AGRICULTURE DECISIONS

Volume 66

July - December 2007
Part One (General)
Pages 971- 1314

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AGRICULTURE DECISIONS

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ANIMAL HEALTH PROTECTION ACT

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RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA v. USDA.
No. 06-35512.
Filed August 28, 2007.

(Cite as 499 F.3d 1108).

AHPA – APA – N.E.P.A. – Beef import ban – Arbitrary and capricious rule, when not – USDA wide discretion over imports – Risk-free not required.

Court upheld revised beef importation rules issued without public hearing based upon deferential to agency's administration of its own policies. USDA and FDA issued rules in 2003 banning ruminant products (beef) imports from all countries where Bovine Spongiform Encephalopathy (BSE) is known to exist in importing countries, including Canada. After a re-review of the scientific data, USDA issued new rules allowing beef imports from Canada under certain conditions providing for "low risk" cattle under 30 months of age. Petitioners objected under A.P.A. and N.E.P.A. that USDA had, without public notice, expanded the list of ruminant products eligible to be imported from Canada. The lower court had granted an injunction on the promulgation of the new rules based upon Petitioner's showing of a likelihood of success. This court found that agency had a reasonable scientific basis for the revised rules and the court deferred to the agency's broad authority to control imports.

United States Court of Appeals
Ninth Circuit.

Before: CYNTHIA HOLCOMB HALL and MILAN D. SMITH, JR., Circuit Judges, and KEVIN THOMAS DUFFY,[FN*] Senior Judge.

FN* The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

HALL, Senior Circuit Judge:

This case involves a challenge to the government's regulation of Canadian cattle imports in the wake of the "mad cow disease" scare of the late 1990s. Ranchers Cattlemen Action Legal Fund United Stockgrowers of America ("R-CALF-USA" or "R-CALF") argues that the United States Department of Agriculture ("USDA") issued an arbitrary and capricious rule relaxing a ban on Canadian beef and cattle imports. *See Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities,* 70 Fed.Reg. 460 (January 4, 2005) (hereinafter "the Final Rule").

R-CALF argues that recent incidents of mad cow disease in the Canadian herd, and in American cows imported from the Canadian herd, cast doubt on the agency's rulemaking procedure. With additional references to scientific studies and international regulations, R-CALF challenges the agency's assessment that the "multiple, interlocking safeguards" implemented by both the United States and Canada will be effective at preventing human infection domestically.

The district court granted summary judgment to the USDA, and we have jurisdiction to review this order under 28 U.S.C. § 1291. The facts have been provided in prior related decisions and will not be recited exhaustively here. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. United States Dep't of Agric.,* 359 F.Supp.2d 1058 (D.Mont.) (hereinafter "*R-CALF I* "), *rev'd,* 415 F.3d 1078 (9th Cir.2005) (hereinafter "*R-CALF II* ").

We affirm.

Background

Commonly referred to as "mad cow disease," Bovine Spongiform Encephalopathy ("BSE") is a degenerative neurological disease that was first discovered in 1986 and has since infected more than 187,000 cattle worldwide, with 95 percent of the cases occurring in England. In the mid-1990s, public health officials discovered that cattle feeding practices were the likely cause of an outbreak of BSE in England. At the time, cattle feed typically contained recycled or "rendered" cattle parts

that gave it a higher protein content.[1]

In 1996, the British government discovered that consumption of BSE-contaminated meat could cause variant Creutzfeld-Jakob Disease (vCJD) in humans. There have been approximately 150 human cases of vCJD, including one case in the United States in a woman who had probably contracted the disease while living in England. Scientists are still learning how these diseases develop, incubate and spread. *See R-CALF II,* 415 F.3d at 1086.

The Food and Drug Administration and the USDA responded to the BSE outbreak with new regulations.[2] These rules prohibited the use of mammalian proteins in cattle feed, *see*21 C.F.R. § 589.2000, and prohibited the use of "specified risk materials"-such as cattle brains, spinal cords, and nerve tissue-in human food, *see*9 C.F.R. § 310.22. The USDA, working closely with the World Organization for Animal Health, developed guidelines and proposed protective measures to prevent the spread of BSE to the United States. *See*70 Fed.Reg. at 463.[3] Chief among these measures was a ban on imports of all cattle products from countries where BSE was known to exist. *See*9 C.F.R §§ 93.401, 94.18 (2003). The USDA added Canada to this list of countries in May 2003, after a cow in Alberta was diagnosed with BSE.*Change in*

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[1] *See generally* PL 107-9 Federal Inter-agency Working Group, "Animal Disease Risk Assessment, Prevention, and Control Act of 2001 (PL 107-9), Final Report," January 2003.

[2] The FDA is under the Department of Health and Human Services. The USDA acted through two subsidiary agencies, the Food Safety and Inspection Service and the Animal and Plant Health Inspection Service. We will refer to actions by these agencies as actions by the USDA.

[3]This organization is also called the Office International des Epizooties, or "OIE." It is responsible for the development of standards and recommendations regarding animal health and "zoonoses" (diseases that are transmissible from animals to humans). *See* 70 Fed.Reg. at 463.

Disease Status of Canada Because of BSE, 68 Fed.Reg. 31939 (May 29, 2003). Though Canada had instituted its own feed ban in 1997, it was likely that the cow had been exposed before the ban and that the disease had incubated for a period of years.[4] The USDA estimates that the disease has an incubation period of two to eight years. 70 Fed.Reg. at 470.

In August 2003, the agency partially changed course and announced that certain "low-risk" cattle products could be imported from Canada, including meat from cows under 30 months of age. *See*70 Fed.Reg. at 536. In November 2003, it also announced a proposed rule creating a new category of "minimal risk" regions-a category that would include Canada and possibly other countries. *See Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities,* 68 Fed.Reg. 62386 (Nov. 4, 2003).

Shortly before the comment period on this rule was to end, a Canadian-born cow in Washington state was diagnosed with BSE, likely caused by feed ingested before the Canadian feed ban went into effect. The USDA reopened the comment period in March with an expiration date of April 7, 2004. *See Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities,* 69 Fed.Reg. 10,633 (Mar. 8, 2004). By the close of the comment period, the agency had received 3,379 comments. *See*70 Fed.Reg. at 465.

On January 4, 2005, after a struggle with R-CALF over an interim regulation,[5] the USDA published the Final Rule, which modified

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[4]Scientists thus far believe that BSE is caused by protein-based infectious agents called "prions." 70 Fed.Reg. at 461.

[5] The USDA had moved, without public notice, to expand the types of ruminant products eligible to be imported from Canada. R-CALF sued to prevent this move, and the district court granted a temporary restraining order on April 26, 2004. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. United States Dep't of Agriculture,* 2004 WL 1047837 (D.Mont. April 26, 2004). The USDA included a formal version of this amendment in the Final Rule but ultimately suspended its

(continued...)

existing regulations to allow imports of Canadian cattle under 30 months of age for purchase by feedlots or meat packing companies. *See id.* at 548; 9 CFR §§ 93.420, 93.436, 94.0, 94.18, 94.19, 95.4; *R-CALF II,* 415 F.3d at 1090 n. 10.The rule at this stage also allowed in Canadian beef products from cattle of all ages. 70 Fed.Reg. at 494.

Shortly after the rule was published, two older cows in Alberta were diagnosed with BSE, and the USDA attributed the disease to contaminated feed manufactured before the Canadian feed ban. The USDA then announced its intention to suspend the part of the rule that would relax the ban on meat from cattle over 30 months old. *See Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities; Partial Delay of Applicability,* 70 Fed.Reg. 12,112 (March 11, 2005).

The Final Rule was set to go into effect on March 7, 2005, but was blocked by a preliminary injunction from the district court in *R-CALF I*, a ruling stemming from related proceedings in this case.

Prior Proceedings

On January 10, 2005, six days after the Final Rule was published, R-CALF filed a complaint alleging that the USDA's rulemaking violated the Administrative Procedure Act (APA), the Regulatory Flexibility Act, and the National Environmental Policy Act. It applied for a preliminary injunction, which the district court granted on March 2, 2005. *See R-CALF I,* 359 F.Supp.2d at 1074.The district court found that R-CALF had demonstrated a likelihood of success on its claim that the rule was arbitrary and capricious, in violation of the APA. *See*5 U.S.C. § 706(2). While an initial appeal to this court was pending, the parties filed cross-

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[5](...continued)
implementation. *See Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities; Partial Delay of Applicability,* 70 Fed.Reg. 12,112 (March 11, 2005).

motions for summary judgment with the district court.

We reversed the preliminary injunction ruling on July 14, 2005, and issued a final amended opinion on August 17, 2005. *See R-CALF II,* 415 F.3d 1078. (We found that the district court had not accorded adequate deference to the USDA's determinations and concluded that the agency "had a firm basis for determining that the resumption of ruminant imports from Canada would not significantly increase the risk of BSE to the American population." *Id.* at 1095.

In light of this order and opinion, the district court postponed, and ultimately never scheduled, a hearing on the cross-motions for summary judgment. It denied R-CALF's motion for summary judgment, and granted summary judgment to the USDA on April 5, 2006.

The district court's order set out the deferential standard of review and provided only one paragraph of analysis. It quoted this court's holding in *R-CALF II,* and then stated: "Based upon this, the District Court's hands are tied. The Ninth Circuit has instructed this court to 'abide by this deferential standard,' and 'respect the agency's judgment and expertise.'" It offered no analysis of the record, which had been supplemented several times while the preliminary injunction appeal was pending.

R-CALF filed its timely appeal of the district court's decision on June 2, 2006. Only the APA claim is before us.

A Second Remand is Unnecessary

R-CALF argues that the district court improperly determined it was bound by our decision reversing the preliminary injunction, and therefore R-CALF requests that we remand to the district court for analysis of the record that was developed in support of the motion for summary judgment.

R-CALF correctly points out that the ruling on the motion for a preliminary injunction "leaves open the final determination of the merits

of the case." *Ross-Whitney Corp. v. Smith Kline & French Labs.,* 207 F.2d 190, 194 (9th Cir.1953). This rule acknowledges that "decisions on preliminary injunctions are just that-preliminary-and must often be made hastily and on less than a full record." *S. Or. Barter Fair v. Jackson County,* 372 F.3d 1128, 1136 (9th Cir.2004) (citation omitted).

Accordingly, the district court should abide by "the general rule" that our decisions at the preliminary injunction phase do not constitute the law of the case. *See id.*; *see also City of Anaheim v. Duncan,* 658 F.2d 1326, 1328 n. 2 (1981). Any of our conclusions on pure issues of law, however, are binding. *See This That And The Other Gift And Tobacco, Inc. v. Cobb County,* 439 F.3d 1275, 1284-85 (11th Cir.2006); 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4478.5 (2002) ("A fully considered appellate ruling on an issue of law made on a preliminary injunction appeal ... become[s] the law of the case for further proceedings in the trial court on remand and in any subsequent appeal."). The district court must apply this law to the facts anew with consideration of the evidence presented in the merits phase. *See Ross-Whitney,* 207 F.2d at 199; *accord Washington Capitols Basketball Club, Inc. v. Barry,* 419 F.2d 472, 476 (9th Cir.1969).

This administrative law case presents a thornier issue because this court has reviewed the administrative record for the purpose of the injunction, and, with some narrow exceptions, neither we nor the district court may consider any other evidence. *See Asarco, Inc. v. U.S. E.P.A.,* 616 F.2d 1153, 1160 (9th Cir.1980). For summary judgment, R-CALF has presented only new, extra-record evidence, of arguable relevance to this court's review. Still, technically, the district court was not bound by our earlier conclusions.

Though the district court erroneously determined otherwise, remand is not the only option available at this stage of the litigation. Our review of a summary judgment order proceeds de novo, *see The Lands Council v. Powell,* 395 F.3d 1019, 1026 (9th Cir.2005), and in administrative

appeals, where the court reviews only the record before the agency, "[t]he factfinding capacity of the district court is ... typically unnecessary to judicial review of agency decisionmaking." *Fla. Power & Light Co. v. Lorion,* 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985). Simply put, this court's task on appeal is the same as the district court's task in the initial review: "Both courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *Id.*

Because all of R-CALF's new evidence is outside the administrative record and of very limited use, and because we agree with amici that extension of this litigation will aid R-CALF in its attempt to "create, on a rolling basis, a one-sided evidentiary record that supersedes USDA's administrative record," Brief of the Government of Canada at 15, we decide to reach the merits of this case.

Legal Standard

Under the APA, an agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We must determine whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *City of Sausalito v. O'Neill,* 386 F.3d 1186, 1206 (9th Cir.2004) (citation omitted). This standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Indep. Acceptance Co. v. California,* 204 F.3d 1247, 1251 (9th Cir.2000) (citations omitted).

In its paradigmatic statement of this standard, the Supreme Court explained that an agency violates the APA if it has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

The USDA's Rulemaking Process

The Animal Health Protection Act authorizes the Secretary of Agriculture to ban imports of animals if "necessary to prevent the introduction ... of any pest or disease of livestock." 7 U.S.C. § 8303. We previously remarked that the statutory language "indicate[s] a congressional intent to give the Secretary wide discretion in dealing with the importation of plant and animal products." *R-CALF II,* 415 F.3d at 1094. The statute does not contain a strict requirement that the USDA eliminate all risk that BSE will enter the country. *Id.*

The Final Rule at issue in this case establishes a lower tier of import restrictions for regions that pose a "minimal-risk" of exporting BSE to the United States. Though the World Organization for Animal Health would have based any lower-risk designation on the statistical incidence rate of BSE in a given country, the USDA disagreed with "holding a country to a rigid criterion without consideration of compensatory risk reduction measures," such as surveillance programs. 70 Fed.Reg. at 464. The agency instead defined a minimal-risk region as one that had (1) implemented risk mitigation measures (including import restrictions, surveillance and a feed ban) before BSE was detected in the country, (2) conducted an epidemiological investigation after BSE was detected, and (3) took additional risk mitigation measures after the BSE outbreak. *See*9 C.F.R. § 94.0. The USDA did not establish numerical criteria.

The agency accordingly designated Canada as a "minimal-risk region" based on the following documents, actions and considerations:

• Regulations in the U.S., specifically the bans on the use of "specified risk materials" in human food from cattle over 30 months old, and the ban on meat from non-ambulatory cattle. 70 Fed.Reg. at 466.

• The 2003 Revised Harvard-Tuskegee Study of BSE risk in the U.S., which concluded that there was a "very low risk" of BSE becoming established domestically if it were introduced. The study found that bans

on U.K.-imported cattle and feed bans were the most effective measures to prevent BSE introduction, and that the biggest risks for human exposure to BSE were non-compliance with the feed bans, use of other infected farm animals in feed, and use of high-risk tissues in products for human consumption. *Id.* at 467.

• A memorandum from researchers at the Harvard Center for Risk Analysis, which updates the model from the Harvard-Tuskegee Study. *Id.*

• Measures taken by Canada prior to the discovery of BSE in 2003, including import restrictions on U.K. cattle and Canada's 1997 feed ban. Because most infected cattle show clinical signs of BSE within seven years of infection, any cattle born before the feed ban would show clinical signs before the time of the Final Rule and therefore would be detected by surveillance. *Id.* at 467-68.

• A 2002 assessment of BSE risk in Canada, finding that the 665 cattle imported from Europe between 1979 and 1997 resulted only in a "low potential" for introduction of BSE infection. *Id.* at 468.

• A 2003 epidemiological investigation and report after BSE detection, which found little exposure to BSE and determined that Canada's protective measures were effective and proposed additional measures. *Id.*

• Additional measures taken in Canada, including a ban on specified-risk materials from cattle at slaughter, a new epidemiological investigation, and increased surveillance. *Id.* at 468-69.

• The agency's update to its own risk analysis of Canada that provides a more detailed analysis of its rules and their application to Canada. *Id.* at 469.

In its later affirmation of the Final Rule, the USDA emphasized that "the cumulative effect of all the measures in place in Canada and the United States ... is an extremely effective set of interlocking,

overlapping and sequential barriers to the introduction and establishment of BSE in the United States." *Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities; Finding of No Significant Impact and Affirmation of Final Rule,* 70 Fed.Reg. 18,252, 18,255 (April 8, 2005).

We endorsed this holistic approach at the preliminary injunction phase, when we chose to "evaluate the cumulative effects of the multiple, interlocking safeguards" instead of following a "divide and conquer" strategy. *R-CALF II,* 415 F.3d at 1095. Because this approach represents a legal conclusion about the construction of the regulations, it is the law of the case, and therefore we adopt it for our decision now.

R-CALF's Allegations

R-CALF initially brought five claims for declaratory and injunctive relief but appeals only on the basis of its first APA claim, in which it argues that the Final Rule is arbitrary and capricious because it is based on faulty assumptions about the efficacy of the American and Canadian feed and import restrictions.

As we evaluate each argument under this claim, we will consider whether R-CALF's new evidence is relevant to our review. It is an established rule that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). Under limited circumstances, however, extra-record evidence can be admitted and considered.

At the district court level, extra-record evidence is admissible if it fits into one of four "narrow" exceptions: (1) if admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) if the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain

technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith. *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.,* 100 F.3d 1443, 1450 (9th Cir.1996) (internal punctuation omitted). R-CALF also relies heavily on one statement in the case law that extra-record information might be admitted if it tends to show that the agency relied on assumptions that were "entirely fictional or utterly without scientific support." *Ass'n of Pac. Fisheries v. E.P.A.,* 615 F.2d 794, 812 (9th Cir.1980).

In *Asarco, Inc. v. U.S. E.P.A.,* 616 F.2d 1153 (9th Cir.1980), the benchmark case on this issue in this circuit, the district court had held a four-day hearing, which included testimony from two experts who had not helped the agency make the challenged decision. This court disapproved because this testimony was "plainly elicited for the purpose of determining the scientific merit of the EPA's decision." *Id.* at 1161. Considering evidence outside this record is inappropriate, we explained, because it "inevitably leads the reviewing court to substitute its judgment for that of the agency." *Id.* at 1160. Under the APA, courts must refrain from de novo review of the action itself and focus instead on the agency's decision-making process. *Id.* at 1158.

Under these principles, R-CALF's arguments can only carry the day if they show flaws in the USDA's approach, rather than in its predictions. We address each of R-CALF's arguments in turn below.

1) The BSE Incidence Rate in Canada: R-CALF argues that the agency relied on a Canadian report that used an insufficient sample size based on data collected in 2001, before the Canadian and American BSE-infected cows were discovered. The district court agreed, *R-CALF I,* 359 F.Supp.2d at 1065-66, but we held that the district court improperly substituted its judgment for the agency's, *see R-CALF II,* 415 F.3d at 1097. We found that the USDA had based its calculations on international standards, and that the World Organization for Animal Health had ranked Canada in its minimal risk range in 2003. *Id.* at 1098.

R-CALF argues now that "data not available during the preliminary

injunction proceedings and appeal indicate, if anything, an increasing prevalence of BSE, with five of the nine cases in Canadian-born cattle having been diagnosed in just the past year." R-CALF argues that this post-decision empirical data shows that the USDA was relying on faulty assumptions that lacked scientific support.

While these new incidents are certainly cause for concern, they do not suggest that the agency made an incomplete or unreasoned review of the evidence before it in 2004. The agency was entitled to rely on the reasonable opinion of its experts at that time, *see Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989), and the agency continues to monitor BSE in Canada, *see Bovine Spongiform Encephalopathy; Minimal-Risk Regions; Importation of Live Bovines and Products Derived From Bovines,* 72 Fed.Reg. 1102 (Jan. 9, 2007). Because the Final Rule does not anticipate an incidence rate of zero in Canada or the U.S., these subsequent BSE cases do little to impugn the agency's decision-making process. If recent cases have cast doubt on the agency's scientific predictions, the proper remedy is to petition to reopen rulemaking under 5 U.S.C. § 553(e), not to challenge the existing rule as arbitrary and capricious.[6]

2) The Effectiveness of the Canadian Feed Ban: R-CALF argues that BSE may be transmitted through blood and saliva, not just contaminated feed, that one of the BSE-infected cows was rendered into feed, and that the recent diagnoses of BSE show that the feed ban is not working because of alleged non-compliance. The district court credited this argument, *see R-CALF I,* 359 F.Supp.2d at 1066-67, but we held that the agency had properly considered and rejected these alternative theories of transmission. *R-CALF II,* 415 F.3d at 1098. We also held that it was appropriate for the agency to assume the longer incubation rates for BSE in Canada to explain the more recent cases of infected cattle. *Id.*

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[6] R-CALF's related argument about the risk of BSE entering the United States also fails for these reasons.

R-CALF now argues that the recent incidents of BSE in cows born after the feed ban prove that the feed ban is ineffective. It also argues that a government study on the U.S. feed ban shows some noncompliance. *See* United States Government Accountability Office, *Mad Cow Disease-FDA's Management of the Feed Ban Has Improved, but Oversight Weaknesses Continue to Limit Program Effectiveness,* Feb. 2005. It also refers to a statement by Secretary Johanns suggesting that there are "questions that must be answered" about the number of BSE incidents in Canada and remarking that South Korea has continued to close its borders to American beef. These post-decisional statements are far outside the record and of little persuasive weight.

Though these recent incidents in younger cattle certainly cast doubt on the effectiveness of the feed ban, the agency-at the time it made its decision-properly relied on studies from both the World Organization for Animal Health and the Harvard Center on Risk Analysis finding that feed bans were the most effective way to prevent the spread of BSE, *see*70 Fed.Reg. at 463, 467, and, again, considered them as a part of a system of safeguards, not as a sole preventative measure. It bears repeating that the agency did not assume 100 percent effectiveness of its measures. *See*70 Fed.Reg. at 511.

In a related argument, R-CALF claims that the agency incorrectly assumed that the Canadian feed ban, which exempted products made from animal blood or fat, would be as effective as the European feed ban, which does not have these exemptions. The agency expressly considered this argument and rejected it because Canada's feed ban was equivalent to the feed ban in the United States, which also allowed these products. 70 Fed.Reg. at 491. The agency's research showed that about 96% of the "infectivity" of any given cow was contained in certain tissues, and that the only examples of blood transmission of BSE occurred in blood transfusions. *Id.*

As we noted in our preliminary injunction ruling, the agency properly relied on studies rejecting the idea of transmission through tallow, and we held that the district court erred when it criticized the "gaps" in the Canadian feed ban. *See R- CALF II,* 415 F.3d at 1099.

R-CALF does not offer any evidence or arguments to support a different result at this phase. In light of the science available at the time, the agency's partial reliance on the feed ban was justified.[7]

Finally, R-CALF argues that the agency showed its own lack of confidence in the feed ban when it suspended the part of the Final Rule allowing meat products from cattle over 30 months old. This argument fails as well. While the Final Rule prohibited importing *cattle* over 30 months of age, *see*9 C.F.R. §§ 93.436(a)(1), (b)(1), and banned the use of specified risk materials from cows over 30 months of age, *see*9 C.F.R. 310.22(a)(1), it allowed meat products from cattle of any age, *see*70 Fed.Reg. at 494. The Final Rule, however, stated that international guidelines recommended allowing meat from cattle of any age as long as there were measures in place to segregate highly infective tissues from the nervous system. *Id.*[8]

Two months after issuing the Final Rule, the agency decided to suspend this part of the rule and continue to ban beef derived from older cattle. *See*70 Fed.Reg. 12,112. It essentially left in place the pre-2004 practice of allowing in meat from cattle under 30 months of age. *See*70 Fed.Reg. at 536.

R-CALF argues that this change of heart shows the agency's "lack of confidence" in its initial assumptions about the effectiveness of the feed ban, the ban on specified risk materials, and the BSE incubation period.

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[7] For these reasons, we also reject R-CALF's related argument that the agency assumed that cattle under 30 months old would not be infected with BSE because this claim is an implicit attack on assumptions about the feed ban.

[8] It did not provide a citation to any provision from the World Organization for Animal Health guidelines, and the current guidelines do not appear to "recommend" allowing beef imports from older cattle. *See* OIE Terrestrial Animal Health Code, 2.3.13.10 (stating that meat products may be imported from cattle that were born after the imposition of an appropriate feed ban). *See* http://www.oie.int/downld/SC/2007/en-chapitre-2.3.13.pdf.

To be considered by the courts, however, this evidence would have to show a “lack of reasons” for the parts of the rule that are currently being challenged, rather than a subsequent “lack of confidence” in them. R-CALF has failed to make a connection between the uncertainty about this provision and the lack of justification for any other provisions of the Final Rule.

3) Blood Transmission: R-CALF claims that the agency incorrectly assumed that the ban on “specified risk materials” in products for human consumption would eliminate the risk of BSE in spite of information that BSE can also be transmitted by blood that affects other tissues. R-CALF points out that the agency continues to ban fetal bovine serum, *see*70 Fed.Reg. at 502-03, but, it argues, inconsistently permits the use of tallow in cattle feed, *see id.* at 500-01.

The agency's commentary in the Final Rule explains that fetal bovine serum “might pose a risk for livestock if used in certain applications such as bovine vaccine production or bovine embryo transfer, or for other products brought into direct exposure with ruminants.” 70 Fed.Reg. at 502. In *R-CALF II,* we noted the special risk posed by the serum because it is injected directly into the bloodstream. *R-CALF II,* 415 F.3d at 1099. The agency's ban on fetal bovine serum represents caution in the face of unknown risk. It does not imply a more general finding of risk from feed products that may have come into contact with cattle blood. As the agency explains in the Final Rule, cattle blood only appears to pose a risk when it is directly transfused into other cattle. *See* 70 Fed.Reg. at 491. Regarding the agency's decision to allow imports of tallow, the agency was entitled to follow international standards and previous practices requiring that the tallow be protein-free and accompanied by certification. *See id.* at 501. In light of our previous endorsement of the feed ban, we find that the agency has justified its different treatment of tallow, fetal bovine serum, and cattle feed.

R-CALF, in a similar vein, argues that the agency's subsequent rule prohibiting imports of pregnant cattle shows that it has since come to recognize the possibility of other types of BSE transmission. *See Bovine*

Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities; Technical Amendments, 71 Fed.Reg. 12,994 (Mar. 14, 2006). However, we previously adopted the agency's interpretation that the Final Rule, even before the amendments, banned breeding cattle. *See R-CALF II,* 415 F.3d at 1099. Moreover, the amendments specifically state that the agency is merely clarifying the Final Rule. 71 Fed.Reg. at 12,994. R-CALF is therefore incorrect that the Final Rule did not ban breeding cattle.

The agency fully considered the possibility of other types of BSE transmission and gave reasons for banning some products and not others. Its analysis satisfies our review.

4) Ban on Specified Risk Materials. R-CALF argues that more recent science shows that the ban on these cattle parts will be less effective than the agency assumed. We previously endorsed the agency's reliance on this ban because its decision was based on the Harvard-Tuskegee Study. *See R-CALF II,* 415 F.3d at 1099.[9] As R-CALF's summary judgment motion points out, the study's authors have since revised their certainty about the ban from 95% to 80%. The agency has also acknowledged the scientists' downward adjustment. *See Substances Prohibited From Use in Animal Food or* Feed, 70 Fed.Reg. 58,570, 58,587 (Oct. 6.2005). This post-decisional revision, however, does not show that the agency, at the time it made its decision on the Final Rule, failed to consider relevant factors or rested its decision on completely baseless assumptions.[10]

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[9]R-CALF has also submitted a declaration from Dr. Stanley Prusiner, who discovered the "prions" that cause BSE. Dr. Prusiner makes several conclusions that run counter to the findings of the Harvard-Tuskegee study but, as in *Asarco,* this declaration serves only to attack the merit of the agency's decision and does little to suggest flaws in the process leading up to that decision.

[10] We previously held that the agency's reliance on this study gave it a "firm basis" for its assumptions that R-CALF's speculative arguments did little to undermine. *See*

(continued...)

5) Other Arguments: R-CALF argues that the agency assumed that non-ambulatory cattle (who are more likely to have BSE) will not be slaughtered for human consumption, but the agency stated in the Final Rule that Canada does not allow non-ambulatory cattle to be slaughtered for export, 70 Fed.Reg. at 491, and R-CALF offers no reason to distrust that statement.

R-CALF also argues that the agency relied on the Harvard-Tuskegee study's findings of low risk without considering the risk of errors and mislabeling. We find that the agency considered these risks and found them covered by existing regulation and monitoring by the USDA. *See*70 Fed.Reg. at 499.

Finally, on summary judgment, R-CALF contends that, overall, the agency's actions were contrary to the purposes of the Animal Disease Risk Assessment, Prevention and Control Act of 2001, Pub.L. No. 107-9, 115 Stat. 11, which requires the Secretary of Agriculture to submit a report to Congress on the USDA's plans to research and monitor BSE and gauge the effectiveness of its prevention measures. This argument was not pled in the complaint, and in any event is unavailing. The Act merely requires a report on these factors, and the USDA continues to provide these reports.

Therefore, under the APA standard of review, none of the claims as stated in R-CALF's complaint warrant remand to the agency.

Conclusion

Having reviewed the merits of this case, we conclude that the agency considered the relevant factors and articulated a rational connection between the facts found and its decision to designate Canada a minimal-risk country. R-CALF's extra-record evidence has failed to convince us that the agency's review was unauthorized, incomplete, or otherwise improper. The district court's order granting summary judgment to the

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[10](...continued)
R-CALF II, 415 F.3d at 1095.

USDA is therefore

AFFIRMED.

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HEIN HETTINGA AND ELLEN HETTINGA D/B/A SARAH FARMS, ET AL. v. USDA.
Civil Action No. 06-1637 (RJL).
Court Decision.
Filed July 31, 2007.

(Cite as 518 F.Supp.2d 58).

AAMA – M.R.E.A. – Injunction – Bill of attainder – Equal protection – Exhaustion of administrative remedies.

Petition is a producer-handler of fluid milk products in the Arizona distribution region. Petitioner alleged various constitutional challenges to the Secretary's new milk volume rule which (due to its market advantage) adversely affected only Petitioner as a producer-handler. The court granted summary judgement against Petitioner for failure to exhaust its administrative remedies under 7 USC § 608c(15)(A) *(see Edaleen Dairy* 467 F 3d 778) even when bringing constitutional challenges citing *Ruzicka v. US*, 329 U.S. 294. Petitioners had objected to the Secretary's promulgated rule which for the first time removed the producer-handler exemption for dairies with fluid milk distributions greater than 3 million pounds of milk per month.

United States District Court, District of Columbia.

MEMORANDUM OPINION

RICHARD J. LEON, District Judge.

Plaintiffs, Hein and Ellen Hettinga d/b/a Sarah Farms, seek to have this Court declare unconstitutional two provisions of the Milk Regulatory Equity Act of 2006, Pub.L. No. 109-215, 120 Stat. 328 (Apr. 11, 2006) (the "MREA") and to permanently enjoin the application of that statute to plaintiffs. Before this Court is the United States' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. For the following reasons, this Court GRANTS defendant's motion to dismiss for lack of subject matter jurisdiction.

BACKGROUND

The Agricultural Marketing Agreement Act of 1937 as amended, 7 U.S.C. § 601, *et seq*. (the "AMAA"), empowers the Secretary of

Agriculture to regulate "handlers," who are persons who handle agricultural commodities, including milk products. *See id.*§ 608c(*l*)-(2). The purposes of this regulation were to establish and maintain orderly marketing conditions for agricultural commodities, *see id.* § 602(1), to protect consumers of agricultural commodities, *see id.* § 602(2), and to avoid unreasonable fluctuations in supplies and prices by maintaining an orderly supply of agricultural products, *see id.* § 602(4). The AMAA authorizes the Secretary of Agriculture to establish milk marketing orders to regulate different geographic regions of the country, and to guarantee dairy farmers (*i.e.* "producers") a minimum uniform price for milk sold to handlers. *See id.*§§ 608c(1), (5), Pursuant to the AMAA, the Secretary of Agriculture has issued milk marketing orders for many geographic regions of the United States, including Order 131, which governs the Arizona geographic region. *See, e.g.,*7 C.F.R. §§ 1131.1-.86 (providing regulations specific to Order 131).

Historically, the pooling and pricing systems established by federal milk marketing orders did not apply to an entity that is both the producer and the handler of the milk, known as a "producer-handler," because such entities were typically small and had little impact on the milk market. *See Edaleen Dairy, LLC v. Johanns,* 467 F.3d 778, 780-82 (D.C.Cir.2006). However, in February 2006, the Secretary of Agriculture redefined the producer-handler exception for Order 131 (the Arizona geographic region) so that large producer-handlers are no longer exempt from the Order's pooling and pricing requirements. *See* Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas; Order Amending the Orders, 71 Fed.Reg. 9430 (Feb. 24, 2006). The USDA concluded that "large producer-handlers have and use a pricing advantage that cannot be overcome by fully regulated handlers [and that this] advantage increases only as producer-handler size increases." 70 Fed.Reg. 74166, 74187 (Dec. 14, 2005).

Enacted on April 11, 2006, the MREA amends and supplements the AMAA. *See*Pub.L. No. 109-215, 120 Stat 328 (Apr. 11, 2006). The purpose of the MREA is "[t]o ensure regulatory equity between and

among all dairy farmers and handlers for sales of packaged fluid milk." *Id.* At issue in this case are subsections (M) and (N) of Section 2(a) of the MREA (now codified at 7 U.S.C. § 608c(5)(M)-(N)) that place volume limits on the applicability of the "producer-handler exception." Subsection (M) regulates the sale of fluid milk into geographic regions with state-law minimum prices for milk (such as California) by handlers located in federally regulated milk marketing areas (such as Arizona). Under this subsection, milk handlers who import milk into a region governed by state minimum milk prices "shall be subject to all of the minimum and uniform price requirements of a Federal milk marketing order ... applicable to the county in which the plant of the handler is located"7 U.S.C. § 608c(5)(M)(i). Producer-handlers with monthly fluid milk disposition of less than three million pounds are exempted from this rule. *Id.* § 608c(5)(M)(iv). Subsection (N) applies a similar limit of three million pounds of milk per month to the producer-handler exception for the Arizona geographical region (Order 131). *Id.* § 608c(5)(N).

Plaintiffs, Hein and Ellen Hettinga d/b/a Sarah Farms and their family partnership GH Dairy, allege that they own, control, and operate Sarah Farms, which processes and markets more than three million pounds of milk produced from plaintiffs' own farms in the Arizona milk marketing area (Order 131) and a second, independent plant in Yuma, Arizona that sells all of the milk it processes into California. (Am. Compl. ¶¶ 11-12, 17-17.1.) Plaintiffs further allege that they are the only producer-handler in Order 131 with monthly milk sales over three million pounds. (*Id.* ¶ 17.)

Plaintiffs assert that Section 2(a) of the MREA violates the Bill of Attainder Clause because it "singles out plaintiffs for legislative punishment" for their past conduct. (*Id.* ¶¶ 54-57.) Plaintiffs also allege that the MREA violates the Due Process Clause "by imposing a mandatory statutory punishment upon the operation of their business." (*Id.* ¶ 61.) Finally, plaintiffs argue that Section 2(a) of the MREA denies them equal protection "by specifically singling them out for adverse treatment that is extended to no other producerhandler in any other Milk Marketing area." (*Id.* ¶ 65.)

ANALYSIS

A. Legal Standard

Defendant brings this Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In reviewing a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, and Rule 12(b)(6) for failure to state a claim, the Court must accept all well-pleaded allegations as true, construing them in the light most favorable to the plaintiff. *See Kalil v. Johanns,* 407 F.Supp.2d. 94, 96-97 (D.D.C.2005); *Menkes v. Dept. of Homeland Sec.,* 402 F.Supp.2d 204, 207 (D.D.C.2005). While the Court must construe the complaint liberally in determining whether the Court has subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), *see Scandinavian Satellite Sys., AS v. Prime TV Ltd.,* 291 F.3d 839, 844 (D.C.Cir.2002) (citing *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 508 n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)), it is still the plaintiff's burden to demonstrate jurisdiction, *Tremel v. Bierman & Geesing, L.L.C.,* 251 F.Supp.2d 40, 43 (D.D.C.2003). In resolving a motion to dismiss under Rule 12(b)(1), a court may consider materials outside the pleadings. *See EEOC v. St. Francis Xavier Parochial Sch.,* 117 F.3d 621, 624-25 n. 3 (D.C.Cir.1997).

B. Lack of Subject Matter Jurisdiction

The United States argues that plaintiffs' claims are barred because they did not comply with the administrative remedies required for challenges to milk marketing orders. The Agricultural Marketing Agreement Act of 1937 ("AMAA") plainly requires any handler seeking to challenge an order of the secretary related to milk marketing or "the obligations imposed in connection therewith" as being "not in accordance with law," must first exhaust the administrative remedies

available through petition to the Secretary of Agriculture.[1] 7 U.S.C. § 608c(15)(A) ("Section 15(A)"). It is well-established in our Circuit that this exhaustion requirement is mandatory, and a failure to comply will result in dismissal. *United States v. Ruzicka,* 329 U.S. 287, 294, 67 S.Ct. 207, 91 L.Ed. 290 (1946) ("And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture."); *Edaleen Dairy,* 467 F.3d at 785 ("Consistent with this long line of cases, we hold that the AMAA's administrative appeal process is a mandatory procedure that handlers must follow prior to seeking judicial review of a milk marketing order."); *Hershey Foods Corp. v. Dep't of Agric.,* 293 F.3d 520, 526-27 (D.C.Cir.2002) (upholding dismissal of case where plaintiff did not exhaust the mandatory Section 15(A) administrative remedies).

Plaintiffs' claims here are subject to this mandatory exhaustion requirement because they challenge the "obligations imposed in connection" with a milk marketing order brought on by the enactment of subsections (M) and (N). The MREA itself contains no requirement that plaintiffs must pay into the pricing pool, rather, the MREA requires an order by the Secretary to be effective. Milk Regulatory Equity Act of 2005, 109 P.L. 215, 120 Stat. 328 (April 11, 2006), codified at 7 U.S.C. § 608c(5)(N) (stating that in order to "accomplish the expedited implementation of these amendments ... the Secretary of Agriculture shall include in the pool distributing plan provisions of each Federal milk marketing order ... a provision that a handler described in subparagraph (M) of such section, ... will be fully regulated by the order in which the handler's distributing plant is located"). Thus, in response to the MREA, the Secretary hypothetically could have terminated the Arizona-Las Vegas Order, essentially rendering the MREA ineffective against Sarah Farms, but, instead, the Secretary reissued the order with amendments. Milk in the Northeast and Other Marketing Areas, 71

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[1] The Agricultural Marketing Agreement Act of 1937 ("AMAA") states:

> 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.7 U.S.C. § 608c(15)(A).

Fed.Reg. 28248, 28249 (May 16, 2006). Accordingly, because the MREA cannot be implemented as to plaintiffs without an order by the Secretary, any challenge to the validity of the MREA is essentially a challenge to that order by the Secretary, and, therefore, the mandatory exhaustion requirement of Section 15(A) applies.

Moreover, our Circuit Court has recently held that producer-handlers, such as plaintiffs, must first exhaust their administrative remedies pursuant to Section 15(A) before bringing an action in federal court. *Edaleen Dairy,* 467 F.3d 778. In that case, a large producer-handler operating in the Pacific Northwest challenged the decision by the Secretary that lifted the exemption for the pricing and pooling requirements for large producer-handlers in the Pacific Northwest and Arizona-Las Vegas areas. The *Edaleen* court explicitly held that the exhaustion of administrative remedies required by the AMAA is mandatory and cannot be excused. *Edaleen,* 467 F.3d at 784-85 (citing *Hershey Foods,* 293 F.3d 520; *Am. Dairy of Evansville v. Bergland,* 627 F.2d 1252 (D.C.Cir.1980); *Benson v. Schofield,* 236 F.2d 719 (D.C.Cir.1956)).

Finally, plaintiffs argue that they do not have to exhaust their administrative remedies because the Secretary has no further expertise than this Court in interpreting the constitutionality of the statute. However, the Supreme Court has held that even when bringing constitutional challenges to an order by the Secretary pursuant to the AMAA, a handler must first exhaust his administrative remedies with the Secretary. *Ruzicka,* 329 U.S. at 294, 67 S.Ct. 207 ("Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture"). Accordingly, plaintiffs here must exhaust their mandatory administrative remedies before they may seek relief from this Court. Having failed to do so, this Court lacks jurisdiction and hereby dismisses plaintiffs' amended complaint.

CONCLUSION

For the foregoing reasons, this Court GRANTS defendant's Motion to Dismiss plaintiff's claims for lack of subject matter jurisdiction. An appropriate Order consistent with this ruling accompanies this Opinion.

FINAL JUDGMENT

For the reasons set forth in the Memorandum Opinion above, it is this 31st day of July, 2007, hereby

ORDERED that the motion to dismiss filed by defendant the United States of America is GRANTED, and it is further

ORDERED that this case is dismissed.

SO ORDERED.

WHITE EAGLE COOPERATIVE ASSOC., DEAN MARTIN D/B/A CRD DAIRY FARMS, ERIE COOPERATIVE ASSOCIATION, INC., FAMILY DAIRIES USA, NATIONAL ALL-JERSEY, INC., LANCO DAIRY FARMS COOPERATIVE, CENTRAL EQUITY MILK COOPERATIVE, INC., AND CONTINENTAL DAIRY PRODUCTS, INC. v. USDA AND DAIRY FARMERS OF AMERICA, INC., MICHIGAN MILK PRODUCERS ASSOC., INC., NFO, INC., LAND O'LAKES, INC., DAIRYLEA COOPERATIVE INC., AND DEAN FOODS COMPANY, INTERVENORS.
No. 3:05-CV-620 AS.
Court Decision.
Filed August 21, 2007.

(Cite as: 508 F.Supp.2d 664).

AMMA – APA – RFA – Milk marketing rules – Producer-handler.

Unlike handlers or producer-handlers, under 7 U.S.C. 608c(15(A), milk producers do

not have automatic standing to challenge USDA milk marketing rules. Petitioners, as producers, achieve standing when - unless there is clear and convincing evidence of a contrary legislative intent that court should restrict judicial review - they assert a claim that they are members of a class within the zone of interests of the legislation. The court will not grant summary judgment to USDA if Petitioners can allege a "concrete" economic injury shown with an offer of competent proof and shown by a casual relationship that the injury complained of will be redressed by a favorable decision. Petitioner alleged that the Emergency final Milk Marketing rule failed to follow an expert recommendation and thus was arbitrary and capricious and unsupported by the evidence. Court dismissed Petitioner's allegation that, due to the source of their salaries, dairy program employees had a pecuniary interest (albeit minor) in the writing of the rules and in addition, Petitioner had failed to timely raise the influence issue. Court dismissed Petitioner's allegation that the USDA had violated the Regulatory Flexibility Act (RFA) in that USDA had certified that the regulation had no disparate impact on small entities and that this factual basis reasonably supports the agency's conclusions. Court dismissed Petitioner's unsupported allegation and lack of cited legal authority that the Agency's issuance of "Emergency Rules" were invalid under A.P.A. when the agency, (1) broke with established practice and, (2) [the rule was] unsupported by evidence. Perfunctory arguments, unsupported, and undeveloped arguments are waived.

United States District Court
N.D. Indiana, South Bend Division.

MEMORANDUM OPINION AND ORDER

ALLEN SHARP, District Judge.

This matter is before the Court on various dispositive motions filed by the parties. Specifically, this Court considers the following motions: (1) Defendants Mike Johanns, Secretary of the United States Department of Agriculture ("Secretary") and the United States Department of Agriculture's ("USDA" or "agency") (collectively "Government Defendants") Motion to Dismiss or in the Alternative Motion for Summary Judgment (Docket No. 101) filed on July 21, 2006; (2) Intervenor/Defendant Dean Foods Company's Motion for Summary Judgment (Docket No. 110) filed on October 2, 2006; (3) Intervenor/Defendants Dairy Farms of America, Dairylea Cooperative, Inc., Land O'Lakes, Inc., Michigan Milk Producers Association, Inc., and NFO, Inc.'s (collectively, with Dean Foods Company, "Intervenor Defendants") Motion for Summary Judgment (Docket No. 113) filed on October 2, 2006; and (4) Plaintiffs White Eagle Cooperative

Association, Dean Martin d/b/a CRD Dairy Farms, Erie Cooperative Association, Inc., Family Dairies USA, National All-Jersey, Inc., Lanco Dairy Farms Cooperative, Central Equity Milk Cooperative, Inc., and Continental Dairy Products, Inc.'s (collectively "plaintiffs") cross-motion for Summary Judgment on Count I (Docket No. 118) filed on November 7, 2006. Because Defendant Dean Foods and the Intervenor Defendants rely on and incorporate the Government Defendants' Motion for Summary Judgment, including both the statement of material facts and certain legal arguments, all motions filed by all Defendants (collectively "Defendants") are addressed simultaneously. Oral arguments were heard on these motions in South Bend, Indiana on March 9, 2007, and the issues have been fully briefed.

I. STATEMENT OF FACTS

This case concerns a milk marketing order promulgated under the Agricultural Marketing Agreement Act ("AMAA"). The marketing system governing many dairy farmers ("producers") and milk handlers is extremely intricate, causing one appellate court judge to remark, "the 'milk program' is exquisitely complicated.... The milk problem is so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government." *Queensboro Farms Products v. Wickard* 137 F.2d 969, 974-75 (2d Cir.1943).

The basic idea behind the milk marketing scheme is as follows:

> federal milk regulation may be perhaps most easily understood by remembering one principle: all federally regulated Grade A milk is treated equally. Regardless of whether it becomes the finest cream or the lowliest milk powder, the AMAA provides that the dairy farmer will receive the same minimum price for the farmer's milk.

Lois Bonsal Osler, *An Overview of Federal Milk Marketing Orders,* 5 San J Ag. LRev. 67, 68 (1995). Fortunately, beyond the above description, this Court need not delve into the intricacies of the milk

marketing scheme, except to note that the minimum price paid to dairy farmers is regulated and governed by regional Milk Marketing orders, which are promulgated by the USDA. *See Alto Dairy v. Veneman,* 336 F.3d 560, 562-65 (7th Cir.2003) (providing a thorough summary of the federal scheme regulating the price of milk and, in particular, the Mideast region of the system).

The relevant facts in this case are as follows: on February 17, 2005 the USDA published a hearing notice in the *Federal Register,* scheduling a hearing in Wooster, Ohio to convene on March 7, 2005 (Pl. Br. 91 at 14), *see also*70 Fed.Reg. 8043 (Feb. 17, 2005); 70 Fed.Reg. 10337 (Mar. 3, 2005). The hearing notice explicitly stated that employees of the Office of the Market Administrator of the Mideast Milk Marketing Area would be participating in the decision-making process. (Pl. Br. 91 at 14). *See also*70 Fed.Reg. 8043 (Feb. 17, 2005). The salaries of the employees of the Mideast Milk Marketing Area ("Dairy Program employees") are indirectly paid by producers, who are charged a fee, which then goes into a pool out of which the Market Administrator pays the salaries of Dairy Program employees (Pl. Br. 118, 13-14)

During the March, 2005 hearing, the plaintiffs actively participated and representatives of the cooperative testified. (Pl. Br. 91 at 14). Four months later, on July 17, 2005 the USDA published a tentative partial decision. 70 Fed.Reg. 43335. Then on September 26, 2005 the USDA announced that the order had been approved by a referendum of eligible producers and was published on October, 1, 2005. 70 Fed.Reg. 56113.

On September 26, 2005, the plaintiffs sent a letter to the USDA alleging that Dairy Program employees who work for the Mideast Milk Marketing Area had a pecuniary interest in the proceeding (Pl. Br. 91 at 17). The final partial decision was published on January 23, 2006. 71 Fed.Reg. 3435 (2006). Later that same year, plaintiffs brought the present action.

II. STANDARD OF REVIEW[1]

A. *SUMMARY JUDGMENT STANDARD OF REVIEW*

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only if there is no genuine issue as to any material fact, the trial court has properly construed the claims, and the moving party is entitled to judgment as a matter of law. *Lockwood v. American Airlines Inc.,* 107 F.3d 1565, 1576 (Fed.Cir.1997). *See also Nebraska v. Wyoming,* 507 U.S. 584, 590, 113 S.Ct. 1689, 123 L.Ed.2d 317 (1993); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In deciding a motion for summary judgment, a court must view all facts in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *NUCOR Corp. v. Aceros Y Maquilas de Occidente,* 28 F.3d 572, 583 (7th Cir.1994).

The moving party bears the burden of identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" that the moving party believes demonstrate an absence of genuine issue of material fact. *Celotex,* 477 U.S. at 323, 106 S.Ct. 2548. Once this burden is met, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *Becker v. Tenenbaum-Hill Assocs., Inc.,* 914 F.2d 107, 110 (7th Cir.1990); *Schroeder v. Lufthansa German Airlines,* 875 F.2d 613, 620 (7th Cir.1989). "[A] party who bears the burden of proof on a particular issue may not rest on its pleading, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact which requires trial." *Beard v. Whitley County REMC,* 840 F.2d 405, 410 (7th Cir.1988). Therefore, if a party fails to establish the existence of an essential element on which

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[1] For purposes of the standards of review, Defendants argue that if the Court determines that it possesses subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), then the Court should consider dismissal of the complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted, or in the alternative, enter summary judgment in favor of the pursuant to Fed.R.Civ.P. 56. Further, plaintiffs filed a cross-motion for summary judgment on Count I.

the party bears the burden of proof at trial, summary judgment is proper.

When parties file cross motions for summary judgment, each motion must be assessed independently, and denial of one does not necessitate the grant of the other. *M. Snower & Co. v. United States,* 140 F.2d 367, 369 (7th Cir.1944). Rather, each motion evidence only that the movant believes it is entitled to judgment as a matter of law on the issues within its motion and that trial is the appropriate course of action if the court disagrees with that assessment. *Miller v. LeSea Broadcasting, Inc.,* 87 F.3d 224, 230 (7th Cir.1996).

B. *MOTION TO DISMISS STANDARD OF REVIEW*

Fed.R.Civ.P. 12(b)(1) and (h)(3) authorize the court to dismiss claims for lack of subject matter jurisdiction. If a plaintiff cannot establish standing to sue, then relief from this court is not possible, and a dismissal under Fed.R.Civ.P. 12(b)(1) is the appropriate disposition. *See American Fed'n of Gov't Employees, Local 2119 v. Cohen,* 171 F.3d 460, 465 (7th Cir.1999).

In ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(1) for want of standing, the district court must accept as true all material allegations of the complaint, drawing all reasonable inferences therefrom in the plaintiff's favor. *Lee v. City of Chicago,* 330 F.3d 456, 468 (7th Cir.2003) (*citing Retired Chicago Police Assoc. v. City of Chicago,* 76 F.3d 856, 862 (7th Cir.1996, *r'hrng denied, cert. denied*)). The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing the required elements of standing. *Retired Chicago Police Assoc.,* 76 F.3d at 862 (*citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Those elements are (i) an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized and, thus, actual or imminent, not conjectural or hypothetical; (ii) a causal relationship between the injury and the challenged conduct, such that the injury can be fairly traced to the challenged action of the defendant; and (iii) a likelihood that the injury will be redressed by a favorable decision. *See Lujan,* 504 U.S. at

560-61, 112 S.Ct. 2130. If standing is challenged as a factual matter, the plaintiff must come forward with "competent proof"-that is a showing by a preponderance of the evidence-that standing exists. *Retired Chicago Police Assoc.,* 76 F.3d at 862.

A motion under Rule 12(b)(6) challenges the sufficiency of the complaint, and dismissal of an action under the rule is warranted only if "no relief could be granted under any set of facts that could be proved consistent with the allegations." *DeWalt v. Carter,* 224 F.3d 607, 612 (7th Cir.2000).

In *Cler v. Illinois Educ. Ass'n,* the Seventh Circuit has clearly cautioned courts to consider Fed.R.Civ.P. 12(b)(6) along with Fed.R.Civ.P. 8:

> Working hand in glove with Rule 12(b)(6) is Fed.R.Civ.P. 8, subsection (a) of which requires a plaintiff's complaint to contain a "short and plain statement" of his claim and the basis for federal jurisdiction, and subsection (f) of which instructs the courts that "[a]ll pleadings shall be so construed as to do substantial justice." Rule 8(a) thus requires only a "short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *DeWalt v. Carter,* 224 F.3d 607, 612 (7th Cir.2000). In this regard, the Supreme Court has cautioned that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson,* 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *see also Luckett v. Rent-A-Center, Inc.,* 53 F.3d 871, 873 (7th Cir.1995) ("District judges must heed the message of Rule 8: the pleading stage is not the occasion for technicalities.").

Cler v. Illinois Educ. Ass'n., 423 F.3d 726, 729-30 (7th Cir.2005).

Therefore, along with the liberal construction given to a complaint, combined with the minimal notice pleading requirements of Rule 8 and

this Court's obligation to draw all reasonable inferences in the non-moving party's favor, the Rule 12(b)(6) motion is considered.

Where, however, matters outside the pleadings were presented to and not excluded, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56. *Tri-Gen Inc. v. International Union of Operating Engineers, Local 150, AFL-CIO,* 433 F.3d 1024, 1029 (7th Cir.2006) (*citing*Fed.R.Civ.P. 12(b)). Adequate notice is provided when the moving party frames its motion in the alternative as one for summary judgment. *Tri-Gen Inc.,* 433 F.3d at 1029 (citations omitted).

Here, the government defendant's motion was framed in the alternative and adequate notice was provided. Because this Court considered matters outside the pleadings, all motions ruled on herein are treated as motions for summary judgment.

III. DISCUSSION

A. *SUBJECT MATTER JURISDICTION*

1. ***Constitutional Standing***

Under Article III of the United States Constitution, before a plaintiff may seek redress in court, he or she must have standing. U.S. Const. art. III. To have standing, plaintiffs must show three things: (1) injury in fact, (2) causation, and (3) redressability. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 103-04, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Yet, when a case involves procedural rights, the traditional elements of standing are slightly altered. First, with regard to redressibility, the requirement is lessened. *Lujan,* 504 U.S. at 573 n. 7, 112 S.Ct. 2130. ("[t]he person who has been accorded a procedural right to protect his

concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."); *Heartwood, Inc. v. U.S. Forest Service,* 230 F.3d 947, 952 (7th Cir.2000) (holding that plaintiffs had standing without addressing redressibility because they had alleged a procedural injury that was connected to a concrete harm). Second, according to *Lujan,* the injury requirement in a procedural rights case requires more than merely a procedural harm; instead there must be a concrete harm connected to the procedural harm. *Lujan,* 504 U.S. at 571-72, 112 S.Ct. 2130.

In the present case, plaintiffs have Article III standing to bring their claims. They have asserted a concrete harm by claiming that they have suffered an economic injury due to the regulation at issue making it more difficult for member dairy producers to qualify their milk as producer milk (Pl. Br. 117 at 5); *see also Family & Children's Cnt'r, Inc. v. School City of Mishawaka,* 13 F.3d 1052, 1058 (7th Cir.1994) (holding that even a minor or non-economic injury will satisfy Article III standing). Further, under *Heartwood* and *Lujan,* whether or not their alleged harm would be redressed by their prayer for relief is irrelevant since plaintiffs's claims involve procedural rights under the Administrative Procedures Act and the Regulatory Flexibility Act.

2. ***Standing under the Administrative Procedures Act***

Similarly, this court finds that plaintiffs have standing under the Administrative Procedure Act ("APA"). Unlike milk handlers, who are explicitly given standing to challenge Milk Marketing Orders promulgated under the Agriculture Adjustment Act ("AAA"), milk producers must assert standing under the APA. Specifically, the APA states that a plaintiff has standing to challenge an administrative action (1) when the plaintiff has been, "aggrieved by agency action within the meaning of a relevant statute" and (2) where the statute does not preclude judicial review. 5 U.S.C. § 702, 5 U.S.C. § 701.

However, under the APA, courts will only find that a statute precludes judicial review "upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict

access to judicial review. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Further, courts will infer the right of judicial review under the APA where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized. *Barlow v. Collins,* 397 U.S. 159, 167, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970).

In 1941, only four years after the passage of the Agriculture Adjustment Act of 1937, the Supreme Court reviewed the legislative history of the AAA.*Stark v. Wickard,* 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944); *see also, Cohens v. Virginia,* 6 Wheat. 264, 19 U.S. 264, 419, 5 L.Ed. 257 (1821) (holding that "great weight has always been attached, and very rightly attached, to contemporaneous exposition"). In *Stark,* the court concluded that the purpose of Milk Marketing Orders promulgated under the AAA is to protect milk farmers-producers. *Stark,* 321 U.S. at 306-07, 64 S.Ct. 559; *Alto Dairy v. Veneman,* 336 F.3d 560, 567 (7th Cir.2003). Thus, not only is judicial review of milk marketing orders not prohibited by the AAA, but protecting producers is clearly within the statutory objectives of the scheme.

Further, numerous circuits have held that producers have the right to challenge milk marketing orders under the APA. *See Alto Dairy v. Veneman,* 336 F.3d at 569; *Farmers Union Milk Marketing Coop. v. Yeutter,* 930 F.2d 466, 474 (6th Cir.1991, *r'hrng denied*); *Minn. Milk Producers Ass'n v. Madigan,* 956 F.2d 816, 818 (8th Cir.1992). Accordingly, because plaintiffs are alleging that they have been aggrieved by government defendants' actions and because the AAA does not preclude judicial review as to producers, this court holds that plaintiffs have standing under the APA to raise their claims against the defendants.

B. *MERITS*

Moving onto the merits of the case, the plaintiffs have raised six

claims against the USDA each of which will be discussed in turn.

1) ***Pecuniary Interests***

Plaintiffs' first allegation is that the government defendants violated the Administrative Procedures Act and the Due Process Clause of the Fifth Amendment when they allowed Dairy Program employees with a pecuniary interest in the proceeding to participate in the decision making process regarding the promulgation of the regulations at issue in the case. (Pl. Br. 91 at 23-24). The crux of plaintiffs' pecuniary interest argument is that USDA Dairy Program employees have an improper pecuniary interest in pleasing producers because producers could vote to abolish the milk marketing scheme, thus eliminating Dairy Program employees' jobs. (Pl. Br. 84 at 24).

Both the plaintiffs and the government defendants filed motions for summary judgment on the issue, and the intervening defendants filed motions in support of the government defendants' motion for summary judgment. (Pl Br. 118, 119; Def. Br. 101, 102; Intervening Def. Br. 110, 111, 124; Intervening Def. Br. 113, 114).

Specifically, the defendants argues that they are entitled to summary judgment on the pecuniary interest claim because: (1) plaintiffs are procedurally barred from bringing the pecuniary interest claim because they did not raise the claim by affidavit at the administrative hearing, (2) the pecuniary interest is too indirect and speculative, (3) Dairy Program employees with the alleged pecuniary interest were not the final decision makers in the proceeding, and (4) the proceeding was legislative, not judicial in function, thus holding the government to a lower standard of pecuniary interest. (Def. Br. 102, 3-14).

Having carefully considered the arguments of the plaintiffs, and the defendants, this Court rules as follows.

a. Substance of the Pecuniary Interest Claim

Generally, when an adjudicator has a “direct, personal, and

substantial pecuniary interest in the outcome of a case," due process is abrogated. *Tumey v. Ohio,* 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927). Further, under the APA, "The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner." 5 U.S.C. § 556(b). Finally, under the rules governing milk marketing orders, the regulations state that, "No judge who has any pecuniary interest in the outcome of a proceeding shall serve as judge in such proceeding." 7 C.F.R. § 900.6(a).

Only a handful of cases deal with persons having a pecuniary interest in issuing milk marketing orders, none of which are directly on point with plaintiffs' allegations. *See e.g. New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission,* 198 F.3d 1 (1st Cir.1999, *cert. denied*); *Johnson v. Milk Marketing Board,* 295 Mich. 644, 295 N.W. 346 (1940). Nonetheless, in finding no improper pecuniary interest in *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission,* the First Circuit Court of Appeals focused on three points, each of which is instructive in analyzing the alleged pecuniary interest at hand. *Northeast Dairy,* 198 F.3d at 13-14.

First, the court in *Northeast Dairy* indicated that it was more tolerant of pecuniary interests when a commission's functions are legislative rather than judicial. *Northeast Dairy,* 198 F.3d at 13 (stating that while a plaintiff, "has no constitutional right to be regulated by a board that is sympathetic ... he does have a constitutional right to a fair and impartial hearing in any disciplinary proceeding conducted against him by the board."*quoting Friedman v. Rogers,* 440 U.S. 1, 18, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979, *r'hring denied*)).

Though plaintiffs now argue that the rule-making procedure at issue is judicial, their arguments do not comport with the Seventh Circuit's holding in *Brown v. McGarr,* in which the court held that whether a proceeding qualifies as judicial or legislative depends upon several factors, with a proceeding being more likely to be adjudicative when: (1) the action applies to specific individuals, (2) the proceeding concerns

disputed facts, and (3) the action does not determine policy but instead decides a specific dispute. *Brown v. McGarr,* 774 F.2d 777, 780 (7th Cir.1985). Instead, according to the factors set forth in *Brown,* the rule-making proceeding at issue here is legislative because (1) it applied to all milk producers within the Northeast Region rather than specific, named individuals, (2) the proceeding concerned general facts regarding the nature of the dairy industry in the mid-east market, rather than disputed facts, and (3) the action's purpose was to determine USDA policy with regard to pooling requirements, not to resolve a specific dispute between litigants. Accordingly, because the rule-making proceeding at issue was legislative, the court will not hold the defendants to the heightened scrutiny that applies to claims of bias in judicial proceedings.

Additionally, *Northeast Dairy* is instructive in indicating what persons could properly serve on a board, stating that, "Industry representation on a regulatory board is a common and accepted practice." *Northeast Dairy,* 198 F.3d at 13-14; *but see Gibson v. Berryhill,* 411 U.S. 564, 579, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973) (holding that where a person is subject to a board of adjudicators who are the person's competitor, due process is violated).

Although plaintiffs have not proven that the Dairy Program employees actually wrote and lobbied for the Milk Marketing Order in question, the defendants have filed a motion for summary judgment on the issue. Therefore, this court will look at the facts in the most favorable light for the non-moving party and will assume that the Dairy Program employees had a decisive role in promulgating the order. *See e.g. Smith v. Fruin,* 28 F.3d 646, 650 (7th Cir.1994), *cert denied* 513 U.S. 1083, 115 S.Ct. 735, 130 L.Ed.2d 638 (1995); *Brennan v. Daley,* 929 F.2d 346, 348 (7th Cir.1991). Yet the Dairy Program employees in question are not plaintiffs' competitors as was the case in *Gibson.* In fact, they are not even industry representatives, which the *Northeast Dairy* court acknowledged were acceptable persons to serve on regulatory boards. Thus, the fact that Dairy Program employees participated in the promulgation of a Milk Marketing order does not automatically violate due process. Instead this Court must look to any

underlying interest to determine whether it is improper.

To that end, the *Northeast Dairy* court is instructive in determining when an interest is an improper pecuniary interest such that due process is violated. *Northeast Dairy,* 198 F.3d at 13 (stating, "Participation of adjudicators who 'might conceivably have had a slight pecuniary interest,'... does not offend due process."*quoting Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986)).

Plaintiffs claim that there is a direct pecuniary interest in this case because the salaries of USDA Dairy Program employees are paid by producers and handlers (Pl. Br. 119 at 15). However, this argument misses the mark-as plaintiffs' own statement of facts points out, producers are charged a fee, which then goes into a pool out of which the Market Administrator pays the salaries of Dairy Program employees (Pl. Br. 118, 13-14). This crucial step ensures that Dairy Program employees do not serve at the pleasure of producers as plaintiffs insinuate, but, instead, Dairy Program employees serve at the pleasure of the Market Administrator who is a USDA employee. The fact that Dairy Program employees' salaries are indirectly paid for by producers does not rise to the level of a "direct substantial pecuniary interest."

Moreover, whether producers would have voted to abolish the entire milk marketing system is merely speculative. Thus, this is not a case where there is such high likelihood that the employees might benefit that they would be subject to temptations. *See United States v. Mississippi Valley Generating Co.,* 364 U.S. 520, 560, 81 S.Ct. 294, 5 L.Ed.2d 268 (1961, *r'hring denied*) (stating that the question in ethics cases is, "whether the likelihood that he might benefit was so great that he would be subject to those temptations which the statute seeks to avoid"). Indeed, plaintiffs point to only one instance in the seventy (70) year history of Milk Marketing Orders in which producers threatened to abolish the scheme (Pl. Br. 118 at 19). Therefore, the claim that Dairy Program employees were influenced to promulgate Milk Marketing orders out of fear that producers would vote to abolish the Milk Marketing scheme is merely speculative and does not rise to the level of

the temptation at issue in *Mississippi Valley*.

