AGRICULTURE DECISIONS

Volume 67

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Part One (General)
Pages 1- 530

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

AGRICULTURE DECISIONS

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

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions.*

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Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will be arranged by the controlling statute and will be published chronologically along with appeals (if any) of those ALJ decisions issued by the Judicial Officer.

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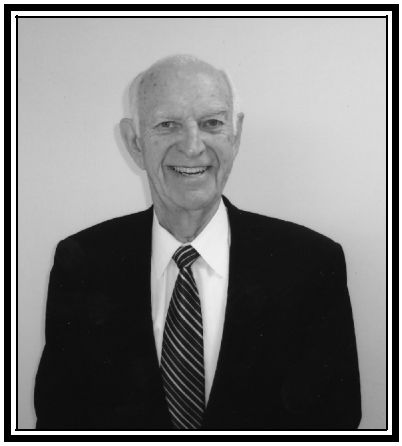
This 67th edition of Agriculture Decisions honors the three Chief Administrative Law Judges who have presided over the Office of Administrative Law Judges for these last two decades.



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Professional Experience
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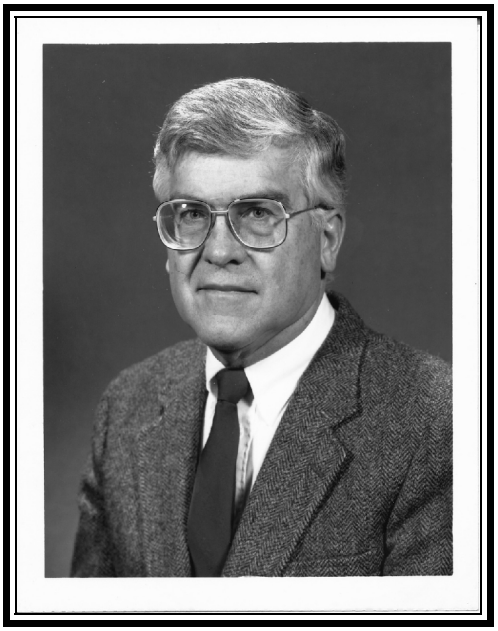
(August 3, 1997), Fellow of the American Bar Association's Section of Administrative Law and Regulatory Practice (October 14, 1999)

Publications Palmer and Bernstein, "Establishing Federal Administrative Law Judges as an Independent Corps: the Heflin Bill," 6 W. New Eng. L. Rev. 673 (1984), Palmer, "The Evolving Role of Administrative Law Judges," 19 New Eng. L. Rev. 755 (1984), Palmer, "Administrative Hearings for the General Practitioner," ABA Journal, (March, 1987), Palmer, "The Administrative Procedure Act: after 40 years still searching for independence," 26 Judges Journal, Winter 1987, at 34., Levant and Palmer, "Role of 'Hidden Judiciary' Expands in Importance," Legal Times, (August 2, 1982)



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Military Service Served on active duty as an 1st Lt. infantry officer in the U.S. Army from 1953-55.

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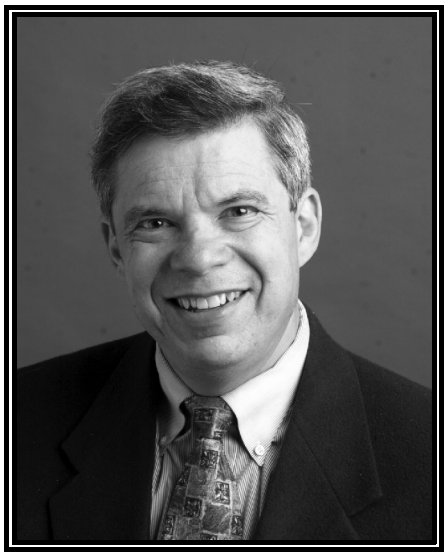
Publications "The Law of the Workplace: Rights of Employers and Employees" in 1986, and updated second edition in 1992; "Employer's Guide to Labor Relations" in 1974. Published by B.N.A.



Marc R. Hillson

USDA Chief Administrative Law Judge, 2004-2009 (Acting Chief 2003-2004); Member, Departmental Appeals Board, Health and Human Services, 2000-2003; Administrative Law Judge, Health and Human Services, 1999-2000; Administrative Law Judge, Social Security Administration's Office of Hearings and Appeals, 1997-2009. Chief, Mobile Sources

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Enforcement Branch, USEPA, 1984-1997. Litigation, rulemaker and supervisor with EPA 1977-1984. Attorney, Office of the Solicitor, U.S. Department of Labor, Occupational Safety and Health Division, 1972-1977.

Education New York University School of Law, J.D. 1972; Duke University, A.B. 1969.

Professional Association Activities Treasurer of the Forum of Administrative Law Judges (FORUM) (2007-2009), and a member of both FORUM and the Federal Administrative Law Judges Conference from 1999-through present.

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and
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ANIMAL HEALTH PROTECTION ACT

COURT DECISION

RANCHERS CATTLEMEN ACTION LEGAL FUND, et al. v. USDA.
No. CIV 07-1023.
Feburary 13, 2008.

AHPA – BSE – Intervene, right to – Injunction, preliminary – Final rule.

Canadian Cattlemen's Assoc. (CCA) seeks to interview in a case which certain persons (CCA) are adversely affected by a "Final rule." APHIS proposed a final rule whereby the prior ban on importation of Canadian cattle would be modified to allow cattle over 30 months of age and edible bovine products for such cattle. Court reviewed the intervention requirements: (1) intervenor must have a recognized interest in the litigation, (2) the interest must be one that would be impaired by the litigation, and (3) the interest must not be adequately protected by existing parties. The Court found that allowing the intervention would incur undue delay, but allowed CCA to file a brief.

United States District Court,
D. South Dakota,
Northern Division.

ORDER DENYING MOTION TO INTERVENE

LAWRENCE L. PIERSOL, District Judge.

Pending before the Court is a Motion to Intervene filed by the Canadian Cattlemen's Association ("CCA"). (Doc. 31.) Defendants resist the motion. (Doc. 62.)

This is an action for judicial review, under the Administrative Procedure Act, of an agency rule issued in September 2007, which went into effect on November 19, 2007. Plaintiffs in this case sued the United States Department of Agriculture ("USDA"), seeking a preliminary injunction barring implementation of a final rule allowing resumption of importation of Canadian cattle 30 months of age and older and edible

bovine products for such cattle.[1]The final rule is referred to as the "OTM Rule," meaning "over thirty months." Plaintiffs allege that Canadian cattle in that age group are the ones most likely to have infectious levels of Bovine Spongiform Encephalopathy ("BSE"), also known as "mad cow disease." Eating meat products contaminated with the agent for BSE is believed to cause variant Creutzfeldt-Jakob Disease ("vCJD") in humans, a degenerative, fatal neurological disease for which there is no known cure.

The CCA, a national organization representing the interests of Canada's nearly 90,000 beef producers, opposes Plaintiffs' challenge to the OTM Rule, The CCA seeks to intervene as defendants in this action pursuant to Rule 24 of the Federal Rules of Civil Procedure in order to protect the livelihood of "the men and women who raise Canadian cattle."CCA asserts that it should be allowed to intervene either pursuant to Rule 24(a), which governs intervention as of right, or pursuant to Rule 24(b), which establishes standards for permissive intervention.

A. Intervention as of Right

Rule 24(a) provides for intervention as of right as follows:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action; (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In *United States v. Union Electric Co.,* 64 F.3d 1152 (8th Cir .1995), the Court discussed the factors applicable to intervention as of right under Rule 24(a). The first factor, timeliness, is met in the present case as Defendants concede the motion to intervene is timely. The second factor is whether "a statute of the United States confers an unconditional right to intervene."There is no such right conferred on CCA by federal

---

[1]Since 2005, cattle could be imported from Canada, but only for slaughter before 30 months of age, and beef could be imported only if obtained from Canadian cattle that were under 30 months of age at slaughter, under the USDA's "Minimal-Risk Region" Rule.

statute and no party asserts that such a right exists. "Absent a federal statute conferring an unconditional right to intervene, a party's right to intervention under Rule 24(a) is subject to the analysis determined by subsection (2)."*Id.* at 1160, n.3, *quoting Harris v. Reeves,* 946 F.2d 214, 222 & n.10 (3d Cir.1991).

An applicant for intervention under Rule 24(a)(2) must satisfy a tripartite test:

> (1) the party must have a recognized interest in the subject matter of the litigation; (2) that interest must be one that might be impaired by the disposition of the litigation; (3) the interest must not be adequately protected by the existing parties.

Union Electric, 64 F.3d at 1160. The Court will apply this test to CCA.

