

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

FCIA Docket No. 08-0153

In re: TIMOTHY MAYS,
d/b/a CT FARMS,

Respondent

DECISION AND ORDER

Preliminary Statement

On June 30, 2008, Eldon Gould, the Manager of the Federal Crop Insurance Corporation, United States Department of Agriculture, (“FCIC”) initiated this disciplinary proceeding against the Respondent by filing a complaint alleging violations of the Federal Crop Insurance Act, (7 U.S.C. § 1501, *et seq.*) (the “Act”). On August 1, 2008, Counsel for the Respondent filed a Motion for Leave to File Answer and Answer. The Answer denied generally the material allegations of the Complaint and requested that an oral hearing be scheduled.

On August 6, 2008, the Complainant filed a motion asking that the Complaint be deemed admitted. By Order dated August 7, 2008, the Motion for Leave to File Answer was granted and the Motion for the Complaint to be Deemed Admitted was denied. On August 12, 2008, the Complainant also requested that the matter be set for oral hearing. On December 10, 2008, a teleconference was conducted with the parties, dates were established for the exchange of witness and exhibit lists and the matter was initially set to be heard in Abingdon, Virginia on March 24, 2009. As hearing space in Abingdon,

Virginia was not available on March 24, 2009, by Notice of Hearing Location filed on March 3, 2009, the hearing site was moved to Roanoke, Virginia. On March 16, 2009, the Respondent filed a Motion to Continue Hearing Until Available Space in Abingdon, Virginia. Following a telephonic hearing on the Motion, an Order dated March 19, 2009 was entered denying in part the Motion for continuance. The hearing would commence on March 24, 2009 for the presentation of the Complainant's case, but, in order to accommodate the needs of locally based witnesses, the Respondent was to be given an opportunity to present his portion of the case at a later date when hearing space would be available in Abingdon, Virginia.

At the oral hearing held on March 24, 2009 in Roanoke, Virginia, the Complainant was represented by Mark R. Simpson, Esquire, Office of General Counsel, United States Department of Agriculture, Atlanta, Georgia and the Respondent was represented by Terry G. Kilgore, Esquire of Gate City, Virginia. Five witnesses testified and 25 exhibits were identified and received into evidence.¹ Upon conclusion of the Complainant's presentation of evidence, the hearing was recessed pending the availability of space in Abingdon to conclude the hearing.

The hearing resumed in Abingdon, Virginia on August 13, 2009 for the presentation of evidence by the Respondent. The Complainant was again represented by Mark R. Simpson and the Respondent was represented by Terry G. Kilgore. At this hearing, three witnesses were called by the Respondent. Johnnie Perdue, who had testified at the earlier hearing, was recalled by the Complainant and again testified. One

¹ CX-1 through CX-25. References to the Transcript of the proceedings will be to "Tr."

exhibit was admitted and a DVD disk was admitted subject to confirmation of its authenticity and consistency with the records of the Farm Service Agency Office.²

Discussion

The Complaint in this action alleges that Timothy Mays, doing business as CT Farms,³ willfully misrepresented material facts in connection with obtaining a federally insured crop insurance policy on burley tobacco raised by him during the 2003 crop year and that he provided false and inaccurate information regarding the planting date of his tobacco to the insurance company which sold him the crop insurance policy.

7 C.F.R. § 400.454(a) provides:

“any person who willfully and intentionally provides any materially false or inaccurate information to FCIC or to any approved insurance provider reinsured by FCIC with respect to an insurance plan or policy issued under the authority of the Federal Crop Insurance Act...may be subject to a civil fine...and disqualification from participation....

Because of the alleged misrepresentations and false certifications, the Complaint seeks disqualification of the Respondent Mays and CT Farms from receiving monetary or nonmonetary gain under certain specified federal programs for up to five years and imposition a civil fine or penalty of up to \$10,000.00 per violation or the amount of pecuniary gain obtained as a result of the false or incorrect information.

Mays expressly denies any wrongdoing, asserting that his tobacco was planted within the prescribed period, indicating that as many as six adjusters representing two different agencies inspected his fields and found evidence of tobacco production for that

² The contents contained on the disk (RX-4) were verified by the Complainant. Docket Entry 19 is a letter dated August 25, 2009 from Mark R. Simpson to L. Eugene Whitfield indicating that the contents of the DVD were compared to and found to be maintained with the usual business records of the Washington/Smyth County Farm Service Agency Office.

³ CT Farms is a general partnership. CX-15. The Respondent Mays has an 80% interest and Michelle Fleenor has the other 20%. CX-6, 15. Fleenor took care of the books, made the payroll and “more or less kept [Mays] organized. Mays took care of the day to day operations. Tr. 174.

crop year, and blaming his poor tobacco crop yield on washing from rain and adverse weather conditions. Tr. 7, 197, 200.