Thus, because the alleged pecuniary interest depends on the speculative claim that producers would abolish the milk marketing system and on an employment relationship that is indirect at best, any interest Dairy Program employees may have is not a direct pecuniary interest. Thus, their participation in the promulgation of the Milk Marketing order does not offend due process or the APA. Accordingly, summary judgment is **GRANTED** in favor of the defendants on count one of the plaintiffs' amended complaint.

b. Procedural Requirement of the Pecuniary Interest Claim

Though this court has granted summary judgement on the pecuniary interest claim in favor of the defendants on the basis that no such interest exists as a matter of law, the court also finds that plaintiffs still could not prevail on this count because they are procedurally barred from challenging the order due to their failure to file a timely affidavit. *See*5 U.S.C. § 556(b)(3) ("On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case").

The relevant facts as described in plaintiffs' brief are not in dispute and are as follows: in February, 2005, the USDA published hearing notices in the *Federal Register* announcing an upcoming hearing in Wooster, Ohio at which the proposed rules at issue in this case would be debated (Pl. Br. 91 at 14). *See also*70 Fed.Reg. 8043 (Feb. 17, 2005); 70 Fed.Reg. 10337 (Mar. 3, 2005). The hearing notice explicitly stated that employees of the Office of the Market Administrator of the Mideast Milk Marketing Area would be participating in the decision-making process. (Pl. Br. 91 at 14). *See also*70 Fed.Reg. 8043 (Feb. 17, 2005). Plaintiffs actively participated in this hearing, which lasted from March 7, 2005 to March 10, 2005. (Pl. Br. 91 at 14). Nonetheless, plaintiffs did not allege that Dairy Program employees who work for the Mideast Milk Marketing Area had a pecuniary interest in the proceeding until they sent a letter to the USDA on September 26, 2005, over six (6)

months after the administrative proceeding. *Id.* at 17.

Generally, alleged pecuniary interests must be raised as soon as the aggrieved party becomes aware of their existence. *See Marcus v. Director, Office of Workers' Compensation Programs,* 548 F.2d 1044, 1050-51 (D.C.Cir.1976) ("[t]he general rule governing disqualification, normally applicable to the federal judiciary and administrative agencies alike, requires that such a claim be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist"). Thus, by the time plaintiffs first raised the possibility of pecuniary interests in September, 2005, they had already waived their claim by failing to bring it in a timely fashion pursuant to 5 U.S.C. § 556(b)(3).

The plaintiffs make several excuses for their failure to abide by the affidavit requirements of 5 U.S.C. § 556(b)(3), each of which is unavailing.

First, the plaintiffs point to *Stieberger v. Heckler* in arguing that the affidavit was not necessary in this case because it concerns an alleged systemwide bias (Pl. Br. 119 at 11, 12). Yet, the facts of *Stieberger* are distinguishable from the instant case, because in *Stieberger,* it would have been futile for plaintiffs to raise their claims by affidavit because they were alleging that all ALJs in the system were biased, thus there would be no ALJ who could objectively hear the plaintiff's case. *Stieberger v. Heckler,* 615 F.Supp. 1315 (S.D.N.Y.1985; *vacated on other grounds*). However, plaintiffs are only alleging that Dairy Program employees have a pecuniary interest in pleasing producers within their particular district, in this case the Mideast Dairy Program employees. Had plaintiffs raised their pecuniary interest claim by affidavit in February, 2005, when they became aware of the pecuniary interest, the government defendants could have, for example, relied wholly upon Dairy Program employees in their Washington D.C. office who do not work within the system. (Def. Br. 130 at 6); *see also*70 Fed.Reg. 8043 (Feb. 17, 2005) (stating that Dairy Program employees in the Washington office were among the decision-makers in the instant case).

At any rate, unlike *Stieberger,* it would not have been futile for plaintiffs to raise their claims by affidavit.

Additionally, plaintiffs claim that they should be excused from filing the affidavit because they thought that the USDA was going to issue a tentative decision in September rather than a recommended decision (Pl. Br. 119 at 11). Here, as discussed, plaintiffs had already waived their pecuniary interest claim by September, regardless of whether the agency would have issued a tentative or recommended decision, because they should have raised the pecuniary interest claim when they became aware of it in February of 2005. *Marcus,* 548 F.2d at 1050-51 ("[t]he general rule governing disqualification ... requires that such a claim be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist"). Thus, the fact that the government defendants omitted a tentative decision does not excuse plaintiffs from complying with the affidavit requirements of the APA.

Further, plaintiffs rely on *Keating v. Office of Thrift Supervision* in arguing that the affidavit was not necessary in the instant case because the alleged pecuniary interest was already known to the government defendants (Pl. Br. 119 at 10). However, this argument misreads *Keating,* which says nothing about excusing the affidavit requirement when facts regarding a pecuniary interests are a part of the public record.[2] *Keating v. Office of Thrift Supervision,* 45 F.3d 322, 327 (9th Cir.1995, *cert.denied*).

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[2] This Court is in no way stating that there is a pecuniary interest present in the instant case. *See* Part 2.A (detailing the lack of substance in plaintiffs' pecuniary interest claim). Instead, this Court is pointing out that the plaintiffs have misconstrued *Keating,* which lists the need to "assemble and substantiate" the grounds of the pecuniary interest claim as one of the purposes of the affidavit requirement. *Keating,* 45 F.3d at 327. The Keating court goes on to list several other reasons for the requirement, including: (1) the need to allow for recusal of interested parties, (2) to ensure that the party alleging pecuniary interest cannot "wait to see the result of the proceeding before substantiating his or her allegations of bias," and (3) the need to foster solemnity in the proceeding. *Id.* Each of these additional reasons suggest that, by holding plaintiffs to the affidavit requirement, this court is fulfilling the purpose behind 5 U.S.C. § 556(b)(3).

Moreover, numerous Circuit Court decisions have established the purpose of the affidavit requirement. *See Gibson v. Federal Trade Comm'n,* 682 F.2d 554, 565 (5th Cir.1982, *r'hring denied, cert. denied*) (the affidavit "serves not only to focus the facts underlying the charge, but to foster an atmosphere of solemnity commensurate with the gravity of the claim"); *Keating,* 45 F.3d 322, 327 (9th Cir.1995, *cert.denied*) (same); *Marcus v. Director, Office of Workers' Compensation Programs,* 548 F.2d 1044, 1050-51 (D.C.Cir.1976) (holding that the affidavit encourages efficiency in the administrative process by disallowing plaintiffs from mounting pecuniary interests simply because they do not like the outcome). If this Court were to excuse plaintiffs' failure to file a timely affidavit pursuant to the A.P.A., it would negate the numerous purposes behind the requirement, by allowing a party to wait until they have received an unfavorable outcome in order to challenge a bias.

Even reading the facts in favor of the plaintiffs, this Court finds that the Plaintiffs are both substantively and procedurally barred from mounting a pecuniary interest. Accordingly, the defendants are **GRANTED** summary judgment on count one of the amended complaint.

2) ***Violation of the Regulatory Flexibility Act***

Plaintiffs next allege that the government defendants violated the Regulatory Flexibility Act ("RFA") by failing to make a Regulatory Flexibility Analysis, and failing to support its certification with a statement providing the factual basis for the same (Pl. Br. 91 at 24-25).

Congress originally adopted the RFA in order to "encourage administrative agencies to consider the potential impact of nascent federal regulation on small businesses." *Associated Fisheries v. Daley,* 127 F.3d 104, 111 (1st Cir.1997). Specifically, the RFA requires an assessment of the economic and administrative effects a particular administrative action will have on small businesses. 5 U.S.C. § 604(a). However, the RFA goes on to provide an exception to the Regulatory Flexibility Analysis required by § 604(a) by allowing an administrative

agency to forgo the analysis by certifying that a rule does not have a significant impact on a substantial number of small entities. 5 U.S.C. § 605(b).

The decision to certify that a rule does not have a significant impact on a substantial number of small entities is not subject to judicial review and is not before this court. 5 U.S.C. § 611(a); *see also* Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act,* 1982 Duke L.J. 213, 259-60 (1982) (describing the non-reviewability provisions of the RFA). Instead, plaintiffs allege that the support the USDA offered for certifying that the regulation would not affect a substantial number of small entities was inadequate. (Pl. Br. 91 at 24-25).

The defendants responded by arguing the following: (1) plaintiffs cannot challenge the government defendants under the RFA because they are not subject to the regulation that was being promulgated, (2) the government defendants did not need to make a Regulatory Flexibility Analysis because they certified the issue pursuant to 5 U.S.C. § 605(b), and (3) the government defendants' statements in support for certification were sufficient. (Def. Br. 102 at 24-26); *see also*71 Fed.Reg. 3435.

The defendants point out that plaintiffs cannot challenge the USDA under the RFA because milk marketing orders regulate handlers not producers. (Def. Br. 102 at 25); *Lamers Dairy Inc. v. USDA,* 379 F.3d 466, 469 (7th Cir.2004, *cert.denied*) ("Although it protects producers, the AMAA regulates handlers only"). Further, it is undisputed that White Eagle is a cooperative made up of producers and all other plaintiffs are producers. (Pl. Br. 91 at 2-6).

In support of their first argument, the defendants cite *Cement Kiln Recycling Coalition v. EPA,* a case which held that a plaintiff could not challenge an agency under the RFA because the plaintiff was not "subject to" the particular regulation even though the plaintiff was a target of a regulation. (Def. Br. 102 at 25); *Cement Kiln Recycling Coalition v. EPA,* 255 F.3d 855, 869 (D.C.Cir.2001); *see also Mich. v. EPA,* 213 F.3d 663, 697 (D.C.Cir.2000, *cert.denied*); *Motor & Equip.*

Mfrs. Ass'n. v. Nichols, 142 F.3d 449, 467 (D.C.Cir.1998); *Mid-Tex Elec. Coop. v. FERC,* 773 F.2d 327, 342 (D.C.Cir.1985).

This court recognizes that producers are a beneficiary of milk marketing orders and could even be said to be a target of milk marketing orders. *See Block v. Community NutritionInstitute*, 467 U.S. 340, 342, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984) (stating that the "essential purpose [of this milk marketing scheme], is to raise producer prices") *quoting*S.Rep. No. 1011, 74th Cong., 1st Sess., 3 (1935). Were that the extent of the relationship between milk marketing orders and producers, the effect would not be enough to allow plaintiffs to challenge the agency under the RFA.

However, viewing the facts in the light most favorable to the plaintiffs, this court cannot definitively state that producers were not subject to the regulation in question. In fact, the text of the regulation explicitly states, "During March 2005 ... there were 9,767 dairy producers pooled ... by the Mideast order." 71 Fed.Reg. 3435. Further, the regulation change states, "Criteria for pooling are established on the basis of performance levels that ... determine those producers who are eligible to share in the revenue that arises from the classified pricing of milk." *Id.* Thus, even though producers' behavior may not be regulated by the Milk Marketing Order, their eligibility for revenue sharing is. *Id.* Accordingly, despite the Seventh Circuit's statement that "milk marketing orders only regulate handlers" this court declines to hold that plaintiffs were not subject to the regulation such that they could not challenge the government defendants under the RFA. *Lamers Dairy Inc. v. USDA,* 379 F.3d 466, 469 (7th Cir.2004, *cert.denied*).

Moving on to the merits of the RFA challenge, the defendants argue that the USDA did not need to make a Regulatory Flexibility Analysis because the agency certified the issue pursuant to 5 U.S.C. § 605(b), and their factual statement in support for certification was sufficient. (Def. Br. 102 at 24-26).

The USDA's certification and support for its certification can be

found in the department's Final Partial decision which states in relevant part:

> Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The criteria established are applied in an identical fashion to both large and small businesses and do not have any different impact on small entities as opposed to large entities. Therefore, the adopted amendments will not have a significant impact on a substantial number of small entities.
> 71 Fed.Reg. 3435.

Thus, pursuant to § 605(b), the agency published such certification in the Federal Register at the time of publication of the final rule, leaving the only remaining question of whether there was an adequate factual basis for such certification. 5 USC § 605(b).

This court's review of whether or not there was "a statement providing the factual basis for such certification" under § 605(b) is a limited one. For example, courts have upheld agency certification even when the certification fails to mention the number of small entities that the rule would affect. *See e.g. Southwestern Pa. Growth Alliance v. Browner,* 121 F.3d 106, 123 (3rd Cir.1997). Further, the standard of review for agency fact finding is whether there was "substantial evidence" to support a finding. *See Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 850 (D.C.Cir.1970), *cert denied,*402 U.S. 1007, 91 S.Ct. 2191, 29 L.Ed.2d 429 (1971); *Mattes v. U.S.* 721 F.2d 1125, 1128 (7th Cir.1983) ("The Secretary's findings must be sustained if they are supported by substantial evidence which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

In the instant case, this Court is satisfied that the USDA's certification passes the substantial evidence standard because the USDA stated a factual basis for its certification when it stated that the regulation has no disparate impact on small entities and that this factual basis reasonably supports the agency's conclusion that the amendments will not have a significant impact on a substantial number of small entities. Thus, because the USDA did not violate the RFA in certifying

that the amendment will not have a significant impact on a substantial number of small entities, summary judgement is hereby **GRANTED** to the defendants on count two of plaintiffs' amended complaint

3) ***Emergency Rulemaking***

In its third cause of action, plaintiffs allege that the government defendants' issuance of a final decision on an emergency basis violated section 557(b)(2) of the Administrative Procedure Act ("APA") (Pl. Br. 117 at 8). Plaintiffs vehemently argue that the decision to omit a recommended decision is invalid because (1) it broke with established practice and (2) it was unsupported by evidence (Pl. Br. 117 at 8-19). Yet, plaintiffs have failed to cite any persuasive authority for its arguments. *See United States v. Berkowitz,* 927 F.2d 1376, 1384 (7th Cir.1991), *cert. denied* (citations omitted) ("Perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived"). Though this court will look at the facts in the light most favorable to the plaintiffs, the non-moving party, this Court does not bear the obligation of researching and constructing the legal arguments on plaintiffs' behalf. *See Beard v. Whitley County REMC,* 840 F.2d 405, 408-09 (7th Cir.1988).

Both the APA and the rules regulating USDA marketing orders describe circumstances under which an agency may forgo issuing a recommended decision. First, the APA states that a recommended decision may be omitted when "the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires." 5 U.S.C. § 557. Similarly, the rules of practice governing marketing orders states that an agency may omit a recommended decision where "the secretary finds on the basis of the record that due and timely execution of his functions imperatively and unavoidably requires such omission." 7 C.F.R. § 900.12(d).

Further, the APA sets forth the standard under which agency actions-including the decision to omit a recommended decision-should be evaluated, stating that a reviewing court should set aside an agency

action if it is (1) arbitrary and capricious, or (2) unsupported by substantial evidence. 5 U.S.C. § 706.

The Seventh Circuit has interpreted § 706 in such a way that it is very deferential to agencies. *See e.g. Pozzie v. U.S. Dep't of Housing and Urban Development,* 48 F.3d 1026, 1029 (7th Cir.1995) (stating that the arbitrary and capricious standard "presumes agency actions are valid as long as the decision is supported by a rational basis"); *CAE, Inc. v. Clean Eng'g Inc.,* 267 F.3d 660 (7th Cir.2001) (holding that a factual finding satisfies the substantial evidence standard if the record contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *Mt. Sinai Hosp. Med. Ctr. v. Shalala,* 196 F.3d 703, 709 (7th Cir.1999) (holding that an administrative decision will be upheld so long as "there is a rational relationship between the facts as the [Secretary] finds them and [his] ultimate conclusion"). In short, this Court's "sole task is to determine whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been any clear error of judgment." *Pozzie,* 48 F.3d at 1029*quoting Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

This Court has carefully considered the argument of the plaintiffs and the defendants and rules as follows: even construing the relevant facts in the light most favorable to the plaintiffs, the defendants are entitled to judgment as a matter of law.

First, it is undisputed that from the time the USDA issued its tentative partial decision, the secretary maintained that "[t]he unwarranted erosion of the blend price stems from ... the lack of appropriate diversions of milk." 70 Fed.Reg. 43341. The desire to stop the erosion of the blend price of milk within the Mideast market remains the USDA's justification for the emergency rulemaking. (Def. Br. 128 at 18). Thus, the USDA's justification for the omission of a recommended decision is not a post-hoc argument as plaintiffs allege. (Pl. Br. 117 at 13).

Further, plaintiffs' argument that the omission of a recommended

decision is invalid because it was a deviation from past practice is without warrant. Even if the decision to omit a recommended decision is a deviation from past USDA practice, plaintiffs have presented no authority suggesting that this deviation is illegal, and thus this court can find no basis for plaintiffs' deviation argument. *Beard,* 840 F.2d at 408-09.

Finally, plaintiffs' claim that the decision was unsupported by sufficient evidence does not stand up to the standards for reviewing agency fact-finding under § 706 of the APA. As the D.C. Circuit Court of Appeals recently stated it is not the court's role to determine whether an agency's decision was " 'ideal' nor whether it was the most 'appropriate,' but only whether it was 'reasonable'." *Allied Local & Regional Manufactures Caucus v. EPA,* 215 F.3d 61, 73 (D.C.Cir.2000, *cert.denied*). Here, it is undisputed that numerous witnesses, including Edward Gallagher and others, testified that the state of affairs before the emergency rulemaking was resulting in the reduction of the blend price of milk within the region (Tr. 234-235, 394, 452-55, Def. Br. 123 at 14-15). Clearly, the testimony of these individuals presents a rational basis for the agency's decision such that the decision is neither arbitrary and capricious nor unsupported by substantial evidence under § 706 of the APA.

Thus, even construing the facts in the most favorable light to the plaintiffs, the government defendants did not violate the APA or the rules governing marketing orders when it omitted a recommended decision in the present case. Thus, summary judgment is hereby **GRANTED** to the defendants on count three of the amended complaint.

4) ***Delegation of Authority***

Plaintiffs next allege that the government defendants violated the APA and USDA rules of practice when the Secretary of the USDA delegated the authority to Administrator of the Agriculture Marketing Service to issue a final order (Pl. Br. 91 at 25-26). Specifically, the plaintiffs cite a 1940 statute which states "[t]here shall not be in the

Department at any one time more than two officers or employees designated under this section and vested with a regulatory function or part thereof delegated under this section." 7 U.S.C. § 450. However, the delegation at issue is clearly authorized by 7 U.S.C. § 6912, a 1994 statute which states in relevant part "the Secretary may delegate to any agency, office, officer, or employee of the Department the authority to perform any function"7 U.S.C. § 6912(a)(1).

It is undisputed that 7 U.S.C. § 6912 is still good law and that the delegation at issue in the present case fits within the statute's broad allowance of delegation. Further, this court holds that even if the 1940 statute was still controlling, it has not been interpreted to disallow the delegation from the Secretary to administrators. *See e.g. Freeman v. Fidelity-Philadelphia Trust Co.,* 248 F.Supp. 487 (E.D.Pa.1965). Accordingly, because the delegation was authorized by 7 U.S.C. § 6912, summary judgement is hereby **GRANTED** to the defendants on the fourth count of the plaintiffs' amended complaint.

5) ***Violation of the AMAA***

Plaintiffs next allege that the government defendants violated the AMAA when they considered the classification of milk as a condition for eligibility to receive the market blend price. (Pl. Br. 91 at 26). Specifically, in this case the USDA considered the end use of milk as a consideration in determining which dairy farmers are eligible for a particular pool under the milk marketing order. *Id.*

Plaintiffs correctly point out that the AMAA guarantees that prices "for milk purchased from producers ... shall be uniform as to all handlers." 7 U.S.C. § 608c(5)(A). However, as the Seventh Circuit pointed out in *County Line Cheese Co. v. Lyng,* non-pooled milk does not qualify as milk purchased from producers. *County Line Cheese Co. v. Lyng,* 823 F.2d 1127, 1135 (7th Cir.1987); *see also*7 U.S.C. § 608c(5)(B)(ii)(f) (differentiating between "producers" and "dairy farmers not delivering milk to producers"). Thus, plaintiffs' argument that the purpose of the milk marketing system is to ensure price uniformity, fails to recognize that the system only ensures price

uniformity to all milk within a specific pool. *See County Line,* 823 F.2d at 1135 (stating "non-pool milk is not subject to the minimum price requirement and the requirement of uniformity").

Moreover, the regulation at issue does not differentiate the prices that farmers in a particular pool will receive according to the type of milk they produce. Accordingly, because the AMAA does not prohibit differentiating between those producers who are eligible for a specific pool and those who are not, summary judgement is **GRANTED** in favor of the defendants on count five of the plaintiffs' amended complaint.

6) ***Agency Conclusions under § 557 of the APA***

Finally, plaintiffs allege that the government defendants violated § 557 of the APA by failing to consider all relevant factors, thus rendering its final partial decision arbitrary and capricious (Pl. Br. 91 at 27). Section 557(c) of the APA requires an agencies decision to include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c).

This Court's review of an agency decision is a limited one, with decisions being set aside only if they are "arbitrary and capricious, an abuse of discretion, or otherwise not in accord with the law." 5 U.S.C. § 706(2). Further a court is not permitted to reweigh the evidence or to substitute its own judgment for that of the agency. *Howard Young Med. Center, Inc. v. Shalala,* 207 F.3d 437, 441 (7th Cir.2000, *r'hrng denied*). "If a reviewing court can discern 'what the [Department] did and why [the Department] did it,' the duty of explanation is satisfied"*Piney Mt. Coal Co. v. Mays,* 176 F.3d 753, 762 (4th Cir.1999); *see also Bagdonas v. Dep't of Treasury,* 93 F.3d 422, 426 (7th Cir.1996) (stating that while the court has a duty to uphold agency decisions "of less than ideal clarity" the court cannot substitute a rational basis for agency action when one was not given).

In the present case, the government defendants clearly had a

reasonable basis for its decision: it is clear from the plain language of the regulation at issue in this case that the agency promulgated the rule to stop the erosion of the blend price of milk. As was previously established in count three, *supra,* the agency reasonably relied upon witnesses in considering the regulation.

Though plaintiffs argue that the agency's specific findings of fact as to their particular organization are insufficient, the government defendants properly explained why they disagreed (Pl. Br. 117 at 23); *see also*71 Fed.Reg. at 3440 (stating that plaintiffs' argument's "are not persuasive").

Further, plaintiffs argue that the Department failed to consider each of its arguments, yet plaintiffs can point to no authority stating that an agency has to address every argument every witness makes. Indeed, "existing law does not require that an agency make an explicit response to every argument made by a party, but instead requires that issues material to the agency's determination be discussed so that the agency's path may reasonably be discerned by a reviewing court"*Caribbean Ispat Ltd. v. U.S.,* 366 F.Supp.2d 1300, 1307 (Ct. Int'l Trd.2005) (*overturned on other grounds*).

This Court concludes that the USDA's reasoning rises to the level required by *Bagdonas* and *Howard* in providing enough of an explanation of the agency's grounds that this Court can reasonably discern what the USDA did and why the decision was not an abuse of discretion. Further, the USDA's failure to address the nuances of plaintiffs' argument does not render the agency's decision arbitrary and capricious. Accordingly, because the agency's decision was not arbitrary and capricious in violation of the APA, summary judgement is **GRANTED** to the defendants on count six of the plaintiffs' amended complaint.

IV. CONCLUSION

Based on the foregoing analysis, this Court has held as a matter of law that, although plaintiffs have standing, no claim in plaintiffs'

amended complaint can survive summary judgment. As such, defendant's motions (Docket Nos. 101, 110, and 113) are **GRANTED** and plaintiffs' motion (Docket No. 118) is **DENIED.** This case is considered closed, and the Clerk of the Court shall enter judgment in favor of the defendants and against the plaintiffs. Each party will bear its own costs.

SO ORDERED.

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AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

In re: LANCO DAIRY FARMS COOPERATIVE.
2006 AMA Docket No. M-4-1.
Decision and Order.
Filed September 26, 2007.

AMAA – Agricultural Marketing Agreement Act – Milk – Shipping standards – Burden of proof –Meaning of regulations – Deference to the Market Administrator – Trade barriers – Cannons of statutory construction – Petition dismissed.

The Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's dismissal of Lanco's Petition. Lanco challenged the Market Administrator's determinations that Lanco is a "reporting unit," as that term is used in the Northeast Milk Marketing Order (7 C.F.R. § 1001.13(b)(2)), and that, for pooling purposes, Lanco must satisfy the shipping standards specified for a supply plant pursuant to 7 C.F.R. § 1001.7(c). The Judicial Officer stated the burden of proof in a proceeding instituted under 7 U.S.C. § 608c(15)(A) rests with the petitioner, and Lanco failed to meet its burden. The Judicial Officer stated 7 C.F.R. § 1001.13(b)(2) requires, for pooling purposes, handlers described in 7 C.F.R. § 1000.9(c), such as Lanco, to satisfy the shipping standards specified for supply plants pursuant to 7 C.F.R. § 1001.7(c). The Judicial Officer also stated he defers to the Market Administrator because the Market Administrator's construction of the Northeast Milk Marketing Order is entitled to controlling weight, unless it is plainly erroneous or inconsistent with the regulation. Finally, the Judicial Officer found that Lanco's interpretation of 7 C.F.R. § 1001.13(b) would create an economic trade barrier against milk that originates outside the Northeast marketing area because only the reporting units of 7 C.F.R. § 1000.9(c) handlers, which are located outside of the states included in the Northeast marketing area and outside Maine and West Virginia, would be required, for pooling purposes, to satisfy the shipping standards specified for a supply plant, pursuant to 7 C.F.R. § 1001.7(c). The Judicial Officer concluded 7 U.S.C. § 608c(5)(G) precludes adoption of Lanco's interpretation of 7 C.F.R. § 1001.13(b).

Sharlene A. Deskins, for Respondent.
John H. Vetne, Raymond, New Hampshire, for Petitioner.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Lanco Dairy Farms Cooperative [hereinafter Lanco] instituted this proceeding by filing a "Petition Contesting Interpretation and Application of Certain Federal Milk Order Regulations and for Restitution of Obligations and Costs Incurred" [hereinafter Petition] on November 17, 2005. Lanco instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the Agricultural Marketing Agreement Act]; the federal order regulating the handling of milk in the Northeast marketing area[1] (7 C.F.R. pt. 1001) [hereinafter the Northeast Milk Marketing 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).

Lanco seeks: (1) a declaration that the Market Administrator's[2] construction of the term "reporting unit" in 7 C.F.R. § 1001.13(b)(2) is not in accordance with law; (2) a declaration that the meaning of the term "reporting unit" in 7 C.F.R. § 1001.13(b)(2) is the same as the meaning of the term "state units" in 7 C.F.R. § 1001.13(b)(1); (3) a refund of all costs and expenses incurred by Lanco because of the Market Administrator's construction of the term "reporting unit" in 7 C.F.R. § 1001.13(b)(2); and (4) an award of all attorney fees, costs, and expenses incurred by Lanco in connection with the instant proceeding (Pet. ¶ 24).

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[1]The term *Northeast marketing area* refers to a geographic area that includes the states of Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont, and the District of Columbia, as well as all of Maryland except Allegany and Garrett counties, all of New York except those counties and townships specifically excepted, and specified counties in Pennsylvania and Virginia (7 C.F.R. § 1001.2).

[2]The term *market administrator* refers to the United States Department of Agriculture employee responsible for the administration of a federal milk marketing order. The Secretary of Agriculture selects a market administrator for each federal milk marketing order and the market administrator is subject to removal at the Secretary of Agriculture's discretion (7 C.F.R. § 1000.25(a)). The powers and duties of market administrators are specified in 7 C.F.R. § 1000.25(b)-(c). At all times material to this proceeding, Erik Rasmussen was the Market Administrator for the Northeast Milk Marketing Order.

On December 16, 2005, Lloyd Day, Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed "Answer of Defendant": (1) denying the material allegations of the Petition; (2) asserting Lanco failed to state a claim upon which relief can be granted; and (3) asserting the Market Administrator's interpretation of the Northeast Milk Marketing Order is in accordance with law and binding upon Lanco.

On September 26, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] conducted a hearing in Washington, DC. John H. Vetne, Raymond, New Hampshire, represented Lanco. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. On January 11, 2007, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision]: (1) concluding the Market Administrator's interpretation of the Northeast Milk Marketing Order is in accordance with the law; and (2) dismissing Lanco's Petition (Initial Decision at 8).

On February 9, 2007, Lanco filed an appeal petition and a request for oral argument before the Judicial Officer. On March 15, 2007, the Administrator filed a response opposing Lanco's appeal petition and Lanco's request for oral argument. On March 19, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's dismissal of Lanco's Petition. Lanco's exhibits are designated by "PX." Transcript references are designated by "Tr."

DECISION

Discussion

The Issue

The issue to be resolved in this proceeding is whether the Market Administrator's determination that Lanco is a "reporting unit," as that term is used in 7 C.F.R. § 1001.13(b)(2), is in accordance with law. The Administrator contends Lanco is a "reporting unit," as that term is used in 7 C.F.R. § 1001.13(b)(2); consequently, for pooling purposes, Lanco

must satisfy the shipping standards for a supply plant pursuant to 7 C.F.R. § 1001.7(c). Lanco contends it is not a "reporting unit." Lanco asserts the term "reporting unit" has the same meaning as the term "state units" in 7 C.F.R. § 1001.13(b)(1); consequently, the shipping standards for a supply plant in 7 C.F.R. § 1001.7(c) are applicable only to reporting units of 7 C.F.R. § 1000.9(c) handlers which are located outside the states included in the Northeast marketing area and outside Maine and West Virginia.

Burden of Proof

The burden of proof in a proceeding instituted under 7 U.S.C. § 608c(15)(A) rests with the petitioner, and, in order to prevail in this proceeding, Lanco has the burden of proving that the Market Administrator's determination that Lanco is a "reporting unit," as that term is used in 7 C.F.R. § 1001.13(b)(2), is not in accordance with law.[3] I find Lanco has not met its burden.

Facts

Lanco is a "cooperative association"[4] of dairy farmers incorporated in Pennsylvania with its principal place of business in Hagerstown, Maryland. Lanco was formed in 1998 with approximately 30 members. As of the date of the September 26, 2006, hearing, Lanco had

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[3]*United States v. Rock Royal Co-op., Inc.,* 307 U.S. 533 (1939); *Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *In re Stew Leonard's*, 59 Agric. Dec. 53, 69 (2000), *aff'd*, 199 F.R.D. 48 (D. Conn. 2001), *printed in* 60 Agric. Dec. 1 (2001), *aff'd*, 32 F. App'x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002); *In re Garelick Farms, Inc.,* 56 Agric. Dec. 37, 39 (1997); *In re Mil-Key Farm, Inc.,* 54 Agric. Dec. 26, 54 (1995).

[4]The term *cooperative association* means any cooperative marketing association of producers which the Secretary of Agriculture determines: (1) is qualified under the provisions of the Capper-Volstead Act (7 U.S.C. §§ 291-292), (2) has full authority with regard to the sale of milk of its members, and (3) is engaged in the marketing of milk or milk products for its members (7 C.F.R. § 1000.18).

approximately 825 members. (Tr. 12-15; Pet. ¶ 1.) Lanco has been a "handler"[5] since prior to January 1, 2000. Lanco's primary customers for its members' Class I milk[6] historically have been four bottling pool plants,[7] each of which has its own independent suppliers. These four bottling pool plants are: (1) Cloverland-Greenspring, located in Baltimore, Maryland; (2) High Point Dairy, located in Delaware; (3) Harrisburg Dairies, located in Harrisburg, Pennsylvania; and (4) Reddington Farms, located in New Jersey. Their purchases of Lanco's Class I milk are seasonal, in effect making Lanco a supplemental and balancing supplier for those four plants. Lanco also sells milk, which is not Class I milk, to Saputo Cheese. Lanco delivers all of its additional milk, with the exception of deliveries to some small customers, to a pool plant in Laurel, Maryland. (Tr. 16-18.)

Pooling entitles Lanco's members to receive the same blend price as other producers supplying milk to the market, but, in order for Lanco's members to receive the blend price, the milk sold by Lanco must qualify for the market-wide revenue pool as "producer milk"[8] under the Northeast Milk Marketing Order. Qualification for the blend price requires that specified percentages of milk, which vary by season, be included in the pool and limits the amount of milk that can be diverted to nonpool plants. Until June 2005, Lanco qualified for the blend price under the Northeast Milk Marketing Order (Tr. 19-20).

The Northeast Milk Marketing Order provides that the milk received by a handler must satisfy the shipping standards specified for a supply plant, as follows:

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[5]The word *handler* includes any cooperative association with respect to milk that it receives for its account from the farm of a producer and delivers to pool plants or diverts to nonpool plants pursuant to 7 C.F.R. § 1001.13 (7 C.F.R. § 1000.9(c)).

[6]Milk is classified in accordance with its utilization. There are four classifications of milk—Class I milk, Class II milk, Class III milk, and Class IV milk (7 C.F.R. § 1000.40(a)-(d)). Class I milk generally refers to milk used for fluid milk products (7 C.F.R. § 1000.40(a)).

[7]The term *pool plant* is defined in 7 C.F.R. § 1001.7.

[8]The term *producer milk* is defined in 7 C.F.R. § 1001.13.

§ 1001.13 Producer milk.

Producer milk means the skim milk (or skim equivalent of components of skim milk) and butterfat contained in milk of a producer that is:

. . . .

(b) Received by the operator of a pool plant or a handler described in § 1000.9(c) in excess of the quantity delivered to pool plants subject to the following conditions:

(1) The producers whose farms are outside of the states included in the marketing area and outside the states of Maine or West Virginia shall be organized into state units and each such unit shall be reported separately; and

(2) *For pooling purposes, each reporting unit must satisfy the shipping standards specified for a supply plant pursuant to § 1001.7(c)*[.]

7 C.F.R. § 1001.13(b) (emphasis added). Effective June 1, 2005, the Northeast Milk Marketing Order was amended by increasing supply plant shipment requirements in 7 C.F.R. § 1001.7(c) and reducing the volume of producer milk eligible for diversion in 7 C.F.R. § 1001.13(d).[9] The Northeast Milk Marketing Order contains the shipping standards for supply plants, as follows:

§ 1001.7 Pool plants.

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[9]The amendments increasing supply plant shipment requirements in 7 C.F.R. § 1001.7(c) and reducing the volume of producer milk eligible for diversion in 7 C.F.R. § 1001.13(d) were the result of a multi-day, rulemaking hearing which considered a number of amendments regarding the quantity of milk that must be shipped and transferred to a distributing plant in order for the milk to be included in the pool. A rulemaking document containing these proposed amendments to the Northeast Milk Marketing Order was published in the Federal Register on January 31, 2005 (70 Fed. Reg. 4932-55 (Jan. 31, 2005)), and became effective after the proposed amendments received a favorable vote by at least two-thirds of the producers engaged in the production of milk for sale in the Northeast marketing area (70 Fed. Reg. 18,961-63 (Apr. 12, 2005)).

> *Pool plant* means . . . .
>
> . . . .
>
> (c) A supply plant from which fluid milk products are transferred or diverted to plants described in paragraph (a) or (b) of this section subject to the additional conditions described in this paragraph. In the case of a supply plant operated by a cooperative association handler described in § 1000.9(c), fluid milk products that the cooperative delivers to pool plants directly from producers' farms shall be treated as if transferred from the cooperative association's plant for the purpose of meeting the shipping requirements of this paragraph.
>
> (1) In each of the months of January through August and December, such shipments and transfers to distributing plants must not equal less than 10 percent of the total quantity of milk (except the milk of a producer described in §1001.12(b)) that is received at the plant or diverted from it pursuant to § 1001.13 during the month; [and]
>
> (2) In each of the months of September through November, such shipments and transfers to distributing plants must equal not less than 20 percent of the total quantity of milk (except the milk of a producer described in § 1001.12(b)) that is received at the plant or diverted from it pursuant to § 1001.13 during the month[.]

7 C.F.R. § 1001.7(c)(1)-(2).

In early July 2005, the Market Administrator notified Lanco that it had failed to meet the pooling requirements because its deliveries to the Laurel, Maryland, pool plant during the month of June were not qualifying deliveries for meeting pool eligibility requirements. (While the Laurel, Maryland, plant is a pool supply plant, it is not a pool distributing plant). The Market Administrator advised Lanco that these eligibility requirements would not be enforced for June 2005, but they would be enforced beginning in July 2005. (Tr. 19-23.)

On July 13, 2005, Lanco sent the Market Administrator a memorandum requesting reconsideration of the determination that Lanco did not meet pool eligibility requirements in June 2005 and explaining

the hardship that fulfilling the requirements of 7 C.F.R. § 1001.7(c) would cause Lanco (Pet. Attach. A; PX 1). By letter dated July 15, 2005, the Market Administrator reaffirmed his position and rejected Lanco's request for reconsideration (Pet. Attach. B; PX 2). Lanco then sought review by the Dairy Programs Administrator, Agricultural Marketing Service, requesting that he overrule the Market Administrator. In an undated letter, John R. Mengel, the Acting Deputy Administrator, Dairy Programs, affirmed the Market Administrator's position (Pet. Attach. C; PX 3). In July 2005, Lanco also met with, and unsuccessfully pleaded its case to, Dairy Programs personnel, including Dana Coale, John R. Mengel, Gino Tosi, and an individual believed to be Dave Jamison (Tr. 25).

In order to continue to qualify for revenue sharing, Lanco initially made arrangements to meet the pooling requirements by purchasing milk from the independent suppliers to the four bottling plants, delivering Lanco milk to the bottling plants, and delivering the same amount of the purchased independent suppliers' milk to Saputo Cheese (Tr. 21-22). Thereafter, Lanco entered into a contract with Maryland-Virginia Milk Producers, another cooperative association, under which Lanco pays a pooling accommodation fee for the right to divert Lanco's milk to one of Maryland-Virginia Milk Producers' Class I milk customers thereby enabling Lanco to meet the pool qualification requirements (Tr. 32-33). Thus, Lanco's cost of qualification includes the accommodation fee and the increased cost of transportation. Lanco maintains, in order to comply with 7 C.F.R. § 1001.7(c), it has paid pooling accommodation fees and additional transportation costs of $26,000 to $30,000 per month (Tr. 34-38).

Although the locations of all of Lanco's producer-members were not identified, Lanco indicates it has not received any producer milk from dairy farms outside the Northeast marketing area, Maine, and West Virginia (Tr. 15, 55-56).

Meaning of the Northeast Milk Marketing Order

As in any case of statutory or regulatory construction, the analysis begins with the language of the statute or regulation and, where the

statutory or regulatory language provides a clear answer, it ends there as well.[10] The Northeast Milk Marketing Order defines the term "producer milk" as the skim milk (or the skim milk equivalent of components of skim milk) and butterfat contained in milk of a producer that is received by a handler described in 7 C.F.R. § 1000.9(c) in excess of the quantity delivered to pool plants subject to the following conditions—for pooling purposes, each reporting unit must satisfy the shipping standards specified for a supply plant pursuant to 7 C.F.R. § 1001.7(c) (7 C.F.R. § 1001.13(b)(2)). Section 1001.13(b)(2) of the Northeast Milk Marketing Order (7 C.F.R. § 1001.13(b)(2)) makes no reference to 7 C.F.R. § 1001.13(b)(1), the term "reporting unit" is not used in 7 C.F.R. § 1001.13(b)(1), and I find no basis on which to conclude that the term "reporting unit" in 7 C.F.R. § 1001.13(b)(2) has the same meaning as the term "state units" in 7 C.F.R. § 1001.13(b)(1).

I conclude the meaning of the words of 7 C.F.R. § 1001.13(b)(2) requires, for pooling purposes, handlers described in 7 C.F.R. § 1000.9(c), such as Lanco, to satisfy the shipping standards specified for supply plants pursuant to 7 C.F.R. § 1001.7(c).

The Market Administrator's Determination is Accorded Deference

An administrative agency's interpretation of its own regulations will be accorded deference in any administrative proceeding, and an agency's construction of its own regulations has controlling weight, unless it is plainly erroneous or inconsistent with the regulations.[11]

The Market Administrator is responsible for administering the Northeast Milk Marketing Order and making regulations to effectuate the terms of the Northeast Milk Marketing Order (7 C.F.R. § 1000.25(b)(1), (3)). The Market Administrator has been working with milk marketing orders for 33 years. During the period 1990 through

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[10] *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *Freytag v. Comm'r*, 501 U.S. 868, 873 (1991).

[11] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

1999, Mr. Rasmussen was the market administrator for the New England marketing area. On January 1, 2000, the New England marketing area was merged with the New York-New Jersey marketing area and the Middle Atlantic marketing area to form the Northeast marketing area. Mr. Rasmussen has been the Market Administrator for the Northeast Milk Marketing Order since its inception on January 1, 2000 (Tr. 85-87). The Market Administrator was involved in writing 7 C.F.R. § 1001.13(b) and has consistently interpreted the term "reporting unit" in 7 C.F.R. § 1001.13(b)(2) to include handlers, such as Lanco, located in the Northeast marketing area (Tr. 90, 93-94).

It is well settled that an official who is responsible for administering a regulatory program has authority to interpret the provisions of the statute and regulations. Moreover, the interpretation of that official is entitled to great weight.[12]

The doctrine of affording considerable weight to interpretation by the administrator of a regulatory program is particularly applicable in the field of milk. As stated by the court in *Queensboro Farms Products, Inc. v. Wickard*, 137 F.2d 969, 980 (2d Cir. 1943) (footnotes omitted):

> The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts. If ever there was a place for that doctrine, it is, as to milk, in connection with the administration of this Act because of its background and legislative history. The Supreme Court has, at least inferentially, so recognized.

Similarly, in *Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966), the court stated:

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[12]*Lawson Milk Co. v. Freeman*, 358 F.2d 647, 650 (6th Cir. 1966); *In re Stew Leonard's*, 59 Agric. Dec. 53, 73 (2000), *aff'd*, 199 F.R.D. 48 (D. Conn. 2001), *printed in* 60 Agric. Dec. 1 (2001), *aff'd*, 32 F. App'x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 76-77 (1995); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 19 (1990).

> A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority.

I give considerable weight to the Market Administrator's determination that Lanco is a "reporting unit," as that term is used in 7 C.F.R. § 1001.13(b)(2), and required, for pooling purposes, to satisfy the shipping standards specified for a supply plant, pursuant to 7 C.F.R. § 1001.7(c). I do not find the Market Administrator's construction of 7 C.F.R. § 1001.13(b) either plainly erroneous or inconsistent with the Northeast Milk Marketing Order. Therefore, I defer to the Market Administrator's determination.

Effect of Lanco's Interpretation of 7 C.F.R. § 1001.13(b)

Lanco seeks a declaration that the term "reporting unit" in 7 C.F.R. § 1001.13(b)(2) has the same meaning as the term "state units" in 7 C.F.R. § 1001.13(b)(1) (Pet. ¶ 24). The declaration sought by Lanco would create an economic trade barrier against milk that originates outside the Northeast marketing area. Under Lanco's interpretation, only reporting units of 7 C.F.R. § 1000.9(c) handlers, which are located outside of the states included in the Northeast marketing area and outside Maine and West Virginia, would be required, for pooling purposes, to satisfy the shipping standards specified for a supply plant, pursuant to 7 C.F.R. § 1001.7(c). Handlers, as defined in 7 C.F.R. § 1000.9(c), located in the states included in the Northeast marketing area and in Maine and West Virginia, would not be required, for pooling purposes, to satisfy the shipping standards for a supply plant, pursuant to 7 C.F.R. § 1001.7(c) (Tr. 95). This disparity of treatment between handlers in the states included in the Northeast marketing area and in Maine and West Virginia, and handlers outside the states included in the Northeast marketing area and outside Maine and West Virginia, would create an economic trade barrier against milk that originates outside the Northeast marketing area.

The Agricultural Marketing Agreement Act provides that no milk

marketing order shall prohibit or limit marketing, in the area covered by that order, of milk produced in the United States but outside the milk marketing area, as follows:

> **§ 608c. Orders regulating handling of commodity**
>
> . . . .
>
> **(5) Milk and its products; terms and conditions of orders**
>
> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> . . . .
>
> (G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

7 U.S.C. § 608c(5)(G). The Supreme Court of the United States held, in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76 (1962), 7 U.S.C. § 608c(5)(G) prohibits the Secretary of Agriculture from establishing economic trade barriers.[13] Adoption of Lanco's interpretation of 7 C.F.R. § 1001.13(b) would create a trade barrier

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[13]*See also Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 379 (1964) (stating 7 U.S.C. § 608c(5)(G) is intended to prevent the Secretary of Agriculture from setting up trade barriers to the importation of milk from other production areas in the United States); *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 20 (D.C. Cir. 1979) (stating 7 U.S.C. § 608c(5)(G) is addressed primarily to obstacles to the marketing in one area of milk and milk products produced in another area); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315 (3d Cir. 1968) (stating 7 U.S.C. § 608c(5)(G) is designed to ensure that no regulation would be promulgated placing a greater burden on outside milk and milk products entering the market than is placed on milk and milk products within the market; the Secretary of Agriculture may require no more than equal treatment of pool and nonpool milk), *cert. denied*, 394 U.S. 929 (1969).

against milk that originates outside the Northeast marketing area; viz., if the Secretary of Agriculture were to adopt Lanco's interpretation of 7 C.F.R. § 1001.13(b), the Secretary of Agriculture would place a greater burden on outside milk entering the Northeast marketing area than is placed on milk produced in the Northeast marketing area. The Agricultural Marketing Agreement Act (7 U.S.C. § 608c(5)(G)) precludes adoption of Lanco's interpretation of 7 C.F.R. § 1001.13(b).

Lanco's Appeal Petition

Lanco raises two issues in Lanco's Petition of Appeal to the Secretary and Request for Oral Argument on Issues [hereinafter Appeal Petition]. First, Lanco contends the ALJ erred because he did not address the "regulatory history facts," "acknowledge the only rulemaking decision explaining the intent" of 7 C.F.R. § 1001.13(b)(2), or discuss the judicial cannons of regulatory interpretation (Appeal Pet. at 2).

The ALJ did not address the "regulatory history" of or the rulemaking documents explaining the intent of 7 C.F.R. § 1001.13(b)(2) and did not discuss the cannons of statutory construction. I do not find the ALJ's failure to address the regulatory history of or the rulemaking documents explaining the intent of 7 C.F.R. § 1001.13(b)(2) or the ALJ's failure to discuss the cannons of statutory construction, error. Based upon the ALJ's conclusions of law, 7 C.F.R. § 1001.13(b)(2) requires, for pooling purposes, handlers described in 7 C.F.R. § 1000.9(c), such as Lanco, to satisfy the shipping standards specified for supply plants pursuant to 7 C.F.R. § 1001.7(c). I have reviewed Lanco's regulatory history and regulatory construction arguments and find them without merit.

Second, Lanco contends the ALJ mistakenly relied on a 2002 rulemaking proceeding in which neither the content of 7 C.F.R. § 1001.13(b)(2) nor the meaning of 7 C.F.R. § 1001.13(b)(2) was at issue (Appeal Pet. at 2).

The rulemaking proceeding commenced on September 10, 2002, which resulted in amendments to the Northeast Milk Marketing Order, effective June 1, 2005, did not amend 7 C.F.R. § 1001.13(b)(2); however, the ALJ does not indicate that the rulemaking proceeding

commencing September 10, 2002, resulted in an amendment to 7 C.F.R. § 1001.13(b)(2), as Lanco contends. Instead, as the ALJ correctly indicates, the rulemaking proceeding commenced September 10, 2002, resulted in amendments to the Northeast Milk Marketing Order which increased supply plant shipment requirements in 7 C.F.R. § 1001.7(c) and reduced the volume of producer milk eligible for diversion in 7 C.F.R. § 1001.13(d). Therefore, I find the ALJ's reference to the rulemaking proceeding commenced September 10, 2002, was not error.

Lanco's Request for Oral Argument

Lanco's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[14] is refused because the parties have thoroughly briefed the issues and the issues are not complex. Thus, oral argument would serve no useful purpose.

Findings of Fact

1. Lanco is a cooperative association of dairy farmers incorporated in Pennsylvania with its principal place of business in Hagerstown, Maryland.

2. Lanco was formed in 1998 with approximately 30 members. On September 26, 2006, Lanco had approximately 825 members located in Pennsylvania, Maryland, and West Virginia.

3. Lanco markets the raw milk of its members to milk plants in the Northeast marketing area.

4. Lanco has been a handler since prior to January 1, 2000.

5. In order for Lanco's members to receive the same blend price as other producers supplying milk to the market, the milk sold by Lanco must qualify for the market-wide revenue pool as "producer milk" under the Northeast Milk Marketing Order (7 C.F.R. § 1001.13).

6. The Northeast Milk Marketing Order (7 C.F.R. § 1001.13(b)) provides that the milk received by a handler must satisfy the shipping standards specified for a supply plant pursuant to 7 C.F.R. § 1001.7(c).

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[14] 7 C.F.R. § 900.65(b)(1).

7. Prior to June 2005, the milk sold by Lanco qualified for revenue sharing purposes as "producer milk," and Lanco's members received the same blend price as other producers supplying milk to the market.

8. The Northeast Milk Marketing Order was amended, effective June 1, 2005.[15] The amendments increased supply plant shipment requirements in 7 C.F.R. § 1001.7(c) and reduced the volume of producer milk eligible for diversion in 7 C.F.R. § 1001.13(d).

9. In July 2005, the Market Administrator informed Lanco that it had failed to qualify for revenue sharing purposes in June 2005 because it had failed to meet the shipping standards for pooling by shipping the required percentage of milk to a pool distributing plant, as was required by the amendment of the Northeast Milk Marketing Order.[16] The Market Administrator waived the requirement for June 2005, but not for subsequent months.

10. In order to meet the post-amendment shipping standards, Lanco has incurred additional monthly expenses of $26,000 to $30,000 in transportation costs and pooling accommodation fees, from July 2005 through the date of the September 26, 2006, hearing.

Conclusions of Law

1. Lanco has the burden of proof in any proceeding instituted pursuant to 7 U.S.C. § 608c(15)(A). Lanco has failed to meet the burden of proof in this proceeding.

2. Lanco is a "cooperative association" described in 7 C.F.R. § 1000.18.

3. Lanco is a "handler" described in 7 C.F.R. § 1000.9(c) and a "reporting unit," as that term is used in 7 C.F.R. § 1001.13(b)(2).

4. Lanco is required, for pooling purposes, to satisfy the shipping standards specified for a supply plant pursuant to 7 C.F.R. § 1001.7(c).

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[15] 70 Fed. Reg. 18,961-63 (Apr. 12, 2005).

[16] Prior to June 2005, Lanco had qualified for revenue sharing by delivering the required percentages of milk to the Laurel, Maryland, pool supply plant. After June 1, 2005, only deliveries of milk to pool distributing plants qualified to meet the performance standards.

5. The Market Administrator's determination that Lanco is a "reporting unit," as that term is used in 7 C.F.R. § 1001.13(b)(2), is consistent with the language of the Northeast Milk Marketing Order and is in accordance with law.

6. The Market Administrator's determination that Lanco, for pooling purposes, must satisfy the shipping standards for a supply plant pursuant to 7 C.F.R. § 1001.7(c) is consistent with the language of the Northeast Milk Marketing Order and is in accordance with law.

7. The Secretary of Agriculture is precluded by 7 U.S.C. § 608c(5)(G) from granting the declaratory relief requested by Lanco.

For the foregoing reasons, the following Order is issued.

ORDER

1. Lanco's Petition is denied.
2. This Order shall become effective on the day after service of this Order on Lanco.

RIGHT TO JUDICIAL REVIEW

Lanco has the right to obtain review of the Order in this Decision and Order in any district court of the United States in which Lanco has its principal places of business. Lanco must file a bill in equity for the purpose of review of the Order in this Decision and Order within 20 days from the date of entry of the Order in this Decision and Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture.[17] The date of entry of the Order in this Decision and Order is September 26, 2007.

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[17] 7 U.S.C. § 608c(15)(B).

In re: INTERNATIONAL ALMOND EXCHANGE, INC.
AMAA Docket No. 07-0068.
Decision and Order.
Filed December 18, 2007.

Robert A. Ertman for AMS.
William Cowan for Respondent .
Decision and Order by Chief Administrative Law Judge Marc Hillson.

AMAA – Admissions in answer.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This proceeding was instituted under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 et seq. (the "Act"), and the Marketing Order for Almonds Grown in California, 7 C.F.R. Part 981 (the "Order") by a complaint filed by the Administrator, Agricultural Marketing Service ("AMS") United States Department of Agriculture, alleging that Respondent willfully violated the Act and the Order.

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served on the Respondent by certified mail on March 8, 2007. On March 27, 2007, I issued an Order extending the time to answer the complaint to April 24, 2007, "when the Hearing Clerk must receive it." No answer was received by April 24, 2007. On June 15, 2007 Complainant filed a motion that a decision be issued upon reason of default upon admission of facts.

On July 5, 2007, the Hearing Clerk received an answer to the complaint. On July 6, 2007, counsel for Respondent filed an "Objection to Motion for Decision" stating that the late answer should be accepted. Although Respondent's answer was not timely filed, it is undisputed that, following settlement talks, significant payments were made on Respondent's behalf to USDA. Respondent's counsel contends there was a settlement, which Complainant's counsel disputes. Clearly, there is no written settlement agreement. However, the USDA has accepted

substantial payments which Respondent contends is tantamount to a settlement.

The complaint sought a total of $229,625.20 in unpaid assessments, interest and late fees. Respondent contended during an untranscribed telephone conference with me and counsel for Complainant, that in conversations that were held even before the complaint was issued, an agreement was reached whereby Respondent would pay $227,450.58 to Complainant. Respondent subsequently presented evidence, through cancelled checks, that this amount was paid in five increments over a period of approximately six months. Counsel for Complainant stated during the same telephone conference that he had indicated that Complainant would accept such a payment as resolution only if the payment were made promptly and via a single payment. Counsel for Complainant did not have a good explanation as to why Complainant continued to accept the checks if they believed there was no agreement, and Counsel for Respondent did not have a good explanation as to why he did not file an answer.

Since there is neither a timely answer nor a written settlement agreement, the material facts alleged in the complaint, which are admitted by the Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law. However, since it appears that Respondent has paid all but $2,174.62 of the amount alleged by Complainant, I am finding that Respondent owes $2,174.62 in late payments, interest and late fees. In addition while Complainant seeks a civil penalty of $20,000, I find that in light of the payments already made by Respondent a civil penalty of $5,000 is more appropriate. Even though the violations continued over a long period of time, the relatively prompt and complete payment of amounts owed at the time the complaint was filed and counsel for Complainant's concession that he would have accepted the amount Respondent actually paid had it been paid immediately and in a single lump sum constitute a basis for mitigating the civil penalty.

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. Respondent, International Almond Exchange, Inc., is a California corporation and the mailing address is of its principal place of business is 144 Westlake Avenue, Watsonville, California 95076.
2. At all times material hereto, Respondent was a "handler" of California almonds as that term is defined in the Act and the Order.
3. Respondent willfully violated section 981.81 of the Order (7 C.F.R. § 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Almond Board of California ("Board") for the period August 1, through October 31, 2003 (the first assessment billing for the 2003-04 crop year).
4. Respondent willfully violated section 981.81 of the Order (7 C.F.R. § 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Almond Board of California for the period November 1, through December 31, 2003 (the second assessment billing for the 2003-04 crop year).
5. Respondent willfully violated section 981.81 of the Order (7 C.F.R. § 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Board for the period January 1, through March 31, 2004 (the third assessment billing for the 2003-04 crop year).
6. Respondent willfully violated section 981.81 of the Order (7 C.F.R. §981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Board for the period April 1, through July 31, 2004 (the fourth assessment billing for the 2003-04 crop year).
7. Respondent willfully violated section 981.81 of the Order (7 C.F.R. § 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Board for the period August 1, through October 31, 2004 (the first assessment billing for the 2004-05 crop year).
8. Respondent willfully violated section 981.81 of the Order (7 C.F.R. § 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Board for the period November 1, through December 31, 2004 (the second assessment billing for the 2004-05 crop year).
9. Respondent willfully violated section 981.81 of the Order (7 C.F.R.

§ 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Board for the period January 1, through March 31, 2005 (the third assessment billing for the 2004-05 crop year).

10. Respondent willfully violated section 981.81 of the Order (7 C.F.R. § 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Board for the period April 1, through July 31, 2005 (the fourth assessment billing for the 2004-05 crop year).

11. Respondent willfully violated section 981.81 of the Order (7 C.F.R. § 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Board for the period August 1, through October 31, 2005 (the first assessment billing for the 2005-06 crop year).

12. Respondent willfully violated section 981.81 of the Order (7 C.F.R. § 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Board for the period November 1, through December 31, 2005 (the second assessment billing for the 2005-06 crop year).

13. Respondent willfully violated section 981.81 of the Order (7 C.F.R. § 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Board for the period January 1, through March 31, 2006 (the third assessment billing for the 2005-06 crop year).

14. Respondent willfully violated section 981.81 of the Order (7 C.F.R. § 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Board for the period April 1, through July 31, 2006 (the fourth assessment billing for the 2005-06 crop year).

15. Respondent willfully violated section 981.81 of the Order (7 C.F.R. § 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481) by failing to pay when due the assessments invoiced by the Board for the period August 1, through October 31, 2006 (the first assessment billing for the 2006-07 crop year).

16. Respondent willfully violated section 981.81 of the Order (7 C.F.R. § 981.81) and section 981.481 of the Regulations (7 C.F.R. § 981.481)

by failing to pay when due the assessments invoiced by the Board for the period November 1, through December 31, 2006 (the second assessment billing for the 2006-07 crop year).

17. As of November 30, 2006, Respondent owed the Board $172,256.50 in unpaid assessments, $40,782.04 in interest on assessments not paid within 30 days of the invoice date, and $16,568.66 in late payment charges on assessments not paid within 60 days of the invoice date (7 C.F.R. § 981.481).

18. On or about August 31, 2005, Respondent violated section 981.42 of the Order (7 C.F.R. § 981.42), section 981.442 (a)(5) of the Regulations (7 C.F.R. § 981.442 (a)(5)) by failing to dispose on time 16,586 kernel-weight pounds of inedible almonds acquired by respondents during the 2004/2005 crop year.

19. On or about August 31, 2005, Respondent violated section 981.42(a) of the Order (7 C.F.R. § 981.42(a)), section 981.442 (a)(4)(i) of the Regulations (7 C.F.R. § 981.442 (a)(4)(i)), and section 981.442(a)(5) of the Regulations (7 C.F.R. § 981.442(a)(5)) by failing to dispose of 255 kernel-weight pounds of inedible almonds acquired by respondents during the 2004/2005 crop year.

20. On or about August 31, 2005, Respondent violated section 981.42 of the Order (7 C.F.R. § 981.42) and section 981.442(a)(5) of the Regulations (7 C.F.R. § 981.442(a)(5)) by failing to dispose of at least 25% of their true inedible obligation. Their 25% obligation for the 2004/2005 crop year was 7,716 kernel-weight pounds of almonds; Respondents disposed of only 5,451 kernel-pounds.

21. On October 5, 2003, Respondent violated section 981.72 of the Order (7 C.F.R. § 981.72) and section 981.472 of the Regulations (7 C.F.R. § 981.472) by failing to submit on time to the Board a report on ABC Form 1 on the acquisition of almonds.

22. On March 5, 2004, Respondent violated section 981.72 of the Order (7 C.F.R. § 981.72) and section 981.472 of the Regulations (7 C.F.R. § 981.472) by failing to submit on time to the Board a report on ABC Form 1 on the acquisition of almonds.

23. On April 5, 2004, Respondent violated section 981.72 of the Order (7 C.F.R. § 981.72) and section 981.472 of the Regulations (7 C.F.R. § 981.472) by failing to submit on time to the Board a report on ABC Form 1 on the acquisition of almonds.

24. On October 5, 2003, Respondent violated section 981.74 of the Order (7 C.F.R. § 981.74) and section 981.474 of the Regulations (7 C.F.R. § 981.474) by failing to submit on time to the Board a report on ABC Form 25-1 on the shipment of almonds.
25. On March 5, 2004, Respondent violated section 981.74 of the Order (7 C.F.R. § 981.74) and section 981.474 of the Regulations (7 C.F.R. § 981.474) by failing to submit on time to the Board a report on ABC Form 25-1 on the shipment of almonds.
26. On October 5, 2003, Respondent violated section 981.74 of the Order (7 C.F.R. § 981.74) and section 981.474 of the Regulations (7 C.F.R. § 981.474) by failing to submit on time to the Board a report on ABC Form 25-2 on the commitment of almonds.
27. On March 5, 2004, Respondent violated section 981.74 of the Order (7 C.F.R. § 981.74) and section 981.474 of the Regulations (7 C.F.R. § 981.474) by failing to submit on time to the Board a report on ABC Form 25-2 on the commitment of almonds.
28. On December 5, 2004, Respondent violated section 981.72 of the Order (7 C.F.R. § 981.72) and section 981.472 of the Regulations (7 C.F.R. § 981.472) by failing to submit on time to the Board a report on ABC Form 1 on the acquisition of almonds.
29. On September 5, 2004, Respondent violated section 981.74 of the Order (7 C.F.R. § 981.74) and section 981.474 of the Regulations (7 C.F.R. § 981.474) by failing to submit on time to the Board a report on ABC Form 25-1 on the shipment of almonds.
30. On December 5, 2004, Respondent violated section 981.74 of the Order (7 C.F.R. § 981.74) and section 981.474 of the Regulations (7 C.F.R. § 981.474) by failing to submit on time to the Board a report on ABC Form 25-1 of the shipment on almonds.
31. On September 5, 2004, Respondent violated section 981.74 of the Order (7 C.F.R. § 981.74) and section 981.474 of the Regulations (7 C.F.R. § 981.474) by failing to submit on time to the Board a report on ABC Form 25-2 on the commitment of almonds.
32. On December 5, 2004, Respondent violated section 981.74 of the Order (7 C.F.R. § 981.74) and section 981.474 of the Regulations (7 C.F.R. § 981.474) by failing to submit on time to the Board a report on ABC Form 25-2 on the commitment of almonds.

33. On December 5, 2005, Respondent violated section 981.72 of the Order (7 C.F.R. § 981.72) and section 981.472 of the Regulations (7 C.F.R. § 981.472) by failing to submit on time to the Board a report on ABC Form 1 on the acquisition of almonds.

34. On February 5, 2006, Respondent violated section 981.72 of the Order (7 C.F.R. § 981.72) and section 981.472 of the Regulations (7 C.F.R. § 981.472) by failing to submit on time to the Board a report on ABC Form 1 on the acquisition of almonds.

35. On January 15, 2006, Respondent violated section 981.73 of the Order (7 C.F.R. § 981.73) and section 981.473 of the regulations (7 C.F.R. § 981.473) and section by failing to submit on time to the Board a report on ABC Form 2 on the redetermination of almonds.

36. On December 5, 2005, Respondent violated section 981.74 of the Order (7 C.F.R. § 981.74) and section 981.474 of the Regulations (7 C.F.R. § 981.474) by failing to submit on time to the Board a report on ABC Form 25-1 on the shipment of almonds.

37. On February 5, 2006, Respondent violated section 981.74 of the Order (7 C.F.R. § 981.74) and section 981.474 of the Regulations (7 C.F.R. § 981.474) by failing to submit on time to the Board a report on ABC Form 25-1 on the shipment of almonds.

38. On December 5, 2005, Respondent violated section 981.74 of the Order (7 C.F.R. § 981.74) and section 981.474 of the Regulations (7 C.F.R. § 981.474) by failing to submit on time to the Board a report on ABC Form 25-2 on the commitment of almonds.

39. On February 6, 2006, Respondent violated section 981.74 of the Order (7 C.F.R. § 981.74) and section 981.474 of the Regulations (7 C.F.R. § 981.474) by failing to submit on time to the Board a report on ABC Form 25-2 on the commitment of almonds.

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, 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 Order, and in particular, shall cease and desist from

(a) failing to file required reports and to pay assessments and charges under the Act in a timely manner, and

(b) failing to submit past-due assessments, interest, and late payment charges to the Almond Board.

2. Since Respondent has paid $227,450.58 in unpaid assessments, interest and late fees, Respondent shall pay the remaining $2,174.62 alleged in the complaint.

3. Respondent is assessed a civil penalty of $5,000.00.

4. Respondent shall pay the $7,174.62 imposed in the above two paragraphs by a certified check or money order made payable to the Treasurer of United States. This payment shall be sent to the Attorney for Complainant within 30 days from the effective date of this order.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145, unless appealed.