1. *Recognized Interest.*

The Eighth Circuit has defined an interest sufficient to support intervention as follows:

> The applicant for intervention must have an interest in the subject matter of the litigation, i.e., an interest that is 'direct,' as opposed to tangential or collateral. Furthermore, that interest must be 'recognized,' i.e., both 'substantial' and 'legally protectable.'

Union Electric, 64 F.3d at 1161.

A party must show more than an economic interest. *See Curry v. Regents of the University of Minnesota,* 167 F.3d 420, 422-23 (8th Cir.1999) (mere economic interest of student organizations funded by mandatory fees held insufficient to support intervention in suit challenging constitutionality of such fees). The non-economic interests asserted by CCA are: avoiding harm "to the reputation of CCA's products-cattle and beef-as well as to CCA's interest in U.S. observance of international obligations with respect to nondiscriminatory beef and cattle trade with Canada."These, however, are business interests in avoiding economic pressures that would be created if the OTM Rule is enjoined. Harm to one's business reputation and trading all relate to CCA's members' economic interest in having additional markets for the products they sell. Various treaty obligations are also urged as a basis for intervention. CCA's interest in those treaty obligations is once again

an economic interest. These are not “legally protectable” interests that require intervention as of right.

2. *Impairment of the Interest.*

The second prong of the test for intervention under Rule 24(a)(2) is whether the interest of the applicant for intervention is one that might be impaired by the disposition of the litigation. CCA's economic interests would be impaired by an injunction against the OTM Rule. The Court has ruled, however, that CCA's economic interests are not enough to support intervention.

3. *Inadequate Representation by Existing Party.*

The third requirement for intervention under Rule 24(a)(2) is that the interest will not be adequately protected by the existing parties. The Eighth Circuit has stated that “[t]ypically, persons seeking intervention need only carry a ‘minimal’ burden of showing that their interests are inadequately represented by the existing parties.”*Union Electric,* 64 F.3d at 1168. CCA acknowledges that Defendants share CCA's interest in upholding the OTM Rule. CCA argues, however, that Defendants might alter the timing or manner of implementing the OTM Rule and CCA will not have a say in those alterations. Defendants have as great an incentive to safeguard the OTM Rule from Plaintiffs' challenge as does CCA, and it is speculation to suppose that Defendants' interests will diverge from CCA's interests at some time in the future. The motion to intervene as of right must be denied. The denial will be without prejudice to CCA's right to renew the motion in the event Defendants do not vigorously litigate the case. CCA also urges that the 2007 Final Rule does not go far enough as ti still precludes the importation of cattle born before March 1, 1999. That is a different claim that once again is an economic interest of CCA that it could attempt to pursue separately but not in this litigation. That claim will not be added to this litigation so, insofar as this litigation goes, the interests of CCA and the Defendants in defending the 2007 Final Rule are the same. There is no showing of inadequate representation by the existing parties.

B. Permissive Intervention

Permissive intervention is governed by Rule 24(b) of the Federal Rules of Civil Procedure. It provides, in relevant part:

Upon timely application anyone may be permitted to intervene in

> an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed.R.Civ.P. 24(b).

Whether to grant permissive intervention pursuant to Rule 24(b)(2) is wholly within the court's discretion. *See South Dakota ex rel Barnett v. United States Dep't of Interior,* 317 F.3d 783, 787 (8th Cir.2003). A court properly grants permissive intervention where (1) the motion is timely; (2) the movant shows independent jurisdictional grounds; and (3) the movant's claim or defense and the main action share common questions of law or fact. Fed.R.Civ.P. 24(b).*Union Electric,* 64 F.3d at 1170 n. 9. But the "principal consideration in ruling on a Rule 24(b) motion is whether the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights."*South Dakota ex rel Barnett,* 317 F.3d at 787. The first three factors listed above are not at issue in this case. Defendants do not dispute that the motion is timely, there is an independent showing of jurisdiction, and CCA's claims and the main action share common questions of law or fact. Thus, the Court must decide whether the intervention will unduly prejudice the adjudication of the rights of the original parties. Defendants assert that CCA's participation in this lawsuit would do little more than complicate and unnecessarily prolong the litigation to the detriment of the existing parties. The Court agrees. This case is to be decided on the basis of the administrative record. The Defendants are in the best position to defend that record and CCA cannot supplement the record. Any additional arguments CCA wants the Court to consider may be submitted by a brief amicus curiae. Accordingly,

IT IS ORDERED:

1. That Canadian Cattlemen's Association's Motion to Intervene, doc. 31, is denied without prejudice.

2. That Canadian Cattlemen's Association Opposition to Plaintiffs' Motion for Preliminary Injunction, doc. 34-4, shall be filed by the Clerk of Court as a brief amicus curiae.

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

In re: SOUTHEASTERN MILK ANTITRUST LITIGATION.
MDL No. 1899.
Master File No. 2:08-MD-1000.
Filed June 6, 2008.

Cite as: 2008 WL 2368212 (E.D.Tenn.)

AMMA – FMMO – Capper-Volstead Act – Filed rate doctrine – Mailbox price.

SMA alleges Capper-Volstead Act (7 U.S.C.§291) protects its activities which would otherwise be anti-competitive and/or unlawful. Capper-Volstead immunity must satisfy two requirements (1) the cooperative must be composed of members that are producers, (2) the organization must be involved in handling or marketing for its members. Plaintiffs allege SMA's anti-competitive and predatory practices are conduct outside of Capper-Volstead's limited immunities. SMA invoked the "filed rate" doctrine under *Keogh* (260 U.S. 156), however the court found that the minimum price rate under the FMMO did not control the Maximum price (Mailbox) price paid to producers. The FMMO affects the minimum price paid to producers through a complex regulatory price structure.

United States District Court,
E.D. Tennessee,
Greeneville Division.

MEMORANDUM OPINION AND ORDER

J. RONNIE GREER, District Judge.

This matter is before the Court on the motion of Southern Marketing Agency, Inc. ("SMA") and James Baird ("Baird") to dismiss plaintiffs' complaints for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Variations of the motion had been filed in all the cases except No. 2:07-CV-272 and No. 2:08-CV-53 and this order is intended to dispose of the pending motions in all cases. As grounds, SMA and Baird argue that plaintiffs' complaints fail to state a claim on which relief can be granted because (1) the Capper-Volstead Act, 7 U.S.C. § 291, immunizes SMA and Baird for the conduct alleged against them; (2) the filed rate doctrine bars plaintiffs' claims against SMA and Baird; and (3) plaintiffs have failed to plead specific allegations against SMA and Baird as required by *Bell Atlantic v. Twombly,* 127 S.Ct. 1955 (2007).

At least one of the motions filed also raises issues related to counts 3, 4 and 6 of the plaintiffs' complaint. The issue raised by plaintiffs with respect to *Bell Atlantic v. Twombly* was the subject of a prior order. This order will address the other issues raised by defendants. For the reasons which follow, the motions of SMA and Baird will be DENIED.

I. Background

Plaintiffs in these cases have sued various entities and/or individuals involved in either the marketing and sale of milk on behalf of dairy farmers or the purchase and processing of that milk. Plaintiffs have filed these actions on behalf of themselves and as a class action on behalf of various proposed classes. The complaints generally allege a far ranging conspiracy and combination among the various defendants to eliminate competition and fix prices in violation of § 1 of the Sherman Act and to monopolize and monopsonize in violation of § 2 of the Sherman Act. The complaints allege various other causes of action; however, the defendants SMA and Baird are named as defendants only in the conspiracy counts of the complaints. SMA is named as a defendant in all complaints and Baird is named as a defendant in the *Sweetwater, Baisley* and *Breto* complaints.

II. Factual Allegations

The following facts, taken as true for purposes of these motions, are from plaintiffs' complaints:

In 2001, Dean Foods ("Dean") and National Dairy Holdings, L.P. ("NDH"), the two largest milk bottlers in the United States, entered into long-term full-supply agreements [1] with Dairy Farmers of America, Inc. ("DFA") for the supply of raw Grade A milk to Dean's and NDH's bottling plants in the Southeast. These agreements vested DFA with control over access to Dean's and NDH's bottling plants, which amount to 77 percent of the fluid Grade A milk bottling capacity in the Southeast. DFA also jointly owns eight bottling plants in the Southeast which it also supplies exclusively.

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[1]Although these agreements are for one year terms, they can be renewed annually for 20 successive one year terms. The agreements contain significant penalties for non-renewal and significant financial incentives if renewed, virtually guaranteeing that the full supply agreements will be in effect for the full 20 years.

