 5 and March 7, 1996, APHIS inspected Respondent's facility and found that the interior building surfaces of indoor housing facilities were not substantially impervious to moisture and capable of being readily sanitized, in violation of section 3.51(d) of the Standards (9 C.F.R. § 3.51(d)). The March 7, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states that "[r]abbit restraint device is made of wood. Interior part is bare wood which cannot be sanitized" (CX 8 at 2). He added in his testimony that "[bare wood] has to be impervious to be sanitizable"

(Tr. 118). Dr. Lopinto, however, did not provide any basis for his determination that the rabbit restraint device was an interior building surface of an indoor housing facility. Therefore, Complainant has failed to prove that Respondent violated 9 C.F.R. § 3.51(d) on March 5 and March 7, 1996, as alleged in paragraph III(B)(1) of the Complaint.

Paragraph III(B)(2) of the Complaint alleges that on March 5 and March 7, 1996, APHIS inspected Respondent's facility and found that the premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices, in violation of section 3.56(c) of the Standards (9 C.F.R. § 3.56(c)). The March 7, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states:

III Item 37 Housekeeping 3.56(c)

Premises shall be kept clean and in good repair to facilitate good husbandry practices.

- 1) Rabbit rm 2 had a ceiling leak
- 2) Rabbit rm 1 had assorted debris in the room to include cage parts, fly strips, paint cans, open terramycin package
- 3) Lab area had clutter of adjuvant bottles, old glass syringes and blood tubes on floor and table.

Facility shall clean and maintain good housekeeping standards

Correct by 3/10/96

CX 8 at 2.

These findings of a ceiling leak and accumulated trash constitute a violation of 9 C.F.R. § 3.56(c), as alleged in paragraph III(B)(2) of the Complaint.

Paragraph III(B)(3) of the Complaint alleges that on March 5 and March 7, 1996, APHIS inspected Respondent's facility and found that the indoor housing facilities for animals were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors and ammonia levels, in violation of section 3.51(b) of the Standards (9 C.F.R. § 3.51(b)).

Dr. Lopinto testified that the ammonia odors were "[s]trong enough that they were bothering my respiratory [system] and eyes" (Tr. 122). Respondent contended that the odor level in his facility complies with OSHA standards (Respondent's Brief at 3). Whether it does or not, OSHA standards are not applicable to this proceeding. The odor of ammonia that affects a person's respiratory system and eyes would certainly affect a rabbit's health and comfort and thus constitutes a violation of 9 C.F.R. § 3.51(b).

Paragraph III(B)(4) of the Complaint alleges that on March 5 and March 7, 1996, APHIS inspected Respondent's facility and found that primary enclosures for rabbits were not sanitized every 30 days and pans under primary enclosures were not cleaned once every week, in violation of section 3.56(a)(3) and (b)(1) of the Standards (9 C.F.R. § 3.56(a)(3), (b)(1)). The March 7, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states:

**IV Non-Compliant Items Identified on Last Inspection That Have Not Been Corrected as of This Inspection.**

**Item 36 Cleaning and Sanitation 3.56(b)(1) & (a)(3)**

- 1) Primary enclosures for rabbits shall be sanitized at least once every 30 days.

There is still no evidence that the cages are being sanitized according to the regulations.

- 2) Pans under enclosures continue to have urine scale & debris buildup.

**CX 8 at 4.**

Although Dr. Lopinto did not explain how he determined that the cages were not being sanitized as frequently as required, his finding of urine scale and debris buildup raises at least the inference that Respondent was not cleaning primary enclosures and pans under primary enclosures, as required by section 3.56 of the Standards (9 C.F.R. § 3.56). Respondent also implies that he was not performing adequate cleaning by testifying that, since the inspections, he works full-time at the facility and has been able to improve the cleaning (Tr. 271). Substantial evidence supports the finding that Respondent violated 9 C.F.R. § 3.56(a)(3) and (b)(1), as alleged in paragraph III(B)(4) of the Complaint.

Paragraph IV(A) of the Complaint alleges that on May 28 and May 29, 1996, Respondent refused to permit APHIS employees to conduct a complete inspection of Respondent's facilities by not allowing inspectors to take photographs of conditions of noncompliance.

The May 29, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states, as follows:

**III Non-Compliant Items Newly Identified on This Inspection of 5/96**

**Item 51 Miscellaneous 2.38(b)(v)**

Each research facility shall allow APHIS officials to document by taking photographs of conditions of non-compliance.

APHIS officials were not allowed to take photographs of conditions of non-compliance.

APHIS officials shall be allowed to document with photographs areas of non-compliance.

Correct from this date forward.

CX 24 at 2.

Dr. Lopinto testified that Respondent refused to allow APHIS officials to take photographs of Respondent's facility during the May 28 and May 29, 1996, inspection of Respondent's facility (Tr. 141-43).

I find that Complainant proved by a preponderance of the evidence that, during the May 28 and May 29, 1996, inspection of Respondent's facility, Respondent refused to allow APHIS officials to take photographs of conditions of noncompliance, in violation of 9 C.F.R. § 2.126(a)(5).

Paragraph IV(D) of the Complaint alleges that on May 28 and May 29, 1996, APHIS inspected Respondent's premises and found that Respondent had failed to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

While Complainant introduced some evidence which indicates that Respondent may have failed to maintain programs of adequate veterinary care on May 28 and May 29, 1996, Complainant has not proved by a preponderance of the evidence that Respondent failed to maintain programs of adequate veterinary care on May 28 and May 29, 1996, as alleged in paragraph IV(D) of the Complaint.

Paragraph IV(E)(1) of the Complaint alleges that on May 28 and May 29, 1996, APHIS inspected Respondent's facility and found that the interior building surfaces of interior housing facilities were not substantially impervious to moisture and capable of being readily sanitized, in violation of section 3.51(d) of the Standards (9 C.F.R. § 3.51(d)). During the inspection on May 28 and 29, 1996, Dr. Lopinto found that "ceiling tiles in back rabbit rm still show evidence of water damage" (CX 24 at 8). The May 29, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, constitutes substantial evidence that Respondent violated 9 C.F.R. § 3.51(d), as alleged in paragraph IV(E)(1) of the Complaint.

Paragraph IV(E)(2) of the Complaint alleges that on May 28 and May 29, 1996, APHIS inspected Respondent's facility and found that the premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices, in violation of section 3.56(c) of the Standards (9 C.F.R. § 3.56(c)). During the inspection on May 28 and 29, 1996, Dr. Lopinto found that the lab area had a "clutter" of bottles, old glass syringes and blood tubes, and walls of the rabbit room had urine and fecal residue on surfaces

(CX 24 at 3). The May 29, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, constitutes substantial evidence that Respondent violated 9 C.F.R. § 3.56(c), as alleged in paragraph IV(E)(2) of the Complaint.

Paragraph IV(E)(3) of the Complaint alleges that on May 28 and May 29, 1996, APHIS inspected Respondent's facility and found that indoor housing facilities for animals were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors and ammonia levels, in violation of section 3.51(b) of the Standards (9 C.F.R. § 3.51(b)). During the inspection on May 28 and 29, 1996, Dr. Lopinto found that "there is still a strong ammonia odor present in all rabbit rms and facility" (CX 24 at 5). The May 29, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, constitutes substantial evidence that Respondent violated 9 C.F.R. § 3.51(b), as alleged in paragraph IV(E)(3) of the Complaint.

Paragraph IV(E)(4) of the Complaint alleges that on May 28 and May 29, 1996, APHIS inspected Respondent's facility and found that primary enclosures for rabbits were not sanitized every 30 days, and pans under primary enclosures were not cleaned once every week, in violation of section 3.56(a)(3) and (b)(1) of the Standards (9 C.F.R. § 3.56(a)(3), (b)(1)). Dr. Lopinto cited the facility for not sanitizing the cages, but without providing any supporting details. However, he also said that the pans under rabbit enclosures "continue to have urine scale & debris" (CX 24 at 5). The May 29, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, constitutes substantial evidence that Respondent violated 9 C.F.R. § 3.56(a)(3), as alleged in paragraph IV(E)(4) of the Complaint.

Paragraph V(A) of the Complaint alleges that on October 16, 1996, APHIS inspected Respondent's facility and found that Respondent had failed to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

The October 17, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states Respondent failed to employ an attending veterinarian, as follows:

### III Non-compliant Items Newly Identified on This Inspection of 10/96

#### Item 48 Vet. Care 2.33(a)(1)

Each research facility shall employ an attending veterinarian under formal arrangements which shall include a written program of vet. care.

A blank program of vet. care was left with the facility at last inspection because . . . it indicated facility was changing vet.

There is no indication at the time of inspection that program has been completed.

Program of vet. care shall be completed.

Correct by 10/20/96

CX 25 at 2.

Dr. Lopinto explained the entry in the October 17, 1996, Animal Care Inspection Report, as follows:

[BY MR. MARTIN:]

Q. Doctor, did you identify any deficiencies during this inspect [sic]?

[DR. LOPINTO:]

A. Yes, I did.

Q. Would you tell us what the first one was, please.

A. Again vet care. Each research facility shall employ an attending veterinarian on a formal arrangement which shall include a written program of veterinary care. Now facilities that have a consulting vet have to maintain this written program. When they change, they have to get a new program. There was a change in veterinarians, there was no program. So here again that's to establish who will be the new veterinarian, a program -- a blank program is left for review at that time, so that can be completed.

Q. How would you characterize that deficiency?

A. That would be serious because once you get -- if you know there's going to be a change, you've got pro active on that so that there is that continuity that when you get a change, the new veterinarian is on board so that he can be descriptive. He's assuming a role immediately. So from the get go he has to have that too.

Q. Does that deficiency affect animal health?

A. You cannot operate if you don't have an attending veterinarian.

....

Q. You refer to CX 24, page 8?

A. Right. If you look on May 28th and 29th, you will notice a notation on page 8, "Note: Institutional official is changing vets. A blank program was left with institutional official at the time of inspection." So back in May when I was up there, he said he was changing it. So I didn't write it up because I said okay, you're changing vets, here you are. I left a blank as you'll notice.

In October, again if I wrote it -- the reason I wrote it up is it probably wasn't done in October. So therefore with that month interlude not getting done, then I had grounds to write it up.

Q. So you left a blank form in May.

A. Five months.

Tr. 151-53.

I find that Respondent failed to employ an attending veterinarian under formal arrangements on October 16, 1996, and that this failure constitutes a failure to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, as alleged in paragraph V(A) of the Complaint.

Paragraph V(B)(1) of the Complaint alleges that on October 16, 1996, APHIS inspected Respondent's facility and found that the premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices, in violation of section 3.56(c) of the Standards (9 C.F.R. § 3.56(c)). Dr. Lopinto reported that he found the following deficiencies in the facility's housekeeping during the October 16, 1996, inspection:

- A) Walls of rabbit rm still had urine and feces stains & residue on surfaces
- B) Fly strips are full of flies and need to be replaced
- C) Ventilation fans had accumulation of dust & hair
- D) Lab area counter still had a clutter of debris
- E) Ceiling tile in back rm still shows water damage

CX 25 at 3.

The October 17, 1996, Animal Care Inspection Report, completed by

Dr. Lopinto, constitutes substantial evidence that Respondent violated 9 C.F.R. § 3.56(c), as alleged in paragraph V(B)(1) of the Complaint.

Paragraph V(B)(2) of the Complaint alleges that on October 16, 1996, APHIS inspected Respondent's facility and found that indoor housing facilities for animals were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors and ammonia levels, in violation of section 3.51(b) of the Standards (9 C.F.R. § 3.51(b)). During the inspection on October 16, 1996, Dr. Lopinto again reported a strong ammonia odor in all rabbit rooms and the facility, which constitutes a violation of section 3.51(b) of the Standards (9 C.F.R. § 3.51(b)) (CX 25 at 2).

Paragraph V(B)(3) of the Complaint alleges that on October 16, 1996, APHIS inspected Respondent's facility and found that primary enclosures for rabbits were not sanitized every 30 days, and pans under primary enclosures were not cleaned once every week, in violation of section 3.56(a)(3) and (b)(1) of the Standards (9 C.F.R. § 3.56(a)(3), (b)(1)). Dr. Lopinto found urine scale in the rabbit cages and pans, which constitutes a violation of section 3.56(a)(3) and (b)(1) of the Standards (9 C.F.R. § 3.56(a)(3), (b)(1)).

### Sanction

Drs. Fairchild and Lopinto testified that, despite the violations, Respondent's rabbits were watered, well-fed, and "in good flesh," which indicates that they were in good health (Tr. 67, 76, 176). However, they also testified that the lesions resulting from the injections were "open" and, in Dr. Lopinto's opinion, were painful. They based their conclusions on observing the rabbits without actually handling them. Both doctors said that Respondent should consider using analgesics in his procedure. (Tr. 51, 67, 73, 126, 138, 157, 170.) Although both doctors were experienced veterinarians, it was not shown that either had rabbit-handling experience.

Mr. Monteith, who has had over 30 years' experience handling rabbits, said that he personally examines the rabbits after the injections by running his hand over the lesions and that, although the lesions may appear "shiny," the lesions are not open. He said that, based on his experience, he knows when rabbits react to pain and that the procedures that he and Respondent use do not cause the rabbits to experience pain. (Tr. 196-201, 208-09, 219-20.)

I give greater weight to Mr. Monteith's testimony in view of his greater experience in handling rabbits and his physical examination of the rabbits than I give to Drs. Fairchild and Lopinto. Moreover, Drs. Fairchild and Lopinto, who did not examine the lesions, may also have assumed that the rabbits experienced pain

and developed open lesions because of their mistaken belief that the rabbits were injected with an antigen rather than with an immunogen. I accordingly find that Respondent's procedure was not a painful procedure as defined by section 1.1 of the Regulations (9 C.F.R. § 1.1).

Considering all the circumstances, I find that a \$3,750 civil penalty is appropriate.

### **Findings of Fact**

1. Respondent Michael A. Huchital, Ph.D., is an individual doing business as Quality Antisera Development and Production, 29 Distillery Road, Warwick, New York 10990.

2. At all times material to this proceeding, Respondent was registered with APHIS as a research facility.

3. Respondent obtains rabbits in commerce. Respondent produces antisera from the blood of these rabbits, which he obtains by injecting the rabbits with an immunogen provided by his customers for the purpose of producing antisera. Respondent draws blood from the rabbits, separates the antisera serum from the blood, and sells the serum in commerce to customers for research and other purposes. Respondent does not use the rabbits or their blood in research, testing, or experiments.

4. On April 18, 1995, interior building surfaces of Respondent's indoor housing facilities were not substantially impervious to moisture and capable of being readily sanitized; Respondent's premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices; and Respondent failed to provide veterinary care to an animal in need of care.

5. On March 5 and 7, 1996, Respondent's premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices; Respondent's indoor housing facilities for rabbits were not sufficiently ventilated to provide for the health and well-being of the rabbits and to minimize odors and ammonia levels; and Respondent's primary enclosures for rabbits were not sanitized every 30 days, and pans under primary enclosures were not cleaned once every week.

6. On May 28 and 29, 1996, Respondent refused to allow APHIS officials to document, by the taking of photographs, conditions of noncompliance; interior building surfaces of Respondent's indoor housing facilities were not substantially impervious to moisture and capable of being readily sanitized; Respondent's premises (buildings and grounds) were not kept clean and in good repair to protect

the animals from injury and to facilitate the prescribed husbandry practices; Respondent's indoor housing facilities for rabbits were not sufficiently ventilated to provide for the health and well-being of the rabbits and to minimize odors and ammonia levels; and Respondent's pans under primary enclosures were not cleaned once every week.

7. On October 16, 1996, Respondent failed to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine; Respondent's premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices; Respondent's indoor housing facilities for rabbits were not sufficiently ventilated to provide for the health and well-being of the rabbits and to minimize odors and ammonia levels; and Respondent's primary enclosures for rabbits were not sanitized every 30 days, and pans under primary enclosures were not cleaned once every week.

### **Conclusions of Law**

1. Respondent is a *dealer* within the meaning of the Animal Welfare Act and the Regulations.

2. On April 18, 1995, Respondent violated sections 2.40 and 2.100(a) of the Regulations and sections 3.51(d) and 3.56(c) of the Standards (9 C.F.R. §§ 2.40, .100(a); 3.51(d), .56(c)).

3. On March 5 and March 7, 1996, Respondent violated section 2.100(a) of the Regulations and sections 3.51(b), 3.56(a)(3), 3.56(b)(1), and 3.56(c) of the Standards (9 C.F.R. §§ 2.100(a); 3.51(b), .56(a)(3), (b)(1), and (c)).

4. On May 28 and May 29, 1996, Respondent violated sections 2.100(a) and 2.126(a)(5) of the Regulations and sections 3.51(b), 3.51(d), 3.56(a)(3), and 3.56(c) of the Standards (9 C.F.R. §§ 2.100(a), .126(a)(5); 3.51(b) and (d), .56(a)(3) and (c)).

5. On October 16, 1996, Respondent violated sections 2.40 and 2.100(a) of the Regulations and sections 3.51(b), 3.56(a)(3), 3.56(b)(1), and 3.56(c) of the Standards (9 C.F.R. §§ 2.40, .100(a); 3.51(b), .56(a)(3), (b)(1), and (c)).

### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

Complainant raises eight issues in Complainant's Appeal of Decision and Order and Response to Respondent's Appeal of Decision and Order [hereinafter Appeal Petition].

As an initial matter, Complainant contends that on April 20, 1999, Respondent

filed an appeal (Appeal Pet. at 1-3). I disagree with Complainant's contention that Respondent filed an appeal on April 20, 1999. Instead, I find that on April 29, 1999, Respondent filed a letter, dated April 20, 1999, addressed to the ALJ, requesting that the ALJ amend the Initial Decision and Order. The ALJ treated Respondent's letter as a motion for reconsideration of the Initial Decision and Order, and on April 29, 1999, the ALJ denied Respondent's motion (Order Denying Motion for Recons.). Thus, I find Respondent's April 29, 1999, filing is not Respondent's appeal, and the ALJ has disposed of Respondent's April 29, 1999, filing.

First, Complainant contends that the ALJ erred in finding that Respondent does not use animals in testing (Appeal Pet. at 4).

Complainant contends that Respondent was testing animals and that, because Respondent was testing animals, Respondent was a *research facility* as that term is defined in section 2(e) of the Animal Welfare Act (7 U.S.C. § 2132(e)) and section 1.1 of the Regulations (9 C.F.R. § 1.1).

Complainant asserts that "the ALJ glossed over the fact that the individual whom [Respondent] employs to inject and bleed rabbits described what he does as 'testing.'" (Appeal Pet. at 4.)

I disagree with Complainant's assertion that the ALJ "glossed over" Mr. Monteith's characterization of Respondent's injection and bleeding of rabbits as "testing." The ALJ quoted Mr. Monteith's testimony in which Mr. Monteith characterized injection and bleeding as "testing," and the ALJ provided cogent reasons for finding that Mr. Monteith's characterization of Respondent's procedures was not accurate. See Initial Decision and Order at 5-7.

Complainant also contends that the ALJ misreads *In re Lee Roach, supra*. I disagree with Complainant. The ALJ properly analyzed *Roach* and found that it was not applicable to this proceeding. The administrative law judge, who issued the *Roach* decision, found that the respondents in *Roach* operated a *research facility*, as defined in the Animal Welfare Act and the Regulations, based not only on the production of antiserum, but also on the respondents' testing of blood to determine the level of antibodies. *In re Lee Roach, supra*, 51 Agric. Dec. at 257-59.

Second, Complainant contends that the ALJ erred in finding that before 1997, APHIS had no policy that antisera production is testing (Appeal Pet. at 5).

The record does establish that APHIS had a policy that may have been similar to the policy set forth in Policy #10 (CX 34 at 2); however, the record is not sufficiently clear to find that prior to April 14, 1997, APHIS had a policy that antisera production is testing. Policy #10 (CX 34 at 2), which is dated April 14, 1997, provides that it "[r]eplaces memos dated August 28, 1990, entitled

‘Determination of Need for Licensing or Registration for Antibody Production/Serum Collection’ and April 17, 1992, entitled ‘License Fees for the Production and Sale of Blood Products.’” However, Policy #10 does not indicate what policy is in the August 28, 1990, and April 17, 1992, memoranda. Moreover, while Dr. Carter-Corker testified that “the policy [articulated in Policy #10] had been in place since 1990” (Tr. 236), Drs. Geib and Lopinto were much less specific about the date of issuance of the previous APHIS policy and the similarity of the previous APHIS policy to the policy articulated in Policy #10 (CX 34 at 2).<sup>5</sup>

Complainant’s failure to introduce documents setting forth the APHIS policy that was applicable at the time of the alleged violations and reliance on Policy #10 (CX 34 at 2), which was issued after the violations alleged in the Complaint, is perplexing. The record is not sufficiently clear to find that the ALJ erred when he found that before 1997, APHIS had no policy that antisera production is testing.

Third, Complainant contends that the ALJ erred in not considering Respondent’s registration as a research facility as an admission that he was “engaged in regulated activities as a research facility” (Appeal Pet. at 6).

I disagree with Complainant’s contention that the ALJ erred in not considering Respondent’s registration as a research facility as an admission that Respondent was engaged in regulated activities as a research facility. Respondent’s applications for registration, which were admitted into evidence (CX 1, CX 2), do not contain an admission that Respondent was “engaged in regulated activities as a research facility.” Moreover, Respondent consistently took the position in this proceeding that, while he was registered as a research facility, he did not operate as a research facility, as defined in the Animal Welfare Act and the Regulations (Answer ¶ I(B); Respondent’s Brief at 1, 3; Respondent’s response to Complainant’s Appeal Petition [hereinafter Response to Appeal Pet.] at 1-2; Tr. 268-70). Finally, it does not necessarily follow that a person who is registered as a research facility always engages in regulated activities as a research facility.

Fourth, Complainant contends that the ALJ erred in failing to find that Respondent violated 9 C.F.R. § 3.56(c) on April 18, 1995, as alleged in paragraph II(L)(2) of the Complaint (Appeal Pet. at 10).

I agree with Complainant that the ALJ erred in failing to find that Respondent violated 9 C.F.R. § 3.56(c) on April 18, 1995, as alleged in paragraph II(L)(2) of the Complaint. Paragraph II(L)(2) of the Complaint alleges that on April 18, 1995,

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<sup>5</sup>Dr. Geib testified that Policy #10 is based on “correspondences [sic] and memos and policies that had been previously issued” (Tr. 100-05). Dr. Lopinto testified that “some of the fundamentals of [Policy #10] had been evolved earlier, written up earlier than in April 1997” (Tr. 191).

Respondent's premises (buildings and grounds) were not kept clean and in good repair to protect animals from injury and to facilitate the prescribed husbandry practices. The ALJ states that there is a lack of substantial evidence to support a finding that Respondent violated 9 C.F.R. § 3.56(c), as follows:

The complaint (§ II L.2.) alleges a violation of the housekeeping standard at the [April 18, 1995,] inspection based on Dr. Fairchild's finding that two empty cages were dirty. (CX 6; Tr. 63-64.) . . . .

Dr. Fairchild, however, did not describe in any factual detail in her testimony or in her report to support her conclusion that the cages were not clean. I find that there is a lack of substantial evidence to support this allegation.

Initial Decision and Order at 10.

However, the April 18, 1995, Animal Care Inspection Report, completed by Dr. Fairchild, states, as follows:

# 37 Housekeeping 3.56(c)

Premises shall be kept clean in order to facilitate prescribed husbandry practices.

- (1) There were at least two empty but used, dirty cages that were not in use and had not been cleaned and sanitized. Empty cages that have been used and are dirty need to be cleaned and sanitized after use.
- (2) The walls of all the rabbit rooms had urine & feces on them and need to be kept clean & free of contaminating material.
- (3) There was pop & paint stored in the first rabbit room. Only materials needed for actual animal husbandry should be stored in animal areas.
- (4) The fans on both rabbit room doors had hair on the filter and must be cleaned.

CX 6 at 10-11.