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.

ANIMAL WELFARE ACT

COURT DECISION

IN DEFENSE OF ANIMALS v. USDA AND LIFE SCIENCES RESEARCH, INC.
Civil Action No. 02-557 (RWR).
Court Decision.
Filed August 6, 2007.

(Cite as 501 F.Supp.2d 1).

AWA – FOIA – Exemption 4 – Summary judgement.

Court denied summary judgement on the issue of material fact as to whether the FOIA disclosures would permit reverse engineering of commercial trade secrets. Petitioner sued USDA under Freedom of Information Act (FOIA) when after a year they had not received disclosures to their FOIA request. USDA's belated response was to file a Vaughn (see *Judicial Watch v. FDA*, 449 F 3d 141) index which claimed FOIA exemption 4 (non-disclosure due to confidential trade secrets and commercial or financial information to competitors). USDA and the targeted AWA licensed animal laboratory alleged that if documents were not redacted, the confidential and proprietary information could be used to reverse engineer by commercial competitors. After a failed mediation, the court ordered a review of a sampling of the documents en camera. USDA had a duty to set forth facts which justify its use of specific exemptions. Affidavits showing with reasonable specificity the justifications for the redaction are required. The affidavits must be specific and not be general and broad sweeping. While the USDA and licensee's rational for the exemption 4 is not strong, it can be said that there is a genuine dispute of whether commercial harm will result making a summary judgment to dismiss the suit to enforce FOIA improper.

United States District Court, District of Columbia.

MEMORANDUM OPINION

OBERDORFER, District Judge.

This is an action brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff In Defense of Animals ("IDA"), an animal rights advocacy group, seeks access to records held by defendant the United States Department of Agriculture ("USDA" or "government" or "agency"). The records concern USDA's investigation of Huntingdon

Life Sciences ("Huntingdon")-a research facility licensed to conduct animal experiments on behalf of private clients-for violations of the Animal Welfare Act. Huntingdon is a subsidiary of Life Sciences Research, Inc., ("Life Sciences") which has intervened in this litigation to protect its interest against divulging the investigatory records.

In a previous memorandum opinion and order,[1] Judge Richard Roberts denied, without prejudice, the parties' initial motions for summary judgment insofar as they concerned the validity of the government's claim of exemption from FOIA's disclosure requirements. He further ordered that the government produce a comprehensive *Vaughn* index [2] to assist the court in adjudicating the exemption claim, after which the parties would be permitted to file renewed summary judgment motions. Mem. Op. & Order, at 34 (Sept. 28, 2004) [dkt # 31].

Thus on August 3, 2005, the government (joined by Life Sciences) filed a new *Vaughn* index, accompanied by a renewed motion for summary judgment. On October 28, 2005, IDA responded with its own renewed cross-motion for summary judgment. The case was transferred to this judge on May 18, 2006.

Despite an attempt by the court to resolve the dispute by mediation, *see* Consent to Mediation (Aug. 9, 2006) [dkt # 52], the parties have been unable to do so. For the reasons that follow, an accompanying order will deny all parties' motions for summary judgment.

BACKGROUND

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[1] The court assumes familiarity with the prior opinion, Mem. Op. & Order (Sept. 28, 2004) [dkt # 31].

[2] A *Vaughn* index is a detailed affidavit which summarizes the documents withheld by an agency and sets forth why such documents are exempt from disclosure, the purpose of which is to permit adequate adversary testing of the agency's claimed right to an exemption without full disclosure of the documents. *See Kimberlin v. Dep't of Justice,* 139 F.3d 944, 950 (D.C.Cir.1998); *Vaughn v. Rosen,* 484 F.2d 820 (D.C.Cir.1973).

In 1997, USDA investigated Huntingdon for alleged violations of the Animal Welfare Act. After the investigation USDA filed an administrative complaint against Huntingdon that charged various violations of the Act and sought civil penalties. Thereafter, USDA entered into a settlement with Huntingdon: The laboratory would pay $50,000 in civil penalties and take measures to assure compliance with the Act. In 1999, USDA approved Huntingdon's activities as being in compliance with the Act and the settlement, and closed the case. *See* Pl.'s Stmt Of Material Facts As To Which There Is No Genuine Issue ("Pl.'s Stmt") ¶¶ 1-5 [dkt # 18]; Pl.Ex. H [dkt # 18].

Dissatisfied with the government's resolution of the matter, on November 20, 2000, IDA submitted a FOIA request to USDA for all records pertaining to the agency's investigation of Huntingdon. On April 13, 2001, USDA responded by disclosing the agency's report on Huntingdon's violations of the Animal Welfare Act, the administrative complaint, and the settlement agreement. It also informed IDA that any remaining responsive documents would have to await processing in the agency's FOIA queue. *See* Def.'s Stmt Of Material Facts As To Which There Is No Genuine Issue ("Def.'s Stmt") ¶¶ 1-2 [dkt # 13].

Receiving no further response from USDA for nearly a year, IDA filed this lawsuit. *See* Compl. (Mar. 22, 2001) [dkt # 1]. USDA then released several hundred pages of redacted and unredacted documents, and withheld several pages in full, claiming various exemptions under FOIA.

USDA also sent well over two thousand pages of responsive documents to Huntingdon to review for potential exemption from disclosure pursuant to, *inter alia,* FOIA Exemption 4. That exemption permits nondisclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Upon receiving Huntingdon's views on the documents, USDA decided to withhold approximately fifteen-hundred pages of documents in their entireties, in addition to hundreds more

redacted pages, although the number of documents presently at issue has been reduced in the course of this litigation. *See* Def.'s Stmt ¶¶ 3-4.

Both parties filed initial motions for summary judgment. On September 28, 2004, Judge Roberts issued a memorandum opinion and order adjudicating the motions. He held, *inter alia,* that the government had failed to provide sufficient justification or explanation to review the government's claim that it was impossible for the nonexempt and exempt information to be segregated as required under this circuit's law. *See* Mem. Op. & Order, at 21, 29-30. Judge Roberts ordered a comprehensive *Vaughn* index, describing "the documents withheld (and to the extent necessary, portions thereof), the reasons for nondisclosure, and the reasons for non-segregability." *Id.* at 34. He deferred ruling on the merits of the exemption claims.

On August 3, 2005, the government filed a 182-page *Vaughn* index, attached to a renewed summary judgment motion. The *Vaughn* index detailed the category of records withheld; a general description of the document; whether the document was withheld in part or in full; the applicable FOIA exemption(s); and a short, specific description of the items exempted. The index did not include any segregability analysis. *See Vaughn* Index (Aug. 3, 2005) [dkt # 39].

The government supplemented the index with the declaration of Lesia Banks, an assistant director of USDA's FOIA staff. *See* Banks Decl. ¶ 1 (Aug. 1, 2005) [dkt # 39]. She averred that the documents at issue were all subject to FOIA Exemption 4, because the documents reveal either "the design of and methods used in scientific tests conducted by Huntingdon on behalf of its clients," or "information that characterizes the physiological and health effects of proprietary experimental compounds tested by Huntingdon on behalf of its clients." *Id.* ¶ 3. Disclosing such documents, according to Ms. Banks, "would cause Huntingdon substantial competitive harm." *Id.* As for segregability, the Banks Declaration parrots almost verbatim the first declaration of the government's other FOIA analyst, Hugh Gilmore, which Judge Roberts earlier found inadequate for purposes of

performing a segregability analysis. *See id.* ¶¶ 3-5.

The Banks Declaration organizes the documents that remain at issue in the litigation, which the government has further reorganized into the following three categories and several subcategories :[3]

Group I

A. Final Test Reports and Related Records (124 pages withheld in full)

B. Clinical Observation Raw Data Reports (121 pages withheld in full)

C. Interim Test Reports (twenty-two pages withheld in full)

Group II

A. Necropsy and Postmortem Examination Reports (twenty-three pages withheld in full)

B. Viability Records (397 pages released in part and fifty-eight pages withheld in full)

C. Veterinary Treatment Request and Logs (twenty pages released in part and ninety-four page withheld in full),

D. Observations Sheets (twenty-eight pages withheld in full)

E. Miscellaneous Records Pertaining to Animal Cages (seven pages

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[3] Although the government's organization of the documents differs slightly from that used by Ms. Banks, *compare* Def.'s Supp. Stmt Of Material Facts As To Which There Is No Genuine Issue ("Def.'s Supp. Stmt") ¶ 2 [dkt # 39] *with* Banks Decl. ¶¶ 4-6, the court, following the example of all the parties to this case, will utilize the government's organization.

released in part)

Group III

A. Institutional Animal Care and Use Committee (IACUC) Records (fifty-six pages released in part)

B. Internal Huntingdon Memoranda (seven pages released in part and thirty-three pages withheld in full)

C. Internal USDA Investigatory Memoranda (twenty-seven pages released in part)

In all, some 1,017 pages remain at issue, 503 of which are being withheld in full and the rest withheld in part pursuant to Exemption 4.[4] *See* Def.'s Supp. Stmt Of Material Facts As To Which There Is No Genuine Issue ("Def.'s Supp. Stmt") ¶ 3 [dkt # 39].

In response to the government's renewed motion and *Vaughn* index, IDA filed its own renewed cross-motion for summary judgment, asserting, *inter alia,* that neither the *Vaughn* index nor the Banks Declaration sufficed to cure the deficiencies articulated in Judge Roberts'

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[4] Although plaintiff claims to lack the information to determine whether these records are indeed the only ones at issue, *see* Pl.'s Stmt Of Material Facts As To Which There Is No Genuine Issue & Pl.'s Resp. To Def.'s Supp. Stmt ("Pl.'s Resp.") ¶ 1 [dkt # 42], there is no basis, and plaintiff provides none, for doubting the government's presentation of the responsive documents. In any event this court has already held that the government executed a reasonably adequate search to cull all responsive documents. *See* Mem. Op. & Order, at 10-17, 33. The court thus finds that the documents remaining at issue consist of the 1,017 pages described *supra.*

Plaintiff also claims that the government failed to discuss the withholding under Exemption 4 of some thirty documents, described in the *Vaughn* index as various communications between Huntingdon, its clients, and/or USDA. *See* Pl.'s Rep. To Def.'s Opp. To Pl.'s Renewed Mot. For Summ. J., at 15-17 [dkt # 46]. The government contends its filings adequately address those documents. It is unnecessary to resolve this dispute at this time.

original opinion, in particular the segregability issue. *See* Pl.'s Renewed Mot. For Summ. J. (Oct. 28, 2005) [dkt # 42].

Once the parties had completed filing all responsive papers, Judge Roberts referred the matter to this judge, *see* Order Referring Motion (May 18, 2006). A motions hearing was held on August 9, 2006, at which the court persuaded the parties to attempt to resolve their differences by mediation. *See* Consent to Mediation (Aug. 9, 2006) [dkt # 52]. That attempt was entirely unsuccessful. Following another hearing, the parties filed for the court's review some seventy-two pages that the government had recently decided to re-release to plaintiff in revised form, *i.e.,* with fewer redactions. *See* Notice of Filing (Nov. 8, 2006) [dkt # 55]. The court then ordered, at the request of plaintiff, that the government produce a sampling of the withheld documents for in camera review to assist in adjudicating the applicability of Exemption 4 to the full range of documents. *See, e.g., Tax Analysts v. IRS,* 294 F.3d 71, 74 (D.C.Cir.2002).

DISCUSSION

I. Applicable Law

A. The Legal Standard

Summary judgment is granted if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The evidence must be such that a reasonable fact-finder *could not* return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The court must view the facts and reasonable inferences thereof "in the light most favorable to the party opposing the summary judgment motion,"*Scott v. Harris,* --- U.S. ----, ----, 127 S.Ct. 1769, 1774, 167 L.Ed.2d 686 (2007) (brackets omitted). And "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249, 106 S.Ct. 2505.

Importantly, "these general standards ... apply with equal force in the FOIA context." *Washington Post Co. v. U.S. Dep't of Health and Human Services,* 865 F.2d 320, 325 (D.C.Cir.1989). "If a genuine dispute does exist over a material issue, then parties should be given the opportunity to present direct evidence and cross-examine the evidence of their opponents in an adversarial setting." *Id.*

B. FOIA Exemption 4

Under FOIA, an agency has the burden to demonstrate that withheld documents are exempt from disclosure, which it may meet by submitting "affidavits [that] show, with reasonable specificity, why the documents fall within the exemption. The affidavits will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *See Quinon v. FBI,* 86 F.3d 1222, 1227 (D.C.Cir.1996) (quoting *Hayden v. National Security Agency/Central Security Service,* 608 F.2d 1381, 1387 (D.C.Cir.1979)). A *Vaughn* index is a specialized affidavit of which the purpose is to meet the agency's burden under FOIA without actually having to disclose the documents. *See supra* n. 2; *Judicial Watch, Inc. v. FDA,* 449 F.3d 141, 146 (D.C.Cir.2006).

FOIA directs this court to review de novo the applicability of the exemption. 5 U.S.C. § 552(a)(4)(B). In rendering its judgment, a court may, at its discretion, "examine the contents of [disputed] records in camera to determine whether such records or any part thereof shall be withheld under any of the [FOIA] exemptions." *Id.; see Quinon,* 86 F.3d at 1227.

At issue in this case is Exemption 4 of FOIA, which permits nondisclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The parties agree that plaintiff does not seek access to any trade secrets and that the information at issue is "commercial" and "obtained from a person" for purposes of the exemption. *See* Def.'s Mem. Of Points & Authorities In Support Of Def.'s Renewed Mot. For

Summ. J. ("Def.'s Mem."), at 4 (Aug. 3, 2005) [dkt # 39]; Mem. Op. & Order, at 28.

The parties contest, however, whether the information is "privileged and confidential." In this circuit information is privileged and confidential for purposes of Exemption 4 if disclosure would either impair the agency's ability to obtain similar information in the future or likely "cause substantial competitive harm to the entity that submitted the information." *See Judicial Watch,* 449 F.3d at 148. The "substantial competitive harm" standard is applicable to cases where, as here, the government compelled the entity to submit the contested information. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n,* 975 F.2d 871, 879 (D.C.Cir.1992) (en banc). The government does not argue that disclosure of Huntingdon's documents would result in impairing its ability to retain the cooperation of other entities in future investigations; but it does maintain that disclosure would likely cause Huntingdon substantial competitive harm.

II. Analysis

In response to a prior order that the government provide *reasons* for its claim that most of the exempt information was not reasonably segregable from the documents, the government provided a *Vaughn* index that fails to even mention segregability and a declaration by one of its FOIA staff that is identical-almost to the word-to an earlier declaration that this court previously had found deficient, at least insofar as concerns segregability. *See* Mem. Op. & Order, at 21-22. Moreover, in camera review of a sampling of the documents-which was undertaken at the request of *plaintiff*-has done little to instill confidence in the government's claim of exemption for most of the contested information.

Nevertheless, the parties have a genuine dispute over a material fact: whether disclosure of the categories of information in the context of the documents sought by IDA would permit Huntingdon's competitors to derive or reverse engineer Huntingdon's proprietary information, thereby causing it substantial competitive harm. Accordingly, summary

judgment is inappropriate.

Plaintiff does not dispute that revelation of certain proprietary information might well cause substantial competitive harm to Huntingdon. Plaintiff contends, however, that with appropriate redactions the documents would be utterly useless to competitors. For example, "plaintiff has long contended that the USDA simply cannot meet its burden of proof that all of the information that has been withheld is nevertheless exempt from disclosure under Exemption 4, since it would be extremely difficult, if not impossible, for any competitor of Huntingdon's to successfully use the bare results of tests, [sic] and observations of animals *without knowing the product being tested or the company for which it was being tested*." Pl.'s Mem. In Support Of Its Cross-Mot. For Summ. J., at 3-4 (emphasis in original). Plaintiff has argued further that "disclosure of the actual result of a particular research experiment" would cause little or no harm to Huntingdon's business "if the agency deletes from the document any information that identifies the test protocol, the substance being tested, or the name of Huntingdon's client." *See id.* at 4.

Life Sciences vigorously disputes this contention. The general manager of Huntingdon has averred that "Huntingdon's detailed study designs could easily be derived from the study reports, the raw data and other documentation reflecting their execution on a product within a particular therapeutic class, regardless of whether or not actual testing protocols or the identity of the product tested is available." Caulfield Decl. ¶ 32(s) (Mar. 19, 2003) [dkt # 21]. For instance, "information about the type of compound a competitor is testing, and the stage to which the testing has evolved, is used by pharmaceutical companies in the industries Huntingdon serves to make decisions about whether or not to enter or continue to conduct research in a given area, how fast to proceed, and how much to invest." *Id.* ¶ 32(t). And often "small bits of information," such as the kind of animal being tested and the evaluations of the results, "reveal valuable trade secrets to competitors, including insight into the therapeutic class to which a drug candidate belongs." *Id.* ¶ 32(u).

These direct contradictions preclude summary judgment which would end this interminable litigation. *See Niagara Mohawk Power Corp. v. U.S. Dep't of Energy,* 169 F.3d 16, 18 (D.C.Cir.1999). Two cases from this circuit, *Niagara Mohawk,* at 18-19, and *Washington Post,* 865 F.2d at 325-26, are instructive and, in all likelihood, controlling. In both cases, the court of appeals held that denial of summary judgment was appropriate because a genuine issue of material fact existed as to the applicability of FOIA Exemption 4.

In the *Washington Post* case, the dispute centered on the factual issue whether the government's ability to gather information from future private entities would be impaired by releasing the information. There the court acknowledged that the "inherently speculative" nature of the issue rendered the factual question "rarely susceptible to definitive proof." *Id.* at 326. Nevertheless, " 'factual' issues that involve predictive facts almost always require a court to survey the available evidence, to credit certain pieces of evidence above others, and to draw cumulative inferences until it reaches a judgmental conclusion.... In such an inquiry, the ultimate 'facts' in dispute are most successfully approached *when all relevant underpinnings are fully developed,*" not at the summary judgment stage. *Id.* (emphasis added). Similarly, here the ultimate question is whether disclosure of information concerning the results of Huntingdon's research would *likely* reveal proprietary information to competitors, despite appropriate redactions, and cause the company substantial competitive harm. That hotly contested issue cannot be resolved by a summary judgment.

The *Niagara Mohawk* case is even more on point. There the court of appeals also encountered contradicting assertions by the parties on the issue of impairment, and, like the *Washington Post* panel, held that summary judgment was improper. *Niagara Mohawk,* 169 F.3d at 18. But it also found summary judgment improper because of a second sharp dispute on the very issue now before this court: whether disclosure would create a likelihood of substantial competitive harm. *Id.* The factual point of contest was whether the private entity actually faced

business competition, *see National Parks & Conservation Ass'n v. Kleppe,* 547 F.2d 673, 679 (D.C.Cir.1976); and because the parties' views contradicted each other, the appellate court held that summary judgment should not have been granted-even where one of the parties' assertions "seem[ed] unlikely." *Niagara Mohawk,* 169 F.3d at 19. Here the specific issue is whether the disputed documents containing laboratory results and other pertinent information would serve as blueprints from which competitors of Huntingdon could reverse engineer valuable proprietary information exempt from disclosure. *See* Caulfield Decl. ¶ 32(s). Although the contention seems doubtful on the basis of the evidence before the court, the dispute is genuine and factual for which summary judgment is improper.

Finally, a comment. Although the law precludes summary judgment in this case, that does not mean that the court is, or should be, blind to the voluminous material submitted and reviewed. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott,* 127 S.Ct. at 1776. While defendants' view of the facts does not rise to the level of "blatantly" contradicting the record, it comes mighty close. Review in camera of a sampling of the disputed documents convinces that much, if not all, of the redacted and withheld documents will not likely survive the scrutiny of a trial, particularly under de novo FOIA review. Moreover, the seventy-two pages that the government has recently decided to re-release to plaintiff with fewer redactions than it previously claimed under Exemption 4 is amply suggestive of the extraordinarily broad and far-reaching view the government takes of the exemption. *See* Notice of Filing (Nov. 8, 2006) [dkt # 55]. A trial on the merits would be greatly facilitated by expert testimony on the ability of competitors to reverse engineer proprietary information from the disputed documents, as well as the likelihood of effective advantage to a competitor from the redacted data. With this in mind, the parties, and especially the government and Life Sciences, are admonished to attempt to arrive at a settlement.

CONCLUSION

For the foregoing reasons, an accompanying order will deny the pending motion and cross-motion for summary judgment and direct the parties to submit a joint status report scheduling further proceedings to bring this litigation to end.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: TRACEY HARRINGTON.
AWA Docket No. 07-0036.
Decision and Order.
Filed August 28, 2007.

AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Excuses for noncompliance – Service by certified mail – Extension of time from Hearing Clerk – Ability to pay civil penalty – Cease and desist order – Civil penalty – License revocation – License disqualification.

The Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's (ALJ) decision concluding Tracey Harrington violated the regulations and standards issued under the Animal Welfare Act. The Judicial Officer found Ms. Harrington failed to file a timely answer to the Complaint and held, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), Ms. Harrington was deemed to have admitted the allegations in the Complaint and waived the opportunity for hearing. Ms. Harrington asserted a number of events made difficult her compliance with the Animal Welfare Act. The Judicial Officer held these events are neither defenses to her violations of the Animal Welfare Act nor mitigating circumstances to be considered when determining the sanction to be imposed for her violations. The Judicial Officer also held the Hearing Clerk served Ms. Harrington with the Complaint on December 9, 2006, in accordance with the Rules of Practice. The Judicial Officer rejected Ms. Harrington's assertion that she received an extension of time from the Office of the Hearing Clerk stating the Rules of Practice provide extensions of time may only be granted by an administrative law judge or the Judicial Officer (7 C.F.R. § 1.147(f)) and none of the employees of the Office of the Hearing Clerk are administrative law judges or judicial officers. The Judicial Officer rejected Ms. Harrington's request for a reduction of the civil penalty assessed by the ALJ based on Ms. Harrington's inability to pay the civil penalty. The Judicial Officer stated the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth the 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 a respondent's ability to pay the civil penalty is not one of those factors. The Administrator alleged Ms. Harrington failed to take adequate measures to prevent molding, contamination, and deterioration of *food containers*, in violation of 9 C.F.R. § 3.129(b) and, by reason of her failure to file a timely answer, Ms. Harrington was deemed to have admitted the allegations in the Complaint. Based upon this deemed admission, the ALJ found Ms. Harrington failed to take adequate measures to prevent molding, contamination, and deterioration of *food containers*, in violation of 9 C.F.R. § 3.129(b). However, 9 C.F.R. § 3.129(b) provides "[i]f self-feeders are used, adequate measures shall be taken to prevent molding,

contamination, and deterioration or caking of *food*." (Emphasis added.) The Judicial Officer held Ms. Harrington's admission that she failed to take adequate measures to prevent molding, contamination, and deterioration of *food containers* is not a basis for concluding that she violated 9 C.F.R. § 3.129(b). Therefore, the Judicial Officer declined to conclude Ms. Harrington violated 9 C.F.R. § 3.129(b). The Judicial Officer imposed a cease and desist order against Ms. Harrington, revoked Ms. Harrington's Animal Welfare Act license, disqualified Ms. Harrington from becoming licensed under the Animal Welfare Act, and assessed Ms. Harrington a $6,200 civil penalty.

Brian T. Hill for Complainant.
Respondent, Pro se.
Initial Decision issued by Administrative Law Judge Jill S. Clifton.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 6, 2006. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and 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].

The Administrator alleges Tracey Harrington willfully violated the Regulations and Standards on May 10, 2004, and February 3, 2005 (Compl. ¶¶ II-III). The Hearing Clerk served Ms. Harrington with the Complaint, the Rules of Practice, and a service letter on December 9, 2006.[1] Ms. Harrington failed to file an answer to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Ms. Harrington a letter dated January 5, 2007, informing her that she had not filed a

[1]United States Postal Service Domestic Return Receipt for Article Number 7004 2510 0003 7198 1947.

timely response to the Complaint. Ms. Harrington failed to file a response to the Hearing Clerk's January 5, 2007, letter.

On March 15, 2007, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Administrator filed a 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 Tracey Harrington with the Administrator's Motion for Default Decision, the Administrator's Proposed Default Decision, and a service letter on March 19, 2007.[2] Ms. Harrington failed to file objections to the Administrator's Motion for Default Decision and the Administrator'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). The Hearing Clerk sent Ms. Harrington a letter dated May 15, 2007, informing her that she had not filed a timely objection to the Administrator's Motion for Default Decision. Ms. Harrington failed to file a response to the Hearing Clerk's May 15, 2007, letter.

On June 20, 2007, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order by Reason of Default [hereinafter Initial Decision]: (1) concluding Tracey Harrington willfully violated the Animal Welfare Act and the Regulations and Standards, as alleged in the Complaint; (2) ordering Ms. Harrington to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Ms. Harrington a $10,120 civil penalty; (4) revoking Ms. Harrington's Animal Welfare Act license; and (5) permanently disqualifying Ms. Harrington from becoming licensed under the Animal Welfare Act or from otherwise obtaining, holding, or using an Animal Welfare Act license.

On July 13, 2007, Tracey Harrington appealed the ALJ's Initial Decision to the Judicial Officer. On July 25, 2007, the Administrator filed a response to Ms. Harrington's appeal petition. On July 25, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record,

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[2]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 6804.

I affirm the ALJ's Initial Decision, except, for the reason discussed in this Decision and Order, *infra*, I do not conclude Ms. Harrington violated section 3.129(b) of the Regulations and Standards (9 C.F.R. § 3.129(b)) on May 10, 2004, and February 3, 2005.

DECISION

Statement of the Case

Tracey Harrington failed to file an answer to the Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint, except the allegations that Ms. Harrington violated section 3.129(b) of the Regulations and Standards (9 C.F.R. § 3.129(b)) on May 10, 2004, and February 3, 2005, are adopted as findings of fact. 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 and Conclusions of Law

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

2. Tracey Harrington is an individual whose address is 1312 State Route 369, Chenango Forks, New York 13746.

3. On May 10, 2004, and February 3, 2005, Tracey Harrington held an Animal Welfare Act license and operated as an "exhibitor" as that word is defined in the Animal Welfare Act and the Regulations and Standards.

4. On May 10, 2004, the Animal and Plant Health Inspection Service inspected Tracey Harrington's premises and found the following willful

violations of section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)):

A. The indoor facilities were not structurally sound and maintained in good repair so as to protect the animals from injury and to contain the animals, in willful violation of section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a));

B. The facility lacked proper drainage, in willful violation of section 3.127(c) of the Regulations and Standards (9 C.F.R. § 3.127(c)); and

C. A sufficient number of adequately trained employees were not utilized to properly care for the animals, in willful violation of section 3.132 of the Regulations and Standards (9 C.F.R. § 3.132).

5. On February 3, 2005, the Animal and Plant Health Inspection Service inspected Tracey Harrington's premises and found Ms. Harrington 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 adequate veterinarian care for animals in distress, in willful violation of section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)).

6. On February 3, 2005, the Animal and Plant Health Inspection Service inspected Tracey Harrington's premises and found Ms. Harrington had failed to maintain and provide the proper equipment necessary to euthanize her animals, in willful violation of section 2.40(b)(1) of the Regulations and Standards (9 C.F.R. § 2.40(b)(1)).

7. On February 3, 2005, the Animal and Plant Health Inspection Service inspected Tracey Harrington's premises and found Ms. Harrington had failed to provide for daily observation of her animals to prevent health issues, in willful violation of section 2.40(b)(3) of the Regulations and Standards (9 C.F.R. § 2.40(b)(3)).

8. On February 3, 2005, the Animal and Plant Health Inspection Service inspected Tracey Harrington's premises and Ms. Harrington denied Animal and Plant Health Inspection Service inspectors access to fully inspect her records, in willful violation of section 2.126 of the Regulations and Standards (9 C.F.R. § 2.126).

9. On February 3, 2005, the Animal and Plant Health Inspection

Service inspected Tracey Harrington's facility and found the following willful violations of section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)):

A. The facilities were not structurally sound and maintained in good repair so as to protect the animals from injury and to contain the animals, in willful violation of section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a));

B. The facility lacked proper drainage, in willful violation of section 3.127(c) of the Regulations and Standards (9 C.F.R. § 3.127(c)); and

C. Tracey Harrington failed to utilize a sufficient number of employees to maintain the prescribed level of husbandry practices, in willful violation of sections 3.32, 3.57, and 3.132 of the Regulations and Standards (9 C.F.R. §§ 3.32, .57, .132).

10. Tracey Harrington has a small-sized business. The gravity of eight of Ms. Harrington's 10 violations of the Regulations and Standards is significant. The gravity of Ms. Harrington's February 3, 2005, violations of 9 C.F.R. §§ 2.40(a) and 2.126 is severe. Ms. Harrington exhibited a lack of good faith and has a history of previous violations of the Animal Welfare Act and the Regulations and Standards.

11. A cease and desist order against Tracey Harrington, revocation of Ms. Harrington's Animal Welfare Act license, disqualification of Ms. Harrington from becoming licensed under the Animal Welfare Act, and assessment of a $6,200 civil penalty against Ms. Harrington are warranted in law (7 U.S.C. § 2149) and justified by the facts.

Tracey Harrington's Appeal Petition

Tracey Harrington raises four issues in her July 13, 2007, filing [hereinafter Appeal Petition]. First, Ms. Harrington asserts a number events have made her compliance with the Animal Welfare Act and the Regulations and Standards difficult. These events include a propane gas explosion, which destroyed Ms. Harrington's barn and its contents and damaged Ms. Harrington's home; the refusal by Ms. Harrington's insurance company to pay for damages caused by the gas explosion; the abandonment of Ms. Harrington by her boyfriend and father of her 6-

year-old daughter in November 2004, when, without notice, Ms. Harrington's boyfriend moved to Florida to be with Ms. Harrington's mother; and the care needed by all Ms. Harrington's animals and Ms. Harrington's two small children in the cold winter of upstate New York. Ms. Harrington states physically and mentally she is having difficulty dealing with these events. (Appeal Pet. at 1-5.)

I have no reason to disbelieve Tracey Harrington's assertions regarding events which have adversely affected her ability to comply with the Animal Welfare Act and the Regulations and Standards, and I empathize with Ms. Harrington. Nonetheless, the events which have adversely affected Ms. Harrington's ability to comply with the Animal Welfare Act and the Regulations and Standards are neither defenses to her violations of the Animal Welfare Act and the Regulations and Standards nor mitigating circumstances to be considered when determining the sanction to be imposed for her violations of the Animal Welfare Act and the Regulations and Standards.

Second, Tracey Harrington contends she did not receive anything related to the instant proceeding until March 19, 2007 (Appeal Pet. at 4-5).

The Rules of Practice provide for service of the Complaint, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (c) *Service on party other than the Secretary*. (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding . . . shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual.

7 C.F.R. § 1.147(c)(1). The record establishes that the Hearing Clerk sent the Complaint to Ms. Harrington, 1312 State Route 369, Chenango Forks, New York 13746, by certified mail. The United States Postal Service delivered the certified mailing to Ms. Harrington's last known address on December 9, 2006, where "Steve Harrington" signed for the Complaint.[3] Proper service of a complaint is made under the Rules of Practice when the complaint is delivered by certified mail to the respondent's last known address and someone signs for the complaint.[4] Thus, I conclude the Hearing Clerk served Ms. Harrington with the Complaint on December 9, 2006, in accordance with the Rules of Practice, and Ms. Harrington was required to file her answer no later than December 29, 2006. Ms. Harrington's first and only filing in this proceeding is her Appeal Petition, which she filed July 13, 2007, 6 months 2 weeks after her answer was required to be filed. As Ms. Harrington has failed to file a timely answer, she is deemed to have admitted the material allegations of the Complaint.

Third, Tracey Harrington states she called (202) 720-4443 on March 19, 2007, and requested an extension of time from a woman answering the telephone. Ms. Harrington asserts the woman granted an extension of time and assured Ms. Harrington she would inform me of the extension of time. The telephone number for the Office of the Hearing Clerk is (202) 720-4443; therefore, I infer Ms. Harrington asserts she spoke with a woman employed in the Office of the Hearing Clerk. (Appeal Pet. at 4-5.)

As an initial matter, I find nothing in the record indicating Ms.

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[3]See note 1.

[4]*In re Ow Duk Kwon* (Order Denying Late Appeal), 55 Agric. Dec. 78, 93 (1996) (stating proper service by certified mail is made when a respondent is served with a certified mailing at his or her last known address and someone signs for the document); *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 619 (1988) (stating the excuse, occasionally given in an attempt to justify the failure to file a timely answer, that the person who signed the certified receipt card failed to give the complaint to the respondent in time to file a timely answer has been and will be routinely rejected); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925, 929 (1987) (stating a default order is proper where the respondent's sister signed the certified receipt card as to a complaint and forgot to give it to the respondent when she saw him 2 weeks later).

Harrington requested or was granted an extension of time to file any document in the instant proceeding and no one from the Office of the Hearing Clerk has contacted me in reference to a request for an extension of time in the instant proceeding.

The Hearing Clerk served Ms. Harrington with the Complaint on December 9, 2006.[5] Therefore, Ms. Harrington was required to file a response to the Complaint no later than December 29, 2006. Ms. Harrington asserts she requested an extension of time on March 19, 2007. Ms. Harrington's request for an extension of time to file a response to the Complaint on March 19, 2007, is a nullity as extensions of time must be requested before the expiration of the time for filing the document that is the subject of the request for an extension of time.

Moreover, any extension of time granted by an employee of the Office of the Hearing Clerk would be a nullity. The Rules of Practice explicitly provide extensions of time may only be granted by an administrative law judge or the Judicial Officer, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (f) *Extensions of time*. The time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge or the Judicial Officer as provided in § 1.143 if, in the judgment of the Judge or the Judicial Officer, as the case may be, there is good reason for the extension. In all instances in which time permits, notice of the request for extension of the time shall be given to the other party with opportunity to submit views concerning the request.

7 C.F.R. § 1.147(f). None of the employees of the Office of the Hearing Clerk are administrative law judges or judicial officers. Therefore, I reject Ms. Harrington's contention that she was granted an extension of time.

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[5]See note 1.

Fourth, Tracey Harrington contends she is not able to pay the $10,120 civil penalty assessed by the ALJ (Appeal Pet. at 4-5).

When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations and Standards, the Secretary of Agriculture is required to give due consideration to four factors: (1) the size of the business of the person involved, (2) the gravity of the violations, (3) the person's good faith, and (4) the history of previous violations.[6] A respondent's ability to pay the civil penalty is not one of the factors considered by the Secretary of Agriculture when determining the amount of the civil penalty. Therefore, Ms. Harrington's inability to pay the $10,120 civil penalty is not a basis for reducing the $10,120 civil penalty assessed by the ALJ.[7]

The Administrator does not allege the size of Tracey Harrington's business; thus, Ms. Harrington is not deemed to have admitted the size of her business by her failure to file a timely answer. As the record before me does not establish the size of Ms. Harrington's business, I find Ms. Harrington has a small business, which is the most favorable finding I can make when determining the amount of the civil penalty. Based on the nature of the violations which Ms. Harrington is deemed to have admitted, I find eight of her violations are significant; however, the Administrator does not contend that any of these eight violations resulted in harm or injury to Ms. Harrington's animals. I find Ms. Harrington's February 3, 2005, failure to provide adequate veterinary care for animals in distress, in violation of section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)), severe because the violation appears that it may have caused harm to her animals. In addition, I find Ms. Harrington's February 3, 2005, denial of Animal and Plant Health Inspection Service inspector access to her records, in violation of section 2.126 of the Regulations and Standards (9 C.F.R. §

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[6]7 U.S.C. § 2149(b).

[7]*See In re Marjorie Walker*, 65 Agric. Dec. 932, 967, (2006) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and Standards and a respondent's ability to pay the civil penalty is not one of those factors).

2.126), severe because it thwarts the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act. Ms. Harrington's ongoing pattern of violations on May 10, 2004, and February 3, 2005, establishes a history of previous violations for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

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

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[8]

The Administrator seeks assessment of a $10,120 civil penalty against Tracey Harrington, issuance of a cease and desist order against

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[8]*In re Jerome Schmidt*, 66 Agric. Dec. 159, 207, (2007); *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005).

Ms. Harrington, revocation of Ms. Harrington's Animal Welfare Act license, and disqualification of Ms. Harrington from obtaining an Animal Welfare Act license.[9] However, the Administrator does not provide any basis for his recommendation. I find Ms. Harrington is deemed to have admitted she committed 10 violations of the Regulations and Standards and she could be assessed a maximum civil penalty of $2,750 for each of her 10 violations of the Regulations and Standards.[10] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude a cease and desist order against Ms. Harrington, revocation of Ms. Harrington's Animal Welfare Act license, disqualification of Ms. Harrington from obtaining an Animal Welfare Act license, and assessment of a $6,200 civil penalty[11] against Ms. Harrington are

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[9]The Administrator's Proposed Default Decision at fifth unnumbered page.

[10]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, effective September 2, 1997, adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v) (2005); 62 Fed. Reg. 40,924 (July 31, 1997)). Subsequently, the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards occurring after June 23, 2005, by increasing the maximum civil penalty from $2,500 to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). None of Ms. Harrington's violations of the Regulations and Standards occurred after June 23, 2005.

[11]I assess Ms. Harrington a $2,000 civil penalty for her February 3, 2005, violation of 9 C.F.R. § 2.40(a); a $2,000 civil penalty for her February 3, 2005, violation of 9 C.F.R. § 2.126; and $275 for each of her other eight violations of the Regulations and

(continued...)

appropriate and necessary to ensure Ms. Harrington's compliance with the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

The ALJ's Conclusion That Tracey Harrington Violated 9 C.F.R. § 3.129(b)

The Administrator alleges that, on May 10, 2004, and February 3, 2005, Tracey Harrington failed to take adequate measures to prevent molding, contamination, and deterioration of *food containers*, in willful violation of section 3.129(b) of the Regulations and Standards (9 C.F.R. § 3.129(b)) (Compl. ¶¶ II A.3., III E.3.), and, by reason of her failure to file a timely answer, Ms. Harrington is deemed to have admitted the allegations in the Complaint. Based upon this deemed admission, the ALJ found that, on May 10, 2004, and February 3, 2005, Ms. Harrington failed to take adequate measures to prevent molding, contamination, and deterioration of *food containers*, in willful violation of section 3.129(b) of the Regulations and Standards (9 C.F.R. § 3.129(b)). However, section 3.129(b) of the Regulations and Standards (9 C.F.R. § 3.129(b)) provides "[i]f self-feeders are used, adequate measures shall be taken to prevent molding, contamination, and deterioration or caking of *food*." (Emphasis added.) Ms. Harrington's admission that she failed to take adequate measures to prevent molding, contamination, and deterioration of *food containers* is not a basis for concluding that she violated 9 C.F.R. § 3.129(b). Therefore, I decline to conclude Ms. Harrington violated 9 C.F.R. § 3.129(b).

For the foregoing reasons, the following Order is issued.

ORDER

1. Tracey Harrington, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device,

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[11](...continued)
Standards.

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

Paragraph 1 of this Order shall become effective on the day after service of this Order on Ms. Harrington.

2. Tracey Harrington is assessed a $6,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, Brian T. Hill within 60 days after service of this Order on Ms. Harrington. Ms. Harrington shall state on the certified check or money order that payment is in reference to AWA Docket No. 07-0036.

3. Tracey Harrington's Animal Welfare Act license is revoked.

Paragraph 3 of this Order shall become effective on the 60th day after service of this Order on Ms. Harrington.

4. Tracey Harrington is permanently disqualified from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly through any corporate or other device or person, effective on the 60th day after service of this Order on Ms. Harrington.

RIGHT TO JUDICIAL REVIEW

Tracey Harrington has the right to seek judicial review of the Order

in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of the Order in this Decision and Order. Ms. Harrington must seek judicial review within 60 days after entry of the Order in this Decision and Order.[12] The date of entry of the Order in this Decision and Order is August 28, 2007.

In re: AMARILLO WILDLIFE REFUGE, INC.
AWA Docket No. 07-0077.
Decision and Order.
Filed July 31, 2007.

AWA – Admissions in answer – Criminal conviction, prior

Bernadette Juarez for APHIS.
Respondent Pro se.
Decision and order by Administrative Law Judge Victor W. Palmer.

ORDER

On March 6, 2007, Complainant, the Animal and Plant Health Inspection Service (APHIS), filed an "Order to Show Cause as to Why Animal Welfare License 74-C-0486 Should Not Be Terminated". On April 2, 2007, Charles Azzopardi filed a letter as Respondent's Answer in which he requested a hearing. Mr. Azzopardi contends that there are mitigating circumstances why the license should not be terminated even though he admits, as the Order to Show Cause alleges, that he was the Respondent's president, director and agent, and managed and controlled its business when, on July 21, 2006, he pled guilty to and was convicted by a U.S. Magistrate Judge of the misdemeanor of Selling and Transporting in Interstate Commerce an Endangered Species of Wildlife.

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[12] 7 U.S.C. § 2149(c).

APHIS, by its attorney, responded that Mr. Azzopardi's request for a hearing should be denied since the license termination sought by APHIS is based on a criminal conviction. Attached to the APHIS response were: (1) a copy of the plea agreement, (2) a factual resume signed by Mr. Azzopardi and his attorney, and (3) the Judgment by the United States Magistrate's Judge; each of which was certified to be a "true copy of an instrument on file" by the Deputy Clerk of the U.S. District Court, Northern Texas. In sum, counsel for APHIS contended that a hearing is unnecessary and would serve no useful purpose where the agency's action is predicated upon a criminal conviction and the material facts are not in dispute.

On May 8, 2007, Administrative Law Judge Peter M. Davenport, to whom the case was initially assigned, but who I have replaced since he is presently unavailable, entered an Order denying Respondent's request for a hearing and granted APHIS:

> . . .leave to amend or supplement the pleadings to conform to the rules for the institution of proceedings, to provide documentation of compliance with 5 U.S.C. § 558 or in lieu thereof, authority for dispensing with the same, and any appropriate dispositive motion in this matter.

Order of May 8, 2007.

I agree with the position asserted in the response filed for APHIS to this Order, that under section 1.132 of the rules of practice (7 C.F.R. § 1.132), an "order to show cause" constitutes a valid form of a complaint.

I further agree that inasmuch as Mr. Azzopardi admitted in the Court certified true copy of his signed and witnessed "Factual Resume" that he "knowingly and willfully offered for sale, or sold in interstate commerce in the course of commercial activity an endangered species of wildlife", his conduct comes within the "willfulness" exception to the requirement of 5 U.S.C. § 558 that an agency must give a licensee notice and opportunity to achieve compliance before taking action to terminate a license.

The response concluded by requesting that "an order be issued allowing this case to proceed as filed". In other words, to take the action

requested in the order to show cause that APHIS initially filed. The action requested was:

> 1. That unless the respondent fails to file an answer within the time allowed therefor, or files an answer admitting all the material allegations of this order to show cause, this proceeding be set for oral hearing in conformity with the Rules of Practice governing proceedings under the Act; and
>
> 2. That such order or orders be issued as are authorized by the Act and warranted under the circumstances, including an order: (a) Terminating Animal Welfare Act license number 74-C-0486 ; and (b) disqualifying respondent from obtaining a new license for two years.

Order to Show Cause, at page 5.

It is uncertain whether APHIS desires that part of Judge Davenport's order denying Respondent's request for a hearing to be set aside in abandonment of the position it took in its response to Mr. Azzopardi's letter that a hearing is not needed. If APHIS is seeking instead to rely upon its position that an order should be entered to terminate the license without a hearing, it has still not filed an appropriate dispositive motion. Such a motion would be akin to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Though the Federal Rules of Civil Procedure are not applicable in this administrative proceeding, they may provide guidance when applying our Rules of Practice. *See Fresh Prep, Inc.,* 58 Agric. Dec. 683, at 687 (1999).

Rule 56 provides that a party may move for summary judgment with or without supporting affidavits. In this proceeding an affidavit or declaration by an APHIS official would be most helpful in clarifying the policy it seeks to make controlling in this case of first impression.

The certified court documents that have been filed, and Mr. Azzopardi's admissions, establish that Mr. Azzopardi was the Respondent's president, director and agent, and managed and controlled its business when he pled guilty to and was convicted, on July 21, 2006, by a U.S. Magistrate Judge of the misdemeanor of Selling and

Transporting in Interstate Commerce an Endangered Species of Wildlife. Counsel for APHIS asserts that these facts constitute a sufficient basis for license termination and that the mitigating facts the licensee has offered to prove are immaterial. In short, counsel for APHIS is asserting that under 9 C.F.R. § 2.11(a)(6) and § 2.12, it is the policy of APHIS to not issue a license and to terminate a license it has issued to someone convicted of the same crime as Mr. Azzopardi. But the record presently lacks an evidentiary basis for establishing this as controlling APHIS policy and providing the supporting reasons for such policy. Without an affidavit or declaration, my entry of a summary judgment type order would in essence be an attempt to apply and implement controlling and binding APHIS policy based solely on a statement by counsel. This would be inconsistent with the policy often expressed by the Judicial Officer that when adjudicating sanction cases, we should ascertain policies relevant to their disposition from the Department's administrative officials.

Any affidavit or declaration by an APHIS official filed in support of a summary judgment motion would be served upon Mr. Azzopardi who would then have the right to file his own affidavit in opposition. The affidavit or declaration should address why APHIS believes the proposed license termination would further the purposes of the Animal Welfare Act that in respect to the transportation and ownership of animals as set forth in the Congressional statement of policy are:

> (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.

7 U.S.C. § 2131.

Inasmuch as Mr. Azzopardi's misdemeanor conviction did not involve mistreatment of animals during their transportation, or the sale or use of stolen animals, APHIS should explain its reasons for basing a license denial under 9 C.F.R. § 2.11 (6) that then acts as the basis for license termination under 9 C.F.R. § 2.12. If APHIS is actually basing its policy position on the language in 9 C.F.R. § 2.11 (6) by which it

may deny a license to an applicant who "is otherwise unfit to be licensed", it should so explain and give the reasons why it would make this determination against a license applicant who has been found guilty of the crime committed by Mr. Azzopardi.

In re: WYOMING DEPARTMENT OF PARKS AND CULTURAL RESOURCES AND KEVIN SKATES AND WADE HENDERSON
AWA Docket No. 07-0022.
Decision and Order.
Filed August 23, 2007.

AWA – Exhibitor – Public parks – Public viewing – Public corporation – Eleventh amendment – Sovereign immunity – State agency as "persons" – Veterinary plan – Bison.

Babak A. Rastgoufard for APHIS.
Ryan T. Schelhause and Patrick J. Crank for Respondents.
Decision and Order by Administrative Law Judge Victor W. Palmer.

DECISION AND ORDER

Disposition

I have decided that the Secretary of Agriculture has jurisdiction under the Animal Welfare Act (7 U.S.C. §§ 2131-2159; "the Act"), to require an agency of the State of Wyoming to be licensed by the United States Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS") and to comply with regulations and standards issued under the Act, when the Wyoming agency engages in the activities of an "exhibitor" as that term is defined in the Act. I have further decided that under the uncontested facts in this proceeding, a cease and desist order should be entered against the Wyoming agency to require such licensing and compliance. However, civil penalties are not being assessed, and the complaint is being dismissed in respect to Wyoming's two Park Superintendents whom the Complaint had included as Respondents.

Procedural Background

On November 15, 2006, APHIS filed a Complaint against the Respondents, the Wyoming Department of Parks and Cultural Resources and two of its Park Superintendents, for violating the Act and regulations and standards issued pursuant to the Act (9 C.F.R. §§ 1.1-3.142; "the Regulations"). In the Complaint, APHIS contends that the operation of two of the State's thirty-one parks requires an exhibitor's license under the Act and the Regulations in that bison and elk are maintained at those parks for public viewing. The complaint requests a cease and desist order and the assessment of civil penalties against the Respondents.

On December 6, 2006, the Respondents filed their Answer in which they admitted many of the factual allegations of the Complaint including the maintenance of bison and elk at the two parks for public viewing, but deny that the United States Department of Agriculture has subject matter or personal jurisdiction over the State of Wyoming and its agencies and employees. The Answer asserts that the remedies APHIS seeks against the Respondents are barred under sovereign immunity; that the Complaint fails to state a claim against them; and that the relief sought is inappropriate, improper and contrary to law. The Answer requests that the Complaint be dismissed.

On February 15, 2007, APHIS filed a motion for judgment on the pleadings. On April 2, 2007, Respondents filed a response to the motion with a cross-motion for judgment on the pleadings. On April 27, 2007, APHIS filed its response to the cross-motion.

On May 16, 2007, I requested the parties to answer questions respecting the differences, if any, in the amount of oversight APHIS seeks to exercise in respect the two Wyoming State Parks in comparison to the oversight APHIS exercises, if any, in respect to National Parks such as Yellowstone. APHIS filed its response to the questions on June 12, 2007 and the Respondents filed their response on July 19, 2007.

Findings

1. Respondent Wyoming Department of Parks and Cultural Resources

is an agency of the State of Wyoming. Its primary business address is 2301 Central Avenue, Cheyenne, Wyoming 82002. It operates no fewer than thirty-one State Parks and Historic Sites within the State of Wyoming, including, Hot Springs State Park, a Wyoming State Park located at 220 Park Street, Thermopolis, Wyoming 82443 ("Hot Springs"), and Bear River State Park, a Wyoming State Park located at 601 Bear River Drive, Evanston, Wyoming 82930 ("Bear River").

2. Respondent Kevin Skates is the Park Superintendent of Hot Springs.

3. Respondent Wade Henderson is the Park Superintendent of Bear River.

4. A herd of adult and yearling bison is maintained at Hot Springs for public viewing. Hot Springs is a resort complex that includes facilities and amenities for overnight lodging (Holiday Inn and Plaza Hotel), aquatic recreation (Star Plunge Water Park), and a rehabilitation hospital (Gottsche Rehabilitation Center).

5. Captive bison and elk are kept at Bear River for public viewing. Bear River is located along Interstate 80 and contains a rest stop for travelers on I-80 with a Travel Information Center that acts as, in the words of a Wyoming State brochure: "a distribution point for information about Wyoming's many aspects and events that make our state a splendid place to visit."

6. On April 11, 2002, the Director of the APHIS Western Region for Animal Care, wrote to the Park Superintendent of Hot Springs and suggested that the State of Wyoming might be conducting activities that required licensing by APHIS, and enclosed a packet of materials including copies of the Regulations and Standards for his review.

7. On June 4, 2003, in response to a request from the Park Superintendent of Hot Springs, the Director of the APHIS Western Region for Animal Care sent him forms and information for obtaining an APHIS license.

8. On May 29, 2004, the Park Superintendent of Hot Springs completed an application for an APHIS license.

9. On September 29, 2004 a pre-license inspection of Hot Springs was conducted by an APHIS Animal Care Inspector who reported that the facility was inadequate for licensing because a written program of veterinary care had not been completed; there were no barriers between the animals and the public; no employee/attendant was present during times the public has access to the animals; and the facility only had a buck rail styled fence and lacked a secondary restriction/containment perimeter fence.

10. On October 18, 2004, a pre-license inspection of Bear River was conducted by an APHIS Veterinary Medical Officer who reported that the facility was inadequate for licensing because it lacked appropriate fencing and secondary barriers to prevent public contact or an attendant to monitor potential public contact.

11. Subsequent to these pre-licensing inspections and reports by APHIS, no further effort to obtain an APHIS license was made by the Wyoming Department of Parks and Cultural Resources.

12. The Wyoming Department of Parks and Cultural Resources has not and does not hold a valid Exhibitor's License issued by APHIS that section 2.1a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) requires of any person meeting the Act's definition of "exhibitor" set forth at 7 U.S.C. § 2132 (h).

Conclusions

1. It is appropriate to enter a decision and order in this proceeding without holding an evidentiary hearing.

Under the controlling rules of practice:

> Any motion will be entertained other than a motion to dismiss on the pleading.

7 C.F.R. § 1.143 (b)(1).

The Respondents, however, have challenged the jurisdictional authority for initiating this proceeding against an agency and employees of a sovereign State. This jurisdictional issue must necessarily be first addressed.

Moreover, there is no dispute as to the essential material facts needed to arrive at a decision and order in this proceeding. Both sides have moved for a judgment to be entered without a hearing. To the extent a different designation than "motion for judgment on the pleadings" is needed to satisfy the cited rule of practice, complainant has suggested that its motion may be construed as a motion for summary judgment. At any rate, I have concluded that adjudicatory economy shall be best served by resolving the issues raised in this proceeding without conducting an evidentiary hearing.

2. The Secretary has jurisdiction to regulate a State Agency that "exhibits" animals within the meaning of the Act, and I have jurisdiction to conduct this administrative proceeding to enforce the terms of the Act in respect to such a State Agency.

Respondents contend that this proceeding should be dismissed because the Secretary and I lack subject matter and personal jurisdiction over State agencies and employees acting on a State's behalf. They assert they are protected from being sued under the doctrine of sovereign immunity that generally applies under the United States Constitution, and because the language of the Act does not include a State as a "person" that the Secretary may require to be licensed.

Apparently, Wyoming was initially agreeable to the request by APHIS that it obtain a license to exhibit the herds of bison and elk that the public view in their two State Parks. It was the filing of a license application on behalf of Wyoming for its two parks that caused APHIS to conduct pre-license inspections. But those inspections resulted in APHIS conditioning license issuance on the preparation of a written program of veterinary care; the erection of barriers between bison, elk and the public; and the presence of an employee/attendant when the public has access to the bison or elk. APHIS does not attempt to

similarly control the viewing of animals by the public at neighboring National Parks, and these licensing conditions evidently were considered to be unduly burdensome by Wyoming[1]. It then consulted its Attorney General and on his advice, has asserted sovereign immunity defenses, and argues that under the language of the Act, a State may not be required to submit to licensing and oversight by APHIS.

Under the Eleventh Amendment, a State may not be sued by private persons without its consent. But "… nothing in this or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States." *United States v. Mississippi*, 380 U.S. 138, at 140, 85 S.Ct. 808, at 815 (1965). Therefore, the controlling issue in this proceeding is whether the language of the Act authorizes the regulation of a State agency that maintains animals for public viewing.

The Act subjects an animal "exhibitor" to licensing by the Secretary of Agriculture, and to standards, rules and regulations promulgated by the Secretary governing the humane handling, care, treatment and transportation of animals 7 U. S.C. §§ 2132-2143. An "exhibitor" is defined as follows:

> The term "exhibitor" means any person (public or private) exhibiting any animals which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences,

[1] In response to my questions, APHIS advised that National Parks and other Federal agencies exhibiting animals are not regulated by APHIS except on a voluntary basis such as the National Zoo. This is due to an interpretation by APHIS that Section 2144 of the Act (7 U.S.C.§ 2144) requires Federal agencies exhibiting animals to directly comply with the standards promulgated by the section without the need for licensing and oversight by APHIS.

> as may be determined by the Secretary.

7 U.S.C. § 2132(h).

This definition was added to the Act by its amendment in 1970. As originally enacted in 1966, the Act applied to "dealers" and "research facilities". When amended in 1970 to extend its licensing requirements and control to the activities of exhibitors, the Act employed the term "person" as part of the definition of "exhibitor" and left its definition of "person" unchanged from the way it was originally stated in 1966. When further amended in 1976 to, among other things, extend coverage to prevent the mistreatment of animals while being transported and to make it a crime to engage in animal fighting, the definitions of "person" and "exhibitor" were both left unchanged. The Act continues to define "person" in the identical language used in 1966, as follows:

> The term "person" includes any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.

7 U.S.C. § 2132(a).

The motions of APHIS and Wyoming debate whether the Act's definition of "exhibitor" that incorporates this definition of "person", is intended to bring a State agency or its employees within the Secretary's jurisdiction. Both cite *Vermont Agency of Nat. Resources v. United States*, 529 U.S. 765, 120 S.Ct.1858 (2000), as authority for their opposing positions.

The controlling issue in *Vermont*, *supra*, was whether the word "person" as used in the statute being considered by the Court, permitted a cause of action on behalf of the United States to be asserted against a State. Justice Scalia, speaking for the majority, explained how this statutory question should be decided:

We must apply to this text our longstanding interpretive presumption that "person" does not include the sovereign. See *United States v. Cooper Corp*., 312 U.S. 600, 604, 61 S.Ct. 742, 85 L.Ed. 1071 (1941); *United States v. Mine Workers*, 330 U.S. 258, 275, 67 S.Ct. 677, 91 L.Ed. 884 (1947)*(footnote reference omitted*).The presumption is 'particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before.' *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304, 105

L.Ed.2d 45 (1989); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979). The presumption is, of course, not a 'hard and fast rule of exclusion,' *Cooper Corp.*, *supra*, at 604-605, 61 S.Ct. 742, but it may be disregarded only upon some affirmative showing of statutory intent to the contrary. See *International Primate Protection League v. Administrators of Tulane Ed. Fund*, 500 U.S. 72, 83, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991). *Vermont*, *supra*, at 789-780, 120 S.Ct.1866.

The full statement of the referenced opinion in *Cooper Corp., supra*, February 12, 2009is:

> Since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.

As both *Vermont* and the Court's earlier decision in *Cooper*, make clear, the intent of Congress is controlling in deciding this statutory question, and the legislative history of the Act needs to be reviewed.

This review shows that when originally enacted in 1966, State and municipal governments were not intended to come within the Act's definition of "persons" subject to the Secretary's jurisdiction.

The Senate's section-by-section analysis of the House bill that was enacted into law in 1966, stated:

> **Section 2**.—This section contains definitions of eight terms used in the bill.
>
> (a) The term "person" is limited to various private forms of business organizations. It is, however, intended to include nonprofit or charitable institutions which handle dogs, cats, monkeys, guinea pigs hamsters, or rabbits. It is *not* intended to include public agencies or political subdivisions of State or municipal governments.

1966 U.S. Code Cong. & Adm. News 2635, 2637.

The section-by-section analysis of the Conference report on the House bill similarly stated:

> **Section 2**. ---This section contains definitions of eight terms used in the bill:
>
> (a) The term "person" is limited to various forms of business organizations. It is, however, intended to include nonprofit or charitable institutions which handle dogs and cats. It is *not* intended to include public agencies or political subdivisions of State or municipal governments or their duly authorized agents. It is the intent of the conferees that local or municipal dog pounds or animal shelters shall not be required to obtain a license since these public agencies are not a "person" within the meaning of section 2(a). Accordingly, research facilities would not (under sec.3) be prohibited from purchasing or acquiring dogs and cats from city dog pounds or similar institutions or their duly authorized agents because these institutions are not "persons" within the meaning of section 2(a). Section 2(a) is identical to section 2(a) of the House bill which is broader in scope than the comparable provision in section 2(a) of the Senate amendment.

1966 U.S. Code Cong. & Adm. News at 2652.

In 1970, when the Act was amended to give the Secretary jurisdiction over the activities of exhibitors, the definition of a "person" was left unchanged while the definition of "exhibitor" was set forth as meaning:

> "…any person (public or private) exhibiting any animals…"

7 U.S.C. § 2132(h).

The legislative history of the 1970 amendments to the Act consists entirely of the House report unaccompanied by a Senate or Conference report. The House's section-by-section analysis does address the new definition of "exhibitor", but is silent in respect to whether it was intended to apply to State governments or their agencies.

However, the fact that the phrase "public or private" is used in the "exhibitor" definition as a modifier of the term "person", has led the author of a treatise on the Animal Welfare Act published in

AGRICULTURAL LAW, Vol. II (Matthew Bender, 2004 edition), to conclude, at 87-8:

> The term "person," as used in the Act, includes individuals, partnerships, corporations, associations, and other legal entities. It does not cover public persons, such as state and local governments. State and local governmental bodies, however, are included in the definition of an "exhibitor" under the Act.

The author explains his rationale for this conclusion as part of his footnote 7 appearing at the bottom of page 87-8:

> *Rationale*: If the term "person" were construed to include public persons such as state and local governments, it would mean that the statutory definition of "exhibitor" to mean "any person (public or private)" would be redundant and serve no useful purpose.

The State of Wyoming in its Response to Complainant's Motion for Judgment and its Cross Motion for Judgment, at page 11, argues that the use of "(public or private)" to modify "person" in the "exhibitor" definition should be interpreted as modifying only those individuals, partnerships, firms, joint stock companies, corporations, associations, trusts, estates, or other legal entities who are "persons" as specified in 7 U.S.C. § 2132(a). When so viewed "… 'public or private' would include public or private corporations, not-for-profits or any other number of non-sovereign legal persons whether traded publicly or privately held."

However, not-for-profits were always covered by the Act's definition of person. *See* the Senate and Conference reports, *supra*. Furthermore, the offered interpretation is both contrary to the conclusion reached in the quoted treatise published in AGRICULTURAL LAW, *supra*, and to the definition of "public or private" found in older versions of BLACK'S LAW DICTIONARY[2]:

Public and private. A public corporation is one created by the

[2] Recent additions of BLACK'S do not include a definition of the phrase. After stating the definition, the older 4th edition cited early cases that employed it in reaching various decisions.

> state for political purposes and to act as an agency in the administration of civil government….
>
> Private corporations are those founded by and composed of private individuals for private purposes, as distinguished from governmental purposes, and having no political or governmental franchises or duties.

BLACK'S LAW DICTIONARY, 4th edition, page 409.

More importantly and decisively, Wyoming's interpretation of this operative language of the Act is inconsistent with the interpretation given it for over thirty years by the officials who administer the provisions of the Act for the Secretary that:

> … a state actor is just as capable of acting as an exhibitor and operating what is essentially a zoo. (The regulations define 'zoo' to mean 'any park, building, cage, enclosure, or other structure or premise in which a live animal or animals are kept for public exhibition or viewing, regardless of compensation' 9 C.F.R. § 1.1). Indeed, no fewer than twenty-one (21) states and state agencies are currently listed as exhibitors under the Act.

Complainant's Motion for Judgment on the Pleadings, at page 10. Complainant was careful to explain in its Response to Respondent's Cross-Motion for Judgment on the Pleadings, at page 6, footnote 4, that the referenced twenty-one States and State agencies are listed by APHIS as exhibitors holding required exhibitors' licenses for operating Animal Care Facilities covered under the Act and the Regulations and are not merely entities who may have voluntarily become registered exhibitors.

After the Act's amendment, in 1970, to extend its coverage to exhibitors, the Act was amended in 1976, to further extend its coverage. Other amendments were made by Congress in 1984, 1985, 1990, 1991 and 1995.

In 1990, section 2158 was added to the Act to require pounds or shelters owned and operated by a State, county, or city, and those privately owned that are operated on behalf of a State, county or city, to observe a five day holding period after acquiring a dog or cat before selling it to a dealer (7 U.S.C. § 2158). By that time, any reluctance by

Congress to regulate a State, county or city was no longer apparent.

Ostensibly, whenever the Act came before Congress for consideration and amendment during the past thirty years, Congress accepted the Department's interpretation that the "exhibitor" definition properly includes State agencies, and, for that reason, that definition together with the one for "person" was not altered

In *Doris Day Animal League v. USDA*, 315 F.3d 297 (DC Cir. 2003),[3] the Court of Appeals for the District of Columbia Circuit reversed a district court decision that held against the Secretary for continuing to employ, even after conducting rulemaking in which 36,000 comments were received on the need for change, a regulatory definition of "retail pet store" that included residential operations as coming within the term. The district court believed the regulation was inconsistent with the Act's use of the term to exempt "retail pet stores" from dealer licensing requirements. In reaching its decision to reverse the district court, the Circuit Court stated:

> The regulation's basic definition of 'retail pet store' to mean 'any outlet,' without distinguishing homes from traditional business locations, dates back to 1971….
>
> * * * *
>
> While the regulation's definition of 'retail store' does not exactly leap from the page, there is enough play in the language of the Act to preclude us from saying that Congress has spoken to the issue with clarity. From what we can make out, Congress has paid little attention to the question posed in this case. Still, it is true that in the years since the passage of the Act and the Secretary's adoption of the regulation, Congress has not altered the regulatory definition of 'retail pet store' although it has amended the Act three times. One line of Supreme Court cases holds that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence

[3]See also 62 Agric. Dec. 19, 451 (2003) - Editor

> that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846, 106 S.Ct. 3245, 3254, 92 L.Ed.2d 675 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, 94 S.Ct. 1757, 1762, 40 L.Ed.2d 134 (1974)).

The quotation fits this case perfectly....

* * * *

Taken together, the Secretary's decision to retain the regulatory definition of 'retail pet store' reflects the judgment of the agency entrusted with administering the Animal Welfare Act to fulfill the purpose of the Act as effectively as possible. For the reasons given, the regulation is a permissible construction of the statutory term 'retail pet store.'