Access to bottling plants is critical to Southeast dairy cooperatives since each month their dairy farmer members must “touch base,” which is a regulatory requirement that dairy farmers deliver certain minimum quantities of their monthly milk production to bottling plants in order to qualify to participate in the Federal Milk Program. DFA's own membership in the Southeast lacked the milk production necessary to meet the requirements of its long term full-supply agreements with Dean, NDH and others. Defendants agreed that DFA would establish SMA, and that defendants would require previously independent dairy cooperatives to join SMA as a condition of access to defendants' bottling plants. SMA played a central role in implementing and maintaining defendants' conspiracy to eliminate competition for the purchase of Grade A milk.

Pursuant to this conspiracy, for example, Dean and DFA forced Maryland & Virginia Milk Producers Cooperative Association, Inc. to join SMA in order to have continued access to Dean's bottling plants. Other dairy cooperatives were subjected to the same coercive threats, and had no choice but to join SMA or lose access to bottling plants. As the result of defendants' agreement to force dairy cooperatives to join SMA as a condition to access defendants' bottling plants, SMA gained control of 90 percent of the milk produced in the Southeast.

SMA began operating in April 2002. Defendants designed SMA to “market” dairy farmers' Grade A milk to bottling plants in the Southeast in order to carry out the goals of defendants' conspiracy to monopolize, stabilize prices paid to farmers and engage in other unlawful acts specified in the complaint. “Marketing” milk in this context consists of SMA coordinating the hauling of milk from dairy farms to bottling plants, reporting related data to the USDA, and calculating prices for Grade A milk paid to dairy cooperatives or independent dairy farmers, less SMA and defendants' fees and expenses.

Baird is the general manager of SMA. As general manager, Baird has directed, participated in and authorized SMA's unlawful conduct. This participation includes Baird's attendance at numerous meetings with DFA and SMA management, and with dairy farmers and cooperatives. Baird is also the principal owner, officer and manager of several for-profit businesses that, under his control and direction, have participated in the conspiracy through defendants' agreement to utilize Baird and his for-profit businesses to haul milk for SMA. These businesses include Lone Star Milk Transport, Inc., BullsEye Transport,

LLC and Bullseye Logistics, LLC.

SMA, Baird and other defendants have maintained SMA's market power by collectively enforcing compliance with their conspiracy. SMA, Dean, NDH and others have acquired the Grade A milk sold to defendants' bottling plants by dairy cooperatives being marketed pursuant to DFA's full-supply agreements, *e.g.,* marketed by SMA, and Dean and NDH have refused to accept milk from dairy cooperatives that resist joining SMA. Consequently, dairy cooperatives must join SMA in order for their dairy farmer members to have access to bottling plants in the Southeast. SMA has monitored compliance with the conspiracy through its marketing of milk sold pursuant to defendants' conspiracy, including tracking prices paid by defendants and other processors. In addition, SMA and other defendants have agreed to utilize Baird's Bullseye companies to market milk for SMA, which further enables SMA and Baird to monitor and confirm compliance with defendants' conspiracy because SMA and Baird control the amounts, origins and destinations of nearly all Grade A milk shipped in the Southeast.

SMA requires its members to pay excessive, anti-competitive and unlawful fees and dues. Baird's Bullseye companies inefficiently haul excessive quantities of milk into the Southeast, thus generating large hauling bills. Since defendants have eliminated alternative means for dairy cooperatives to access bottling plants, dairy cooperatives have no other choice but to pay SMA's and Baird's fees, dues and bills. In addition, SMA and Baird, in collaboration with other defendants, have "flooded" the Southeast market by pooling on the Southeast market substantial and excessive quantities of Grade A milk produced outside of the Southeast with the intent of depressing prices for milk paid to Southeast dairy farmers.

III. Standard of Review

For the purpose of deciding this motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court must accept as true the facts as plaintiffs have pleaded them and construe the complaint in the light most favorable to plaintiffs. *Inge v. Rock Fin. Corp .,* 281 F.3d 613, 619 (6th Cir.2002). Defendants' motion must be denied where the complaint's "[f]actual allegations [are] enough to raise a right to relief above the speculative level of the assumption that all of the complaint's allegations are true."*Bell Atlantic v. Twombly,* 127 S.Ct. 1955, 1959 (2007)." In reviewing a Rule 12(b)(6) motion to dismiss, all well pleaded allegations

in the complaint are treated as true, and dismissal is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims that would entitle him or her to relief. *Downie v. City of Middleburg Heights,* 301 F.3d 688, 693 (6th Cir.2002) A complaint may not be dismissed based on a district court's assessments that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the fact finder.*Twombly,* 127 S.Ct. at 1970. While the court must construe the complaint in the light most favorable to the plaintiff, the court is not required to accept "the bare assertion of legal conclusions" as enough, nor does it "accept as true ... unwarranted factual inferences."*In re Sofamor Danek Group, Inc.,* 123 F.3d 394, 400 (6th Cir.1997).

IV. Analysis and Discussion

A. Capper-Volstead Act

The Capper-Volstead Act, 7 U.S.C. § 291, which provides a limited exemption from antitrust liability, provides:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: ...

7 U.S.C. § 291.

In order to qualify for Capper-Volstead immunity, a cooperative must satisfy two requirements: (1) the cooperative must be composed of members that are producers of agricultural products or cooperatives composed of such producers, and (2) the organization must be involved in the "processing, preparing for market, handling, or marketing" of the agricultural products of its members. SMA argues that it satisfies both of these requirements and is therefore entitled to the immunity provided by the Capper-Volstead Act.

The parties agree that Capper-Volstead immunity is an affirmative defense that must be pled and proven by defendants. *See Alexander v.*

National Dairy Farmers Org., 687 F.2d 1173, 1184 (8th Cir.1982), *cert. denied,*461 U.S. 937 (1983). Because Capper-Volstead is an affirmative defense, the court must first determine whether this matter is appropriate for disposition on a Rule 12(b)(6) motion before addressing the merits of the motion itself.

The purpose of a motion under Rule 12(b)(6) is generally to test the sufficiency of the complaint. *Ashiegbu v. Purviance,* 76 F.Supp.2d 824, 827 (S.D.Ohio.1998). The court will grant a motion for dismissal under Rule 12(b)(6) only if there is an absence of law to support a claim of the type made or a fact sufficient to make a valid claim, or if on the face of the complaint there is an insurmountable bar to relief indicating that the plaintiff does not have a claim. *Id.* at 828 (citing *Rauch v. Day & Night Mfg., 576 F.2d 697, 702(* 6th Cir.*1978*)). SMA and Baird, relying on *Rauch,* allege that the defense is properly asserted by a Rule 12(b)(6) motion here because the complaint, on its face, shows that relief is barred by the Capper-Volstead Act. If the defense is not apparent on the face of the complaint, however, it may still be raised by a motion to dismiss accompanied by affidavits or other evidentiary matter. *Jablon v. Dean Whitter,* 614 F.2d 677, 682 (9th Cir.1980). Such a motion may then be considered tantamount to one for summary judgment.

While defendants assert that Capper-Volstead immunity is apparent from the allegations of the complaint, they do so in largely conclusory fashion. On the one hand, defendants assert that their actions are legitimate business activities protected by Capper-Volstead. On the other hand, plaintiffs argue that defendants have engaged in a host of anti-competitive and/or predatory practices which place defendants' conduct outside Capper-Volstead's limited grant of immunity. Resolving such issues necessarily requires a fact intensive inquiry which can be completed by this Court only after proper discovery has been conducted.

While this issue may well be a proper one for resolution on summary judgment after discovery, this Court concludes that the affirmative defense of Capper-Volstead immunity cannot be resolved through a Rule 12(b)(6) motion and the motion will, therefore, be denied on this ground alone. In addition, it appears that the defendants' reliance on *Rauch* may be misplaced in that the *Rauch* complaint, on its face, indicated that the claim was barred by the applicable statute of limitations. Nothing quite so obvious appears on the face of the complaints in this case.

B. The Filed Rate Doctrine

The filed rate doctrine, sometimes referred to as the *"Keogh"* doctrine, originated in the decision of the United States Supreme Court in *Keogh v. Chicago and Northwestern Railway Co.,* 260 U.S. 156 (1922). In *Keogh,* the Supreme Court barred the plaintiffs' antitrust claim based on a price fixing conspiracy because the Interstate Commerce Commission had approved defendant's rates, even though those rates were higher than those possible in a competitive market. The Supreme Court held that a plaintiff could not recover for damages caused by paying transportation rates that had been allegedly set in violation of the Sherman Act, because the rates had been filed with and approved by the Interstate Commerce Commission. The Court held that a plaintiff could not suffer antitrust injury under the Sherman Act by paying rates that had been approved by the ICC and were thus the legal rates. *Id.* at 163.Although the doctrine was first applied to rates filed with the Interstate Commerce Commission, it has been subsequently extended to situations where rates set by various federal regulatory agencies have been challenged. *See, e.g., Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571 (Natural Gas Act, 15 U.S.C. §§ 717-717w); *Nantahala Power and Light Company v. Thornburg,* 476 U.S. 953 (1986) (Federal Power Act); *AT & T v. Central Office Telephone, Inc.,* 524 U.S. 214 (1998) (Communications Act of 1934).