Further, Dr. Fairchild specifically addressed the dirty cages which are referenced in the April 18, 1995, Animal Care Inspection Report, as follows:

[BY MR. MARTIN:]

Q. Did you identify any other deficiencies?

[BY DR. FAIRCHILD:]

A. Yes, I did.

Q. Would you tell us what the next one was.

A. The next one is a housekeeping deficiency.

Q. What did that entail?

A. We had a requirement that premises be kept clean so that husbandry can be practiced in a good manner. There were two empty cages, dirty cages. They weren't actually in use at the time, however they hadn't been cleaned and sanitized and we have a requirement that the empty cages be, once they've been used and they're dirty be cleaned and sanitized.

Q. How would you characterize that deficiency?

A. As a significant deficiency.

Q. Why?

A. These cages that have hair and dirt or haven't been cleaned are a source of contamination for the rest of the animals.

Q. Could that affect an animal's health?

A. Yes, it could[.]

Q. How?

A. By being a source of contamination for animals in the facility.

Tr. 63-64.

In response to Complainant's contention that the ALJ erred in failing to find that Respondent violated 9 C.F.R. § 3.56(c) on April 18, 1995, Respondent states that the empty cages, the walls, and the fans are cleaned regularly; the cans, which contained water-based paint, were removed; and all the rabbits in Respondent's facility have always been found in good health (Respondent's Response to Appeal

Pet. at 3).

Respondent's assertion that the empty cages, walls, and fans were cleaned regularly does not rebut the evidence that the empty cages, walls, and the fans were not clean on April 18, 1995, when Dr. Fairchild inspected Respondent's facility. Moreover, while one of the purposes of the requirement that the premises must be kept clean is to protect animals from injury, the good health of Respondent's rabbits does not rebut the evidence that Respondent violated 9 C.F.R. § 3.56(c) on April 18, 1995.

Finally, even if I found that Respondent removed the cans containing paint from a rabbit room immediately after they were found by Dr. Fairchild, the correction does not eliminate the fact that the violation of 9 C.F.R. § 3.56(c) occurred.<sup>6</sup>

I find, based on the April 18, 1995, Animal Care Inspection Report (CX 6) and Dr. Fairchild's testimony, that Complainant proved by a preponderance of the evidence that on April 18, 1995, Respondent violated section 3.56(c) of the Standards (9 C.F.R. § 3.56(c)), as alleged in paragraph II(L)(2) of the Complaint.

Fifth, Complainant contends that the ALJ erred in failing to find that Respondent violated 9 C.F.R. § 3.51(d) on March 5 and March 7, 1996, as alleged in paragraph III(B)(1) of the Complaint (Appeal Pet. at 11).

I disagree with Complainant's contention that the ALJ erred in failing to find that Respondent violated 9 C.F.R. § 3.51(d) on March 5 and March 7, 1996, as alleged in paragraph III(B)(1) of the Complaint. Paragraph III(B)(1) of the Complaint alleges that the interior building surfaces of indoor housing facilities were not substantially impervious to moisture and capable of being readily sanitized. The ALJ states that Complainant failed to prove that Respondent violated 9 C.F.R. § 3.51(d) on March 5 and March 7, 1996, because the inspector,

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<sup>6</sup>It is well-settled that a correction of a violation of the Animal Welfare Act or the Regulations and Standards does not eliminate the fact that the violation occurred. *In re James E. Stephens*, 58 Agric. Dec. \_\_\_, slip op. at 48 (May 5, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, No. 98-3100 (3d Cir. 1998) (unpublished); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1316 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

Dr. Lopinto, “did not provide any basis for his determination that the wood [on a rabbit restraint device] was not impervious, such as finding that the wood had not been treated with a water sealer” (Initial Decision and Order at 11).

The March 7, 1996, Animal Care Inspection Report, Dr. Lopinto’s testimony, and the photograph of Respondent’s rabbit restraint device (CX 8 at 2, CX 19; Tr. 117-18, 138) support a finding that Respondent’s rabbit restraint device was not substantially impervious to moisture and was not capable of being readily sanitized. However, 9 C.F.R. § 3.51(d) requires that the interior building surfaces of indoor housing facilities must be substantially impervious to moisture and capable of being readily sanitized, and the record does not clearly establish that Respondent’s rabbit restraint device or any part of the device is an interior building surface of an indoor housing facility. Therefore, while I disagree with the ALJ’s basis for finding that Complainant failed to prove that Respondent violated 9 C.F.R. § 3.51(d) on March 5 and March 7, 1996, I agree with the ALJ’s conclusion that Complainant failed to prove that Respondent violated 9 C.F.R. § 3.51(d) on March 5 and March 7, 1996.

Sixth, Complainant contends that the ALJ erred by failing to find that Respondent failed to maintain programs of adequate veterinary care under the supervision of and assistance of a doctor of veterinary medicine on April 18, 1995, March 5 and March 7, 1996, May 28 and May 29, 1996, and October 16, 1996, as alleged in paragraphs II(M), III(A), IV(D), and V(A) of the Complaint, respectively, and failed to provide veterinary care to animals in need of care on April 18, 1995, and March 5 and March 7, 1996, as alleged in paragraphs II(M) and III(A) of the Complaint, respectively (Appeal Pet. at 12-18).

I agree with Complainant’s contention that the ALJ erred in failing to find that Respondent failed to provide veterinary care to animals in need of care on April 18, 1995, as alleged in paragraph II(M) of the Complaint.

The April 18, 1995, Animal Care Inspection Report, completed by Dr. Fairchild, states, as follows:

#48 Veterinary care. 2.33(b)(2)

Each research facility shall maintain programs of adequate veterinary care.

Rabbit #13 had long nails that need to be trimmed.

CX 6 at 11.

Respondent does not refer to evidence that rebuts the allegation in paragraph II(M) of the Complaint, but rather contends that “[t]he fact that one rabbit did not

have its toenails clipped demonstrates the frivolous nature of Complainant's allegations" (Respondent's Response to Appeal Pet. at 3). However, Dr. Fairchild testified regarding her finding that Respondent failed to provide veterinary care on April 18, 1995, and the significance of the violation, as follows:

[MR. MARTIN:]

Q. Doctor, did you identify any other deficiencies during this inspection?

[DR. FAIRCHILD:]

A. Yes, I did.

Q. Would you tell us what the next one was, please.

A. The next one was veterinary care.

Q. What did that entail?

A. That was -- each research [sic] needs to maintain a program of adequate veterinary care and there was one rabbit that had long toe nails that needed to be trimmed.

Q. How would you characterize that deficiency?

A. As a significant deficiency.

Q. Why?

A. The rabbit[']s toe nails, if they get long, they could grow around or even just walking he could -- he can't put his pads down the way he should, it could cause pain.

Q. So could that affect the animal's health?

A. Yes, it could.

Q. How?

A. It could cause them to not be able to walk as well, maybe get their toes hooked in the cage and could if not taken care of, eventually grow around.

Tr. 64-65.

I find, based on the April 18, 1995, Animal Care Inspection Report and Dr. Fairchild's testimony that Complainant proved by a preponderance of the evidence that, on April 18, 1995, Respondent failed to provide veterinary care to an animal in need of veterinary care, as alleged in paragraph II(M) of the Complaint.

I disagree with Complainant's contention that the ALJ erred in failing to find that Respondent failed to maintain programs of adequate veterinary care under the supervision of and assistance of a doctor of veterinary medicine on March 5 and March 7, 1996, as alleged in paragraph III(A) of the Complaint, and on May 28 and May 29, 1996, as alleged in paragraph IV(D) of the Complaint.

Dr. Lopinto identified items on the March 7, 1996, and the May 29, 1996, Animal Care Inspection Reports, which he characterized as failures to maintain programs of adequate veterinary care (CX 8 at 2-3, CX 24 at 3-4). While these items may constitute violations of the requirement that Respondent maintain programs of adequate veterinary care, these items are not sufficiently described, either in the Animal Care Inspection Reports or in Dr. Lopinto's testimony, to find that they constitute violations of the requirement that Respondent maintain programs of adequate veterinary care.

I agree with Complainant's contention that the ALJ erred in failing to find that Respondent failed to maintain programs of adequate veterinary care under the supervision of and assistance of a doctor of veterinary medicine on October 16, 1996, as alleged in paragraph V(A) of the Complaint.

The October 17, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states Respondent failed to employ an attending veterinarian, as follows:

### III Non-compliant Items Newly Identified on This Inspection of 10/96

#### Item 48 Vet. Care 2.33(a)(1)

Each research facility shall employ an attending veterinarian under formal arrangements which shall include a written program of vet. care

A blank program of vet. care was left with the facility at last inspection because . . . it indicated facility was changing vet.

There is no indication at the time of inspection that program has been completed.

Program of vet. care shall be completed.  
Correct by 10/20/96

CX 25 at 2.

Dr. Lopinto explained this entry on the October 17, 1996, Animal Care Inspection Report, as follows:

[BY MR. MARTIN:]

Q. Doctor did you identify any deficiencies during this inspect?

[DR. LOPINTO:]

A. Yes, I did.

Q. Would you tell us what the first one was, please.

A. Again vet care. Each research facility shall employ an attending veterinarian on a formal arrangement which shall include a written program of veterinary care. Now facilities that have a consulting vet have to maintain this written program. When they change, they have to get a new program. There was a change in veterinarians, there was no program. So here again that's to establish who will be the new veterinarian, a program -- a blank program is left for review at that time, so that can be completed.

Q. How would you characterize that deficiency?

A. That would be serious because once you get -- if you know there's going to be a change, you've got pro active on that so that there is that continuity that when you get a change, the new veterinarian is on board so that he can be descriptive. He's assuming that role immediately. So from the get go he has to have that too.

Q. Does that deficiency affect animal health?

A. You cannot operate if you don't have an attending veterinarian.

....

Q. You refer to CX 24, page 8?

A. Right. If you look on May 28th and 29th, you will notice a notation on page 8, "Note: Institutional official is changing vets. A blank program was left with institutional official at the time of inspection." So back in May when I was up there, he said he was changing it. So I didn't write it up because I said okay, you're changing vets, here you are. I left a blank as you'll notice.

In October, again if I wrote it -- the reason I wrote it up is it probably wasn't done in October. So therefore with that month interlude not getting done, then I had grounds to write it up.

Q. So you left a blank form in May.

A. Five months.

Tr. 151-53.

I find that Respondent failed to employ an attending veterinarian under formal arrangements on October 16, 1996, and that this failure constitutes a failure to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, as alleged in paragraph V(A) of the Complaint.

Dr. Lopinto identified additional items on the October 17, 1996, Animal Care Inspection Report which he characterized as a failure to maintain programs of adequate veterinary care (CX 25 at 4). While these additional items may constitute violations of the requirement that Respondent maintain programs of adequate veterinary care, these items are not sufficiently described, either in the Animal Care Inspection Report or in Dr. Lopinto's testimony, to find that they constitute violations of the requirement that Respondent maintain programs of adequate veterinary care.

The ALJ found that Respondent was not a research facility and dismissed paragraphs II(M), III(A), IV(D), and V(A) of the Complaint because they allege violations of section 2.33 of the Regulations (9 C.F.R. § 2.33), which applies to research facilities. However, the ALJ found that Respondent is subject to the Animal Welfare Act and the Regulations and Standards as a dealer (Initial Decision and Order at 9).

Section 2.40 the Regulations (9 C.F.R. § 2.40) places the same requirement on dealers to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and to provide veterinary care to

animals in need of care as section 2.33 of the Regulations (9 C.F.R. § 2.33) places on research facilities. Therefore, while I agree with the ALJ that Respondent is not a research facility and therefore did not violate 9 C.F.R. § 2.33, I find that Respondent was a dealer and Complainant proved by a preponderance of the evidence that on April 18, 1995, and October 16, 1996, Respondent violated section 2.40 of the Regulations (9 C.F.R. § 2.40).

It is well-settled that the formalities of court pleading are not applicable in administrative proceedings.<sup>7</sup> It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy; a complaint is adequate and satisfies due process in the absence of a showing that some party was misled.<sup>8</sup> I find that paragraphs II(M) and V(A) of the

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<sup>7</sup>*Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940); *NLRB v. Int'l Bros. of Elec. Workers, Local Union 112*, 827 F.2d 530, 534 (9th Cir. 1987); *Citizens State Bank of Marshfield v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984); *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 959 n.7 (4th Cir. 1979); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454 (7th Cir. 1943).

<sup>8</sup>*NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Rapp v. United States Dep't of Treasury*, 52 F.3d 1510, 1519-20 (10th Cir. 1995); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats v. United States Dep't. Agric.*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella v. United States*, 208 F.2d 783, 788-89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union v. NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 277 (1998); *In re Peter A. Lang*, 57 Agric. Dec. 91, 104-05 (1998) (Order Denying Pet. for Recons.); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1323 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 200 n.9 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 132 (1996); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1097-98 (1994); *In re James Petersen*, 53 Agric. Dec. 80, 92 (1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re SSG Boswell, II*, 49 Agric. Dec. 210, 212 (1990); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 264-65 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Dr. John H. Collins*, 46 Agric. Dec. 217, 233-32 (1987); *In re H & J Brokerage*, 45 Agric. Dec. 1154, 1197-98 (1986); *In re Dane O. Petty*, 43 Agric. Dec. (continued...)

Complaint reasonably apprise Respondent of the issues in controversy, and the references in paragraphs II(M) and V(A) of the Complaint to section 2.33 of the Regulations (9 C.F.R. § 2.33) did not mislead Respondent so as to deprive Respondent of due process.

Seventh, Complainant contends that the ALJ erred by failing to find that Respondent refused to allow APHIS inspectors to take photographs of his facility on May 28 and May 29, 1996, as alleged in paragraph IV(A) of the Complaint (Appeal Pet. at 18).

I agree with Complainant that the ALJ erred in failing to find that Respondent refused to allow APHIS employees to conduct a complete inspection of Respondent's facility on May 28 and May 29, 1996, as alleged in paragraph IV(A) of the Complaint. Paragraph IV(A) of the Complaint alleges that on May 28 and May 29, 1996, Respondent refused to permit APHIS employees to conduct a complete inspection of Respondent's facilities by not allowing inspectors to take photographs of conditions of non-compliance, in violation of section 2.38(b)(v) of the Regulations (9 C.F.R. § 2.38(b)(v)).

The May 29, 1996, Animal Care Inspection Report, completed by Dr. Lopinto, states, as follows:

### III Non-Compliant Items Newly Identified on This Inspection of 5/96

#### Item 51 Miscellaneous 2.38(b)(v)

Each research facility shall allow APHIS officials to document by taking photographs of conditions of non-compliance.

APHIS officials were not allowed to take photographs of conditions of non-compliance.

APHIS officials shall be allowed to document with photographs areas of non-compliance.

Correct from the date forward.

CX 24 at 2.

Respondent contends that he did not refuse to allow APHIS officials to take photographs of his facility, as alleged in paragraph IV(A) of the Complaint.

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<sup>8</sup>(...continued)

1406, 1434 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Sterling Colorado Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (Ruling on Certified Questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re A.S. Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976).

Instead, Respondent contends that he was not present at the facility at the time of the inspection and that Respondent's father, Mr. E. Huchital, told the APHIS officials that he (Mr. E. Huchital) was not authorized to allow the APHIS officials to take photographs. Further, Respondent contends that, despite Mr. E. Huchital's admonition, APHIS officials took photographs of the facility, during the inspection. (Respondent's Response to Appeal Pet. at 6.)

However, while Mr. E. Huchital did testify (Tr. 250-66), he did not testify regarding statements he made concerning photographs of the facility during the May 28 and May 29, 1996, inspection. Moreover, there are no photographs from the May 28 and May 29, 1996, inspection that were introduced into evidence, and Dr. Lopinto testified that he was not allowed to take photographs of conditions and areas of noncompliance during the May 28 and May 29, 1996, inspection, as follows:

[MR. MARTIN:]

Q. Would you tell us what the first deficiency was that you identified during this inspection.

A. The first one was under refusal to allow APHIS officials to take photographs.

Q. What did that entail?

DR. HUCHITAL: Excuse me, may I make an objection.

JUDGE HUNT: I'm sorry.

DR. HUCHITAL: It's been stated that we have been cited in this inspection report for refusing to allow the APHIS official to take photographs. What were those photographs then?

DR. LOPINTO: Those photographs were taken from the previous inspection of March 1996. In May 1996 when I went in there to document, Mr. Eugene Huchital was there and said we couldn't take pictures and I documented that. At the conclusion of that, that's why it was documented. So as far as I was concerned at the time of inspection, I was refused to allow to take pictures of the facility.

Q. Doctor, how would you characterize that deficiency?

A. That is serious because that is interference with the APHIS officials. When a person assumes responsibility and signs off on that, that means he's going to abide by it all the way, therefore he has to allow us to do our job.

Q. Were you told why you were not being allowed to take photographs?

A. When we took the initial photographs, Dr. Zaidlicz and I, and if you see on the previous inspection from March going back to March when we took our pictures, if you'll notice the inspection took place over a three day period at that time. We took our photographs, we went back, we wrote up the report and went back the additional day. Dr. Huchital, Michael Huchital had called the office speaking to our then sector supervisor, at that time it was Joe Walker, again saying that we had no right to take pictures, there was confidentiality and so forth. We're documenting areas of non-compliance. We have the right to take pictures and we can.

Now I can also bring up another aspect that I was personally involved with that photographs – I had another facility that one time refused to allow us to take photographs but we also went in there, our camera and our photographs are part of our inspection, so therefore we can take them and we're not worried about confidentiality or patents. We're documenting areas of non-compliance under the Animal Welfare Act.

Q. So you wouldn't take a photograph of something sensitive like if there was a document or a protocol on the table, you wouldn't take a photograph of that, would you?

A. Not unless that document has a specific bearing on a particular protocol or so forth in the sensitivity of relating to the Animal Welfare Act.

Tr. 141-43.

I find that Complainant proved by a preponderance of the evidence that, during the May 28 and May 29, 1996, inspection of Respondent's facility, Respondent refused to allow APHIS officials to take photographs of conditions of noncompliance.

The ALJ found that Respondent was not a research facility and dismissed

paragraph IV(A) of the Complaint because it alleges a violation of section 2.38(b)(v) of the Regulations (9 C.F.R. § 2.38(b)(v)), which applies to research facilities. However, the ALJ found that Respondent is subject to the Animal Welfare Act and the Regulations and Standards as a dealer (Initial Decision and Order at 9).

Section 2.126(a)(5) of the Regulations (9 C.F.R. § 2.126(a)(5)) places the same requirement on dealers to allow APHIS officials to document, by the taking of photographs and other means, conditions and areas of noncompliance, as section 2.38(b)(v) of the Regulations (9 C.F.R. § 2.38(b)(v)) places on research facilities. Therefore, while I agree with the ALJ that Respondent is not a research facility and therefore did not violate 9 C.F.R. § 2.38(b)(v), I find that Respondent was a dealer and Complainant proved by a preponderance of the evidence that on May 28 and May 29, 1996, Respondent refused to permit APHIS officials to take photographs of conditions of noncompliance at Respondent's facility, in violation of section 2.126(a)(5) of the Regulations (9 C.F.R. § 2.126(a)(5)).

It is well-settled that the formalities of court pleading are not applicable in administrative proceedings.<sup>9</sup> It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy; a complaint is adequate and satisfies due process in the absence of a showing that some party was misled.<sup>10</sup> I find that paragraph IV(A) of the Complaint reasonably apprises Respondent of the issue in controversy, and the reference to Respondent's refusal to allow APHIS employees to conduct a complete inspection of Respondent's animal research facility, in violation of section 2.38(b)(v) of the Regulations (9 C.F.R. § 2.38(b)(v)) in paragraph IV(A) of the Complaint, did not mislead Respondent so as to deprive Respondent of due process.

Eighth, Complainant contends that the ALJ's assessment of a civil penalty of \$1,200 is error and seeks the assessment of a civil penalty of "at least \$10,000"<sup>11</sup> (Appeal Pet. at 6-9, 18).

Respondent asserts that the assessment of a civil penalty of the magnitude recommended by Complainant would destroy his business and "put [him] and [his]

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<sup>9</sup>See note 7.

<sup>10</sup>See note 8.

<sup>11</sup>Complainant originally sought a civil penalty of \$17,500 (Complainant's Brief at 41, 85). Complainant now seeks the assessment of a civil penalty of "at least \$10,000" (Appeal Pet. 18), but provides no explanation for the change in the amount of the civil penalty which it seeks.

family out on the street.” (Respondent’s Response to Appeal Pet. at 3.) Collateral effects of a civil penalty on a respondent’s business or family are not relevant to determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations and Standards. Nonetheless, for the reasons described, *infra*, I have not assessed the civil penalty recommended by Complainant.

The ALJ concluded that Respondent committed 13 violations of the Standards.<sup>12</sup> As discussed in this Decision and Order, *supra*, I find that Respondent committed 17 violations of the Regulations and Standards.<sup>13</sup> Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that I may assess a civil penalty of not more than \$2,500 for each violation. Therefore, the maximum civil penalty that could be assessed against Respondent for the 17 violations of the Regulations and Standards is \$42,500.

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) requires that in determining the civil penalty to be assessed, I must give due consideration to the size of the business of the person involved, the gravity of the violations, the violator’s good faith, and the history of previous violations.

Respondent has about 80 rabbits and grosses approximately \$57,000 annually (CX 2; Tr. 203, 277-78). Respondent contends that “[a] business that grosses between \$57,000 and \$70,000 is by today’s standards far from successful. One must consider the cost of rent, employee salaries, insurance, utilities,

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<sup>12</sup>Specifically, the ALJ concluded that Respondent violated: (1) 9 C.F.R. § 3.51(d), as alleged in paragraph II(L)(1) of the Complaint; (2) 9 C.F.R. § 3.56(c), as alleged in paragraph III(B)(2) of the Complaint; (3) 9 C.F.R. § 3.51(b), as alleged in paragraph III(B)(3) of the Complaint; (4) 9 C.F.R. § 3.56(a)(3), as alleged in paragraph III(B)(4) of the Complaint; (5) 9 C.F.R. § 3.56(b)(1), as alleged in paragraph III(B)(4) of the Complaint; (6) 9 C.F.R. § 3.51(d), as alleged in paragraph IV(E)(1) of the Complaint; (7) 9 C.F.R. § 3.56(c), as alleged in paragraph IV(E)(2) of the Complaint; (8) 9 C.F.R. § 3.51(b), as alleged in paragraph IV(E)(3) of the Complaint; (9) 9 C.F.R. § 3.56(a)(3), as alleged in paragraph IV(E)(4) of the Complaint; (10) 9 C.F.R. § 3.56(c), as alleged in paragraph V(B)(1) of the Complaint; (11) 9 C.F.R. § 3.51(b), as alleged in paragraph V(B)(2) of the Complaint; (12) 9 C.F.R. § 3.56(a)(3), as alleged in paragraph V(B)(3) of the Complaint; and (13) 9 C.F.R. § 3.56(b)(1), as alleged in paragraph V(B)(3) of the Complaint.

<sup>13</sup>In addition to the 13 violations of the Standards found by the ALJ, I find that Respondent violated: (1) 9 C.F.R. § 3.56(c), as alleged in paragraph II(L)(2) of the Complaint; (2) the requirement that Respondent provide veterinary care to animals in need of veterinary care, as alleged in paragraph II(M) of the Complaint; (3) the requirement that Respondent allow APHIS officials to conduct a complete inspection of his facility, as alleged in paragraph IV(A) of the Complaint; and (4) the requirement that Respondent maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, as alleged in paragraph V(A) of the Complaint.

transportation, legal fees, taxes, building repairs, animal feed and care, etc.” (Respondent’s Response to Appeal Pet. at 3.) However, neither the success of the business nor the profitability of the business is a criterion that I must examine when determining the amount of the civil penalty to assess. I find that Respondent’s business is large. Respondent chronically failed to comply with the Animal Welfare Act and the Regulations and Standards during the period April 18, 1995, through October 16, 1996. Many of Respondent’s violations were serious and could have affected the health of Respondent’s rabbits. However, Drs. Fairchild and Lopinto testified that, despite the violations, Respondent’s rabbits were watered, well-fed, and “in good flesh,” which indicates that they were in good health (Tr. 67, 76, 176). Respondent’s refusal to allow APHIS officials to complete inspection of the facility is a very serious violation of the Regulations because it thwarts the Secretary of Agriculture’s ability to carry out the purposes of the Animal Welfare Act.