The uncontroverted evidence in the case establishes that Timothy Mays, acting on behalf of CT Farms, applied to Rural Community Insurance Service (RCIS), a participating insurance provider for the Federal Crop Insurance Program and received a federally insured crop insurance policy on 14.9 acres of burley tobacco. Tr. 174. Under the terms of the common crop policy, the grower is required to certify the type of crop, where it was planted, the number of acres planted, the date the crop was planted and to identify the applicant's ownership share in the crop. CX-1, Tr. 10. That certification was made on July 15, 2003⁴ when Timothy Mays completed the RCIS Acreage Report indicating that CT Farms had a 100% interest in the crop and had planted 9 acres of burley tobacco on Farm 7542 on June 28, 2003 and 5.9 acres of burley tobacco on Farm 7781 on June 29, 2003.⁵ CX-8, Tr. 177. Mays testified that he took the insurance out on the CT Farms tobacco because of an agreement with McClellan ("Tubb") Salyer, Jr. whereby in exchange to having access to Salyer's credit for the CT Farms tobacco the crop had to be insured, but personal tobacco raised that year by Mays was not insured.⁶ Tr. 176. On August 29, 2003, Mays filed a loss claim with RCIS on behalf of CT Farms,

⁴ The planting certificate was made at approximately the same time that Mays indicated that he had replanted a portion of the crop due to rains having washed out his insured fields. CX-15 (8 of 15).

⁵ The 9 acres reported on Farm FS 7542 was reduced to 8.31 acres following a field measurement. CX-11. The CT Farms burley tobacco was raised on Fields 1 (Tracts 1AY, 1BY, 1CY & 1DY), Field 3 (Tracts 3BY & 3CY) and Field 4 (Tract 4BY) CX-7, 9, 23(6 of 8).

⁶ Mays raised burley tobacco on the two tracts of land which were designated FS 7542 and FS 7781 by the Farm Services Agency. Tr. 12. In addition to the tobacco raised by CT Farms, tobacco was also raised there by others, including Mays (in his individual capacity), Michelle Fleenor, and Robert Salyer. Tr. 181-3. Mays personal tobacco was raised in Fields 1 (Tract 1EY), 2 (Tract 2AY), 3 (Tract 3AY), and 7 (Tract 7AY). CX 7, 9, 23 (6 of 8). Fields 8 and 9 were on Farm FS 7781. Tr. 180. In order to complete FSA Form 578, the grower identifies the crop grown in each field and indicates the numeric identifier of the individual or entity having an ownership interest. CT Farms' number was 8519, Mays' personal number was 5707, and Michelle Fleenor's was 2332. Tr. 181, CX-7,9. The grower also completes a more detailed report for the Farm Services Agency; it indicates the specific fields which are planted using field identifiers which correlate to aerial photographs of each farm.

claiming that the crop was damaged due to excessive precipitation encountered during June and July of that year. On October 15, 2003, J. Landis Walker, a RCIS adjuster visited the Respondent's farm and observed that all of the insured burley tobacco had been harvested. Visits during the same month by others reported that May's uninsured tobacco was being harvested and the fields had been disked.⁷ Based upon CT Farms claim of damage, it was paid \$45,804 by RCIS.⁸ CX-13.

The case presented by the Government against CT Farms disputed the accuracy of Mays' certification that CT Farms burley tobacco was planted on FS 7542 on June 28, 2003 and on FS 7781 on June 29, 2003. Testimony from Douglas Eastep and Melvin Wayne Harless was introduced which indicated that they visited the farm on October 22, 2003 and felt that tobacco may not have been planted in all of the fields on FS 7542 for the crop year 2003; however, their testimony was equivocal and vague as to the details as to which field each had observed and neither could rule out tobacco being grown on the field in question.⁹ Tr. 23-25, 27-29, 31-36, 40-41, CX-14. More definitive and persuasive evidence was introduced by the testimony of James Hipple, Ph.D., a remote sensing specialist with the Risk Management Agency of the Department of Agriculture.¹⁰ Dr. Hipple testified that based upon his analysis of the satellite imagery data obtained from

⁷ Some question was raised as to whether tobacco had been raised on certain of the fields as no stubble was present; however, the fields had been worked after harvest and at least one adjuster indicated that he saw evidence of tobacco production in every field.

⁸ Because tobacco was raised by CT Farms on both FS 7542 and 7781, two checks were cut, one for \$21,383.00 for the FS 7781 loss and a second one for \$24,421.00 for the FS 7542 loss. CX-13.