The Supreme Court revisited and reaffirmed the *Keogh* Doctrine more than 60 years after it was first stated in *Square D Co. v. Niagara Frontier Tarif Bureau, Inc.,* 476 U.S. 409 (1986). There, the Court explained that the doctrine is not an antitrust immunity but that *"Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rates submitted to, and approved by, the ICC was the product of an antitrust violation."*Id.* at 422.In essence, then, the filed rate doctrine prevents plaintiffs from attacking judicially any "filed rate"-that is, one filed with and approved by the governing regulatory agency. *Wegoland Ltd. v. NYNEX Corp.,* 27 F .3d 17, 18 (2nd Cir.1994).

1. Milk Industry Regulation

Necessary to a resolution of this motion is an understanding of the government regulatory scheme for the milk industry, an industry which has been subject to extensive government regulation since the 1930's. The Sixth Circuit Court of Appeals has had occasion several times in

recent years to examine the regulatory scheme which applies to the milk industry. *See generally Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339 (6th Cir.1994); *Farmers Union Milk Marketing Cooperative v. Yeutter,* 930 F.2d 466 (6th Cir.1991); *Defiance Milk Products Co. v. Lyng,* 857 F.2d 1065 (6th Cir.1988). Much of the following background comes from those cases.

In 1937, Congress passed the Agricultural Marketing Agreement Act of 1937 ("AMAA") which authorizes the Secretary of Agriculture to regulate the dairy industry. The AMAA sets up a complex structure to regulate the milk industry and authorizes the Secretary of Agriculture to issue and amend milk marketing orders which set the minimum prices "which those who process dairy products, designated as handlers (as defined in 7 C.F.R. § 1040.9 (1994)), must pay the dairy farmers, designated as producers (as defined in 7 C.F.R. § 1040.12 (1994))." Prior to regulation, raw milk to be used as fluid milk commanded a much higher price than milk to be used in manufactured products, such as cheese, butter and dry milk. The minimum prices set by the Secretary of Agriculture guaranteed that producers would receive a uniform minimum price for their milk, regardless of its end use, eliminating much of the competition among farmers to sell as much of their milk as possible for fluid use.

Under the AMAA, the Secretary of Agriculture classifies Grade A milk into four classes for minimum pricing purposes based on the actual end use of the milk: Class I (beverage milk products); Class II (soft dairy products such as sour cream, cottage cheese, ice cream and custards); Class III (cheese); and Class IV (butter and nonfat dry milk). Milk handlers pay different prices for each class but producers receive a uniform "blend price" regardless of the end use of the milk they produce. These minimum prices are calculated on a monthly basis based upon a codified regulatory framework. In implementing this system of minimum prices, the Secretary of Agriculture has divided the country into milk marketing areas each governed by a separate federal milk market order ("FMMO"). The Secretary of Agriculture propagates these FMMOs only after formal, on the record rule making. 7 U.S.C. § 608(c)(3) and (4). Dairy farmers "pool" their Grade A milk on an order, delivering specified minimum quantities of Grade A milk to USDA regulated milk bottling plants associated with that order. The minimum blend price for an order is then based upon all the uses of the Grade A milk pooled on the order.

Although this regulatory scheme removes from the system significant competition among farmers who produce milk, the free market also affects prices to some extent. Although the minimum price is set by regulation, there is no maximum price. Cooperatives and independent producers are free to negotiate for prices in excess of FMMO minimum prices to reflect more accurately market forces. The amounts by which prices for Grade A milk exceed FMMO minimum blend prices are called "over-order" premiums. Market forces can, therefore, raise the price of milk but cannot lower it. The actual price a dairy farmer receives for Grade A milk is referred to as the "mailbox price." The mailbox price is comprised of the FMMO minimum blend price plus any overorder premiums and bonuses for volume or quality, minus marketing costs.

Before issuing, or amending, a milk marketing order, the Secretary of Agriculture must conduct a formal on-the-record rule making proceeding. The public must be notified of these proceedings and provided an opportunity for public hearing and comment. 7 U.S.C. § 608c(3). In addition, before a milk marketing order, or amendment, may become effective, it must be approved by the handlers of not less than 50 percent of the volume of milk covered by the proposed order or amendment and also must be approved by at least 2/3 of the affected dairy producers in the region. 7 U.S.C. § 608c(8).

2. The Parties' Positions

The defendants, SMA and Baird, focus on the allegations of plaintiffs' complaints that the defendants are "diluting" or "flooding" the pools of milk on FMMOs 5 and 7. FMMOs 5 and 7 generally cover the Southeast, which are at issue in this case. According to the plaintiffs, defendants increase the total volume of milk pooled to the point that it decreases the order's Class I utilization, thereby reducing the minimum blend price. In other words, the plaintiffs allege that defendants manipulate components of the formula for setting minimum blend prices in order to reduce the minimum prices. SMA and Baird argue that these "flooding" allegations represent a "practical impossibility" because the Secretary of Agriculture strictly controls and dictates what kind of milk and how much milk can be pooled in an order. They further argue that plaintiffs' allegations of flooding are inherently related to the issue of what volume of milk is allowed to be pooled in an order, which directly impacts the minimum blend price. Therefore, they argue, plaintiffs' complaints are in essence challenging the determinations of the Secretary of Agriculture regarding the volume of milk to be pooled in

an order and the lawful rates established by the Secretary.

Plaintiffs respond by arguing that defendants have not proven that minimum blend prices are filed with and approved by a regulatory agency so as to invoke the filed rate doctrine here. In addition, they point out that it is the "elimination of competition and the fixing of over-order premiums" which is at the heart of the plaintiffs' complaints in this case, not the minimum blend prices established by the Secretary of Agriculture and they note a distinction between the minimum blend prices and the minimum class prices set by the Secretary of Agriculture. They argue that the minimum blend price is determined by the actual end uses of all four classes of Grade A milk pooled in an order and that the minimum class prices are not the prices paid for milk to dairy farmers or cooperatives, or the prices challenged by their complaints. Plaintiffs also accuse the defendants of erroneously claiming that the market administrator determines "how much milk is eligible to be pooled in each respective order" and suggest that the regulations cited by the defendants have nothing to do with how much milk may be pooled in an order. Defendants reply that the statute, 7 U.S.C. § 608c(5)(A)(B) "unquestionably" establishes that both the minimum class price and the minimum blend price for Grade A milk is established by the market administrator.[2]

3. Analysis

In spite of the fairly large body of case law which now exists on the subject of the filed rate doctrine, the defendants have pointed this Court to no binding or persuasive authority where the doctrine has been applied under circumstances such as those presented in this case. Defendants rely on the case of *Servais v. Kraft Foods, Inc.,* 631 N.W.2d 629 (Wis.App.2001), *aff'd.,*643 N.W.2d 92 (Wis.2002). In *Servais,* dairy farmer plaintiffs filed suit under Wisconsin's antitrust law, alleging that they had been adversely affected by federal regional milk orders for the areas in which they produce milk. More specifically, they alleged that the defendants were able to lower the milk order's minimum prices through the manipulation of data. The court held that, because the milk orders were federally established rates, the filed rate doctrine precluded

[2]With all due respect to defendants' counsel, it appears to the Court that defendants' counsel do in fact misconstrue the regulations upon which they rely for their argument that the market administrator acting on behalf of the Secretary of Agriculture controls the volume of milk pooled on an order and misstate the provisions of the statute.

the court's substituting its judgment for that of the USDA as to what constituted a reasonable minimum milk price. *Servais,* 631 N.W.2d at 634.

The defendants' argument fails here for several reasons. As an initial matter, plaintiffs point out that even if their claim for damages were somehow barred by the filed rate doctrine, discovery should proceed because the filed rate doctrine does not bar claims for equitable relief, which they also seek in this case, citing *Georgia v. Pennsylvania R.R. Co.,* 324 U.S. 439 (1945). By not responding to the argument, defendants apparently concede that the filed rate doctrine does not bar claims for equitable relief. Given that there is no basis to limit discovery, this case would go forward in any event on plaintiffs' claims for equitable relief and the motion should be denied on this ground alone.