The repeated violations found during four inspections of Respondent’s facility evidence a lack of good faith and the ongoing pattern of violations establishes a “history of previous violations” for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)).

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

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

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

administrative officials.<sup>14</sup>

The administrative officials base their sanction recommendation on the 65 violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint; therefore, I reject Complainant's recommendation of a civil penalty of at least \$10,000. Instead, I am assessing Respondent a civil penalty of \$3,750, which I believe is sufficient to deter Respondent and similarly situated persons from future violations of the Animal Welfare Act and the Regulations and Standards.

I agree with Complainant that, in addition to the assessment of a civil penalty, Respondent should be ordered to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

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

### Order

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and, in particular, shall cease and desist from:

(a) failing to provide interior building surfaces of indoor housing facilities which are substantially impervious to moisture and capable of being readily sanitized;

(b) failing to keep premises (buildings and grounds) clean and in good repair to protect animals from injury and to facilitate prescribed husbandry practices;

(c) failing to provide veterinary care to animals in need of care;

(d) failing to maintain programs of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(e) failing to sufficiently ventilate indoor housing facilities for rabbits to

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<sup>14</sup>*In re James E. Stephens*, 58 Agric. Dec. \_\_\_\_, slip op. at 44 (May 5, 1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal docketed*, Nos. 99-2460, 99-2665 (8th Cir. June 1 and June 25, 1999); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

minimize odors and ammonia levels;

(f) failing to sanitize primary enclosures for rabbits at least once every 30 days;

(g) failing to clean pans under primary enclosures at least once each week; and

(h) failing to allow APHIS officials to document, by the taking of photographs, conditions of noncompliance.

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

2. Respondent is assessed a civil penalty of \$3,750. The civil penalty shall be paid by a 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 Division  
1400 Independence Avenue, SW  
Room 2014-South Building  
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Colleen A. Carroll within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 97-0020.

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**HORSE PROTECTION ACT****COURT DECISION**

**WILLIAM J. REINHART; JACK R. STEPP v. UNITED STATES  
DEPARTMENT OF AGRICULTURE.**

**No. 98-3765.**

**Filed August 13, 1999.**

**(Cite as 188 F.3d 508 (Table), 1999 WL 646138 (6<sup>th</sup> Cir.))**

***Horse protection - Soring - Substantial evidence.***

The United States Court of Appeals for the Sixth Circuit affirmed the Judicial Officer's decision that Jack Stepp violated 15 U.S.C. § 1824(2)(B) by entering a horse in a horse show while the horse was sore and that William Reinhart violated 15 U.S.C. § 1824(2)(D) by allowing the entry of a horse in a horse show while the horse was sore. The Sixth Circuit concluded that William Reinhart's and Jack Stepp's evidentiary challenge to the Judicial Officer's decision lacked merit and that the Judicial Officer's decision employed the proper legal standards and was supported by substantial evidence.

**UNITED STATES COURT OF APPEALS  
SIXTH CIRCUIT**

**ORDER**

Before: NORRIS and SUHRHEINRICH, Circuit Judges; RICE, District Judge.\*

Jack Stepp, a horse trainer, and William Reinhart, owner of the horse "Honey's Threat," appeal from the decision of the United States Department of Agriculture's ("USDA") Judicial Officer ("JO") that they violated the Horse Protection Act ("HPA"), as amended (15 U.S.C. §§ 1821-1831), by attempting to show Honey's Threat when the horse was sore. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

The Acting Administrator of the Animal and Plant Health Inspection Service instituted a disciplinary administrative proceeding under the HPA, and the Rules

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\*The Honorable Walter H. Rice, United States District Judge for the Southern District of Ohio, sitting by designation.

of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151) by filing a complaint on March 30, 1994. The complaint alleged that: (1) on August 3, 1991, Jack Stepp entered, for the purpose of showing or exhibiting, a horse known as "Honey's Threat," as Entry No. 362, in Class No. 15, at the Wartrace Horse Show at Wartrace, Tennessee, while the horse was sore, in violation of § 5(2)(B) of the HPA; and (2) on August 3, 1991, William Reinhart allowed the entry, for the purpose of showing or exhibiting, a horse known as "Honey's Threat," as Entry No. 362, in Class No. 15, at the Wartrace Horse Show at Wartrace, Tennessee, while the horse was sore, in violation of § 5(2)(D) of the HPA. Reinhart and Stepp responded to the complaint by denying that Honey's Threat was sore when entered in the Horse Show.

On October 8, 1997, an Administrative Law Judge ("ALJ") conducted a hearing in the matter. On February 6, 1998, the ALJ issued a Decision and Order in which the ALJ: (1) concluded that Stepp violated § 5(2)(B) of the HPA by entering Honey's Threat in the Wartrace Horse Show on August 3, 1991, while the horse was sore; (2) concluded that Reinhart violated § 5(2)(D) of the HPA by allowing the entry of Honey's Threat in the Wartrace Horse Show on August 3, 1991, while the horse was sore; (3) assessed each respondent a civil penalty of \$2,000; and (4) disqualified each respondent for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction.

On March 11, 1998, Reinhart and Stepp appealed to the JO, who serves as the delegate of the Secretary of Agriculture for judicial matters, 7 C.F.R. § 2.35, and has final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556, 557. The JO affirmed the ALJ's factual findings. In their appeal to this court, Reinhart and Stepp challenge an evidentiary ruling of the ALJ and question the sufficiency of the evidence to support the ALJ's findings.

Upon review, we conclude that the Secretary's decision employed the proper legal standards and is supported by substantial evidence. See *Elliott v. Administrator, Animal & Plant Health Inspection Serv.*, 990 F.2d 140, 144 (4<sup>th</sup> Cir.), cert. denied, 114 S.Ct. 191 (1993); *Fleming v. United States Dep't of Agric.*, 713 F.2d 179, 188 (6<sup>th</sup> Cir. 1983). Moreover, Reinhart's and Stepp's evidentiary challenge lacks merit.

Accordingly, the JO's decision is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

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**MUSHROOM PROMOTION, RESEARCH, AND  
CONSUMER INFORMATION ACT**

**COURT DECISION**

**UNITED FOODS, INC. v. UNITED STATES OF AMERICA.**  
**No. 98-6436.**  
**Filed November 23, 1999.**

**(Cite as 197 F.3d 221 (6<sup>th</sup> Cir.))**

**Mushrooms – First amendment – Freedom of speech – Commercial speech.**

The United States Court of Appeals for the Sixth Circuit held that portions of the Mushroom Promotion, Research, and Consumer Information Act of 1990, which authorize coerced payments for advertising, are unconstitutional and the effort by the Department of Agriculture to force payments from the plaintiff for advertising is invalid under the First Amendment. The Court read *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), as holding that nonideological, compelled, commercial speech is justified in the context of extensive regulation of an industry but not otherwise. The Court found that, unlike the collectivized California tree fruit industry at issue in *Wileman*, mushrooms are unregulated; thus, *Wileman* is inapposite.

**UNITED STATES COURT OF APPEALS,  
SIXTH CIRCUIT.**

Before: MERRITT and CLAY, Circuit Judges; ALDRICH,\* District Judge.

**OPINION**

MERRITT, Circuit Judge.

In this case of compelled, commercial speech challenged under the First Amendment, the Department of Agriculture requires the plaintiff, a mushroom producer, to contribute funds for advertising mushrooms, on a regional basis, as authorized by the Mushroom Promotion, Research, and Consumer Information Act

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\*The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

of 1990, 7 U.S.C. § 6101 *et seq.*<sup>1</sup> The District Court upheld the Act and the government's action compelling payments for mushroom advertising. The plaintiff claims that other mushroom producers shape the content of the advertising to its disadvantage and that the administrative process allows a majority of producers to create advertising to its detriment. The issue before us is whether the answer to the First Amendment question presented here should be the same as in the recent case of *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), in which the Supreme Court in a controversial 5-4 decision<sup>2</sup> upheld a similar agricultural advertising program in the heavily regulated California tree fruits business (peaches, plums and nectarines). But unlike the tree fruit business in *Wileman*, the mushroom growing business in the case before us is unregulated, except for the enforcement of a regional mushroom advertising

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<sup>1</sup>Enacted by Congress in 1990, the Mushroom Act states:

It is declared to be the policy of congress that it is in the public interest to authorize the establishment of an orderly procedure for financing through adequate assessments on mushrooms produced domestically or imported into the United States, program of promotion, research, and consumer and industry information designed to—

- (1) strengthen the mushroom industry's position in the marketplace;
- (2) maintain and expand existing markets and uses for mushrooms; and
- (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b). These policy objectives are supported by findings set forth in the Act that mushrooms are not only an important food valuable to the human diet, but that they play a significant role in this country's economy and that their production benefits the environment. The Act does not permit the regulation of prices or mandatory quantity or quality controls of mushrooms produced and sold by farmers, nor does it subsidize or restrict the growth of mushrooms or otherwise collectivize the industry. It is basically a commercial advertising statute designed to assess mushroom growers for the cost of advertising. 7 C.F.R. Part 1209.40(a).

Pursuant to the Mushroom Act, the Secretary of Agriculture promulgated an Order establishing a Mushroom Council made up of mushroom producers nominated by producers and importers for appointment by the Secretary. 7 U.S.C. § 6104(b); 7 C.F.R. Part 1209. The Order generally directs the Council to "carry out programs, plans, and projects designed to provide maximum benefits to the mushroom industry." 7 C.F.R. § 1209.39(l). The Council's activities are funded through mandatory assessments on larger producers and importers of fresh mushroom products for domestic use, based upon poundage of mushrooms marketed in the United States and not to exceed a penny per pound. 7 U.S.C. § 6104(g), 7 C.F.R. § 1209.51. The Council has used these funds solely to finance generic advertising efforts on behalf of the mushroom industry.

<sup>2</sup>See, e.g., Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929 (1998); *Leading Case, Commercial Speech—Compelled Advertising*, 111 HARV. L. REV. 319 (1997).

program.

The government argues that the degree of regulation or "collectivization" of an industry should make no First Amendment difference on the compelled advertising issue so long as the compelled advertising is nonpolitical and so long as the plaintiff is not restricted in its own advertising. The plaintiff contends to the contrary that the constitutionality of the compelled speech under the 1990 Mushroom Act—in light of *Wileman*—must turn on the degree of regulation of the industry. The question for us is whether the degree of government regulation of an industry controls the outcome or whether the government is right that this is irrelevant under *Wileman*.

In prior restraint and compelled speech cases involving nonbroadcast political speech, the First Amendment prohibition is nearly absolute, *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), holding that newspapers have a right to publish without prior restraint, *West Virginia v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), holding that schoolchildren may not be compelled to join in a flag salute ceremony, and *Miami Herald v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), holding that newspapers may not be compelled to publish a reply by political candidates. But commercial speech compelled by government is governed by a different, and as yet unsettled, set of principles which require a court to balance a number of factors according to its judgment concerning the welfare of buyers and sellers in the market place.

In the *Wileman* case, the Supreme Court emphasized and reemphasized that the compelled advertising program for California tree fruits under the Agricultural Marketing Agreement Act of 1937 contemplates "a uniform price to all producers in a particular market," a "policy of collective, rather than competitive, marketing" and an exemption from the antitrust laws in order "to avoid unreasonable fluctuation in supplies and prices." *Wileman*, 521 U.S. at 461, 117 S.Ct. 2130. In his opinion for five members of the Court, Justice Stevens repeatedly "stress[ed]" the importance of the fact that the advertising takes place "as a part of a broader collective enterprise in which [the producers'] freedom to act independently is already constrained by the regulatory scheme." *Id.* at 469, 117 S.Ct. 2130. In contrast, the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply. Except for the compelled advertising program assessing growers based on their volume of mushroom production, there appears to be a

relatively free market in mushrooms, both processed and fresh.<sup>3</sup>

On the other side of the ledger, the government correctly argues that Justice Stevens also emphasized repeatedly in his opinion that the compelled agricultural advertising in *Wileman* is not a *restriction* on commercial advertising as in cases that have invalidated such regulation, *see, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), because separate, individual, producer advertising of tree fruits is not prohibited or restricted. *See Wileman*, 521 U.S. at 469-70, 117 S.Ct. 2130. The opinion emphasizes that the test for compelled advertising is not the same as the four-part test for restrictions on advertising set out in *Central Hudson*. *See id.* The government also correctly argues that Justice Stevens repeatedly emphasizes that no “symbolic,” “ideological” or “political” speech is involved in the tree fruit advertising. *See id.* Justice Stevens’ opinion sets out these various factors concisely when he says that the compelled advertising of tree fruits passes muster “because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders [which collectivize the industry] and, (2) *in any event*, the assessments are not used to fund ideological activities.” *Wileman*, 521 U.S. at 473, 117 S.Ct. 2130 (emphasis added).

The question for us then is whether these two elements—(1) germaneness to a valid, comprehensive, regulatory scheme and (2) nonideological content—are independent of each other and each provide a sufficient basis for upholding compelled commercial speech. In other words, even though the mushroom

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<sup>3</sup>Justice Souter’s twenty-five page dissenting opinion in *Wileman* provides an extensive history of compelled advertising in the market for agricultural commodities. His reading of the history of the agricultural regulations is that it shows that the advertising is simply the result of interest group lobbying, not a response to economic conditions. *See Wileman*, 521 U.S. at 491-99, 117 S.Ct. 2130 (Souter, J., dissenting). Justice Souter’s dissent recounts that in 1952 Congress began providing for compelled advertising for an ever-expanding list of agricultural commodities. Sometimes the legislation, and the marketing orders authorized by the legislation, cover a commodity from just one section of the country—for example, California peaches but not Georgia peaches. In recent years Congress has added many farm products to the list in which compelled advertising is the main or the only form of regulation. Justice Souter explains that this comes about because of “the view of the Department of Agriculture that ‘any fruit or vegetable commodity group which actively supports the development of a promotion program by this means should be given an opportunity to do so.’” *Id.* at 495-96, 117 S.Ct. 2130 (citing S. REP. NO. 92-295, at 2 (1971)). Justice Souter concludes that these programs of compelled advertising appear to rest only on “the preference of a local interest group.” *Id.* at 497, 117 S.Ct. 2130. “Without more, the most reasonable inference is not of a substantial Government interest, but effective politics on the part of producers who see the chance to spread their advertising costs.” *Id.* at 498, 117 S.Ct. 2130.

advertising program before us is not “germane” to any collective program setting prices or supply, does the fact that the advertising is “nonideological” or “nonpolitical” in nature mean that it should be permitted under the First Amendment?

We do not read the majority opinion in *Wileman* as saying that any compelled commercial speech that is nonpolitical or nonsymbolic or nonideological does not warrant First Amendment protection. We conclude that the explanation for the *Wileman* decision is to be found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of a free market, as well as in the nonpolitical nature of the compelled speech. The majority uses this concept of collectivization and the nonideological nature of the advertising together. The conjunction “and” germaneness “and” nonpolitical—is used in the Court’s holding. Our interpretation of *Wileman* is that if either of the two elements is missing—either the collectivization of the industry or the purely commercial nature of the advertising—the First Amendment invalidates the compelled commercial speech, absent some other compelling justification not present in the case before us. The Court’s holding in *Wileman*, we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise. The purpose of this principle joining regulation and content is to deter free riders who take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits such free riders receive at the hands of the government. Whether wise or unwise, or true or untrue, the legislative theory behind such extensive regulation is that the interests of producers and consumers are furthered by the monopoly powers inherent in government control of price and supply. In exchange for such power in the market place, members of the industry may have to provide certain benefits to their industry in the form of payments for nonideological advertising of industry products. If an economic actor chooses to remain aloof from the regulated industry, he owes no reciprocal duty to promote the industry; but if he chooses to join, he has a reciprocal duty to promote its interest. This principle of reciprocity designed to control free-ridership is essentially the same basis upon which the Supreme Court upheld some, and struck down other, compelled speech in the union, closed-shop context in *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991).

Applying this interpretation to the case at hand, we find that the context of the mushroom business is entirely different from the collectivized California tree fruit business. Mushrooms are unregulated. Hence the compelled commercial speech is not a price the members must pay under the reciprocity principle in order to further their self-interest which is regarded as arising from heavy regulation

through marketing orders controlling price, supply and quality. Thus in the absence of extensive regulation, the effort by the Department of Agriculture to force payments from plaintiff for advertising is invalid under the First Amendment. The portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are likewise unconstitutional.

Accordingly, the judgment of the District Court is reversed.

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## NATIONAL DAIRY PROMOTION AND RESEARCH BOARD

## COURT DECISION

## GALLO CATTLE COMPANY v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 98-17318.

Filed July 27, 1999.

(Cite as 189 F.3d 473, 1999 WL 547427 (9<sup>th</sup> Cir.)).

Dairy program – Freedom of speech – First amendment.

The United States Court of Appeals for the Ninth Circuit, relying on *Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S. Ct. 2130 (1997), concluded that the Dairy Promotion Program, which compelled appellant to fund generic advertising, did not violate appellant's right to freedom of speech guaranteed under the First Amendment to the United States Constitution.

UNITED STATES COURT OF APPEALS  
NINTH CIRCUIT

## MEMORANDUM\*

Before: REINHARDT, O'SCANNLAIN and W. FLETCHER, Circuit Judges.

The facts are known to the parties and need not be repeated here.

The advertising program here is indistinguishable in all relevant aspects from the programs held constitutional by the Supreme Court in *Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S. Ct. 2130 (1997) ("*Wileman*"), and by this court in *Gallo Cattle Co. v. California Milk Advisory Bd.*, No. 97-17182, slip op. 7879 (9<sup>th</sup> Cir. July 14, 1999) ("*Gallo I*"), the *Wileman* analysis is applicable because "[t]he dairy farmers 'are compelled to fund the generic advertising . . . as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.'" *Id.* at 7894 (quoting *Wileman*, 117 S. Ct. at 2138). Under that analysis, the advertising program here does not impose a restraint on Gallo's freedom to communicate because "Gallo is free to advertise or

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\*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9<sup>th</sup> Cir. R. 36-3.

otherwise communicate any message that it desires in any manner that it desires to any audience that it desires.” *Id.* Nor does the advertising program compel Gallo to engage in any actual or symbolic speech; Gallo is not publicly associated with the generic advertising, nor do the mandatory assessments themselves constitute compelled speech. *See id.* at 7895. Moreover, while Gallo asserts that it has ideological objections to the advertising program’s promotion of bovine growth hormone, such objections do not render the advertisements compelled speech in violation of the First Amendment so long as the promotion of bovine growth hormone is germane to the advertising program’s purposes and goals. *See id.* at 7896. Regardless of the legitimacy of Gallo’s ideological objections, we cannot conclude that the promotion of bovine growth hormone is not germane to the advertising program’s purposes. Arguably, to the extent that the use of growth hormones increases milk production, the dairy industry might well be better able to supply the current market for dairy products and to expand that market. *See* 7 U.S.C. § 4501 (stating that the Dairy Promotion Program was “designed to strengthen the dairy industry’s position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products”).

AFFIRMED.

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**NONPROCUREMENT DEBARMENT AND SUSPENSION****DEPARTMENTAL DECISION****In re: CARL H. FREI.****DNS-FS Docket No. 99-0001.****Decision and Order filed November 12, 1999.****Nonprocurement Debarment - Conviction of Crime - Suspension Affirmed.**

Judge Edwin S. Bernstein affirmed the decision of the debarring official suspending Respondent for 18 months because Respondent was convicted of unlawfully taking trees in violation of his contract with the Forest Service.

Lori Polin Jones, for Debarring Official.

Dennis L. Albers, for Respondent.

*Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.*

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions pursuant to 7 C.F.R. part 3017, the regulations which implement a governmentwide system for nonprocurement debarment and suspension. The regulations at 7 C.F.R. § 3017.100(a) state "Executive Order (E.O.) 12549 provides that to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have a governmentwide effect."

On August 23, 1999, Respondent, Carl H. Frei, filed a timely appeal of the July 20, 1999 decision of the debarring official, Paul Brouha, acting on behalf of the United States Department of Agriculture, Forest Service ("the Forest Service") which debarred Respondent from entering into primary or lower tier covered transactions with the Federal Government, or any participants in such programs, for 18 months until November 3, 2000. The debarment was based upon Respondent's actions in violation of his contract with the Forest Service which resulted in Respondent's conviction of a criminal offense by the United States District Court for the District of Idaho. Respondent asserts that this conviction was not serious enough to warrant debarment, that the debarring official failed to consider mitigating facts, and that any administrative penalty should be limited to

a period of probation.

On August 31, 1999, Acting Chief Judge Dorothea A. Baker entered a ruling respecting procedural requirements governing this proceeding. Pursuant to that ruling, the Forest Service filed the record of the administrative proceeding below ("the Record"), and on September 9, 1999, the Forest Service filed its "Debarring Official's Response in Opposition to Appeal." Respondent did not file any reply to this response.

### **Findings of Fact**

On June 3, 1998, Frei Logging, a partnership consisting of Carl H. Frei and Bill M. Frei was awarded a Timber Sale Contract for Clearwater National Forest by the United States Department of Agriculture, Forest Service. The contract stated that the Forest Service agreed to sell and permit Frei Logging to purchase, cut and remove specified timber in Clearwater National Forest. (Record Tab 4). The specifications for the contract were contained in a bid submitted by Frei Logging on May 13, 1998 (Record Tab 5).

On February 25, 1999, by Judgment in a Criminal Case filed in United States District Court, District of Idaho, Respondent, Carl H. Frei was convicted of "Violating Term or Condition of Timber Sale Contract Without Approval" in violation of 16 U.S.C. § 551 and 36 C.F.R. § 261.10(1). (Record Tab 3). The Court ordered Respondent to pay fines totaling \$35 and pay restitution to the Forest Service of \$764.26.

### **Conclusion**

The decision of the Debarring Official, debarring Carl Frei for a period of 18 months until November 3, 2000, is appropriate.

### **Discussion**

The Department of Agriculture's Government Nonprocurement Debarment and Suspension regulations provide that debarment may be imposed for conviction of theft. 7 C.F.R. § 3017.305(a)(3). On February 25, 1999, Respondent was convicted, by virtue of his guilty plea, of unlawfully taking trees in violation of his contract with the Forest Service. Therefore, Mr. Frei's conviction is valid cause for debarment.

Violations of the prohibitions contained in Forest Service regulations at 36 C.F.R. Part 261, for which Mr. Frei was convicted, and the seriousness of such

violations have been contemplated by federal courts. *See, e.g., United States v. Northwest Pine Products, Inc.*, 914 F. Supp. 404, 407 (D. Or. 1996); and *see also, United States v. Wilson, et al.*, 438 F.2d 525 (9<sup>th</sup> Cir. 1971) in which (the Ninth Circuit declined to find that wilfulness or *mens rea* is an element of the prohibition against cutting or otherwise damaging any timber, tree or other forest product except as authorized, and affirmed the District Court's conviction of two offenders under 36 C.F.R. § 261.6(a)).

The prohibition violated by Mr. Frei, and upon which he was convicted, in 36 C.F.R. § 261.10, is very similar to those prohibitions determined by courts to be serious offenses. Section 261.6(a) of Title 36 of the Code of Federal Regulations states: “[c]utting or otherwise damaging any timber, tree, or other forest product, except as authorized by a special-use authorization, timber sale contract, or Federal law or regulation” is prohibited conduct. *See also*, 36 C.F.R. §§ 261.6(c) & (e) which prohibits the removal of timber except as otherwise authorized.

Respondent's arguments in defense of his actions are without merit. The fact is that he pleaded guilty and was convicted of committing these wrongful and illegal actions.

### **Order**

The suspension of Respondent Carl H. Frei until November 3, 2000, is affirmed.

This Order shall take effect immediately. This Decision and Order is final and not appealable within this Department. 7 C.F.R. § 3017.515(d).