In the instant proceeding, there is even more reason to defer to the interpretation of the pertinent statutory language by the officials of APHIS who administer the Animal Welfare Act. Their interpretation is not only a permissible one of long standing; it is consistent with an identical interpretation expressed in the treatise published in AGRICULTURAL LAW, *supra*, and the definition of "public and private" found in older editions of BLACK'S LAW DICTIONARY, *supra.*

Respondents further argue that because the public view the bison and elk at the two State Parks without charge, the Respondents are outside the ambit of that part of the "exhibitor" definition which limits its application to "exhibiting animals....to the public for compensation."

This argument is unavailing in light of controlling Departmental decisions. In *Lloyd A. Good, Jr.*, 49 Agric. Dec. 156, 163-164 (1990), it was held that an animal exhibited in conjunction with a resort is exhibited for compensation within the meaning of the Act and the Regulations. Additionally, under the Regulations "any park...in which a live animal or animals are kept for public exhibition or viewing regardless of compensation" is defined to be a "zoo" (9 C.F.R. § 1.1), and thereby comes within the "exhibitor" definition regardless of

whether the exhibition is for compensation. *See James Petersen and Patricia Petersen*, 53 Agric. Dec. 80, 90-91 (1994).

For these reasons, I conclude that the Secretary does have jurisdiction over the Wyoming Department of Parks and Cultural Resources, and that I have jurisdiction to impose a cease and desist order requiring its licensing and compliance with governing Regulations and Standards.

3. The Wyoming Department of Parks and Cultural Resources should be ordered to cease and desist from operating as an "exhibitor" without holding a valid license issued by APHIS and failing to comply with the Regulations and Standards.

The issuance of a cease and desist order is appropriate and needed to assure that the Wyoming agency will no longer exhibit animals at its State Parks without holding a valid license and will, in the future, observe the Regulations and Standards.

On the other hand, inasmuch as the Wyoming Agency legitimately believed that it was not subject to the Secretary's jurisdiction under the Act, it is not appropriate to assess civil penalties against it. It acted on the basis of advice it was given by the Wyoming Attorney General's Office in a case of first impression.

Furthermore, the Complaint is being dismissed in respect to the two Park Superintendents who were also named as Respondents. They were sued as individuals in their official capacities under a doctrine announced in *Ex parte Young*, 209 U.S. 123 (1908), to overcome the possible application of sovereign immunity under the Eleventh Amendment. (*See* the discussion at pages 11-12 of Complainant's Motion for Judgment on the Pleadings). Inasmuch as this provision of the Constitution does not prevent a State's being sued by the United States for the reasons enunciated in *United States v. Mississippi*, *supra*, the inclusion of the two Park Superintendents as subjects of the order is superfluous and unnecessary.

Accordingly the following Order is being entered.

ORDER

It is hereby ORDERED that the Wyoming Department of Parks and Cultural Resources shall cease and desist from (1) exhibiting animals at its State Parks without holding a valid Exhibitor's license issued by the United States Department of Agriculture's Animal and Plant Health Inspection Service; and from (2) failing to comply with the Regulations and Standards issued under the Animal Welfare Act governing the activities of animal exhibitors.

This decision and order shall become effective and final 35 days from its service upon the parties who have the right to file an appeal with the Judicial Officer within 30 days after receiving service of this decision and order by the Hearing Clerk as provided in the Rules of Practice (7 C.F.R. § 1.145).

In re: OCTAGON SEQUENCE OF EIGHT, INC., A FLORIDA CORPORATION, d/b/a OCTAGON WILDLIFE SANCTUARY AND OCTAGON ANIMAL SHOWCASE; LANCELOT KOLLMAN RAMOS, AN INDIVIDUAL; AND MANUEL RAMOS, AN INDIVIDUAL.
AWA Docket No. 05-0016.
Decision and Order as to Lancelot Kollman Ramos.
Filed October 2, 2007.

AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Correction of violations – Right to chosen occupation – Hardship defense – Animal lover defense – Cease and desist order – Civil penalty – License revocation.

The Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's (ALJ) decision concluding Lancelot Kollman Ramos violated the regulations and standards issued under the Animal Welfare Act. The Judicial Officer found Mr. Ramos failed to file an answer denying or otherwise responding to the allegations of the Complaint and held, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), Mr. Ramos was deemed to have admitted the allegations of the Complaint and waived the opportunity for hearing. The Judicial Officer rejected Mr. Ramos' assertion that the ALJ should be reversed based on Mr. Ramos' hard work to change "things" "for the better" stating, while Mr. Ramos' hard work was commendable, it does not eliminate the fact that the violations occurred. The Judicial Officer also held Mr. Ramos' inability to pursue his chosen occupation without an Animal Welfare Act license is not a basis for reversing

the ALJ's revocation of Mr. Ramos' Animal Welfare Act license stating, the Secretary of Agriculture is not compelled to allow individuals to retain Animal Welfare Act licenses merely because they desire to pursue an occupation for which an Animal Welfare Act license is necessary. The Judicial Officer further held the hardship revocation of Mr. Ramos' Animal Welfare Act license may cause Mr. Ramos and his family is not a basis for reversing the ALJ's revocation of Mr. Ramos' Animal Welfare Act license stating, collateral effects of revocation of an Animal Welfare Act license on a respondent or a respondent's family are not relevant to the revocation of an Animal Welfare Act license. The Judicial Officer also rejected Mr. Ramos' assertion that his love of animals should operate as a defense to his violations of the Animal Welfare Act and the Regulations and Standards. The Judicial Officer declined to address issues raised in Mr. Ramos' second appeal petition stating, the Rules of Practice (7 C.F.R. § 1.145(a)) provide only for a single appeal petition and Mr. Ramos had not requested an opportunity to supplement or amend his first appeal petition. The Judicial Officer issued a cease and desist order, assessed Mr. Ramos a $13,750 civil penalty, and revoked Mr. Ramos' Animal Welfare Act license.

Colleen A. Carroll for Complainant.
Joseph R. Fritz, Tampa, Florida, for Respondent Lancelot Kollman Ramos.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
Decision and Order as to Lancelot Kollman Ramos issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on April 29, 2005. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and 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].

The Administrator alleges Lancelot Kollman Ramos willfully violated the Animal Welfare Act and the Regulations and Standards on or about September 13, 2000, and December 13, 2000, and between May 10, 2001, and April 29, 2005 (Compl. ¶¶ 8-10, 12-16). The Hearing Clerk served Lancelot Kollman Ramos with the Complaint, the

Rules of Practice, and a service letter on July 5, 2005.[1] On July 22, 2005, Lancelot Kollman Ramos filed a response to the Complaint in which he requested oral hearing, but failed to deny or otherwise respond to any of the allegations of the Complaint.

On April 12, 2007, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Administrator filed a Motion for Adoption of Proposed Decision and Order as to Lancelot Ramos by Reason of Admission of Facts [hereinafter Motion for Default Decision] and a Proposed Decision and Order as to Lancelot Kollman Ramos by Reason of Admission of Facts [hereinafter Proposed Default Decision]. The Hearing Clerk served Lancelot Kollman Ramos with the Administrator's Motion for Default Decision, the Administrator's Proposed Default Decision, and a service letter on April 18, 2007.[2] Lancelot Kollman Ramos failed to file objections to the Administrator's Motion for Default Decision and the Administrator's Proposed Default Decision by May 8, 2007, within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On May 9, 2007, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Default Decision and Order as to Lancelot Kollman Ramos, a/k/a Lancelot Ramos Kollman [hereinafter Initial Decision as to Lancelot Kollman Ramos]: (1) concluding Lancelot Kollman Ramos willfully violated the Animal Welfare Act and the Regulations and Standards; (2) ordering Lancelot Kollman Ramos to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Lancelot Kollman Ramos a $43,500 civil penalty; and (4) revoking Lancelot Kollman Ramos' Animal Welfare Act license (Initial Decision as to Lancelot Kollman Ramos at 5-6). On May 11, 2007, Lancelot Kollman Ramos filed a late-filed objection to the Administrator's Motion for Default Decision.

On June 6, 2007, Lancelot Kollman Ramos filed a request to appeal the ALJ's Initial Decision as to Lancelot Kollman Ramos. I construed

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[1]United States Postal Service Track & Confirm for Receipt Number 7003 2260 0005 5721 4844.

[2]United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0004 4086 1738.

Lancelot Kollman Ramos' request to appeal as a request for an extension of time within which to appeal and concluded Lancelot Kollman Ramos' letter dated June 26, 2007, and filed July 2, 2007, constitutes a timely-filed appeal to the Judicial Officer.[3] On July 23, 2007, the Administrator filed a response to Lancelot Kollman Ramos' appeal petition. On July 30, 2007, Lancelot Kollman Ramos filed a Motion to Set Aside Default Decision and Order as to Lancelot Kollman Ramos, a/k/a Lancelot Ramos Kollman [hereinafter Motion to Set Aside Default Decision]. On August 2, 2007, the Administrator filed a response to the Motion to Set Aside Default Decision. On August 2, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm the ALJ's Initial Decision as to Lancelot Kollman Ramos.

DECISION

Statement of the Case

Lancelot Kollman Ramos failed to file an answer denying or otherwise responding to the allegations of the Complaint. Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegation. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, except as discussed in this Decision and Order as to Lancelot Kollman Ramos, *infra*, the material allegations of the Complaint that relate to Lancelot Kollman Ramos are adopted as findings of fact. This Decision and Order as to Lancelot Kollman Ramos is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

[3]Informal Order Regarding Lancelot Kollman Ramos' Request to File Appeal Petition and Request for the Rules of Practice, filed July 9, 2007.

1. Lancelot Kollman Ramos is an individual whose address is 12661 Andrew Road, Post Office Box 221, Balm, Florida 33503.

2. At all times material to this proceeding, Lancelot Kollman Ramos operated as a *dealer*, as that term is defined in the Animal Welfare Act and the Regulations and Standards. Lancelot Kollman Ramos is an Animal Welfare Act licensee and currently holds Animal Welfare Act license number 58-C-0816.

3. Lancelot Kollman Ramos has a small business. The gravity of his violations of the Animal Welfare Act and the Regulations and Standards is great. Lancelot Kollman Ramos knowingly operated as a dealer without a valid Animal Welfare Act license. Lancelot Kollman Ramos caused injuries to two lions that resulted in the death of one of the lions and lied to investigators about his actions. Lancelot Kollman Ramos has a history of previous violations of the Animal Welfare Act and the Regulations and Standards. Lancelot Kollman Ramos has been a respondent in one previous Animal Welfare Act enforcement case.[4]

4. On or about September 13, 2000, Lancelot Kollman Ramos operated as a dealer by delivering for transportation, or transporting, two lions for exhibition, without a valid Animal Welfare Act license.

5. On or about September 13, 2000, Lancelot Kollman Ramos violated the Regulations and Standards governing the provision of veterinary care to animals:

a. Lancelot Kollman Ramos failed to have an attending veterinarian provide adequate veterinary care to two juvenile lions;

b. Lancelot Kollman Ramos failed to establish and maintain adequate programs of veterinary care that include the availability of appropriate facilities, personnel, equipment, and services;

c. Lancelot Kollman Ramos failed to establish and maintain adequate programs of veterinary care that include the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries;

d. Lancelot Kollman Ramos failed to establish and maintain adequate programs of veterinary care that include daily observation of all animals to assess their health and well-being and a mechanism of direct and frequent communication so that timely and accurate information on problems of animal health and well-being is conveyed

[4]*In re Lancelot Kollman* (Consent Decision), 60 Agric. Dec. 291 (2001).

to the attending veterinarian; and

e. Lancelot Kollman Ramos failed to establish and maintain adequate programs of veterinary care that include adequate guidance to personnel involved in the care and use of animals.

6. On or about December 13, 2000, Lancelot Kollman Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause trauma.

7. On or about December 13, 2000, Lancelot Kollman Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause behavioral stress.

8. On or about December 13, 2000, Lancelot Kollman Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause physical harm.

9. On or about December 13, 2000, Lancelot Kollman Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause unnecessary discomfort.

10. On or about December 13, 2000, Lancelot Kollman Ramos, and/or his agents, used physical abuse to train, work, or otherwise handle two juvenile lions.

Lancelot Kollman Ramos' Appeal Petition

Lancelot Kollman Ramos raises three issues in his letter, dated June 26, 2007, and filed July 2, 2007 [hereinafter Appeal Petition]. First, Lancelot Kollman Ramos references an Animal Welfare Act administrative proceeding against Manuel Ramos (Lancelot Kollman Ramos' father) and himself in 2000. Lancelot Kollman Ramos indicates, since 2000, he has not worked for his father and states "[t]hings have changed since I worked for my father[.] [H]e had his way of doing things, but I am proud to say that with my hard work things have changed for the better." (Appeal Pet. at first and third unnumbered pages.)

Lancelot Kollman Ramos is required to be in compliance with the Animal Welfare Act and the Regulations and Standards at all times. While Lancelot Kollman Ramos' hard work to change things for the better is commendable, Lancelot Kollman Ramos' hard work does not

eliminate the fact that the violations occurred.[5] Therefore, even if I were to find that, subsequent to Lancelot Kollman Ramos' September 13, 2000, and December 13, 2000, violations of the Regulations and Standards, Lancelot Kollman Ramos worked hard to change things for the better, I would not reverse the ALJ's Initial Decision as to Lancelot Kollman Ramos.

Second, Lancelot Kollman Ramos contends, without an Animal Welfare Act license, he will not be able to pursue his chosen occupation and he and his family will suffer (Appeal Pet. at first through fourth unnumbered pages).

Revocation of Lancelot Kollman Ramos' Animal Welfare Act license is warranted in law and justified in fact. Lancelot Kollman Ramos' inability to pursue his chosen occupation without an Animal Welfare Act license is not a basis for reversing the ALJ's revocation of Lancelot Kollman Ramos' Animal Welfare Act license. The Secretary of Agriculture is not compelled to allow individuals to retain Animal Welfare Act licenses merely because they desire to pursue an occupation for which an Animal Welfare Act license is necessary.[6] Moreover, the hardship revocation of Lancelot Kollman Ramos' Animal Welfare Act license may cause Lancelot Kollman Ramos and his family is not a basis for reversing the ALJ's revocation of Lancelot Kollman Ramos' Animal Welfare Act license. I have no reason to disbelieve Lancelot Kollman Ramos' assertions regarding the hardship revocation of his Animal Welfare Act license may cause, and I empathize with Lancelot Kollman Ramos. Nonetheless, collateral effects of revocation of an Animal Welfare Act license on a respondent or a respondent's family are not

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[5]*In re Jewel Bond* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1175 (2006), *appeal docketed*, No. 06-3242 (8th Cir. Sept. 5, 2006); *In re Eric John Drogosch*, 63 Agric. Dec. 623, 643 (2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (2000).

[6]*Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934) (stating the Constitution does not guarantee an unrestricted privilege to engage in business or to conduct a business as one pleases); *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993) (same); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.) (same), *cert. denied*, 389 U.S. 835 (1967).

relevant to the revocation of an Animal Welfare Act license held by an individual determined to have violated the Animal Welfare Act or the Regulations and Standards.[7]

Third, Lancelot Kollman Ramos asserts he is an animal lover (Appeal Pet. at second unnumbered page).

The Animal Welfare Act does not provide that the love of animals is a defense to violations of the Animal Welfare Act or the Regulations and Standards. Therefore, even if I were to find that Lancelot Kollman Ramos is an "animal lover," such a finding would not operate as a defense to his violations of the Animal Welfare Act or the Regulations and Standards. I find Lancelot Kollman Ramos' love of animals irrelevant.

Lancelot Kollman Ramos' Motion to Set Aside Default Decision

On July 2, 2007, Lancelot Kollman Ramos filed a timely Appeal Petition.[8] On July 30, 2007, Lancelot Kollman Ramos filed a Motion to Set Aside Default Decision. After reviewing Lancelot Kollman Ramos' July 30, 2007, filing, I find the filing is an appeal petition. Section 1.145(a) of the Rules of Practice provides that a party may only file a single appeal petition, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, . . . a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing *an appeal petition* with the Hearing Clerk.

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[7]*In re Michael A. Huchital, Ph.D.*, 58 Agric. Dec. 763, 816 (1999).

[8]See the Informal Order Regarding Lancelot Kollman Ramos' Request to File Appeal Petition and Request for the Rules of Practice filed July 9, 2007, in which I found that Lancelot Kollman Ramos' July 2, 2007, filing constitutes a timely-filed appeal petition.

7 C.F.R. § 1.145(a) (emphasis added).[9] Lancelot Kollman Ramos did not request the opportunity to supplement or amend his July 2, 2007, Appeal Petition. Moreover, Lancelot Kollman Ramos filed his second appeal petition 28 days after the expiration of the time for filing his appeal petition. Therefore, I strike Lancelot Kollman Ramos' supernumerary, late-filed appeal petition from the record, and I do not address the issues raised in Lancelot Kollman Ramos' second appeal petition in this Decision and Order as to Lancelot Kollman Ramos.

Lancelot Kollman Ramos' Violation of a Cease and Desist Order

The Administrator alleges, between May 10, 2001, and April 29, 2005, Lancelot Kollman Ramos knowingly failed to obey the Secretary of Agriculture's cease and desist order issued in *In re Lancelot Kollman* (Consent Decision), 60 Agric. Dec. 291 (2001) (Compl. ¶ 8). Lancelot Kollman Ramos is deemed, by his failure to deny or otherwise respond to the allegations of the Complaint, to have admitted violating the cease and desist order issued in *In re Lancelot Kollman* (Consent Decision), 60 Agric. Dec. 291 (2001). However, the Administrator, without explanation, failed to include this violation of the Secretary of Agriculture's cease and desist order in the Proposed Default Decision and the ALJ, without explanation, failed to include this violation of the Secretary of Agriculture's cease and desist order in the Initial Decision as to Lancelot Kollman Ramos. Under these circumstances, I decline to conclude that Lancelot Kollman Ramos knowingly failed to obey the Secretary of Agriculture's cease and desist order issued in *In re Lancelot Kollman* (Consent Decision), 60 Agric. Dec. 291 (2001).

Sanctions

The Animal Welfare Act requires, when considering the amount of a civil penalty, the Secretary of Agriculture to give due consideration to four factors: (1) the size of the business of the person involved in the

[9] *See also In re Karl Mitchell*, 60 Agric. Dec. 91, 94 n.5 (2001) (stating the Rules of Practice do not provide that a party may file multiple appeal petitions), *aff'd*, 42 F. App'x 991 (9th Cir. 2002).

violations; (2) the gravity of the violations; (3) the violator's good faith; and (4) the violator's history of previous violations.[10]

Lancelot Kollman Ramos operates a small business. The gravity of Lancelot Kollman Ramos' violations is great. Lancelot Kollman Ramos operated as a dealer without an Animal Welfare Act license and Lancelot Kollman Ramos caused injuries to two lions that resulted in the death of one of the lions. Lancelot Kollman Ramos has been a respondent in one previous Animal Welfare Act enforcement case establishing a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and Lancelot Kollman Ramos' lack of good faith.

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

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that

[10] 7 U.S.C. § 2149(b).

recommended by administrative officials.[11]

The Administrator seeks assessment of a $43,500 civil penalty against Lancelot Kollman Ramos, revocation of Lancelot Kollman Ramos' Animal Welfare Act license, and a cease and desist order.[12] I find Lancelot Kollman Ramos is deemed to have admitted five violations of the Regulations and Standards and Lancelot Kollman Ramos could be assessed a maximum civil penalty of $2,750 for each of his five violations of the Regulations and Standards.[13] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude the revocation of Lancelot Kollman Ramos' Animal Welfare Act license, a cease and desist order, and assessment of a $13,750 civil penalty are appropriate and necessary to ensure Lancelot Kollman Ramos'

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[11]*In re Jerome Schmidt*, 66 Agric. Dec. 159, 207, (2007); *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002).

[12]The Administrator's Motion for Default Decision at 5.

[13]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, effective September 2, 1997, adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v) (2005)). Subsequently, the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards occurring after June 23, 2005, by increasing the maximum civil penalty from $2,500 to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). None of Lancelot Kollman Ramos' violations of the Regulations and Standards occurred after June 23, 2005.

compliance with the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

Conclusions of Law

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

2. On or about September 13, 2000, Lancelot Kollman Ramos operated as a dealer by delivering for transportation, or transporting, two lions for exhibition, without a valid Animal Welfare Act license, in willful violation of sections 2.1, 2.10(c), and 2.100(a) of the Regulations and Standards (9 C.F.R. §§ 2.1, .10(c), .100(a)).

3. On or about September 13, 2000, Lancelot Kollman Ramos violated the Regulations and Standards governing the provision of veterinary care to animals, in willful violation of section 2.40 of the Regulations and Standards (9 C.F.R. § 2.40):

a. Lancelot Kollman Ramos failed to have an attending veterinarian provide adequate veterinary care to two juvenile lions, in willful violation of section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a));

b. Lancelot Kollman Ramos failed to establish and maintain adequate programs of veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, in willful violation of section 2.40(b)(1) of the Regulations and Standards (9 C.F.R. § 2.40(b)(1));

c. Lancelot Kollman Ramos failed to establish and maintain adequate programs of veterinary care that include the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, in willful violation of section 2.40(b)(2) of the Regulations and Standards (9 C.F.R. § 2.40(b)(2));

d. Lancelot Kollman Ramos failed to establish and maintain adequate programs of veterinary care that include daily observation of all animals to assess their health and well-being and a mechanism of direct and frequent communication so that timely and accurate information on problems of animal health and well-being is conveyed

to the attending veterinarian, in willful violation of section 2.40(b)(3) of the Regulations and Standards (9 C.F.R. § 2.40(b)(3)); and

e. Lancelot Kollman Ramos failed to establish and maintain adequate programs of veterinary care that include adequate guidance to personnel involved in the care and use of animals, in willful violation of section 2.40(b)(4) of the Regulations and Standards (9 C.F.R. § 2.40(b)(4)).

4. On or about December 13, 2000, Lancelot Kollman Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause trauma, in willful violation of section 2.131(a)(1) of the Regulations and Standards (9 C.F.R. § 2.131(a)(1) (2001)).

5. On or about December 13, 2000, Lancelot Kollman Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause behavioral stress, in willful violation of section 2.131(a)(1) of the Regulations and Standards (9 C.F.R. § 2.131(a)(1) (2001)).

6. On or about December 13, 2000, Lancelot Kollman Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause physical harm, in willful violation of section 2.131(a)(1) of the Regulations and Standards (9 C.F.R. § 2.131(a)(1) (2001)).

7. On or about December 13, 2000, Lancelot Kollman Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause unnecessary discomfort, in willful violation of section 2.131(a)(1) of the Regulations and Standards (9 C.F.R. § 2.131(a)(1) (2001)).

8. On or about December 13, 2000, Lancelot Kollman Ramos, and/or his agents, used physical abuse to train, work, or otherwise handle two juvenile lions, in willful violation of section 2.131(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 2.131(a)(2)(i) (2001)).

For the foregoing reasons, the following Order is issued.

ORDER

1. Lancelot Kollman Ramos, 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.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Lancelot Kollman Ramos.

2. Lancelot Kollman Ramos is assessed a $13,750 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Lancelot Kollman Ramos. Lancelot Kollman Ramos shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0016.

3. Lancelot Kollman Ramos' Animal Welfare Act license (Animal Welfare Act license number 58-C-0816) is revoked.

Paragraph 3 of this Order shall become effective on the 60th day after service of this Order on Lancelot Kollman Ramos.

RIGHT TO JUDICIAL REVIEW

Lancelot Kollman Ramos has the right to seek judicial review of the Order in this Decision and Order as to Lancelot Kollman Ramos in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of the Order in this Decision and Order as to Lancelot Kollman Ramos. Lancelot Kollman Ramos must seek judicial review within

60 days after entry of the Order in this Decision and Order as to Lancelot Kollman Ramos.[14] The date of entry of the Order in this Decision and Order as to Lancelot Kollman Ramos is October 2, 2007.

In re: MARILYN SHEPHERD.
AWA Docket No. 05-0005.
Decision and Order.
Filed November 29, 2007.

AWA – Animal Welfare Act – Commerce – Constitutionality of Animal Welfare Act – Cease and desist – Civil penalty – License disqualification.

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson's decision concluding Marilyn Shepherd operated as a dealer without an Animal Welfare Act license in violation of the Animal Welfare Act (7 U.S.C. § 2134) and the Regulations (9 C.F.R. § 2.1). The Judicial Officer rejected Ms. Shepherd's contentions that she did not sell dogs in commerce and that the Animal Welfare Act is unconstitutional. The Judicial Officer ordered Ms. Shepherd to cease and desist from violating the Animal Welfare Act and the Regulations, assessed Ms. Shepherd a $52,000 civil penalty, and permanently disqualified Ms. Shepherd from becoming licensed under the Animal Welfare Act.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on November 29, 2004. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the

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[14]7 U.S.C. § 2149(c).

Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, during the period April 2002 through December 2002, Marilyn Shepherd violated the Animal Welfare Act and the Regulations by selling, in commerce, at least 165 dogs on at least 26 occasions, without the required Animal Welfare Act license. The Administrator seeks assessment of a civil penalty, issuance of a cease and desist order from future violations of the Animal Welfare Act and the Regulations, and permanent disqualification from obtaining an Animal Welfare Act license. Ms. Shepherd filed a timely answer to the Complaint denying the material allegations of the Complaint and requesting an oral hearing.

On May 2, 2006, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted an oral hearing in Springfield, Missouri. Robert A. Ertman represented the Administrator. Ronnie Williams, Ms. Shepherd's spouse, represented Ms. Shepherd. The Administrator called four witnesses and introduced seven exhibits into evidence, CX 1 through CX 7. Ms. Shepherd called one witness and introduced three exhibits into evidence, RX 2 through RX 4.

On August 31, 2006, the Chief ALJ issued a Decision [hereinafter Initial Decision] concluding Marilyn Shepherd willfully committed 165 violations of the Animal Welfare Act on 26 occasions by operating as a dealer without obtaining the required Animal Welfare Act license. The Chief ALJ ordered Marilyn Shepherd to cease and desist from violating the Animal Welfare Act and the Regulations, assessed Ms. Shepherd a $25,000 civil penalty, and permanently disqualified Ms. Shepherd from becoming licensed under the Animal Welfare Act. On October 10, 2006, Ms. Shepherd filed a "Request for Judicial Review" which I treat as an appeal to the Judicial Officer.

DECISION

Factual Background

There are few, if any, facts in dispute. Marilyn Shepherd owns and

operates a kennel in Ava, Missouri (CX 5-CX 6). During the period April 2002 through December 2002, Ms. Shepherd did not have an Animal Welfare Act license, but she was licensed as an Animal Care Facility by the State of Missouri (CX 5-CX 6). Ms. Shepherd had previously been licensed under the Animal Welfare Act, but in two enforcement actions initiated by the Animal and Plant Health Inspection Service, Ms. Shepherd's Animal Welfare Act license had been suspended. *In re Marilyn Shepard*, 61 Agric. Dec. 478 (2002); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998).

Animal and Plant Health Inspection Service investigators determined that, on at least 26 occasions during the period April 2002 through December 2002, Marilyn Shepherd sold a total of 165 dogs to NVK Kennels (CX 1, CX 3). NVK Kennels is licensed as a class "B" dealer under the Animal Welfare Act and is located in Seneca, Kansas (CX 1). Deborah Hubbard, a buyer-driver for NVK Kennels, obtained the dogs in question from Ms. Shepherd's kennel in Ava, Missouri (CX 2, CX 7). Ms. Hubbard, who lives in Missouri, is an employee of NVK Kennels (CX 7). Her job responsibility was "to contact dog breeders and book puppies for purchase for NVK Kennels." (CX 7.) When Ms. Hubbard first contacted Marilyn Shepherd to inquire about the availability of dogs for purchase, Ms. Hubbard explained to Ms. Shepherd that she was employed by NVK Kennels and that NVK Kennels would be the purchaser of the puppies (CX 7). Ms. Hubbard lived in Kansas when she first contacted Ms. Shepherd about purchasing puppies for NVK Kennels (CX 7). After learning that Ms. Hubbard planned to move to Missouri, Ms. Shepherd waited until Ms. Hubbard resided in Missouri before Ms. Shepherd sold puppies to NVK Kennels (CX 7).

Ms. Shepherd would contact Ms. Hubbard when Ms. Shepherd had puppies she wanted to sell (CX 7). Ms. Hubbard would then go to Ms. Shepherd's kennel in the NVK Kennels van and take custody of the puppies (CX 2, CX 7). Ms. Hubbard signed for the puppies, but never personally paid Ms. Shepherd for the puppies. All payments were made by check issued by NVK Kennels (CX 1, CX 7). After taking custody of the puppies, Ms. Hubbard would take them to a veterinarian, obtain health certificates, and then transport the puppies across the state border to NVK Kennels facilities in Kansas (Tr. 19-21). Some of the health

certificates indicated the owner of the puppies was NVK Kennels, while others indicated the owner of the puppies was Ms. Hubbard (Tr. 21).

Daniel Hutchings, a senior investigator for the Animal and Plant Health Inspection Service, interviewed Ms. Shepherd on March 18, 2003 (CX 4). Ms. Shepherd acknowledged that she sold all of the 165 puppies but claims she sold the puppies to Ms. Hubbard (CX 4). However, Ms. Shepherd confirmed that NVK Kennels issued the checks paying for the puppies (CX 4).

Dr. Jerome Schmidt, a veterinarian who runs a dog auction business, testified that, under the policy of the American Kennel Club, which he follows, ownership of a dog transfers to the new owner when the dog "cross[es] the auction block" before payment is made (Tr. 64).

Discussion

The Animal Welfare Act regulates "animals and activities" that "are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof[.]" 7 U.S.C. § 2131. Section 4 of the Animal Welfare Act requires dealers to be licensed to sell puppies, as follows:

> **§ 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.

7 U.S.C. § 2134.

It is undisputed that Ms. Shepherd did not have an Animal Welfare Act license during the period April 2002 through December 2002. Ms. Shepherd's primary contention is that she did not need an Animal

Welfare Act license, as she was not engaged in "commerce" within the meaning of the Animal Welfare Act (Request for Judicial Review ¶ 5). Ms. Shepherd contends, because she delivered the dogs in question to Deborah Hubbard, NVK Kennels' employee, within the State of Missouri, she cannot be found to have been engaged in commerce, even though it is undisputed that Ms. Shepherd and Ms. Hubbard were both aware the dogs were clearly intended to be taken to NVK Kennels' Kansas location (Request for Judicial Review ¶ 6). The Administrator contends the sale of these 165 dogs was in commerce and Ms. Shepherd's sale of these dogs without an Animal Welfare Act license violated the Animal Welfare Act and the Regulations.

Two prior cases involving Ms. Shepherd provide background to this discussion. In *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998), Ms. Shepherd had been licensed as a dealer, but her Animal Welfare Act license expired when the Animal and Plant Health Inspection Service refused to re-license her. *Id*. at 257. Finding a number of violations, the Judicial Officer assessed Ms. Shepherd a $2,000 civil penalty and issued a cease and desist order against Ms. Shepherd. Additionally, the Judicial Officer suspended Ms. Shepherd's Animal Welfare Act license for 7 days, stating, if she was not licensed at the time of the decision, she would be disqualified from obtaining an Animal Welfare Act license for 7 days and the disqualification period would continue until the $2,000 civil penalty was paid. Ms. Shepherd paid the civil penalty, but there is no evidence that she applied for or received a new Animal Welfare Act license.

After a subsequent inspection of Ms. Shepherd's kennel, she was cited for a number of regulatory violations, as well as for operating without the required Animal Welfare Act license. In that matter, *In re Marilyn Shepard*, 61 Agric. Dec. 478 (2002), Administrative Law Judge Dorothea Baker, while finding in favor of Ms. Shepherd on the regulatory counts, ruled Ms. Shepherd was in violation of the licensing requirement. "The fact that all of the puppies were bred, born and sold in the State of Missouri and that while [Ms. Shepherd] had title, the puppies did not leave Missouri but were sold to an individual within the State of Missouri who subsequently sold over State lines, and who paid for the puppies from a Missouri bank, does not preclude the jurisdiction

of the Secretary of Agriculture." *In re Marilyn Shepard*, 61 Agric. Dec. at 482. Ms. Shepherd did not appeal Administrative Law Judge Dorothea Baker's decision. Furthermore, there is no evidence that Ms. Shepherd paid the civil penalty assessed by Administrative Law Judge Baker.

The facts in the current case favor the Administrator's position. Ms. Hubbard made it clear that she was not buying the puppies in her own right and that she was an employee of NVK Kennels. In addition, the checks in payment for the puppies were all issued by NVK Kennels. (CX 7.) There is no question that Ms. Shepherd knew the dogs she delivered to Ms. Hubbard were being sold to and delivered to an entity in Kansas.

In one of Ms. Shepherd's earlier cases, Administrative Law Judge Baker cited an opinion of the Attorney General of the United States' Office of Legal Counsel, issued in response to a request from the Secretary of Agriculture for an opinion regarding the constitutionality of the Animal Welfare Act. *In re Marilyn Shepard*, 61 Agric. Dec. at 483. In that opinion, the Office of Legal Counsel stated the Animal Welfare Act even applied to "purely intrastate activities" as long as these activities affect interstate commerce. By expanding the definition of "commerce" to include trade, traffic, transportation, or other commerce which affects trade, traffic, transportation, and commerce, Congress determined "that certain specified activities have a sufficient effect on commerce among the States to require regulation, even if they take place entirely within one State." *In re Marilyn Shepard,* 61 Agric. Dec. at 490, Attach. A. Thus, Ms. Shepherd's selling dogs to NVK Kennels via Ms. Hubbard without an Animal Welfare Act license would be a violation of the Animal Welfare Act even if the transactions did take place solely in Missouri. The evidence overwhelmingly shows the true purchaser was located in Kansas and the arrangements of having the dogs picked up in Missouri and "sold" to Ms. Hubbard (even though she was unequivocally acting on behalf of NVK Kennels) were little more than cynical attempts to bypass the requirements of the Animal Welfare Act.

Ms. Shepherd's reliance on the American Kennel Club policy under which ownership of a dog transfers to the new owner at the time and

point of delivery is neither controlling nor relevant. Ms. Shepherd clearly sold the 165 puppies to NVK Kennels, and Ms. Shepherd was well aware that the puppies were to be transported from Missouri to Kansas—in the NVK Kennels van—after issuance of veterinary health certificates. According to the Office of Legal Counsel opinion, even if the sale of the dogs was completely within the State of Missouri and the dogs never subsequently crossed state lines, the sales would be subject to the jurisdiction of the Secretary of Agriculture. Under the facts of this case, where the transactions involved sales to an out-of-state company through its in-state employee and the out-of-state company directly paid for the puppies after delivery, I find, not only was Ms. Shepherd engaged in activities that were in commerce or affecting interstate commerce, but also Ms. Shepherd was directly engaged in interstate commerce.

Ms. Shepherd mentions several constitutional claims in passing. Without citing any authority, Ms. Shepherd states that licensing requirements must be voluntary to be constitutional. While I do not have the authority to declare an Act of Congress unconstitutional, it is clear that no one forced Ms. Shepherd to enter the business of selling dogs. Congress specifically required those who engage in this business to obtain a license. I find no valid constitutional challenge here.

Ms. Shepherd also contends, citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), that warrantless inspections are unconstitutional. In *Barlow's*, the Supreme Court of the United States did not outlaw, but rather established guidelines for the conduct of civil administrative warrantless inspections and for the issuance of civil administrative search warrants. Furthermore, courts have found the Animal Welfare "Act's inspection program provides a constitutionally adequate substitute for a search warrant." *Lesser v. Espy*, 34 F.3d 1301, 1308 (7th Cir. 1994). More important, however, the Complaint was not brought because of an inspection of Ms. Shepherd's facilities. While Ms. Shepherd was interviewed at her residence, which was at the kennel site, there was no inspection undertaken. Thus, there is no basis for this constitutional challenge.

Findings of Fact

1. Marilyn Shepherd is a breeder and dealer of dogs who operates a kennel in Ava, Missouri.

2. Although Ms. Shepherd previously held an Animal Welfare Act license, Ms. Shepherd was not licensed during calendar year 2002.

3. During the period April 10, 2002, through December 18, 2002, Ms. Shepherd, on 26 occasions, sold a total of 165 puppies to NVK Kennels, located in Seneca, Kansas.

Conclusions of Law

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

2. Each of the transactions referenced in Finding of Fact number 3 was, at the least, in commerce, and Ms. Shepherd was required by 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) to have a valid Animal Welfare Act license.

3. Ms. Shepherd willfully violated the Animal Welfare Act and the Regulations by operating as a dealer without an Animal Welfare Act license (7 U.S.C. § 2134; 9 C.F.R. § 2.1). Each of the 165 transactions referenced in Finding of Fact number 3 constitutes a separate violation of the Animal Welfare Act and the Regulations.

Appropriate Sanctions

The Administrator has requested that, due to the seriousness of Marilyn Shepherd's violations, I issue a cease and desist order, assess a $50,000 civil penalty, and permanently disqualify Ms. Shepherd from obtaining an Animal Welfare Act license. The Chief ALJ reduced the civil penalty amount to $25,000. Neither the Administrator nor the Chief ALJ indicates how he determined the amount of the civil penalty.

The Animal Welfare Act authorizes the Secretary of Agriculture to suspend or revoke Animal Welfare Act licenses, assess civil penalties, and issue cease and desist orders, as follows:

§ 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 . . . 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 . . . 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. . . . 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. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(a)-(b). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, effective September 2, 1997, adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act

and the Regulations by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v) (2005)). Subsequently, the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations occurring after June 23, 2005, by increasing the maximum civil penalty from $2,500 to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). None of Marilyn Shepherd's violations of the Animal Welfare Act and the Regulations occurred after June 23, 2005; therefore, the maximum civil that may be assessed against Ms. Shepherd for each violation of the Animal Welfare Act and the Regulations is $2,750.

Ms. Shepherd apparently feels free to ignore the prior imposition of civil sanctions and to continue doing business without an Animal Welfare Act license. Refusing to comply with a lawful final order such as that issued by Administrative Law Judge Baker is unacceptable, to say the least. Such actions on Ms. Shepherd's part influence my decision regarding the appropriate sanction.

The evidence indicates Marilyn Shepherd's kennel is not small. Shortly after the time of the violations at issue in this proceeding, Ms. Shepherd maintained 150 female dogs and 50 male dogs (CX 5). Looking at the other statutory factors, including the gravity of Ms. Shepherd's violations, Ms. Shepherd's lack of good faith, and Ms. Shepherd's history of violations, I find a $52,000 civil penalty would satisfy the Animal Welfare Act's requirements. Ms. Shepherd committed the 165 violations on 26 occasions. Weighing all the factors to be considered, I conclude a civil penalty of $2,000 for each of those 26 occasions is appropriate.

In addition, I issue an order directing Ms. Shepherd to cease and desist from violating the Animal Welfare Act and the Regulations. Finally, in light of Ms. Shepherd's repeated violations of the Animal Welfare Act and Ms. Shepherd's disregard for the Animal Welfare Act, I agree with the Administrator that Ms. Shepherd should be permanently disqualified from being licensed under the Animal Welfare Act.

Marilyn Shepherd's Appeal Petition

On October 10, 2006, Ms. Shepherd filed a Request for Judicial Review of the Chief ALJ's Initial Decision. I treat this request as an appeal to the Judicial Officer. Ms. Shepherd's request identifies what she sees as errors in the Chief ALJ's Initial Decision. Ms. Shepherd fails to articulate an understanding of the legal basis for the Chief ALJ's Initial Decision, and she does not present a clear discussion of the issues she raises.

First and foremost, I have no authority to judge the constitutionality of the Animal Welfare Act. *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983). Therefore, Ms. Shepherd's questioning of the constitutionality of the Animal Welfare Act falls on legally deaf ears. However, I note that others who have challenged the constitutionally of all or parts of the Animal Welfare Act have been united in their failure to convince any court to strike down any provision of the Animal Welfare Act on constitutional grounds. *See, Lesser v. Espy*, 34 F.3d 1301, 1308 (7th Cir. 1994) ("[w]e are also convinced that the [Animal Welfare] Act's inspection program provides a constitutionally adequate substitute for a warrant"); *Haviland v. Butz*, 543 F.2d 169, 177 (D.C. Cir. 1976) (referring to the Animal Welfare Act, the court said "[w]e perceive nothing in the Constitution outlawing this commendable effort to demonstrate America's humanity to lesser creatures" (internal quote marks omitted)).

Furthermore, Ms. Shepherd's discussions regarding her two previous cases has no relevance to this case. *In re Marilyn Shepard*, 61 Agric. Dec. 478 (2002); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998). While the Chief ALJ briefly described the two previous proceedings in which Ms. Shepherd was found to have violated the Animal Welfare Act, his reliance on these cases is limited to a showing that Ms. Shepherd knew the sale of puppies "to an individual within the State of Missouri who subsequently sold over State lines, and who paid for the puppies from a Missouri bank," required a license under the Animal Welfare Act (Initial Decision at 5 quoting *In re Marilyn Shepard*, 61 Agric. Dec. at 482). Ms. Shepherd's efforts to demonstrate bias on the part of Animal and Plant Health Inspection Service inspectors is futile. I have examined the decisions in the two previous cases and

believe Ms. Shepherd's characterization of them is somewhat overstated; however, even if accurate and she could demonstrate inspector bias, it is not relevant to my decision as there was no inspection of her kennel in the current case and the Complaint contains no allegation based on an inspection of Ms. Shepherd's facility.

With those points aside, the only issue in this case is whether Ms. Shepherd was required to have an Animal Welfare Act license. Then, if the answer to that question is yes, did she have an Animal Welfare Act license. Ms. Shepherd argues, because she lives in Missouri and she delivered the puppies to Ms. Hubbard in Missouri, the Animal Welfare Act does not apply. Ms. Shepherd's argument fails.

Section 4 of the Animal Welfare Act provides:

> **§ 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.

7 U.S.C. § 2134.

Ms. Shepherd sold and offered to sell animals to another dealer – NVK Kennels (CX 1, CX 3-CX 4, CX 7). If these transactions were "in commerce," then Ms. Shepherd would be required to have an Animal Welfare Act license. The Animal Welfare Act defines the word "commerce," as follows:

> **§ 2132 Definitions**
>
> When used in this chapter—
>
> . . . .
>
> (c) The term "commerce" means trade, traffic, transportation,

> or other commerce—
>
> (1) between a place in a State and any place outside of such State, or between points within the same State but through any place outside thereof, or within any territory, possession, or the District of Columbia; [or]
>
> (2) which affects trade, traffic, transportation, or other commerce described in paragraph (1).

7 U.S.C. § 2132(c). Ms. Shepherd interprets the word "commerce" very narrowly. She argues, in essence, that because title to the puppies transferred while the dogs were still in Missouri and she did not personally transport the puppies to Kansas, then her transactions were not "in commerce." Such a view ignores the second part of the definition which includes any transaction "which affects trade, traffic, transportation, or other commerce described in paragraph (1)." Determining what transactions are in "commerce" and what transactions fall outside the definition consumes considerable portions of the commerce clause jurisprudence. Even so, there is no simple answer. However, certain points are not in dispute. "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

Numerous United States statutes regulating intrastate economic activity have been upheld by the courts. The basis for such holdings has been that the regulated economic activity substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559-60 (1995). Examples of such legislation include, the regulation of intrastate coal mining, *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 276-80 (1981); the regulation of restaurants utilizing substantial interstate supplies, *Katzenbach v. McClung,* 379 U.S. 294, 299-301 (1964); the regulation of inns and hotels catering to interstate guests *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 252-53 (1964); and the regulation of the production and consumption of homegrown wheat, *Wickard v. Filburn*, 317 U.S. 111 (1942). Commerce clause jurisprudence makes the point clear "[w]here

economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *United States v. Lopez*, 514 U.S. 549, 560 (1995).

Ms. Shepherd sold 165 puppies on 26 occasions. Her claim that she sold them to Deborah Hubbard is without merit. Ms. Shepherd acknowledges that she received payment for the puppies from NVK Kennels (CX 4). Furthermore, Ms. Hubbard explained to Ms. Shepherd how NVK Kennels purchased puppies.

> I told Marilyn Shepherd I was employed by NVK Kennels Seneca Kansas and I explained to her I booked and transported puppies to NVK Kennels for their purchase. I told her I would not purchase her puppies but NVK Kennels would be the buyer of puppies. I told Marilyn Shepherd I would book the puppies to NVK Kennels for their purchase and transport the puppies from her kennel to NVK Kennels in Kansas and NVK Kennels would send Marilyn Shepherd a check as payment for the puppies they purchased from her. Marilyn Shepherd told me she understood this method of selling puppies.

CX 7. I conclude Ms. Shepherd knew the 165 puppies she alleges were sold to Deborah Hubbard were sold to NVK Kennels, Seneca, Kansas. Ms. Shepherd's actions indicate these transactions were in "commerce" as that word is defined in the Animal Welfare Act. I find the sale of the 165 puppies was trade "between a place in a State [Ava, Missouri,] and any place outside of such State [Seneca, Kansas]." However, even if I were to find these transactions to be between Ms. Shepherd and Ms. Hubbard, I would still find the transactions in commerce because, at the very least, the transactions "affect trade" described in 7 U.S.C. § 2132(c)(1), thus bringing the transactions under the second paragraph of the definition of the word "commerce." 7 U.S.C. § 2132(c)(2).

Because the transactions in question were in "commerce," Ms. Shepherd was required to have a license under the Animal Welfare Act. 7 U.S.C. § 2134. However, Ms. Shepherd failed to obtain an Animal Welfare Act license; therefore, she violated the Animal Welfare Act and the Regulations.

For the foregoing reasons, the following Order is issued.

ORDER

1. Marilyn Shepherd, her agents and employees, successor and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from operating as a dealer as defined in the Animal Welfare Act and Regulations without being licensed as required.

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

2. Marilyn Shepherd is assessed a $52,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and shall be sent to counsel for the Administrator at the following address:

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

Payment of the civil penalty shall be sent to Robert A. Ertman within 60 days after service of this Order on Marilyn Shepherd. Marilyn Shepherd shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0005.

3. Marilyn Shepherd is permanently disqualified from becoming licensed under the Animal Welfare Act effective on the 60th day after service of this Order on Marilyn Shepherd.

RIGHT TO JUDICIAL REVIEW

Marilyn Shepherd has the right to seek judicial review of the Order

in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of the Order in this Decision and Order. Ms. Shepherd must seek judicial review within 60 days after entry of the Order in this Decision and Order.[1] The date of entry of the Order in this Decision and Order is November 29, 2007.

In re: JAMES B. GARRETSON.
AWA Docket No. D-07-0050.
Decision and Order.
Filed December 28, 2007.

AWA – Threats – Verbal abuse – Harassing of public official.

Colleen A. Carroll for APHIS.
Respondent Pro se.
Decision and Order by Administrative Law Judge Jill S. Clifton.

DECISION

1. The Petitioner James B. Garretson represents himself (appears pro se) in this appeal, filed in January 2007, of the denial on November 27, 2006, of his application for an Animal Welfare Act license. *See* 9 C.F.R. § 2.11. The Respondent, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS"), is represented by Colleen A. Carroll, Esq.
2. APHIS's Motion for Summary Judgment, filed November 1, 2007, which Petitioner James B. Garretson did not oppose, is GRANTED.

Findings of Fact

3. The Secretary of Agriculture revoked the privilege of the Petitioner

[1] 7 U.S.C. § 2149(c).

James B. Garretson, also known as James Brandon Garretson, to engage in activities that require an Animal Welfare Act license. See Decision and Order issued March 22, 2007 in AWA Docket No. 04-A032, slip opinion at 2, 44-45, decided at the administrative law judge level and not appealed, *In re James B. Garretson*, *et al.*, 66 Agric. Dec. 119 (2007).
4. The Secretary of Agriculture permanently disqualified the Petitioner James B. Garretson, also known as James Brandon Garretson, from obtaining, holding, or using any Animal Welfare Act license or from otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly, or through any corporate or other device or person. See Decision and Order issued March 22, 2007 in AWA Docket No. 04-A032, slip opinion at 2, 44-45, decided at the administrative law judge level and not appealed, *In re James B. Garretson*, *et al.*, 66 Agric. Dec. 119 (2007).
5. While an applicant for an initial Animal Welfare Act license, the Petitioner James B. Garretson, also known as James Brandon Garretson, threatened, verbally abused, and harassed Dr. Gaj, an official of the Animal and Plant Health Inspection Service (APHIS official) in the course of carrying out his duties, on June 25, 2004, at Lake City, Florida, in willful[1] violation of section 2.4 of the Regulations (9 C.F.R. § 2.4). The Petitioner James B. Garretson, also known as James Brandon Garretson, had a pattern of threatening, verbally abusing, and harassing APHIS officials in the course of carrying out their duties. See Decision and Order issued March 22, 2007 in AWA Docket No. 04-A032, slip opinion at 2, 44-45, decided at the administrative law judge level and not appealed, *In re James B. Garretson*, *et al.*, 66 Agric. Dec. 119 (2007).

Conclusions

6. No genuine issues of material fact exist, and APHIS is entitled to judgment as a matter of law.
7. The Petitioner James B. Garretson, also known as James Brandon Garretson, is barred from obtaining an Animal Welfare Act license.

[1] The term "willful" used here includes such gross neglect of a known duty as to be the equivalent of an intentional misdeed.

Consequently, he cannot prevail on his Petition herein.
8. APHIS's denial on November 27, 2006, of the application for an Animal Welfare Act license by the Petitioner James B. Garretson, also known as James Brandon Garretson, must be and hereby is upheld.

Order

9. The Petitioner James B. Garretson, also known as James Brandon Garretson, and his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act or the Regulations.
10. The Petitioner James B. Garretson, also known as James Brandon Garretson, and his agents and employees, successors and assigns, directly or indirectly, or through any corporate or other device or person, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder.

Finality

11. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see enclosed Appendix A).
Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.
Done at Washington, D.C.

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ADMINISTRATIVE WAGE GARNISHMENT

DEPARTMENTAL DECISION

In re:VALLIRE SCOTT.
DA Docket No. 08-0009.
Decision and Order.
Filed November 8, 2007.

AWG – Overpayment of wages and leave – Wage offset, USDA employee.

Petitioner Pro se.
Decision and Order by Administrative Law Judge Victor W. Palmer.

DECISION

On November 5, 2007 and on November 8, 2007, I conducted telephonic hearings on the Petition of Vallire Scott to determine whether the National Finance Center, United States Department of Agriculture, under 5 U.S.C. § 5514 and 7 C.F.R. § 3.51-3.68, may properly offset and make deductions from her bi-weekly salary for alleged overpayments of wages and leave. The alleged overpayments have been treated by the National Finance Center as valid debts presently owed to the United States Department of Agriculture by an employee because a worker's compensation claim filed by Mrs. Scott was denied, on June 18, 2007, by a Senior Claims Examiner for the U.S. Department of Labor, Employment Standards Administration, Office of Workers' Comp. Programs (DOL).

During the first telephonic hearing, Mrs. Scott explained that she has appealed the initial determination by the claims examiner and that her appeal is now pending. At the second hearing, Mrs. Scott read from a letter from DOL vacating the decision and remanding her claim for its more thorough consideration in compliance with controlling law. Therefore, it cannot be found that a valid debt is presently due and owed by Mrs. Scott to the United States Department of Agriculture, and her petition is herewith GRANTED. Accordingly, the Notices of Intent to

Offset Salary with Bill Dates of September 1, 2007 and September 16, 2007, are set aside and vacated. In the event, after exhaustion of all of her appeal rights, Mrs. Scott's workers compensation claim is denied, nothing in this decision and order shall be interpreted as barring new salary offsets as authorized by pertinent statutes and regulations.

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DEBARMENT NON-PROCUREMENT

DEPARTMENTAL DECISION

In re: SUN MOUNTAIN LOGGING, L.L.C., SHERMAN G. ANDERSON, AND BONNIE ANDERSON
DNS-FS Docket No. 02-0001.
Decision and Order.
Filed November 27, 2007.

DNS – E.A.J.A. – Debarment improper – Evidence inadequacy.

Douglas D. Harris for Petitioners.
Lori Polin Jones for FS.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision & Order
Awarding EAJA Attorneys' Fees to Sun Mountain

Decision Summary

1. Applicants Sun Mountain Logging, L.L.C., Sherman G. Anderson, and Bonnie Anderson (collectively, Sun Mountain) are entitled to reimbursement under the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504, 7 C.F.R. §§ 1.180-1.203.

Introduction

2. Sun Mountain sought EAJA reimbursement from the U. S. Forest Service (Forest Service) for monies expended to defend against suspensions imposed by the Forest Service. *See* Sun Mountain's Application for Award of Fees and Expenses Under Equal Access to Justice Act, filed December 11, 2002, with supporting documents (Application); and Sun Mountain's Reply Brief in Support of Application for Award of Fees and Expenses Under Equal Access to Justice Act, filed February 28, 2003 (Reply). Sun Mountain sought "$32,527.41 attorneys fees and attorneys costs," plus "$192 in expenses

for mileage and meals for employees required to testify."

3. The Forest Service imposed the suspensions against Sun Mountain under the Government wide Debarment and Suspension (Nonprocurement) regulations, found in Title 7 Part 3017 of the Code of Federal Regulations.

4. The Forest Service opposed Sun Mountain's EAJA application. *See* the Forest Service Suspending Official's Response, filed January 31, 2003 (Response).[1]

Background

5. In a Decision issued November 14, 2002, I ordered the Forest Service suspensions of Sun Mountain vacated, finding that the Forest Service decisions to suspend Sun Mountain were not based on the applicable standard of evidence. *See* 7 C.F.R. § 3017.515 Appeal of debarment or suspension decisions. *In re Sun Mountain Logging, L.L.C., et al.*, 61 Agric. Dec. 627 (2002).

6. The Forest Service is authorized to impose suspension based upon adequate evidence that a cause for debarment may exist. I concluded that, given the knowledge within the Forest Service, the Forest Service did not have the authority to suspend Sun Mountain, because there was never "adequate evidence" of a "cause of so serious or compelling a nature that it affect(ed) the present responsibility" of Sun Mountain. 7 C.F.R. §§ 3017.400, 3017.405, and 3017.305(d).

7. The suspensions the Forest Service imposed on Sun Mountain involved the Mudd-York Salvage Timber Sale, on the Beaverhead-Deerlodge National Forest, Wise River Ranger District, in Montana. The Mudd-York Salvage Timber Sale was contracted to Darby Lumber, Inc., which contracted with two logging subcontractors, Sun Mountain and Myrsdol Logging.

8. On October 8, 1999, the Forest Service notified the timber purchaser, Darby Lumber, Inc., that it, Darby Lumber, Inc., was in breach of contract for the removal of undesignated timber from the sale

[1] Contrary to the Forest Service's assertion, made by Lori Polin Jones, Esq. (Response, p. 1), I did ***not*** hold the Sun Mountain suspensions to have been arbitrary and capricious; I held that the Sun Mountain suspensions were not based on the applicable standard of evidence.

area and owed damages to the Forest Service in the amount of $596,283.71. In January 2000, the Forest Service revised the amount of damages owed by Darby Lumber, Inc. downward to $321,012.95. In March 2000, the Forest Service revised the amount of damages owed by Darby Lumber, Inc. downward to $179,456.15 (including not only stumpage, but associated charges, the cost of a recruise, government costs, and interest).[2] Darby Lumber, Inc., in February 2000, appealed the Forest Service determination to the Board of Contract Appeals, U. S. Department of Agriculture. *See Darby Lumber Incorporated*, AGBCA No. 2000-131-1, Ruling of the Board of Contract Appeals (October 15, 2003).

9. The Mudd-York Salvage Timber Sale was not a clear-cut project, so the two logging subcontractors for Darby Lumber, Inc., Sun Mountain and Myrsdol Logging, were expected to cut additional timber for "skid roads, landings, and just to get through the woods." The "additional volume" logs were to be billed to Darby Lumber, Inc. by the Forest Service.

10. The Forest Service failed to bill Darby Lumber, Inc. adequately for the "additional volume" logs; thus the Forest Service was not paid adequately by Darby Lumber, Inc. for the "additional volume" timber.

Findings of Fact and Conclusions

11. During the latter half of 1998, Sun Mountain was responsible for removing more "additional volume" timber, also called "undesignated" timber, than was billed by the Forest Service. [Regarding the timber being removed by the other logging subcontractor, Myrsdol Logging, there is no evidence before me.]

12. The Forest Service Suspending Officials had adequate evidence that timber was unaccounted for; but taking into account the knowledge within the Forest Service, the Suspending Officials did not have adequate evidence to believe that Sun Mountain caused the timber to be unaccounted for. Consequently, I concluded that the Forest Service's decisions to impose suspensions on Sun Mountain were not substantially

[2] Forest Service Contracting Officer's Findings and Decision dated March 17, 2000, Ex. 4 at p. 7. Brown hard-back binder, containing Administrative Record Exhibits 1-11.

justified.

13. The Forest Service took a position adversary to Sun Mountain on July 9, 2001, by imposing suspensions, effective immediately. The Forest Service then, after a hearing August 8, 2001, extended the suspensions, effective August 13, 2001. Then, after a hearing February 25-26, 2002, the Forest Service terminated the suspensions effective June 26, 2002, but failed to vacate the suspensions.

14. An adversarial proceeding begins when there is an "action or failure to act by the agency" which becomes the basis for the adversary adjudication. 5 U.S.C. § 504(b)(1)(E).

15. The adversary adjudications at issue commenced on July 9, 2001, when the Forest Service imposed suspensions on Sun Mountain. *In re Dwight L. Lane, et al.*, 59 Agric. Dec. 148, 162-165 (2000); *aff'd*, No. A2-00-84 (D. N.D. July 18, 2001) (unpublished), *but see* 60 Agric. Dec. 506 (2001); *aff'd*, 294 F.3d 1001 (8th Cir. 2002), *see also* 61 Agric. Dec. 143 (2001).

16. On July 9, 2001, when the Forest Service imposed the suspensions, the Forest Service's actions were adversary adjudications against Sun Mountain, followed by continuing adversary adjudications within the meaning of the Equal Access to Justice Act.

17. Sun Mountain, assisted by attorneys, immediately opposed the suspensions imposed by the Forest Service, as evidenced by the request for oral hearing dated July 24, 2001, and the written argument in opposition dated July 25, 2001. These documents alerted the Forest Service that the suspensions against Sun Mountain were questionable; the Forest Service could have terminated the suspensions pending further investigation.

18. Sun Mountain continued to provide the Forest Service with documents including Affidavits, and the Forest Service proceeded with two hearings.

19. The hearing on August 8, 2001, was a portion of the adversary adjudications. The Forest Service was represented by counsel; Sun Mountain was represented by counsel. Evidence was presented, including the testimony of witnesses who testified on direct and cross examination. The presiding officer was a Forest Service Suspending Official. The hearing persuaded the Suspending Official that further investigation was warranted, but he did not terminate the suspensions

pending further investigation.

20. The hearing on February 25-26, 2002, in Missoula, Montana was a portion of the adversary adjudications. The Forest Service was represented by counsel (Lori Polin Jones, Esq., and Marcus Wah, Esq.); Sun Mountain was represented by counsel (Douglas D. Harris, Esq., and James J. Masar, Esq.). Evidence was presented, including the testimony of witnesses who testified on direct and cross examination. The presiding officer was a Forest Service Suspending Official. The hearing persuaded the Suspending Official that the suspensions should be terminated. Sun Mountain had lost approximately a year and would have lost more had it not so vigorously opposed the suspensions.

21. When Sun Mountain filed this case (August 13, 2002), the Forest Service continued to take a position adversary to Sun Mountain. Sun Mountain's attorneys' fees and costs in defense of the adversary adjudications continued to accrued through November 19, 2002, when Sun Mountain's counsel received my Decision.

22. I ordered the suspensions vacated (*In re Sun Mountain Logging, L.L.C., et al.*, 61 Agric. Dec. 627 (2002)), and Sun Mountain is the prevailing party, for purposes of the Equal Access to Justice Act.

23. The Forest Service decisions to suspend Sun Mountain were not substantially justified. The fault in the Forest Service's failure to bill Darby Lumber, Inc. adequately for the "additional volume" logs, lay in large part with the failure of Forest Service personnel, in particular the Timber Sale Administrator, to relay accurate counts of "additional volume" timber to the resource clerk for billing. Sun Mountain had no responsibility and no opportunity to review the information being submitted to the resource clerk, which was done electronically by computer within the Forest Service.

24. Following the two-day hearing February 25-26, 2002, the Forest Service Suspending Official who terminated the suspensions made no credibility findings but found that both the Forest Service and Sun Mountain were responsible for the lack of clear communication and failure to ensure that the government was paid for the amount of additional timber removed.

25. In my November 14, 2002 Decision, I noted that it may have initially appeared that there was "adequate evidence" of a "cause of so

serious or compelling a nature that it affect(ed) the present responsibility" of Sun Mountain, but that initial appearance was false, as proved by evidence within the knowledge of the Forest Service. I also remarked that while both the Forest Service and Respondent Sun Mountain may have contributed to the problem, it was the Forest Service that had the opportunity to remedy the problem early on.

26. The Forest Service asks me to put myself in the shoes of the Suspending Official, who first decided in June 2001 to impose the suspension (the suspension referral is dated June 7, 2001). It is not what the Suspending Official knew or did not know that determines whether the Forest Service was substantially justified. The collective knowledge of the Forest Service, including the knowledge of the Timber Sale Administrator, must be considered.

27. Originally, the method of handling the "additional volume" logs was that they would be decked separately to await the Timber Sale Administrator's inspection(s) each week to count them and mark them with paint, prior to their being hauled away. That method of handling the "additional volume" logs was soon modified (about two weeks into the work), however, with the requirement that Respondents' workers keep a hand-counter tally of the additional logs cut, clearing the counter each time the tally was reported to the Timber Sale Administrator.

28. Whether the modification relieved Sun Mountain from complying with the original method is in dispute. In any event, the Timber Sale Administrator failed to compare the data gathered from counting and painting separately decked logs, with the data provided by Respondents' workers' hand-counter tallies. He failed to report any of the "additional volume" logs revealed by the hand-counter tallies to the resource clerk for billing. He failed to do anything with the hand-counter tallies.

29. The preponderance of the evidence showed that Sun Mountain accurately kept hand-counter tallies of harvested "additional volume" logs and reported them to the Forest Service, as requested. The Forest Service requested those hand-counter tallies and then failed to do anything with them. Since the hand-counter tallies reported by Sun Mountain were part of the evidence known to the Forest Service, the Forest Service did not have "adequate evidence" of a "cause of so serious or compelling a nature that it affect(ed) the present

responsibility" of Sun Mountain.

30. The Forest Service states that my "November 14, 2002 Decision discounts the testimony of the Forest Service timber sale administrator. The sale administrator testified that he used the applicants' hand-counter tallies to compare the counts of the separated additional, undesignated, and unpaid decked logs. LB, Tab 33, at 390." Response, at 12. Sadly, the documentation does not support that claim. The Timber Sale Administrator's "Tally Sheet" (Tab 30), which is pitifully inadequate, demonstrates the failure of the Forest Service to do anything with the hand-counter tallies. There is no record, no documentation, of coordinating the separately decked logs counts with Sun Mountain's reports of hand-counter counts. The "Tally Sheet" doesn't show an adequate number of logs; and the dates shown are not frequent enough to account for the harvest of the "additional volume" logs. The preponderance of the evidence shows that the Forest Service either failed to get an accurate count of the separately decked logs, or failed to utilize the hand-counter tallies effectively, or both. Thus, accurate counts of "additional volume" timber were not relayed to the resource clerk for billing by the Timber Sale Administrator.

31. In June 2001, the Suspending Official may have been unaware of the pressures on the ground during the latter half of 1998 and the competing demands upon the Timber Sale Administrator's time, including those occasioned by fire season. The Suspending Official may have been unaware that the Timber Sale Administrator's visits to the decks to count the harvested logs and mark them with paint were not occurring at least once per week as agreed. The Suspending Official may not have had a look at the Timber Sale Administrator's "Tally Sheet" and may not have been aware of its inadequacies. The Suspending Official may not have been aware of the contract modification, by which Sun Mountain kept hand-counter tallies of the additional logs cut, clearing the counter each time the tally was reported to the Timber Sale Administrator. The Forest Service is responsible for its decisions made, including failing to take into account its own inadequacies while blaming Sun Mountain.