There are, however, other bases for the denial of defendants' motion. First of all, it appears that the Supreme Court has limited the application of the filed rate doctrine to cases in which the rates or tariffs at issue were in fact filed with and meaningfully approved by the regulatory agency. Defendants in this case have not established that the minimum blend prices at issue, or the mailbox prices, are rates which were filed with or approved by a regulatory agency. Secondly, even if the *Servais* court correctly applies the filed rate doctrine, plaintiffs in this case do not appear to be challenging the minimum prices set by the Secretary of Agriculture but rather the elimination of competition and the fixing of over-order premiums paid to dairy farmers. In fact, defendants acknowledge that those aspects of milk pricing are not regulated by the Department of Agriculture and it is these premiums which, in large part, have been eliminated or reduced based upon the alleged unlawful acts of the defendants. Although the AMAA has reduced competition in the milk industry significantly, market forces still play a substantial role in the prices actually paid to dairy farmers and cooperatives for the milk they produce. While Congress did authorize the Secretary of Agriculture to set certain minimum prices, Congress specifically left the determination of milk prices above this floor to market forces. Plaintiffs' complaints clearly assert that the defendants have stifled competition and fixed prices to the extent they are determined by market forces. In other words, plaintiffs clearly allege that the “mailbox price” is fixed at an artificially low amount because of defendants' alleged illegal conduct. These prices are neither regulated nor approved by the Department of Agriculture.

As interpreted by this Court, plaintiffs' complaints do not ask this Court to engage in judicial rate making and to substitute its judgment for that of the Department of Agriculture. It does not, for the reasons stated above, appear that the filed rate doctrine is implicated in this case. For these reasons, defendants' motion to dismiss on the basis of the filed rate doctrine will be denied.

C. The Non-conspiracy Counts

As noted above, SMA and Baird are not named as defendants in any of the counts of the complaints except for the conspiracy counts. It is somewhat baffling, therefore, that they seek dismissal of the other counts of the complaints. That defendants not sued are not entitled to an order of dismissal seems to be a proposition that could not be reasonably debated, except by SMA and Baird. This Court will not waste its time on such frivolous arguments.

V. Conclusion

For the reasons set forth above, the motions of SMA and Baird to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure are DENIED.[Doc. 32 in 2:07-CV-188; Doc. 50 in 2:07-CV-208; Doc. 36 in 2:07-CV-248; Doc. 99 in 2:08-CV-12 and Doc. 93 in 2:08-CV-14]. This order is also binding on the parties in No. 2:07-CV-272 and No. 2:08-CV-53.

SO ORDERED.

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AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

In re: MARVIN D. HORNE AND LAURA R. HORNE, D/B/A RAISIN VALLEY FARMS, A PARTNERSHIP AND D/B/A RAISIN VALLEY FARMS MARKETING ASSOCIATION, A/K/A RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION
and
MARVIN D. HORNE, LAURA R. HORNE, DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D/B/A LASSEN VINEYARDS, A PARTNERSHIP.
AMAA Docket No. 04-0002.
Filed April 11, 2008.

AMAA – Raisins – Civil penalties – Handler – Failure to inspect incoming raisins – Failure to hold raisins in reserve – Failure to pay assessments to RAC – Failure to allow inspection of records.

Frank Martin, Jr. and Babak A. Rastgoufard, for Complainant.
David A. Domina and Michael Stumo, Omaha, NE, for Respondents.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary proceeding on April 1, 2004, by filing a Complaint alleging that, during crop years 2002-2003 and 2003-2004, Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, did not comply with the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the federal order regulating the handling of Raisins Produced from Grapes Grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]. On October 25, 2004, the Administrator filed an Amended Complaint which made minor amendments to the Complaint. On August 10, 2005, with permission from Administrative Law Judge Victor W. Palmer [hereinafter the ALJ], the Administrator filed a Second Amended Complaint. In the Second Amended Complaint, the Administrator made amendments to conform the Complaint to the evidence presented at the hearing conducted on February 9-11, 2005, as well as to add Raisin Valley Farms Marketing Association, also known as Raisin Valley Marketing, an unincorporated

association, and Marvin D. Horne, Laura R. Horne, Don Durbahn, and the Estate of Rena Durbahn, a partnership, d/b/a Lassen Vineyards, as parties to the proceeding.

Under the Raisin Order, handlers[1] who first handle the raisins are required to: (1) obtain inspections of raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold acquired raisins designated as reserve tonnage for the account of the Raisin Administrative Committee [hereinafter the RAC] (7 C.F.R. §§ 989.66, .166); (3) file accurate reports with the RAC (7 C.F.R. § 989.73); (4) allow access to records to verify the accuracy of the records (7 C.F.R. § 989.77); and (5) pay assessments to the RAC (7 C.F.R. § 989.80).

Marvin D. Horne and the other respondents dispute that they are handlers claiming they never obtained any raisins through purchase or transfer of ownership to any of the business entities that Mr. Horne and his partners operate. Mr. Horne and his partners argue they did not *acquire* raisins within the meaning of the Raisin Order. They further argue they are not subject to the requirements of the Raisin Order because they are farmers/producers who have acted in good faith to advance the stated policy of the Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006).

The ALJ held an oral hearing in Fresno, California, on February 9-11, 2005 (Tr. I), and May 23, 2006 (Tr. II). Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented the Administrator during the portion of the hearing conducted on February 9-11, 2005. Babak A. Rastgoufard, Office of the General Counsel, United States Department of Agriculture, joined Mr. Martin during the May 23, 2006, portion of the hearing. David A. Domina and Michael Stumo, DominaLaw Group, Omaha, Nebraska, represented Mr. Horne and the other respondents.

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[1]The term "handler" means: (a) any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside the area; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: *Provided*, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) a producer who, in his capacity as a producer, blends raisins entirely of his own production in the course of his usual and customary practices of preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels; or (3) a dehydrator who, in his capacity as a dehydrator, blends raisins entirely of his own manufacture (7 C.F.R. § 989.15).

On December 8, 2006, the ALJ issued a Decision and Order in which he found that Marvin D. Horne, Laura R. Horne, Don Durbahn, and Rena Durbahn, now deceased, acting together as partners doing business as Lassen Vineyards,[2] at all times material to this proceeding, acted as a handler of raisins subject to the inspection, assessment, reporting, verification, and reserve requirements of the Raisin Order. The ALJ further found that Mr. Horne and partners violated the AMAA and the Raisin Order by failing to obtain inspections of acquired incoming raisins, failing to hold requisite tonnages of raisins in reserve, failing to file accurate reports, failing to allow access to their records, and failing to pay requisite assessments.

The ALJ concluded that the Farmer-to-Consumer Direct Marketing Act of 1976 does not exempt farmers/producers who act as handlers from regulation under federal marketing orders. The ALJ further concluded that the violations by Mr. Horne and partners require the entry of an order directing them to pay the RAC assessments they have failed to pay and to pay the RAC the dollar equivalent of the raisins they failed to hold in reserve. Moreover, the ALJ concluded that the violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order. Pursuant to 7 U.S.C. § 608c(14)(B), the ALJ assessed Mr. Horne and partners a $731,500 civil penalty and ordered payment of $523,037 for the dollar equivalent of raisins not held in reserve and $9,389.73 for owed assessments.

On January 4, 2007, Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, and Marvin D. Horne, Laura R. Horne, and Don Durbahn, a partnership, d/b/a Lassen Vineyards, filed a timely petition for review of the ALJ's Decision and Order and requested oral argument before the Judicial Officer. The request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues have been fully briefed; thus, oral argument would appear to serve no useful purpose.

DECISION

Findings of Fact

Marvin D. Horne has been a farmer since 1969. Mr. Horne and his wife Laura R. Horne grow Thompson seedless grapes for raisins. Their

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[2]In this Decision and Order, I refer to these respondents, as well as the partnership Raisin Valley Farms, as "Mr. Horne and partners" unless clarity dictates otherwise.

grape-growing and raisin-producing activities operate under the registered trademark "Raisin Valley Farms." Raisin Valley Farms is one of the largest operations in the California valley where most of the world's raisins are produced (Tr. I at 868-69). Marvin D. Horne and Laura R. Horne also do business as Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). Both Raisin Valley Farms and Raisin Valley Farms Marketing Association have the same business mailing address in Kerman, California. (Tr. I at 873-74.)