⁹ A slightly different observation was made by Sam Hunter and William Bushong, individuals who visited both tracts 7542 and 7781 of the farm in January of 2004. While those individuals had reservations as to whether tobacco was planted, they did indicate that they did observe tobacco stubble in the fields and further stated that there was no way to tell whether tobacco had been planted by the time of their visit as the ground had been disked after the tobacco had been harvested. Tr. 51-2, CX-21.

¹⁰ Respondent's Counsel had no objection to Dr. Hipple testifying as an expert in satellite imagery. Tr. 59. The use of satellite imagery is sufficiently well established as a scientific technique as to satisfy the evaluation standards using the criteria set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).

three satellites (LANDSAT 5, LANDSAT 7 and NASA ASTER) between the dates of April 23, 2003 to July 4, 2003 and using the Normalized Difference Vegetation Index, the imagery of fields 1 and 3 of FS 7542 was gramineous, consistent with native grass growth and that contrary to the certification that burley tobacco had been planted on June 28, no burley tobacco had been planted on either fields 1 or 3 during that period. Tr. 78-82, 85-87, 93-95. By way of contrast, Dr. Hipple indicated that his analysis of the same data indicated that during the period field 7 reflected signs of vegetation removal, consistent with the field being prepared for planting or having been planted. Tr. 84, 86-88. As Dr. Hipple's testimony was confined to analysis of Farm FS 7542 and the testimony of individuals visiting the farm was inconclusive, the burden of proving any adverse conclusion concerning the planting date of the burley tobacco raised on Farm FS 7781 was not met in this case.

During the hearing on August 13, 2009, in addition to testifying himself, the Respondent introduced the testimony of two witnesses, McClellan McNear Salyer, Jr. (Tubb) and Dennis Giles Porter. Mr. Salyer, an individual with whom the Respondent lived and whose family fed the Respondent¹¹, as previously indicated had allowed the Respondent access to his line of credit to raise the CT Farms tobacco, but had as a condition to such access, required that the crop be insured. Tr. 134, 142. Mr. Salyer indicated that he did the running, "picked up fertilizer chemical, ever what was needed." Tr. 119. Mr. Salyer indicated that he had been on the farm every day, had plowed some of the fields, provided the 10 to 12 Mexican laborers that actually did the planting, and paid the bills for the crop, but could not remember with any precision when any of the

¹¹ Mr. Salyer's son Robert was allowed to raise about three acres on tobacco on the same farm. Tr. 119, 124.

fields were planted.¹² Tr. 119, 126-127, 129, 131, 141-2, 144. Mr. Porter's testimony was otiose and even less helpful in providing specific details as he had never been to the upper fields' location; didn't even know the tracts "existed up there;" but wouldn't have gone up there as the road was rough and he had a new truck and didn't want it scratched. Tr. 152, 154, 161. The Respondent testified that he planted 9 acres of burley tobacco on Farm FS 7542 with the last final planting being completed on June 28, 2003 and that he planted 5.9 acres of burley tobacco on Farm FS 7781 with the last final planting being completed on June 29, 2003.¹³ Tr. 177, 221. The Respondent also introduced aerial slides from a DVD provided by the county Farm Services Agency Office which appeared to show that all of the fields were plowed and planted by July 20, 2003. RX-3, 4.

After considering all of the evidence, including the testimony and the exhibits which were introduced in this case, the following Finding of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Timothy Mays is an individual currently residing in Honaker, Virginia. He is the owner of 80% of and is the controlling partner of CT Farms, a Virginia partnership which was originally formed in 2002. Tr. 173.
2. CT Farms was a participant in the Federal Crop Insurance Program in the crop year 2003, insuring CT Farms burley tobacco crop which was raised in Washington County, Virginia on Farm FS 7542. Tr. 173-174.

¹² Mr. Salyer testified that he thought that Field 7 (an uninsured field) was planted in June. Tr. 123, 130.

¹³ The 9 acres on Farm FS 7542 was subsequently reduced to 8.3 acres after field measurement. Tr. 198, CX-11.