32. During the latter half of 1998, neither Sun Mountain nor Darby Lumber, Inc., was tasked with recording and reporting numbers of logs

removed (which could have been done in a number of ways); neither was tasked with keeping tallies to compare with those of the Timber Sale Administrator for maximum accountability; nor did either Sun Mountain or Darby Lumber, Inc. initiate such actions. Both they and the Forest Service relied too heavily on the Timber Sale Administrator for accurate reporting, which was beyond his capability, given all the circumstances.

33. The Equal Access to Justice Act allows for an award of fees and expenses "in connection with" an adversarial proceeding. 5 U.S.C. § 504(a)(1).

34. Sun Mountain is the prevailing party, for purposes of the Equal Access to Justice Act.

35. Sun Mountain expended monies reimbursable under the Equal Access to Justice Act in the adversarial adjudications, beginning July 9, 2001, when the Forest Service imposed the suspensions, and ending November 19, 2002, when Sun Mountain's counsel received my Decision.

36. Sun Mountain's Application for Award of Fees and Expenses under Equal Access to Justice Act was timely filed, on December 11, 2002. 5 U.S.C. § 504(a)(2), 7 C.F.R. § 1.193(a). Sun Mountain meets the eligibility requirements.

37. Sun Mountain's rulemaking request to increase the maximum allowable attorney's fee rate was not successful. By letter dated July 1, 2004, over the signature of General Counsel Nancy S. Bryson, the Secretary of Agriculture denied Sun Mountain's petition "to increase the hourly rate at which fees may be awarded in adversary adjudications before the Department." The letter includes in pertinent part,

> After publishing for public comment a notice of proposed rulemaking, the Department revised its EAJA regulation at 67 Fed. Reg. 63237, October 11, 2002. The regulation as revised is codified at 7 C.F.R. 1.180 *et seq*. In view of the recency of the latest revision, we do not believe that further amendment is warranted at this time.

38. Based on United States Department of Agriculture (USDA) limits, the maximum allowable attorneys' fee rate is $125.00 per hour for attorneys' work beginning October 11, 2002; and the maximum allowable attorneys' fee rate is $75 per hour for attorneys' work through

October 10, 2002. 7 C.F.R. §§ 1.182, 1.186, and 1.187. USDA kept the maximum rate at $75 per hour long after the EAJA raised the maximum to $125 per hour in 1996. Were it not for these regulations and the rulemaking result, I would have awarded the $150 per hour that Sun Mountain paid for its attorneys' work, based on the reasons enumerated in Sun Mountain's Application and Reply, including especially the prevailing rates and the extraordinarily effective representation of a small business against an agency of the United States of America. On rare occasion Sun Mountain paid less than $150 per hour for its attorneys' work (for example, $100 per hour for the work of attorneys Cory Laird and Julie Gardner); such work was also worth more than $75 per hour and I have awarded the $75 maximum.

39. Beginning July 9, 2001, work in connection with the Board of Contract Appeals action was intertwined with the Suspensions actions, in that timber not accounted for was key to both actions. Beginning July 9, 2001, separation of the work is not practical and the work done by Sun Mountain's attorneys occasioned by the Board of Contract Appeals action is connected to the Suspension actions and reimbursable here.

40. Beginning July 9, 2001, response to the criminal investigation prompted by the Forest Service was intertwined with the Suspensions actions, in that timber not accounted for was key to both actions. Beginning July 9, 2001, separation of the work is not practical and the work done by Sun Mountain's attorneys occasioned by the criminal investigation is connected to the Suspension actions and reimbursable here.

41. I have omitted from the award here the work regarding a new entity as not connected to the Suspension actions for EAJA purposes, even though the Suspensions actions triggered such work.

42. The adversary adjudications concluded on November 19, 2002, when the Decision I issued November 14, 2002, was delivered to and considered by Sun Mountain's counsel. [Although Sun Mountain incurred additional attorneys' fees in connection with this EAJA proceeding, those attorneys' fees are not reimbursable. A portion of even the November 19, 2002 attorneys' fees has been eliminated as not reimbursable here because the attorneys' work was in furtherance of the EAJA award.]

43. The portion of the attorneys' fees and costs in the amount of $32,527.41 that Sun Mountain paid, that was connected to opposing the Forest Service imposed suspensions against it, that does not exceed USDA's maximum rates for EAJA awards, and that was reasonable and necessary and in accordance with 7 C.F.R. § 1.186, is detailed as follows, in reverse chronology:

Attorneys' Fees & Attorneys' Costs in 2002

Attorneys' Fees	Attys' Costs		2002
$ 93.75	($125 x 0.75)		November
$ 7.50	($75 x 0.1)	$ 10.11	October
$ 1,260.00	($75 x 16.8)	$ 438.82	September
$ 52.50	($75 x .7)		August
$ 187.50	($75 x 2.5)	$ 30.26	July
$ 150.00	($75 x 2)	$ 4.00	June
$ 885.00	($75 x 11.8)		May
$ 37.50	($75 x 0.5)	$ 5.36	April
$ 150.00	($75 x 2)	$ 28.10	March
$ 3,060.00	($75 x 40.8)		February
$ 206.25	($75 x 2.75)		January

Attorneys' Fees & Attorneys' Costs in 2001

Attorneys' Fees	Attys' Costs		2001
$ 457.50	($75 x 6.1)	October/November/December	
$ 1,061.25	($75 x 14.15)	$ 43.51	September
$ 2,643.75	($75 x 35.25)[3]	$ 567.99[4]	August
$ 2,898.75	($75 x 38.65)	$ 80.00	July
		(beginning July 9, 2001)	

44. The foregoing totals $13,151.25 attorneys' fees and $1,208.15 attorneys' costs.

[3] Three hours of work on 08/28/2001, I have eliminated as not connected to the Suspension actions.

[4] Contrary to the Forest Service's argument made by Ms. Polin (Response), I find the August 8 hearing transcript cost to be Sun Mountain's reasonable and necessary cost in defending against the suspensi

45. In addition to the $13,151.25 attorneys' fees and $1,208.15 attorneys' costs, Sun Mountain's expenditures of $192.00 for mileage and meals of Sun Mountain employees who traveled on February 25 and 26, 2002, to Missoula, Montana for purposes of presenting testimony, are connected to the Suspension actions and are added to Sun Mountain's reimbursement.

Order

46. The Forest Service shall pay Sun Mountain **$14,551.40**, payable to the order of "Sun Mountain Logging, L.L.C., Sherman G. Anderson, and Bonnie Anderson," referencing **DNS-FS Docket No. 02-0001**. In seeking payment, Sun Mountain should comply with 7 C.F.R. § 1.203.

This Decision and Order shall become final and effective 35 days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145 (*see* attached Appendix A).

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

Done at Washington, D.C.

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such

briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any

right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

EQUAL CREDIT OPPORTUNITY ACT

COURT DECISIONS

SUSAN J. ANSELL v. USDA.
No. 2:05-cv-505.
Court Decision.
Filed September 4, 2007.

(Cite as 2007 WL 2593777 (W.D.Pa.))

EOCA – Section 741 – Statute of limitations – Federal tort claim – Discovery rule.

Petitioners were delinquent on a 1984 FSA loan and alleged that FSA agency officials tortuously mis-applied loan payments and improperly denied them operating loans causing inadvertent default on their FSA loan requiring Petitioners to take extreme measures including putting their farm into a "Debt for Nature" program for 50 years where they could not use it for farm purposes for 50 years. From 1994 to 2003, Petitioners sought administrative relief through various means, but did not institute litigation until May 2005. Petitioner's Pro se complaint was analyzed by the court as a civil rights complaint under Section 741, and alternately, a complaint sounding in contract and tort. Under the "Discovery rule," Petitioner's cause of action arose in late 1994 when they knew or should have known of a claim against the USDA. Petitioners were advised in writing on/about July 29, 1999 to file a claim. Under Federal Claims Act, (28 U.S.C. 2401), a claim must be filed within six years. Under the Equal Credit Opportunity Act (EOCA), the Petitioner must allege one of the specified reasons (Section 741) for claims of discrimination even if timely filed which it is not.

United States District Court
W.D. Pennsylvania.

MEMORANDUM OPINION AND ORDER

McVERRY, J.

Before the Court for consideration is DEFENDANT'S MOTION TO DISMISS (*Document No. 26*). The United States has filed a brief in

support. Plaintiff Susan Ansell has filed a response *(Document No. 28)*. The motion is ripe for decision.

Standard of Review

When considering a motion to dismiss, the court accepts as true all well-pleaded allegations of fact. *See Albright v. Oliver,* 510 U.S. 266, 267, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994).Federal Rule of Civil Procedure 8(a)(2) provides that a complaint need only offer "a short and plain statement of the claim showing that the pleader is entitled to relief" enough to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."*See*Fed.R.Civ.P. 8(a)(2). This is a minimum notice pleading standard "which relies on liberal discovery rules and summary judgment motions to ... dispose of unmeritorious claims."*Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 513-14, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). Claims lacking merit may be dealt with through summary judgment pursuant to Rule 56. *Id.* If a defendant feels that a pleading fails to provide sufficient notice, he or she may move for a more definite statement pursuant to Rule 12(e) before fashioning a response. *Id.*

However, in *Bell Atlantic Corp. v. Twombly,* --- U.S. ----, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the United States Supreme Court recently issued a decision which may represent a sweeping change in the pleading standard applicable to complaints filed in federal court. At a minimum, as all nine justices agreed, the oft-quoted standard that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" has been retired and "is best forgotten." *Id.* at 1968.The Supreme Court explained that a complaint must allege enough "facts" to show that a claim is "plausible" and not merely conceivable. Indeed, the *Twombly* Court made a distinction between facts that are merely "consistent" with wrongful conduct and facts that would be "suggestive" enough to render the alleged conduct plausible. The Supreme Court also emphasized the need for district courts to prevent unjustified litigation expenses resulting from claims that are "just shy of

a plausible entitlement."*Id.* at 1967, 1975.

Factual and Procedural History

Plaintiff Susan Ansell resides with her husband Larry on a farm in Scottdale, Pennsylvania. Plaintiff alleges that the Ansells first borrowed operating money from the Farm Service Agency (FSA) of the United States Department of Agriculture (USDA) in 1984, to refinance an existing Farm Credit loan and to refinance a farm ownership loan. Michael Jankovic, a loan officer for the FSA, allegedly lied in 1986 by telling the Ansells that no Spring Operating Loans existed. In addition, Jankovic refinanced the Ansells' loans multiple times, the latest in 1994, improperly compounding their debt. Jankovic also allegedly misapplied payments, took excessively long to approve loans, and improperly denied a loan. As a result, in order to plant crops, the Ansells were forced to borrow money at 18-22% interest rather than the 5% rate available through the FSA. Eventually, facing foreclosure, the Ansells were forced to apply for and enter into the Debt for Nature program. They are able to stay on their farm property but are not allowed to use it for farm purposes for 50 years.

On May 17, 2005, Plaintiff filed a hand-written pro se complaint in this Court against "Michael Jankovic Farm Service Agency." She seeks monetary damages and asks that the contract for the Debt for Nature program be accelerated to expire this year, such that the Ansells may farm their land. Because Michael Jankovic was acting within his official government capacity, the United States was substituted as the defendant. The Court interpreted the complaint as asserting a tort claim because Attachment # 1 to the Complaint is a letter from Kenneth Cohen which denied an administrative claim filed by Plaintiff with the FSA under the Federal Tort Claims Act (FTCA). The United States filed a motion to dismiss the complaint. On March 8, 2007, the Court granted the motion on the ground that a tort claim was untimely. However, the Court granted Plaintiff an opportunity to file an amended complaint.

On March 30, 2007, the Court received an undated letter from Plaintiff via certified mail (the "March 30, 2007 Letter").[1] The March 30, 2007 Letter is "organized chronologically to show continuous pro se commitment to resolve our farm loan complaint from 1994 until the tort claim was filed in 2003."Plaintiff asserts that she followed every available avenue in the FSA chain of command and contends that she can establish "[Breach] of Contract in loan servicing."The March 30, 2007 Letter explains that the government exceeded the applicable 15-day and 60-day time limits for making decisions on numerous occasions "from 1984 through 1994"; that Plaintiff received an apology for the poor service from Lou Anne Kling, Acting Deputy Administrator for Farm Credit Programs, on May 8, 1995; and that Amos Morrow and James Bullard verified that Jankovic committed errors in their separate investigations. The March 30, 2007 Letter states that Ansell lost count of how many lawyers she asked to help her, and that "none would commit to a battle with the government."Attached is a letter from the Ansells to an attorney dated October 20, 1996, stating that they "have decided to pursue our dilemma as suggested by the FSA office in Harrisburg by filing a lawsuit."The March 30 Letter further asserts: "James Root in Washington, D.C. and Charlie Marshall in Harrisburg told me to file a tort claim" but explains that they did not file a tort [claim] until all other avenues were exhausted. Ms. Ansell justifies the eight-year gap from 1995 to 2003 due to the files being lost in the Kittanning office, shuffled in Civil Rights, delayed for years in FOIA and sent to the wrong office in Washington, D.C. She asserts that her complaint was continuous, but the branches could not decide who should handle it and it fell into a "black hole."

The documents attached by Ms. Ansell to this March 30, 2007 Letter have also been scrutinized by the Court. Notably, the affidavit of Cheryl Cook, formerly State Director Farmers Home Administration, describes how Mike Jankovic's incompetence and untruthfulness has harmed the Ansells. On April 30, 1997, Jim Root of FSA prepared a memo of his

[1] This document was not placed on the CM/ECF system by the parties and therefore the Court will do so.

conversation with Ms. Ansell, in which he recommended three options: (1) a tort claim; (2) a lawsuit; or (3) bankruptcy, and noted that these options were all unacceptable to the Ansells. A letter on Department of Agriculture letterhead, stamped January 27, 1998, explains that "the case has been closed from a civil rights standpoint and is being considered as a program complaint."On November 8, 2000, a USDA official prepared a memo stating that Ansell was eligible for a hearing before an ALJ and that her case is "considered active until the ALJ issues a decision ."On February 6, 2002, Ansell sent an email in which she requested a "waiver" for her longstanding FSA complaint.

On May 9, 2007, Ms. Ansell submitted another letter (the "May 9, 2007 Letter") addressed to the Court, along with several attached exhibits. Although the form of the document is not a proper pleading, the Court has designated this letter from a pro se plaintiff as an "Amended Complaint." (Document No. 23). The May 9, 2007 Letter explains that Plaintiff seeks to assert a claim for breach of contract and refers back to the contentions made in the March 30, 2007 Letter. The May 9, 2007 Letter asserts that any government action that impacts the special relationship of a family farm violates the duty of good faith and commits a breach of contract. Attached are multiple samples of year-end loan statements, taken from the investigation file in 1998. Plaintiff alleges that loan payments were not properly applied and that rescheduling covered up the government's lending errors. As relevant to the timeframe, the May 9, 2007 Letter states:

> This pattern of unfair dealing changed abruptly when we filed a complaint in 1994 and Cheryl Cook initiated a federal investigation which uncovered the loan damages done to all the farmers with FSA loans in Westmoreland County. Afterwards, our loan portfolio was moved to Kittanning and then Somerset County where Rich Lehman properly applied loan payments.

The May 9, 2007 Letter explains that the government has abused the

Ansells' trust and fraudulently abused its authority. In addition to a breach of contract claim, the May 9, 2007 Letter states that "other contract related cases may apply."In particular, Plaintiff states that a Bivens Claim may apply because Cheryl Cook, an official who "tried to do something about it" was transferred. The May 9, 2007 Letter asserts that the statute of limitations did not expire because the complaint was continuously dragging on, records were withheld, discovery was blocked, a "statute of limitations waiver" was obtained, the government lost their claim, and it took two years for an official to determine that it was not a tort. Attached are numerous documents which bear Ms. Ansell's notations. There is a Civil Rights Action Team Followup Referral Form from March 1997, noting that the Ansells "raise some very serious allegations" that should be investigated. A memorandum from Jeremy Wu, Deputy Director for Programs, Office of Civil Rights, dated June 28, 1998, states that an investigation will be conducted. On July 29, 1999, Rosalind Gray, Director of USDA's Office of Civil Rights, sent a letter to the Ansells notifying them that their "pre-July 1, 1997 complaint meets the requirements for a waiver of the Statute of Limitations" pursuant to Public Law 105-277 § 741.The July 29, 1999 letter explains that the Ansells have several options, including an administrative determination, a hearing before an ALJ, "to take your case to Federal Court"; or two or more of those options.

The United States argues that the Amended Complaint should be dismissed for three reasons: (1) that the statute of limitations has run; (2) that the Court lacks subject matter jurisdiction over a breach of contract claim; and (3) that the complaint fails to state a valid claim for breach of contract. The United States attached a declaration from Richard Lehman, a Farm Loan Manager at the FSA, in support of its motion to dismiss. Mr. Lehman avers that the regulation concerning how payments are to be applied when borrowers have more than one type of loan is FmHA Instruction 1951-A, 7 C.F.R. §§ 1951.9-1951.11. [2]

[2] The declaration purported to attach a copy of the Debt Cancellation Conservation Contract between the Ansells and the government, but no such document was actually attached.

On August 23, 2007, Plaintiff submitted a third letter (the "August 23, 2007 Letter"), which the Court has designated as a response to the government's motion to dismiss (Document No. 28). In the August 23, 2007 Letter, Plaintiff contends that the statute of limitations never expired because she has sought constant resolution from the agency since 1994 and incorporates her "previously presented chronological documents." Plaintiff argues that jurisdiction is proper to correct damages from lack of qualified funding and asks the Court "to look at the initial 1994 complaint," which is enclosed as Attachment # 1. Plaintiff contends that she has stated a valid claim for breach of contract because a loan is a contract that carries an implied duty of good faith. Plaintiff explains that delays in payments, rescheduling and consolidation had the cumulative effect of increasing the amount owed and hiding the errors. Also enclosed, as Attachment # 2, is a Promissory Note dated January 22, 1985, with a notation that it has been "reamortized, not paid."

Legal Analysis

1. Preliminary Matters

Before turning to the substantive merits of the argument, the Court will first explain the process to be undertaken. When a plaintiff is proceeding pro se, the complaint is subject to a less stringent standard than more formal pleadings drafted by lawyers. *Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). It is apparent that Ms. Ansell is not familiar with the technical formalities of the legal system and the record reflects her fruitless efforts to obtain the assistance of counsel. In this instance, the Court will consider the arguments and factual statements made in Ms. Ansell's letters to the Court as if they had been proper pleadings. However, even a pro se plaintiff, like Ms. Ansell, must plead the essential elements of her claim and is not immune from standard procedural rules. *See McNeil v. United States,* 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993).

The Court will also consider the numerous attachments to her various letters provided by Plaintiff as exhibits. As explained in *Frese v. United States,* 2006 WL 231895 *3 n. 1 (D.N.J.2006):

Where a plaintiff relies upon separate documents in the complaint and attaches those documents as exhibits to the complaint, the Court may properly consider the relied upon documents when analyzing a motion to dismiss. *Lum v. Bank of America,* 361 F.3d 217, 222 n. 3 (3d Cir.2004) ("In deciding motions to dismiss pursuant to Rule 12(b)(6), courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.").

The Court will not consider the factual averments set forth in the declaration of Mr. Lehman that was submitted by the government at this stage of the litigation. Rather, the Court will consider all the facts set forth by Plaintiff as true for purpose of analyzing the motion to dismiss.

2. Statute of Limitations

The United States contends that, taking the allegations made by Ms. Ansell as true, the alleged breach of contract occurred from 1984 to some time in 1994. The United States points to Plaintiff's statement that the "pattern of unfair dealing changed abruptly when we filed a complaint in 1994" and that afterwards "Rich Lehman properly applied loan payments."The government concedes that Jankovic did not always apply the Ansells' loan payments correctly, but argues that the error stopped sometime in 1993.

With the exception of tort claims or claims under the Contracts Dispute Act, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."28 U.S.C. § 2401. The Court's Memorandum Opinion dated March 8, 2007 concluded that a tort claim is untimely. The Contracts Dispute Act also does not apply to this case,

because it does not involve an executive agency contract for procurement of property, service, construction or the disposal of personal property, or the Tennessee Valley Authority. 41 U.S.C. § 602. Thus, the Court must determine whether this case was timely filed within six years of the time when the right of action first accrued.

The allegations made by Ms. Ansell clearly demonstrate that this case was not timely filed. Construed in the light most favorable to Plaintiff, the alleged breach of contract occurred and the right of action accrued by, at the latest, the end of 1994. Ms. Ansell was obligated to file this lawsuit within six years of the breach of contract. However, the original complaint in this action was not filed until 2005, some eleven years after the alleged breach and five years after the expiration of the statute of limitations.

Neither party has addressed the question of whether the statute of limitations may be "tolled" in this case. Ms. Ansell asserts that she has made continuous efforts to seek redress and to exhaust all available administrative options over the past decade. The Court is unaware of any administrative exhaustion requirements in this case. Indeed, agency officials explicitly told Plaintiff that she had a right to file a lawsuit. *See* April 30, 1997 memorandum by Jim Root, in which he recommended three options: (1) a tort claim; (2) a lawsuit; or (3) bankruptcy, and noted that none of these options was acceptable to the Ansells; *see also* July 29, 1999 letter (notifying Plaintiff that she could pursue **both** a federal lawsuit and an administrative remedy at the same time). While the Court appreciates Ms. Ansell's desire to avoid litigation, her preference to reach an administrative solution does not authorize the Court to ignore the statute of limitations established by Congress.

In some situations, the "discovery rule" tolls the running of the statute of limitations until the plaintiff "knew or using reasonable diligence should have known of the claim."*Vernau v. Vic's Mkt., Inc.,* 896 F.2d 43, 46 (3d Cir.1990). However, the discovery rule doctrine

does not apply under the facts and circumstances of this case. The documents submitted to the Court by Ms. Ansell clearly demonstrate that Plaintiff was well aware of her claim far longer than six years prior to the date she filed suit. The record reflects that Plaintiff filed a complaint with Cheryl Cook in 1994, which stopped the improper conduct of Jankovic and resulted in the transfer of her file. Plaintiff submitted a letter dated October 20, 1996, stating that the Ansells "have decided to pursue our dilemma as suggested by the FSA office in Harrisburg by filing a lawsuit."*See also* Civil Rights Action Team FollowupReferral Form attached to May 9, 2007 Letter (noting that the Ansells' allegations were referred to the agency on March 19, 1997). In sum, the record conclusively demonstrates that Ms. Ansell knew of her claim, but made a conscious decision to forego litigation for nearly ten years. Accordingly, even assuming for the sake of argument that the doctrine of equitable tolling applies and that Plaintiff has made continuous efforts to seek a non-litigation resolution of her dispute, there is no basis to toll the statute of limitations in this case.

3. Waiver of Statute of Limitations

One of the documents submitted by Plaintiff was a letter dated July 29, 1999 from the USDA Office of Civil Rights, indicating that the Ansell's administrative complaint met the requirements for waiver of the statute of limitations pursuant to Public Law 105-277 § 741.The United States has not responded to this argument. The Court of Appeals, however, addressed a very similar situation in *Ordille v. United States,* 216 Fed. Appx. 160 (3d Cir.2007) (unpublished) (alleging mistreatment and errors by the FSA in connection with farm loans).

As discussed by the Court of Appeals, Section 741 states, in relevant part:

> (a) To the extent permitted by the Constitution, any civil action to obtain relief with respect to the discrimination alleged in an eligible complaint, if commenced not later than 2 years after the date of the enactment of this Act [Oct. 21, 1998], shall not be

> barred by the statute of limitations.
>
> (b) The complainant may, in lieu of filing a civil action, seek a determination on the merits of the eligible complaint by the Department of Agriculture if such complaint was filed not later than 2 years after the date of enactment of this Act [Oct. 21, 1998].

Pub.L. 105-277, Title VII § 741(a), 112 Stat. 2681-30 (reprinted in 7 U.S.C. § 2279 notes).

An "eligible complaint" is defined by Section 741 as:

> a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996-

"(1) in violation of the Equal Credit Opportunity Act (15 U.S.C .1961 et seq.) in administering-

(A) a farm ownership, farm operating or emergency loan funded from the Agricultural Credit Insurance Program Account; ....

Pub.L. 105-277, Title VII § 741(e), 112 Stat. 2681-31.

The Court in *Ordille* held that the scope of the waiver represented in Section 741 must be strictly and narrowly construed and that a form letter (such as that received by the Ansells and Ordilles) did not operate as a broad entitlement to file suit. Further, the Court explained that the waiver was strictly limited to allegations of discrimination. The Ansells are claiming breach of contract rather than a violation of the Equal Credit Opportunity Act and therefore this is not an "eligible complaint" that qualifies for the extended period for filing a discrimination claim.

Moreover, this lawsuit was not filed within the applicable two-year window following the date of enactment, to wit, October 28, 1998. Accordingly, the United States has not waived the six-year statute of limitations that applies to this case.

4. Summary

The Court empathizes with Plaintiff in her struggle to keep her family farm, particularly in view of the United States having conceded that Mr. Jankovic made errors which impacted the Ansells. The Court further empathizes with the frustration which the Ansells have endured over the past decade in trying to secure an acceptable response from the farm services bureaucracy. The picture portrayed in the complaint and in the numerous supporting documents supplied by Plaintiff certainly does not reflect well on the FSA. Nevertheless, the right to file suit against the United States is conditioned upon specific rules created by Congress which this Court is bound to follow. For the reasons set forth above, Plaintiff was required to file this lawsuit within six years of the alleged wrongful actions taken by Jankovic. Because the Court concludes that the complaint was not timely filed, it need not address the alternative arguments raised by the United States.

An appropriate order follows.

ORDER OF COURT

AND NOW, this 4th day of September, 2007, in accordance with the foregoing Memorandum Opinion it is hereby ORDERED, ADJUDGED AND DECREED that the DEFENDANT'S MOTION TO DISMISS (*Document No. 26*) is **GRANTED** and Plaintiff's amended complaint is dismissed. The clerk shall docket this case closed.

_____

RODNEY BRADSHAW v. USDA
AND
GEORGE HILDEBRANDT, JR. AND PATRICIA HILDEBRANDT v. USDA.
Civil Action Nos. 04-1422 (PLF/JMF), 04-1423 (PLF/JMF).
Court Decision.
Filed September 11, 2007.

(Cite as 2007 WL 2683999 (D.D.C.)).

EOCA – Excusable neglect – Late filing.

Petitioner's counsel failed to file an affirmative response to a motion to dismiss or a motion within the time allowed to expand time. The Appeal court found that the District court abused its discretion is receiving Petitioner's motions for extension without finding that there was excusable neglect.

United States District Court, District of Columbia.

MEMORANDUM OPINION

JOHN M. FACCIOLA, U.S. Magistrate Judge.

These two related cases were referred to me for discovery. Currently pending and ready for resolution in these consolidated cases are the government's two motions to dismiss or for other sanctions. These motions are both captioned *Defendants' Motion for Dismissal or other Sanctions Pursuant to Fed.R.Civ.P. 37(b)(2) and 41(b).*[1] For the reasons stated below, I recommend that both motions be denied without prejudice while plaintiffs first comply with Rule 6(b) of the Federal Rules of Civil Procedure.

BACKGROUND

[1] In *Bradshaw v. Johanns,* 04-1422, the motion appears as [# 60] on the docket while in *Hildebrandt v. Johanns,* 04-1423, the motion appears as [# 63] on the docket.

Plaintiffs in these two actions bring these suits against Mike Johanns, the United States Secretary of Agriculture, alleging[2] that the United States Department of Agriculture ("USDA") violated the Equal Credit and Opportunity Act of 1972 ("ECOA"), 15 U.S.C. § 1691.[3]

After a discovery status held on December 4, 2006, this Court stayed all deadlines and ordered (*inter alia*) that:

1. Plaintiffs' counsel correlate, by January 5, 2007, the documents previously produced in response to *Defendants' First Set of Requests for Production of Documents* to the specific requests propounded in accordance with Rule 34(b) of the Federal Rules of Civil Procedure.

2. Plaintiffs' counsel correlate, by January 5, 2007, the answers previously given in response to *Defendants' First Set of Interrogatories.*

3. Defendants' letters to plaintiffs' counsel, dated August 30, 2006, be deemed motions to compel, and plaintiffs' counsel's arguments the opposition thereto.

4. Plaintiffs' counsel shall, by January 5, 2007, either supplement any previously answered requests for production of documents or interrogatories as detailed in the defendants' counsel's August 30, 2006 or show cause in writing by the same date, why he should not be required to do so.

5. Plaintiffs counsel shall provide defendants' counsel with signed copies of his discovery responses.

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[2]In *Plaintiff's Second Amended Complaint,* plaintiff also claims "that he is a member of a protected class as that phrase is defined in the Civil Rights Act of 1964," although, as noted by Judge Friedman in his *Memorandum Opinion* of March 13, 2006, no claims appear to have been made under that statute. *See Plaintiff's Second Amended Complaint* ¶ 32; *Memorandum Opinion* of March 13, 2006(PLF).

[3]All references to the United States Code or the Code of Federal Regulations are to the electronic versions that appear in Westlaw or Lexis.

DISCUSSION

On January 5, 2007, the deadline for compliance with my Order, nothing happened. On January 12, 2007, defendants, having heard nothing, filed their motions for dismissal. Plaintiffs then filed two motions for extensions of time within which to file their oppositions. While both motions were granted, it is true that, as defendants note, "neither of Plaintiffs' enlargement motions requested additional time to comply with the Court's December 22 order, directing Plaintiffs to supplement their discovery responses."*Defendants' Reply Memorandum of Points and Authorities in Support of Their Motion for Dismissal or Other Sanctions Pursuant to Fed R. Civ. P. 37(b)(2) and 41(b)*[4] at 3. Instead, on February 12, 2007, plaintiffs moved for a third extension of time to file their opposition to defendants' motions and, for the first time, requested an enlargement of time within which to file their supplementary discovery responses, now overdue by more than a month.[5]

The Court granted that motion and plaintiffs' provided defendants' counsel with supplemental responses to the first set of interrogatories in both cases on February 23, 2007. On that same day, plaintiffs moved for a one day enlargement of time within which to deliver discovery. It was granted and responses to the first set of requests for production of documents were received on February 26, 2007. The Court now realizes, however, that its granting of plaintiffs' motions to enlarge the time within which plaintiffs had to comply with the Court's December 22, 2005 Order was an abuse of discretion.

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[4]In *Bradshaw v. Johanns,* 04-1422, the reply appears as [# 68] on the docket while in *Hildebrandt v. Johanns,* 04-1423, the motion appears as [# 71] on the docket.

[5]In *Bradshaw v. Johanns,* 04-1422, the motion appears as [# 64] on the docket while in *Hildebrandt v. Johanns,* 04-1423, the motion appears as [# 68] on the docket.

Since the applications to enlarge the time within which to comply with the Court's order were filed after January 5, 2007, the deadline for complying with the obligations imposed by that Order, they had to be accompanied by a motion establishing that the failure to act in accordance with the deadlines was "the result of excusable neglect." Fed.R.Civ.P. 6(b).

In *Smith v. District of Columbia,* 430 F.3d 450, 457 (D.C.Cir.2005), this Court granted a motion for summary judgment that had been filed long after the deadline for filing had passed. The Court nevertheless granted the motion and attempted to alleviate the prejudice caused plaintiff by awarding her attorneys fees for the work her lawyer did that she would not have had to do had the District of Columbia not filed its motion when it did. The Court of Appeals, however, reversed the grant of summary judgment and indicated that Rule 6(b) means exactly what it says:

> We have been quite deferential to *Rule 6(b)* decisions in the past, even affirming a deadline extension that was granted without a formal finding of excusable neglect when the court found no prejudice to the other party.[FN5] *See Yesudian ex rel. United States v. Howard Univ.,* 270 F.3d 969, 971 (D.C.Cir.2001). In *Yesudian,* however, we found that the *Rule 6(b)(2)* motion requirement may have been satisfied by a memorandum filed by the requesting party. *Id.* Here, the District concedes that it never moved for an extension of the deadline. In the absence of any motion for an extension, the trial court had no basis on which to exercise its discretion. *See Lujan,* 497 U.S. at 896, 110 S.Ct. 3177 (stating that "any *post* deadline extension must be 'upon motion made' "). Under these circumstances, then, we are compelled to conclude that the district court abused its discretion in entertaining the late motion for summary judgment on Smith's disability discrimination claim.

Id. at 457.

Identically here, my granting of plaintiffs' motions for extensions of time were an abuse of discretion and must be vacated. Plaintiffs will

now have to file a motion for leave to file that complies with Rule 6(b) by establishing excusable neglect. The defendants may then file an opposition and plaintiffs may reply thereto. In the meanwhile, *Defendants' Motion for Dismissal or Other Sanctions Pursuant to Fed. R.Civ. 37(b)(2) and 41(b)* in both cases will be denied without prejudice.

An Order accompanies this Memorandum Opinion.

VIRGIL WILKINSON, CHARLES WILKINSON, ALVA ROSE HALL, WILBUR D. WILKINSON, FOR THEMSELVES AND AS HEIRS OF ERNEST WILKINSON, MOLLIE WILKINSON, HARRY WILKINSON, AND VIRGINIA WILKINSON v. USDA.
No. 1:03-cv-02.
Court Decision.
Filed November 9, 2007.

(Cite as: 2007 WL 3544062 (D.N.D.))

EOCA – I.I.E.D. – Trespass – Conversion.

The Court held the United States of America liable for $459,976.00 in damages for trespass, intentional infliction of emotional distress (IIED), and other tortious conduct by the Department of Interior's Bureau of Indian Affairs (BIA), in that BIA acting upon the request of the Department of Agriculture's Farm Services Agency (FSA), employed assignments of income FSA had obtained from a Native American couple to oust the couple from 315 acres of farmland BIA held in trust for them in circumvention of their legal protections under applicable State mortgage foreclosure laws.

United States District Court,
D. North Dakota, Southwestern Division.

Memorandum Opinion and Order

RODNEY S. WEBB, District Judge.

The Plaintiffs (collectively "the Wilkinsons") have sued the United States, alleging trespass of several family allotments, conversion of farm equipment, intentional infliction of emotional distress ("IIED"), and wrongful death in the death of Ernest Wilkinson, under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. ch. 171. The Court held a bench trial May 15-17, 2007. The Court enters this Memorandum Opinion and Order as its findings of fact and conclusions of law under Fed.R.Civ.P. 52(a). The Court finds that the United States has injured the Wilkinsons in its trespass and conversion of real and personal property and by intentionally inflicting emotional distress. The Court **ORDERS** the United States to pay the Wilkinsons $459,976 in damages.

I. Facts

The Wilkinsons are members of the Three Affiliated Tribes ("the Tribe") at the Fort Berthold Indian Reservation in North Dakota. Ernest and Mollie Wilkinson, husband and wife, owned several descendable possessory interests on allotted Indian land the Bureau of Indian Affairs ("BIA") held in trust for them. Ernest and Mollie farmed on these allotments. Four of their sons---Wilbur, Charles, Virgil, and Harry---and two daughters---Alva Rose Hall and Virginia---joined the farming operation. The crops grown on the farm varied but generally included durum wheat, spring wheat, oats, and flax. The Wilkinsons also participated in the Tribe's cattle relending program. Under this program, the Tribe would loan cattle to farmers and ranchers, and the ranchers could keep the calves born of the borrowed cattle. Allotments 208A-A (described during trial as the "Home Place" or the "Yellow House"), 322A, 371, 1357, 1366 (including 1366-A, which was described during trial as the "White House"), and 3016 (a/k/a.176A) made up a portion of the Wilkinsons' farming operation. Mollie owned allotments 322A, 371, 1357, and 3016. Ernest owned allotments 208A-A and 1366 (Exh. P-1).

During the 1970's and 1980's, Ernest and Mollie mortgaged the allotments to the Farmers Home Administration (n/k/a and referred to in this opinion as the Farm Services Agency ("FSA")) as provided by 25

U.S.C. § 483a. The loans included an assignment of income generated from the land.

Ernest and Mollie soon defaulted on the debt. In 1990, the FSA adjusted Ernest's and Mollie's debt through a write-down, reducing the debt to the fair market value of the land. The write down helped little because soon after the debt again exceeded the value of the land. The Wilkinsons also defaulted on the renegotiated debt. The last payment made on the FSA debt was in 1992.

Mollie died in September 1991. The Department of the Interior probated her estate, and in October 1993, it issued its Order Approving Will and Decree of Distribution and Notice, ordering the distribution of Mollie's assets (Exh. P-7). Under the distribution, allotment 1366-A passed to Ernest, allotment 3016 passed to Harry, allotments 371 and 1357 passed to Virginia. Allotment 322A passed under the residuary clause of Mollie's will to Virgil and Charles (Exh. P-7). However, this distribution did not occur until February 25, 2003, after this lawsuit was commenced.

In 1993, Ernest suffered a stroke and heart attack. He moved from the farm to Parshall, North Dakota, to be close to medical care. Wilbur and Charles Wilkinson testified that Ernest was still involved in the farming operation as a supervisor and advisor.

Harry died in August 1994. The Department of the Interior probated Harry's estate, and in the Department's probate order of August 31, 1998, Ernest was named as Harry's sole heir (Exh. P-8). All of Harry's assets passed to Ernest.

These family tragedies took their toll on the farming operation. The Wilkinsons admit they actively farmed very little by 1996. In August 1996, the FSA sent a letter to the BIA regarding the Wilkinsons' allotments, stating it had not received any recent payments and asking for aid in collecting on the Wilkinsons' debt (Exh. P-13). The BIA

advertised the allotments for lease bids the following February (Exh. D-510 pp. 2-3). In March 1997, Fort Berthold Superintendent Adeline Brunsell sent a letter to Ernest informing him that several of the Wilkinsons' allotments were being advertised for lease (Exh. P-13). Ernest responded by sending a letter to the BIA asking it not to advertise the allotments for lease because the Wilkinsons planned to farm the land that year (Exh. P-14). The BIA refused (Exh. P-15) and leased the allotments. Ernest appealed the BIA's decision to lease the allotments (Exh. P-16). In June 1997, BIA Area Director Gary Foell denied Ernest's appeal, stating the leases were justified under the FSA loan's assignment of income (Exh. P-19).

By this time, the Wilkinsons had abandoned their farming operation and equipment and moved out of the Yellow House on 208A-A because without these allotments, they believed they did not have sufficient property to farm. Allotments 1366, 3016, 371, and 1357 were leased to local non-Indian farmers for a five year term, 1997-2001. Allotment 208A-A was not leased because no bids were received (Exh. D-510-15). According to the United States, Allotment 322A was leased in a privately negotiated contract between Charles and Virgil and a local non-Indian farmer.

Charles and Virgil testified, however, that the BIA leased 322A. Exhibit D-523 is the lease agreement for allotment 322A for the 1997-2001 and 2002-2003 leases. The non-Indian lessee and the acting superintendent of the Fort Berthold reservation signed the agreement. Charles and Virgil never signed the agreement, nor do their names appear anywhere in the document. The agreement says only, “THIS CONTRACT, made and entered into this 26th day of December, 1996, by and between the Indian or Indians named below (the Secretary of the Interior acting for and on behalf of the Indians)....” However, the first page of the lease states it was “negotiated,” as opposed to “bid” as the other leases indicate. The BIA's advertisement for bids does not list 322A as one of the available allotments. As expected, the Wilkinsons testified they did not privately negotiate the lease of allotment 322A, and the United States' witnesses, including Superintendent Brunsell, testified

the Wilkinsons privately negotiated the lease. However, Duane Risen, the lessee who farmed 322A, testified he negotiated the lease with Ernest. He also testified his son continues to farm 322A and negotiated the lease with Wilbur. Exhibit D-576 is the 2002-2007 lease. Part of the exhibit is an "Acceptance of Lessor to be Attached to Farming and/or Pasture Lease."Charles and Virgil both signed that document. All of this is strong evidence the 322A leases were privately negotiated by the Wilkinsons and signed for by the BIA. The Court finds that Allotment 322A was leased in a private lease the Wilkinsons negotiated with the lessee. The BIA did not lease allotment 322A.

Ernest appealed Foell's decision to the Department of the Interior's Interior Board of Indian Appeals ("IBIA"). In July 1998, the IBIA concluded the BIA had no authority to lease the Wilkinsons' allotments (Exh. P21). It held Mollie's heirs had been determined in October 1993 when the administrative law judge ordered the distribution of Mollie's estate. The BIA's failure to distribute the property and close the estate was irrelevant. The IBIA reversed and remanded the BIA leases. The BIA communicated the IBIA's decision to Superintendent Brunsell (Exh. P-22), but Fort Berthold took no action to effectuate the IBIA's decision. The BIA or Fort Berthold did not appeal the IBIA decision and it became the law of the case.

Ernest, however, did not live to see his victory with the IBIA. He died in November 1997. A probate of Ernest's estate was not opened until 2003 after this lawsuit began, and a dispute arose between Charles, Virgil, and Wilbur regarding the estate. In October 2004, Wilbur, Charles, and Virgil entered into a settlement agreement of Ernest's estate (Exh. P-10). Under the agreement, Wilbur, Charles, and Virgil each took one-third of their father's estate including any interest in the allotments in dispute here.

Virginia died in November 1998. The Department of the Interior probated her estate. In September 2003, the administrative law judge issued an Order Determining Heirs and Decree of Distribution for

Virginia's estate (Exh. P-9). Under the order, Wilbur, Charles, Virgil, Alva Rose Hall, and two brothers, whom are not parties to this lawsuit, were determined as heirs and each received a one-sixth share of Virginia's estate.

The BIA leased Allotments 1366, 371, and 1357 again in 2002 to local non-Indian farmers (Exhs. D-577 and D-578). These leases were two-year leases, ending December 31, 2003. On January 17, 2003, the BIA sent a letter to lessees stating it no longer possessed authority to lease the allotments (Exh. P-24). However, on March 24, 2003, the BIA sent another letter to the lessees stating it did in fact have authority to lease the allotments, citing its "authority to grant leases to allotments where the heirs have yet to be determined."(Exh. P-25).

William Huesers, one of the lessees, testified that he leased and farmed Allotments 1357 and 371 in 2004, although no lease agreements were presented as evidence of that. The Court inquired into who farmed the allotments in 2005 and 2006, but it never received a definitive answer. From what the Court can find from the evidence before it, the allotments were not leased or farmed in 2005 and 2006. The land sat idle.

The Wilkinsons brought this lawsuit, claiming trespass of the allotments, conversion of farm equipment, intentional infliction of emotional distress, and wrongful death for the death of Ernest (doc. # 1, # 106). The District Court granted the United States' Motion for Summary Judgment, holding the Wilkinsons did not have standing to sue. *Wilkinson v. United States,* 314 F.Supp.2d 902, 911 (D.N.D.2004). The Eighth Circuit Court of Appeals reversed, holding the Wilkinsons did have standing. *Wilkinson v. United States,* 440 F.3d 970, 979 (8th Cir.2006). The Eighth Circuit also held the unappealed decision of the IBIA was entitled to respect and was the law of the case. *Id.* at 976-77. Therefore, the 1997 leases were unlawful because the BIA acted without authority. *Id.* The Eighth Circuit did not decide the issue of whether the BIA became vested with the authority to lease the allotments at some later date as a result of several of the Wilkinsons passing away. *Id.* at

796 n. 6. The Circuit guided the remand of this case by outlining two issues: "[1] whether the initial actions of BIA personnel, taken without legal authority, comprised a federal tort or constitutional violation, and [2] whether those actions remained devoid of authority for the entire term of the BIA's seizure."*Id.* Those are the primary issues this Court is faced with following the bench trial.

II. Discussion

The Wilkinsons have claimed trespass, conversion, IIED, and wrongful death as theories for recovery. The Court applies North Dakota state law to these causes of action. Each claim will be addressed in turn.

A. Trespass

Under North Dakota law, trespass occurs when an actor intentionally and without privilege enters the land of another or causes a thing or third person to do so. *Tibert v. Slominski,* 2005 ND 34, ¶ 15, 692 N.W.2d 133, 137. To decide whether the BIA intentionally and without privilege caused the third party lessees to enter the Wilkinsons' allotments requires the Court to decide whether the BIA had authority to lease the Wilkinsons' allotments.

The Secretary of the Interior, through the BIA, may lease an allotment on behalf of an Indian only when authorized by law:

> The Secretary may grant leases on individually owned land on behalf of:
> (1) Persons who are non compos mentis;
> (2) Orphaned minors;
> (3) The undetermined heirs of a decedent's estate;
> (4) The heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the

heirs or devisees; and

(5) Indians who have given the Secretary written authority to execute leases on their behalf.

25 C.F.R. § 162.601(a) (2001).

As the IBIA opinion noted, only subsections three and five could have any relevance to this case. 32 I.B.I.A. 265, 269 (I.B.I.A.1998).

The Eighth Circuit held the 1997 leases were unlawful. *Wilkinson,* 440 F.3d at 976. The United States argues, however, that the lease must be examined on a year-to-year basis and that the Eighth Circuit decision did not foreclose the possibility that the leases became valid after the deaths of Ernest, Harry, or Virginia. *See id.* at 976 n. 6 ("It does not follow, however, that the Interior Board's order foreclosed the BIA from exercising control over the land at *some point* following the deaths of Ernest and Virginia."(emphasis in original)). The Eighth Circuit also commented on the use of Ernest's estate as a source of undetermined heirs: "Probate was not commenced for Ernest's estate until 2003, so it does not appear that the BIA gained authority to lease his land as administrator or executor."*Id.* The clear import of this statement is that an estate for the decedent must be opened and the BIA assume a personal representative role before the BIA may exercise its authority to lease allotments.

The Court concludes the United States' argument regarding the five-year leases made in 1997 is unavailing. When the BIA leased allotments 1366, 371, 3016, and 1357, its intent was to benefit FSA by generating revenue to pay the outstanding FSA debt. The leases were not made as a personal representative of an estate to benefit the estate of an allotee prior to a probate distribution. The BIA-imposed leases were made for five years and signed in May 1997 (Exhs. D-519 to D-522). At that time, as the Eighth Circuit has held, the United States was plainly without authority to lease the lands on behalf of the Wilkinsons. However, the harm had been inflicted at that time. The fact that some of the allotees passed away after the leases were made is fortunate for the United States in that it may make this argument, but this argument is simply a

rationalization for unlawful conduct that had already been committed.

An analogy may be a person who intends to assault another person. One day, the attacker sees the targeted victim and attacks. Later, the attacker learns that unbeknownst at the time, the victim also intended to assault the attacker. Surely, the attacker cannot now claim self defense for his wrong, relying on a fact he was unaware of at the time. The attacker's motivation was to attack his target.

As it is here, the BIA's motivation was to help its fellow governmental agency, not the estate of an allotee. Only after the BIA imposed on the allotee's possessory interest did the grounds for justifying its conduct arise. The BIA's action caused third parties to enter and interfere with the allotments of the Wilkinsons. This action meets the definition of trespass under North Dakota law. Therefore, the Court holds the United States committed a trespass against the Wilkinsons for allotments 1366, 371, 3016, and 1357 from 1997-2001.

The analysis for allotments 1366, 371, 3016, and 1357 is different after the 1997 leases had expired. By then, Virginia, Ernest, and Harry had passed away. Harry's estate had been probated in August of 1998, giving his interest in allotment 3016 to Ernest's estate. No probate was opened for Ernest's estate until 2003, so as the Eighth Circuit noted, the BIA had no authority to lease Ernest's allotments as the personal representative of the estate until then. Virginia's probate was opened some time in 2002, so the BIA had no authority to lease Virginia's allotments until then. The letter sent to the non-Indian lessees on March 24, 2003, cited the BIA's authority to lease allotments when no heirs had been judicially determined (Exh. P-21). This shows the BIA had now acknowledged the proper authority to rent the allotments. However, the leases for allotments 1366, 371, and 1357 state the allotments were leased for a two year period, starting January 1, 2002, and ending December 31, 2003. Neither probate had been opened prior to the effective date of these leases. Therefore, the BIA was still without authority to lease the allotments. The testimony at trial and the BIA's

March 24, 2003, letter indicate allotment 3016 was leased during this time, so the Court can infer that allotment 3016 was under a similar two-year lease, beginning January 1, 2002. The Court concludes these leases for 2002 and 2003 were also an unlawful trespass into the allotment interests of the Wilkinsons because the leases were made prior to the BIA being vested with authority to lease the property.

The evidence indicates no allotments were leased after 2003. Although William Huesers testified he farmed allotments 371 and 1357 in 2004, he also testified he only signed two lease agreements. The lease agreement for the second term ended in 2003. Therefore, the Court finds the allotments were not farmed from 2004-2006.

However, while these allotments may not have been leased or farmed from 2004-2006, the interference with the Wilkinsons' property rights continued. The Wilkinsons had not been allowed to farm their property since 1997. The Court received no evidence the BIA communicated to the Wilkinsons that the BIA would no longer lease their property after 2003 and the Wilkinsons could return to the land themselves. The Wilkinsons, after seven years of being withheld from their land would justifiably not know that they could now return to farming unless the BIA officially informed them. Therefore, the BIA, not the Wilkinsons, bears the fault of the land remaining idle for those three years. The trespass continued, and the Wilkinsons are entitled to the damages stemming from this trespass.

Regarding allotment 208A-A, exhibit D-510, page 15, indicates that the property was never leased because no bids were received (Exh. D-510, p. 15). No one ever interfered with the Wilkinsons' interest in that property, so no trespass could occur. Although the Wilkinsons chose to abandon the property, no trespass occurred because no one entered the property or deprived them of the ability to possess the property.

B. Conversion

Under North Dakota law, conversion is the tortious detention of,

destruction of, or wrongful exercise of dominion or control over the personal property of another. *Paxton v. Wiebe,* 1998 ND 169, ¶ 28, 584 N.W.2d 72, 78. It does not require a wrongful intent, just the intent to exercise control over or interfere with an owner's use to "an actionable degree." *Id.* The interference must be sufficiently severe that the Court is authorized to impose a "forced sale;" in other words, it may order the tortfeasor to pay the plaintiff the full value of the property. *Id.* (citing *Dairy Dept. v. Harvey Cheese, Inc.,* 278 N.W.2d 137, 144 (N.D.1979)); *see also* W. Page Keeton et al., *Prosser and Keeton on Torts* § 15, at 94 (5th ed.1984) (discussing the degree of interference necessary to be a conversion).

No agency of the United States took physical possession of the Wilkinsons' equipment. However, the leasing of their allotments had a paralyzing effect on their farming operation, even if the United States did not take all their farmland. The BIA's deplorable actions eliminated the use of the equipment. This conduct is a sufficient exercise of dominion or control over the equipment to justify a forced sale. Therefore, the United States converted the Wilkinsons' equipment.

The Court also notes, however, that the Wilkinsons did nothing to maintain the value of their equipment after the leases. They allowed the equipment to be completely exposed to the elements with no attempt to remedy the effect that would have on the equipment. This wasting of "operational" equipment is reflected in the exhibits presented to the Court (Exh. P-2). This fact will be reflected in the Court's damages calculation. The Court also notes one of the tractors, a Case model 2590, was repossessed by a secured party and not by any action of the United States. Therefore, the Wilkinsons cannot claim damages on that tractor.

C. IIED

To prove IIED under North Dakota law, a plaintiff must show the defendant (1) engaged in extreme and outrageous conduct, (2) that conduct was intentional or reckless, and (3) caused severe emotional

distress. *Sec. Nat'l Bank v. Wald,* 536 N.W.2d 924, 927 (N.D.1995) (citing Restatement (Second) of Torts § 46 (1965)). Contrary to the United States' suggestion, actual physical harm or a risk of physical harm is not required. *Compare* N.D. Pattern Jury Instruction C-20.00 *with* N.D. Pattern Jury Instruction C20.65. "The Defendant's conduct was reckless if the Defendant had knowledge of a high degree of probability that emotional distress would result and acted with deliberate disregard of that probability or with a conscious disregard of the probable results."*Id.* C-20.40 (citing Restatement (Second) of Torts §§ 46, cmt. i, 500, cmt. a).

The BIA acted in the best interests of the FSA, not their fiduciary trust beneficiaries, the Wilkinsons. For years, the BIA has directly interfered with the Wilkinsons' allotment interests. The BIA also completely ignored a directive of the IBIA. This Court finds its actions show an extreme and outrageous disregard for our government's conflict resolution system. Furthermore, the employees of the BIA could see their defiance of the IBIA decision was resulting in great emotional angst for the Wilkinsons. Despite this, they continued denying the Wilkinsons their allotment rights. The Court finds the BIA acted at least recklessly. Furthermore, the Wilkinsons would not have suffered any emotional distress without the actions of the BIA, so the BIA caused the distress. Therefore, the Court finds the Wilkinsons have met the elements of IIED.

D. Wrongful Death

The Court need spend little time discussing whether the actions of the BIA were the wrongful cause of Ernest Wilkinson's death. The undisputed evidence showed Ernest had numerous health problems for many years, including heart attack, stroke, emphysema, congestive heart failure, diabetes, and chronic obstructive pulmonary disease ("COPD"). He was also a smoker. The causes of death listed on Ernest's death certificate were cardiorespiratory arrest and coronary artery disease. The Wilkinsons presented no expert evidence that the actions of the BIA could be a medical cause of his death. Based on this evidence, the Court

cannot find the BIA caused Ernest's death. The Wilkinsons have failed to meet their burden of proof for wrongful death, and the claim fails.

E. Damages

Three North Dakota statutes guide the Court's damages analysis. First for torts in general, "the measure of damages ... is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."N.D. Cent.Code § 32-03-20 (1996). Second for wrongful occupation of realty, "The detriment caused by the wrongful occupation of real property ... is deemed to be the value of the use of the property for the time of such occupation...."*Id.* § 32-03-21. Finally for conversion, "The detriment caused by the wrongful conversion of personal property is presumed to be ... [t]he value of the property at the time of the conversion, ..."*Id.* § 32-03-23.

i. Economic Damages

At trial, the Wilkinsons called an agricultural economics expert, Professor David Saxowsky of North Dakota State University, to testify regarding the value of the loss of use of the Wilkinsons' property. Professor Saxowsky prepared two reports to aid the Court (Exh. P-30 and P-31). In his first report, Professor Saxowsky explains his methodology, the enterprise analysis (Exhs. P-30 at 1-2). The enterprise analysis takes into account each "enterprise" of a farm operation, calculates their average rate of return, and then totals all enterprises to yield a projected financial picture of the farm operation. An enterprise is a specific activity within the operation. Using this case as an example, the Wilkinsons grew durum wheat, spring wheat, oats, and flax and raised cattle. Each of these activities is its own enterprise.

Professor Saxowsky's report states the enterprise approach requires detailed information about the farm operation including acres, yields, revenues, and expenses. He testified that when the farmer is unable to provide this detailed information, he looks to economic databases to fill

in the information. In this case, the Wilkinsons were able to provide very little information about their operation. Therefore, Professor Saxowsky used information from the North Dakota Farm Business Management ("NDFBM") and the United States Department of Agriculture's National Agriculture Statistical Service ("NASS") databases to supplement the analysis.

Professor Saxowsky testified the NDFBM program is composed of farmers from across North Dakota. Those farmers are divided into regions. The Wilkinsons' farm was located in the NDFBM's south-central region, so Professor Saxowsky used statistics reported from that region for his enterprise analysis. Professor Saxowsky testified the NDFBM program is composed of a good sample of farmers, making the statistics reliable.

Using the NDFBM statistics, Professor Saxowsky was able to determine an average rate of return on farm assets for participating farms in the south-central region. Using the NASS database, Professor Saxowsky was able to determine an average value of farmland for the counties in the south-central region. For the value of the Wilkinsons' equipment and farmstead, Professor Saxowsky used values Wilbur Wilkinson provided based on Wilbur's estimate of how much money would be needed to replace the equipment and repair the farmstead. Professor Saxowsky multiplied these assets by the rate of return to create the projected lost earnings for the Wilkinsons.

Professor Saxowsky's first report calculated loss assuming the Wilkinsons' property would not be returned to them. After learning the property would likely be returned, Professor Saxowsky prepared a second report (Exh. P-31). The second report calculates loss using the methodology described above. Professor Saxowsky also calculated an alternative measure of damages based on rental income (Exh. P-31 at Second Attachment). Professor Saxowsky used the average rental income for 750 acres of rented property from the NASS database to project the loss.

The United States disputes Professor Saxowsky's methodology for several reasons: (1) the financial data used for the report has no connection to the Wilkinson farm; (2) Professor Saxowsky wrongly assumed the Wilkinsons were actively farming; and (3) Professor Saxowsky's methodology is flawed because using the rate of return to calculate loss is not an accepted practice.

During trial, the United States cross-examined Professor Saxowsky using financial guidelines for agricultural producers published by the Farm Financial Standards Council ("FFSC") under Fed.R.Evid. 803(18). Professor Saxowsky admitted that one of the textbooks he uses relies on the FFSC and that he considered this source reliable and authoritative. The United States read into the record a portion of the book that states "strict, rigid reliance upon financial measures as a sole determinant of financial position and financial performance is fraught with danger."Thus, the United States argues Professor Saxowsky's enterprise methodology is unreliable. However, the United States failed to present an expert providing the Court with an alternative method of calculating damages. While financial data may not be able to provide a perfect picture of what condition a business may be in, every industry experiences unknown market variables. Financial data is the best information available to the Court.

The United States also argues the financial data used in Professor Saxowsky's report is unreliable because it is based on an average farm in the south-central region, not the Wilkinsons' farm. The Court agrees. Several witnesses testified the Wilkinson farm was a below-average farm. The reports and photos received in evidence show a farming operation with a below average rate of return. Furthermore, Professor Saxowsky's report uses an equipment value based on Wilbur's estimate of what replacement equipment would cost. Under North Dakota law, conversion damages can only be "[t]he value of the property at the time of the conversion, ..."N.D. Cent.Code § 32-03-23. Therefore, Wilbur's unsupported estimate of replacement equipment cannot be used in the calculation. The Wilkinsons can only recover the value of their

equipment at the time of the conversion, adjusted for present value.

Professor Saxowsky's own report lists rates of return on assets for average, above average, and below average farms in the south-central region. Exh. P-30, at 4 Table 1. Professor Saxowsky's research shows a negative rate of return on assets for below average farmers. The Court finds this is the most appropriate category for the Wilkinsons' operation. Because relying on an enterprise methodology with a negative rate of return would yield a negative damage award, the Court must base its damages calculation based on the rental value the Wilkinsons could have received.

Professor Saxowsky's supplemental report estimates damages based on renting the property (Exh. P-31). The Court finds this methodology reliable. However, not all of the information in the report is based on what has actually occurred in this case. Therefore, the Court must substitute the information Professor Saxowsky used to come to an accurate damages calculation.

The first variable that must be found is the acreage of land for which the Wilkinsons may recover damages. The Court has found BIA trespass of allotments 371 (forty acres); 1357 (forty acres); 1366 (eighty acres), which includes the five acres of allotment 1366-A (the white house) that was never leased and where Virgil presently lives with his family (75 acres net); and 3016 (160 acres) (Exh. P-1). The total acreage trespassed on is 315 acres. This is roughly forty-two percent of the 750 total acres the Wilkinsons reported farming (Exh. P-1). The Wilkinsons argue damages should be based on the full 750 acres. However, the Court cannot justify giving trespass damages for property that was never taken but was instead left idle by the Wilkinsons. Therefore, the Court finds 315 acres is the proper acreage that should be used for calculating damages.

Regarding the proper rental value per acre, the Court has two choices. The Court could use the rental value the BIA actually received, or it could use the NASS average Professor Saxowsky used. The Court

finds the NASS value is the better evidence to calculate damages. The BIA leases were secured through a bid process, a process that most likely depressed the value of what the Wilkinsons could receive if they rented the land themselves. Alicia Vorland, a certified general appraiser in the state of North Dakota, testified regarding a real-estate appraisal she conducted on the Wilkinson farm operation in 1998 (Exh. D-61). The appraisal was prepared for the FSA and the United States Department of Agriculture ("USDA") as a general appraisal of the farm real estate. Ms. Vorland testified the property was of average to above average value for that area. Therefore, the Court finds the NASS average rental value accurately reflects what rental income the Wilkinsons could have earned for average property in that area.

Regarding the value of the Wilkinsons' farm equipment, Wilbur testified the $380,000 reflected in Exhibit P-2 was replacement value, not actual value, of the equipment (Exh. P-2). Under North Dakota law, they may only receive the value of the equipment at the time as conversion damages. N.D. Cent.Code § 32-03-23. As the Court previously mentioned, some allowance for the Wilkinsons' neglect is also appropriate. Eugene Geiser, a FSA farm loan officer, appraised the equipment in 1997 after the allotments were leased (Exh. D-541). According to Geiser, what property he did locate was in very poor condition. He testified the equipment was "junked" and worth only its salvage value. However, on cross examination he testified the equipment may have been operable. Wilbur, Virgil, and Charles all testified the equipment was operable. The Court finds this evidence credible and concludes the equipment did have some value. After considering Exhibits P-2 and D-541, the Court finds that $72,000 accurately reflects the value of all equipment combined. While the appraisal indicates the equipment was only worth salvage value, it was operable at the time. Furthermore, Geiser's appraisal indicates a lien on the property of $44,775, which indicates the FSA thought the equipment had some value. Therefore, the Wilkinsons are entitled to $72,000 for the conversion of their equipment.

Professor Saxowsky's report also calculated $11,000 per year in actual earnings for the Wilkinsons to mitigate their damages. The Court finds mitigating their damages in this situation is not necessary. If we assume for calculation of damages the Wilkinsons would have rented their allotments, they each could have found other employment to earn additional money. These actual earnings should not act to mitigate their damages because they could have earned both that income and the rental income. Therefore, actual earnings will not mitigate their damages.

The Court finds the five percent rate Professor Saxowsky applied to calculate present value is a justified assessment of a potential rate of return. The Court will use five percent per year as the appropriate rate for present value calculations. After considering the number of acres trespassed on, the conversion of equipment, and the present value of those damages, the Court finds $232,407 in economic damages accurately reflects the harm the FSA inflicted on the Wilkinsons.

Calculation of Rental Damages

Acres	Rent Per	Loss (Rounded)	Rate	Present Value Equipment
$78,000			5%	$117,000
1997	315	$29.16	9,185 5%	13,778
1998	315	28.72	9,047 5%	13,118
1999	315	26.26	8,272 5%	11,581
2000	315	29.41	9,264 5%	12,507
2001	315	28.61	9,012 5%	11,716
2002	315	28.66	9,028 5%	11,285
2003	315	25.61	8,067 5%	9,681

2004	315	29.99	9,447	5%	10,864
2005	315	30.97	9,756	5%	10,731
2006	315	30.68	9,664	5%	10,147
		Economic Damages			$232,407

However, Renita Howling Wolf, who worked for the BIA realty department, testified only $34,580.79 of the rents received was paid over to the FSA. Exhs. D-567 to D-575. The rest of the rents received were deposited into Ernest's and Mollie's Individual Indian Money ("IIM") accounts. Howling Wolf testified the IIM accounts for Ernest, Mollie, Virginia, and Harry have since been closed and disbursed to the surviving Wilkinsons. Therefore, part of the damage inflicted has already been paid to the Wilkinsons, and the United States is entitled to a setoff of that amount. The Court's review of Howling Wolf's exhibits and testimony reveals $4,838 in rent payments were received by Ernest and Mollie and then later disbursed to the other Wilkinsons. Therefore, the economic damages of this case should be reduced by that amount for net economic damages of $227,569.

ii. Non-Economic Damages

The Wilkinsons, with the support of Professor Saxowsky, suggest non-economic damages should be based on the ratio of noneconomic damages to economic damages from *In re Warren,* a USDA administrative opinion concerning denial of federal farm benefits because of race discrimination. *See generally In re Warren,* USDA Docket No. 1194, HUDALJ No. 00-19-NA (USDA Dec. 19, 2002). The Court rejects this argument. Using a ratio derived from a completely unrelated case wholly ignores the realities of this case or the actual emotional harm the Wilkinsons experienced.

Like *Warren,* however, this case also presents outrageous conduct of a governmental agency. For practical purposes, two agencies, the BIA and the FSA, conspired with each other to deprive a family of its farming operation. It did so while being unsure of its legal ability to do so. The BIA is supposed to act as the Wilkinsons' trustee, but instead openly ignored what may have been in the best interests of the family. Even after the IBIA instructed the BIA that it had no legal authority to act as it had, the BIA defied its own appeal board. When Superintendent Brunsell testified, she still insisted the BIA properly leased the land, despite contrary holdings of the IBIA and the Eighth Circuit Court of Appeals. This demonstrates a completely willful and arrogant defiance of our country's administrative and judicial process.