During the 2002-2003 and 2003-2004 crop years, Marvin D. Horne and Laura R. Horne also operated a partnership with Laura's father, Don Durbahn, and Laura's mother, Rena Durbahn (now deceased). This partnership did business and continues to do business, as Lassen Vineyards, also in Kerman, California. Prior to 2002, Lassen Vineyards was exclusively a farming partnership that produced Thompson seedless grapes made into raisins (Tr. I at 870). In 2002, Lassen Vineyards started operating raisin packing plant equipment at the Kerman, California, location (Tr. I at 871-73).

In 1998, Marvin D. Horne and Laura R. Horne expressed an interest to the RAC about acting as a handler of California raisins under the Raisin Order (CX 94). In 1999, Marvin D. Horne and Laura R. Horne filed a fictitious name certificate in the Fresno (California) County Clerk's Office in which they adopted the name "Raisin Valley Farms" (CX 95, CX 96). Then, for crop years 2001-2002, 2002-2003, and 2003-2004, Mr. and Mrs. Horne, under the Raisin Valley Farms' name, filed RAC-5 forms, notifying the RAC of their intention to handle raisins as a packer under the Raisin Order (CX 98, CX 100, CX 102). During this time-frame, Mr. Horne served 6 years as an alternate member of the RAC (Tr. I at 175; CX 103, CX 104).

Lassen Vineyards is a partnership formed in 1995 by Marvin D. Horne, Laura R. Horne, Don Durbahn, and the late Rena Durbahn. The partnership was created "to engaged [sic] in farming and any other farming related business." (RX 12 at 1.) The partnership owned land in Kerman, California, where it produced raisins and operated a raisin packing plant. Don Durbahn and Marvin A. Horne, Mr. and Mrs. Marvin D. Horne's son, supervised the packing activities at Lassen Vineyards (Tr. I at 879-80). The workers who performed the packing activities at Lassen Vineyards were "leased employees" who were leased to Lassen Vineyards by a partnership of Laura R. Horne and Rena Durbahn (Tr. I at 933-34).

In crop years 2002-2003 and 2003-2004, Lassen Vineyards operated the packing plant to process (i.e., to stem, sort, clean, grade, and

package) California raisins for themselves and, for a fee, for other raisin producers (Tr. I at 962; Tr. II at 25-27). During this time, Lassen Vineyards charged producers 12 cents per pound to pack raisins and $5 for each pallet upon which the boxed raisins were stacked (Tr. II at 28, 44). The cost for labor and packaging materials was included in the fee charged (Tr. II at 30-31, 44, 48). All raisins packed by Lassen Vineyards in crop years 2002-2003 and 2003-2004 were packaged in boxes stamped with the handler number 94-101. That number had been assigned to Marvin D. Horne and Laura R. Horne (Tr. I at 964-65). When questioned, Mr. Horne indicated that the difference between Lassen Vineyards and a toll packer was that the packed product could leave Lassen Vineyards without the farmer being required to pay fees up front (Tr. I at 979).

On numerous occasions, Mr. Horne exchanged communications with the United States Department of Agriculture and the RAC concerning the Raisin Order, including his responsibilities under the Raisin Order (CX 94, CX 105-CX 110; RX 91-RX 103, RX 105-RX 125, RX 127-RX 149). On March 15, 2001, Marvin D. Horne and Laura R. Horne, through their then attorney, wrote to the Secretary of Agriculture and asked whether the obligations of the Raisin Order regarding volume regulation, quality control, payment of assessments to the RAC, and reporting requirements would apply if Raisin Valley Farms had its raisins "custom packed" by a packer that would not take title to Raisin Valley Farms' raisins (RX 95). On April 23, 2001, the Deputy Administrator, Fruit and Vegetable Programs, United States Department of Agriculture, explained that under the scenario presented, Raisin Valley Farms would be neither a packer nor a handler, but that the custom packer would be both a packer and a handler. The Deputy Administer further explained that the custom packer "acquired" the raisins because it obtained physical possession of the raisins at a packing or processing plant. (7 C.F.R. § 989.17.) Furthermore, the custom packer would be "required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements." (RX 98.) The Deputy Administrator also provided Mr. Horne with portions of the 1949 proposed rule making and rule making hearing testimony discussing the treatment of this activity under the Raisin Order. The testimony establishes that the Raisin Order was intended to treat such custom packers (also called toll packers) as handlers (RX 98).

In a number of these communications, the Agricultural Marketing Service clearly informed Mr. Horne that his proposed activities would make him a handler subject to the Raisin Order. In a January 18, 2002,

letter, Maureen T. Pello, Senior Marketing Specialist in the Fresno, California, Field Office of the Agricultural Marketing Service, told Mr. Horne that his proposed activities would make him a handler under the Raisin Order.

> As we discussed, based upon your description of your proposed activities, you would be considered a handler under the Federal marketing order for California raisins (order). As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (which includes incoming and outgoing inspection), assessments, and reporting to the Raisin Administrative Committee (RAC).

RX 100. On May 20, 2002, the Administrator responding to an e-mail and a letter sent by Mr. Horne stated:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.

RX 101. Marvin D. Horne expressly disregarded the United States Department of Agriculture's interpretations of the terms of the Raisin Order that he requested. Mr. Horne did not use the custom packing firm to process his raisins, but rather, he elected to establish a family-owned packing operation at Lassen Vineyards where he packed raisins for his family, and, for a fee, Lassen Vineyards packed raisins for other growers (Tr. I at 977-78). Contrary to the advice Mr. Horne received from the United States Department of Agriculture, Lassen Vineyards did not pay any assessments, did not have any incoming inspections performed, did not file accurate reports, and did not hold any raisins in reserve with respect to any of the raisins Lassen Vineyards received from and packed for growers during the 2002-2003 and 2003-2004 crop years (Tr. I at 965-73).

During crop years 2002-2003 and 2003-2004, Mr. and Mrs. Horne also operated an unincorporated grower association named "Raisin Valley Farms Marketing Association." Mr. and Mrs. Horne created Raisin Valley Farms Marketing Association to "attract the market of buyers." (Tr. I at 876.) Sixty raisin growers were members of Raisin

Valley Farms Marketing Association (Tr. II at 55). Membership in Raisin Valley Farms Marketing Association allowed the raisin growers to market their raisins under the Hornes' trade name "Raisin Valley Farms" (Tr. I at 874-78).

When a Raisin Valley Farms Marketing Association member sold raisins through the Raisin Valley Farms Marketing Association, the association collected the purchase price from the buyer and deducted Lassen Vineyards' fee for the packing services as well as an accounting fee for Raisin Valley Farms Marketing Association and a contribution for a fund to protect members from customers who fail to pay. If the sale was negotiated through a broker, Raisin Valley Farms Marketing Association deducted a brokerage fee. After all the deductions were taken, Raisin Valley Farms Marketing Association remitted the balance to the grower. (Tr. II at 50-52.) Mr. Horne acknowledged that Lassen Vineyards benefitted from the fees it received from Raisin Valley Farms Marketing Association members (Tr. II at 52).

When Raisin Valley Farms Marketing Association received an order for raisins, Mr. Horne contacted one of the Raisin Valley Farms Marketing Association members inquiring if the member would accept the price offered. When Mr. Horne found a grower willing to accept the order, he told that grower when to bring the raisins to Lassen Vineyards' packing plant to be stemmed, sorted, cleaned, graded, and packaged (Tr. II at 55-57). The buyer picked up the packaged raisins and left a bill of lading. When the buyer paid for the raisins, Mr. Horne deposited the funds into an account. Originally, the funds were deposited into an account in the name of Mr. and Mrs. Horne. Mr. Horne changed the account to one named "Raisin Valley Farms Marketing, LLT." Now, Raisin Valley Farms Marketing Association has "a bone fide Association bank account" from which Mr. Horne, for Raisin Valley Farms Marketing Association, disburses funds to Lassen Vineyards, the brokers, and the growers. (Tr. II at 58-60.)

On or about August 22, 2002, Marvin Horne, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the RAC. Mr. Horne reported to the RAC that Raisin Valley Farms did not acquire any California raisins during the week ending August 3, 2002. (CX 62.) However, the record evidence shows that Raisin Valley Farms acquired more than 95,000 pounds of California raisins during this time period (CX 1, CX 2).

From September 5, 2003, to December 2, 2003, Laura Horne and/or Marvin Horne, on behalf of Raisin Valley Farms, submitted 13 inaccurate RAC-1 Forms, Weekly Report of Standard Raisin

Acquisitions, to the RAC.[3] The Hornes reported to the RAC that they did not acquire any California raisins during this time period (CX 63-CX 75). However, the record evidence leads to the conclusion that they acquired substantial amounts of California raisins during this time period (CX 3-CX 56).