[This Decision and Order became final November 12, 1999.-Editor]

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**PLANT QUARANTINE ACT**  
**DEPARTMENTAL DECISION**

**In re: LA FORTUNA TIENDA.**  
**P.Q. Docket No. 99-0013.**  
**Decision and Order filed September 1, 1999.**

**Default — Avocados — Failure to file timely answer — Civil penalty — Sanction policy.**

The Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt, concluding that Respondent moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to Mt. Airy, North Carolina, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff. The Judicial Officer found that the respondent's movement of 11 boxes of avocados constituted 11 violations of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff and increased the \$500 civil penalty assessed by the ALJ to \$1,000. The Judicial Officer also held that the sanction policy in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988), was not applicable to the proceeding because the complainant did not request a specific civil penalty in the complaint. Further, the Judicial Officer found that the assessment of a \$1,000 civil penalty against the respondent was warranted in law and justified by the facts. The Judicial Officer also found that the number of plant quarantine and animal quarantine cases filed with the Hearing Clerk had declined in recent years and there was no further need for the sanction policy in *Kaplinsky*. The Judicial Officer held that sanction policy in *Kaplinsky* would not be applied to any case in which the complaint instituting the proceeding was filed after September 1, 1999.

Sheila Hogan Novak, for Complainant.

Respondent, Pro se.

Initial decision issued by James W. Hunt, Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Acts]; regulations issued under the Acts (7 C.F.R. §§ 301.11(b) and 319.56-2ff) [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], by filing a Complaint on April 1, 1999.

The Complaint alleges that on or about December 28, 1998, La Fortuna Tienda [hereinafter Respondent] moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to La Fortuna Tienda, Mt. Airy, North Carolina, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff (Compl. ¶ 2).

The Hearing Clerk served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and a service letter on April 8, 1999.<sup>1</sup> Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On May 18, 1999, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a proposed Default Decision and Order. Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's proposed Default Decision and Order, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On June 16, 1999, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt [hereinafter the ALJ] issued a Default Decision and Order [hereinafter Initial Decision and Order]: (1) concluding that on or about December 28, 1998, Respondent moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to La Fortuna Tienda, Mt. Airy, North Carolina, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff; and (2) assessing Respondent a \$500 civil penalty (Initial Decision and Order at 2).

On July 30, 1999, Complainant appealed to, and requested oral argument before, the Judicial Officer. The Hearing Clerk served Respondent with a copy of Complainant's Proposed Findings of Fact, Conclusions, and Order and Brief In Support Thereof [hereinafter Appeal Petition] on August 6, 1999.<sup>2</sup> Respondent failed to file a response to Complainant's Appeal Petition within 20 days after service of the Appeal Petition, as provided in section 1.145(b) of the Rules of Practice (7 C.F.R. § 1.145(b)), and on August 31, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

Complainant's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Complainant has thoroughly addressed the issues; thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order, except that I disagree with the civil penalty assessed by the ALJ. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order with modifications that reflect my disagreement with the civil penalty assessed by

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<sup>1</sup>See Domestic Return Receipt for Article Number P 040 136 701.

<sup>2</sup>See Domestic Return Receipt for Article Number P093175108.

the ALJ. Additional conclusions by the Judicial Officer follow the ALJ's conclusion.

## **APPLICABLE STATUTORY AND REGULATORY PROVISIONS**

7 U.S.C.:

### **TITLE 7—AGRICULTURE**

....

#### **CHAPTER 7B—PLANT PESTS**

....

##### **§ 150gg. Violations**

....

###### **(b) Civil penalty**

Any person who—

(1) violates section 150bb of this title or any regulation promulgated under this chapter[]

....

may be assessed a civil penalty by the Secretary not exceeding \$1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

....

**CHAPTER 8—NURSERY STOCK AND OTHER PLANTS  
AND PLANT PRODUCTS**

....

**§ 163. Violations; forgery, alterations, etc., of certificates; punishment;  
civil penalty**

... Any person who violates any ... rule[] or regulation [promulgated by the Secretary of Agriculture under this chapter] ... may be assessed a civil penalty by the Secretary not exceeding \$1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. §§ 150gg(b), 163.

7 C.F.R.:

**TITLE 7—AGRICULTURE**

....

**SUBTITLE B—REGULATIONS OF THE  
DEPARTMENT OF AGRICULTURE**

....

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

....

**PART 301—DOMESTIC QUARANTINE NOTICES**

**SUBPART—IMPORTED PLANTS AND PLANT PARTS**

....

**§ 301.11 Notice of quarantine; prohibition on the interstate movement of certain imported plants and plant parts.**

(a) In accordance with part 319 of this chapter, some plants and plant parts may only be imported into the United States subject to certain destination restrictions. That is, under part 319, some plants and plant parts may be imported into some States or areas of the United States but are prohibited from being imported into, entered into, or distributed within other States or areas, as an additional safeguard against the introduction and establishment of foreign plant pests and diseases.

(b) Under this quarantine notice, whenever any imported plant or plant part is subject to destination restrictions under part 319:

....

(2) No person shall move any plant or plant part from any such quarantined State or area into or through any State or area not quarantined with respect to that plant or plant part.

....

**PART 319—FOREIGN QUARANTINE NOTICES**

....

**SUBPART—FRUITS AND VEGETABLES**

**QUARANTINE**

....

**§ 319.56-2ff Administrative instructions governing movement of Hass avocados from Mexico to the Northeastern United States.**

Fresh Hass variety avocados (*Persea americana*) may be imported from Mexico into the United States for distribution in the northeastern United

States only under a permit issued in accordance with § 319.56-4, and only under the following conditions:

(a) *Shipping restrictions.* . . .

(3) The avocados may be distributed only in the following northeastern States: Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin.

....

(c) *Safeguards in Mexico.* . . .

....

(3) *Packinghouse requirements.* The packinghouse must be registered with Sanidad Vegetal's avocado export program and must be listed as an approved packinghouse in the annual work plan provided to APHIS by Sanidad Vegetal. The operations of the packinghouse must meet the following conditions:

....

(vii) The avocados must be packed in clean, new boxes. The boxes must be clearly marked with the identity of the grower, packinghouse, and exporter, and the statement "Distribution limited to the following States: CT, DC, DE, IL, IN, KY, ME, MD, MA, MI, NH, NJ, NY, OH, PA, RI, VA, VT, WV, and WI."

7 C.F.R. §§ 301.11(a), (b)(2), 319.56-2ff(a)(3), (c)(3)(vii).

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

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

### Findings of Fact

1. La Fortuna Tienda is a business whose mailing address is 103 East Pine Street, Mt. Airy, North Carolina 27030.
2. On or about December 28, 1998, Respondent moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to La Fortuna Tienda, Mt. Airy, North Carolina.

### Conclusion of Law

By reason of the Findings of Fact in this Decision and Order, *supra*, Respondent violated the Acts and the Regulations (7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff).

### ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises one issue in Complainant's Appeal Petition. Complainant contends that the ALJ's failure to assess Respondent a \$1,000 civil penalty, as Complainant requested in Complainant's Motion for Adoption of Proposed Default Decision and Order, is error.

The ALJ assessed Respondent a \$500 civil penalty stating that "[a]s the complaint does not allege more than one incident as constituting a violation, the penalty is reduced to \$500 in accordance with *Shu[lam]is Kaplinsky*, [47] Agric. Dec. 613 (1988)" (Initial Decision and Order at 2 n.1).

Complainant contends that the Complaint alleges multiple violations of the Regulations and that the ALJ's conclusion that the Complaint only alleges "one incident as constituting a violation," is error (Appeal Pet. at 5-9).

Paragraph 2 of the Complaint provides, as follows:

On or about December 28, 1998, [R]espondent moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to La Fortuna Tienda, Mt. Airy, North Carolina, in violation of 7 C.F.R. §§ 301.11(b)(2), 319.56-2ff because such movement is prohibited.

By reason of the facts alleged herein, the *[R]espondent has violated the Acts and regulations promulgated thereunder with the movement of each box of Mexican Hass avocados* outside of the state quarantined for Mexican Hass avocados.

Compl. ¶ 2 (emphasis added).

The language in paragraph 2 of the Complaint supports Complainant's contention that the Complaint alleges that each box of Mexican Hass avocados that Respondent moved from Chicago, Illinois, to Mt. Airy, North Carolina, constitutes a separate violation of the Regulations. Therefore, I find that the ALJ erred when he found that the Complaint alleges only "a violation."

Moreover, I agree with Complainant's position that each box of Mexican Hass avocados moved by Respondent from Chicago, Illinois, to Mt. Airy, North Carolina, constitutes a separate violation of the Regulations. Neither the Act of August 20, 1912, as amended, nor the Federal Plant Pest Act, as amended, defines the term *violation* and any reasonable interpretation of the term must be upheld. The Regulations provide that fresh Hass variety avocados imported from Mexico may be distributed only in Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin (7 C.F.R. § 319.56-2ff(a)(3)) and that in order to ensure that avocados are not distributed to other states, each box of avocados must be clearly marked with the statement "Distribution limited to the following States: CT, DC, DE, IL, IN, KY, ME, MD, MA, MI, NH, NJ, NY, OH, PA, RI, VA, VT, WV, and WI" (7 C.F.R. § 319.56-2ff(c)(3)(vii)). Because each box of avocados is required to be marked with the states to which the avocados may be distributed, I conclude that each box of avocados, which is distributed to a state other than a state identified on the box, is a separate violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff.<sup>3</sup>

Complainant also contends that the sanction policy in *In re Shulamis Kaplinsky*,

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<sup>3</sup>The conclusion that Respondent's movement of each box is a separate violation of the Regulations is consistent with cases under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], in which each misrepresented carton of produce constitutes a separate violation of the PACA. See *In re Sunland Packing House Co.*, 58 Agric. Dec. \_\_\_, slip op. at 72 (Feb. 17, 1999) (stating that the respondent misrepresented 10,622 cartons of hybrid grapefruit and that each misrepresented carton constitutes a separate violation of 7 U.S.C. § 499b(5)); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. \_\_\_, slip op. at 35 (Sept. 30, 1998) (stating that the respondent misrepresented at least 2,319 cartons of grapefruit and that each misrepresented carton constitutes a separate violation of 7 U.S.C. § 499b(5)); *In re Limeco, Inc.*, 57 Agric. Dec. \_\_\_, slip op. at 36 (Aug. 18, 1998) (concluding that the respondent's misrepresentation of the country of origin of 411 cartons of limes sold to three customers on three occasions constitutes 411 violations of 7 U.S.C. § 499b(5)), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); and *In re Potato Sales, Co.*, 54 Agric. Dec. 1382, 1404 (1995) (stating that each misrepresented carton of apples, rather than each shipment, constitutes a violation of the PACA), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

47 Agric. Dec. 613 (1988), is not applicable to this proceeding and that the ALJ's application of the sanction policy in *Kaplinsky* to this proceeding, is error.

In *Kaplinsky*, the Judicial Officer adopted a sanction policy that applies to plant quarantine cases<sup>4</sup> in which no hearing is required because the respondent fails to file an answer, files a late answer, or files an answer either admitting or not denying the material allegations of the complaint. In these plant quarantine cases, the civil penalty requested by the complainant in the complaint is reduced by one-half, unless the complaint contains an allegation that the alleged violation is so serious that a civil penalty larger than one-half the amount requested in the complaint is required. *In re Shulamis Kaplinsky, supra*, 47 Agric. Dec. at 633-34, 637.

Complainant does not request the assessment of a specific civil penalty in the Complaint, but rather, requests an order assessing an unspecified civil penalty, as follows:

The Animal and Plant Health Inspection Service requests:

....

2. That an order be issued assessing civil penalties against the respondent in accordance with the Acts (7 U.S.C. §§ 163, 150gg), and as warranted by the facts upon which the complaint is based.

Compl. at 3.

Moreover, neither 7 U.S.C. § 150gg nor 7 U.S.C. § 163, which Complainant references in its request in the Complaint for the assessment of a civil penalty against Respondent, provides for a specific civil penalty for each violation of the Regulations. Instead, each of the pertinent statutory provisions authorizes the Secretary of Agriculture to assess a civil penalty not exceeding \$1,000 for each violation of the Regulations.

Since Complainant did not request a specific civil penalty in the Complaint, the sanction policy in *Kaplinsky* is not applicable to this proceeding, and the ALJ's reliance on *Kaplinsky* to reduce, by one-half, the amount of the civil penalty

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<sup>4</sup>Plant quarantine cases are proceedings conducted in accordance with the Rules of Practice and instituted under the Act of August 20, 1912, as amended; the Act of January 31, 1942, as amended; the Federal Plant Pest Act, as amended; the Act of February 2, 1903, as amended; or related laws designed to prevent the introduction into the United States, and dissemination within the United States, of plant pests and plant diseases.

requested by Complainant in Complainant's Motion for Adoption of Proposed Default Decision and Order, is error.

Complainant contends that the assessment of a \$1,000 civil penalty against Respondent is warranted in this proceeding (Appeal Pet. at 12-15).

Respondent is deemed by its failure to file an answer to have admitted that on or about December 28, 1998, it moved 11 boxes of Mexican Hass avocados from Chicago, Illinois, to La Fortuna Tienda, Mt. Airy, North Carolina, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff.

A sanction by an administrative agency must be warranted in law and justified in fact.<sup>5</sup> The Secretary of Agriculture has authority to assess a civil penalty not exceeding \$1,000 for each violation of the Regulations (7 U.S.C. §§ 150gg, 163); therefore, the assessment of a \$1,000 civil penalty against Respondent for 11 violations of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff is warranted in law.

Moreover, the assessment of a \$1,000 civil penalty is justified by the facts. The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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<sup>5</sup>*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re James E. Stephens*, 58 Agric. Dec. \_\_\_\_, slip op. at 50 (May 5, 1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec. \_\_\_\_, slip op. at 9 (Mar. 15, 1999); *In re Limeco, Inc.*, 57 Agric. Dec. \_\_\_\_, slip op. at 29-30 (Aug. 18, 1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 1575 (1999); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 257 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497.

The Acts and the Regulations are designed to prevent the introduction into the United States, and dissemination within the United States, of plant pests and plant diseases. The success of the program designed to protect United States agriculture by preventing the introduction of plant pests associated with Mexican Hass avocados is dependent upon compliance with the Regulations by persons such as Respondent. Respondent's violations of the Regulations directly thwart the remedial purposes of the Acts and the Regulations and could have caused losses of billions of dollars and eradication expenses of tens of millions of dollars.

Complainant could have sought the maximum of \$1,000 for each of Respondent's 11 violations of the Acts and the Regulations. Instead, Complainant seeks a civil penalty of approximately \$90.91 for each of Respondent's 11 violations. In light of the number of Respondent's violations and the serious nature of the violations, I am perplexed by the modest civil penalty recommended by Complainant for each violation. However, Complainant states that a \$1,000 civil penalty will serve the remedial purposes of the Acts and Regulations and deter Respondent and other similarly situated persons from future violations of the Acts and the Regulations (Appeal Pet. at 15). Civil penalties assessed by the Secretary of Agriculture are not designed to punish persons who are found to have violated the Acts or the Regulations. Instead, civil penalties are designed to deter future violations by persons found to have violated the Acts or the Regulations and other potential violators.

United States Department of Agriculture sanction policy requires that I give appropriate weight to the sanction recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the

statute in question,<sup>6</sup> and despite the facts of this case, which would appear to warrant the assessment of more than the \$1,000 civil penalty recommended by Complainant, I am reluctant to assess a civil penalty larger than that recommended by Complainant.

Complainant also suggests that I abandon the sanction policy in *In re Shulamis Kaplinsky, supra* (Appeal Pet. at 11-12). The sanction policy in *Kaplinsky*, which is described in this Decision and Order, *supra*, was adopted because of the large number of plant quarantine cases that the Animal and Plant Health Inspection Service instituted prior to the issuance of *Kaplinsky* and the number of plant quarantine cases that the Judicial Officer expected the Animal and Plant Health Inspection Service to institute in the future. The Judicial Officer described what he referred to as "unique administrative problems peculiar to Plant Quarantine Act and related cases" and the expected effect of reducing, by one-half, the civil penalty requested in a complaint when no hearing is required because a respondent fails to file a timely answer, files a late answer, or admits or does not deny the material allegations in the complaint, as follows:

Complainant states that there "are approximately 13 thousand alleged baggage violations of the Animal and Plant Quarantine and related laws and regulations promulgated thereunder for which the Department seeks to assess a civil penalty at ports of entry each year" (Appeal to Judicial Officer at 5-6). During the last 12 months, 101 formal cases have been filed with the Hearing Clerk under the Plant Quarantine Act alone. If the Department had to hold a hearing in a large number of Plant Quarantine Act cases, it would require additional [administrative law judges], which is not contemplated.

In view of the great number of cases that will be filed under this Act, and the small amount of the civil penalties that will be imposed, it seems appropriate to provide an economic incentive to respondents not to force the Department to hold unnecessary hearings where there is no real basis for challenging the allegations in the complaint.

*In re Shulamis Kaplinsky, supra*, 47 Agric. Dec. at 633.

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<sup>6</sup>*In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3).

Complainant states that the number of plant quarantine cases filed with the Hearing Clerk has declined in recent years,<sup>7</sup> and consequently, the premise for the sanction policy in *Kaplinsky* no longer exists. I agree with Complainant that the number of plant quarantine cases has declined in recent years and that there is no longer a basis for the sanction policy adopted in *Kaplinsky*. Moreover, the sanction policy in *Kaplinsky* has been applied to animal quarantine cases<sup>8</sup> for the same reason as it was applied to plant quarantine cases. The number of animal quarantine cases filed with the Hearing Clerk has declined in recent years. Therefore, the sanction policy in *Kaplinsky* will not be applied to any case in which the complaint instituting the proceeding is filed after the date this Decision and Order is issued, September 1, 1999.

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

### Order

La Fortuna Tienda is assessed a civil penalty of \$1,000. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
P.O. Box 3334  
Minneapolis, Minnesota 55403

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent.

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<sup>7</sup>Complainant states that "in 1992, 164 Plant Quarantine Act cases were filed with the Hearing Clerk" and "[i]n fiscal year 1998, only 19 complaints alleging violations of the Plant Quarantine Act were filed." (Appeal Pet. at 11.)

<sup>8</sup>Animal quarantine cases are proceedings conducted in accordance with the Rules of Practice and instituted under the Act of May 29, 1884, as amended; the Act of August 30, 1890, as amended; the Act of February 2, 1903, as amended; the Act of March 3, 1905, as amended; the Act of July 2, 1962, as amended; the Act of May 6, 1970, as amended; the Swine Health Protection Act, as amended; or related laws designed to prevent the introduction into the United States, and dissemination within the United States, of animal diseases.

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 99-0013.

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**MISCELLANEOUS ORDERS**

**In re: JOHNNY BEASLEY, AN INDIVIDUAL DOING BUSINESS AS B&F FARMS.**

**AMAA Docket No. 99-0001.**

**Order of Dismissal filed August 4, 1999.**

Brian Thomas Hill, for Complainant.  
Respondent, Pro se.

*Order issued by James W. Hunt, Administrative Law Judge.*

In view of Complainant's notice of its withdrawal of the Complaint, the case is dismissed.

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**In re: W.B. HART, AN INDIVIDUAL DOING BUSINESS AS W.B. HART FARMS.**

**AMAA Docket No. 99-0002.**

**Order of Dismissal filed August 4, 1999.**

Brian Thomas Hill, for Complainant.  
Respondent, Pro se.

*Order issued by James W. Hunt, Administrative Law Judge.*

In view of Complainant's notice of its withdrawal of the Complaint, the case is dismissed.

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**In re: GREG RAUMIN, AN INDIVIDUAL DOING BUSINESS AS JEWELL DATE CO., A SOLE PROPRIETORSHIP OR UNINCORPORATED ASSOCIATION, AND SUCCESSOR IN INTEREST TO COVALDA, INC., ALSO KNOWN AS COVALDA DATE COMPANY, A CALIFORNIA CORPORATION.**

**AMAA Docket No. 98-0004.**

**Case Closed filed September 3, 1999.**

Colleen A. Carroll, for Complainant.

Respondent, Pro se.

*Order issued by Dorothea A. Baker, Administrative Law Judge.*

By reason of the matters set forth by Complainant in its "Notice of Complainant's Withdrawal of Complaint as to Respondent Greg Raumin," filed September 1, 1999, the above-entitled case is closed.

Copies hereof shall be served upon the parties.

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**In re: JAMES DUNN, d/b/a GREAT DATE IN THE MORNING AND COACHELLA VALLEY DATE CO.; AND MATILDE TORRES, CARMEN LEAL, FRANCISCO RODRIGUEZ, BEATRIZ ACOSTA AND THOMAS J. BARKMAN, d/b/a COACHELLA VALLEY DATE CO.**

**AMAA Docket No. 97-0004.**

**Order Dismissing Complaint filed November 19, 1999.**

Colleen A. Carroll, for Complainant.

Thomas Slovak, Palm Springs, CA, for Respondent.

*Order issued by James W. Hunt, Administrative Law Judge.*

In view of Complainant's November 17, 1999, notice that it has withdrawn its complaint in this matter, it is ordered that the case be dismissed.

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**In re: MIDWAY FARMS, INC.  
94 AMA Docket No. F&V 989-1.  
Remand Order filed November 30, 1999.**

**Raisin order – Remand – Handler – Standing – ALJ powers – In camera review.**

The Judicial Officer remanded the proceeding to Chief ALJ James W. Hunt for assignment to an administrative law judge for further proceedings in accordance with the instructions in *Midway Farms v. United States Dep't of Agric.*, 188 F.3d 1136 (9<sup>th</sup> Cir. 1999).

Sharlene Deskins, for Respondent.  
Brian C. Leighton, Clovis, California, for Petitioner.  
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.  
Order issued by William G. Jenson, Judicial Officer.

Midway Farms, Inc. [hereinafter Petitioner], instituted this proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of Raisins Produced From Grapes Grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) by filing a Petition To Modify Raisin Marketing Order Provisions/Regulations and/or Petition To Terminate Specific Raisin Marketing Order Provisions/Regulations, and/or Petition To Exempt Petitioner From Various Provisions Of The Raisin Marketing Order and Any Obligations Imposed In Connection Therewith That Are Not In Accordance With Law [hereinafter Petition] on July 1, 1994.

On May 10, 1996, former Chief Administrative Law Judge Victor W. Palmer [hereinafter the former Chief ALJ] filed an Initial Decision and Order holding that he lacked the requisite power to conduct an *in camera* inspection of Petitioner's records and dismissing the Petition without prejudice on the grounds that Petitioner has not shown and, without producing its records, cannot show itself to be a handler subject to the Agricultural Marketing Agreement Act of 1937, as required by 7 U.S.C. § 608c(15)(A).

On June 4, 1996, Petitioner appealed to the Judicial Officer; on August 9, 1996, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a response to Petitioner's appeal petition and a cross-appeal; on September 6, 1996, Petitioner filed a reply to Respondent's response and cross-appeal; and on September 9, 1996, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision.

On April 18, 1997, I issued a Decision and Order concluding that Petitioner's

position that it is not a handler subject to the Raisin Order leaves Petitioner no standing to bring a petition under 7 U.S.C. § 608c(15)(A) and dismissing the Petition with prejudice. *In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 114, 117 (1997).

On May 5, 1997, Petitioner filed a petition for review with the United States District Court for the Eastern District of California, which denied Petitioner's motion for summary judgment and granted summary judgment in favor of the United States Department of Agriculture. *Midway Farms, Inc. v. United States Dep't Agric.*, CV F 97-5460 AWI SMS (E.D. Cal. May 18, 1998, and June 15, 1998) (Memorandum Opinion Re Plaintiff's Motion for Summary Judgment and Defendant's Motion for Judgment on the Pleadings and Memorandum Opinion and Order Granting Summary Judgment to Defendant USDA). Petitioner appealed the grant of summary judgment in favor of the United States Department of Agriculture and the denial of Petitioner's motion for summary judgment.

The United States Court of Appeals for the Ninth Circuit held that Petitioner is a handler and has standing to file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). The Court remanded the proceeding to the Secretary of Agriculture with instructions to rule on the merits of Petitioner's Petition. The Court also stated that, upon remand, the administrative law judge, to whom the proceeding is assigned, has inherent power: (1) to conduct hearings *in camera*, upon showing of good cause; (2) to allow Petitioner to submit redacted materials; and (3) to impose protective conditions upon any materials submitted by Petitioner for *in camera* review. *Midway Farms v. United States Dep't of Agric.*, 188 F.3d 1136 (9<sup>th</sup> Cir. 1999).