Furthermore, the actions of the BIA have had lasting effects on the Wilkinsons. Wilbur, Virgil, and Charles each testified about their pride in the family farm. Each explained a connection with the land and a love of farming. The stress, frustration, and anger the Wilkinsons must have felt towards the BIA, an agency that is supposed to act as their fiduciary, is indescribable. Therefore, the distress the family endured is entitled to respect and substantial damages. For that reason, the Court finds the Wilkinsons should be paid $232,407 for their emotional distress, an amount equal to the economic damages the Wilkinsons have endured.

III. Conclusion

The BIA's actions were a deplorable breach of trust and a perfect example of how bureaucracy can overpower the people it is supposed to serve. However, the Wilkinsons have attempted to claim more than they are entitled. The United States, through the BIA, committed a trespass on 315 acres and committed a conversion of personal property. The Clerk of Court is **ORDERED AND DIRECTED** to enter **JUDGMENT** in favor of the Wilkinsons for a total amount of $459,976. The damages are to be paid to the BIA in trust for the Wilkinsons and disbursed to the Wilkinsons according to their legal interests in the property, which is for them to determine, or as decided in any separate agreement the Wilkinsons may enter into. Each party is responsible for its own

attorney's fees. Before disbursing the damages award to the Plaintiffs, the BIA shall pay the Plaintiff's attorneys fees out of the awarded damages as negotiated by the Plaintiffs and their Attorney, mindful of the FTCA's statute addressing attorneys fees. 28 U.S.C. § 2678 (2000).

IT IS SO ORDERED.

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EQUAL CREDIT OPPORTUNITY ACT

HUD ALJ DEPARTMENTAL DECISION

In re: JOSEPH R. PUGH.
USDA Docket No. 1036.
HUDALJ No. 04-100-NA.
Decision and Order.
Filed December 5, 2007.

EOCA – Discrimination – Section 741.

Claimant alleged discrimination based upon disability as well as Agency corruption, unethical conduct, and unfair actions. None of claimant's basis for discrimination are covered by Section 741.

Final Determination

Nature of the Proceeding

This proceeding is an adjudication under section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999 (7 U.S.C. § 2279 note) [hereinafter Section 741] and the rules of practice applicable to adjudications under Section 741 (7 C.F.R. pt. 15f) [hereinafter the Rules of Practice]. Section 741 waives the statute of limitations on eligible complaints[1] filed against the United States Department of Agriculture alleging discrimination in violation of the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f) or in connection with the administration of a commodity program or a disaster assistance program. Section 741(b) provides that a complainant may seek a determination regarding an eligible complaint by the United States Department of Agriculture and, after providing the complainant an opportunity for a hearing on the record, the United States Department of Agriculture shall provide the complainant such relief as would be afforded under the applicable statute from which the eligible complaint arose notwithstanding any

[1] 7 U.S.C. § 2279(e) note and 7 C.F.R. § 15f.4 define the term *eligible complaint*.

statute of limitations.

Procedural History

On May 12, 1995, Joseph R. Pugh [hereinafter Complainant] mailed an administrative claim to the United States Attorney's Office for the Middle District of Florida.Complainant instituted the administrative claim pursuant to the Federal Tort Claims Act against the Farmers Home Administration, United States Department of Agriculture [hereinafter the Farmers Home Administration], and sought return of property sold by the Farmers Home Administration in a foreclosure sale and money damages of $1,000,000. Complainant did not allege discrimination by the Farmers Home Administration or any other entity in the administrative claim. Complainant supplemented his administrative claim with a filing dated July 5, 1996, in which Complainant states he was disabled.[2]

On November 23, 1998, Complainant sent a copy of the May 12, 1995, administrative claim to the Office of Civil Rights, United States Department of Agriculture [hereinafter the Office of Civil Rights]. The Office of Civil Rights treated Complainant's November 23, 1998, submission [hereinafter the Complaint] as a discrimination complaint and determined that the Complaint was not timely-filed.[3] Complainant responded contending the Complaint was timely-filed in accordance with Section 741 and the Rules of Practice. On September 17, 1999, the Office of Civil Rights informed Complainant that the Complaint was eligible for review under Section 741 and explained the procedures applicable to Section 741 proceedings. The Office of Civil Rights also indicated that Complainant could obtain relief under Section 741 based on discrimination in violation of the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f) and informed Complainant that discrimination on the basis of disability is not prohibited by the Equal

[2]Filing by Complainant entitled "Joe R. Pugh v. United States of America c/o Farmers Home Adm. Citrus Loan Division" (Exhibit 1 at 0006-0031).

[3]Letter dated June 23, 1999, from Rosalind D. Gray, Director, Office of Civil Rights, to Complainant (Exhibit 3).

Credit Opportunity Act.[4]

On September 26, 1999, Complainant requested an administrative determination of his Complaint by the Director, Office of Civil Rights. On October 3, 2000, the Director, Office of Civil Rights, informed Complainant that the Office of Civil Rights had no jurisdiction to process the Complaint because Complainant had not alleged discrimination in violation of the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f).[5]

In response to a telephone conversation with Complainant, the Office of Civil Rights requested that Complainant submit a written request for a hearing before an administrative law judge and document the basis for the Complaint. On November 26, 2003, Complainant requested a hearing before an administrative law judge, but did not document the basis for the Complaint. On March 17, 2004, the Office of Civil Rights referred the proceeding to the Office of Administrative Law Judges, United States Department of Housing and Urban Development,for adjudication and a proposed determination pursuant to Section 741 and in accordance with the Rules of Practice.[6]

On June 18, 2004, the Farm Service Agency filed a motion to dismiss the May 12, 1995, administrative claim and the November 23, 1998, Complaint with prejudice. On January 12, 2006, Complainant mailed a response opposing the Farm Service Agency's motion to dismiss. On May 31, 2006, Administrative Law Judge Robert A. Andretta [hereinafter the ALJ] issued a proposed determination in which he found that Complainant had alleged that the Farm Service Agency discriminated against him based on disability and dismissed Complainant's claim of discrimination because discrimination based on

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[4]Letter dated September 17, 1999, from Rhonda Davis, Chief, Statute of Limitations, Office of Civil Rights, to Complainant (Exhibit 5).

[5]Letter dated October 3, 2000, from Rosalind D. Gray, Director, Office of Civil Rights, to Complainant (Exhibit 7).

[6]Letter dated March 3, 2004, from Sadhna G. True, Acting Director, Office of Civil Rights, United States Department of Agriculture, to Arthur A. Liberty, Chief Administrative Law Judge, United States Department of Housing and Urban Development.

disability is not prohibited by the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f).[7]

On June 23, 2006, Complainant requested that the Assistant Secretary for Civil Rights review the ALJ's May 31, 2006, proposed determination.On July 5, 2006, the United States Department of Agriculture acknowledged receipt of Complainant's request for review and provided Complainant 15 days from the date of the acknowledgment of receipt of the request for review within which to mail a brief in support of Complainant's request for review.[8] Complainant did not mail a brief in support of Complainant's request for review during the 15-day period, which ended July 20, 2006. On August 28, 2006, the Farm Service Agency filed a statement in support of the ALJ's May 31, 2006, proposed determination requesting that the Assistant Secretary for Civil Rights adopt the ALJ's May 31, 2006, proposed determination as the Final Determination.

Discussion

Section 741 waives the statute of limitations on eligible complaints filed against the United States Department of Agriculture alleging discrimination in violation of the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f) or in connection with the administration of a commodity program or a disaster assistance program. Section 701(a) of the Equal Credit Opportunity Act prohibits a creditor from discriminating against an applicant, with respect to any aspect of a credit transaction, as follows:

§ 1691. Scope of prohibition

(a) Activities constituting discrimination

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[7]The ALJ's Determination dated May 31, 2006.

[8]Acknowledgment of Request for Review sent by Raymond J. Sheehan, Director, Office of Ethics, United States Department of Agriculture, to Complainant July 5, 2006.

> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—
>
> (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);
>
> (2) because all or part of the applicant's income derives from any public assistance program; or
>
> (3) because the applicant has in good faith exercised any right under this chapter.

15 U.S.C. § 1691(a).

Complainant does not allege discrimination in the May 12, 1995, administrative claim or in the November 23, 1998, Complaint. The ALJ provided Complainant an opportunity to identify the specific basis of discrimination upon which the administrative claim and the Complaint rest.[9] In response, Complainant stated he had been disabled, but Complainant did not explicitly state that the Farm Service Agency discriminated against him on the basis of disability.[10] Nonetheless, I infer, based on Complainant's response to the ALJ's request and based on previous filings in which Complainant states he is disabled,[11] that Complainant alleges the Farm Service Agency discriminated against him on the basis of disability in violation of the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f). The Equal Credit Opportunity Act does not prohibit discrimination based on disability; therefore, the May 12, 1995, administrative claim and the November 23, 1998, Complaint must be dismissed with prejudice.

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

Decision

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[9]ALJ's May 31, 2006, Determination at 3.

[10]Complainants [sic] Objections to Agencys [sic] Motion to Dismiss at 3.

[11]Filing by Complainant entitled "Joe R. Pugh v. United States of America c/o Farmers Home Adm. Citrus Loan Division" (Exhibit 1 at 0006-0031); Joe R. Pugh Request for Review to the Assistant Secretary for Civil Rights dated June 23, 2006.

The United States Department of Agriculture adopts the ALJ's May 31, 2006, proposed determination as the Final Determination in this proceeding. Complainant's May 12, 1995, administrative claim and Complainant's November 23, 1998, Complaint are dismissed with prejudice.

Judicial Review

Complainant has the right to seek judicial review of this Final Determination in the United States Court of Federal Claims or in a United States District Court of competent jurisdiction.[12] Complainant has at least 180 days after the issuance of this Final Determination within which to commence a cause of action seeking judicial review of this Final Determination.[13]

[12] 7 U.S.C. § 2279(d) note.

[13] 7 U.S.C. § 2279(c) note.

FEDERAL CROP INSURANCE ACT

DEPARTMENTAL DECISION

In re: MARK L. ANDREASEN.
FCIA Docket No. 06-0002.
Decision and Order.
Filed December 12, 2007.

FCIA – Backdating, not proper – Timely dated – Accepted practices – Loss claim.

Donald J. Brittenham, Jr. for FSA
Randall C. Budge and Thomas J. Budge for Respondent.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

In this decision I find that Respondent Mark Andreasen committed violations of the Federal Crop Insurance Act, 7 U.S.C. § 1515, by improperly backdating the applications of 46 of his clients for crop insurance. However, since there were no material misstatements in the applications other than the backdating, and since that backdating was shown to have been a long standing established policy of the insurance company for whom Respondent was writing the policies in question, I reject Complainant's request that Respondent be suspended from the crop insurance program for five years and instead impose a civil penalty of $2,500.

Procedural History

On March 23, 2006, Eldon Gould, Manager, Federal Crop Insurance Corporation, United States Department of Agriculture, issued a complaint against crop insurance agent Mark Andreasen, Respondent, alleging that in 46 separate instances in 2002, Respondent backdated the acreage reports of policyholders. Complainant further alleged that by backdating the acreage reports, Respondent was willfully and intentionally providing false information to the approved insurance provider, and requested that a $5,000 civil penalty and a five-year

disqualification from receiving any benefits under the Federal Crop Insurance Act (FCIA or the Act) be imposed.

On April 13, 2006, Respondent filed a timely answer to the complaint. Respondent contended that he did not willfully and intentionally provide false information as alleged in the complaint, but that he rather "timely dated" the acreage reports in a matter totally consistent with the "accepted practices and instructions" of the insurance company. Respondent also raised several affirmative defenses, including that he never transmitted any false information to Complainant or the insurance company, and that estoppel and/or waiver applied.

On August 14, 2006 I conducted a telephone conference and set the matter for hearing in Pocatello, Idaho beginning January 23, 2007. The parties exchanged witness lists and proposed exhibits pursuant to my prehearing order, and on December 27, 2006 the parties filed "Prehearing Stipulated Facts and Statements" which were subsequently admitted into evidence as Joint Exhibit 1.[1]

I conducted a hearing in this matter in Pocatello, Idaho from January 23 through 25, 2007. Donald Brittenham, Jr., Esq. represented Complainant, and Randall C. Budge, Esq., and Thomas J. Budge, Esq., represented Respondent. Complainant called eight witnesses, and Respondent called six witnesses, including the Respondent himself. Over 100 exhibits were received in evidence.

Following the hearing, both parties filed proposed findings of fact and conclusions of law, and their briefs, on April 20, 2007.

Statutory and Regulatory Background

The Act is designed to "promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance." 7 U.S.C. § 1502. The Crop Insurance program is administered by the FCIA, which imposes a number of conditions and restrictions governing eligibility for coverage. The Act limits the

[1] In this decision, Stip. will refer to facts or statements stipulated to in the Joint Exhibit, CX to Complainant's exhibits, RX to Respondent's exhibits, and Tr to the transcript.

Federal Crop Insurance Corporation's authority to insure crops to "producers of agricultural commodities grown in the United States," against losses from "drought, flood or other natural disaster." 7 U.S.C. § 1508(a)(1).

The Federal Crop Insurance Corporation (FCIC) is a wholly owned government corporation within the U.S. Department of Agriculture. The Risk Management Agency (RMA) essentially runs the crop insurance program for the FCIC, and is responsible for the crop insurance handbook and the loss adjustment manual. The RMA implements a standard crop insurance contract, which sets a number of obligations and deadlines on behalf of the parties to the contract.

Another USDA agency with a substantial impact on this case is the Farm Service Agency (FSA). While the FSA does not directly administer the crop insurance program, it is involved in many other programs where the exact acreage of various crops planted by farmers is required. The FSA uses aerial photography to measure the amount of acreage farmers plant with various crops. While these measurements are utilized for coverage under FSA programs, there is no bar to the same numbers being used for other purposes, including the determination of coverage under FCIC policies.

The Common Crop Insurance Policy and the Crop Revenue Insurance Policy, CX 1 and 2, required for coverage under the Act, mandate the types of coverages provided for crop insurance. While the insurance policy is actually a contract between the producer (farmer) and the designated insurance company, the FCIC plays the role of reinsurer. Stip. 1.

Section 6 of the Policy, "Report of Acreage" is of particular relevance to this case. That section requires the insured farmer to file, by a specified date depending on what crop is insured and when it was planted, the amount of acreage planted for that growing season for each crop. Stip. 8. Section 2 of the Policy provides that the policy is "continuous," that is, the policy automatically remains in effect for each crop year once the policy is first accepted. Thus, the crop is usually insured by the time it is planted, while the acreage report, which verifies the acreage of each crop planted is due several months after the normal planting date of the crop.

An agent who "willfully and intentionally provides any false or inaccurate information," 7 U.S.C. § 1515(h)(1), or who otherwise willfully and intentionally fails to comply with a requirement of the Corporation," 7 U.S.C. § 1515(h)(2), is subject to sanctions, pertinently including a civil fine of up to $10,000 for each violation, and disqualification for a period of up to five years from participating in the crop insurance program. 7 U.S.C. § 1515(h)(3). In imposing a sanction, the Secretary must consider the gravity of the violations. 7 U.S.C. § 1515(h)(4).

Facts

Most of the pertinent facts in this case have either been stipulated to by the parties or are otherwise undisputed.

Respondent Mark Andreasen is an independent insurance agent who has maintained an office in Soda Springs, Idaho for over twenty years. Tr. 923-924. The name of his agency is Trac One, LLC. *Id.* A significant percentage of his business involves writing crop insurance for between 160 and 180 farmers. Tr. 927. With respect to each of the 46 crop insurance policies at issue here, all of which were written in 2002, each respective acreage report was due during the month of June—2 by June 15 and 44 by June 30. Stip. 8. In most cases, Respondent had received a copy of the FSA 578, the report prepared by FSA of the acreage planted, before the respective due date, and in each case there is no question that the FSA report in each case was accurate. With respect to each policy, the insured farmer signed the acreage report submitted to the insurance company. With each policy, the signature was made after June 30 (or after June 15, with respect to the two that had the June 15 deadline). Stip. 11.

All of the policies at issue in this case were written by American Agrisurance (AmAg). Respondent was operating under an agency agreement with AmAg, CX 80, and AmAg in turn had entered into a

Standard Reinsurance Agreement with the FCIC. CX 79.[2] The Agency Agreement has a number of provisions pertaining to the duties and obligations of Respondent vis-à-vis AmAg, including the "fiduciary duty to act in [AmAg's] exclusive interest with loyalty and care," CX 80, p. 1, and to generally follow the rules and regulations of the FCIC and the company regulations, and not to act fraudulently or deceptively. There is no discussion of the agent's duties to his or her client farmers.

During 2002, AmAg failed as a business and was taken into receivership by the State of Nebraska. Tr. 205. As a result, all liabilities on AmAg crop insurance policies were assumed by FCIC through RMA. RX 17. A report by the Government Accounting Office (GAO) pinned part of the responsibility for AmAg's failure on the lack of oversight by RMA. RX 17.

In reviewing a loss claim from the 2002 crop season involving Barker Ag, an insured entity which was a client of Respondent, Jay Rhodes, an AmAg employee who stayed on after the company was taken over by the State of Nebraska, noticed that the acreage report, even though dated June 30, 2002, was printed out on a form that was dated in July 2002. CX 37-39. Mr. Rhodes was in the process of reviewing high dollar claims against AmAg that occurred during 2002 when he came across this report in the early spring of 2003. Tr. 280. He believed the backdating was improper and contacted Marla Fricke of USDA's Office of Inspector General. He joined Ms. Fricke and Julie Michaelis of RMA compliance at a meeting with Respondent in Respondent's Soda Springs office. By the time of this meeting he had discovered a number of similar backdatings. Tr. 271.

At the meeting with Rhodes, Fricke and Michaelis on April 3, 2003, Respondent was totally cooperative and forthcoming. He told the investigative team that because the FSA 578 forms were not always received by him before the deadlines for filing the acreage reports, it was the normal business practice of AmAg, and other insurance companies that he wrote crop insurance for, to give him approximately two weeks

[2] The Reinsurance Agreement is between the FCIC and Acceptance Insurance Company, while the Agency Agreement is between Respondent's Trac One, LLC insurance agency and American Growers Insurance Company and Acceptance Insurance Company, but is on the AmAg letterhead.

after the official deadline to turn in the acreage reports. CX 28. He voluntarily turned over all relevant records to the investigative team (and did not receive them back for a year).

After reviewing the records, USDA first tried to treat Respondent's actions as a criminal matter, and forwarded Ms. Fricke's Report of Investigation to the U.S. Attorney's office in Pocatello. Tr. 320. Ms. Fricke also contacted the Idaho Insurance Commission Office, the Idaho Department of Insurance and representatives of the Idaho Attorney General's Office. *Id.* None of these entities would take any action against Respondent. Tr. 364-365.

During the course of other investigations of AmAg agents in the same general time period, Ms. Fricke estimated that approximately ten different agents also had similar problems with backdating of acreage reports. These other agents were "still under criminal investigation pending indictment" at the time of her testimony. Tr. 341. No action was ever taken against AmAg, presumably because it was insolvent and its policies were taken over by the government by the time the investigation got started. Tr. 355.

Respondent has contended from the onset of this investigation through the hearing and again in his brief that his actions with regard to submission of the acreage reports were not "back dating" but rather were "timely dating" and that his actions were proper and consistent with the policies and procedures of AmAg (as well as other companies he has worked with). Whether Respondent was in fact following accepted policies and procedures is probably the only significant fact in this case that is in dispute.

Respondent is an independent agent for Mountain States Insurance, and at the time of the hearing he had 160-180 crop insurance customers. Crop insurance is about half of his business. Tr. 925-928. During 2002 he wrote crop insurance for three different companies, although with the demise of AmAg he was writing crop insurance for only two companies at the time of the hearing. *Id.* Crop insurance must be applied for before planting and attaches to the crop once it is planted. Tr. 937. The premium for crop insurance is generally due October 1—after the crop has been harvested. Tr. 937-938. The premium is generally determined

by the farmer's production history from which average yield is derived, along with the acreage planted, and the level of coverage, i.e., the percentage of the projected yield that the farmer wants to insure. Tr. 938.

The accurate reporting of acreage is an integral part of the crop insurance process. It is obviously a crucial factor in determining coverage if there is a claim. It is an unambiguous requirement that the acreage report be signed—by the farmer and the insurance agent—no later than the date for the particular crop as specified in the regulations. CX 1. For the acreage reports in this case, all but two were required to be signed by June 30, with the remaining two required to be signed by June 15.

Respondent testified that he prepared the report for the farmer's signature by using the FSA 578 form, even though the use of that form is not specifically required, nor even alluded to, by FCIC. Tr. 943. He used the FSA form because all his crop insurance clients participate in FSA programs and are required to utilize the form, and because the FSA measuring system, relying on aerial photos and direct consultation with the farmer, is accurate to a tenth of an acre. Tr. 941-942. The farmers usually go to FSA within a week after they finish planting, while the 578's are sometimes issued on the spot and sometimes later. Tr. 948-949. All of Respondent's crop insurance clients authorize him to receive a copy of the 578 and he normally receives all of them in June. Tr. 943, 950. Once Respondent had the report prepared he would call the client and let him know it was ready for signature. Tr. 956-958. If the form was ready before June 30 (or June 15 if applicable), he would have the client sign it and put the actual date of signature on it. *Id.* However, if the client did not sign it by the due date, Respondent would fill in the due date and have the farmer sign it even though that date had passed. Tr. 956-958. He also stated that when he was submitting "timely dated" material he would put it in an envelope marked "personal and confidential" so that it would go directly to the AmAg crop specialist handling his accounts rather than being opened by the mailroom. Tr. 1051-1053.

Respondent contends that what the government refers to as "backdating" and what he refers to as "timely dating" was proper as far

as he knew and was consistent with the training he had as a crop insurance agent. He contends that the insurance companies he worked with, particularly AmAg, considered acreage reports properly submitted as long as they were dated no later than the due date, and as long as the reports were received within a certain period—usually 20 days—after the due date. Tr. 968-972. He stated that timely dating was discussed in training, and that submission of an acreage report was considered acceptable as long as it met the above-described conditions. *Id.* He pointed out that he could have easily avoided suspicion by using generic forms that did not reflect the printed run date of the document, but that he did not do so because he believed he was not doing anything wrong and was in fact following a common practice accepted by all the crop insurance companies. Tr. 966-979. When confronted by the USDA investigation team Respondent was extremely cooperative and maintained that he did not believe that he was doing anything wrong, and that he could not possibly have defrauded the government because he reported the acreage accurately in all instances. Tr. 977-980. He received the same commissions he would have received if the acreage reports were actually signed by June 30 (which was a Sunday in 2002) and all the premiums were paid (as were all claims). Tr. 982-983.

Since the visit from USDA personnel, Respondent has had his clients sign the acreage reports on or before the reporting due date. Tr. 981.

Joan Mahrt, testifying for Respondent, worked for AmAg for nearly thirteen years in its Council Bluffs office, which was the same office that serviced Respondent. She served in a variety of capacities, including as a supervisor, before she left due to the relocation of her husband. Tr. 609. She stated that "timely dated" acreage reports were crucial, but stressed that meant that the report must indicate that it was not signed after June 30. Tr. 596. She stated that the signature line of the acreage report was a representation that as of the date indicated the information contained in the form was correct. Tr. 596-597. She stated that the report did not have to be in AmAg's hands until July 20, as long as it was dated by June 30.[3] Tr. 598-600, If an agent submitted a report with a post June 30 date, the report would be returned with a "pending letter;"

[3] Presumably July 5 for reports that were due on June 15.

the agent could then resubmit the report with the correct date and AmAg would accept it even though they knew the date was not the date the document was actually signed. Tr. 600-603. She also stated that if a letter came in marked "personal and confidential" it would not be opened by the mail room and would go directly to the crop specialist. Tr. 603-604. Basically, she testified that the policy of AmAg's Council Bluffs office was to accept backdated or "timely dated" documents as long as the acreage appeared to be accurate. Tr. 606-607. She stated that this was consistent with oral company guidelines and the policy that she was trained to follow. Tr. 612-618, 629.

Lisa Lapica, a former underwriter with AmAg, disputed the existence of an office policy that allowed agents to backdate or "timely date" acreage reports. Tr. 502-503. She also stated that even documents that were marked "personal and confidential" were opened in the mailroom, and that she never saw an acreage report that did not first go to the mailroom. Tr. 503-504. However, she never worked in the Council Bluffs office, but was stationed in the Stanley office. Tr. 494-495. She testified that the agent and farmer should date the form with the actual date it was signed, but that she normally would not be able to tell whether that was the case. She would just look at the forms to determine they were signed by June 30. Tr. 496, 502. Full users such as Respondent, who had the authority to key in their own information, had 20 days to key the information in and mail it to AmAg. Tr. 536-539.

Loretta Helwig, a former FSA employee who worked in AmAg's Stanley office as an underwriter, supervisor and manager until the company went out of business said much the same thing as Ms. Lupica, agreeing both that the signature and signature date were important, and that the signature date should be the actual date the report was signed. Tr. 638-639, 642. She stated she was very familiar with the company's policies and procedures and was not aware of any provisions that would allow the "timely dating" that was practiced by Respondent. Tr. 649.

Glenn Linder, a former marketing representative for AmAg, and currently a marketing representative for another crop insurance company, testified that the company did not accept late documents but that he believed that a document was not late as long as it was "timely dated." Tr. 770, 776. He also stated that he believed that documents

marked "personal and confidential" went straight to the underwriter without being opened in the mailroom. Tr. 771-772.

Discussion

I find that Respondent's use of "timely dating" was a violation of FCIC regulations, and that the plain language and common interpretation of the meaning of signing and dating a document is that the document was signed on the date indicated. I also find that Respondent's practice of not putting the actual signature date on the acreage reports, while inconsistent with the regulations, was consistent with the practices of AmAg's Council Bluffs office. I find that, other than the misrepresenting the dates that the acreage reports were signed, the information in the acreage reports was accurate, that Respondent had no intention of misleading or defrauding the FCIC, and that he was operating under what he perceived to be the correct procedures as implemented by AmAg. I find that in light of Respondent's lack of nefarious intent, and his lifetime of diligent service to his clients, that it would be inappropriate to suspend him from the crop insurance program. However, because I also find that Respondent should have questioned a policy of allowing the submission of documents that were obviously not correctly dated, he should be liable for a civil penalty of $2,500.

"Timely dating" of acreage reports is not consistent with regulatory requirements. While neither party has cited any case law as to the legal significance of the date in a signature block, I interpret the signature block in the same way as Complainant—that the dating of the block is a representation that the signature was made on that date <u>and</u> that the information is accurate, not that that it is a representation only that the information in the acreage report was accurate as of that date. The "acreage report statement" states

> I submit this report as required for the above identified MPCI or alternative policy and certify that to the best of my knowledge and belief the information is correct and includes my entire interest in all acreage of the reported crops planted in the

> county(ies) and that of all sharecroppers, if any, in any crops insured under my policy. I have read and understand all statements and provisions on both sides of this form.

The form is signed and dated by both the insured farmer/producer and the agent. In most or all of the acreage reports at issue here, the signature is that of the farmer/producer, but the document has been hand-dated by Respondent.

While Respondent and several of his witnesses opined that the signature was a certification that as of the date indicated that all the information in the acreage report was correct, I find that interpretation to be a stretch. If the purpose of the date was solely to signify that the information was valid as of that date, the signed statement could so indicate. Furthermore, the specific requirement that the acreage reports "be submitted to us on our form . . . on or before the acreage reporting date," CX 1, p. 6, is facially inconsistent with the notion that the document could be signed after the fact—since it is supposed to be in the hands of the insurance company by that date, it cannot be signed after that date.

AmAg allowed its agents to submit backdated acreage reports, as long as the reports were received within twenty days of the acreage reporting date. While there was some conflict in testimony as to AmAg's policy, there was no conflict that with respect to the Council Bluffs office acreage reports were acceptable as long as they had a signature date no later than the due date, and that all information was received at the Council Bluffs office within 20 days of the due date. Neither of the two witnesses who testified that backdating was against AmAg policy were employed in the Council Bluffs office, while Joan Mahrt, who worked in that office for 13 years, testified that as long as the documents showed the correct date, AmAg did not care if the document actually was signed after the date, as long as AmAg got all the information electronically entered and received the document within 20 days after the required due date.

While it is obvious that the FCIC's position is that the date entered into the signature block of the acreage report must be the actual date the report was signed, and I have found that the FCIC's interpretation is the

correct one, there is no evidence to indicate that the backdating by Respondent was not in accord with the policies and procedures of AmAg, the company with whom he had a direct relationship. Complainant did not provide any testimony from anyone who would have been directly familiar with AmAg's practices in its Council Bluffs office to refute the testimony of either Respondent or Ms. Mahrt that for an acreage report to be acceptable it had to be "timely dated"—that is, facially showing that the report was signed and dated no later than the reporting date—and that all information must be received in Council Bluffs and entered into the computer within the twenty days allocated for mailing time. The testimony from the two witnesses who worked at the Stanley office, while supporting the fact that at the Stanley office "timely dating" was not an acceptable practice, did not refute the testimony that the practice was considered acceptable at Council Bluffs.[4]

Respondent did not engage in conduct intended to defraud or mislead the FCIC. The evidence overwhelmingly establishes that, other than not being signed on the date indicated, the acreage reports were accurate in all respects. Indeed, all the information in the acreage reports at issue was well in hand with AmAg by the time 20 days elapsed after the due dates. The fact that Respondent printed out the acreage reports in a format that showed the print date, when it was clear that he had several other options, including the use of generic forms, that would have disguised the date and thus rendered his backdating undetectable, is strong evidence that Respondent had no intention to mislead and believed that what he was doing was proper and in accord with AmAg procedures.

Further, I had ample opportunity to observe Respondent's demeanor during his hours of testimony and find his testimony generally credible. I find him to be an honest agent trying his best to service his clients consistent with the instructions given to him by the insurance agency he

[4] I also found interesting the testimony of Ms. Fricke that there were perhaps ten other agents under investigation for similar practices. Tr. 341. While I am not relying on this statement in my findings, it certainly is an indication that the practice was not unusual.

is representing. A number of witnesses called by Respondent testified as to his reputation for being an honest and thorough businessman, but even more impressive was that Complainant's own witnesses consistently conveyed the same impression. Jay Rhodes described him as "very forthcoming" and "producer minded," Tr. 274, and stated that he appeared to be an honest person who was not withholding any information. Tr. 284-285. Julie Michealis found him to be "fully cooperative," that he did not appear evasive and answered all questions fully. Tr. 439-440. Lisa Lapica agreed with Respondent's counsel that he was "always honest and forthright in his dealings" and was "very professional" and that she had no reason to doubt him. Tr. 588-589. Loretta Helwig testified that Respondent was "very good to work with," a "wonderful agent," "one of the top agents." Tr. 665-666.

While I believe that Respondent should have questioned a policy that in essence required him to backdate acreage reports, the fact is that I have not heard or seen any evidence that demonstrates that he did anything but comply with what he thought complied with the policies and practices of AmAg.

The violations do not warrant suspension but do warrant a civil penalty. While the requirement that the acreage report be signed and dated by the reporting farmer by the reporting date for the crops that were planted is a clearly spelled out requirement, the net impact of the violations in this case is not significant. While it is true that the FCIC technically can deny coverage if the acreage report is not submitted by the acreage reporting date, as a practical matter they can also allow coverage even with an unsigned acreage report, Tr. 1042-1043, or they can have the fields measured to determine the coverage. CX 1, paragraph 6(f). In addition, coverage of the crops attached at the time when they were planted, so it is arguable that the crops were covered in any event.[5] While it is essential for the insurance company and the FCIC to know the amount of crops planted, so that premiums can be properly assessed, the fact is that premiums are not paid until after the crop is harvested. And even if the signature rules are properly adhered to, the insurance companies still give their agents 20 days or so to

[5] The only remaining variable is for the farmer to determine what percentage of the total expected crop yield will be insured under the policy application.

submit the signed documents to them and key the information into company computers. So it is difficult to see any actual harm that could result from the failure to sign the documents by the reporting date as long as the insurance companies have the information by the "mailing date." And since the FCIC never gets the information until nearly twelve weeks after the reporting date it is difficult to see how they are materially affected by the violations. CX 79, p. 18, Tr. 181.

The violations here are more in the nature of impacting on program integrity generically rather than having the potential of causing any specific harm to the FCIC. If the FCIC thought they were defrauded by the backdated signings, they could have taken legal action to recover the funds they fraudulently paid out, but they chose not to do so. Likewise, they could have refunded all the premiums that were paid by the 46 producers and declared their insurance invalid, but they chose not to do so. Rather, they treated these policies no differently than other crop insurance policies, where both they and the insurance company had the actual acreage numbers well in hand. Indeed, the FCIC, through the RMA, had a direct relationship with AmAg, and AmAg received the backdated reports on forms clearly indicating, to anyone who spared them more than a cursory glance, that the reports had to have been actually signed after the acreage reporting date, since the date the form was printed out was clearly indicated on the face of the form. Since all other information in the form was accurate, and since Respondent was following the procedures implemented by AmAg, I find it difficult to perceive a serious violation of the Act that would give rise to the suspension provisions.

Although the FCIC was not harmed by Respondent's backdating, and he was following AmAg's policies and procedures, that does not totally absolve Respondent's conduct, however. An experienced insurance agent, or for that matter anyone else signing a document, should be aware that when a document is required to be signed and dated, the date on the document is presumed to be when the document is actually signed. Respondent's unquestioning compliance with AmAg's questionable interpretation of the submission requirements is worthy of some sanction. Accordingly, I assess a civil fine of $2,500.

Findings of Fact

1. Respondent, Mark Andreasen, is an independent insurance agent in Soda Springs, Idaho. Approximately half his business involves writing crop insurance for between 160 to 180 clients.

2. During 2002 Respondent sold crop insurance for American Agrisurance (AmAg).

3. Participants in the Federal crop insurance program must file an acreage report by a prescribed date.

4. In each of the 46 instances cited in the complaint, the acreage report was signed by the farmer after the required date. In each instance, Respondent wrote the prescribed date next to the signature, rather than the actual date signed.

5. It was the policy of AmAg at its Council Bluffs office to accept acreage reports that were "timely dated"—that is the date indicated on the signature line was no later than the due date—even if the report was actually signed after the due date, as long as all information was correct and was received by AmAg within 20 days after the due date.

6. Respondent testified credibly and is an honest individual who attempted to provide good service to his customers. While he should have questioned AmAg's "timely dating" policy, he believed that he was acting properly when he backdated the acreage reports.

7. AmAg failed in late 2002, and was taken over by the State of Nebraska.

8. RMA made good on the insurance claims that were filed by Respondent's clients whose acreage reports were backdated.

9. Upon discovery of the improper backdating, RMA made no attempt to seek reimbursement for the claims they paid, nor did they make any attempt to refund premiums from those clients of Respondent whose acreage reports were backdated and who did not suffer crop damage in 2002.

Conclusions of Law

1. When a signature block on a document includes a line for the

date, the presumption is that the date to be entered is the date the document was actually signed.

2. The backdating of acreage reports required to be filed by participants in the federal crop insurance program is not proper.

3. Since all the information provided on the acreage reports at issue in this case was accurate (other than the actual date signed), and since AmAg and RMA received this information on a timely basis, there was no actual harm to Complainant. There was a negative impact on the program integrity of the crop insurance program, however, which constitutes a material violation of the FCIA.

4. None of Respondent's action demonstrated a willful or intentional providing of false information to the insurance carrier or to the government reinsurer.

5. A civil fine of $2,500 is an appropriate sanction in this matter.

Order

Respondent has committed violations of the Federal Crop Insurance Act and the regulations thereunder as detailed above. Respondent is assessed a civil penalty of $2,500, which shall be paid by a certified check, cashier's check or money order made payable to the order of "Treasurer of the United States."

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

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.

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FOOD STAMP PROGRAM

COURT DECISION

NASSR MOHAMED, ET AL., v. USDA.
No. CV-F-05-0657 SMS.
Court Decision.
Filed July 2, 2007.

(Cite as 2007 WL 1946573 (E.D.Cal.)).

FSP – Transfer penalty – Trafficking – Perspective injuries – Ripeness – Unconstitutional taking, when not.

Plaintiff owner of a grocery store whose employees were previously found to have trafficked in Food Stamps was permanently disqualified from further participation in the Food Stamp program and was fined. The statute further permits the Agency to impose a separate CMP for the transfer or sale of the store after conviction in trafficking. The court dismissed Plaintiff's contention that the statute which authorizes USDA to impose CMP for the sale or transfer of the store an unconstitutional taking, impairment of a contractual interest, and impairment of a property interest. The court determined that Plaintiff's injuries were perspective and not ripe.

United States District Court
E.D. California.

ORDER ON UNITED STATES' MOTION TO DISMISS CERTAIN CLAIMS AND/OR FOR PARTIAL JUDGMENT ON PLAINTIFF'S AMENDED COMPLAINT (Doc)

SANDRA M. SNYDER, United States Magistrate Judge.

Pursuant to a notice filed on May 2, 2007, defendant United States of America moves to dismiss plaintiffs' fourth through eighth causes of action. Plaintiffs Nassar Mohamed, owner of Family Food Market, Nassar Mohammed and Nabeel Abdulla, owners of Parkview Market ("plaintiffs") filed an opposition on May 22, 2007. The United States filed its reply on June 1, 2007. The motion was heard on June 8, 2007

before the Honorable Magistrate Judge Sandra M. Snyder. Attorney Bruce Leichty appeared on behalf of plaintiffs and Brian Enos appeared on behalf of defendant. Having considered the moving, opposition, and reply papers, as well as the Court's file, the Court issues the following order.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs bring this action under *7 U.S.C. § 2023* to seek de novo review of an administrative determination of defendant, the United States Department of Agriculture Food and Nutrition ("defendant"), to disqualify plaintiffs from participating in the Food Stamp program as persons authorized to redeem Food Stamps vouchers. Plaintiffs were permanently disqualified from the food stamp program in accordance with Section 14A of the Food Stamp Act, as amended. Plaintiffs contend that the actions leading to their disqualification were the intentional and criminal actions of one or more of their employees.

As a result of the illegal activity, employees of plaintiffs were arrested and charged with criminal acts. The Government executed a search warrant during the course of the investigation and seized approximately $100,000 in cash. In March 2004, plaintiffs entered into a written settlement agreement with the Government forfeiting the sum of $20,000. Plaintiffs contend that this agreement bars this debarment action. Defendants contend that it does not and that the disqualification process is wholly distinct from the asset forfeiture proceeding and that the administrative ruling disqualifying plaintiffs should be upheld.

Plaintiffs filed this action on May 19, 2005. Brian Leichty substituted in as plaintiffs' counsel on December 20, 2006 and on April 2, 2007, the parties stipulated to the filing of a first amended complaint. The First Amended Complaint includes nine causes of action which can be categorized into three groups: (1) the first through third and ninth causes of action generally challenge the USDA and Food and Nutrition

Service's ("FNS") administrative actions taken against them pursuant to their employees' trafficking food stamps; (2) the fourth cause of action, is a constitutional challenge to a food stamp regulation (*7 C.F.R. § 278.6*) based on an alleged lack of Congressional endorsement; and (3) the fifth through eighth causes of action challenge the imposition of civil money penalties against them when they transfer their stores.

On May 2, 2007, defendant filed the instant motion to dismiss and/or judgment on the pleadings regarding the fourth through eighth causes of action based on: (1) lack of ripeness; (2) lack of subject matter jurisdiction; and (3) failure to state a claim upon which relief can be granted.

LEGAL STANDARD

Rule 12(b) (1) of the Federal Rules of Civil Procedure governs dismissal of a case for lack of jurisdiction over a case's subject matter. "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears."*Stock West, Inc. v. Confederated Tribes,* 873 F.2d 1221, 1225 (9th Cir.1989).

Dismissal under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim may be granted if the cause of action lacks a cognizable legal theory or there is an absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dept.,* 901 F.2d 696, 699 (9th Cir.1990). In considering a motion to dismiss for failure to state a claim, the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital Trustees,* 425 U.S. 738, 740, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), construe the pleading in the light most favorable to the party opposing the motion, and resolve all doubts in the pleader's favor. *Jenkins v. McKeithen,* 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404*,reh'g denied,* 396 U.S. 869, 90 S.Ct. 35, 24 L.Ed.2d 123 (1969), *Parks School of Business, Inc. v. Symington,* 51 F.3d 1480 1484 (9th Cir.1995). A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claim that

would entitle him to relief. *See Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); see also *Palmer v. Roosevelt Lake Log Owners Ass'n,* 651 F.2d 1289, 1294 (9th Cir.198*1).*

The Food Stamp Act provides for authorized stores to be disqualified (or, in exceptional circumstances, a civil monetary penalty) if any store employee accepts or uses food stamps in violation of the program. *7 U.S.C. § 2021* (a); *7 C.F.R. § 278.6(a).* In the event any retail store that has been disqualified to participate in the program is sold or otherwise transferred, "the person or persons who sell or otherwise transfer ownership ... shall be subjected to a monetary penalty in an amount established by the Secretary through regulations to reflect that portion of the disqualification period that has not yet expired. If the retail food store ... has been disqualified permanently, the civil money penalty shall be double the penalty for a ten-year disqualification period, as calculated under the regulations issued by the Secretary."7 U.S.C. § 2021(e); 7 C.F.R. § 278.6(f) (2).

DISCUSSION

A. *Defendants' Motion to Dismiss Claim Four*

Plaintiff's Fourth Cause of Action states:

63. Congress at no time conferred authority on the Department of Agriculture to promulgate the "transfer penalty" provisions of *7 C.F.R. Section 278.6*

64. The provisions for a "transfer penalty" found in *7 C.F.R. Section 278.6* are inconsistent with the authority conferred on the Department of Agriculture by Congress, or alternatively, unconstitutionally ambiguous and vague, in that, among other things, they appear to condition eligibility for a fine in lieu of

permanent disqualification for food stamp trafficking on a set of criteria that are impossible to meet if a violation of trafficking has already been found.

Defendant contends that plaintiffs' claim that the "transfer penalty" imposed on business owners for trying to sell businesses disqualified from the Food Stamp Program by 7 C.F.R. § 278.6 is unconstitutional is not viable because the regulation was expressly authorized by Congress pursuant to 7 U.S.C. § 2021(e) and is uniformly upheld as proper by the Supreme Court and Ninth Circuit. *See Vasudeva v. United States,* 214 F.3d 1155, 1159-61 (9th Cir.2000).

Plaintiff contends there is no ruling binding on this court which finds that 7 C.F.R. § 278.6 is constitutional as applied under the circumstances of this case. Plaintiffs do not dispute that Congress authorized and directed the Department of Agriculture to propound regulations providing for a penalty upon the transfer of a market that is the subject of a proper regulatory action. Plaintiffs' claim is that the agency lacks authority to condition eligibility for a fine in lieu of permanent disqualification on a set of criteria that are impossible to meet if a violation of trafficking has already been found. Plaintiffs argue that *Vasudeva* is a case involving the imposition of civil monetary penalties instead of permanent disqualification, whereas the case at hand involves civil monetary penalties added to permanent disqualification.

In the fourth cause of action, plaintiffs make a constitutional challenge to 7 C.F.R. § 278.6, arguing that the transfer penalty is not authorized by Congress.

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguous expressed intent of Congress."*Chevron, U.S.A., v. Natural Resources Defense Counsel, Inc.,* 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81

L.Ed.2d 694 (1984).

In 7 U.S.C. § 2021(e), Congress codifies the transfer penalty which 7 C.F.R. § 278.6 calculates and administers, and provides that in the event any retail food store that has been disqualified to participate in the program is sold or otherwise transferred:

> [T]he person or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern shall be subjected to a civil money penalty in an amount established by the Secretary through regulations to reflect that portion of the disqualification period that has not yet expired. If the retail food store or wholesale food concern has been disqualified permanently, the civil money penalty shall be double the penalty for a ten-year disqualification period, as calculated under regulations issued by the Secretary.

7 U.S.C. § 2021(e)(1).

The statute plainly authorizes the transfer penalty challenged by plaintiffs. The Court agrees that the *Vasudeva v. United States,* 214 F.3d 1155, 1159-61 (9th Cir.2000) case does not address the constitutionality of the transfer penalty specifically; however, the fact remains that the statute clearly speaks to the "precise question at issue" in the challenged regulation authorizing the imposition of transfer penalties as well as the creation of regulations to calculate and impose the penalties. Accordingly, plaintiff's fourth cause of action fails as a matter of law and therefore fails to state a claim upon which relief can be granted.

At the hearing, plaintiffs' counsel argued that the statute itself was unconstitutional as well as the regulation and therefore the fourth cause of action is not precluded by *Chevron, U.S.A., v. Natural Resources Defense Counsel, Inc.,* 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As pointed out by defendant, the fourth cause of action does not challenge the statute itself as currently plead.

Accordingly, the claim shall be dismissed with leave to amend.

B. Defendant's Motion to Dismiss Claims Five through Eight.

In the fifth through eighth causes of action, plaintiffs challenge the constitutionality of the regulation as imposed in this case.

Defendants argue these claims are not ripe for review in that they are constitutional challenges to the FNS's imposing civil money penalties against plaintiffs pursuant to transferring ownership of their food markets since the FNS has not imposed any "transfer penalties" on plaintiffs. Defendant contends plaintiffs have not made any allegations suggesting that they have tried to sell their businesses which might lead to the imposition of such penalties. Defendant argues plaintiffs have suffered no hardship and no controversy exists regarding possible yet thus far non-existent, transfer penalties and therefore plaintiffs' fifth through eighth causes of action are not ripe for review.

Plaintiffs argue their injury is not speculative or contingent in that each letter at issue in this action included the following verbiage,

> [S]hould your client sell or otherwise transfer ownership of your client's retail food business before completion of the disqualification, your client will be subject to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not yet expired.

Plaintiffs argue the letter effectuates a disability in the right that the owner of property normally has to transfer his or her property without government interference. Plaintiffs therefore contend the penalty is the imposition of the disability itself. Plaintiffs are experiencing the equivalent of a lien or other encumbrance placed on real property which they would otherwise be able to convey or sell for a profit absent a lien tor encumbrance, except in this case, plaintiffs argue it is effectively a hidden statutory lien on their personal property. Plaintiffs point out that they have alleged that they are "trying" to sell their property (*see First*

Amended Complaint ¶¶ 47-50) and nothing more is required under federal pleading standards.

The ripeness doctrine prevents premature adjudication. It is aimed at cases that do not yet have a concrete impact upon the parties. *Thomas v. Union Carbide Agricultural Prod. Co.,* 473 U.S. 568, 580, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985). Inquiries into ripeness generally address two factors. First, the court assesses whether the relevant issues are sufficiently focused to permit judicial resolution without further factual development. *See Clinton v. Acequia Inc.* 94 F.3d 568 572 (9th Cir.1996). Second, the court assesses the extent to which the parties would suffer any hardship by the postponement of judicial action. *Exxon Corp. v. Heinze,* 32 F.3d 1399, 1404 (9th Cir.1994).

Administrative regulations are not ordinarily considered "ripe" for judicial review under the Administrative Procedure Act "until the scope of the controversy has been reduced to more manageable proportions and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. *Nat'l Park Hospitality Ass'n v. Dept. of Interior,* 538 U.S. 803, 808, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003).

Here, as alleged in the complaint, the issues are not sufficiently focused to permit judicial resolution without further factual development and therefore claims five through eighth are unripe. Plaintiffs allege that they have been permanently disqualified from further participation in the Food Stamp Program and they have been notified that if they sell or otherwise transfer the retail food businesses before completing the period of disqualification, they will be subject to a monetary penalty. *First Amended Complaint,* p. 9, ¶ 41. Claims five through eight do not challenge the disqualification itself but specifically challenge the "transfer penalty" as an excessive fine; an unconstitutional taking; an impairment of contractual interest; and an impairment of a property interest. However, the transfers penalty has not yet been imposed and

may never be.

In *Abbott Labs. v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)*, overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), the Supreme Court explained that the ripeness doctrine serves "to prevent the court, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties."

Here, there is not a direct and immediate effect on the day to day business of the complaining parties. This is not a case where, as in *Abbott Laboratories,* the plaintiff is presented with an immediate choice between foregoing potentially lawful behavior and risking prosecution. The transfer penalty may never come to pass and even if it does, the amount of the penalty will depend on when the transfer occurs. Until those penalties are actually imposed in a specific amount, any decision by this Court would address a purely hypothetical situation. "Possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action."*Abbott Labs. v. Gardner, 387 U.S. at 153* 87 S.Ct. At 1517. Plaintiffs' claims five through eighth are therefore unfit for judicial decision because they are contingent both upon an a decision by plaintiffs to actually transfer the retail food businesses and an administrative action not yet taken.

CONCLUSION

For the foregoing reasons, the motion to dismiss is GRANTED. The fourth through eighth causes of action are dismissed. Plaintiffs are granted leave to amend the fourth cause of action. Plaintiffs shall file an amended complaint within 20 days of this Order.

IT IS SO ORDERED.

_____

NASSR MOHAMED, ET AL.,v. USDA.
No. CV-F-05-0657 SMS.
Court Decision.
Filed November 7, 2007.

(Cite as 2007 WL 3340948 (E.D.Cal.))

FSP – Transfer penalty – Trafficking – Perspective injuries – Ripeness Unconstitutional taking, when not..

Court granted Government's motion to dismiss. Reconsideration is appropriate when the court is presented with newly discovered evidence, clear error of law, or there is an intervening change of controlling law. Plaintiffs have failed to demonstrate sufficient grounds for reconsideration. New arguments can not be raised for the first time on appeal.

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO DISMISS

SANDRA M. SNYDER, United States Magistrate Judge.

On July 2, 2007, the Court issued an Order granting Defendant United States of America's ("Defendant") Motion to Dismiss the Fourth through Eighth causes of action and granting Plaintiffs leave to amend the Fourth cause of action. On July 12, 2007, plaintiffs Nassar Mohamed and Nabeel Abdulla, owners of Parkview Market ("Plaintiffs") filed a motion for reconsideration of the Order. The United States filed an opposition on August 17, 2007 and Plaintiffs filed a reply on August 23, 2007. The motion was heard on August 31, 2007 before the Honorable Magistrate Judge Sandra M. Snyder. Attorney Bruce Leichty appeared on behalf of Plaintiffs and Brian Enos appeared on behalf of Defendant. Having considered the moving, opposition, and reply papers, as well as the Court's file, the Court issues the following order.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs bring this action under 7 U.S.C. § 2023 to seek de novo review of an administrative determination of defendant, the United States Department of Agriculture Food and Nutrition to disqualify Plaintiffs from participating in the Food Stamp program as persons authorized to redeem Food Stamps vouchers. Plaintiffs were permanently disqualified from the food stamp program in accordance with Section 14A of the Food Stamp Act, as amended.

During the course of an investigation of the Food Stamp activity, employees of Plaintiffs were arrested and charged with criminal acts. The Government executed a search warrant during the course of the investigation and seized approximately $100,000 in cash. In March 2004, Plaintiffs entered into a written settlement agreement with the Government forfeiting the sum of $20,000.00. Plaintiffs contend that this agreement bars the debarment action. Defendants contend that it does not and that the disqualification process is wholly distinct from the asset forfeiture proceeding and that the administrative ruling disqualifying Plaintiffs should be upheld.

Plaintiffs filed this action on May 19, 2005. Brian Leichty substituted in as Plaintiffs' counsel on December 20, 2006 and on April 2, 2007, the parties stipulated to the filing of a First Amended Complaint ("FAC"). The FAC includes nine causes of action which can be categorized into three groups: (1) the first through third and ninth causes of action generally challenge the USDA and Food and Nutrition Service's ("FNS") administrative actions taken against them pursuant to their employees' trafficking food stamps; (2) the fourth cause of action is a constitutional challenge to a food stamp regulation (7 C.F.R. § 278.6) based on an alleged lack of Congressional endorsement; and (3) the fifth through eighth causes of action challenge the imposition of civil money penalties against them when they transfer their stores.

On May 2, 2007, Defendant filed a motion to dismiss and/or judgment on the pleadings regarding the fourth through eighth causes of action based on: (1) lack of ripeness; (2) lack of subject matter jurisdiction; and (3) failure to state a claim upon which relief can be granted.

On July 2, 2007, the Court granted the motion and granted Plaintiffs leave to amend the fourth cause of action for reasons including the FAC's failure to challenge the constitutionality of the regulation's supporting statute. The court noted that the statute (7 U.S.C. § 2021(e)(1)) clearly speaks to the precise questions at issue in the challenged regulation:

> At the hearing, plaintiffs' counsel argued that the statute itself was unconstitutional as well as the regulation and therefore the fourth cause of action is not precluded by *Chevron, U.S.A., v. Natural Resources Defense Counsel, Inc.,* 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As pointed out by defendant, the fourth cause of action does not challenge the statute itself as currently plead. Accordingly, the claim shall be dismissed with leave to amend. Order on Motion to Dismiss, Doc. 51 at 5: 13-17.

As to the fifth through eighth causes of action which challenge the constitutionality of the regulation "as imposed" in this case, the Court held that the claims were "unfit for judicial decision because they are contingent both upon a decision by plaintiffs to actually transfer the retail food businesses and an administrative action not yet taken."Noting that the transfer penalty "may never come to pass and even if it does, the amount of the penalty will depend on when the transfer occurs," the Court granted Defendant's motion to dismiss these claims, without leave to amend.

On July 12, 2007, Plaintiffs filed the present motion for reconsideration pursuant to Federal Rules of Civil Procedure 59 and 60. Plaintiffs argue that: (1) ripeness has been statutorily determined; (2) plaintiffs should be permitted to challenge the regulation by way of their fourth cause of action; and (3) the Court's statements in the background section of the order were not accurate and could be given preclusive effect at a later date.

Defendant argues that Plaintiffs' request should be denied in that Plaintiffs fail to demonstrate that any legally cognizable basis for

reconsideration exists. Defendant argues that Plaintiffs fail to show: (1) the existence of any new facts or law unavailable to them when the order was issued and warranting the order's amendment; or (2) that the order is clearly erroneous or manifestly unjust.

LEGAL STANDARD

Reconsideration is appropriate when the district court is presented with newly discovered evidence, committed clear error, or there is an intervening change in controlling law. *School District No. 1J, Multnomah County, Oregon v. A C and S, Inc.,* 5 F.3d 1255, 1263 (9th Cir.1993), *cert. denied,* 512 U.S. 1236, 114 S.Ct. 2742, 129 L.Ed.2d 861 (1994).“Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence.” *Publisher's Resource, Inc. v. Walker Davis Publications, Inc.,* 762 F.2d 557, 561 (7th Cir.1985) (quoting *Keene Corp. v. International Fidelity Ins. Co.,* 561 F.Supp. 656, 665-666 (N.D.Ill.1982), *aff'd,* 736 F.2d 388 (7th Cir.1984)); *see Novato Fire Protection Dist. v. United States,* 181 F.3d 1135, 1142, n. 6 (9th Cir.1999), *cert. denied,* 529 U.S. 1129, 120 S.Ct. 2005, 146 L.Ed.2d 955 (2000). Reconsideration should not be used “to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided.”*See Brambles USA, Inc. v. Blocker,* 735 F.Supp. 1239, 1240 (D.Del.1990). Under this Court's Local Rule 78-230(k), a party seeking reconsideration must demonstrate “what new or different facts or circumstances are claimed to exist which did not exist or were not shown upon such prior motion, or what grounds exist for the motion.”

As discussed below, Plaintiffs have failed to demonstrate sufficient grounds for reconsideration of this Court's Order.

DISCUSSION

A. Ripeness

Plaintiffs contend that in the Court made “obvious errors of law”

which they had no way of knowing about until receipt of the Order. Counsel claims that he did not "believe it was necessary to argue" as to ripeness "because the Court gave every indication at oral argument that the Court would rule in favor of Plaintiffs' Opposition."Counsel apparently claims that he was "surprised" by the Court's Order. However, the surprise to counsel is attributable to his conscience decision not to respond to Defendant's ripeness argument at the hearing. Counsel's unsuccessful strategy equates to neither surprise nor mistake sufficient to entitle Plaintiffs to relief they seek.

The merits of Plaintiffs' ripeness argument is equally unavailing. Plaintiffs argue that this Court's dismissal of claims five through eight on ripeness grounds was erroneous because the court did not take into account Plaintiff's "statutory right to judicial review of the validity of the agency action in this case which *necessarily* means that their claims ... are ripe."Plaintiffs point to the language of Sections 2023(a)(1), (3) and (5) which provide that after a store is "disqualified" or "subjected to a civil money penalty" the aggrieved store is entitled to a determination made by a designated administrative officer on the subject matter of the store's grievance.Section 2023(a)(13) goes on to state, "if the store ... feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint against the United States ..."

Plaintiffs focus on the language of the statute which provides for judicial review but ignore the language that requires a "final determination" prior to judicial review. As the Court previously noted and Defendant has conceded, this has not yet occurred as to the transfer penalty. Indeed, in the FAC, Plaintiffs allege that they have been "permanently disqualified from the Food Stamp Program" (FAC ¶ 8) and further that "[t]his action was filed within 30 days of the denial by Defendant on May 11, 2005 of plaintiffs' final appeal from the permanent disqualification."FAC ¶ 9. No where do Plaintiffs contend that the administrative prerequisites have been met or that they have exhausted their administrative remedies as to the transfer penalty.

As pointed out by Defendants, prior to the 30 day limitations period in section 2023(13) commencing, Plaintiffs will receive a notice of administrative action, and an opportunity for a hearing. The administrative record upon which Plaintiffs have filed the present action is limited to Plaintiffs' disqualification from the Food Stamp Program, not transfer penalties. This is not unexpected since the transfer penalties have not yet been imposed.

The Court dismissed claims five through eight because they do not challenge the disqualification itself but specifically challenge the "transfer penalty" as an excessive fine; an unconstitutional taking; an impairment of contractual interest; and an impairment of a property interest. The transfer penalty has not yet been imposed and therefore these claims are not ripe. Based on the Court's Order and Defendant's express representations at the hearing, Plaintiffs will have the opportunity to challenge the transfer penalty, when and if it is ever imposed.

B. Challenge to Regulation

Plaintiffs next allege that the Court "overreached" in making the statement that "the transfer penalty has not yet been imposed and may never be" and "[t]here is not a direct and immediate effect on the day to day business of the complaining parties."Plaintiffs argue the Court is obliged to assume that Plaintiffs will sell or transfer their stores. Plaintiffs have provided no support for this argument nor have Plaintiffs presented evidence that the Court's statement is incorrect. Moreover, Plaintiffs' FAC directly contradicts their position in the present motion:

> On or about May 11, 2005, the Administrative Review Branch upheld the penalty imposed by Officer Troups, *namely permanent disqualification* of both Parkview Market and Family Food Market from further participation in the Food Stamp Program, *without, however, alluding to the applicability of any contingent penalty upon transfer of either of the identified stores, or how such penalty would be actuated.*FAC, ¶ 46 (emphasis added).

Plaintiffs also argue that the Court's dismissal of the fourth cause of action with leave to amend "foreclosed any attack on the regulation" and is "internally inconsistent" with its ruling regarding claims five through eight. This argument also fails.

The Fourth Cause of Action, as pled, is admittedly a challenge to the regulation as "inconsistent with the authority conferred on the Department of Agriculture by Congress."FAC, ¶ 64. The Court dismissed the claim with leave to amend because the regulation is specifically authorized by 7 U.S.C. § 2021(e), where Congress codifies the transfer penalty which 7 C.F.R. § 278.6 calculates and administers. The statute provides that in the event any retail food store that has been disqualified to participate in the program is sold or otherwise transferred:

> [T]he person or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern shall be subjected to a civil money penalty in an amount established by the Secretary through regulations to reflect that portion of the disqualification period that has not yet expired. If the retail food store or wholesale food concern has been disqualified permanently, the civil money penalty shall be double the penalty for a ten-year disqualification period, as calculated under regulations issued by the Secretary.

7 U.S.C. § 2021(e)(1).

The Court determined that the statute plainly authorizes the regulation challenged by Plaintiffs. Should Plaintiffs want to challenge the constitutionality of the statute or the regulation on a more specific basis, they have been given leave to amend to do so. As pled, the fourth claim is a limited one and it fails as a matter of law.

C. **Court's "Findings"**

Finally, Plaintiffs argue that the Court made premature, inaccurate and prejudicial "findings" on criminality and illegality. Specifically, Plaintiffs

challenge the statement made by the Court in the "Factual and Procedural Background" section of the Order that "Plaintiffs contend that the actions leading to their disqualification were the intentional and criminal actions of one or more of their employees."Order at 2:4-6. Plaintiffs contend this is false and they do not concede that there was illegal activity in their stores. Plaintiffs argue the statement could "arguably be given preclusive effect at some later date."

The challenged statement is neither a "finding" nor "inaccurate." The Court obtained the challenged statement from the parties' "Summary of the Case" in their Joint Scheduling Conference Report. *See* Doc. 25 at 2:1-3. While the background statement in the Court's Order has no preclusive effect, the parties' joint statement certainly may. Plaintiffs' challenge to the Court's Order on this basis is misplaced and does not warrant amendment of the Order as requested.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for reconsideration is DENIED. As previously ordered, Plaintiff's may file a Second Amended Complaint within 20 days of this Order. Should Plaintiffs fail to do so, Defendant shall respond to the FAC within 20 days.

IT IS SO ORDERED.

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HORSE PROTECTION ACT

DEPARTMENTAL DECISION

In re: ROBERT RAYMOND BLACK, II, AN INDIVIDUAL; CHRISTOPHER B. WARLEY, AN INDIVIDUAL; BLACK GOLD FARM, INC., A TEXAS CORPORATION; ROBBIE J. WARLEY, AN INDIVIDUAL d/b/a BLACK GOLD FARMS; HERBERT DERICKSON AND JILL DERICKSON, INDIVIDUALS d/b/a HERBERT DERICKSON TRAINING FACILITY, a/k/a HERBERT DERICKSON STABLES, a/k/a HERBERT DERICKSON BREEDING AND TRAINING FACILITY.
HPA Docket No. 04-0003.
Decision and Order.
Filed August 30, 2007.

HPA – Horse Protection Act – Horse industry organization decisions – Laches – Sore – Transporting – Entering – Allowing entry – Service by regular mail – Civil penalty – Disqualification – Partnership.

The Judicial Officer concluded that, on March 21, 2002: (1) Christopher B. Warley, Herbert Derickson, and Jill Derickson, entered a horse named "Just American Magic" in the 34th Annual National Walking Horse Trainers Show, in Shelbyville, Tennessee, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B); (2) Robbie J. Warley and Black Gold Farm, Inc., allowed the entry of Just American Magic in the 34th Annual National Walking Horse Trainers Show, in Shelbyville, Tennessee, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D); and (3) Herbert Derickson and Jill Derickson transported Just American Magic to the 34th Annual National Walking Horse Trainers Show, in Shelbyville, Tennessee, while the horse was sore, with reason to believe the horse, while sore, may be entered for the purpose of being shown in the horse show, in violation of 15 U.S.C. § 1824(1). The Judicial Officer assessed Christopher B. Warley, Robbie J. Warley, and Black Gold Farm, Inc., each a $2,200 civil penalty and Herbert Derickson and Jill Derickson each a $4,400 civil penalty. In addition, the Judicial Officer disqualified Christopher B. Warley, Robbie J. Warley, and Black Gold Farm, Inc., for 1 year and Herbert Derickson and Jill Derickson for 2 years from showing, exhibiting, or entering any horse and from judging, managing, or participating in any horse show, horse exhibition, horse sale, or horse auction. The Judicial Officer held a decision issued against a respondent by a horse industry organization to enforce the guidelines issued in the Horse Protection Program Operating Plan does not limit the authority of the Animal and Plant Health Inspection Service to initiate a proceeding under the Horse Protection

Act against that same respondent based on the same incidents as those which formed the basis for the horse industry organization decision. The Judicial Officer rejected Respondents' affirmative defenses – laches, res judicata, collateral estoppel, and double jeopardy. The Judicial Officer concluded that, under the rules of practice applicable to the proceeding (7 C.F.R. §§ 1.130-.151), remailing by regular mail to effectuate service is only allowed if a previous certified return receipt requested mailing is returned marked by the postal service as "unclaimed" or "refused" (7 C.F.R. § 1.147(c)(1)). The Judicial Officer held that entering a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. The Judicial Officer found, when Mr. Black became the custodian of Just American Magic, the horse had already been disqualified from showing; therefore, Mr. Black could not have been entering Just American Magic for the purpose of showing or exhibiting the horse. The Judicial Officer held Christopher B. Warley's designation as the rider of Just American Magic on the 34th Annual National Walking Horse Trainer Show entry form was sufficient evidence to find that Mr. Warley participated in the entry of Just American Magic. The Judicial Officer also found that the owners of Just American Magic, Ms. Warley and Black Gold Farm, Inc., could not avoid a violation of 15 U.S.C. § 1824(2)(D), under *Baird v. U.S. Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994), based on instructions to the trainers of Just American Magic because the instructions were merely pretext.