From August 1, 2003, to November 30, 2003, Marvin Horne, on behalf of Raisin Valley Farms, submitted four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC (CX 76-CX 79). Mr. Horne reported to the RAC that he did not ship or dispose of any California raisins during this time period. However, the record evidence shows that Raisin Valley Farms shipped substantial amounts of California raisins during this time period (CX 3-CX 56, CX 247-CX 273).

During crop year 2002-2003, Marvin Horne, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC (CX 80). Mr. Horne reported to the RAC that Raisin Valley Farms did not have any California raisin inventories during this time period. However, the record evidence shows Raisin Valley Farms had inventories of California raisins in that Raisin Valley Farms was shipping substantial amounts of California raisins during this time period (CX 82-CX 87).

During crop year 2002-2003, Marvin Horne, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC (CX 81). Mr. Horne reported to the RAC that Raisin Valley Farms did not have any California raisin inventories during this time period. However, the record evidence shows Raisin Valley Farms had inventories of California raisins in that Raisin Valley Farms was shipping substantial amounts of California raisins during this time period (CX 1, CX 2, CX 81-CX 87).

During crop year 2002-2003, Mr. Horne and partners failed to obtain incoming inspections of California raisins on at least six occasions (CX 82-CX 87; Tr. I at 966-67).[4]

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[3]Each of the forms has the number "59" written on the upper left of the form. The number "59" is a packer number assigned by RAC for internal control (Tr. I at 189). In addition, each form has "Raisin Valley Farms" shown as the originating fax machine identifier (CX 63-CX 75).

[4]The record does not contain direct evidence that Mr. Horne and partners "received" raisins but there is ample evidence that they "packed-out" raisins (CX 82-CX 87). Logic allows me to conclude that raisins cannot be "packed-out" unless they are received.
(continued...)

During crop year 2003-2004, Mr. Horne and partners failed to obtain incoming inspections of California raisins on at least 52 occasions (CX 3-CX 54, CX 56; Tr. I at 966-67).

During crop year 2002-2003, Mr. Horne and partners failed to hold in reserve for 294 days approximately 49,350 pounds of California Natural Sun-dried Seedless raisins (CX 82-CX 87, CX 88 at 2, CX 92 at 6). The producer price for raisins was $394.85 per ton (CX 161 at 3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners failed to pay $9,742.93 to the RAC for compensation for failing to deliver any reserve raisins to the RAC.

During crop year 2003-2004, Mr. Horne and partners failed to hold in reserve for 298 days approximately 611,159 pounds of California Natural Sun-Dried Seedless raisins (CX 3-CX 56, CX 161). The producer price for raisins was $567 per ton (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)). Therefore, for the 2003-2004 crop year, Mr. Horne and partners failed to pay $173,263.58 to the RAC for compensation for failing to deliver any reserve raisins to the RAC. For this crop year, the RAC issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX 136, RX 137).

During crop year 2002-2003, Mr. Horne and partners failed to pay assessments to the RAC of approximately $222.60. During crop year 2003-2004, Mr. Horne and partners failed to pay assessments to the RAC of approximately $5,819.63.

Mr. Horne and partners failed to allow access to their records to the United States Department of Agriculture (CX 154; Tr. I at 422-24).

Conclusions of Law

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

2. On August 3, 2002, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)) by submitting an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the RAC.

3. From August 1, 2003, to November 30, 2003, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)) by submitting 13 inaccurate RAC-1 Forms, Weekly Reports of Standard Raisin Acquisitions, to the RAC.

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[4](...continued)
Combine that conclusion with Mr. Horne's testimony that incoming inspections were not obtained leads to the holding that Mr. Horne and partners violated the Raisin Order by not obtaining incoming inspections on the raisins. (Tr. I at 966-67.)

4. From August 1, 2003, to November 30, 2003, the respondents violated section 989.73(d) of the Raisin Order (7 C.F.R. § 989.73(d)) by submitting four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC.

5. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. § 989.73(a)) by filing an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC for crop year 2002-2003.

6. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. § 989.73(a)) by filing an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC for crop year 2002-2003.

7. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of California raisins on at least six occasions during crop year 2002-2003.

8. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of California raisins on 52 occasions during crop year 2003-2004.

9. The respondents violated sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold in reserve for 294 days approximately 49,350 pounds of California Natural Sun-dried Seedless raisins and by failing to pay to the RAC $9,742.93, the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003.

10. The respondents violated sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold in reserve for 298 days approximately 611,159 pounds of California Natural Sun-Dried Seedless raisins and by failing to pay to the RAC $173,263.58, the dollar equivalent of the California raisins that were not held in reserve for crop year 2003-2004.

11. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC of approximately $222.60 for crop year 2002-2003.

12. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC of approximately $5,819.63 for crop year 2003-2004.

13. The respondents violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow access to their records to the United States Department of Agriculture.

Discussion

The handling of California raisins is subject to the requirements of the Raisin Order that resulted from a request of the California raisin industry. The industry made the request to the Secretary of Agriculture pursuant to the AMAA.

In response to the request for a marketing order, the United States Department of Agriculture held a hearing in Fresno, California, on December 13-16, 1948. Based on the evidence received at the hearing, a decision was issued that recommended the promulgation of the Raisin Order. The recommendation included a rational basis for issuance of the Raisin Order and for its various provisions (14 Fed. Reg. 3083 (June 8, 1949)). Interested parties were given an opportunity to file written exceptions to the recommended decision. Ibid. Upon consideration of the exceptions that were filed and the record evidence presented at the hearing, the Secretary of Agriculture, on July 8, 1949, found that the issuance of the Raisin Order, as set forth in the recommended decision, would effectuate the declared policy of the AMAA and ordered that a referendum be conducted among producers of raisin variety grapes grown in California to determine whether at least two-thirds of them favored its issuance (14 Fed. Reg. 3858, 3868 (July 13, 1949)). The referendum was conducted and the requisite percentage of producers was found to favor the Raisin Order's terms and provisions. Those terms and provisions, as periodically amended through subsequent rulemaking proceedings, were fully applicable and governed the handling of California raisins during the 2002-2003 and 2003-2004 crop years when Mr. Horne and partners acted as first handlers of raisins.

Mr. Horne and partners raised 12 issues in their appeal. In issue 12, Mr. Horne and partners contend the ALJ erroneously allowed the Administrator to add parties after the hearing was substantially completed.

Ordinarily, leave to amend should be freely given in the absence of prejudice to the opposing party. *Waits v. Weller*, 653 F.2d 1288, 1290 (9th Cir. 1981), citing *Wyshak v. City National Bank*, 607 F.2d 824, 826 (9th Cir. 1979). However, the issue of amending a complaint by adding an additional party after the initial hearing raises concerns. The decision to amend a complaint is within the discretion of the trial judge, keeping in mind the strong policy in favor of allowing amendment, and considering four factors: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, and (4) the futility of amendment. *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994), *cert. denied*, 516 U.S. 810 (1995), citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.1987). Mr. Horne and partners, in their appeal, did not raise bad faith, delay, or futility as reasons for denying the amendments.

Therefore, those issues are not before me.

Prejudice is the most important factor when determining if an amendment should be allowed. *Zeneth Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971). The amendment of a complaint should be denied when a party suffers "undue prejudice" because of the amendment. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993). The determination whether there is sufficient prejudice to justify denying an amendment requires a balancing of the interests of the parties. The balancing

> entails an inquiry into the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material in the original pleading, and the injustice resulting to the party opposing the motion should it be granted.

6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1487 at 621-23 (2d ed. 1990).

For the reasons set forth below, I decline to reverse the ALJ's decision to allow the Administrator to amend the Complaint and add additional parties. First, and foremost, the decision to allow an amendment of a complaint lies within the discretion of the ALJ. Absent evidence that the ALJ abused that discretion, the decision should stand. Mr. Horne and partners presented no argument to convince me that the ALJ abused his discretion. Furthermore, my own examination of the record convinces me that the ALJ's decision to allow the Administrator to add parties was correct.

The following transcript passage from Mr. Horne's counsel's opening statement at the hearing on February 9, 2005, shows Mr. Horne was warned about the possibility of the amendment.

> MR. DOMINA: Now, I want to return to the entities for just this brief moment. Lasson [sic] Vineyards, the partnership that consists of these two folks and Mrs. Horne's parents, own this pack-line. They own the equipment inside this partnership, a California general partnership Lasson [sic] Vineyards, that partnership is a stranger to this case. Lasson [sic] Vineyards–
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> ADMINISTRATIVE [LAW] JUDGE PALMER: I might give you a word of warning. I recall some decisions by the Judicial Officer, past decisions, reviewing our decisions, not mine

> particularly, but saying that you can amend these complaints as you go along and they may well amend it to include them.
>
> MR. DOMINA: I'm aware of those decisions and I appreciate your comment.