On October 28, 1999, Petitioner's counsel informed me that Petitioner will not seek review of *Midway Farms v. United States Dep't of Agric.*, *supra*. On November 24, 1999, the time for filing a petition for certiorari expired, and on November 29, 1999, Mr. Bradley Flynn, Office of the General Counsel, United States Department of Agriculture, informed the Office of the Judicial Officer that Respondent has not filed a petition for certiorari.

The former Chief ALJ retired from federal service, effective January 3, 1999. Accordingly, the proceeding cannot be remanded to the former Chief ALJ and must be assigned to another administrative law judge.

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

### Order

The proceeding is remanded to Chief Administrative Law Judge James W. Hunt for assignment to an administrative law judge for further proceedings in

accordance with the instructions in *Midway Farms v. United States Dep't of Agric., supra.*

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**In re: DONALD BURKE.**  
**A.Q. Docket No. 99-0001.**  
**Order Dismissing Complaint filed October 27, 1999.**

Jane H. Settle, for Complainant.  
Respondent, Pro se.  
*Order issued by Edwin S. Bernstein, Administrative Law Judge.*

Complainant's motion to dismiss the Complaint is granted. It is ordered that the Complaint, filed on September 30, 1998, be dismissed.

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**In re: DAVID M. ZIMMERMAN.**  
**AWA Docket No. 94-0015.**  
**Order Lifting Stay filed July 12, 1999.**

Robert A. Ertman, for Complainant.  
David A. Fitzsimons & Elizabeth J. Goldstein, Harrisburg, PA, for Respondent.  
*Order issued by William G. Jenson, Judicial Officer.*

On June 6, 1997, I issued a Decision and Order: (1) concluding that David M. Zimmerman [hereinafter Respondent] willfully violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; (2) assessing Respondent a \$51,250 civil penalty; (3) suspending Respondent's Animal Welfare Act license for 60 days; and (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards. *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997).

On August 7, 1997, Respondent filed an Application for Stay Pending Review requesting a stay of the Order in *In re David M. Zimmerman, supra*, pending the completion of proceedings for judicial review. On August 8, 1997, I granted Respondent's Application for Stay Pending Review. *In re David M. Zimmerman*, 56 Agric. Dec. 1636 (1997) (Stay Order).

Respondent filed a petition for review of *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997), with the United States Court of Appeals for the Third Circuit, and on May 26, 1998, the Court denied Respondent's petition for review. *Zimmerman v. United States*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998). On June 4, 1999, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed Motion to Lift Stay. The Hearing Clerk served Respondent with Complainant's Motion to Lift Stay on June 14, 1999,<sup>1</sup> and in accordance with section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(d)), Respondent had 20 days after service in which to respond to Complainant's Motion to Lift Stay. Respondent did not file a response to Complainant's Motion to Lift Stay within 20 days after Respondent was served with the Motion to Lift Stay, and on July 8, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

Complainant's Motion to Lift Stay is granted. The Stay Order issued August 8, 1997, *In re David M. Zimmerman*, 56 Agric. Dec. 1636 (1997) (Stay Order), is lifted, and except with respect to the 60-day suspension of Respondent's Animal Welfare Act license, the Order issued in *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997), is effective,<sup>2</sup> as follows:

## Order

### PARAGRAPH I

Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under

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<sup>1</sup>See Domestic Return Receipt for Article Number P 368 427 126.

<sup>2</sup>I do not make effective in this Order Lifting Stay, the license suspension provisions in paragraph III of the Order issued in *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997). Respondent is no longer licensed under the Animal Welfare Act. Moreover, in another administrative proceeding instituted against Respondent, I disqualified Respondent from obtaining a license under the Animal Welfare Act. *In re David M. Zimmerman*, 58 Agric. Dec. \_\_\_\_, slip op. at 6 (Jan. 6, 1999) (Order Denying Pet. for Recons.). Therefore, Respondent no longer has, and cannot obtain, an Animal Welfare Act license which could be suspended.

the Animal Welfare Act, 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 a current, written program of veterinary care under the supervision of a veterinarian;
- c. failing to provide veterinary care to animals as needed;
- d. failing to provide a suitable method for the removal and disposal of animal wastes from primary enclosures;
- e. failing to provide animals with shelter from inclement weather;
- f. failing to maintain primary enclosures which are structurally sound and in good repair and are free of any sharp points or edges which could injure animals;
- g. failing to provide enclosures for animals that are constructed and maintained so as to provide sufficient space to allow each animal to turn about freely and to easily stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner;
- h. failing to have housing facilities for dogs physically separated from other businesses;
- i. failing to store food so as to protect it against spoilage, contamination, and vermin infestation;
- j. failing to clean primary enclosures for animals, as required;
- k. failing to keep food and water receptacles for animals clean and sanitized, as required;
- l. failing to have a sufficient number of employees to maintain the prescribed level of husbandry practices and care;
- m. failing to ensure that the floors, walls, and ceilings of indoor housing facilities and other surfaces coming in contact with animals are impervious to moisture;
- n. failing to handle animals in a manner which does not cause trauma, behavioral stress, physical harm, and unnecessary discomfort;
- o. failing to ensure that housing facilities for dogs and areas used for storing animal food are free of an accumulation of trash, waste material, junk, and other discarded materials;
- p. failing to provide each dog housed in an enclosure with an adequate amount of floor space;
- q. failing to provide indoor housing facilities for dogs which are sufficiently ventilated and lighted well enough to provide for their health and well-being and to allow routine inspection and cleaning of the facility, and observation of the dogs;
- r. failing to individually identify all dogs on the premises by means of an

identification tag or a legible tattoo; and

s. failing to maintain a means of direct and frequent communication with an attending veterinarian so as to ensure that timely and accurate information affecting an animal's health and well-being is accurately conveyed to the attending veterinarian.

Paragraph I of this Order shall become effective on the day after service of this Order on Respondent.

## PARAGRAPH II

Respondent David M. Zimmerman is assessed a civil penalty of \$51,250. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

Robert A. Ertman  
United States Department of Agriculture  
Office of the General Counsel  
Marketing Division  
1400 Independence Avenue, SW  
Room 2014 South Building  
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Robert A. Ertman within 60 days after service of this Order on Respondent. Respondent should indicate on the certified check or money order that payment is in reference to AWA Docket No. 94-0015.

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**In re: MIKE GOCHNAUER.**  
**AWA Docket No. 99-0010.**  
**Dismissal of Complaint filed August 16, 1999.**

Brian T. Hill, for Complainant.  
Respondent, Pro se.  
Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to "Notice of Complainant's Withdrawal of Complaint," filed August 10, 1999, said Complaint, filed on January 11, 1999, is hereby dismissed

without prejudice.

Copies hereof shall be served upon the parties.

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**In re: ANNA MAE NOELL AND THE CHIMP FARM, INC.**

**AWA Docket No. 98-0033.**

**Order Denying The Chimp Farm, Inc.'s Motion to Vacate filed August 30, 1999.**

**Petition for reconsideration — Untimely petition for reconsideration — Argument raised for first time on appeal.**

The Judicial Officer found that the Chimp Farm, Inc.'s Motion to Vacate was a petition for reconsideration filed 6 months and 11 days after the Chimp Farm, Inc., was served with the Judicial Officer's decision. The Judicial Officer denied the Chimp Farm, Inc.'s petition for reconsideration because it was not filed within 10 days after service of the decision, as required by 7 C.F.R. § 1.146(a)(3). The Judicial Officer also stated that even if the Chimp Farm, Inc.'s petition for reconsideration had not been late-filed, it would be denied because it raised the issue of improper service of the Complaint for the first time in the proceeding and that the issue was raised too late to be considered.

Brian T. Hill, for Complainant.

Thomas John Dandar, Tampa, Florida, for the Chimp Farm, Inc.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the Regulations and Standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-1.151) [hereinafter the Rules of Practice], by filing a Complaint on August 10, 1998.

The Complaint alleges that on November 15, 1995, October 9, 1996, July 22, 1997, and April 1, 1998, Anna Mae Noell and the Chimp Farm, Inc. [hereinafter Respondents], violated the Animal Welfare Act and the Regulations and Standards.

The Hearing Clerk served Respondents with the Complaint on August 13, 1998. Respondents failed to answer the Complaint within 20 days after service of the Complaint on Respondents, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On October 1, 1998, in accordance with section

1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order and a Proposed Decision and Order Upon Admission of Facts by Reason of Default. Also, on October 1, 1998, Respondents filed a letter, dated September 14, 1998, in which they denied the material allegations of the Complaint.

On November 3, 1998, Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision] in which the ALJ: (1) found that Respondents violated the Animal Welfare Act and the Regulations and Standards, as alleged in the Complaint; (2) issued a cease and desist order, directing that Respondents cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessed a civil penalty of \$25,000 against Respondents jointly and severally; and (4) revoked Respondents' Animal Welfare Act license.

On December 3, 1998, Respondents appealed to the Judicial Officer; on December 23, 1998, Complainant filed a response to Respondents' appeal petition; and on December 29, 1998, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision. On January 6, 1999, I issued a Decision and Order in which I adopted the ALJ's Default Decision as the final Decision and Order.

On January 15, 1999, the Hearing Clerk served Respondents with the Decision and Order.<sup>1</sup> On July 26, 1999, 6 months and 11 days after Respondents were served with the Decision and Order, the Chimp Farm, Inc., filed Motion to Vacate Default and Decision and Orders. On August 24, 1999, Complainant filed Opposition to Respondents' Motion to Vacate Default and Decision and Orders, and on August 25, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the January 6, 1999, Decision and Order.

The Chimp Farm, Inc., contends that it was not properly served with a copy of the Complaint and requests that I vacate the ALJ's Default Decision and the Decision and Order, as they apply to the Chimp Farm, Inc. I find that the Chimp Farm, Inc.'s Motion to Vacate Default and Decision and Orders constitutes a petition for reconsideration of the ALJ's November 3, 1998, Default Decision and the Judicial Officer's January 6, 1999, Decision and Order.

As an initial matter, the Chimp Farm, Inc.'s Motion to Vacate Default and Decision and Orders, as it relates to the ALJ's Default Decision, cannot be

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<sup>1</sup>See Domestic Return Receipt for Article Number P 368 427 006.

considered. Section 1.139 of the Rules of Practice provides, as follows:

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

. . . Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145: *Provided, however*, That no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.139.

On December 3, 1998, Respondents filed a timely appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145. Consequently, while the ALJ's Default Decision is part of the record,<sup>2</sup> the ALJ's Default Decision never became final and effective and no purpose relevant to this proceeding would be served by vacating the ALJ's Default Decision.

Further, section 1.146(a)(3) of the Rules of Practice provides that a party to a proceeding may seek reconsideration of the decision of the Judicial Officer, 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. . . .*

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly

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<sup>2</sup>See 5 U.S.C. § 557(c).

stated.

7 C.F.R. § 1.146(a)(3).

Thus, petitions for reconsideration filed pursuant to section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)), after the Judicial Officer's decision has been issued, relate to reconsideration of the Judicial Officer's decision only.<sup>3</sup> Therefore, the Chimp Farm, Inc.'s Motion to Vacate Default and Decision and Orders, as it relates to the ALJ's Default Decision, is denied.

Moreover, the Chimp Farm, Inc.'s Motion to Vacate Default and Decision and Orders, as it relates to the Judicial Officer's Decision and Order, is denied because it was filed too late. Section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) provides that a petition for reconsideration must be filed within 10 days after the date of service of the decision on the party filing the petition. The Hearing Clerk served the Decision and Order on the Chimp Farm, Inc., on January 15, 1999.<sup>4</sup> The Chimp Farm, Inc., did not file its Motion to Vacate Default and Decision and Orders until July 26, 1999, 6 months and 11 days after the Hearing Clerk served the Chimp Farm, Inc., with the Decision and Order. Accordingly, the Chimp Farm, Inc.'s Motion to Vacate Default and Decision and Orders was filed too late to be considered and must be denied.<sup>5</sup>

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<sup>3</sup>See *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 719-20 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (stating that a petition for reconsideration, filed after the Judicial Officer's decision has been issued, relates to reconsideration of the Judicial Officer's decision and does not relate to the administrative law judge's initial decision which, because of a timely appeal, did not become effective); *In re Peter A. Lang*, 57 Agric. Dec. 91, 101 (1998) (Order Denying Pet. for Recons.) (stating that a petition for reconsideration, filed after the Judicial Officer's decision has been issued, relates to reconsideration of the Judicial Officer's decision and does not relate to the administrative law judge's initial decision which, because of a timely appeal, did not become effective); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418, 1435 (1996) (stating "[p]etitions for reconsideration under the Rules of Practice relate to reconsideration of the Judicial Officer's decision"); *In re Lincoln Meat Co.*, 48 Agric. Dec. 937, 938 (1989) (stating "[t]he Rules of Practice do not provide for a Motion for Reconsideration to the Administrative Law Judge").

<sup>4</sup>See note 1.

<sup>5</sup>See *In re Paul W. Thomas*, 58 Agric. Dec. \_\_\_\_ (Aug. 4, 1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. \_\_\_\_ (May 14, 1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. \_\_\_\_ (Apr. 14, 1999) (Order Denying Pet. for  
(continued...)

Even if the Chimp Farm, Inc., had filed a timely Motion to Vacate Default and Decision and Orders, the motion would be denied.

The Chimp Farm, Inc., states in its Motion to Vacate Default and Decision and Orders that it was not properly served with a copy of the Complaint and contends that it was, therefore, not afforded due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The Chimp Farm, Inc., raises the issue of service of the Complaint for the first time in its Motion to Vacate Default and Decision and Orders.<sup>6</sup> It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial

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<sup>5</sup>(...continued)

Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. \_\_\_\_ (Sept. 15, 1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

<sup>6</sup>The Chimp Farm, Inc., did not raise the issue of improper service in its previous filings, and in its Motion to Vacate Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Appeal Petition], filed December 3, 1998, the Chimp Farm, Inc., states that its failure to file a timely Answer resulted from its not being represented by counsel at the time it was served with the Complaint and the age, health, and hospitalization of Respondent Anna Mae Noell (Appeal Pet. at ¶¶ 1-2). The Chimp Farm, Inc., requested in the Appeal Petition that I vacate the ALJ's Default Decision on the ground that its failure to respond to the Complaint was excusable neglect and that Complainant would suffer no prejudice if Respondents were permitted to respond to the Complaint (Appeal Pet. ¶¶ 7-8).

Officer.<sup>7</sup> The Chimp Farm, Inc.'s contention that it was not properly served with the Complaint is raised too late to be considered.

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

### Order

The Chimp Farm, Inc.'s Motion to Vacate Default and Decision and Orders is denied.

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<sup>7</sup>*In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1911(1997), *aff'd*, 178 F.3d 743 (5<sup>th</sup> Cir. 1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th Cir. Mar. 27, 1997) (unpublished); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher, Jr.*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

**In re: MARY MEYERS.**

**AWA Docket No. 96-0062.**

**Order Denying Petition for Reconsideration filed October 14, 1999.**

**Default — Failure to file timely petition for reconsideration — Failure to file timely answer — Pro se — Issue raised for first time on appeal — Estoppel — Civil penalty — Ability to pay.**

The Judicial Officer denied Respondent's Petition for Reconsideration because it was not timely filed. The Judicial Officer stated that even if Respondent's Petition for Reconsideration had been timely filed, it would be denied because Respondent had not raised a meritorious basis for finding that the Decision and Order, *In re Mary Meyers*, 56 Agric. Dec. 322 (1997), had been erroneously decided. The Judicial Officer stated that the Decision and Order had been properly issued based on Respondent's failure to file a timely answer. The Judicial Officer rejected Respondent's contention that the Decision and Order must be set aside because a United States Department of Agriculture employee stated to Respondent that the charges would be dropped and rejected Respondent's contention that the \$26,000 civil penalty assessed against her must be vacated because neither Respondent nor Respondent's husband had the financial ability to pay the civil penalty.

Robert A. Ertman, for Complainant.

Charles C. Steincamp, Wichita, Kansas, for Respondent.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the Regulations and Standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on September 9, 1996.

The Complaint alleges that on September 12, 1994, June 14, 1995, July 26, 1995, and October 4, 1995, Mary Meyers [hereinafter Respondent] violated the Animal Welfare Act and the Regulations and Standards.

On September 14, 1996, the Hearing Clerk served Respondent with the Complaint.<sup>1</sup> Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on January 21, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt [hereinafter the ALJ]

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<sup>1</sup>See Domestic Return Receipt for Article Number P 592 003 692.

issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision] in which the ALJ: (1) found that Respondent violated the Animal Welfare Act and the Regulations and Standards, as alleged in the Complaint; (2) directed Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessed a \$26,000 civil penalty against Respondent; and (4) disqualified Respondent from becoming licensed under the Animal Welfare Act for 10 years and continuing after the 10-year disqualification period, until Respondent demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Animal Welfare Act and the Regulations and Standards and pays the assessed civil penalty (Default Decision at 8-9).

On January 29, 1997, Respondent appealed to the Judicial Officer; on February 26, 1997, Respondent filed an addendum to her appeal; on February 28, 1997, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision; and on March 7, 1997, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order. On March 13, 1997, I issued a Decision and Order in which I adopted the ALJ's Default Decision as the final Decision and Order. *In re Mary Meyers*, 56 Agric. Dec. 322 (1997).

On March 24, 1997, the Hearing Clerk served Respondent with the Decision and Order.<sup>2</sup> On September 13, 1999, 2 years 5 months 20 days after the Hearing Clerk served Respondent with the Decision and Order, Respondent filed a letter dated September 7, 1999 [hereinafter Petition for Reconsideration], requesting that "these charges be dropped and the fines be vacated" (Pet. for Recons. at 1). On September 23, 1999, Complainant filed Complainant's Statement Regarding Respondent's Motion to Reopen and Motion to Vacate Administrative Penalty. On October 13, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the March 13, 1997, Decision and Order.

Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, 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.* . . .

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<sup>2</sup>See Domestic Return Receipt for Article Number Z 138 687 944.

....

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Respondent's Petition for Reconsideration, which was filed 2 years 5 months 20 days after the date the Hearing Clerk served the Decision and Order on Respondent, was filed too late, and, accordingly, Respondent's Petition for Reconsideration must be denied.<sup>3</sup>

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<sup>3</sup>See *In re Anna Mae Noell*, 58 Agric. Dec. \_\_\_\_ (Aug. 30, 1999) (Order Denying the Chimp Farm Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months and 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 Agric. Dec. \_\_\_\_ (Aug. 4, 1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. \_\_\_\_ (May 14, 1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. \_\_\_\_ (Apr. 14, 1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. 1280 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles* (continued...)

Moreover, even if Respondent's Petition for Reconsideration had been timely filed, it would be denied because Respondent raised no meritorious basis for finding the Decision and Order erroneous.

First, Respondent contends that she disputed each and every allegation of the Complaint, but that Respondent was unable to afford counsel and, consequently, her response to the Complaint was not "in the proper format to obtain a hearing" (Pet. for Recons. at 1).

The Decision and Order is not based upon Respondent's failure to file an answer in the proper format, as Respondent contends, but rather, the Decision and Order is based upon Respondent's failure to file a timely answer. Sections 1.136(a), 1.136(c), and 1.139 of the Rules of Practice provide that an answer must be filed within 20 days after a respondent is served with a complaint, that a failure to file a timely answer shall be deemed, for the purposes of the proceeding, an admission of the allegations in the complaint, and that a failure to file an answer shall constitute a waiver of hearing, as follows:

#### § 1.136 Answer.

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

....

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

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<sup>3</sup>(...continued)

*Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

....

**§ 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. §§ 1.136(a), (c), .139.

Respondent first filed in this proceeding on January 29, 1997, which is 137 days after the Hearing Clerk served Respondent with the Complaint and 117 days after Respondent's Answer was due. Respondent's failure to file a timely answer constitutes an admission of the allegations in the Complaint and a waiver of Respondent's right to a hearing. Moreover, Respondent is not exempt from the Rules of Practice merely because Respondent was *pro se* at the time her answer was due.

Second, Respondent contends that the Decision and Order must be set aside because she was told that the charges would be dropped, as follows:

[A]t the time that the initial charges were brought against [Respondent,] she had indicated to a U.S. Department of Agriculture employee that she did not have the financial means to defend herself and was told that in the event she ceased all kennel and dog raising activities immediately the charges would be dropped. In reliance on these representations[, Respondent] immediately placed all of her remaining dogs in new homes and ceased all kennel operations. It now appears that the charges have not been dropped as [Respondent] had been lead [sic] to believe.

In light of the fact [Respondent] has ceased all kennel activities in reliance on the U.S. Department of Agriculture's agreement to drop all charges against her in return, we would ask that these charges be dropped and the fines be vacated.

Pet. for Recons. at 1.

Respondent raises for the first time in her Petition for Reconsideration the issue of a representation by a United States Department of Agriculture employee that all charges would be dropped. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.<sup>4</sup> Respondent's failure, prior to her filing the Petition for Reconsideration, to argue that a United States Department of Agriculture employee agreed to drop the charges against Respondent comes too late to be considered.

Even if I considered Respondent's contention and found that a United States Department of Agriculture employee stated that the charges against Respondent would be dropped, that finding would not constitute a basis for setting aside the Decision and Order. It is well settled that individuals are bound by federal statutes and regulations, irrespective of the advice of federal employees.<sup>5</sup> Therefore, even

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<sup>4</sup>*In re Anna Mae Noell*, 58 Agric. Dec. \_\_\_, slip op. at 6 (Aug. 30, 1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1911 (1997), *aff'd* 178 F.3d 743 (5<sup>th</sup> Cir. 1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th Cir. Mar. 27, 1997) (unpublished); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), printed in 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), printed in 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), printed in 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

<sup>5</sup>*See FCIC v. Merrill*, 332 U.S. 380, 382-86 (1947); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1049-50, 1058 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 227 (1998), *appeal* (continued...)

if Respondent was given erroneous advice by a United States Department of Agriculture employee, Respondent was bound by the Animal Welfare Act and the Regulations and Standards, and a proceeding could be instituted against Respondent for violations of the Animal Welfare Act and the Regulations and Standards, despite any statement that such a proceeding would not be instituted.

I infer that Respondent contends that the Secretary of Agriculture is estopped from issuing the Decision and Order and imposing a sanction against Respondent because of a United States Department of Agriculture employee's statement to Respondent that the charges against Respondent would be dropped. The doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct.<sup>6</sup> One key principle of equitable estoppel is that the party claiming the theory must demonstrate reliance on the other party's conduct in such a manner as to change his or her position for the worse.<sup>7</sup> Respondent has not shown that her position in this proceeding was changed for the worse based upon the alleged statement by a United States Department of Agriculture employee.

Further, even if Respondent had acted to her detriment based on a United States Department of Agriculture employee's statement, it is well settled that the government may not be estopped on the same terms as any other litigant.<sup>8</sup> It is only with great reluctance that the doctrine of estoppel is applied against the government, and its application against the government is especially disfavored

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<sup>5</sup>(...continued)

*dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 20 (1990); *In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1477 (1988); *In re Maquoketa Valley Coop. Creamery*, 27 Agric. Dec. 179, 186 (1968); *In re Leslie E. Donley*, 22 Agric. Dec. 449, 452 (1963).

<sup>6</sup>*Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986).

<sup>7</sup>*Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984); *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993); *Kennedy v. United States*, 965 F.2d 413, 418 (7th Cir. 1992).

<sup>8</sup>*Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947).

when it thwarts enforcement of public laws.<sup>9</sup> Equitable estoppel does not generally apply to the government acting in its sovereign capacity,<sup>10</sup> as it was doing in this case,<sup>11</sup> and estoppel is only available if the government's wrongful conduct threatens to work a serious injustice, if the public's interest would not be unduly damaged by the imposition of estoppel, and, generally, only if there is proof of affirmative misconduct by the government.<sup>12</sup> Respondent bears a heavy burden when asserting estoppel against the government, and Respondent has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Therefore, I find no basis upon which to grant Respondent's request to set aside the Decision and Order based upon an alleged statement by a United States Department of Agriculture employee that the charges against Respondent would be dropped.