Colleen A. Carroll for Complainant.
Jack G. Heffington, Christiana, Tennessee, for Respondent Robert Raymond Black, II.
L. Thomas Austin, Dunlap, Tennessee, for Respondents Christopher B. Warley, Black Gold Farm, Inc., and Robbie J. Warley.
S. Todd Bobo, Shelbyville, Tennessee, for Respondents Herbert Derickson and Jill Derickson.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On August 19, 2004, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], initiated this disciplinary proceeding by filing a Complaint. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. The Administrator alleges: (1) on or about March 21, 2002, Herbert Derickson, Jill Derickson, and Robert Raymond Black, II,

violated section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)), by transporting a horse named "Just American Magic" to the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore, with reason to believe the horse, while sore, may be entered for the purpose of his being shown in that horse show; (2) on or about March 21, 2002, Christopher B. Warley, Herbert Derickson, Jill Derickson, and Robert Raymond Black, II, violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), by entering Just American Magic as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore; and (3) on or about March 21, 2002, Robbie J. Warley and Black Gold Farm, Inc., violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), by allowing Christopher B. Warley, Herbert Derickson, Jill Derickson, and Robert Raymond Black, II, to enter Just American Magic, owned by Robbie J. Warley and Black Gold Farm, Inc., in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing that horse, which was sore (Compl. ¶¶ 11-13).

All parties, except Robert Raymond Black, II, filed answers denying the material allegations of the Complaint. Mr. Black's copy of the Complaint, sent by the Hearing Clerk, certified mail return receipt requested, could not be delivered by the United States Postal Service, which returned the envelope containing the Complaint to the Hearing Clerk marked "Not deliverable as addressed/Unable to Forward/Return to Sender." On September 13, 2004, the Hearing Clerk remailed a copy of the Complaint to the same address by regular mail. Mr. Black did not file his answer, and the Administrator filed a motion seeking a Decision and Order as to Robert Raymond Black, II, By Reason of Admission of Facts. Counsel for Mr. Black entered an appearance and opposed the motion. Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] deferred a decision on the motion. The Administrator appealed the ALJ's deferral of the decision to the Judicial Officer. On May 3, 2005, I remanded the case to the ALJ finding that, because there was no decision on the motion, the appeal was premature and that interlocutory appeals are not authorized under the Rules of Practice. *In re Robert*

Raymond Black, II (Order Dismissing Interlocutory Appeal as to Robert Raymond Black, II, and Remanding the Proceeding to the ALJ), 64 Agric. Dec. 681 (2005).

The ALJ conducted an oral hearing on June 26 and 27, 2006, in Shelbyville, Tennessee. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator; Jack G. Heffington, Christiana, Tennessee, represented Robert Raymond Black, II; L. Thomas Austin, Austin, Davis & Mitchell, Dunlap, Tennessee, represented Christopher B. Warley, Black Gold Farm, Inc., and Robbie J. Warley; and S. Todd Bobo, Bobo, Hunt & White, Shelbyville, Tennessee, represented Herbert Derickson and Jill Derickson.

Eleven witnesses testified during the hearing. The Administrator called nine witnesses, including both veterinary medical officers, who examined Just American Magic on March 21, 2002, at the 34th Annual National Walking Horse Trainers Show. The Administrator also called as witnesses the executive vice president of the National Horse Show Commission, the executive secretary of the Walking Horse Trainers Association, and numerous United States Department of Agriculture investigators. Robert Raymond Black, II, and his wife Amanda Black were the only two witnesses called by any of the Respondents.

On October 3, 2006, the ALJ issued his Decision and Order [hereinafter Initial Decision]. The ALJ dismissed the Complaint against Robert Raymond Black, II, Christopher B. Warley, and Jill Derickson. The ALJ found Herbert Derickson violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Just American Magic in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 21, 2002, while the horse was sore. However, the ALJ dismissed the allegation that Mr. Derickson violated section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)) by transporting the horse, while the horse was sore, with reason to believe the horse, while sore, may be entered for the purpose of his being shown in that horse show. Finally, the ALJ found Black Gold Farm, Inc., and Robbie J. Warley violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of Just American Magic in the 34th Annual National Walking Horse Trainers Show in Shelbyville,

Tennessee, on March 21, 2002, for the purpose of showing the horse, which was sore.

The ALJ assessed Mr. Derickson a $2,200 civil penalty and disqualified him for 2 years from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction; however, the ALJ suspended 1 year of Mr. Derickson's 2-year disqualification. The ALJ assessed Robbie J. Warley and Black Gold Farm, Inc., jointly and severally, a $2,200 civil penalty. In addition, the ALJ disqualified Robbie J. Warley and Black Gold Farm, Inc., for 1 year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

Herbert Derickson appealed the ALJ's decision. He argues that the decision of the National Horse Show Commission, under the guidelines of the 2001 APHIS Horse Protection Operating Plan, imposing a fine and a suspension for his actions, bars the United States Department of Agriculture from bringing an enforcement action for violations of the Horse Protection Act. For the reasons set forth below, I deny Mr. Derickson's appeal.

The Administrator appealed the ALJ's decision. First, the Administrator argues the ALJ erred in deferring a ruling on the Administrator's motion for a Decision and Order as to Robert Raymond Black, II, By Reason of Admission of Facts. The Administrator next challenges the ALJ's dismissal of the "entering" violations against Christopher B. Warley, Jill Derickson, and Robert Raymond Black, II. The Administrator further challenges the ALJ's dismissal of the "transporting" violations against Herbert Derickson, Jill Derickson, and Robert Raymond Black, II. Finally, the Administrator argues the ALJ erred in the sanctions he imposed on Mr. Derickson, Ms. Warley, and Black Gold Farm, Inc.

Christopher B. Warley, Herbert Derickson, Jill Derickson, and Robert Raymond Black, II, each filed a response to the Administrator's appeal petition. Although the Administrator appealed the sanction imposed on Robbie J. Warley and Black Gold Farm, Inc., neither Ms. Warley nor

Black Gold Farm, Inc., filed a response to the appeal.

For the reasons set forth below, I grant in part and deny in part the Administrator's appeal petition.

FINDINGS OF FACT

Just American Magic was a 7-year-old Tennessee Walking Horse owned by Black Gold Farm, Inc., and Robbie J. Warley (CX 3). Ms. Warley is a director, the president, and sole shareholder of Black Gold Farm, Inc. (CX 9). Ms. Warley retained Herbert and Jill Derickson, doing business as Herbert Derickson Training Facility or Herbert Derickson Stables, to train Just American Magic and other horses to perform in horse shows and exhibitions and to show Just American Magic in horse shows. Billing records indicate Ms. Warley retained the Dericksons at least since September 2000. (CX 24.)

Just American Magic was entered as entry number 425 in class 25 in the 34th Annual National Walking Horse Trainers Show held in Shelbyville, Tennessee, on March 21, 2002 (CX 2). The entry form for the show indicates Mr. Derickson was Just American Magic's trainer (CX 2). Mr. Derickson does business under a number of trade names including Herbert Derickson Training Facility, Herbert Derickson Stables, and Herbert Derickson Breeding and Training Facility (Dericksons' Answer ¶ 5). Jill Derickson is married to Herbert Derickson. She also does business under the same trade names as Mr. Derickson including Herbert Derickson Training Facility, Herbert Derickson Stables, and Herbert Derickson Breeding and Training Facility (Dericksons' Answer ¶ 6). Mrs. Derickson signed the check that paid for Just American Magic's entry in the 34th Annual National Walking Horse Trainers Show (CX 10 at 8). She also completed the National Walking Horse Trainers Show Entry Blank identifying Just American Magic as an entry in the show (CX 2).[1]

[1]Although the signature block on the entry blank states "Herbert Derickson," the writing is similar in style to Jill Derickson's signature on the entry payment check (CX 10 at 8), an entry payment check for the 2003 National Walking Horse Trainers Show (CX 19 at 41), and an entry blank for the 2003 National Walking Horse Trainers Show (CX 19 at 13). The signature on the entry blank for the 2002 National Walking Horse

(continued...)

Christopher B. Warley was scheduled to ride Just American Magic in the 34th Annual National Walking Horse Trainers Show (CX 2). Mr. Warley is a director and vice president of Black Gold Farm, Inc. (CX 9 at 17-19).

On the evening of March 21, 2002, Mr. Derickson led Just American Magic to the pre-show inspection. Designated Qualified Persons [hereinafter DQPs][2] Bob Flynn and Charles Thomas inspected Just American Magic. The DQPs found the horse was bilateral sore and did not comply with the scar rule. (RX 1D.) The DQPs issued National Horse Show Commission DQP Ticket number 23130 disqualifying the horse from showing (RX 1D). After the DQPs disqualified Just American Magic from showing, Mr. Derickson had his employee, Robert Raymond Black, II, take control of the horse (CX 12). Mr. Derickson then left the inspection area. Lynn P. Bourgeois and Clement Dussault, veterinary medical officers employed by the United States Department of Agriculture, inspected Just American Magic (CX 1b-CX 1c). Each veterinarian found the horse had strong, repeatable, reproducible pain responses when palpated on each front foot (CX 1b-CX 1c). In addition, Dr. Bourgeois and Dr. Dussault each found an area of raised scar tissue on each front foot (CX 1b-CX 1c). The veterinary medical officers conferred agreeing the horse was sore and did not comply with the scar

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[1](...continued)
Trainers Show (CX 2) is very different from Mr. Derickson's signature as seen on other documents in the record, including acknowledgment of receipt of a letter from Black Gold Farm, Inc. (RX 1W); the DQP Ticket issued September 30, 2000, dismissing Just American Magic from the 2000 International Show (CX 14); and the DQP Ticket issued May 10, 2002, dismissing another horse from the 4th Annual Children's Classic Horse Show (CX 20 at 5).

[2]The management of a horse show employs DQPs, and United States Department of Agriculture veterinarians monitor their performance (9 C.F.R. §§ 11.7, .21). The Horse Protection Act provides that the management of a horse show may be held liable if it fails to utilize a DQP and a sore horse participates in the show (15 U.S.C. § 1824(3); 9 C.F.R. § 11.20). Therefore, use of a DQP protects the show's management from liability under the Horse Protection Act and indicates management has made a conscientious and concerted effort to see that sore horses are not entered, exhibited, or shown (H.R. Rep. No. 91-1597, at 4 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4873).

rule. The veterinary medical officers then completed the bottom portion of APHIS Form 7077, Summary of Alleged Violations, indicating the locations of the scar tissue and the locations where they elicited pain responses when palpating Just American Magic (CX 1a).

DISCUSSION

I first address an issue that has become more prevalent in recent Horse Protection Act cases and was raised before me in this case: the interaction between the various horse industry organizations and the Animal and Plant Health Inspection Service, along with the role each plays in the enforcement of the Horse Protection Act. Individuals appearing before me continue to argue that a document entitled "Horse Protection Program Operating Plan" binds the Animal and Plant Health Inspection Service in its enforcement of the Horse Protection Act. That argument fails. Under the Horse Protection Program Operating Plan, the Animal and Plant Health Inspection Service allows a horse industry organization that has signed the plan[3] to address Horse Protection Act violations at shows managed by that horse industry organization. Although the Animal and Plant Health Inspection Service grants horse industry organizations this opportunity, the Animal and Plant Health Inspection Service retains full authority to enforce the Horse Protection Act. The Horse Protection Program Operating Plan leaves no doubt that the Animal and Plant Health Inspection Service retains authority to enforce the Horse Protection Act after the Horse Protection Program Operating Plan is implemented:

> Nothing in this Operating Plan is intended to indicate that APHIS has relinquished any of its authority under the Act or Regulations (RX 4 at 2 (footnote omitted)).

[3]I note the copy of the Horse Protection Program Operating Plan entered into record does not contain a signature page (RX 4D). Therefore, based on the evidence before me, I cannot determine whether the Horse Protection Program Operating Plan applied to the 34th Annual National Walking Horse Trainers Show. However, the applicability of the Horse Protection Program Operating Plan (RX 4D) to the 34th Annual National Walking Horse Trainers Show has no impact on my decision.

> It is not the purpose or intent of this Operating Plan to limit in any way the Secretary's authority. It should be clearly understood that the Secretary has the ultimate administrative authority in the interpretation and enforcement of the Act and the Regulations. This authority can only be curtailed or removed by an act of Congress, and not by this Plan. (RX 4 at 2 n.1.)
>
> The Department retains the authority to initiate enforcement proceedings against any violator when it feels such action is necessary to fulfill the purposes of the HPA (RX 4 at 4 n.8).
>
> Nothing in this section is intended to limit APHIS's disciplinary authority under the Act and the Regulations (RX 4 at 7 n.10).
>
> APHIS has the inherent authority to pursue a federal case whenever it determines the purposes of the HPA have not been fulfilled (RX 4 at 25 n.25).

A decision issued by a horse industry organization after a proceeding to enforce the guidelines in the Horse Protection Program Operating Plan does not limit the Animal and Plant Health Inspection Service's authority to initiate an action under the Horse Protection Act against an individual for the activities that were the subject of that horse industry organization's decision. A horse industry organization's decision does not limit the Animal and Plant Health Inspection Service's authority to impose sanctions against an individual for the activities which resulted in the horse industry organization's sanctions, when the Secretary of Agriculture finds those activities violated the Horse Protection Act. In addition, I hold the Animal and Plant Health Inspection Service's issuance of the Horse Protection Program Operating Plan does not make a horse industry organization, which signs the plan, an agent of the Animal and Plant Health Inspection Service or the United States Department of Agriculture for any purpose, including enforcement of the Horse Protection Act. Furthermore, I hold the United States Department of Agriculture is not a party to any horse industry organization

proceeding instituted by a horse industry organization under the Horse Protection Program Operating Plan or the horse industry organization's own rules. Therefore, defenses raised in proceedings before the Secretary of Agriculture that rely on decisions issued by a horse industry organization under authority of the Horse Protection Program Operating Plan will generally fail. I have previously considered these arguments and found that horse industry organization proceedings do not bar the Secretary of Agriculture from enforcing the Horse Protection Act. *In re Jackie McConnell*, 64 Agric. Dec. 436 (2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006) (unpublished).

Respondents have asserted a number of affirmative defenses including laches, res judicata, collateral estoppel, and double jeopardy. Respondents assert the violations were the subject of proceedings before the National Horse Show Commission against certain of the Respondents and, because the Horse Protection Program Operating Plan was in place, those proceedings, resulting in exoneration of Robbie J. Warley by the National Horse Show Commission Board of Directors and sanctions imposed against Herbert Derickson, preclude relitigation by the United States Department of Agriculture in the instant proceeding. Even if all the requisite elements necessary to trigger these defenses were present, and they are not, a detailed discussion of the doctrines of res judicata, collateral estoppel, and double jeopardy is not necessary. For the reasons discussed above, these defenses presented by Respondents fail.

The ALJ correctly held the defense of laches does not apply. Laches, a defense based upon undue delay in asserting a legal right or privilege, has long been held to be inapplicable to actions of the government. *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735-36 (1824). *See also United States v. Mack*, 295 U.S. 480, 489 (1935); *United States v. Verdier*, 164 U.S. 213, 219 (1896); *German Bank v. United States*, 148 U.S. 573, 579-80 (1893); *Gaussen v. United States,* 97 U.S. 584, 590 (1878).

However, before discussing the specific violations, I briefly address the Dericksons' statement that they "have been previously tried in a criminal hearing by the National Horse Show Commission" (Respondents' Response to Pet. for Appeal Filed by the Complainant at 3). Such a statement is without merit. Criminal proceedings are actions

by a state or federal government body, not proceedings by a private organization, such as the National Horse Show Commission. No proceedings before any horse industry organization can be considered criminal for purposes of double jeopardy. While the Horse Protection Act makes certain actions "criminal" (15 U.S.C. § 1825(a)), the proceedings before me are civil in nature.

Although not discussed in detail in their response to the Administrator's appeal petition, the Dericksons suggest Just American Magic was not sore (Memorandum in Support of Respondents' Response at 5 ¶ 5).

§ 1821. Definitions

. . . .

(3) The term "sore" when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving . . . .

15 U.S.C. § 1821(3). Furthermore, the Horse Protection Act creates a presumption that a horse with abnormal, bilateral sensitivity is sore, as follows:

§ 1825. Violations and penalties

. . . .

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

. . . .

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. § 1825(d)(5).

The evidence demonstrates Just American Magic was sore when he was entered in the 34th Annual National Walking Horse Trainers Show on March 21, 2002. The evidence includes: (1) National Horse Show Commission DQP Ticket number 23130 (RX 1D) signed by both DQPs who examined the horse, indicating the horse was "bilateral sore" and did not comply with the scar rule; (2) APHIS Form 7077, Summary of Alleged Violations (CX 1a) signed by both United States Department of Agriculture veterinary medical officers who examined the horse, indicating the horse was sore, further indicating the horse did not comply with the scar rule, and showing on the illustration in block number 31 of the form where the veterinary medical officers elicited pain responses when palpating the horse, as well as where the veterinary medical officers found scaring; (3) affidavits from each veterinary medical officer (CX 1b-CX 1c) discussing the veterinary medical officers' observations of the horse that led to the conclusion that the horse was sore on March 21, 2002; and (4) the videotape of the examinations by the DQPs and veterinary medical officers on March 21, 2002 (CX 12), showing Just American Magic's reaction to palpation.[4] Therefore, I conclude Just

[4]I have viewed numerous videotapes of horses being examined prior to entry at horse shows. Even when found to be sore, in most cases, the horse's reaction on the videotape appears subtle. Here, the videotape shows Just American Magic had a demonstrable and repeated reaction to palpation. Just American Magic's reaction to palpation is one of

(continued...)

American Magic was sore when entered in the 34th Annual National Walking Horse Trainers Show. Furthermore, based on the testimony of the two veterinary medical officers, I find Just American Magic was sore well prior to March 21, 2002 (Tr. 46-47, 255). Therefore, I conclude Just American Magic was sore when transported to the 34th Annual National Walking Horse Trainers Show. Dr. Dussault testified scar tissue develops over time: "You know, I'm not going to put a day on it, but we're talking something weeks, months. This is just a constant irritation, some type of insult to the tissue. It's not something that occurs in a day." (Tr. 255.)

VIOLATIONS

Robert Raymond Black, II

The Administrator alleges that, on or about March 21, 2002, Mr. Black violated section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)) by transporting Just American Magic to the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore, with reason to believe the horse, while sore, may be entered for the purpose of his being shown in that horse show (Compl. ¶ 11). The Horse Protection Act prohibits transportation of a sore horse, as follows:

> **§ 1824. Unlawful acts**
>
> The following conduct is prohibited:
>
> (1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale or auction.

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[4](...continued)
the most severe that I have seen.

15 U.S.C. § 1824(1). The Administrator further alleges that, on or about March 21, 2002, Mr. Black violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Just American Magic as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore (Compl. ¶ 12). The Horse Protection Act also prohibits:

> **§ 1824. Unlawful acts**
>
> The following conduct is prohibited:
>
> . . . .
>
> (2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore.

15 U.S.C. § 1824(2)(A)-(B).

Before addressing the substantive allegations against Mr. Black, I should clarify whether Mr. Black was properly served with the Complaint. I draw a bright line regarding filing deadlines. Close does not count.

Here, if service were proper, Mr. Black failed to file a timely answer to the Complaint and the ALJ should have granted the Administrator's motion seeking a Decision and Order as to Robert Raymond Black, II, By Reason of Admission of Facts. The Rules of Practice provides:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (c) *Service on party other than the Secretary*. (1) Any complaint . . . shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known

> principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1). While I give respondents no leeway on filing deadlines, I am equally strict in interpreting the government's requirements for service of process. The Hearing Clerk mailed the Complaint to Mr. Black on August 20, 2004, by certified mail, return receipt requested. The United States Postal Service returned the Complaint to the Hearing Clerk marked "Not deliverable as addressed/Unable to Forward/Return to Sender." The Hearing Clerk remailed a copy of the Complaint to the same address, by regular mail, on September 13, 2004. The Rules of Practice allows remailing by regular mail to effectuate service only if a document or paper is "returned marked by the postal service as unclaimed or refused." (7 C.F.R. § 1.147(c)(1).) The August 20, 2004, certified mailing of the Complaint was not returned marked by the postal service as "unclaimed" or "refused." Therefore, the remailing on September 13, 2004, by regular mail, did not meet the requirement in the Rules of Practice to effectuate service.

The ALJ dismissed the case against Mr. Black. The Administrator appealed that dismissal. For the reasons set forth below, I affirm the ALJ's dismissal of the case against Mr. Black. The Administrator's argument that Mr. Black transported Just American Magic is based on an entry on APHIS Form 7077, Summary of Alleged Violations (CX 1a). Block number 27 of the form asks for the "Name and Address of Person(s) Responsible for Transportation." The entry for block number 27 is: "same as #11." Mr. Black is identified in block number 11. Having examined the testimony regarding the collection of information used to complete APHIS Form 7077 and compared other entries on the

form with other evidence in the case (Tr. 161-65, 176-89), I must agree with the ALJ that there are inconsistencies that raise questions about the accuracy of some information. These questions, along with the testimony, credited as believable by the ALJ, of Mr. Black and his wife that they traveled to the show together (Tr. 477, 499), cause me to conclude there is not sufficient evidence to find that Mr. Black violated section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)).

I have long held that the entering of a horse is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992). The United States Court of Appeals for the Fourth Circuit concluded "the USDA's interpretation of 'entering' is reasonable and not contrary to Congressional intent and thus we are bound to give it effect." *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 145 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993), citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Part of the entry process includes presenting the horse for inspection prior to showing. There is no dispute that Mr. Black was the custodian of Just American Magic when the United States Department of Agriculture veterinary medical officers examined the horse. The videotape of the inspection shows Mr. Black became custodian of the horse between the inspection by the DQPs and the inspection by the United States Department of Agriculture veterinary medical officers (CX 12).

In his affidavit, Dr. Bourgeois stated:

> At approximately 6:45 PM on the evening of March 21, 2002 a horse identified as entry # 425 in class 25 was presented to DQP Bob Flynn for pre-show inspection. This horse led very slowly and reluctantly to and around cone. Mr. Flynn's digital palpation of both fore pasterns elicited severe pain responses. Mr. Flynn then referred horse to Charles Thomas for inspection. Mr. Thomas' findings were similar to Mr. Flynns. They conferred with Mr. Messick and issued ticket # 23130 for bilateral sore and scar rule noncompliance.

> I then requested and received permission from custodian to examine horse.

Affidavit of Lynn P. Bourgeois (CX 1b at 1-2).

The critical part of this statement is that the DQP ticket was issued prior to Dr. Bourgeois beginning his examination. The issuance of the DQP ticket disqualified Just American Magic from showing. Therefore, when Mr. Black became custodian and presented Just American Magic to Dr. Bourgeois for examination, the horse already was disqualified from showing. Mr. Black could not be "entering" Just American Magic for the purpose of showing him in the 34th Annual National Walking Horse Trainers Show because, at the time Mr. Black became the custodian and presented Just American Magic to the veterinary medical officers, the DQPs had already disqualified the horse from showing. Therefore, I dismiss the Complaint against Mr. Black.

Christopher B. Warley

The Administrator alleges Christopher B. Warley violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Just American Magic as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 21, 2002, while the horse was sore (Compl. ¶ 12). Mr. Warley was scheduled to ride Just American Magic in the 34th Annual National Walking Horse Trainers Show (CX 2). The ALJ dismissed the Complaint against Mr. Warley holding "extension of liability to a designated rider whose mount is excused at a pre-show inspection appears unwarranted if the rider is neither an owner of the horse nor presented the horse for inspection." (Initial Decision at 9.)

The ALJ dismissed, as dicta, the discussion in *In re Bowtie Stables, LLC*, 62 Agric. Dec. 580, 594-95 (2003), which indicates that being the designated rider is sufficient to support a violation of the Horse Protection Act for "entering" if the horse is found to be sore. Even if the ALJ was correct that in *Bowtie Stables* the proposition was dicta, I now

hold that being the designated rider on the entry form, or other horse show documentation, is sufficient evidence to find that the individual participated in the entry of the horse in the show.

The Administrator challenged the ALJ's dismissal of the Complaint against Mr. Warley (Complainant's Appeal Pet. at 34-37). Mr. Warley's response raised no questions regarding the Administrator's appeal:

> This Respondent hereby states that the Administrative Law Judge observed the demeanor of the witnesses, heard the testimony for two (2) days and concluded in favor of the Respondent, Christopher B. Warley, and the evidence sustains this Respondent's position.
>
> In conclusion, the Appeal filed by the Complainant should be dismissed.

Respondent Christopher B. Warley's Response to Petition for Appeal Filed by the Complainant at 1.

I have examined the record and found evidence supporting the allegation that Mr. Warley violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). There is evidence that he was scheduled to ride Just American Magic on March 21, 2002 (CX 2). This evidence that Mr. Warley was scheduled to ride Just American Magic was confirmed in an interview with Robbie J. Warley conducted on July 11, 2002, by an Animal and Plant Health Inspection Service investigator (CX 7). The evidence also establishes that Mr. Warley is the vice president and a director of Black Gold Farm, Inc., one of the co-owners of Just American Magic (CX 9 at 16-19). Mr. Warley presented no evidence or argument to rebut this evidence. More important, Mr. Warley made no attempt to rebut the claim that he would have been the rider showing Just American Magic had the horse not been disqualified from showing.

Based on the record, I find Mr. Warley was the scheduled rider of Just American Magic on March 21, 2002, and, therefore, entered the horse in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee. As discussed above, I also find that Just American Magic was

sore when entered. Therefore, I conclude Christopher B. Warley violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Just American Magic as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 21, 2002, while the horse was sore.

Robbie J. Warley and Black Gold Farm, Inc.

The Administrator alleges Robbie J. Warley and Black Gold Farm, Inc., violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of Just American Magic, owned by Robbie J. Warley and Black Gold Farm, Inc., in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 21, 2002, for the purpose of showing that horse when the horse was sore (Compl. ¶ 13).

Ms. Warley and Black Gold Farm, Inc., rely upon a letter to Herbert Derickson directing him to fully comply with the Horse Protection Act (RX 1W) as a defense to the Complaint. Under *Baird v. U.S. Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994), an owner may avoid a violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) if the owner takes affirmative steps in an effort to prevent the soring of the owner's horse. These steps include a letter of instruction to the trainer such as the one provided to Mr. Derickson (RX 1W). The letter advised Mr. Derickson that should he fail to comply with the directions, any horse placed at his facility would be removed. Mr. Derickson acknowledged the instructions by signing the letter and returning the signed letter to Ms. Warley (RX 1W).

However, the Court in *Baird* allows the government to prove that the instructions given by the owner to the trainer concerning the soring of the owner's horses constituted merely a pretext or a self-serving ruse designed to mask what in actuality was conduct violative of the Horse Protection Act. *Baird*, 39 F.3d at 137. The Administrator demonstrated the instructions to Mr. Derickson were a pretext. On September 30, 2000, while being trained by Herbert Derickson, Just American Magic had been entered in the International Show at Murfreesboro, Tennessee,

but was found to be in violation of the Horse Protection Act and was disqualified by the DQPs from showing (CX 14). Notwithstanding this earlier Horse Protection Act violation by Mr. Derickson (CX 14) and contrary to the written intent expressed in the letter to Mr. Derickson that the horse would be removed from the trainer for non-compliance with the Horse Protection Act (RX 1W), Robbie J. Warley and Black Gold Farm, Inc., allowed Just American Magic to remain at the Herbert Derickson Training Facility. In fact, Mr. Derickson trained Just American Magic for the 34th Annual National Walking Horse Trainers Show at which the horse was again found to be sore. The ALJ correctly found that Robbie J. Warley and Black Gold Farm, Inc., violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of Just American Magic, owned by Robbie J. Warley and Black Gold Farm, Inc., in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 21, 2002, for the purpose of showing that horse when the horse was sore. Neither Robbie J. Warley nor Black Gold Farm, Inc., appealed the ALJ's decision.

Herbert Derickson and Jill Derickson

The Administrator alleges that, on or about March 21, 2002, Herbert Derickson and Jill Derickson violated section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)) by transporting Just American Magic to the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore, with reason to believe the horse, while sore, may be entered for the purpose of his being shown in that horse show; and, that, on or about March 21, 2002, Herbert Derickson and Jill Derickson violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Just American Magic as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore (Compl. ¶¶ 11-12).

The ALJ dismissed both the entry and transporting charges against Mrs. Derickson and dismissed the transporting charge against Mr. Derickson. The ALJ found Mr. Derickson violated the Horse Protection Act by entering Just American Magic in the 34th Annual National

Walking Horse Trainers Show while the horse was sore. The ALJ assessed Mr. Derickson a $2,200 civil penalty and disqualified him for 2 years from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction; however, the ALJ suspended 1 year of Mr. Derickson's 2-year disqualification. Mr. Derickson appealed the ALJ's decision finding he violated the Horse Protection Act and imposing a sanction against him, while the Administrator appealed the dismissal of both claims against Mrs. Derickson and the transporting claim against Mr. Derickson.

The nature of the business run by the Dericksons is not addressed by the parties or the ALJ. Mr. and Mrs. Derickson each admit in their answer that each was an individual doing business as Herbert Derickson Training Facility, a/k/a Herbert Derickson Stables, a/k/a Herbert Derickson Breeding and Training Facility (Dericksons' Answer ¶¶ 5-6). Invoices issued by the Dericksons include statements "Thank you, we appreciate your business!" and "Thanks, Herbert and Jill Derickson." (CX 24.) Based on the record before me, I find Herbert Derickson and Jill Derickson were partners that operated under various names including Herbert Derickson Training Facility, Herbert Derickson Stables, and Herbert Derickson Breeding and Training Facility. *Bass v. Bass*, 814 S.W.2d 38 (Tenn. 1991).

Herbert Derickson Stables, one of the names of the partnership operated by Herbert Derickson and Jill Derickson, sent invoice #945 to Black Gold Farm and Robbie Warley dated March 30, 2002 (CX 24 at 22). One line item included an entry for "Class entry fees Trainers Show" for Just American Magic. Right below that line item is a line item for "Hauling/Show Prep/Stall." Although this item is marked "no charge," I interpret it to indicate that Herbert Derickson Stables transported Just American Magic to the 34th Annual National Walking Horse Trainers Show. The partnership, Herbert Derickson Stables, operates through its partners. Because Herbert Derickson Stables transported Just American Magic to the 34th Annual National Walking Horse Trainers Show, I conclude that its two partners, Herbert Derickson and Jill Derickson, transported the horse to the 34th Annual National

Walking Horse Trainers Show.

As discussed above, and based on the testimony of the two United States Department of Agriculture veterinary medical officers, I find Just American Magic was sore well prior to March 21, 2002 (Tr. 46-47, 255). Therefore, I conclude Just American Magic was sore when transported to the 34th Annual National Walking Horse Trainers Show. Finding that Herbert Derickson and Jill Derickson transported Just American Magic to the 34th Annual National Walking Horse Trainers Show and that Just American Magic was sore when transported to the 34th Annual National Walking Horse Trainers Show, I conclude that, on or about March 21, 2002, Herbert Derickson and Jill Derickson violated section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)) by transporting Just American Magic to the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore, with reason to believe the horse, while sore, may be entered for the purpose of his being shown in that horse show.

It is well established that an individual who presents a horse for inspection may be found to be participating in "entering" a horse. *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 145 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *Gray v. U.S. Dep't of Agric.,* 39 F.3d 670, 676 (6th Cir. 1994). The videotape of the inspection of Just American Magic (CX 12) shows Herbert Derickson presenting Just American Magic to the DQPs for inspection. Therefore, I find Herbert Derickson entered Just American Magic in the 34th Annual National Walking Horse Trainers Show. As I found above, Just American Magic was sore when entered in the 34th Annual National Walking Horse Trainers Show. Therefore, I find Mr. Derickson violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Just American Magic as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 21, 2002, while the horse was sore.

Jill Derickson did not escort Just American Magic to be inspected; however, she is equally responsible for entering the horse in the show. I have long held that "entry" is a process, not a distinct event, which includes among other items, paying the entry fee, registering the horse with the show management, and presenting the horse for the mandatory

pre-show inspection. *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 145 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993). The United States Court of Appeals for the Sixth Circuit adopted my view holding that entry of a horse, for purposes of the Horse Protection Act, is a process, which consists of, among other steps, paying the entry fee and presenting the horse for inspection. *Gray v. U.S. Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994), citing with approval *Elliott*, 990 F.2d at 145. I have repeatedly held that any individual who participates in, or completes any part of, the entry process is liable for the Horse Protection Act violation should the horse be found to be sore. *See In re Derwood Stewart*, 60 Agric. Dec. 570, 605 (2001), *aff'd*, 64 F. App'x 941 (6th Cir. 2003).

Jill Derickson paid the entry fee for Just American Magic to enter the 34th Annual National Walking Horse Trainers Show (CX 10 at 8). Furthermore, I find Jill Derickson completed the entry blank for the 34th Annual National Walking Horse Trainers Show identifying Just American Magic as an entry in the show[5] (CX 2). This evidence is sufficient to find that Jill Derickson entered Just American Magic in the 34th Annual National Walking Horse Trainers Show. Therefore, because Just American Magic was sore when entered in the 34th Annual National Walking Horse Trainers Show, I find Mrs. Derickson violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Just American Magic as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 21, 2002, while the horse was sore.

SANCTIONS

Introduction

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than $2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. §

[5]See note 1.

1824).[6] Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, in determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require. In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[7] The Horse Protection Act also provides that any person assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)) may be disqualified from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation (15 U.S.C. § 1825(c)). Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)).

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

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances,

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[6]Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from $2,000 to $2,200 (7 C.F.R. § 3.91(b)(2)(vii) (2005)).

[7]*See In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1504 (2005), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007).

> always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[8]

Christopher B. Warley

In determining Mr. Warley's sanction, I have examined the United States Department of Agriculture's sanction policy and the factors in the Horse Protection Act that must be considered before imposing a sanction (15 U.S.C. § 1825(b)(1)). Without articulating my thoughts on each factor, I found two most relevant. These two factors, at first glance, appear to create a counter balance. There is no evidence in the record indicating that Mr. Warley participated in the soring of Just American Magic; however, there is evidence indicating that Mr. Warley has a prior history of violating the Horse Protection Act. The National Horse Show Commission found Mr. Warley committed a violation of the Horse Protection Act on May 26, 2001, and suspended Mr. Warley from participating in horse shows, horse exhibitions, horse sales, and horse auctions for 2 weeks (CX 24 at 7).

Riders and individuals designated as riders have the same responsibility as any other participant in the entry process to ensure the horse is in compliance with all the requirements of the Horse Protection Act. Their failure to ensure compliance with the Horse Protection Act

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[8] *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. at 1505-06.

will subject these individuals to the same sanction as other violators.

Mr. Warley has not presented any evidence indicating he is unable to pay a civil penalty. Considering the record before me, the statutory factors, Mr. Warley's disregard of the mandates of the Horse Protection Act, and Mr. Warley's failure to present exculpatory evidence, I find no justification to impose a civil penalty less than the maximum. Therefore, I assess Mr. Warley a civil penalty of $2,200. In addition, because disqualification, as well as the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, and Mr. Warley has presented no evidence demonstrating disqualification is inappropriate, Mr. Warley is disqualified for a period of 1 year from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

Robbie J. Warley and Black Gold Farm, Inc.

The ALJ assessed Robbie J. Warley and Black Gold Farm, Inc., jointly and severally, a $2,200 civil penalty (Initial Decision at 14). The ALJ provides no explanation regarding his decision to provide a single civil penalty for two distinct "persons." Robbie J. Warley and Black Gold Farm, Inc., each have a distinct legal existence and are treated as two persons for the purpose of the Horse Protection Act. The Horse Protection Act authorizes the assessment of a civil penalty on "[a]ny person who violates section 1824" of the Horse Protection Act (15 U.S.C. § 1825(b)(1)). Robbie J. Warley and Black Gold Farm, Inc., each violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of Just American Magic, which Robbie J. Warley and Black Gold Farm, Inc., owned, in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 21, 2002, for the purpose of showing that horse when the horse was sore. Therefore, I assess Robbie J. Warley a civil penalty of $2,200 and I assess Black Gold Farm, Inc., a civil penalty of $2,200.

The ALJ disqualified Robbie J. Warley, and Black Gold Farm, Inc., for 1 year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse

exhibition, horse sale, or horse auction. I affirm the disqualification imposed by the ALJ.

Herbert Derickson and Jill Derickson

I found Herbert Derickson and Jill Derickson each committed two violations of the Horse Protection Act. I examined the statutory factors as they apply to each violation. First, regarding Mr. Derickson's violations, the soring found on Just American Magic's feet is one of the worst cases of soring I have seen. Usually, when watching the videotape of an examination of a horse, the reactions of the horse to palpation are subtle – here, Just American Magic unquestionably felt pain when palpated, demonstrated by visibly strong withdrawal of his feet when palpated by both the DQPs and the United States Department of Agriculture veterinary medical officers (CX 12). In addition, Just American Magic has significant scaring, indicating the injury to the horse occurred over a period of time. Dr. Dussault testified scar tissue develops over time: "You know, I'm not going to put a day on it, but we're talking something weeks, months. This is just a constant irritation, some type of insult to the tissue. It is not something that occurs in a day." (Tr. 255.) As Dr. Dussault's testimony indicates, Just American Magic was sore for a considerable period of time prior to the show, allowing me to conclude the horse was sore when transported. Based on the record before me and an examination of the statutory factors to be considered in determining the appropriate sanction, I find appropriate the assessment of the maximum civil penalty. Therefore, I assess Herbert Derickson a civil penalty of $2,200 for each violation for a total civil penalty of $4,400. In addition, because disqualification, as well as the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, and Mr. Derickson has presented no evidence demonstrating a disqualification is inappropriate, I disqualify Mr. Derickson for 1 year for each violation of the Horse Protection Act. Therefore, Mr. Derickson is disqualified for a period of 2 years from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

Although there is no evidence that she was involved with the training of Just American Magic, Jill Derickson's violations of the Horse Protection Act demonstrate that individuals other than the trainers have a responsibility to assure compliance with the Horse Protection Act. She paid the bills, she filled out the forms, she entered the horse, but there is no evidence that she made any effort to stop the significant and multiple violations of the Horse Protection Act occurring in the business she admits she owns. The evidence in the record (CX 10, CX 24) demonstrates the Herbert Derickson Training Facility had significant cash flow, sufficient to pay the civil penalties. Therefore, I assess Jill Derickson a $2,200 civil penalty for each violation for a total civil penalty of $4,400. In addition, because disqualification, as well as the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, and Mrs. Derickson has presented no evidence demonstrating a disqualification is inappropriate, I disqualify Mrs. Derickson for 1 year for each violation of the Horse Protection Act. Therefore, Mrs. Derickson is disqualified for a period of 2 years from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

I find important the clarification of the impact of the disqualifications of Mr. and Mrs. Derickson on the partnership operated by the Dericksons. The partnership – Herbert Derickson Training Facility, a/k/a Herbert Derickson Stables, a/k/a Herbert Derickson Breeding and Training Facility, or any other non-incorporated enterprise, however named, run by the Dericksons, together, individually, or with one or more individuals not a party to this action – is disqualified for a period of 2 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, 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.

As a specific example, counsel for the National Horse Show Commission, in a letter to the United States Department of Agriculture, identifies "21 entries at the 2003 Trainer's Show," attributable to Herbert Derickson Stables (CX 19 at 2, 7-8). These entries are examples of activities that would be deemed participation, directly or indirectly, that would violate the disqualification order, should such activities occur during the disqualification period.

CONCLUSIONS OF LAW

1. On or about March 21, 2002, Christopher B. Warley violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Just American Magic as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show held in Shelbyville, Tennessee, while the horse was sore.

2. On or about March 21, 2002, Robbie J. Warley violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry by others of Just American Magic, a horse owned by Ms. Warley and Black Gold Farm, Inc., as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show held in Shelbyville, Tennessee, for the purpose of showing that horse, which was sore.

3. On or about March 21, 2002, Black Gold Farm, Inc., violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry by others of Just American Magic, a horse owned by Black Gold Farm, Inc., and Robbie J. Warley, as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show held in Shelbyville, Tennessee, for the purpose of showing that horse, which was sore.

4. On or about March 21, 2002, Herbert Derickson violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Just American Magic as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show held in Shelbyville, Tennessee, while the horse was sore.

5. On or about March 21, 2002, Herbert Derickson violated section

5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)) by transporting Just American Magic to the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore, with reason to believe the horse, while sore, may be entered for the purpose of his being shown in that horse show.

6. On or about March 21, 2002, Jill Derickson violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Just American Magic as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show held in Shelbyville, Tennessee, while the horse was sore.

7. On or about March 21, 2002, Jill Derickson violated section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)) by transporting Just American Magic to the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore, with reason to believe the horse, while sore, may be entered for the purpose of his being shown in that horse show.

8. Service of the Complaint on Robert Raymond Black, II, did not meet the requirements of the Rules of Practice for service by regular mail.

For the foregoing reasons, the following Order is issued.

ORDER

1. Christopher B. Warley is assessed $2,200 civil penalty. The civil penalty shall be paid by certified check or money order payable to the Treasurer of the United States of America, within 60 days after service of this Order on Mr. Warley. Mr. Warley shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 04-0003. Furthermore, Mr. Warley is disqualified for 1 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, horse sale, or horse auction, directly or indirectly through any agent, employee, family member, or other device. The disqualification of Mr. Warley shall become effective on the 60th day after service of this Order on Mr. Warley. After the conclusion of the disqualification period, Mr. Warley will continue to be disqualified indefinitely so long as the

civil penalty remains unpaid.

2. Robbie J. Warley is assessed a $2,200 civil penalty. The civil penalty shall be paid by certified check or money order payable to the Treasurer of the United States of America, within 60 days after service of this Order on Ms. Warley. Ms. Warley shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 04-0003. Furthermore, Ms. Warley is disqualified for 1 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, horse sale, or horse auction, directly or indirectly through any agent, employee, family member, or other device. The disqualification of Ms. Warley shall become effective on the 60th day after service of this Order on Ms. Warley. After the conclusion of the disqualification period, Ms. Warley will continue to be disqualified indefinitely so long as the civil penalty remains unpaid.

3. Black Gold Farm, Inc., is assessed a $2,200 civil penalty. The civil penalty shall be paid by certified check or money order payable to the Treasurer of the United States of America, within 60 days after service of this Order on Black Gold Farm, Inc. Black Gold Farm, Inc., shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 04-0003. Furthermore, Black Gold Farm, Inc., is disqualified 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, horse sale, or horse auction, directly or indirectly through any agent, employee, or other device. The disqualification of Black Gold Farm, Inc., shall become effective on the 60th day after service of this Order on Black Gold Farm, Inc. After the conclusion of the disqualification period, Black Gold Farm, Inc., will continue to be disqualified indefinitely so long as the civil penalty remains unpaid.

4. Herbert Derickson is assessed a $4,400 civil penalty. The civil penalty shall be paid by certified check or money order payable to the Treasurer of the United States of America, within 60 days after service of this Order on Mr. Derickson. Mr. Derickson shall indicate on the

certified check or money order that payment is in reference to HPA Docket No. 04-0003. Furthermore, Mr. Derickson is disqualified for 2 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, horse sale, or horse auction, directly or indirectly through any agent, employee, family member, or other device. The disqualification of Mr. Derickson shall become effective on the 60th day after service of this Order on Mr. Derickson. After the conclusion of the disqualification period, Mr. Derickson will continue to be disqualified indefinitely so long as the civil penalty remains unpaid.

5. Jill Derickson is assessed a $4,400 civil penalty. The civil penalty shall be paid by certified check or money order payable to the Treasurer of the United States of America, within 60 days after service of this Order on Mrs. Derickson. Mrs. Derickson shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 04-0003. Furthermore, Mrs. Derickson is disqualified for 2 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, horse sale, or horse auction, directly or indirectly through any agent, employee, family member, or other device. The disqualification of Mrs. Derickson shall become effective on the 60th day after service of this Order on Mrs. Derickson. After the conclusion of the disqualification period, Mrs. Derickson will continue to be disqualified indefinitely so long as the civil penalty remains unpaid.

6. The payments of the civil penalties shall be sent to:

Colleen A. Carroll
Office of the General Counsel
United States Department of Agriculture
1400 Independence Avenue, SW
Room 2343-South Building
Mail Stop 1417
Washington, DC 20250-1417

7. The allegations of violations of the Horse Protection Act brought against Robert Raymond Black, II, are dismissed.

RIGHT TO JUDICIAL REVIEW

Christopher B. Warley, Robbie J. Warley, Black Gold Farm, Inc., Herbert Derickson, and Jill Derickson have the right to obtain review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which they reside or have their place of business or in the United States Court of Appeals for the District of Columbia Circuit. A notice of appeal must be filed in such court within 30 days from the date of the Order in this Decision and Order and a copy of such notice of appeal must simultaneously be sent by certified mail to the Secretary of Agriculture.[9] The date of the Order in this Decision and Order is August 30, 2007.

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[9] 15 U.S.C. § 1825(b)(2), (c).

ORGANIC FOOD PROTECTION ACT

COURT DECISION

ARTHUR HARVEY v. USDA.
No. 06-2738.
Court Decision.
Filed July 24, 2007.

(Cite as: 494 F.3d 237).

OPFA – National list – Handling operations – Ingredients – Non-organic additives.

In the prior case (Harvey I), the court found that the USDA regulations were in conflict with the plain meaning of the NOP statutes regarding synthetic additives. The statute requires of producers and handlers that organic products must be produced without synthetic substances, except those synthetic substances which are on a "National list." By its terms, the amended version of section 6510 only permits the use of "ingredient[s]" found on the National List. The court found that the OFPA statute contained a "general prohibition against adding synthetic ingredients in handling operations"and rejected the Secretary's regulations which allowed the inclusion (by exception) of "National List" ingredients permitted in the handling operations of the processed foods. An "ingredient" is a substance that is "used in the preparation of an agricultural product that is still present in the final commercial product as consumed." (7 C.F.R. § 205.2). Another subset of substances, known as "processing aid[s]," are used in processing, but are either removed or exist in only negligible quantities in the final food product. After the prior case, and without legislative history, the statute was amended to eliminate the specific subsection which the prior court found to limit the regulation's authority as to exceptions. Petitioner Harvey wanted the court to enforce a consent decree stemming from the original case. Appellant Harvey contends that the final judgment below refers to "ingredients" and "processing aids" separately. Appellant requests an order to compel the Secretary to publish new regulations along with the requisite commentary procedures. The Appeal court declined to take such a judiciary active role. The Court determined that intervening law had superceded the consent decree.

United States Court of Appeals
First Circuit.

Before LIPEZ and NEWMAN [FN*], Circuit Judges, and SELYA, Senior Circuit Judge.

FN* The Honorable Pauline Newman, of the Federal Circuit, sitting by designation.

SELYA, Senior Circuit Judge.

This appeal has many of the characteristics of a civics lesson. One principal characteristic is that it offers a window on the interaction of the three branches that comprise our tripartite system of government. The lesson began when the Legislative Branch-Congress-enacted a consumer protection statute. It continued when the Executive Branch-in the person of the Secretary of Agriculture (the Secretary)-promulgated implementing regulations under that statute. It soon implicated the Judicial Branch, where this court ultimately passed upon the validity of the regulations and found that some of them conflicted with the plain language of the statute.

That was not the end of the lesson; Congress, apprised of our decision, amended the statute in an obvious effort to save some of the challenged regulations. It now falls to us to determine whether the amended statute and the original regulations can coexist.

The specifics of the situation are easily summarized. In *Harvey v. Veneman,* 396 F.3d 28 (1st Cir.2005)(*Harvey I*), we reviewed several regulations promulgated by the Secretary under the Organic Foods Production Act (OFPA), 7 U.S.C. §§ 6501-6523 (2000). We declared a number of those regulations invalid and gave others limiting constructions. Congress responded to this opinion by passing a series of amendments to the OFPA. The central issue in this appeal involves the extent to which those amendments vitiate our earlier invalidation of two such regulations.

I. BACKGROUND

The OFPA establishes a national certification program for producers and handlers of organic products and regulates the labeling of such products. *See* 7 U.S.C. §§ 6503(a), 6504, 6505(a)(1)(A). As a general

matter, an agricultural product must be produced and handled without the use of synthetic substances in order to be labeled or sold as organic. *See id.* §§ 6504, 6505, 6510. Nevertheless, the OFPA contemplates that there will be a National List through which non-organic substances can be approved for use in organic products. *Id.* § 6517. The statute specifies the types of substances that can be included on the National List and limns a procedure for obtaining inclusion of substances. *See id.* It also authorizes the Secretary to promulgate implementing regulations. *Id.* § 6521.

In December of 2000, the Secretary published a final rule pursuant to that power. *See*7 C.F.R. pt. 205. Plaintiff-appellant Arthur Harvey took umbrage with various aspects of the final rule, which he viewed as overly tolerant of non-organic substances. Thus, in 2002, he filed suit in Maine's federal district court seeking declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. § 702.

The appellant's nine-count complaint alleged that several provisions of the final rule were inconsistent with the OFPA and impermissibly diluted its organic standard. The only claims relevant to this appeal are those embodied in count 3. That count alleged that two sections of the final rule, 7 C.F.R. §§ 205.600(b) and 205.605(b),[1] contravened OFPA § 6510(a)(1) by too freely permitting the use of synthetic substances in the processing of organic foods.

For present purposes, the travel of the case in the district court is of no moment. What happened on appeal is, however, of decretory significance. There, we agreed with the appellant as to the gist of count 3 and invalidated both of the challenged regulations. *See Harvey I,* 396 F.3d at 40. We based this decision on our interpretation of OFPA § 6510(a)(1), which we described as "a general prohibition against adding synthetic ingredients in handling operations." *Id.* at 39. In rejecting the Secretary's argument that the National List provision authorized the

[1] Section 205.600(b) lists six criteria to be used in determining whether a synthetic "processing aid or adjuvant" should be included on the National List. Section 205.605(b) enumerates synthetic substances already approved for inclusion on the National List.

agency to create such exemptions, we noted that section 6517(c)(1)(B)(iii) allowed inclusion on the National List of an otherwise prohibited substance for use in handling only if the substance "[was] non-synthetic." *Id.* This led to the conclusion that section 6517(c)(1)(B)(iii)"simply [did] not say what the Secretary need[ed] it to say." *Id.* Because the regulations challenged in count 3 were contrary to the plain language of the OFPA, we ruled that the Secretary had exceeded her statutory authority. *Id.* at 40.

On remand, the parties agreed upon a consent decree and final judgment, which the district court entered on June 9, 2005. The judgment purposed to remand the matter to the Secretary to "conduct notice and comment rulemaking and to publish in the federal register final rules implementing [the court's order] with regard to Count 3." The judgment gave the Secretary a one-year period within which to develop new regulations.

Before the Secretary took responsive action, Congress intervened. In November of 2005, Congress amended the OFPA. *See* Pub.L. No. 109-97, § 797, 119 Stat. 2120, 2165 (2005) [hereinafter 2005 Amendments]. In so doing, it added language to section 6510 authorizing the use in handling operations of synthetic ingredients appearing on the National List.[2] Congress simultaneously modified section 6517 in two respects. First, it changed the subtitle of section 6517(c)(1) to clarify that the

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[2] Section 6510(a), with the newly added language underscored, now provides in relevant part:

> (a) In general. For a handling operation to be certified under this title ..., each person on such handling operation shall not, with respect to any agricultural product covered by this title ...
>
> (1) add any synthetic ingredient *not appearing on the National List* during the processing or any postharvest handling of the product.
>
> 7 U.S.C. § 6510(a)(1).

National List relates to processing and handling as well as to production.[3] Second, it eliminated subsection 6517(c)(1)(B)(iii), the provision that we had singled out as limiting the inclusion of non-organic substances used in handling to non-synthetics. *See Harvey I,* 396 F.3d at 39. No legislative history accompanied these alterations. Finally, Congress directed the Secretary to prepare a report detailing the impact of *Harvey I* and describing whether restoring OFPA's regulatory scheme to its pre-*Harvey I* status would negatively impact farmers, processors, or consumers. 2005 Amendments, § 724, 119 Stat. at 2153.

The Secretary proceeded to revise the final rule to comply with other aspects of the judgment in *Harvey I. See* 71 Fed.Reg. 32,803 (June 7, 2006). With regard to the subject matter of count 3, however, the Secretary stated:

> Congress amended the OFPA by permitting the addition of synthetic substances appearing on the National List for use in products labeled "organic." The amendment restores the NOP regulation for organic processed products containing at least 95 percent organic ingredients on the National List and their ability to carry the USDA seal. Therefore, the USDA is *not* revising the NOP regulations to prohibit the use of synthetic ingredients in processed products labeled as organic nor restrict these products' eligibility to carry the USDA seal.

Id. at 32,804.

This statement displeased the appellant. On June 30, 2006, he asked the district court to enforce the judgment vis-à-vis count 3. The Secretary

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[3]Section 6517(c)(1), with the newly added language underscored, now provides in relevant part:

> The National List may provide for the use of substances *in an organic farming or handling operation* that are otherwise prohibited under this title....
>
> 7 U.S.C. § 6517(c)(1).

opposed this motion and cross-moved for relief from the judgment. The essence of the Secretary's position was that the 2005 Amendments had made any revisions to the regulations in question unnecessary.

The district court denied the appellant's motion to enforce and granted the Secretary's cross-motion for relief from judgment. *Harvey v. Johanns,* 462 F.Supp.2d 69 (D.Me.2006)(*Harvey II*). This timely appeal ensued. The amici, whose assistance we appreciate, have filed a brief in support of the Secretary's position.

II. STANDARD OF REVIEW

Typically, we would review both a motion to enforce a judgment and a motion for relief from judgment for abuse of discretion. *See, e.g., McDowell v. Phila. Hous. Auth.,* 423 F.3d 233, 238 (3d Cir.2005) (motion to enforce a judgment); *Honneus v. Donovan,* 691 F.2d 1, 2 (1st Cir.1982) (motion for relief from judgment). In this instance, however, the main issue on appeal concerns whether the two "count 3" regulations invalidated in *Harvey I* have been salvaged by the 2005 Amendments. That issue turns on a question of statutory interpretation, involving the significance and effect of the 2005 Amendments. Thus, appellate review is de novo. *See United States v. Leahy,* 473 F.3d 401, 405 (1st Cir.2007); *Bonano v. E. Carib. Airline Corp.,* 365 F.3d 81, 83 (1st Cir.2004). If the statute is found to be unclear, however, an inquiring court should defer to the Secretary's reasonable interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Dominion Energy Brayton Point, LLC v. Johnson,* 443 F.3d 12, 15 (1st Cir.2006).

There is a second issue bound up in this appeal-an issue that involves the scope of the final judgment. Thus, whether to enforce the judgment on this ground turns entirely on a question of law concerning the scope of the judgment itself. Consequently, we employ de novo review as to that issue as well. *See Fafel v. DiPaola,* 399 F.3d 403, 409-10 (1st Cir.2005); *cf. Goya Foods, Inc. v. Wallack Mgmt. Co.,* 290 F.3d 63, 75

(1st Cir.2002) (explaining that "an error of law is the functional equivalent of an abuse of discretion").

III. THE EFFECT OF THE 2005 AMENDMENTS

We begin this segment of our analysis by revisiting the procedural posture in which this appeal arises. After our decision in *Harvey I,* the district court entered a final judgment. "Final" is a relative term; even though a judgment is denominated as final, a court may grant relief from it in a variety of circumstances. One such circumstance is when it is "no longer equitable that the judgment should have prospective application." Fed.R.Civ.P. 60(b)(5). Thus, when subsequent legislation effects a change in the applicable law, a judgment, legally correct when entered, may become inequitable. *See, e.g., Inmates of Suffolk County Jail v. Rouse,* 129 F.3d 649, 656 (1st Cir.1997) (explaining that "a forward-looking judgment in equity can succumb to legislative action if the legislature alters the underlying rule of law"). So here: to the extent that the 2005 Amendments disturb the legal ground on which our decision in *Harvey I* rested, it would be inequitable to enforce the earlier judgment. We turn, then, to the import of those amendments.

In *Harvey I,* we held, inter alia, that two regulations, sections 205.600(b) and 205.605(b), contravened the plain language of the OFPA, 7 U.S.C. § 6510(a)(1). The statute provided at that time that certified handling operations "shall not, with respect to any agricultural product ... add any synthetic ingredient during the processing or any postharvest handling of the product." Congress responded swiftly and precisely by specifying that the limitation should not apply to ingredients on the National List. *See supra* note 2.

In *Harvey I,* we also rejected the Secretary's reliance on 7 U.S.C. § 6517, noting that section 6517(c)(1)(B)(iii) specified that the National List may provide for the use of otherwise prohibited substances *only if* the substance "is used in handling and i[s] non-synthetic but is not organically produced." *Id.* § 6517(c)(1)(B)(iii). Congress responded swiftly and precisely by deleting that subsection, while amending the title

of the provision to clarify that handling *is* covered by the National List. *See supra* note 3.

It seems incontrovertible that these changes were a direct reaction to our decision in *Harvey I.* It seems equally incontrovertible that, with respect to count 3, they were designed to pull the legs out from under that decision. Any other conclusion would ignore both Congress's expressions of interest (as indicated by, among other things, the requested report) and the sequence of events. Any other conclusion would, therefore, blink reality.

The appellant grudgingly acknowledges that Congress intended to take away at least part of his bounty. He argues, however, that the 2005 Amendments failed to effect a complete resurrection of the invalidated regulations. He mounts this argument on two constructs. We address each in turn.

First, the appellant points out that, by its terms, the amended version of section 6510 only permits the use of "ingredient[s]" found on the National List. He asserts that the word "ingredient," though undefined in the OFPA itself, is a term of art in the regulations; an "ingredient" is a substance that is "used in the preparation of an agricultural product that is still present in the final commercial product as consumed." 7 C.F.R. § 205.2. This, he says, distinguishes ingredients from another subset of substances, known as "processing aid[s]," which are used in processing but are either removed or exist in only negligible quantities in the final food product. *See id.* § 205.2. The appellant adds that the final judgment refers to ingredients and processing aids separately.[4] Lastly,

[4]FN4. The final judgement reads in relevant part:

> With respect to Count 3: 7 C.F.R. §§ 205.600(b) and 605(b) are contrary to the OFPA and exceed the Secretary's rulemaking authority to the extent that they permit the addition of synthetic ingredients and processing aids in the handling and processing of products which contain a minimum of 95% organic content and which are eligible to bear the [U.S. Department of

(continued...)

he notes that the OFPA creates a presumption against non-organic substances. *See* 7 U.S.C. § 6504.

With this backdrop in place, the appellant posits that, unless the new version of section 6510 explicitly authorizes the use of processing aids found on the National List-which it does not-the default rule applies and these substances cannot be used for that purpose. Consequently, the challenged regulations cannot stand insofar as they authorize the inclusion of synthetic processing aids on the National List.

In defending this crabbed reading, the appellant offers an explanation as to why Congress might have authorized the use of synthetic ingredients but not synthetic processing aids. He suggests that Congress limited its authorization because "ingredients, but not processing aids, must be disclosed on a product's label." Appellant's Br. at 25. Thus, Congress might rationally have intended to permit the use of synthetic ingredients while continuing to ban the use of processing aids.

This construct is too clever by half. Our opinion in *Harvey I* did not distinguish between the terms "ingredient" and "processing aid." The separate references in the final judgment appear to reflect a casual word choice by the district court. It attached no significance to the phraseology before the appellant filed his enforcement motion. At that point, the court lost no time in repudiating the appellant's attempted wordplay. *See Harvey II,* 462 F.Supp.2d at 73-74. We must, of course, accord deference to the district court's interpretation of the wording of its own order. *See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel,* 833 F.2d 1059, 1066-67 (1st Cir.1987) (noting the "special role played by the writing judge in elucidating the meaning and intendment of an order which he authored").

Perhaps more important, there is not the slightest indication that Congress intended to draw a distinction between the two types of substances. The definition section of the statute, 7 U.S.C. § 6502, does

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[4](...continued)
Agriculture] seal.

not provide a definition for either "ingredient" or "processing aid." Given that the word "ingredient"-and not the phrase "processing aid"-existed in section 6510(a)(1) prior to the 2005 Amendments, we agree with the district court, *Harvey II,* 462 F.Supp.2d at 73, that it is "farfetched" to suppose that when Congress amended section 6510, it understood the word "ingredient" to have a narrow meaning distinct from, and exclusive of, "processing aid." The fact that these two terms were used by the Secretary in the implementing regulations does not alter this reality.

In an effort to parry this thrust, the appellant cites the Supreme Court's opinion in *Lorillard v. Pons,* 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978), for the proposition that Congress presumably knew of the distinction that the Secretary had made. *Lorillard* does not demand the result that the appellant advocates.

The rule of *Lorillard* is that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Id.* at 580, 98 S.Ct. 866. Here, however, Congress-whatever its awareness of the regulations-was unarguably focused on ameliorating the effects of the decision in *Harvey I.* In that decision, we said that section 6510 stood as an obstacle to a regulation providing that "synthetic substances may be used as a 'processing aid or adjuvant.' " *Harvey I,* 396 F.3d at 39 (quoting 7 C.F.R. § 205.600(b)). Given our suggestion that section 6510 related to processing aids, a Congress accounting for the full background of judicial precedent would not have concluded that section 6510, as it stood, related only to ingredients as opposed to processing aids. In the context of this case, then, *Lorillard* argues eloquently against the appellant's position.

If more were needed-and we doubt that it is-the amendments to section 6517 confirm that Congress wanted to leave room for synthetics in the handling process. Congress not only eliminated the section that previously had been interpreted by us to forbid the use of synthetics in

handling but also specified in a new subtitle that the National List applies to handling. Statutes must be viewed holistically, and statutory language must be read in context. *See Koons Buick Pontiac GMC, Inc. v. Nigh,* 543 U.S. 50, 60, 125 S.Ct. 460, 160 L.Ed.2d 389 (2004). Here, there can be no doubt but that, when the amended sections are read together, their language permits the use of synthetics as both ingredients and processing aids.

This brings us to the appellant's second, more extreme construct. He notes that section 6517(c)(1) allows inclusion of a substance on the National List only in the event that it meets three criteria, delineated in section 6517(c)(1)(A)-(C). Prior to the 2005 Amendments, the second criterion in this grouping specified (subject to limitations not relevant here) that the substance had to be related to production or, if it related to handling, had to be non-synthetic. The 2005 Amendments struck the provision relating to handling in its entirety. From this sequence of events, the appellant teases out the notion that, inasmuch as the amended second criterion now speaks only to production, there is no procedure through which any substance used in handling can be included on the National List. In other words, the net effect of excising section 6517(c)(1)(B)(iii) was not to make the National List more accessible to non-organics used in handling but, rather, to ban them lock, stock, and barrel.

Were we to accept this perverse reading, we would be guilty of outright defiance of Congress's easily discernible intent. That reading renders null and void the amendment to section 6510 and the titlular change to section 6517(c)(1), both of which specifically note that the National List applies to handling. Principles of judicial restraint counsel powerfully against undertaking so confrontational a course.

We need not tarry. The amended version of the OFPA may not be a perfect syntactical model, but any ambiguities are easily resolved once one accounts for context. We consider "all available evidence of Congress's true intent when interpreting its work product." *Koons Buick,* 543 U.S. at 65, 125 S.Ct. 460 (Stevens, J., concurring). After

careful examination of the totality of the evidence in this case, it is clear beyond hope of contradiction that there is only one credible interpretation of the 2005 Amendments. That is the interpretation urged by the Secretary and endorsed by the district court. In the final analysis, no sensible person could credit the bizarre assertion that Congress amended one provision of the statute to stress its applicability to handling operations while it simultaneously eliminated the only vehicle through which handling operations might be included.