3. The Respondent Timothy Mays, acting for and on behalf of CT Farms, applied for and obtained a federal crop insurance policy on CT Farms burley tobacco from Rural Community Insurance Services (RCIS) which policy was reinsured by FCIC. Tr. 174.
4. RCIS was an approved insurance provider under the federal crop insurance program.
5. The final date for planting burley tobacco for full federal crop insurance benefits for the 2003 crop year in Washington County, Virginia was June 30, 2003.
6. The Common Crop Insurance Policy for the 2003 crop year required growers to certify the type of crop, where it was planted, the number of acres planted, the date the crop was planted and the applicant's share of the crop. CX-1, Tr. 10.
7. On July 15, 2003, Respondent Timothy Mays, acting for CT Farms, completed the RCIS Acreage Report indicating that CT Farms had a 100% interest in 9 acres of burley tobacco planted on Farm FS 7542 on June 28, 2003 and 5.9 acres of burley tobacco planted on June 29, 2003 on Farm FS 7781. CX-8, Tr. 177.
8. Respondent Timothy Mays submitted a claim under his federally insured crop insurance policy for the insured tobacco grown by CT Farms for the 2003 crop year and received two checks, one for \$24,421.00 for the Farm FS 7542 loss dated January 28, 2004 and the second for \$21,383.00 for the Farm FS 7781 loss dated March 5, 2004. CX-13.
9. Analysis of satellite imagery from three satellites (LANDSAT5, LANDSAT 7 and NASA ASTER) taken between the dates of April 23, 2003 to July 4, 2003 analyzed by James Hipple, Ph.D., a sensing specialist employed by Risk Management Agency of the United States Department of Agriculture indicated that no burley tobacco could have

been planted by CT Farms on FS 7542 on June 28, 2003 as certified by Respondent Timothy Mays.

10. Although tobacco yields for the year were lower than average throughout the Washington County, Virginia as a result of adverse weather, the pound per acre burley tobacco yield of CT Farms for the crop year 2003 of was significantly less than that for Mays' personal and uninsured tobacco grown on the same farm or that grown in the same general area by other growers in Washington County, Virginia. CX-15 (6 of 13).

11. Respondent Timothy Mays failed to fully cooperate with FCIA Compliance Investigators in the administration of the crop loss claim contrary to the terms of Section 21 of the Common Crop Insurance Policy Basic Provisions for 2003 (01-BR). CX-1, 17.1 (5 of 10).

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. The Respondent Timothy Mays willfully provided false and incorrect information concerning the planting dates of the burley tobacco crop grown on Farm FS 7542 by CT Farms to RCIS and to Farm Services Agency in violation of 7 C.F.R. § 400.454(a).
3. The reporting of false or incorrect planting dates represents a material misrepresentation of fact under the Federal Crop Insurance program.
4. The Respondent Timothy Mays failed to fully cooperate with FCIA Investigators in the administration of the crop loss claim contrary to the provisions of the Common Crop Insurance Policy in effect for crop year 2003.
5. As a result of the false and incorrect information provided by the Respondent Timothy Mays, CT Farms improperly received the sum of \$24,421.00.

Order

1. Pursuant to section 515(h)(3)(B) of the Act (7 U.S.C. § 1515(h)(3)(B)) and FCIC's regulations (7 C.F.R. part 400, subpart R), the Respondent Timothy Mays, individually and as the controlling partner of CT Farms is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of five years:

- (a) Subtitle A of the Federal Crop Insurance Act (7 U.S.C. §§ 1501-1524);
- (b) The Agricultural Market Transition Act (7 U.S.C. § 7201 *et seq.*), including the non-insured crop disaster assistance program under section 196 of the Act (7 U.S.C. § 7333);
- (c) The Agricultural Act of 1949 (7 U.S.C. §§ 1421 *et seq.*);
- (d) The Commodity Credit Corporation Charter Act (15 U.S.C. §§ 714 *et seq.*);
- (e) The Agricultural Adjustment Act of 1938 (7 U.S.C. §§ 1281 *et seq.*);
- (f) Title XII of the Food Security Act of 1985 (16 U.S.C. §§ 3801 *et seq.*);
- (g) The Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1921 *et seq.*); and
- (h) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

2. Unless this Decision and Order is appealed as set out below, the period of ineligibility for all programs offered under the above listed Acts shall commence 35 days after this decision is served. As a disqualified individual, the Respondent will be reported

to the U.S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505. GSA publishes a list of all persons who are determined ineligible in its Excluded Parties List System (EPLS).

3. A civil fine of \$24,421.00 is imposed upon the Respondent pursuant to sections 515(h)(3)(A) and (h)(4) of the Act (7 U.S.C. §1515(h)(3)(A) and (4)). This civil fine shall be paid by cashier's check or money order or certified check, made payable to the order of the "**Federal Crop Insurance Corporation**" and sent to:

Federal Crop Insurance Corporation
Fiscal Operations Branch
6501 Beacon Road, Room 271
Kansas City, Missouri 64133

4. This Decision and Order shall be effective 35 days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.
November 13, 2009

PETER M. DAVENPORT
Administrative Law Judge

Copies to: Mark R. Simpson, Esquire
Terry G. Kilgore, Esquire

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