<sup>9</sup>*Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Trapper Mining, Inc. v. Lujan*, 923 F.2d 774, 781 (10th Cir.), cert. denied, 502 U.S. 821 (1991); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980), cert. denied, 451 U.S. 988 (1981).

<sup>10</sup>*United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982).

<sup>11</sup>See *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1059 (1998) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act). Cf. *In re Sunland Packing House Co.*, 58 Agric. Dec. \_\_\_, slip op. at 81-82 (Feb. 17, 1999) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1561 (1997) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Horse Protection Act of 1970, as amended); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Federal Meat Inspection Act), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), cert. denied, 434 U.S. 920 (1977).

<sup>12</sup>*Lehman v. United States*, 154 F.3d 1010, 1016-17 (9th Cir. 1998), cert. denied, 119 S.Ct. 1336 (1999); *United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997); *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971).

Third, Respondent requests that the \$26,000 civil penalty assessed against Respondent be vacated because “[Respondent] and her husband have no financial ability to pay these fines” (Pet. for Recons. at 1). Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and Standards, and a respondent’s ability to pay the civil penalty is not one of those factors. Therefore, Respondent’s and Respondent’s husband’s inability to pay the \$26,000 civil penalty assessed against Respondent is not a basis for setting aside or reducing the \$26,000 civil penalty assessed against Respondent.<sup>13</sup>

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

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<sup>13</sup>The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. See *In re Nancy M. Kutz* (Decision and Order as to Nancy M. Kutz), 58 Agric. Dec. \_\_\_, slip op. at 16 (July 12, 1999) (stating that the respondent’s inability to pay the \$16,000 civil penalty assessed by the administrative law judge is not a basis for setting aside or reducing the civil penalty); *In re James E. Stephens*, 58 Agric. Dec. \_\_\_, slip op. at 66-67 (May 5, 1999) (stating that the respondents’ financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act and the Regulations and Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating that a respondent’s ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (1998) (stating that the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent’s ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating that a respondent’s inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating that ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating that ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating that the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff’d*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating that the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

## Order

Respondent's Petition for Reconsideration is denied.

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**In re: WERNER WALLACE.**

**AWA Docket No. 97-0027.**

**Order Dismissing Complaint filed October 15, 1999.**

Frank Martin, Jr., for Complainant.

Respondent, Pro se.

*Order issued by Edwin S. Bernstein, Administrative Law Judge.*

The Complainant has moved that the Complaint be dismissed, without prejudice, stating that further formal proceedings in this matter are not required in the public interest because on April 12, 1999, a Consent Agreement and Order was issued by the Kansas Livestock Commissioner in a proceeding before the Kansas Animal Health Department captioned "In the Matter of Werner Wallace," Case No. 99-0020. A copy of said Order is incorporated herein by reference. In that order, Werner Wallace admitted and the Commissioner found certain violations of the Kansas Pet Animal Act, K.S.A. (1997 Supp.) 47-1701 *et seq.*, and the regulations issued thereunder, K.A.R. 9-23-1 *et seq.* The violations included the following provisions:

- Requirements that each "kennel structure be constructed of material that will provide for a sound structure, that such structure shall be maintained in good repair and protect animals housed inside from injury."
- Requirements for "the removal of animal and food wastes, bedding and debris on a regular basis and at reasonable intervals."
- Requirement for "each kennel pen to be maintained in strict sanitary condition."
- Requirements for "the removal of excreta as often as necessary to prevent contamination of the animals, prevent disease and to reduce odors."
- Requirements for "adequate ventilation to reduce moisture condensation and adequate drainage to prevent and eliminate excess water from each hobby kennel unit."
- Requirements that "each kennel shall protect animals housed inside from injury."
- Requirements that "the animals shall be handled in a manner which will not

cause discomfort, stress or physical harm to the animals."

- Requirements for "an adequate veterinary care program for the animals and that each animal shall be observed each day by the person in charge of the hobby kennel."
- Requirements that "animal food . . . be wholesome, palatable and of nutritional value sufficient to maintain each animal in good health and food and water shall be provided to each animal at least once during each 24-hour period and any animal with nutritional need or disease shall be fed more frequently."

Mr. Wallace was required to relinquish all of the animals in his possession except two dogs, which he was required to have spayed or neutered. He was also required to close his breeding kennel facility and to remove all signs advertising his facility. He was prohibited from engaging in any type of breeding business requiring licensure from the Kansas Health Department for a minimum of 24 months and thereafter until he has applied to the Department, paid the applicable fee, and passed an inspection of his facility. Finally, Mr. Wallace was fined \$8,000.00, which was held in abeyance but which will become immediately due and owing if he fails to comply with the terms and conditions of the Consent Agreement and Order.

Accordingly, upon motion of the Complainant and for good cause shown, the complaint in this matter is dismissed, without prejudice.

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**In re: NORTHWEST AIRLINES, INC.**

**AWA Docket No. 99-0038.**

**Order Granting Complainant's Application to Withdraw its Complaint filed December 2, 1999.**

Brian T. Hill, for Complainant.

Glenn C. Fuller, St. Paul, MN, for Respondent.

*Order issued by Edwin S. Bernstein, Administrative Law Judge.*

Upon good cause shown, Complainant's application to withdraw its Complaint is granted. This matter is dismissed without prejudice.

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**In re: THOMPSON & WALLACE OF N.C., INC.**  
**CRPA Docket No. 98-0001.**  
**Order Dismissing Complaint Without Prejudice filed July 23, 1999.**

Sharlene A. Deskins, for Complainant.  
Respondent, Pro se.

*Order issued by Dorothea A. Baker, Administrative Law Judge.*

Wherefore, for good cause shown the complaint against the Respondent is dismissed without prejudice.

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**In re: HY-POINT FARMS, INC.**  
**DNS-FNS Docket No. 00-0001.**  
**Order Dismissing Appeal filed November 16, 1999.**

Rachel H. Bishop, for Complainant.  
Craig J. Huber, Haddonfield, NJ, for Respondent/Appellant.  
*Order issued by James W. Hunt, Administrative Law Judge.*

This matter arises under section 3017.515 of the regulations for nonprocurement debarments and suspensions. (7 C.F.R. §§ 3017.100-.515.)

On September 3, 1999, Hy-Point Farms, Inc., Respondent/Appellant herein, received a notice (decision) from the Debarring Official in this matter, the Administrator of the Food and Nutrition Service, United States Department of Agriculture (USDA), that it was debarred under 7 C.F.R. §§ 3017.314(a) from participation in federal nonprocurement programs until March 8, 2002. Respondent/Appellant was advised in the notice that "You may appeal this debarment to the Office of Administrative Law Judges (OALJ) by filing the appeal in writing to the Hearing Clerk, OALJ, USDA, Washington, DC 20250. The appeal must be filed within 30 days of receiving this decision. . . . You will be notified of the decision in the appeal within 90 days of the date the appeal is filed with the Hearing Clerk."

Respondent/Appellant sent an appeal via Federal Express, with a shipping receipt dated September 30, 1999, to the Hearing Clerk. The appeal was received by the Hearing Clerk on October 7, 1999.

On October 15, 1999, counsel for the Debarring Official filed a motion to dismiss the appeal on the ground that it was untimely filed. Counsel contends that the effective date for the filing of an appeal is the date the appeal is actually

received by the Hearing Clerk, that the 30-day period within which Respondent/Appellant in this matter could appeal ended on October 4, 1999, but that the appeal was not filed with the Hearing Clerk until three days later on October 7, 1999.

Respondent/Appellant filed opposition to the motion contending that the Debarring Official had not followed the regulations when he sent his decision to Respondent/Appellant by Federal Express rather than by certified mail as required by the regulations and that the address for the Hearing Clerk that it was given by the Debarring Official was insufficient. Respondent/Appellant states, with supporting affidavits, that on October 5, 1999, it was notified by Federal Express that it was unable to deliver the appeal because the address it was given for the Hearing Clerk was incomplete. Respondent/Appellant further states that, after giving Federal Express a more complete address on October 5, 1999, Federal Express was able to deliver the appeal on October 7, 1999.

Respondent/Appellant contends that the failure of the Debarring Official to serve a copy of his decision on Respondent/Appellant by certified mail should toll the 30-day appeal period and that the incomplete address constitutes good cause to extend the time for filing the appeal.

It is USDA policy that the time allowed in its proceedings for an appeal is "mandatory and jurisdictional." If an appeal is not filed within the time required, the decision being appealed becomes final and effective and the USDA official to whom the appeal is filed lacks jurisdiction to review the matter. *Toscony Provision Company, Inc.*, 43 Agric. Dec. 1106 (1984).

The regulations for nonprocurement debarment and suspension actions state that an appeal must be filed with the Office of the Hearing Clerk but does not state when it is considered actually filed. 7 C.F.R. § 3017.515(a) provides in relevant part:

If a decision to debar or suspend is made by a debarring or suspending official under § 3017.314 or § 3017.413, the respondent may appeal the decision to the Office of Administrative Law Judges (OALJ) by filing the appeal, in writing, to the Hearing Clerk, OALJ, United States Department of Agriculture, Washington, DC 20250. The appeal must be filed within 30 days of receiving the decision and it must specify the basis of the appeal.

Counsel for the Debarring Official in this proceeding argues in its motion that USDA's Rules of Practice for its other administrative proceedings, while not specifically applicable to debarment proceedings, should be followed in determining the effective date for the filing of an appeal of a debarment decision.

Section 1.147(g) of the Rules of Practice provides that "Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk." (7 C.F.R. § 1.147(g).) Thus, appeals in cases subject to the Rules of Practice received by the Hearing Clerk after the appeal period has elapsed will be dismissed. *Charles Brink*, 41 Agric. Dec. 2146 (1982); *Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996). Similarly, appeals in debarment proceedings that are not timely filed with the Hearing Clerk will also be dismissed. *Leon Howard d/b/a Howard Construction*, 53 Agric. Dec. 1400 (1994).<sup>1</sup>

The time for filing an appeal with the Hearing Clerk in this proceeding was not tolled. Whether the Debarring Official served his decision on Respondent/Appellant by mail or by some other means, the decision was in either event actually received by Respondent/Appellant on September 3, 1999. Section 3017.515(a) provides that "the appeal must be filed within 30 days of receiving the decision." (7 C.F.R. § 3017.515(a).) September 3, 1999, was thus the starting date to calculate the running of the appeal period. As for the inability of Federal Express to deliver the appeal, the address for the Hearing Clerk given to Federal Express was not incomplete. It is the official mailing address for the Hearing Clerk as provided in section 3017.515(a) of the regulations. Even though Respondent/Appellant may not be at fault because of Federal Express' inability to deliver the appeal on time, the decision of the Debarring Official became final and effective after 30 days and I lack jurisdiction to extend the time to file an appeal.

In view of the common requirement that an appeal in both debarment and nondebarment USDA proceedings must be filed with the Hearing Clerk, I find that "filing" has the same meaning in both types of cases and that an appeal in a debarment proceeding, like an appeal in a case subject to the Rules of Practice, is deemed to be filed when it is received by the Hearing Clerk. As the appeal in this matter was not received by the Office of the Hearing Clerk within the 30-day appeal period it must be dismissed.

### Order

Respondent/Appellant's appeal, filed on October 7, 1999, is dismissed.

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<sup>1</sup>Time is of the essence in all phases of debarment proceedings. Appeals not only must be timely filed but the debarring officials must likewise act within strict time limits. In *Prairie Farms Dairy, Inc.*, 53 Agric. Dec. 1407 (1994), a decision in which a debarring official's decision was vacated for failure to adhere to the required time limit, it was held that "stringent time restraints must be applied in an evenhanded manner."

**In re: PAUL W. THOMAS AND LEONA THOMAS.  
EAJA-FSA Docket No. 99-0004.  
Order Denying Petition for Reconsideration filed August 4, 1999.**

**Failure to file timely petition for reconsideration.**

The Judicial Officer denied Applicants' Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)).

Margit Halvorson Williams, for Respondent.

Applicants, Pro se.

Initial decision issued by Byron Bennes, Hearing Officer.

Order issued by William G. Jenson, Judicial Officer.

Paul W. Thomas and Leona Thomas [hereinafter Applicants] instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice] by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture, National Appeals Division, Western Regional Office, on October 19, 1998.

Applicants allege in their EAJA Application that: (1) Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W, in which Applicants appealed the denial, by the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], of Applicants' application for a \$76,000 emergency loan and Applicants' \$175,515 subordination request; (2) Applicants incurred fees and expenses of \$83,469 in connection with *In re Paul W. Thomas*, Case No. 98000848W; and (3) Applicants are eligible for an award of \$83,469, in accordance with the criteria for eligibility in section 1.184 of the EAJA Rules of Practice (7 C.F.R. § 1.184).

On December 22, 1998, Respondent filed Answer to Application for Fees and Expenses [hereinafter Answer], in which Respondent: (1) admits that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) states that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified; (3) states that Applicants request relief that is not available under the Equal Access to Justice Act; (4) states that Applicants' EAJA Application does not comply with the requirements in the Equal Access to Justice Act or the EAJA Rules of Practice; and (5) states that Applicants' request for professional fees is not supported by documentation.

On January 11, 1999, Applicants filed a response to Respondent's Answer, and on January 15, 1999, Larry T. Jordan, Assistant Director, National Appeals

Division, United States Department of Agriculture, issued a Notice of Closing of EAJA Record which states that neither Applicants nor Respondent requested any further proceedings, as authorized by section 1.199 of the EAJA Rules of Practice (7 C.F.R. § 1.199).

On April 1, 1999, Byron Bennes, Hearing Officer, National Appeals Division, United States Department of Agriculture, issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which he: (1) found that Applicants filed a complete and timely EAJA Application (Initial Decision and Order at 2-4); (2) found that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 8); (3) found that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified (Initial Decision and Order at 4-6); and (4) awarded Applicants \$2,392.50 for fees Applicants incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 6-8).

On May 4, 1999, Respondent appealed to the Judicial Officer; on May 11, 1999, Applicants filed a letter responding to Respondent's appeal; and on May 18, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

On June 15, 1999, I issued a Decision and Order: (1) finding that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) finding that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified; (3) finding that Applicants failed to file a timely and complete Equal Access to Justice Act application; (4) finding that Applicants' alleged additional interest payments, lost spring wheat, lost income from 150 calves, and forfeited down payment for, and a lost discount on, a drill are not fees and expenses that they incurred in connection with *In re Paul W. Thomas*, 98000848W; (5) finding that Applicants failed to establish that all of the fees charged by the North Dakota Agricultural Mediation Service were incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W; (6) concluding that Applicants are not entitled, under the Equal Access to Justice Act (5 U.S.C. § 504) and the EAJA Rules of Practice (7 C.F.R. §§ 1.180-.203), to fees and other expenses that they allege they incurred in connection with *In re Paul W. Thomas*, 98000848W; and (7) denying Applicants' request, under the Equal Access to Justice Act, for fees and other expenses, which Applicants allege they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W. *In re Paul W. Thomas*, 58 Agric. Dec. \_\_\_, slip op. at 26-27 (June 15, 1999).

On June 19, 1999, the Hearing Clerk served Applicants with the Decision and

Order.<sup>1</sup> On July 8, 1999, 19 days after the Hearing Clerk served Applicants with the Decision and Order, Applicants filed a letter addressed to the Hearing Clerk requesting reconsideration of the Decision and Order [hereinafter Petition for Reconsideration]. On August 3, 1999, Respondent filed Response to Applicants' Request for Reconsideration, and on August 3, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the June 15, 1999, Decision and Order.

Section 1.146(a)(3) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] provides:

**§ 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. . . .*

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Applicants' Petition for Reconsideration, which was required by section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) to be filed within 10 days after the date the Hearing Clerk served the Decision and Order on Applicants, was filed too late, and, accordingly, Applicants' Petition for Reconsideration must

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<sup>1</sup>See Domestic Return Receipt for Article Number PO93175073 and Domestic Return Receipt for Article Number PO93175074.

be denied.<sup>2</sup>

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

### Order

Applicants' Petition for Reconsideration is denied.

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<sup>2</sup>See *In re Nkiambi Jean Lema*, 58 Agric. Dec. \_\_\_\_ (May 14, 1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. \_\_\_\_ (Apr. 14, 1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. \_\_\_\_ (Sept. 15, 1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

**In re: KENNETH B. DAVIS.**  
**FCIA Docket No. 99-0004.**  
**Order Dismissing Complaint filed December 3, 1999.**

Donald McAmis, for Complainant.  
William C. Bridforth, Pine Bluff, Arkansas, for Respondent.  
*Order issued by James W. Hunt, Administrative Law Judge.*

Pursuant to the joint stipulation of Complainant and Respondent to have this proceeding dismissed, it is ordered that the complaint, filed herein on August 13, 1999, be dismissed.

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**In re: BILLY JACOBS, SR.**  
**HPA Docket No. 95-0005.**  
**Order Lifting Stay filed July 13, 1999.**

Colleen A. Carroll, for Complainant.  
Respondent, Pro se.  
*Order issued by William G. Jenson, Judicial Officer.*

On August 15, 1996, I issued a Decision and Order: (1) concluding that Billy Jacobs, Sr. [hereinafter Respondent], violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and (2) assessing Respondent a \$3,000 civil penalty. *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996).

On October 21, 1996, Respondent filed a Request for Stay requesting a stay of the Order in *In re Billy Jacobs, Sr.*, *supra*, pending the completion of proceedings for judicial review, and on January 29, 1997, I granted Respondent's Request for Stay. *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 516 (1997) (Stay Order).

Respondent appealed the Order issued in *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996), and on June 16, 1997, the United States Court of Appeals for the Eleventh Circuit dismissed Respondent's appeal. *Jacobs v. United States Dep't of Agric.*, No. 96-7124 (11th Cir. June 16, 1997). On June 11, 1999, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed Motion to Lift Stay Order; on July 7, 1999, Respondent filed a response to Complainant's Motion to Lift Stay Order; and on July 8, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift

**Stay Order.**

Respondent states in his response to Complainant's Motion to Lift Stay Order that he was in poor health at the time of the violation, which is the subject of this proceeding, and remains in poor health, that he was unaware of the violation, and that the proceeding depresses, aggravates, and humiliates him.

I find Respondent's poor health unfortunate and I hope for Respondent's speedy recovery; however, Respondent's health is not relevant to the issue of whether to grant or deny Complainant's Motion to Lift Stay Order. Further, Respondent's feelings regarding this proceeding are not warranted. Administrative proceedings under the Horse Protection Act are not designed to depress, aggravate, or humiliate respondents, but rather, are designed to provide those alleged to have violated the Horse Protection Act with due process. In any event, Respondent's emotions engendered by this proceeding are not relevant to the issue of whether to grant or deny Complainant's Motion to Lift Stay Order. Moreover, Respondent's denial of knowledge of the violation is not relevant to the issue of whether to grant or deny Complainant's Motion to Lift Stay Order.

I issued the Stay Order in *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 516 (1997) (Stay Order), in accordance with 5 U.S.C. § 705, to postpone the effective date of the Order issued in *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996), pending judicial review. Respondent does not dispute Complainant's contention that after the Court's dismissal of Respondent's appeal in *Jacobs v. United States Dep't of Agric.*, No. 96-7124 (11th Cir. June 16, 1997), "Respondent Billy Jacobs, Sr., has not filed any further appeal petitions and the time for filing such has expired" (Motion to Lift Stay Order ¶ 3).

I find that proceedings for judicial review are concluded and the time for filing further requests for judicial review has expired. Therefore, Complainant's Motion to Lift Stay Order is granted, the Stay Order issued on January 29, 1997, *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 516 (1997) (Stay Order), is lifted, and the Order issued in *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996), is effective, as follows:

**Order**

Respondent Billy Jacobs, Sr., is assessed a civil penalty of \$3,000. 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 Division  
1400 Independence Avenue, SW  
Room 2014 South Building  
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Colleen A. Carroll within 30 days after service of this Order on Respondent. Respondent should indicate on the certified check or money order that payment is in reference to HPA Docket No. 95-0005.

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**In re: DAVID FIELDS AND SARENA WESTENHAVER.**  
**HPA Docket No. 99-0022.**  
**Order of Dismissal filed August 4, 1999.**

Brian T. Hill, for Complainant.  
Respondent, Pro se.  
*Order issued by James W. Hunt, Administrative Law Judge.*

In view of Complainant's notice of its withdrawal of the Complaint, the case is dismissed.

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**In re: JANET BRACALENTE, THOMAS BRACALENTE, AND RONALD BRACALENTE.**  
**HPA Docket No. 99-0027.**  
**Order Granting Withdrawal filed October 25, 1999.**

Donald A. Tracy, for Complainant.  
Respondent, Pro se.  
*Order issued by James W. Hunt, Administrative Law Judge.*

Complainant's motion to withdraw its Complaint as to Ronald Bracalente is hereby granted.

Copies hereof shall be served upon the parties.

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**In re: JACQUELINE CREARY.**  
**P.Q. Docket No. 99-0047.**  
**Order Dismissing Complaint filed July 9, 1999.**

Jane H. Settle, for Complainant.  
Respondent, Pro se.  
*Order issued by James W. Hunt, Administrative Law Judge.*

The complaint, filed in this matter on June 11, 1999, is dismissed.

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**In re: MENDEZ WHOLESALE, INC., TIENDA-EL MEXICANA, AND  
TIENDA NAYARIT #2.**  
**P.Q. Docket No. 99-0049.**  
**Order Dismissing Complaint filed July 13, 1999.**

James D. Holt, for Complainant.  
Respondent, Pro se.  
*Order issued by Edwin S. Bernstein, Administrative Law Judge.*

Complainant's July 12, 1999, "Motion to Dismiss as to Tienda Nayarit #2" is granted. The Complaint as to Respondent Tienda Nayarit #2, filed on June 24, 1999, is dismissed.

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**In re: LEADERMAR (USA) CORPORATION.**  
**P.Q. Docket No. 99-0004.**  
**Ruling Denying Motion to Waive Rules of Practice filed July 15, 1999.**

The Judicial Officer denied Respondent's request that the Judicial Officer waive the provision in the Rules of Practice limiting the time within which a party may file a petition for reconsideration. The Judicial Officer held that he has no authority to depart from the Rules of Practice.

James A. Booth, for Complainant.  
Jerold H. Tabbott, Jacksonville, FL, for Respondent.  
Initial decision issued by Edwin S. Bernstein, Acting Chief Administrative Law Judge.  
*Ruling issued by William G. Jensen, Judicial Officer.*

On July 1, 1999, Leadermar (USA) Corporation [hereinafter Respondent] filed a motion requesting that "the provision limiting filing petition for reconsideration

be waived." On July 14, 1999, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Response to Respondent's Petition to Reconsider the Judicial Officer's Decision [hereinafter Complainant's Response], and on July 14, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's motion.

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] limit the time within which a party may file a petition for reconsideration, 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.* . . .

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

I issued the decision in this proceeding on May 19, 1999, *In re Leadermar (USA) Corp.*, 58 Agric. Dec. \_\_\_ (May 19, 1999), and the Hearing Clerk served Respondent with the decision on May 24, 1999.<sup>1</sup> Thus, any petition for reconsideration, which Respondent contemplated filing, was due June 3, 1999. Moreover, if Respondent required additional time within which to file a petition for reconsideration, Respondent's request for additional time must have been filed prior to the time that the petition for reconsideration was due.

Respondent requests that I waive the provision in the Rules of Practice limiting

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<sup>1</sup>See Domestic Return Receipt for Article Number P093175049.

the time within which a party may file a petition for reconsideration. The Judicial Officer has no authority to depart from the Rules of Practice;<sup>2</sup> therefore, Respondent's request that I waive the Rules of Practice and allow it to file a late petition for reconsideration is denied.