To sum up, the timing and scope of the 2005 Amendments, together with Congress's specific references to our decision in *Harvey I,* make it transparently clear that Congress set out to achieve the goal of restoring the "count 3" regulations to their pre-suit status; after all, Congress amended both sections on which *Harvey I* relied and, at the same time, took pains to excise the language that we identified as an obstacle to the Secretary's regulatory scheme. In light of these contextual trappings and the plain language of the amendments, we conclude without serious question that the district court did not err in denying the appellant's motion to enforce the judgment and granting the Secretary's cross-motion for relief from judgment.

IV. THE STATEMENT

In a largely unrelated assignment of error, the appellant seeks to scuttle the Secretary's Food Contact Substances Policy Statement (the Statement). He alleges that the Statement permits the use of hundreds of synthetics in organic handling, some of which are processing aids or ingredients, without review by the National Organic Standards Board for inclusion on the National List.

As a part of his motion to enforce the judgment, the appellant asked the district court to strike the Statement. That court refused. *See Harvey II,* 462 F.Supp.2d at 75. The appellant challenges that ruling.

We pause to put this challenge into workable perspective. In

response to inquiries from the organic community, the Secretary issued the Statement as an expression of policy. In terms, it authorized the use of food contact substances classified as such by the federal Food and Drug Administration. *See* www.ams.usda.gov/nop/NOP/Policy Statements/SyntheticSubstances.html

The Secretary issued the Statement two months after the appellant sued and almost two years after the promulgation of the final rule. While some of the briefing in *Harvey I* apparently alluded to the Statement, it was not the target of any of the complaint's nine counts, nor was it mentioned in our opinion (because, among other things, it was not ripe for review). Thus, the Statement was neither part of our adjudication nor part of the final judgment subsequently entered in the district court.

The appellant argues that the Statement was nonetheless within the scope of the final judgment and, thus, can appropriately be challenged on a motion to enforce the judgment. We disagree.

A court's power to enforce a judgment is confined to the four corners of the judgment itself. *Fafel,* 399 F.3d at 411 (explaining that enforcement jurisdiction "extends only as far as required to effectuate a judgment"); *see also Peacock v. Thomas,* 516 U.S. 349, 359, 116 S.Ct. 862, 133 L.Ed.2d 817 (1996). Enforcement proceedings are summary in nature; they cannot be used to take up matters beyond the contours of the judgment and thereby short-circuit the usual adjudicative processes. Consequently, when a matter is beyond the scope of a judgment, no relief is available through a motion to enforce the judgment. *See Fafel,* 399 F.3d at 411.

This case furnishes a paradigmatic example of the operation of these principles. In essence, the appellant argues that the Statement is within the scope of the final judgment because it cannot be reconciled with the provisions of that judgment. That argument is an exercise in boot-strapping and, as such, misses the point. The Statement was not litigated in the original case, and the relief that the appellant seeks is, therefore, inappropriate on a motion to enforce the judgment.

Let us be perfectly clear. In affirming the denial of the appellant's motion to enforce the judgment on this ground, we do not decide whether the Statement does or does not contravene either the current version of the OFPA or the regulations thereunder. By the same token, we do not decide whether the rationale behind the final judgment renders the Statement suspect. The answers to these questions must await a new and separate suit, which the appellant is free to initiate if he so chooses. We hold only that the appellant cannot alter the dimensions of his original suit in a post-judgment enforcement proceeding.

V. CONCLUSION

We need go no further. For the reasons elucidated above, we affirm the decision of the district court in all relevant respects.

Affirmed.

PLANT QUARANTINE ACT

DEPARTMENTAL DECISION

In re: FALCON AIR EXPRESS, INC., AND AEROPOSTAL AIRLINES, INC.
P.Q. Docket No. 07-0018.
Decision and Order.
Filed December 19, 2007.

PQ – Bankruptcy – Admissions in bankruptcy petition.

Darlene Bolinger for APHIS.
Frank P. Terzo and Nathan G. Mancuso for Respondent.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Default Decision and Order for Falcon Air Express, Inc.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Protection Act of June 20, 2000, as amended (7 U.S.C. §§ 7701 et seq.)(the Act) and the regulation promulgated thereunder (7 C.F.R. " 330.111), hereinafter referred to as the regulation, in accordance with the Rules of Practice in 7 C.F.R.§ 1.130 *et seq*.

This proceeding was instituted under the Act by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture on November 8, 2006. The complaint was served by certified mail on the respondent on November 13, 2006. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), the respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing.

Respondent's answer was due no later than twenty days after service of

the complaint (7 C.F.R. § 1.136(a)). On November 28, 2006, within the time allotted for the filing of an answer, notice was filed by Frank P. Terzo and Nathan G. Mancuso, Attorneys at Law, that Falcon Air Express, Inc. had filed a voluntary petition under Chapter 11 of the Bankruptcy Code on May 10, 2006 and asserted that the petition operated as an automatic stay of administrative actions against Falcon Air Express, Inc.

Contrary, to Falcon Air Express, Inc.'s assertion, however, the petition filed under the Bankruptcy Code does not operate as an automatic stay of this action. AThere is an exception to the automatic stay provisions of 11 U.S.C. § 362 that applies to this situation. Under section 362(b)(4), actions and proceedings, such as is the case here, by a government unit to enforce its police or regulatory powers are exempt from the automatic stay provisions. See *Pan Am Air Cargo*, 50 Agric. Dec. 1706 (1991) and *Eastern Airlines*, 51 Agric. Dec. 441 (1991). Accordingly, Complainant was permitted to proceed with this administrative action and Falcon Air Express was required to file an answer. Falcon Air Express, Inc never filed an answer in this matter. 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 admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R.§ 1.139). Consequently, 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).

On July 31, 2007, Complainant filed a Motion for Adoption of Proposed Default Decision, seeking that I impose a civil penalty of $17,000 against respondent. On November 21, 2007 I issued an Order to Show Cause requesting that Complainant justify the requested civil penalty. Complainant filed a Response to my Order on December 14, 2007. In this Response, Complainant indicated that one of the three violations alleged in the complaint had been resolved

in an earlier administrative settlement and provided substantial justification for the imposition of an $11,000 civil penalty for the remaining two alleged violations.

Findings of Fact

1. Falcon Air Express, Inc., hereinafter referred to as Respondent, is an entity with a mailing address of 9500 NW 41st Street, Miami, Florida 333178.
2. On or about December 22, 2002 and January 20, 2004, Respondent failed to provide the appropriate Plant Protection and Quarantine Office serving the ports of arrival with the required advance notification of an intent to arrive at the port, in violation of 7 C.F.R. § 330.111.

Conclusion

By reason of the Findings of Fact set forth above, the Respondent has violated the Act and the regulation issued under the Act. Therefore, the following Order is issued.

Order

The Respondent is hereby assessed a civil penalty of eleven thousand dollars ($11,000.00). The Respondent shall send a certified check or money order for eleven thousand dollars ($11,000.00), payable to the Treasurer of the United States, to United States Department of Agriculture, APHIS, Accounts Receivable, P.O. Box 3334, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding, P.Q. Docket No. 07-0018.

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).

Done at Washington, D.C.

SUGAR MARKETING ACT

COURT DECISIONS

The AMALGAMATED SUGAR COMPANY LLC v. USDA AND AMERICAN CRYSTAL SUGAR COMPANY.
No. 06-167-S-EJL.
Court Decision.
Filed Sept. 6, 2007.

(Cite as 2007 WL 2612675 (D.Idaho)).

SMA – Beet sugar allotments – Sugar processor – Permanent termination of operations – *Chevron* standard – Arbitrary, capricious, not in accordance with the law – Sale of all assets – New entrants Rational connection by agency administrator..

The court found the JO's decision to be reasoned and based on substantial evidence including the evidence that Pacific (seller) still possessed its sugar beet allotment at the time of the sale of "all of its assets" nor had it "permanently terminated" [7 U.S.C. §§ 2359dd(b)(2)(E), (F)] its operations and could sell all of its sugar beet allotment to its buyer. The JO overruled the ALJ's decision and found that the Agency Administrator was acting within his authority when assigning Pacific Sugar's beet sugar allotment to an existing sugar beet processor as part of a sale of "all assets." The ALJ had found that there were no assets remaining to be sold but for the allotment and therefore the rules required the re-distribution of the allotment among the several existing beet sugar processors pro-rata. While Amalgamated Sugar argued that the termination of operations preceded the sale of all assets, the Administrator determined that some portion of the company survived such it had not permanently terminated operations. The JO found that Pacific Sugar was a "Sugar Processor" at the time of its sale and the court reviewed the JO decision as a reasonable interpretation of the facts albeit different from the ALJ.

United States District Court, D. Idaho.

MEMORANDUM ORDER

EDWARD J. LODGE, U.S. District Judge.

Pending before the Court in this matter are cross motions for summary

judgment filed by each of the parties in this action and a motion to strike. The motions are fully briefed and the matters are now ripe for the Court's consideration. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this motion shall be decided on the record before this Court without oral argument. Local Rule 7.1(d)(2).

Factual and Procedural Background

The Agricultural Adjustment Act provides a program of Flexible Marketing Allocations for Sugar which is a scheme to stabilize sugar prices by determining the total amount of domestically-produced sugar that can be marketed in the United States in the coming year and then providing marketing allotments and allocations for production of sugar to processing companies in the United States. 7 U.S.C. § 1359aa *et seq*.. Initial allocations under the Act were made to domestic sugar processors on October 1, 2002 based on the amount of each processor produced from 1998 through 2000. The United States Department of Agriculture ("USDA") is charged with administering this program.

Pacific Northwest Sugar Company's ("Pacific") was initially given a permanent allocation of 2.692% of the total beet sugar market allotment. At the same time, the USDA also temporarily redistributed the majority of Pacific's allotment pursuant to 7 U.S.C. § 1359ee(b)(2) because Pacific was unable to market its allocation. Under this provision Pacific retained its permanent allotment. In 2003, Pacific was sold and its market allotment transferred to Defendant-Intervener American Crystal Sugar Company ("American Crystal").[1]

The dispute in this case is over whether the USDA properly transferred Pacific's market allotment to American Crystal pursuant to 7 U.S.C. § 1359dd(b)(2)(F). The Plaintiff, Amalgamated Sugar Company

[1] American Crystal has been allowed to intervene in this action. (Dkt. No. 22).

LLC ("Amalgamated"), argues because Pacific was no longer processing sugar at the time of the transfer that the USDA should have redistributed Pacific's allocation to all sugar processors pursuant to 7 U.S.C. § 1359dd(b)(2)(E). Amalgamated argues Pacific ceased operations in 2001 and sold its assets, factory, and equipment to another entity, Central Leasing, and therefore was no longer a "processor" of sugar. American Crystal asserts that on September 8, 2003 it purchased all of Pacific's assets and that on September 16, 2003 the USDA properly approved of the transfer of Pacific's allocation to American Crystal pursuant to 7 U.S.C. § 1359dd(b)(2)(F); which allows such transfer upon the sale of all assets of one sugar processor to another.

Amalgamated sought reconsideration of the transfer decision arguing Pacific's allocation should have been redistributed to all sugar processors when it ceased its operations in 2001 pursuant to 7 U.S.C. § 1359dd(b)(2)(E). The request for reconsideration was denied and Amalgamated filed an administrative appeal. The USDA Administrative Law Judge ("ALJ") held two hearings totaling five days on the matter and, on February 7, 2005, he issued his Decision and Order reversing the USDA's decision and ordering it to take back the transferred allotment and redistribute the allocation under 7 U.S.C. § 1359dd(b)(2)(E); finding Pacific had terminated its operations prior to the sale to American Crystal.

Both the USDA and American Crystal appealed the decision to the USDA's Judicial Officer. On March 3, 2006 the Judicial Officer issued his Decision and Order reversing the ALJ and affirming the USDA's transfer of Pacific's allocation to American Crystal. Amalgamated now brings this action pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.,* seeking judicial review of the March 3, 2006 Decision and Order of the Judicial Officer as to the administrative proceeding *In re Amalgamated Sugar Company, L.L.C. (SMA Docket no.*

04-0003) (AR 89). (Dkt. No. 1).[2] Amalgamated claims the decision is arbitrary, capricious, not in accordance with law, and contrary to USDA's own regulations.

Standards of Review

I. *Administrative Review:*

The USDA's interpretation of 7 U.S.C. §§ 1359dd(2)(E) and (F) is analyzed under the analytic framework laid out in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984).“When reviewing an agency's construction of a statute it is charged with administering, we look first to the statutory text to see whether Congress has spoken directly to the question at hand.”*J & G Sales Ltd. v. Truscott,* 473 F.3d 1043, 1047 (9th Cir.2007) (citation omitted).“If the statute is clear, we must give effect to the unambiguously expressed intent of Congress' regardless of the agency's view.”[3]*Northwest Ecosystem alliance v. United States*

[2] Specifically the Complaint alleges the following:

1) The finding that during the period 1998 through September 16, 2003, Pacific was a beet sugar processor is unsupported by the facts in the record.

2) The above finding is inconsistent with the finding that sugar beet processing operations at the Moses Lake factory ceased in February 2001 and never resumed and that no sugar beet crop was planted in 2002 or 2003.

3) The above finding is inconsistent with the definition of a “processor” in 7 C.F.R. § 1435.2 because Pacific did not commercially produce sugar, have a viable processing facility, or have a supply of sugar beets after February 2001.

4) The decision is unlawful because § 1359dd(b)(2)(E) required the USDA to redistribute the allocation because Pacific had ceased its operation in 2001.

5) The decision is arbitrary, capricious, and contrary to § 1359dd(b)(2)(F) because Pacific was no longer a processor of sugar beets.

[3].“If *Chevron* deference is inapplicable because Congress has not delegated interpretative authority to the agency, the agency's views still ‘constitute a body of

(continued...)

Fish and Wildlife Serv., 475 F.3d 1136, 1141 (9th Cir.2007) (citing *Chevron,* 467 U.S. at 842-44).“If the statute is ambiguous, however, we do not simply impose our own independent interpretation. Rather, we must determine how much deference to give to the administrative interpretation. *Id.* (citing *United States v. Mead Corp.,* 533 U.S. 218, 227-31 (2001)).“The precise degree of deference warranted depends on the statute and agency action at issue.”*Id.*“Under *Chevron's* classic formulation, [i]f Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”*Id.* (quoting *Chevron,* 467 U.S. at 844). This standard of review is “highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.”*Id.* (citations omitted). Courts should not “substitute [our] judgment for that of the agency.”*Id.* (quoting *Citizens To Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971)).“Our task is simply to ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made.”*Id.* (citing *National Ass'n of Home Builders v. Norton,* 340 F.3d 835, 841 (9th Cir.2003) (citations and quotations omitted)).

“When reviewing an agency action to determine whether it is arbitrary and capricious, our scope of review ‘is narrow and a court is not to substitute its judgment for that of the agency.’ “ *Truscott,* 473 F.3d at

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[3](...continued)
experience and informed judgment to which courts and litigants may properly resort for guidance.’ “ *Id.* (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)). The “fair measure of deference” may then range from “great respect” to “near indifference,” depending on “the degree of the agency's care, its consistency, formality, and relative expertness, and ... the persuasiveness of the agency's position.” *Id.* (quoting *Mead,* 533 U.S. at 228.

1051 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). "In this court, the review of whether an agency's action was arbitrary or capricious is highly deferential, presuming the agency action to be valid." *Id.* (citation omitted). "The agency must, of course, examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Id (citation and internal quotation marks omitted). "While we may not remedy deficient agency actions, courts will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* at 1051 (internal quotation marks and citations omitted). "Moreover, where the agency's line-drawing does not appear irrational and the party challenging the agency action has not shown that the consequences of the line-drawing are in any respect dire courts will leave that line-drawing to the agency's discretion." *Id.* (citation and quotations omitted).

II. *Standard on Summary Judgment:*

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure which provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c).

The Supreme Court has made it clear that under Rule 56 summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to the non-moving party's case and upon which the non-moving party will bear the burden of proof at trial. *See, Celotex Corp v. Catrett,* 477 U.S. 317, 322 (1986). If the non-moving party fails to make such a showing on any essential element, "there can be no 'genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."*Id.*

at 323.[4]When this standard, the Court must view all of the evidence in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986); *Hughes v. United States,* 953 F.2d 531, 541 (9th Cir.1992).

Discussion

At issue here are the USDA's interpretation of two provisions of the Agricultural Adjustment Act, 7 U.S.C. §§ 1359dd(b)(2)(E), (F), which deal with the distribution of a processor's allocation upon dissolution/termination of a processor's operation or the sale of one processor to another processor and state:

> (E) Permanent termination of operations of a processor. If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall-
>
> (i) eliminate the allocation of the processor provided under this section; and
>
> (ii) distribute the allocation to other beet sugar processors on a pro rata basis.

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[4] *See also,* Rule 56(e) which provides, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

> (F) Sale of all assets of a processor to another processor. If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E).

Amalgamated argues Pacific had terminated its operations as a "processor" prior to its sale and, therefore, § 1359dd(b)(2)(E) required the USDA to eliminate Pacific's allocation and redistribute the amount to all other processors on a *pro rata* basis. The USDA and Judicial Officer, however, determined that Pacific had been sold to American Crystal thereby invoking § 1359dd(b)(2)(F) which authorized the transfer of Pacific's allocation to American Crystal.

Amalgamated urges the Court to reverse the Judicial Officer and adopt the reasoning of the ALJ and points to 7 C.F.R. § 1435.2 which defines a beet sugar processor as "a person who commercially produces sugar, directly or indirectly, from sugar beets ... has a viable processing facility, and a supply of sugar beets for the applicable allotment year."Pacific was not a "processor," Amalgamated argues, because Pacific had stopped processing sugar beets and sold its assets, factory, and equipment to Central Leasing in February of 2001; thus, the USDA should have reallocated Pacific's allotment under § 1359dd(b)(2)(E). To support this conclusion Amalgamated points out that Pacific was deeply in debt, had defaulted on its loans, had ceased processing sugar in February of 2001 and never resumed, had been administratively dissolved by the state of Washington in July 2001, lost its factory and equipment, laid off its employees, and defaulted on its lease agreement. In addition, Amalgamated notes that in 2002 Pacific's Board decided to terminate operations.

The Court has reviewed the Judicial Officer's Decision and finds the interpretation of the relevant statutes is reasonable, not arbitrary or capricious, and supported by the administrative record. *Northwest Ecosystem Alliance,* 475 F.3d 1143 (citation omitted) ("An agency interpretation that enjoys *Chevron* status must be upheld if it is based on

a reasonable construction of the statute.”). The Judicial Officer's interpretation of a “processor” as an entity with a market allocation is reasonable given the use of the word throughout the statute. Congress refers to “processors” throughout the statute as an entity with a market allocation; as opposed to a “new entrant” who is not a “processor” because they do not yet have a market allocation. *See* 7 U.S.C. §§ 1359dd(b)(2)(H), (G). The reasonableness of this definition is apparent when reading the entire statute, including both subparagraphs (E) and (F) which refer to one another. To say that Pacific was not a “processor” under 7 U.S.C. § 1359dd(b)(2)(F), as Amalgamated argues, would also mean Pacific was not a “processor” under 7 U.S.C. § 1359ee(b)(2) and the USDA could not have temporarily reassigned Pacific's shares in 2002. Such a reassignment can be made only from a sugar beet processor who has an allocation but will be unable to market that allocation. Amalgamated was a beneficiary of this reassignment and made no challenge to the USDA's interpretation of Pacific as a processor for purposes of the reassignment. Thus, Pacific was a processor at the time of the sale because it retained its permanent allocation during this time even though, as Amalgamated points out, Pacific's business was struggling. As such, the Court finds the Judicial Officer's Decision's interpretation of the statue to be reasonable and supported by the record.

Amalgamated points to the ALJ Decision urging the Court to find its reasoning more compelling than that of the Judicial Officer. (Dkt. No. 46, p. 2).“When, as here, the findings of the ALJ differ from those of the final administrative decisionmaker, the following standards of review have been held to apply: The fact that the findings of the ALJ differ from those of the full board does not alter the requirement that we affirm [the final decisionmaker's] decisions if supported by substantial evidence. However, consideration of the ALJ's findings will require a more searching scrutiny of the record. Special deference is to be given the ALJ's credibility judgments.”*Pogue v. United States Dept. of Labor,* 940 F.2d 1287, 1289 (9th Cir.1991) (citation omitted). It has not escaped the

Court's attention that the ALJ arrived at the opposite conclusion from that of the USDA and the Judicial Officer. The ALJ concluded that Pacific had terminated its operations prior to September of 2003 and, therefore, the USDA should have redistributed the allocation pursuant to 7 U.S.C. § 1359dd(b)(2)(E). The ALJ discussed Pacific's downward spiral, much of which occurred prior to it obtaining it's initial October 2002 allotment. The Judicial Officer also recognized that Pacific was failing in the sugar beet processing business at this time and selling off assets to minimize its losses. (AR 69, 89). However, the fact remains that although Pacific was not actually processing sugar beets in September of 2003 it still maintained its initial allotment of the sugar beet market and, as determined above, the Judicial Officer reasonably interpreted the statute to mean Pacific was a "processor" of sugar. (AR 89).

The more troubling part of the ALJ decision is the determination that there was no sale of "all the assets of the processor" to invoke a transfer of allocation under 7 U.S.C. § 1359dd(b)(2)(F) because Pacific's factory and equipment had already been sold and Pacific's Board had decided to not resume processing operations. (AR 69). The ALJ discusses at length his finding that the sale between Pacific and American Crystal was void of any true sale of tangible assets because there were no assets left to be sold and all that remained of Pacific was its market allocation; raising the concern that to allow such a sale to go forward allows an end-run around the requirements for new entrants in the sugar beet processing industry.[5]In reaching his decision, the Judicial Officer considered this fact and ultimately concluding that the sale was appropriate to invoke the transfer of Pacific's allocation under 7 U.S.C. §§ 1359dd(b)(2)(F). (AR 89, pp. 15-23). The Judicial Officer determined that based upon the record in this case Pacific was a "processor" at the time of the September 8, 2003 sale, American Crystal purchased all of Pacific's assets, and, therefore, the USDA's transfer under 7 U.S.C. §§ 1359dd(b)(2)(F) was proper. Though the ALJ decided differently, the Court finds the Judicial Officer's decision to be reasonable. In reaching his decision, the Judicial Officer properly relied on the facts in the record, many of which are

[5] The ALJ pointing to the Commodity Credit Corporation's ("CCC") inconsistent treatment of the potential buyers of Pacific. (AR 69, p. 36).

identical to the ALJ's findings, including the correspondence exchanged between the parties regarding the sale of Pacific. (AR 89). These letters evidence the fact that Pacific maintained its initial allocation at the time of the sale and that American Crystal had purchased all of Pacific's assets. Having considered the reasoning of both the ALJ and the Judicial Officer in light of the record, the Court finds the Judicial Officer's conclusions to be reasonable and not arbitrary or capricious based on the record in this case. (AR 89). Courts should not "substitute [our] judgment for that of the agency. Our task is simply to ensure that the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made."*Northwest Ecology Alliance, supra.*The Judicial Officer has done so here.

ORDER

THEREFORE IT IS HEREBY ORDERED as follows:

1) Defendants United States of America and American Crystal Sugar Company motions for summary judgment (Dkt.Nos.36, 37) are **GRANTED.**

2) Plaintiff's motion for summary judgment (Dkt. No. 33) is **DENIED.**

3) Plaintiff's motion to strike (Dkt. No. 49) is **MOOT.**

HOLLY SUGAR CORPORATION, ET AL. v. USDA.
No. 06-5323.
Court Decision.
Filed October 4, 2007.

(Cite as : 2007 WL 2935624 (C.A.D.C.))

SMA – CCC – Arbitrary interest rate, when not – Sugar loans.

The Sugar market Administrator of the Commodity Credit Corporation (CCC) unambiguously has authority over the interest rate charged for loans secured by processed sugar crops.

United States Appellate Court
for the District of Columbia.

Before HENDERSON, ROGERS, and TATEL, Circuit Judges.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties pursuant to D.C. CIR. Rule 34(j). It is

ORDERED AND ADJUDGED that the order of the District Court in *Holly Sugar Corp. v. Johanns,* No. 03-1739, slip op. (D.D.C. Aug. 1, 2006), be affirmed. Two years ago, this court held that 7 U.S.C. § 7283(b) unambiguously gives the Commodity Credit Corporation (CCC) discretion over setting the interest rate for sugar loans. *Holly Sugar Corp. v. Johanns,* 437 F.3d 1210 (D.C.Cir.2006). Holly Sugar Corp. then moved for summary judgment before the District Court, arguing that the interest rate set by CCC is arbitrary and capricious and an unconstitutional tax. The District Court denied the motion for summary judgment and entered final judgment in favor of CCC.

The District Court denied summary judgment on Holly Sugar's arbitrary and capricious claim because the company failed to raise the claim in its complaint. *Holly Sugar,* No. 03-1739, slip op. at 8-9.We agree. Even under liberal notice pleading standards, Holly Sugar failed to present in its complaint the argument that CCC's selection of the particular interest rate was arbitrary and capricious. Instead, the complaint raises only a *Chevron* claim, which was resolved in the previous appeal. *Holly Sugar,* 437 F.3d at 1213-14.

The District Court rejected Holly Sugar's unconstitutional tax claim, pointing out that the issue had been resolved in the earlier appeal. *Holly Sugar,* No. 03-1739, slip op. at 6. Holly Sugar disagrees, but it should have raised that issue in a petition for rehearing, not in a new motion before the District Court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R.APP. P. 41(b); D.C. CIR. Rule 41.

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MISCELLANEOUS ORDERS

In re: COUNTRY CLASSIC DAIRIES, INC.
2005 AMA Docket No. M-4-3.
Order Granting Motion to Withdraw Appeal.
Filed September 21, 2007.

AMAA – Agricultural Marketing Agreement Act – Milk – Motion to withdraw appeal petition.

The Judicial Officer granted Country Classic Dairies, Inc., motion to withdraw its appeal petition. The Judicial Officer stated, while a party's motion to withdraw its own appeal petition is generally granted, a withdrawal of an appeal petition is not a matter of right. The Judicial Officer stated, based on the record before him, he found no basis for denying Country Classic Dairies, Inc.'s motion to withdraw its appeal petition. The Judicial Officer concluded Chief Administrative Law Judge Marc R. Hillson's Decision, issued March 30, 2007, was the final decision in the proceeding. Because the Judicial Officer's Order terminated the proceeding, the Judicial Officer dismissed as moot the Administrator's June 22, 2007, Motion to Reconsider the Order Granting Petitioner's Request to Remove E-mail.

Sharlene A. Deskins, for Respondent.
John H. Vetne, Raymond, New Hampshire, for Petitioner.
Charles M. English, Jr., Washington, DC, for Amicus.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Country Classic Dairies, Inc., instituted this proceeding by filing a "Petition Contesting Interpretation and Application of Certain Federal Milk Order Regulations and of Obligations Assessed to Petitioner Thereunder" [hereinafter the Petition] on August 22, 2005. Country Classic Dairies, Inc., instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA]; the General Provisions of Federal Milk Marketing Orders (7 C.F.R. pt. 1000); 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).

Country Classic Dairies, Inc., seeks: (1) a declaration that the Market Administrator's construction and application of 7 C.F.R. § 1000.76(c) is not in accordance with law; (2) a refund of all monies paid by Country

Classic Dairies, Inc., pursuant to the Market Administrator's interpretation and application of Montana law to 7 C.F.R. § 1000.76(c); and (3) an award of all attorney fees, costs, and expenses incurred by Country Classic Dairies, Inc., in connection with the instant proceeding (Pet. ¶ 24).

On October 11, 2005, Lloyd Day, Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed "Answer of Defendant": (1) denying the material allegations of the Petition; (2) asserting Country Classic Dairies, Inc., failed to state a claim upon which relief can be granted; and (3) asserting the Market Administrator's interpretation of 7 C.F.R. § 1000.76(c) is in accordance with law and binding upon Country Classic Dairies, Inc.

On July 12, 2006, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a hearing in Bozeman, Montana. John H. Vetne, Raymond, New Hampshire, represented Country Classic Dairies, Inc. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. The Utah Dairymen's Association, represented by Charles M. English, Jr., Thelen Reid & Priest, LLP, Washington, DC, participated in the proceeding as an amicus, pursuant to 7 C.F.R. § 900.57. On March 30, 2007, after the parties and amicus filed post-hearing briefs, the Chief ALJ issued a Decision: (1) concluding the Market Administrator's application of 7 C.F.R. § 1000.76(c) to Country Classic Dairies, Inc., is in accordance with the law; and (2) dismissing Country Classic Dairies, Inc.'s Petition (Decision at 12-13).

On May 2, 2007, Country Classic Dairies, Inc., appealed the Chief ALJ's Decision to the Judicial Officer. On September 12, 2007, Country Classic Dairies, Inc., filed a Motion to Withdraw Appeal. On September 18, 2007, the Administrator filed a response to the Motion to Withdraw Appeal stating he supports the motion. On September 19, 2007, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Country Classic Dairies, Inc.'s Motion to Withdraw Appeal Petition.

A party's motion to withdraw its own appeal petition is generally

granted; however, withdrawal of an appeal petition is not a matter of right. In considering whether to grant a motion to withdraw an appeal petition, the Judicial Officer must consider the public interest.[1] Based on the record before me, I find no basis for denying Country Classic Dairies, Inc.'s Motion to Withdraw Appeal Petition.

For the foregoing reasons, the following Order is issued.

ORDER

1. Country Classic Dairies, Inc.'s Motion to Withdraw Appeal Petition is granted.

2. The Chief ALJ's Decision, filed March 30, 2007, is the final decision in this proceeding. The Order issued by the Chief ALJ in the Decision filed March 30, 2007, shall become effective on the date of service of this Order on Country Classic Dairies, Inc.

3. Because this Order terminates this proceeding, the Administrator's June 22, 2007, Motion to Reconsider the Order Granting Petitioner's Request to Remove E-mail is dismissed as moot.

In re: WAYNE P. OXFORD AND DARAE OXFORD, INDIVIDUALS DOING BUSINESS AS ENDANGERED CATS OF THE WORLD, ALSO KNOWN AS HUG A TIGER, AKA OZARK NATURE CENTER, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; ROBERT Q. SMITH AND LARRY F. SMITH, INDIVIDUALS DOING BUSINESS AS CIRCLE 3 BUFFALO RANCH.

[1] *See Ford Motor Co. v. NLRB*, 305 U.S. 364, 370 (1939) (stating, where the NLRB petitions for enforcement of its order against an employer and jurisdiction of the court has attached, permission to withdraw the petition rests in the sound discretion of the court to be exercised in light of the particular circumstances of the case); *American Automobile Mfrs. Ass'n v. Commissioner, Mass. Dep't of Envtl. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994) (stating the court of appeals has broad discretion to grant or deny voluntary motions to dismiss appeal); *In re Hartford Packing Co.*, 60 Agric. Dec. 851, 853 (2001) (stating withdrawal of an appeal petition is not a matter of right); *In re Smith Waller*, 34 Agric. Dec. 373, 374 (1975) (stating the rules of practice do not permit a party to withdraw an appeal as a matter of right; in considering whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest).

AWA Docket No. 02-0025.
Ruling.
Filed October 10, 2007.

AWA.

Colleen A. Carroll for APHIS.
Mark Dabrowski for Respondent David J. Harris.
Ruling by Administrative Law Judge Victor W. Palmer

ORDER

On September 14, 2007 consent decisions were issued as to respondents Robert Q. Smith and Larry F. Smith, thereby resolving this matter as to those respondents. On October 5, 2007 Complainant filed a Motion to Dismiss Amended Complaint without Prejudice as to Respondent Darae Oxford; and Motion to Amend Case Caption. The motion is herewith GRANTED.

Copies of this Order shall be served upon each of the parties by the Hearing Clerk's Office.

In re: OCTAGON SEQUENCE OF EIGHT, INC., A FLORIDA CORPORATION d/b/a OCTAGON WILDLIFE SANCTUARY AND OCTAGON ANIMAL SHOWCASE; LANCELOT KOLLMAN RAMOS, AN INDIVIDUAL; AND MANUEL RAMOS, AN INDIVIDUAL.
AWA Docket No. 05-0016.
Order Denying Petition for Rehearing as to Lancelot Kollman Ramos.
Filed December 13, 2007.

AWA – Animal Welfare Act – Failure to deny allegations – Default decision – Pro se – Second appeal petition – Due process.

The Judicial Officer denied a Petition for Rehearing filed by Lancelot Kollman Ramos. The Judicial Officer found no reasonable basis for Lancelot Kollman Ramos' ignorance

of the provision in the Rules of Practice (7 C.F.R. § 1.136(c)) that a failure to deny or otherwise respond to an allegation in a complaint is deemed an admission of that allegation. The Judicial Officer rejected Lancelot Kollman Ramos' suggestion that his status as a pro se litigant operates as an excuse for his failure to deny or otherwise respond to the allegations in the Complaint. The Judicial Officer found that the record belied Lancelot Kollman Ramos' contention that he denied the allegations in the Complaint and raised meritorious defenses. Finally, the Judicial Officer rejected Lancelot Kollman Ramos' contentions that his July 30, 2007, filing was not a supernumerary, late-filed appeal petition and that he had been denied due process.

Colleen A. Carroll for the Administrator.
Joseph R. Fritz, Tampa, Florida, for Lancelot Kollman Ramos.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On October 2, 2007, I issued a Decision and Order as to Lancelot Kollman Ramos concluding Lancelot Kollman Ramos violated the regulations and standards issued under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Regulations and Standards].[1] On November 15, 2007, Lancelot Kollman Ramos filed a petition for rehearing.[2] On December 4, 2007, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed a response to Lancelot Kollman Ramos' Petition for Rehearing.[3] On December 5, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on the Petition for Rehearing. Based upon a careful review of the record, I deny Lancelot Kollman Ramos' Petition for Rehearing.

CONCLUSIONS BY THE JUDICIAL OFFICER

Lancelot Kollman Ramos raises four issues in his Petition for

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[1] *In re Octagon Sequence of Eight, Inc.* (Decision as to Lancelot Kollman Ramos), __ Agric. Dec. ___ (Oct. 2, 2007).

[2] "Motion for Rehearing of Default Decision and Order as to Lancelot Kollman Ramos a/k/a Lancelot Ramos Kollman" [hereinafter Petition for Rehearing].

[3] "Complainant's Response to Petition for Rehearing Filed by Respondent Lancelot Kollman Ramos."

Rehearing. First, Lancelot Kollman Ramos contends, when he filed his response to the Complaint, he was a pro se litigant and unaware of the specificity with which he was required to respond to the allegations in the Complaint.

I find no reasonable basis for Lancelot Kollman Ramos' ignorance of the provision in the rules of practice[4] that a failure to deny or otherwise respond to an allegation in a complaint is deemed an admission of that allegation. The Hearing Clerk served Lancelot Kollman Ramos with the Rules of Practice, the Complaint, and a service letter on July 5, 2005.[5] Section 1.136(c) of the Rules of Practice specifically provides that the failure to deny or otherwise respond to an allegation in the complaint shall be deemed an admission of the allegation, as follows:

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

7 C.F.R. § 1.136(c) (emphasis added).

Moreover, the Hearing Clerk, in the service letter accompanying the Rules of Practice, informed Lancelot Kollman Ramos that his failure to deny the allegations in the Complaint would constitute an admission of the allegations in the Complaint and a waiver of his right to a hearing, as

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[4]The rules of practice applicable to the instant proceeding are 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].

[5]United States Postal Service Track & Confirm for Receipt Number 7003 2260 0005 5721 4844.

follows:

> 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 four 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.

Letter dated May 2, 2005, from Joyce A. Dawson, Hearing Clerk, to Lancelot Kollman Ramos (emphasis in original).

Further still, I reject Lancelot Kollman Ramos' suggestion that his status as a pro se litigant operates as an excuse for his failure to deny or otherwise respond to the allegations in the Complaint. The Rules of Practice do not distinguish between persons who appear pro se and persons represented by counsel.[6] Therefore, Lancelot Kollman Ramos' status as a pro se litigant is not a basis on which to grant his Petition for Rehearing or to set aside the default decision.[7]

Second, Lancelot Kollman Ramos contends he denied the allegations

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[6]*In re Bodie S. Knapp*, 64 Agric. Dec. 253, 299 (2005) (stating the Rules of Practice makes no distinction between persons who appear pro se and persons represented by counsel); *In re Mary Meyers* (Order Denying Pet. for Recons.), 58 Agric. Dec. 861, 865 (1999) (stating the respondent is not exempt from the Rules of Practice merely because the respondent was pro se at the time her answer was due).

[7]*In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating lack of representation by counsel is not a basis for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1559 (1997) (stating the respondent's decision to proceed pro se does not operate as an excuse for the respondent's failure to file an answer).

in the Complaint and raised meritorious defenses.

The record bellies Lancelot Kollman Ramos' contention that he denied the allegations in the Complaint and raised meritorious defenses. Lancelot Kollman Ramos' answer, dated July 15, 2005, and filed July 22, 2005, states in its entirety, as follows:

> July 15, 2005
>
> The Hearing Clerk, OALJ Room 1081, South Building, United States Department of Agriculture, Washington, DC 20250-9200
>
> Dear . Sir/Madam
>
> I Lancelot Ramos Kollmann am responding to a complaint In re : OCTAGON SEQUENCE OF EIGHT INC., a Florida corporation doing business as OCTAGON WILDLIFE SANCTUARY AND OCTAGON ANIMAL SHOWCASE; PETER OCTAVE CARON an individual; LANCELOT KOLLMANN an individual and MANUEL RAMOS an individual: AWA DOCKET # 05-0016.
>
> I Lancelot Kollmann as an individual am to requesting an oral hearing of this complaint. Please send any or all responses to this address P.O Box 221 Balm, Fl 33503
> Phone # 813-633-6930 or 813-376-1023
>
> Sincerely, Lancelot Kollmann
>
> Signature

Therefore, I reject Lancelot Kollman Ramos' contention that he denied the allegations in the Complaint and raised meritorious defenses.

Third, Lancelot Kollman Ramos argues I erroneously concluded his July 30, 2007, filing is a supernumerary, late-filed appeal petition and I erroneously declined to consider the issues in his July 30, 2007, filing.

I have reviewed the record and find, for the reasons set forth in *In re*

Octagon Sequence of Eight, Inc. (Decision as to Lancelot Kollman Ramos), __ Agric. Dec. ___, slip op. at 10-11 (Oct. 2, 2007), that I properly concluded Lancelot Kollman Ramos' July 30, 2007, filing is a supernumerary, late-filed appeal petition and that I properly declined to consider the issues in the July 30, 2007, filing.

Fourth, Lancelot Kollman Ramos contends he has been denied due process.

Lancelot Kollman Ramos' failure to deny or otherwise respond to the allegations in the Complaint is deemed, for purposes of this proceeding, 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, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding and a default decision was properly issued under the Rules of Practice. The application of the default provisions of the Rules of Practice does not deprive Lancelot Kollman Ramos of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[8]

For the foregoing reasons and the reasons set forth in *In re Octagon Sequence of Eight, Inc.* (Decision as to Lancelot Kollman Ramos), __ Agric. Dec. ___ (Oct. 2, 2007), Lancelot Kollman Ramos' Petition for Rehearing is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for rehearing. Lancelot Kollman Ramos' Petition for Rehearing was timely filed and automatically stayed *In re Octagon Sequence of Eight, Inc.*

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

(Decision as to Lancelot Kollman Ramos), __ Agric. Dec. ___ (Oct. 2, 2007). Therefore, since Lancelot Kollman Ramos' Petition for Rehearing is denied, I hereby lift the automatic stay, and the Order in *In re Octagon Sequence of Eight, Inc.* (Decision as to Lancelot Kollman Ramos), __ Agric. Dec. ___ (Oct. 2, 2007), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Rehearing as to Lancelot Kollman Ramos.

For the foregoing reasons, the following Order is issued.

ORDER

1. Lancelot Kollman Ramos, 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.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Lancelot Kollman Ramos.

2. Lancelot Kollman Ramos is assessed a $13,750 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to Colleen A. Carroll within 60 days after service of this Order on Lancelot Kollman Ramos. Lancelot Kollman Ramos shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0016.

3. Lancelot Kollman Ramos' Animal Welfare Act license (Animal Welfare Act license number 58-C-0816) is revoked.

Paragraph 3 of this Order shall become effective on the 60th day after service of this Order on Lancelot Kollman Ramos.

RIGHT TO JUDICIAL REVIEW

Lancelot Kollman Ramos has the right to seek judicial review of the Order in this Order Denying Petition for Rehearing as to Lancelot Kollman Ramos in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of the Order in this Order Denying Petition for Rehearing as to Lancelot Kollman Ramos. Lancelot Kollman Ramos must seek judicial review within 60 days after entry of the Order in this Order Denying Petition for Rehearing as to Lancelot Kollman Ramos.[9] The date of entry of the Order in this Order Denying Petition for Rehearing as to Lancelot Kollman Ramos is December 13, 2007.

In re: FOR THE BIRDS, INC., AN IDAHO CORPORATION; JERRY LEROY KORN, AN INDIVIDUAL; MICHAEL SCOTT KORN, AN INDIVIDUAL; AND ALBERTSON'S, INC., A DELAWARE CORPORATION.
AWA Docket No. 06-0005.
Ruling.
Filed December 20, 2007.

AWA.

Colleen A. Carroll for APHIS
Raymond Willis, John T. Bujak, Charles F. Cole for Respondents
Ruling by Administrative Law Judge Jill S. Clifton

First Order Amending Case Caption

The Complainant, the Administrator of the Animal and Plant Health

[9] 7 U.S.C. § 2149(c).

Inspection Service, United States Department of Agriculture ("APHIS"), is represented by Colleen A. Carroll, Esq. The Respondent For the Birds, Inc. is represented by Raymond Willis, Chairman of the Board of Directors, and by John T. Bujak, Esq. The Respondents Jerry Leroy Korn and Michael Scott Korn are represented by John T. Bujak, Esq. The Respondent New Albertson's, Inc., formerly known as Albertson's, Inc., has been represented by Charles F. Cole, Esq. and is currently represented by Ronald T. Mendes, Esq.

The Motion to Amend Case Caption, filed October 29, 2007, is GRANTED. Hereafter, the case caption is

In re: FOR THE BIRDS, INC., an Idaho	)	
corporation; JERRY LEROY KORN,	)	
an individual; MICHAEL SCOTT KORN,	)	
an individual; and NEW ALBERTSON'S,	)	
INC., a Delaware corporation formerly	)	
known as ALBERTSON'S, INC.,	)	**AWA Docket**
	)	**No. 06-0005**
Respondents	)	

The parties shall give notice to the Hearing Clerk and one another of any changes in mailing address, FAX number(s), phone number(s), or e-mail address, with a courtesy copy faxed to me at 202-720-8424, for Legal Secretary Trible Greaves, who works with me, whose phone is 202-720-8423, and whose e-mail is Trible.Greaves@usda.gov

Copies of this First Order Amending Case Caption shall be served by the Hearing Clerk upon each of the parties at their most current addresses of record, and to Ronald T. Mendes, Esq., SUPERVALU INC., 250 Parkcenter Blvd., Boise, ID 83706; and to Charles F. Cole, Esq., Albertson's LLC, 250 Parkcenter Blvd., Boise, ID 83726. The Hearing Clerk shall enclose with each mailing, including to Mr. Mendes and to Mr. Cole, a copy of the Consent Decision and Order as to New Albertson's, Inc., which I am issuing today; and the Second Order Amending Case

Caption, which I am issuing today.
Done at Washington, D.C.

In re: AWB LTD. AND ITS AFFILIATED COMPANIES.
DNS-FAS Docket No. 08-0016.
Ruling.
Filed December 17, 2007.

DNS.

Stanley McDermott, III and Sarah J. Sterken for Respondent.
Ruling by Administrative Law Judge Victor W. Palmer.

ORDER OF DISMISSAL

Upon consideration of the Petition, the Motion to Dismiss filed on behalf of the United States Department of Agriculture (USDA) by its Foreign Agricultural Service (FAS), and arguments the attorneys for the parties summarized in a telephone conference held on December 17, 2007, the petition is hereby **DISMISSED.**

The petition sought a declaratory order vacating the USDA's December 20, 2006 Notice of Suspension and Proposed Debarment of the petitioner and terminating the debarment proceeding that was being conducted. The petitioner sought to raise various procedural irregularities in the way FAS has conducted the proceeding and the lack of timeliness of any decision that shall ensue.

I have concluded that I lack jurisdiction to give the relief sought. My power as an Administrative Law Judge in respect to decisions of a suspending or debarring official of USDA is limited to those expressed in 7 C.F.R. §§ 3017.765 and 3017.890, and I may not vacate the proceeding before the decision itself has been entered. However, this order of dismissal, is not meant to prejudice or bar petitioner, if it may need to appeal an adverse decision entered against it in the pending debarment proceeding, to again raise the issues of timeliness and the procedural irregularities it set forth in the dismissed petition.

_____

In re: IDAHO RESEARCH FOUNDATION.
PVPA Docket No. 07-0138.
Remand Order.
Filed July 18, 2007.

PVPA – Plant variety protection – Vacate decision – Remand order.

The Judicial Officer remanded the proceeding to the Commissioner, Plant Variety Protection Office, in order to provide the Commissioner with an opportunity to weigh all the facts that may be relevant to the proceeding.

Robert A. Ertman, for Commissioner.
James D. Holman, Idaho Falls, ID, for Western Marketing, LLC.
Michelle M. Donarski, Fargo, ND, for Valley Tissue Culture, Inc.
Initial decision issued by Paul M. Zankowski, Commissioner, Plant Variety Protection Office, Science and Technology Programs, AMS, USDA.
Decision and Order issued by William G. Jenson, Judicial Officer.

Idaho Research Foundation applied for plant variety protection of the Western Russet potato under the Plant Variety Protection Act, as amended (7 U.S.C. §§ 2321-2582) [hereinafter the Plant Variety Protection Act]. Valley Tissue Culture, Inc., filed a protest asserting the Western Russet variety is not eligible for protection under the Plant Variety Protection Act. On March 1, 2007, the Commissioner, Plant Variety Protection Office [hereinafter the Commissioner], issued a decision upholding Valley Tissue Culture, Inc.'s protest and concluding the Western Russet variety is not eligible for protection under the Plant Variety Protection Act. In a petition dated April 3, 2007, Western Marketing, LLC, acting on behalf of Idaho Research Foundation, appealed the Commissioner's denial of plant variety protection to the Judicial Officer and requested a formal hearing pursuant to 7 C.F.R. § 97.300(d). Valley Tissue Culture, Inc., filed a response to Western Marketing, LLC's appeal, dated April 25, 2007, and Western Marketing, LLC, filed a reply, dated May 29, 2007.

On June 15, 2007, the Commissioner filed a motion for remand requesting remand of the instant proceeding for consideration of facts

raised in affidavits attached to Western Marketing, LLC's May 29, 2007, reply. I provided Western Marketing, LLC, and Valley Tissue Culture, Inc., each with an opportunity to file a response to the Commissioner's motion for remand. On July 9, 2007, Western Marketing, LLC, filed a response to the Commissioner's motion for remand stating it did not object to the Commissioner's motion. On July 11, 2007, Valley Tissue Culture, Inc., filed a response to the Commissioner's motion for remand opposing the Commissioner's motion. I have considered all of the arguments in the Commissioner's motion for remand and Western Marketing, LLC's and Valley Tissue Culture, Inc.'s responses.

In order to provide the Commissioner an opportunity to weigh all the facts that may be relevant to the instant proceeding, I grant the Commissioner's motion for remand. For the foregoing reason, the following Order is issued.

ORDER

1. The Commissioner's March 1, 2007, decision upholding Valley Tissue Culture, Inc.'s protest and concluding the Western Russet variety is not eligible for protection under the Plant Variety Protection Act is vacated.

2. The instant proceeding is remanded to the Commissioner for consideration of facts asserted in affidavits attached to Western Marketing, LLC's May 29, 2007, reply; for consideration of any other evidence properly submitted to the Commissioner; and for the issuance of a decision upholding or denying Valley Tissue Culture, Inc.'s protest.

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ANIMAL QUARANTINE ACT

DEFAULT DECISIONS

In re: RICHARD DAVIS.
A.Q. Docket No.07-0065.
Default Decision and Order.
Filed July 31, 2007.

AQ – Default.

Lauren C. Axley for APHIS.
Respondent Pro se.
Default Decision by Chief Administrative Law Judge Marc R. Hillson.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of goats, swine, tortoises, and cervids (9 C.F.R. §§ 74.1 et. seq.), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 et seq. and 9 C.F.R. §§ 99.1 et seq.

This proceeding was instituted under the Animal Health Protection Act (7 U.S.C. §§ 8301 et seq.), and the regulations promulgated thereunder (9 C.F.R. §§ 74.1 et seq.), by a complaint filed on February 23, 2007, 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 admission of the allegations in the complaint 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.Richard Davis, hereinafter referred to as the Respondent, is an individual with a mailing address of 1483 E. Springdale Drive, Provo, UT 84604.
2. On or about April 15, 2002, the Respondent moved three (3) markhor goats interstate from Missouri to Utah without a proper certificate in violation of 9 C.F.R. § 79.3(a)(5).
3. On or about September 27, 2002, the Respondent violated 9 C.F.R. § 85.7(c) of the regulations by moving seven (7) European hogs from Missouri to Utah without a proper certificate.
4. On or about September 27, 2002, the Respondent violated 9 C.F.R. § 79.3(a)(5) of the regulations by moving three (3) fainting goats from Missouri to Utah without a proper certificate.
5. On or about September 27, 2002, the Respondent violated 9 C.F.R. § 74.1 by moving two (2) African spurred tortoises from Missouri to Utah without a proper health certificate or certificate of veterinary inspection.
6. On or about September 27, 2002, the Respondent violated 9 C.F.R. § 77.36(b) by moving two (2) reindeer from Missouri to Utah without a proper certificate.

Conclusion

By reason of the Findings of Fact set forth above, the Respondent has violated the Animal Health Protection Act (7 U.S.C. §§ 8301 et seq.), and the regulations issued under the Act. Therefore, the following Order is issued.

Order

The Respondent is hereby assessed a civil penalty of three thousand, seven hundred and fifty dollars ($3,750.00). 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

Respondent shall indicate that payment is in reference to: A.Q. Docket No. 07-0065.

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.

Done at Washington, D.C.

In re: JPD AMERICA, LLC.
A.Q. Docket No. 07-0044.
Default Decision.
Filed October 1, 2007.

AQ – Default.

Corey Spiller for APHIS.
Respondent Pro se.
Default Decision by Chief Administrative Law Judge Marc R. Hillson.

Default Decision and Order

This is an administrative proceeding for the assessment of a civil penalty for violations of the Animal Health Protection Act (7 U.S.C. § 8301 et seq.) and regulations promulgated thereunder (9 C.F.R. § 95.4 et seq.), in accordance with the Rules of Practice in 7 C.F.R. § 1.130 et seq.

On December 14, 2006, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture,

instituted this proceeding by filing an administrative complaint against JPD America LLC (hereinafter, Respondent). The complaint was mailed by certified mail to the Respondent on December 14, 2006 and was served on Respondent on December 19, 2006. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Respondent's answer thus was due no later than January 8, 2007, twenty days after service of the complaint. Respondent never filed an answer to the complaint and the Hearing Clerk's Office mailed a No Answer Letter to the Respondent on January 31, 2007.

Therefore, Respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and failed to deny or otherwise 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 the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) or to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. Furthermore, since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and Respondent's failure to file an answer is deemed such an admission pursuant to the Rules of Practice, Respondent's failure to answer is likewise deemed a waiver of hearing. 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. JPD America, LLC, hereinafter referred to as the Respondent, is a limited liability company with a mailing address of 1780 Barnes Blvd. SW, Tumwater, WA 98512-0410.
2. On or about June 19, 2003, the Respondent imported fish food

samples containing fish meal into the United States from Japan (a region where bovine spongiform encephalopaty exists according to 9 C.F.R. § 94.18(a)(1)) without a veterinary certificate, in violation of 9 C.F.R. section 95.4(a)(1)(i).

Conclusion

By reason of the Findings of Fact set forth above, Respondent JPD America LLC violated the Animal Health Protection Act (7 U.S.C. § 8301 et seq.). Therefore, the following Order is issued.

Order

Respondent, JPD America LLC, is hereby assessed a civil penalty of two thousand dollars ($2,000.00). 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

Respondent, JPD America LLC, shall indicate that payment is in reference to A.Q. Docket No. 07-0044.

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 Linda Pena 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). Done at Washington, D.C.

_____

In re: MEN VAN DOAN.
A.Q. Docket No. 07-0041.
Default Decision.
Filed October 24, 2007.

AQ – Default.

Cory Spiller for APHIS.
Respondent Pro se.
Default Decision by Chief Administrative Law Judge Marc. R. Hillson.

Default Decision and Order

This is an administrative proceeding for the assessment of a civil penalty for violations of the Animal Health Protection Act (7 U.S.C. § 8301 et seq.) and regulations promulgated thereunder (9 C.F.R. § 94.1 *et seq.*), in accordance with the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

On December 13, 2006, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, instituted this proceeding by filing an administrative complaint against Men Van Doan (hereinafter, "Respondent"). The complaint was mailed by certified mail to the Respondent on December 13, 2006 and was returned by the United States Postal Service marked "unclaimed." Pursuant to Rule 1.127(c)(1) of the Rules of Practice, the complaint was remailed by ordinary mail on January 17, 2007. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Since service of a complaint under these circumstances is presumed by rule to be accomplished on the date of remailing, Respondent's answer thus was due no later than February 6, 2007, twenty days after service of the complaint (7 C.F.R. § 136(a)). Respondent never filed an answer

to the complaint and the Hearing Clerk's Office mailed Respondent a No Answer Letter on May 15, 2007.

Therefore, Respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and failed to deny or otherwise respond to an allegation of the complaint. 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) or to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. Furthermore, since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and Respondent's failure to file an answer is deemed such an admission pursuant to the Rules of Practice, Respondent's failure to answer is likewise deemed a waiver of hearing. 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. Men Van Doan is an individual with a mailing address of 3900 Socastee Blvd., Myrtle Beach, South Carolina, 29588.
2. On or about November 3, 2003, the Respondent violated 9 C.F.R.§ 94.1(b) by importing into the United States approximately 15 pounds of pork from Vietnam, a region of the world that has not been found to be free from rinderpest or foot-and-mouth disease pursuant to 9 C.F.R. § 94.1(a).

Conclusion

By reason of the Findings of Fact set forth above, Respondent Men Van Doan violated the Animal Health Protection Act (7 U.S.C. § 8301 *et seq*.) and regulations promulgated thereunder (9 C.F.R. § 94.1 *et seq*.) Therefore, the following Order is issued.

Order

Respondent, Men Van Doan, is hereby assessed a civil penalty of five hundred dollars ($500.00). 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

Respondent Men Van Doan shall indicate that payment is in reference to P.Q. Docket No. 07-0011 and A.Q. Docket No. 07-0041.

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 Men Van Doan 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).

Done at Washington, D.C.

In re: MARY D. KARDOR.
A.Q. Docket No. 07-0148.
Default Decision and Order.
Filed December 10, 2007.

AQ – Default.

Lauren C. Auxley for APHIS.
Respondent Pro se.
Default Decision by Chief Administrative Law Judge Marc R. Hillson.

Default Decision

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of ruminant meat from regions where rinderpest or foot-and-mouth disease exists (9 C.F.R. §§ 94.0 *et seq*.), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 9 C.F.R. §§ 99.1 *et seq*.

This proceeding was instituted under the Animal Health Protection Act (7 U.S.C. §§ 8301 et seq.), and the regulations promulgated thereunder (9 C.F.R. §§ 94.0 et seq.), by a complaint filed on June 20, 2007 and amended on August 14, 2007, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The amended complaint was mailed by certified mail to the Respondent and was returned by the United States Postal Service marked "unclaimed." Pursuant to Rule 1.127(c)(1) of the Rules of Practice, the complaint was remailed by ordinary mail on September 13, 2007. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Since service of a complaint under these circumstances is presumed by rule to be accomplished on the date of remailing, Respondent's answer thus was due no later than October 3, 2007, twenty days after service of the complaint (7 C.F.R. § 136(a)). Respondent never filed an answer to the complaint and the Hearing Clerk's Office mailed Respondent a No Answer Letter on October 4, 2007. 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 admission of the allegations in the complaint 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. Mary D. Kardor is an individual with a mailing address of 3538 Brookdale Drive N., Minneapolis, MN 55543.
2. On or about October 3, 2003, the Respondent imported from Ghana approximately 10 kg bush meat consisting of small antelope, smoked rats, and some unidentifiable species in violation of 9 C.F.R. § 94.1(b).

Conclusion

By reason of the Findings of Fact set forth above, the Respondent has violated the Animal Health Protection Act (7 U.S.C. §§ 8301 *et seq.)*, and the regulations issued under the Act. Therefore, the following Order is issued.

Order

The Respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). 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

Respondent shall indicate that payment is in reference to:
A.Q. Docket No. 07-0148.

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.
Done at Washington, D.C.

_____

DEFAULT DECISIONS

PLANT QUARANTINE ACT

In re: VIRGINIA AKER,
P.Q. Docket No. 07-0185.
Decision and Order by Reason of Default.
Filed December 7, 2007.

PQ – Default.

Carylenne S. Cockrum for APHIS.
Respondent. Pro se.
Default Decision by Administrative Law Judge Jill S. Clifton.

1. The Complaint, filed on September 4, 2007, alleged that Respondent Virginia Aker violated the Plant Protection Act (7 U.S.C. § 7701 *et seq*.) (hereinafter frequently "the Act"), and regulations promulgated under the Act.

Parties and Counsel

2. The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter frequently "APHIS").
3. APHIS is represented by Carlynne S. Cockrum, Esq., with the Office of the General Counsel, Regulatory Division, United States Department of Agriculture, 1400 Independence Ave SW, Washington DC 20250.
4. Respondent Virginia Aker is an individual with a mailing address in Idaho.

Failure to Answer

5. No answer to the Complaint has been received. The time for filing an answer expired on October 2, 2007. 7 C.F.R. § 1.136(a). APHIS filed a Motion for Adoption of Proposed Default Decision and Order on October 12, 2007, identifying APHIS's request for "a civil penalty of five hundred dollars ($500.00)." The Motion was sent to Respondent Virginia Aker by the Hearing Clerk on October 12, 2007, by certified

mail, return receipt requested, together with a cover letter.
6. APHIS's Motion states, among other things:

> In order to deter respondent Virginia Aker and others similarly situated from committing violations of this nature in the future, complainant (APHIS) believes that assessment of the requested civil penalty of five hundred dollars ($500.00) is warranted and appropriate.

7. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint, which are admitted by Respondent Virginia Aker's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq*.; *see also* 7 C.F.R. §380.1 *et seq*.

Findings of Fact

8. Respondent Virginia Aker is an individual with a mailing address in Idaho.
9. On or about November 22, 2002, Respondent Virginia Aker attempted to ship through the mail, from Hawaii to the continental United States, ten (10) cactus cuttings, in violation of Section 412 (a) of the Act (7 U.S.C. § 7712 (a)) and Section 318.13 of the Code of Federal Regulations (7 C.F.R. § 318.13).
10. On or about November 22, 2002, Respondent Virginia Aker attempted to ship through the mail, from Hawaii to the continental United States, one (1) cactus plant in soil, in violation of Section 412 (a) of the Act (7 U.S.C. § 7712 (a)) and Section 318.60 of the Code of Federal Regulations (7 C.F.R. § 318.60).

Conclusions

11. The Secretary of Agriculture has jurisdiction.
12. On or about November 22, 2002, Respondent Virginia Aker violated the Plant Protection Act (7 U.S.C. § 7701 *et seq*., specifically 7 U.S.C. § 7712 (a)), and regulations issued under the Act (7 C.F.R. § 318.13 *et seq*., specifically 7 C.F.R. §§ 318.13 and 318.60).
13. The assessment of a civil penalty for violations of the regulations governing the movement of plants from Hawaii into the continental United States (7 C.F.R. § 318.13 *et seq*.) is authorized by 7 U.S.C. § 7734 .
14. A civil penalty in the amount of five hundred dollars ($500) is appropriate, and the following Order is issued.

Order

15. Respondent Virginia Aker is hereby assessed a civil penalty of five hundred dollars ($500), as authorized by 7 U.S.C. § 7734. Respondent shall pay the $500 by cashier's check or money order or certified check, made payable to the order of the "**Treasurer of the United States**" and forwarded within sixty (60) 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. 07-0185**.
16. This Order shall be effective on the first day after this Decision and Order becomes final. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.
Done at Washington, D.C.

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APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in
§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial

Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief,

shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the

appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

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AGRICULTURAL MARKETING AGREEMENT ACT

Global Nuts and Fruits, LLC., and Iqubal S. Purewal, and Mena K. Purewal, AMAA-07-0070, 10/15/07.

ANIMAL QUARANTINE ACT

Ferries del Caribe, Inc. d/b/a Marine Express and Millennium express AQ-07-0088, 08/10/07.

Alfredo Valeriano Rodriguez, AQ-07-0039, 10/30/07.

Mary D. Kardor, AQ-07-0148, 12/10/07

ANIMAL WELFARE ACT

Robert McKnight d/b/a R-N-L's Shibas-N-More, AWA-06-0017, 7/17/07.

Zoological SubDistrict of the Metropolitan Zoological Park and Museum District d/b/a St. Louis Zoological Park, AWA-07-0169, 08/10/07.

Donald B. Arthur, Patricia Y. Arthur d/b/a Kennel Kare, AWA-07-0004, 8/28/07.

Brad and Janet Turner, AWA-07-0145, 09/07/07.

Kenneth Van Dusen d/b/a Lone Pine Brokerage, AWA-07-0160, 09/13/07.

Robert Q. Smith, AWA-02-0025, 09/14/07.

Larry F. Smith, AWA-02-0025, 09/14/07.

Wildlife Way Station, AWA-03-0034 & 07-0175, 09/14/07.

Emory University, AWA-07-0187, 09/25/07.

Bettie Logan d/b/a Logan's Rats, AWA- 07-0182, 10/01/07.

Dale E. Berrey, AWA-06-0021, 10/02/07.
Karl Mogensen d/b/a Natural Bridge Zoo, AWA-07-0144, 10/12/07.

Dr. Richard L. Miller, DVM, PA., AWA-06-0013, 11/20/07.

Joshua Rojas, d/b/a Rojas Wildlife, AWA-08-0008, 11/20/07.

Tom Kaelin d/b/a Kaelin's Kennel, AWA-05-0021, 12/03/07.

Mildred Schachtele, AWA-06-0022, 12/17/07.

New Albertson's Inc., AWA-06-0005, 12/20/07.

FEDERAL CROP INSURANCE ACT

J.D. Hininger, FCIA-07-0155, 07/30/07.

FEDERAL MEAT INSPECTION ACT

Stagno's Meat Company, Brian R. Stagno and Richard A. Stagno, FMIA-07-0191, 11/16/07

HORSE PROTECTION ACT

William R. Sloan, HPA-07-0200, 10/11/07.

Robert Raymond Black, II, HPA-07-0200, 10/19/07.

PLANT QUARANTINE ACT

GWR Produce, Inc., PQ-07-0136, 07/10/07.

Golden Country Oriental Food, LLC, PQ-07-0134, 07/10/07.

ProdiGene, Inc., PQ-07-0075, 7/26/07.

Inchcape Shipping Services, Inc., PQ-07-0061, 08/08/07.

Ferries del Caribe, Inc. d/b/a Marine Express and Millennium Express, PQ-07-0088, 08/10/07.

JetBlue Airways Corporation, PQ-07-0133, 8/28/07.

Stephen Malgay, PQ-07-0153, 09/06/07.
Puerto Rico Freight Systems, Inc., PQ-07-0164, 09/14/07.

M & N Aviation, Inc., PQ-07-0135, 09/14/07.

R.E. Mills Transportation, PQ-07-0143, 9/20/07.

Cielos del Peru, S.A., PQ-07-0017, 10/11/07.

Avi-Gran U.S.A., Inc., PQ-07-0180, 11/2/07.

Bruni International, Inc., PQ-07-0126, 11/07/07.

Stuart Leve d/b/a Stuart Leve, Inc., PQ-07-0118, 11/14/07.

The Scotts Company, LLC, PQ-08-0022, 11/27/07.

Airport Aviation Services, Inc., PQ-07-0132, 11/30/07.

R.W. Zebrowski, Inc., PQ-07-0126, 12/04/07.

Falcon Air Express, Inc., and Aeropostal Airlines, Inc., PQ-07-0018, 12/19/07.