Complainant assumes that Respondent's July 1, 1999, filing is Respondent's petition for reconsideration of *In re Leadermar (USA) Corp.*, 58 Agric. Dec. \_\_\_ (May 19, 1999) (Complainant's Response at 1). Respondent is required by section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) to file any petition for reconsideration within 10 days after the date the Hearing Clerk serves the Decision and Order on Respondent. Respondent's July 1, 1999, filing was filed 38 days after the Hearing Clerk served the Decision and Order on Respondent. Thus, even if I found Respondent's July 1, 1999, filing to be a petition for reconsideration (which I do not so find), I would deny the petition for reconsideration because it was filed late.<sup>3</sup>

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<sup>2</sup>See *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating that the judicial officer and the administrative law judge are bound by the Rules of Practice); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating that the judicial officer and the administrative law judge are bound by the Rules of Practice); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating that the judicial officer has no authority to depart from Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders). Cf. *In re Kinzua Resources, LLC*, 57 Agric. Dec. \_\_\_, slip op. at 20 (June 5, 1998) (stating that generally administrative law judges and the judicial officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding that the Chief Administrative Law Judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating that generally administrative law judges and the judicial officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding that the Chief Administrative Law Judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

<sup>3</sup>See *In re Nkiambi Jean Lema*, 58 Agric. Dec. \_\_\_ (May 14, 1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. \_\_\_ (Apr. 14, 1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as (continued...))

**In re: KYO HEUM LEE.**  
**P.Q. Docket No. 98-0002.**  
**Order Dismissing Complaint filed August 12, 1999.**

Susan Golabek, for Complainant.  
Respondent, Pro se.

*Order issued by Edwin S. Bernstein, Administrative Law Judge.*

Complainant's motion to dismiss the Complaint is granted. It is ordered that the Complaint, filed on November 14, 1997, be dismissed.

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<sup>3</sup>(...continued)

late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. \_\_\_ (Sept. 15, 1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

**In re: DE ANDA TORTILLAS.**

**P.Q. Docket No. 99-0036.**

**Complaint Dismissed filed September 15, 1999.**

James D. Holt, for Complainant.

William Horneber, South Sioux City, Nebraska, for Respondent.

*Order issued by Dorothea A. Baker, Administrative Law Judge.*

Pursuant to Motion filed September 8, 1999, the Complaint filed herein on April 21, 1999, is hereby dismissed.

Copies hereof shall be served upon the parties.

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## DEFAULT DECISIONS

### ANIMAL WELFARE ACT

**In re: SHERMAN JACK WALTON AND TRACEY WALTON, d/b/a  
RUNNING SPRINGS EXOTICS.**

**AWA Docket No. 97-0045.**

**Decision and Order filed June 2, 1999.**

Frank Martin, Jr., for Complainant.  
Respondent, Pro se.

*Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.*

### Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

An Amended Complaint was filed on August 19, 1998. Copies of the Amended Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondents by regular mail on December 2, 1998. Respondents were informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the amended complaint would constitute an admission of that allegation.

Respondents failed to file an Answer addressing the allegations contained in the amended complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Amended Complaint, which are admitted as set forth herein by respondents' failure to file an Answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

### Findings of Fact

1. A. Sherman Jack Walton and Tracey Walton, hereinafter referred to as

respondents, are individuals doing business as Running Springs Exotics, whose mailing address is P. O. Box 947, Meridian, Texas 76665.

B. The respondents, at all times material herein, were operating as an exhibitor as defined in the Act and the regulations.

2. From on or about September 14, 1994, and continuing until August 7, 1997, the respondents operated as an exhibitor as defined in the Act and the regulations on at least 74 occasions, without being licensed, in willful violation of section 2.1 of the regulations (9 C.F.R. § 2.1). Each exhibition constitutes a separate violation.

3. From on or about September 2, 1997, and continuing until the present, the respondents operated as an exhibitor as defined in the Act and the regulations on at least 33 occasions, without being licensed, in willful violation of section 2.1 of the regulations (9 C.F.R. § 2.1). Each exhibition constitutes a separate violation.

4. On October 2, 1997, APHIS attempted to conduct an inspection of respondent's exhibit at the Fort Bend County Fair. Although no one was available for the inspection, the following violations were observed from outside the petting area:

(a) Primary enclosures for animals were not constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement (9 C.F.R. § 3.128)); and

(b) Animals in primary enclosures were not maintained in compatible groups (9 C.F.R. § 3.133)).

### **Conclusions**

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act and regulations promulgated under the Act.
3. The following Order is authorized by the Act and warranted under the circumstances.

### **Order**

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. The respondents are jointly and severally assessed a civil penalty of \$7,000.00, which shall be paid by a certified check or money order made payable

to the Treasurer of United States.

3. The respondents are disqualified for a period of two years from becoming licensed under the Act and regulations.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final July 15, 1999.-Editor]

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**In re: STEVEN GALECKI AND CORINNE BROZ, d/b/a FUNKY MONKEY EXOTICS.**

**AWA Docket No. 98-0039.**

**Decision and Order filed June 17, 1999.**

Frank Martin, Jr., for Complainant.  
Respondents, Pro se.

*Decision and Order issued by James W. Hunt, Administrative Law Judge.*

### **Preliminary Statement**

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondents by personal service on December 7, 1998. Respondents were informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondents failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted by respondents' failure to file an Answer pursuant to the Rules of Practice, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the

Rules of Practice, 7 C.F.R. § 1.139.

### Findings of Fact

1. (a) Steven Galecki and Corinne Broz, hereinafter referred to as respondents, are individuals doing business as Funky Monkey Exotics, 1946 West Norfolk, Crete, Illinois 62241.

(b) The respondents are, and at all times material hereto were, operating as an exhibitor as defined in the Act and the regulations.

2. On June 26, 1997, APHIS attempted to inspect respondents' premises and records, but were unable to do so because respondents failed to have a responsible party available during business hours, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.126(a) of the regulations (9 C.F.R. § 2.75(b)(1)).

3. On August 6, 1997, APHIS attempted to inspect respondents' premises and records, but were unable to do so because respondents failed to have a responsible party available during business hours, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.126(a) of the regulations (9 C.F.R. § 2.75(b)(1)).

4. (a) On August 7, 1997, APHIS attempted to inspect respondents' premises and records, but were unable to do so because respondents failed to have a responsible party available during business hours, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.126(a) of the regulations (9 C.F.R. § 2.75(b)(1)).

(b) On August 7, 1997, APHIS found that respondents used an unapproved method of euthanasia, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

5. On August 12, 1997, APHIS found that respondents used an unapproved method of euthanasia, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

6. (a) On August 20, 1997, APHIS inspected respondents' place of business, and found that respondents failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

(b) On August 20, 1997, APHIS inspected respondents' place of business and found the following willful violations of the standards specified below:

(1) The premises (buildings and grounds) were not kept clean and in good repair and free of accumulations of trash (9 C.F.R. § 3.131(c)); and

(2) An effective program for the control of pests was not established and maintained (9 C.F.R. § 3.131(d)).

7. On August 21, 1997, APHIS attempted to inspect respondents' premises and records, but were unable to do so because respondents failed to have a

responsible party available during business hours, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.126(a) of the regulations (9 C.F.R. § 2.75(b)(1)).

### **Conclusions**

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act, as well as standards and regulations promulgated under the Act.
3. The following Order is authorized by the Act and warranted under the circumstances.

### **Order**

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

- (a) Failing to have a responsible party available during business hours to allow APHIS inspectors access to the facilities and records;
- (b) Failing to provide proper veterinary care;
- (c) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes; and
- (d) Failing to establish and maintain an effective program for the control of pests.

2. The respondents are assessed a civil penalty of \$8,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. The respondents are disqualified for a period of five years from becoming licensed under the Act and regulations.

The provisions of this Order shall become effective on the first day after service of this decision on the respondents. Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final August 17, 1999.-Editor]

**In re: FRANCIS LEWIS AUSTIN AND SUPERIOR PETS, INC.  
AWA Docket No. 99-0007.  
Decision and Order filed June 21, 1999.**

Brian T. Hill, for Complainant.  
Respondents, Pro se.

*Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.*

**Preliminary Statement**

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served by the Hearing Clerk on Superior Pets, Inc. on November 21, 1998. Copies of the complaint and the Rules of Practice were also sent via certified mail to Francis Lewis Austin, return receipt requested, on November 13, 1998. The copies sent to Francis Lewis Austin were returned to the office of the Hearing Clerk marked "unclaimed" on February 19, 1999. Pursuant to the Act, 7 C.F.R. § 1.147(c)(1), copies of the Complaint and the Rules of Practice were sent by ordinary mail to Francis Lewis Austin on March 8, 1999. Each respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

**Findings of Fact and Conclusions of Law**

**I**

A. Respondent Francis Lewis Austin is an individual whose mailing address is Route 2, Box 92, Elkland, MO 65644. Respondent Superior Pets, Inc., is a

corporation and has the same mailing address.

B. At all times material herein, the respondents were licensed and operating as a dealer as defined in the Act and the regulations and the actions of respondent Superior Pets, Inc. were directed, managed, and controlled by respondent Francis Lewis Austin as president and secretary.

## II

A. On October 9, 1997, APHIS found that the respondents had 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 section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On October 9, 1997, APHIS found that the respondents had failed to individually identify dogs, in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

C. On October 9, 1997, APHIS found that the respondents had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

D. On October 9, 1997, APHIS found that the respondents had transported twenty-six dogs in commerce without health certificates issued by a licensed veterinarian, in willful violation of section 2.78(a) of the regulations (9 C.F.R. § 2.78(a)).

E. On October 9, 1997, APHIS found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Primary enclosures were not strong enough to contain the dogs securely and comfortably, and to withstand the normal rigors of transportation (9 C.F.R. § 3.14(a)(1));

2. Primary enclosures failed to prevent animals from putting parts of their body outside the enclosure in a way that could result in injury to the animals, to handlers, or to person or animals nearby (9 C.F.R. § 3.14(a)(3));

3. Primary enclosures in the vehicle of transport did not have handles or handholds on their exterior that enable the enclosures to be lifted without tilting them and to ensure that anyone handling the enclosure will not come into physical contact with animals inside (9 C.F.R. § 3.14(a)(5));

4. Primary enclosures were not clearly marked to indicate both the presence of live animals and the correct upright position of the primary enclosure

(9 C.F.R. § 3.14(a)(6));

5. Primary enclosures were not cleaned at least once for every 24 hours of continuous travel (9 C.F.R. § 3.14(b));

6. Dogs that were not compatible were transported in the same primary enclosure with each other (9 C.F.R. § 3.14(d)(1));

7. Three dogs were transported in a primary enclosure which only provided room enough for one to turn about normally while standing, to sit and stand erect, and to lie in a natural position (9 C.F.R. § 3.14(e)(1));

8. The animal cargo space of primary conveyances used to transport dogs was not maintained in a manner that protected the health and well-being of the animals housed in them, and assured their health and comfort (9 C.F.R. § 3.15(a));

9. Animals that were in obvious physical distress during transportation were not given immediate veterinary care at the closest available veterinary facility (9 C.F.R. § 3.17(a)).

### Conclusions

1. The Secretary has jurisdiction in this matter.
2. The following Order is authorized by the Act and warranted under the circumstances.

### Order

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to provide primary enclosures that were strong enough to contain the dogs securely and comfortably, and to withstand the normal rigors of transportation;

(b) Failing to clean primary enclosures at least once for every 24 hours of continuous travel;

(c) Failing to provide immediate veterinary care at the closest available veterinary facility to animals that were in obvious physical distress during transportation.

2. Respondents are jointly and severally assessed a civil penalty of \$15,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

3. Respondents' license is suspended for a period of two years and continuing

thereafter until he demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final September 8, 1999.-Editor]

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**In re: MARY ANN SKLAR, d/b/a LIVING TREASURES.  
AWA Docket No. 99-0021.  
Decision and Order filed July 8, 1999.**

Robert A. Ertman, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.*

### **Preliminary Statement**

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondent willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served on the Respondent by certified mail on May 7, 1999. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

The Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

### **Findings of Fact and Conclusions of Law**

1. Mary Ann Sklar, hereinafter referred to as the Respondent, is an individual doing business as Living Treasures, with a mailing address of P.O. Box 96, Newport, Tennessee 37831.

2. The Respondent, at all times material herein, was licensed and operating as an exhibitor as defined in the Act and the regulations.

3. When the Respondent became licensed and annually thereafter, she received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

4. On March 2, 1999, Respondent refused to permit Animal and Plant Health Inspection Services employees to conduct an inspection of her animal facilities and records, in willful violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

### **Conclusions**

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the Act and warranted under the circumstances.

### **Order**

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from refusing to make her animal facilities available for inspection pursuant to the Act and regulations.

2. The Respondent is assessed a civil penalty of \$2,500, which shall be paid by a certified check or money order made payable to the Treasurer of United States and shall be sent to Robert A. Ertman, Attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

3. Respondent's license under the Act is revoked.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.  
[This Decision and Order became final September 25, 1999.-Editor]

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**In re: MARY ANN SKLAR, d/b/a LIVING TREASURES.  
AWA Docket No. 97-0042.  
Order Dismissing Complaint filed September 10, 1999.**

Robert A. Ertman, for Complainant.  
Respondent, Pro se.  
*Order issued by Edwin S. Bernstein, Administrative Law Judge.*

Upon motion of the Complainant and for good cause shown, the complaint in this matter is dismissed, without prejudice.

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**In re: MARIANO V. RUGGERI, CYNTHIA V. RUGGERI, AND CRANE  
LABORATORIES, INC.  
AWA Docket No. 98-0009.  
Amended Decision and Order filed July 12, 1999.**

Brian T. Hill, for Complainant.  
Respondents, Pro se.  
*Decision and Order issued by James W. Hunt, Administrative Law Judge.*

### **Preliminary Statement**

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondents wilfully violated the Act, and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon Respondents by certified mail on January 31, 1998. Respondents were informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondents failed to file an answer addressing the allegations contained in the

complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the complaint were deemed admitted by Respondents' failure to file an answer and were adopted as Findings of Fact and Conclusions of Law in a Default Decision and Order, filed on June 15, 1998, pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Thereafter, Complainant and Respondents agreed that the Findings of Fact and Conclusions of Law in the June 15, 1998, Decision and Order be amended. Accordingly, in view of the agreement of the parties, the June 15, 1998, Decision and Order is hereby ordered amended by substituting the following Findings of Fact and Conclusions of Law for those contained in the June 15, 1998, Decision and Order.

### **Findings of Fact and Conclusions of Law**

1. Mariano V. Ruggeri and Cynthia V. Ruggeri, hereinafter referred to as the Respondents, are individuals with a mailing address of 4711 S. Salina Street, Syracuse, New York 13205.

2. Respondent Crane Laboratories, Inc., is a corporation, and has the same mailing address.

3. The Respondents, at all times material hereto, were licensed and operating as dealers as defined in the Act and the regulations and the actions of Respondent Crane Laboratories Inc., were directed, managed, and controlled by Respondents Mariano V. Ruggeri and Cynthia V. Ruggeri.

4. On August 17, 1994, Respondents wilfully violated section 2.40 of the regulations (9 C.F.R. § 2.40) by 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.

5. On August 17, 1994, Respondents wilfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standard specified below:

(a) The interior surface of indoor housing facility was not impervious to moisture (9 C.F.R. § 3.26(d)).

6. On February 23, 1995, Respondents wilfully violated section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126) by failing to permit Animal and Plant Health Inspection Services employees to conduct a complete inspection of their animal facilities and records.

7. On May 3, 1995, Respondents wilfully violated section 2.40 of the regulations (9 C.F.R. § 2.40) by 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.

8. On May 3, 1995, Respondents wilfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records on the premises showing the acquisition, disposition, and identification of animals.

9. On May 3, 1995, Respondents wilfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

(a) Housing facilities for guinea pigs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.25(a));

(b) An effective program for the control of pests was not established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas (9 C.F.R. § 3.31(c));

(c) Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129); and

(d) Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)).

10. On February 28, 1996, Respondents wilfully violated section 2.40 of the regulations (9 C.F.R. § 2.40) by 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.

11. On February 28, 1996, Respondents wilfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records on the premises showing the acquisition, disposition, and identification of animals.

12. On February 28, 1996, Respondents wilfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

(a) Housing facilities for guinea pigs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.25(a));

(b) Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129); and

(c) Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)).

13. On March 18, 1996, Respondents wilfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records on the premises showing the acquisition, disposition, and identification of animals.

14. On March 18, 1996, Respondents wilfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

(a) Indoor housing facilities for guinea pigs were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors, drafts, ammonia levels, and moisture condensation (9 C.F.R. § 3.26(a));

(b) Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.125(a));

(c) Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129); and

(d) Primary enclosures were not kept clean, as required by (9 C.F.R. § 3.31(a)).

15. On March 20, 1996, Respondents wilfully violated of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to permit Animal and Plant Health Inspection Services employees to conduct a complete inspection of their animal facilities and records.

16. On January 2, 1997, Respondents wilfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records on the premises showing the acquisition, disposition, and identification of animals.

17. On January 2, 1997, Respondents wilfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standard specified below:

(a) Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.125(a)).

### **Conclusions**

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact and Conclusions of Law above, the Respondents have violated the Act and the regulations and standards promulgated under the Act.
3. The following Order is authorized by the Act and warranted under the circumstances.

### **Order**

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(b) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

(c) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(d) Failing to maintain records of the acquisition, disposition, description and identification of animals, as required;

(e) Failing to construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated; and

(f) Failing to provide animals with wholesome and uncontaminated food.

2. The Respondents are jointly and severally assessed a civil penalty of \$7,500.00, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

The provisions of this Order shall become effective on the first day after service of this decision on the Respondents.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final August 21, 1999.-Editor]

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**In re: ROGER D. FIGG.**  
**AWA Docket No. 99-0013.**  
**Decision and Order filed July 12, 1999.**

Brian T. Hill, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by James W. Hunt, Administrative Law Judge.*

### **Preliminary Statement**

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of

Agriculture, alleging that the respondent willfully violated the Act, and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were sent via certified mail to the respondent, return receipt requested, on March 3, 1999. The copies were returned to the office of the Hearing Clerk marked "unclaimed" on March 31, 1999. Pursuant to the Act, 7 C.F.R. § 1.147(c)(1), copies of the Complaint and the Rules of Practice were sent by ordinary mail to the respondent on April 6, 1999. Respondent was informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted as set forth herein by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

### **Findings of Fact and Conclusions of Law**

#### **I**

A. Roger D. Figg, hereinafter referred to as respondent, is an individual whose mailing address is 734 Horton Avenue, Riverhead, New York 11901.

B. The respondent, at all times material hereto, was operating as an exhibitor as defined in the Act and the regulations.

#### **II**

A. On or about June 3, 1997, the respondent failed to notify the APHIS, REAC Sector Supervisor of his change of address within 10 days of the change (9 C.F.R. § 2.8).

B. On or about June 3, 1997, the respondent failed to notify the APHIS, REAC Sector Supervisor of his change of site location within 10 days of the change (9 C.F.R. § 2.27).

C. On or about April 2, 1998, respondent failed to notify Animal and Plant Health Inspection Services employees of his change in site locations, therefore they were unable to conduct a complete inspection of his animal facility, in willful

violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

D. On or about June 27, 1998, the respondent failed to claim registered mail from APHIS on three occasions as required, in willful violation of 2.5(c) of the regulations (9 C.F.R. § 2.5(c)).

E. On or about May 30, 1998, the respondent operated as an exhibitor as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and subsection 2.1 of the regulations (9 C.F.R. § 2.1). Respondent exhibited one (1) liger.

F. On or about May 31, 1998, the respondent operated as an exhibitor as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and subsection 2.1 of the regulations (9 C.F.R. § 2.1). Respondent exhibited one (1) liger.

G. On or about June 7, 1998, the respondent operated as an exhibitor as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and subsection 2.1 of the regulations (9 C.F.R. § 2.1). Respondent exhibited one (1) liger.

### **Conclusions**

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact and Conclusions of Law above, the respondent has violated the Act and the regulations and standards promulgated under the Act.
3. The following Order is authorized by the Act and warranted under the circumstances.

### **Order**

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from exhibiting animals without a license which is required under the Act and regulations.

2. The respondent is assessed a civil penalty of \$2,500.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final August 23, 1999.-Editor]

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**In re: DELL L. EISENBARTH, d/b/a TASMANIAN FARMS.  
AWA Docket No. 99-0014.  
Decision and Order filed August 12, 1999.**

Robert A. Ertman, for Complainant.

Respondent, *Pro se*.

*Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.*

### **Preliminary Statement**

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was duly served on the respondent by the Office of the Hearing Clerk. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

## **Findings of Fact and Conclusions of Law**

### **I**

A. Dell L. Eisenbarth, hereinafter referred to as the respondent, is an individual doing business as Tasmanian Farms, with a mailing address of R.R. 1 Box 45, Solsberry, Indiana 47459.

B. The respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations.

### **II**

A. On December 10, 1997, APHIS inspected respondent's premises and found that respondent had 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 section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On December 10, 1997, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. A suitable method was not provided to rapidly eliminate excess water from outdoor housing facilities for animals (9 C.F.R. § 3.127(c)); and
2. Indoor housing facilities for nonhuman primates were not sufficiently heated when necessary to protect the animals from cold and to provide for their health and comfort, which resulted in the death of one Gibbon monkey (9 C.F.R. § 3.76(a)).

### **III**

A. On December 22, 1997, APHIS inspected respondent's premises and found that respondent had 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 section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On December 22, 1997, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.125(a));
2. Provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.125(d));
3. Primary enclosures for nonhuman primates were not kept clean and spot-cleaned daily, and free of accumulation of trash and debris (9 C.F.R. § 3.84(a) and (c));
4. Animals kept outdoors were not provided with adequate shelter from inclement weather (9 C.F.R. § 3.127(b));
5. Animals were not provided with food of sufficient quantity and nutritive value to maintain them in good health (9 C.F.R. § 3.129(a));
6. Animals were not provided with adequate water (9 C.F.R. § 3.130); and
7. Primary enclosures were not kept clean and spot-cleaned daily, and free of accumulation of trash and debris (9 C.F.R. § 3.131(a) and (c)).

#### IV

On December 29, 1997, Animal and Plant Health Inspection Service employees were not permitted to conduct a complete inspection of her animal facilities, in willful violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

#### V

A. On January 13, 1998, APHIS inspected respondent's premises and found that respondent had 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 section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On January 13, 1998, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.125(a));
2. Animals kept outdoors were not provided with adequate shelter from

inclement weather (9 C.F.R. § 3.127(b));

3. A suitable method was not provided to rapidly eliminate excess water from outdoor housing facilities for animals (9 C.F.R. § 3.127(c)); and

4. Animals were not provided with adequate water (9 C.F.R. § 3.130).

### **Conclusions**

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the Act and warranted under the circumstances.

### **Order**

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

(b) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(c) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes;

(d) Failing to maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary;

(e) Failing to provide animals with food of sufficient quantity and nutritive value to meet their normal daily requirements;

(f) Failing to provide animals with adequate potable water;

(g) Failing to establish and maintain an effective program for the control of pests;

(h) Failing to provide adequate heating for animals in indoor and sheltered housing facilities when necessary to protect the animals from cold and to provide for their health and comfort;

(i) Failing to provide for the rapid elimination of excess water from housing facilities for animals;

(j) Failing to provide animals with adequate shelter from the elements;

(k) Failing to establish and maintain programs of disease control and

prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine; and

2. The respondent is assessed a civil penalty of \$5,700.00, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

3. The respondent's license is terminated and the respondent is disqualified from becoming licensed under the Act and regulations for a period of five (5) years and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final December 25, 1999.-Editor]

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**In re: THOMAS W. RASPOPTIS AND PETS AND US, INC.**  
**AWA Docket No. 99-0005.**  
**Decision and Order filed August 20, 1999.**

Sharlene A. Deskins, for Complainant.

Respondents, Pro se.

*Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.*

### **Preliminary Statement**

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondent by certified mail. On March 12, 1999, the attorney for the Respondents requested a thirty day extension in which to file their answer. On March 12<sup>th</sup>, Acting Chief

Administrative Law Judge Bernstein granted the Respondent an extension until April 9, 1999 in which to file their answer. Respondent was informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Moreover, Acting Chief Judge Bernstein informed the Respondent in the Order granting the extension that the Answer must be actually received by the Hearing Clerk by April 9, 1999.

The Respondents failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted as set forth herein by Respondents' failure to file an Answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

### **Findings of Fact and Conclusions of Law**

#### **I**

A. Respondent Thomas W. Raspoptis is an individual whose address is 25001 W.8 Mile Road, Redford Michigan 48240. Respondent Pets and Us, Inc. is a Michigan corporation and has the same mailing address.

B. At all material times the Respondents operated as a dealer and exhibitor as defined in the Act and the regulations and the actions of Respondent Pets and Us, Inc., were directed, managed, and controlled by Respondent Thomas W. Raspoptis as the owner.

#### **II**

C. Since September 26, 1997, the respondents have operated as a dealer and as an exhibitor as defined in the Act and the regulations, without having obtained a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1).

#### **III**

D. On February 24, 1998, APHIS inspected respondents' premises and found that the respondents had 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 section 2.40 of the regulations (9 C.F.R. § 2.40).

E. On February 24, 1998, APHIS inspected respondents' premises and records and found that the respondents had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

F. On February 24, 1998, APHIS inspected the respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Surfaces of housing facilities for nonhuman primates (including perches, shelves, swings, boxes, dens, and other furniture-type fixtures or objects within the facility) were not maintained on a regular basis and replaced when necessary (9 C.F.R. § 3.75(c)(1));

2. The respondents failed to develop, document, and follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of nonhuman primates (9 C.F.R. § 3.81);

3. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals (9 C.F.R. § 3.125(a));

4. The surfaces of housing facilities were not constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled (9 C.F.R. § 3.1(c)(1));

5. Toxic substances were improperly stored in animal areas (9 C.F.R. § 3.1(e)); and

6. Surfaces of housing facilities were not cleaned and sanitized, as required (9 C.F.R. § 3.1(c)(3)). During 1995 and 1996, the respondent willfully violated section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1) by operating as a dealer as defined in the Act and the regulations without having obtained a license. Respondent sold, in commerce, at least 1200 animals for resale for use in research, for use as pets or for exhibition. The sale of each animal constitutes a separate violation.

### Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act and regulations promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

### **Order**

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder, and in particular, shall cease and desist from:

(A) Engaging in any activity for which a license is required under the Act and regulations without being licensed as required;

(B) Failing to establish and 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 maintain records of the acquisition, disposition, description, and identification of animals, as required;

(D) Failing to maintain housing facilities for dogs in a structurally sound condition and in good repair;

(E) Failing to store supplies of food and bedding so as to adequately protect them against infestation or contamination by vermin;

(F) Failing to maintain surfaces of housing facilities for nonhuman primates;

(G) Failing to develop, document, and follow an appropriate plan for environmental enhancement; and

(H) Failing to clean and sanitize housing facilities.

2. The respondents are jointly and severally assessed a civil penalty of \$6,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States. The check shall be sent to Sharlene Deskins, 1400 Independence Avenue, S.W., Room 2014-South Building, Stop 1417, Washington, D.C. 20250-1417.

3. The respondents are disqualified for nine months from applying for or becoming licensed under the Act and regulations. The disqualification from applying for a licensed or becoming licensed will continue until they have paid the civil penalty assessed against them.

The provisions of this Order shall become effective on the first day after service of this decision on the respondent.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.  
[This Decision and Order became final October 1, 1999.-Editor]

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**In re: LYNDA DANIEL.**  
**AWA Docket No. 99-0029.**  
**Decision and Order filed September 29, 1999.**

Brian T. Hill, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.*

### **Preliminary Statement**

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served via certified mail by the Hearing Clerk on Lynda Daniel on June 26, 1999. The respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

### **Findings of Fact and Conclusions of Law**

#### **I**

A. Lynda Daniel, hereinafter referred to as respondent, is an individual whose mailing address is 1310 SE Cook Road, Maysville, Missouri 64469.

B. The respondent, at all times material hereto, was licensed and operating as

a breeder as defined in the Act and the regulations.

## II

A. On April 29, 1998, APHIS inspected respondent's premises and found that the respondent had failed to maintain adequate 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 section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On April 29, 1998, APHIS inspected respondent's premises and records and found that the respondent had failed to individually identify animals, in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

C. On April 29, 1998, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Provisions were not made for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks (9 C.F.R. § 3.1(f));

2. Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b));

3. Dogs were not provided sufficient space, as required (9 C.F.R. § 3.6(c)(1));

4. Primary enclosures for dogs were not kept clean (9 C.F.R. § 3.11(a));  
and

5. The premises, including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses and bushes were not controlled, in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R. § 3.11(c)).

## III

A. On June 17, 1998, APHIS inspected respondent's premises and found that the respondent had failed to maintain adequate 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 section 2.40 of the regulations

(9 C.F.R. § 2.40).

B. On June 17, 1998, APHIS inspected respondent's premises and records and found that the respondent had failed to individually identify animals, in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

C. On June 17, 1998, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b));
2. Primary enclosures for cats did not contain adequate resting surfaces (9 C.F.R. § 3.6(b)(4));
3. Dogs were not provided sufficient space, as required (9 C.F.R. § 3.6(c)(1)); and
4. The premises including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses and bushes were not controlled, in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R. § 3.11(c)).

#### IV

A. On September 9, 1998, APHIS inspected respondent's premises and found that the respondent had failed to maintain adequate 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 section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On September 9, 1998, APHIS inspected respondent's premises and records and found that the respondent had failed to individually identify animals, in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

C. On September 9, 1998, respondent refused to permit Animal and Plant Health Inspection Service employees to conduct a complete inspection of her animal facilities, in willful violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

D. On September 9, 1998, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Housing facilities for dogs were not structurally sound and maintained

in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));

2. Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b));

3. Dogs housed in the same primary enclosure were not compatible (9 C.F.R. § 3.7(b));

4. Primary enclosures for dogs were not kept clean and sanitized as required (9 C.F.R. § 3.11(a), (b)); and

5. The premises, including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses and bushes were not controlled, in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R § 3.11(c)).

### **Conclusions**

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the Act and warranted under the circumstances.

### **Order**

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks;

(b) Failing to construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated;

(c) Failing to provide a suitable method for the rapid elimination of excess water and wastes from housing facilities for animals;

(d) Failing to provide sufficient space for animals in primary enclosures;

(e) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

(f) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes;

- (g) Failing to maintain animals in primary enclosures in compatible groups;
- (h) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine; and
- (i) Failing to individually identify animals, as required.

2. The respondent is assessed a civil penalty of \$12,000.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent's license is suspended for 30 days and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein. When respondent demonstrates to the Animal and Plant Health Inspection Service that she has satisfied this condition, a supplemental order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final November 8, 1999.-Editor]

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## FEDERAL CROP INSURANCE ACT

**In re: RONALD L. BOILINI.**  
**FCIA Docket No. 99-0002.**  
**Decision and Order filed August 19, 1999.**

Donald McAmis, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by James W. Hunt, Administrative Law Judge.*

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of respondent, Ronald L. Boilini, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (7 U.S.C. § 1506(n), the Act).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of one year and from receiving any other benefit under the Act for a period of 5 years. The period disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final October 2, 1999.-Editor]

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## HORSE PROTECTION ACT

**In re: DWAYNE WEBB AND GERALD W. SHARPE.**

**HPA Docket No. 99-0025.**

**Decision and Order as to Dwayne Webb filed September 27, 1999.**

Colleen A. Carroll, for Complainant.

Respondent, Pro se.

*Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.*

This proceeding was instituted under the Horse Protection Act, as amended (15 U.S.C. § 1821 *et seq.*)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act.

The Hearing Clerk served on the respondents, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondents were informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondent Dwayne Webb has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by said respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

### Findings of Fact

1. Respondent Dwayne Webb is an individual whose mailing address is 6639 McMinnville Highway, Smithville, Tennessee 37166. At all times mentioned herein, said respondent was the owner of the horse known as "Beaucoup's of Gen."

2. On September 18, 1998, respondent Dwayne Webb allowed respondent Gerald W. Sharpe to enter "Beaucoup's of Gen" as entry number 64 in class number 47 at the 19<sup>th</sup> Annual National Spotted Saddle Horse Association World Grand Championship, in Murfreesboro, Tennessee (the "Spotted Saddle Horse Show"), for the purpose of showing or exhibiting it in that horse show.

### Conclusions of Law

On September 18, 1998, respondent Dwayne Webb allowed respondent Gerald

W. Sharpe to enter "Beaucoup's of Gen" as entry number 64 in class number 47 at the Spotted Saddle Horse Show, while the horse was sore, for the purpose of showing or exhibiting the horse in the horse show, in violation of section 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)).

### Order

1. Respondent Dwayne Webb is assessed a civil penalty of \$2,000.

2. Respondent Dwayne Webb is disqualified for one year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, family member or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction, and this disqualification shall continue indefinitely so long as the civil penalty described in paragraph 1 above remains unpaid.

3. For purposes of the disqualification described in paragraph 2 above, "participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final November 8, 1999.-Editor]

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**In re: JAMES E. WILLIAMS AND ERIC RUSSELL WILLIAMS.**  
**HPA Docket No. 99-0021.**  
**Decision and Order filed September 23, 1999.**

Colleen A. Carroll, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by James W. Hunt, Administrative Law Judge.*

This proceeding was instituted under the Horse Protection Act, as amended (15 U.S.C. § 1821 *et seq.*)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of

Agriculture, alleging that the respondents willfully violated the Act.

The Hearing Clerk served on the respondents, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondents were informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

### **Findings of Fact**

1. Respondents James E. Williams and Eric Russell Williams are individuals whose mailing address is 402 Venus Place, Murfreesboro, Tennessee 37130. At all times mentioned herein, respondent James E. Williams was the owner of the horse known as "Eb's Mark of Color."

2. On September 19, 1998, respondent Eric Russell Williams entered for the purpose of showing or exhibiting, "Eb's Mark of Color" as entry number 122 in class number 52, at the 19<sup>th</sup> Annual National Spotted Saddle Horse Association Grand Championship, in Murfreesboro, Tennessee (the "Spotted Saddle Horse Show").

3. On September 19, 1998, respondent James E. Williams allowed respondent Eric Russell Williams to enter "Eb's Mark of Color" as entry number 122 in class number 52, at the Spotted Saddle Horse Show, for the purpose of showing or exhibiting the horse.

### **Conclusions of Law**

1. On September 19, 1998, respondent Eric Russell Williams entered "Eb's Mark of Color" as entry number 122 in class number 52 at the Spotted Saddle Horse Show for the purpose of showing or exhibiting the horse in the horse show, while the horse was sore, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)).

2. On September 19, 1998, respondent Eric Russell Williams entered "Eb's Mark of Color," as entry number 122 in class number 52 at the Spotted Saddle Horse Show, for the purpose of showing or exhibiting the horse in the horse show, while the horse was wearing a substance prohibited under the horse protection

regulations (9 C.F.R. § 11.2(c)), in violation of section 5(7) of the Act (15 U.S.C. § 1824(7)).

3. On September 19, 1998, respondent James E. Williams allowed the entry of "Eb's Mark of Color" as entry number 30 in class number 122 at the Spotted Saddle Horse Show, for the purpose of showing or exhibiting the horse in the horse show, while the horse was sore, in violation of section 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)).

### **Order**

1. Respondent James E. Williams is assessed a civil penalty of \$2,000.
2. Respondent Eric Russell Williams is assessed a civil penalty of \$4,000.
3. Respondent James E. Williams is disqualified for one year, and respondent Eric Russell Williams is disqualified for two years, from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, family member, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final December 6, 1999, for Eric Russell Williams, and final December 13, 1999, for James E. Williams.-Editor]

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## PLANT QUARANTINE ACT

**In re: ENCALADA DIEGO.**

**P.Q. Docket No. 97-0004.**

**Decision and Order filed June 16, 1999.**

Cynthia Koch, for Complainant.

Respondent, Pro se.

*Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on November 8, 1996, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

### Findings of Fact

1. Encalada Diego is an individual whose mailing address is 559 50th Street, Brooklyn, New York 11220.
2. On or about November 16, 1994, respondent imported fresh tomatoes from Ecuador into the United States, in violation of Section 7 C.F.R. § 319.56(b).

### Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated

the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

### Order

The respondent is hereby assessed a civil penalty of seven hundred fifty dollars (\$750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
P.O. Box 3334  
Minneapolis, Minnesota 55403  
(612) 370-2221

Respondent shall indicate that payment is in reference to P.Q. Docket No. 97-0004.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final July 31, 1999.-Editor]

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**In re: ESTELA OLVERA-RIOS.**  
**P.Q. Docket No. 99-0001.**  
**Decision and Order filed April 28, 1999.**

Howard Levine, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by James W. Hunt, Administrative Law Judge.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Act of February 2, 1903, as amended (21 U.S.C. § 111), and the regulations

promulgated thereunder (7 C.F.R. § 319.56 *et seq.* and 9 C.F.R. § 94 *et seq.*) .

This proceeding was instituted by a complaint filed against Estela Olvera-Rios, Respondent, on December 22, 1998, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By Respondent's failure to answer, Respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

### **Findings of Fact**

1. Estela Olvera-Rios, hereinafter referred to as the Respondent, is an individual with a mailing address of 44770 Palo Verde Apartment 61, Indio, California 92201.

2. On or about August 28, 1997, Respondent violated 7 C.F.R. § 319.56(c) of the regulations by importing thirty (30) fresh pears, four (4) avocados, five (5) pitayas, and ten (10) fresh limes from Mexico into the United States, importation of which was prohibited.

3. On or about August 28, 1997, Respondent violated 7 C.F.R. § 319.56-3(a) of the regulations by importing one (1) mango from Mexico into the United States without a permit.

4. On or about August 28, 1997, Respondent violated 9 C.F.R. § 94.9(b) by importing two (2) pounds of Chorizo from Mexico into the United States without the required certificate.

### **Conclusion**

By reason of the facts contained in paragraphs one through four above, Estela Olvera-Rios, Respondent, has violated 7 C.F.R. § 319.56(c), 7 C.F.R. § 319.56-3(a), and 9 C.F.R. § 94.9(b).

Therefore, the following order is issued.

## Order

Estela Olvera-Rios is hereby assessed a civil penalty of one thousand five hundred dollars (\$1,500).<sup>1</sup> This penalty shall be payable to "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
Butler Square West, 5th Floor  
100 North Sixth Street  
Minneapolis, Minnesota 55403

within thirty days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final August 1, 1999.-Editor]

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**In re: ESTELA OLVERA-RIOS.**

**P.Q. Docket No. 99-0001.**

**Order Vacating Default Decision and Order and Dismissing Complaint filed October 15, 1999.**

Howard Levine, for Complainant.  
Respondent, Pro se.

*Order issued by James W. Hunt, Administrative Law Judge.*

Complainant's October 14, 1999, "Motion to Vacate Default Decision" is granted. The Default Decision and Order, filed on April 28, 1999, is vacated and the complaint, filed herein on October 15, 1998, is dismissed without prejudice.

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<sup>1</sup>Complainant's proposed maximum penalty of \$3,000 for the three violations is reduced to \$1,500 pursuant to *Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *M. Higgs*, 52 Agric. Dec. 333 (1993).

**In re: MI PUEBLO.**

**P.Q. Docket No. 99-0023.**

**Decision and Order filed July 12, 1999.**

Jeffrey Kirmsse, for Complainant.

Respondent, Pro se.

*Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables into the United States (7 C.F.R. 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the rules of practice set forth in 7 C.F.R. 1.130 *et seq.* and 380.1 *et seq.*)

This proceeding was instituted by a complaint, filed on April 1, 1999, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about December 2, 1998, and on or about January 26, 1999, the respondent moved boxes of Mexican Hass avocados from Chicago, Illinois, to Mi Pueblo, Muscatine, Iowa, in violation of 7 C.F.R. 301.11(b)(2) and 319.56-2ff, because such movement is prohibited.

The complaint was served upon the respondent by certified mail on April 2, 1999. The respondent failed to file an answer which denied or otherwise responded to the allegations in the complaint. In accordance with section 1.136(c) of the rules of practice (7 C.F.R. 1.136(c)), such failure to deny or otherwise respond to an allegation in the complaint is deemed, for the purposes of this proceeding, an admission of said allegation.

In view of the aforementioned facts, the respondent is deemed to have admitted the material allegations in the complaint and, therefore, has waived his right to a hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139). This Default Decision and Order, therefore, is issued, pursuant to sections 1.136 and 1.139 of the rules of practice (7 C.F.R. 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which respondent is deemed to have admitted, are adopted and set forth herein as the Findings of Fact.

### **Findings of Fact**

1. Mi Pueblo, hereinafter referred to as the respondent, is a business with a mailing address of 801 Oregon Street, Muscatine, Iowa 52761.
2. On or about December 2, 1998, the respondent moved 2 boxes of Mexican Hass avocados from Chicago, Illinois, to Mi Pueblo, Muscatine, Iowa, in violation

of 7 C.F.R. 301.11(b)(2) and 319.56-2ff, because such movement is prohibited.

3. On or about January 26, 1999, the respondent moved 2 boxes of Mexican Hass avocados from Chicago, Illinois, to Mi Pueblo, Muscatine, Iowa, in violation of 7 C.F.R. 301.11(b)(2) and 319.56-2ff, because such movement is prohibited.

### **Conclusion**

By reason of the facts in the Findings of Fact set forth above, the respondent has violated the Act and sections 301.11(b)(2) and 319.56-2ff of the regulations (7 C.F.R. 301.11(b)(2) and 319.56-2ff. Therefore, the following Order is issued:

### **Order**

The respondent, Mi Pueblo, is hereby assessed a civil penalty of five hundred dollars (\$500.00), which shall be made payable to the "TREASURER OF THE UNITED STATES" by a certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
P.O Box 3334  
Minneapolis, MN 55403

within thirty (30) days from the effective date of this Order. The respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 99-0023.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer, pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. 1.145).

[This Decision and Order became final August 24, 1999.-Editor]

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**In re: HOANG THANH TRUONG.**

**P.Q. Docket No. 99-0003.**

**Decision and Order filed September 24, 1999.**

James A. Booth, for Complainant.

Respondent, Pro se.

*Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.*

This is an administrative proceeding for the assessment of a civil penalty for violations of the regulations governing the importation of fruits and related articles (7 C.F.R. §§ 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts) and the regulations promulgated thereunder, by a complaint filed on October 23, 1998, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

### **Findings of Fact**

1. Hoang Thanh Truong is an individual whose mailing address is 3000 West 12th Street, Erie, Pennsylvania 16505.

2. On or about June 24, 1997, the respondent imported approximately 5 cases of mangoes, 3 coconuts, 25 pounds of litchi, and 10 bitter melons, into the United States at Buffalo, New York, from Canada, in violation of 7 C.F.R. §§ 319.56(a), 319.56-2(a), 319.56-2(e) and 319.56-3, in that the mangoes, coconuts, litchi, and bitter melons were not imported under permit, as required.

### **Conclusion**

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Act (7 C.F.R. §§ 319.56 *et seq.*). Therefore, the following Order is issued.

### **Order**

The respondent is hereby assessed a civil penalty of one thousand dollars (\$1,000.00). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
P.O. Box 3334  
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 99-0003.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final November 9, 1999.-Editor]

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**CONSENT DECISIONS**

(Not published herein - Editor)

**AGRICULTURAL MARKETING AGREEMENT ACT**

Consent Decision as to Covalda, Inc., a/k/a Covalda Date Company. AMAA Docket No. 98-0004. 8/16/99.

**ANIMAL QUARANTINE AND RELATED LAWS**

Consent Decision as to Mary's Ranch, Inc., d/b/a Cabrera Slaughterhouse. A.Q. Docket No. 99-0006. 12/17/99.

Consent Decision as to Rodolfo Cabrera, Jr. A.Q. Docket No. 99-0006. 12/17/99.

Compania Panamena De Aviacion. A.Q. Docket No. 00-0001. 12/29/99.

**ANIMAL WELFARE ACT**

Ronald and Carol Asvestas. AWA Docket No. 99-0015. 8/11/99.

Laurinda Rae Drain. AWA Docket No. 96-0071. 8/16/99.

James Uriell and Charlette Uriell, d/b/a Rocking U Kennel. AWA Docket No. 99-0024. 8/16/99.

Aeroground, Inc. AWA Docket No. 99-0030. 8/17/99.

The Coulston Foundation. AWA Docket No. 98-0014. 8/24/99.

Bill Strong, d/b/a Bill's Pawn Shop. AWA Docket No. 98-0042. 9/7/99.

Danny Schachtele and Mildred Schachtele. AWA Docket No. 98-0037. 11/2/99.

Gregg Holland, d/b/a Animal Arts. AWA Docket No. 99-0042. 11/17/99.

Sara Trotter. AWA Docket No. 99-0019. 11/24/99.

Dennis Hill and Lorri Hill, d/b/a Hill's Exotics. AWA Docket No. 99-0031. 12/10/99.

BAX Global, Inc. AWA Docket No. 99-0035. 12/29/99.

### **BEEF PROMOTION AND RESEARCH ACT**

Christensen Sales Corporation. BPRD Docket No. 99-0001. 12/22/99.

### **FEDERAL MEAT INSPECTION ACT**

Shannondale Country Market and Bradley D. Lockwood. FMIA Docket No. 99-0003. 8/12/99.

Charles Barry Gashel, Fred M. Gashel, and Lee Gashel & Sons, Inc. FMIA Docket No. 99-0002. 9/23/99.

Brestensky's Meat Market, Inc., and Stephen T. Brestensky. FMIA Docket No. 98-0002. 10/29/99.

Roberto Morales Enterprises, Inc., d/b/a Casanova Meat Company, and Roberto Morales. FMIA Docket No. 00-0002. 12/30/99.

### **HORSE PROTECTION ACT**

Consent Decision as to D.P. Strickland. HPA Docket No. 98-0008. 7/30/99.

Consent Decision as to Robert D. Floyd. HPA Docket No. 98-0008. 7/30/99.

Randy Wimberly. HPA Docket No. 98-0009. 8/16/99.

Consent Decision as to Larry Wheelon. HPA Docket No. 98-0007. 8/23/99.

Consent Decision as to William Welch. HPA Docket No. 99-0001. 9/7/99.

Consent Decision as to Bobbie Jo Garrison. HPA Docket No. 99-0001. 9/7/99.

William R. Dick. HPA Docket No. 99-0011. 9/16/99.

Janet Bracalente, Thomas Bracalente, and Ronald Bracalente. HPA Docket No. 99-0027. 10/25/99.

Larry S. Allman and Joy Allman. HPA Docket No. 99-0004. 11/19/99.

Consent Decision as to Carl Dean Clark, Jr. HPA Docket No. 98-0013. 12/1/99.

### **PLANT QUARANTINE ACT**

Consent Decision as to Tienda Mexicana II. P.Q. Docket No. 99-0039. 7/6/99.

Consent Decision as to Wu-Chu Trading Corp., d/b/a Tropical Wholesale Produce, Inc. P.Q. Docket No. 99-0046. 7/15/99.

Enriquez Produce, Inc. P.Q. Docket No. 99-0008. 8/4/99.

Consent Decision as to La Bodega, Inc. P.Q. Docket No. 99-0039. 8/9/99.

La Hacienda Brands, Inc. P.Q. Docket No. 99-0012. 8/16/99.

Consent Decision as to Long Van, d/b/a The Great Wall Oriental. P.Q. Docket No. 99-0048. 8/17/99.

J&R Mexican Bakery. P.Q. Docket No. 99-0030. 8/31/99.

Wal-Mart Stores, Inc. P.Q. Docket No. 98-0017. 9/2/99.

Consent Decision as to El Gallito. P.Q. Docket No. 99-0040. 9/14/99.

### **POULTRY PRODUCTS INSPECTION ACT**

Shannondale Country Market and Bradley D. Lockwood. PPIA Docket No. 99-0004. 8/12/99.

Charles Barry Gashel, Fred M. Gashel, and Lee Gashel & Sons, Inc. PPIA Docket No. 99-0002. 9/23/99.

Roberto Morales Enterprises, Inc., d/b/a Casanova Meat Company, and Roberto Morales. PPIA Docket No. 00-0001. 12/30/99.

**VETERINARY ACCREDITATION**

Russell D. Bowers, d/b/a Colby Animal Clinic. V.A. 99-0001. 8/31/99.