Tr. I at 58-59. Furthermore, in the order authorizing the amendment to the Complaint adding parties, the ALJ made clear that "the new parties will be given the opportunity to present any evidence they believe is necessary to fully defend themselves from the amended complaint's allegations." (August 3, 2005, Order Authorizing Amendment of the Complaint To Conform To the Evidence.) The ALJ held five teleconferences with counsel between February 2006 and the hearing on May 23, 2006. At these teleconferences, the ALJ sorted out evidence, issues, and witness lists, issued subpoenas, and moved the hearing location at the request of Mr. Horne's counsel. On the morning of the hearing, additional off-the-record conferences resolved many of the issues prior to the hearing. On the afternoon of May 23, 2006, the ALJ presided over a hearing. Mr. Horne was the primary witness. At the conclusion of the hearing, there was no claim that the added parties needed more time to present their evidence (Tr. II at 261).

Although Mr. Horne and partners argue that the addition of the new parties should not have been allowed after the initial hearing, they must take significant responsibility for the Administrator's inability to identify all appropriate parties. On May 21, 2004, the ALJ set the date for the hearing as February 8-17, 2005, and ordered an exchange of witness lists, exhibit lists, and copies of exhibits. The ALJ ordered the Administrator to provide his documents by October 4, 2004. The Administrator filed his documents on September 20, 2004. The order also called for Mr. Horne and partners to provide their documents on November 15, 2004. The ALJ extended that deadline until December 15, 2004. The record does not indicate that Mr. Horne and partners provided the documents in a timely fashion. On January 3, 2005, Mr. Horne was served with a subpoena duces tecum (CX 164) seeking records regarding his raisin operations. In response, Mr. Horne provided hearing exhibits RX 1-RX 152. Mr. Horne admitted he did not fully comply with the subpoena.[5] (Tr. I at 947.) Without Mr. Horne's records, the Administrator's inability to identify all the various

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[5]I note that in November 2002, the Agricultural Marketing Service issued an investigative subpoena seeking Mr. Horne's records (CX 154). Mr. Horne "refuse[d] to produce any records" sought by the investigative subpoena (RX 106; Tr. I at 432).

intermingled entities involved in Mr. Horne's raisin operations before the initial hearing, is understandable.

Mr. Horne's business structure is confusing at best. There appear to be three main entities, Raisin Valley Farms, Lassen Vineyards, and Raisin Valley Farms Marketing Association. The main problem is that at various times Mr. Horne uses the name "Raisin Valley Farms" for each. Without Mr. Horne's personal knowledge, it is impossible to know which bank account in the name of Raisin Valley Farms is the account for which company. In fact, there was not a bank account in the name of Lassen Vineyards. (Tr. II at 58-60, 123-24.)

Raisin Valley Farms is a partnership between Marvin D. Horne and his wife Laura (Tr. I at 868). Mr. Horne grows grapes and makes raisins under the Raisin Valley Farms name. The Raisin Valley Farms name is trademarked. (Tr. I at 869.) Lassen Vineyards is a partnership between Marvin Horne, his wife Laura, and his father-in-law Don Durbahn.[6] (Tr. I at 869-70; RX 12.) Lassen Vineyards began as a farming operation, growing grapes and making raisins, adding a raisin packing facility on its property in 2002 (Tr. I at 870-71).

Another issue raised on appeal is Mr. Horne and partners' position that the Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006) exempts them from handler obligations under the Raisin Order because they were attempting to promote the policy of that statute. The ALJ found this argument "patently specious" and I agree. The Farmer-to-Consumer Direct Marketing Act does not exempt raisin producers from the requirements of the Raisin Order.

Furthermore, the type of activity that the Farmer-to-Consumer Direct Marketing Act sought to encourage was the farmers market where farmer and consumer could come together directly and avoid middlemen. Mr. Horne and partners presented no evidence that their activities, in fact, supported the goals of the Farmer-to-Consumer Direct Marketing Act. Mr. Horne and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne showed no connection between his business activities and the goals of the Farmer-to-Consumer Direct Marketing Act. Therefore, even if the Farmer-to-Consumer Direct Marketing Act exempted raisin producers from the mandates of the Raisin Order – which it does not – Mr. Horne and partners failed to demonstrate compliance with the goals of the

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[6]The partnership also included Laura Horne's mother Rena Durbahn until Mrs. Durbahn passed away.

Farmer-to-Consumer Direct Marketing Act.

In their appeal, Mr. Horne and partners question the constitutionally of the Raisin Order. First and foremost, I have no authority to judge the constitutionality of the various statutes administered by the United States Department of Agriculture. *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) ("The agency is an inappropriate forum for determining whether its governing statute is constitutional"). Therefore, Mr. Horne and partners questioning of the constitutionality of the Raisin Order falls on legally deaf ears. I need not point out to Mr. Horne and partners that the Court of Federal Claims recently found the arguments made in this appeal to be unavailing. *Evans v. United States*, 74 Fed. Cl. 554 (2006). The United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims Decision, 250 F. App'x 231 (2007), and the Supreme Court of the United States denied a petition for certiorari, 128 S. Ct. 1292 (2008). Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional, as I believe it to be.[7]

The Raisin Order's provisions apply to "handlers" who "first handle" raisins. A "handler" is defined in the raisin marketing order to include "any processor or packer" (7 C.F.R. § 989.15). A "packer" is defined as "any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins" (7 C.F.R. § 989.14). A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

> **§ 989.17 Acquire.**
>
> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him: . . . *Provided further*, That the term shall apply only to the handler who first acquires raisins.

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[7]Mr. Horne and partners suggest, at page 29 ¶ 102 of Respondents' Opening Brief On Appeal to Judicial Officer, USDA [hereinafter Respondents' Appeal Brief], that I might consider a "Rule 15(c)" proceeding the appropriate forum in which to address their constitutional argument. I need not address that question because, considering the results of the *Evans* case, conducting a "Rule 15(c)" proceeding would not alter the results.

7 C.F.R. § 989.17.

The record demonstrates that Mr. Horne and partners, in their operation of the packing house known as Lassen Vineyards, came within each of these definitions during crop years 2002-2003 and 2003-2004. As such, they were required as a handler to: (1) cause an inspection and certification to be made of all natural condition raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold in storage all acquired reserve tonnage as established by the controlling reserve tonnage regulation (7 C.F.R. §§ 989.66, .166); (3) file certified reports showing: inventory, acquisition, and other information required by the RAC to enable it to perform its duties (7 C.F.R. § 989.73); (4) allow the RAC access to inspect the premises, the raisins held, and all records for the purposes of checking and verifying reports filed (7 C.F.R. § 989.77); and (5) pay assessments to the RAC with respect to free tonnage acquired and any reserve tonnage released or sold for use in free tonnage outlets (7 C.F.R. § 989.80).

Mr. Horne and partners' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term "acquire." Moreover, if there were any ambiguity, the interpretation given by the United States Department of Agriculture both at the time of the issuance of the Raisin Order and in subsequent correspondence with the Hornes, is clear, straightforward, of long-standing, and controlling. *See Barnhart v. Walton*, 535 U.S. 212 (2002); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The 1949 recommended decision, which was adopted as part of the Secretary of Agriculture's final decision, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor"), in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the

> term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration[.]

14 Fed. Reg. 3083, 3086 (June 8, 1949).

This interpretation is consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

> Q Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?
>
> A The man who performs the packing operation, who is the packer.
>
> Q Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone else for a fee?
>
> A That is right.
>
> Q Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?
>
> A That is right. He is the man who would be held responsible for setting aside the required amount of raisins.
>
> Q I take it that that man would not have title to any raisins insofar as he is a toll packer; is that correct?
>
> A That is right.

ALJ Decision and Order, App. A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the term "acquire" as used in the Raisin Order should take precedence over the plain language of the Raisin Order and the interpretation of its meaning that was conveyed to them by the United States Department of Agriculture. The decision of Mr. Horne and partners not to follow the United States Department of Agriculture's interpretative advice, and, instead, to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided not to file accurate reports, not to hold raisins in reserve, not to have incoming raisins inspected, not to pay assessments, and not to allow inspection of their records for verification purposes.

In simple terms, Mr. Horne and partners, as a matter of law, acquired raisins, as first handlers, when raisins arrived at the processing/packing facility known as Lassen Vineyards. Their arguments that title to the raisins never transferred from the grower to Mr. Horne and partners under California law is unavailing. California law does not control, the Raisin Order does. Under the Raisin Order, the term "acquire" is a term of art that does not encompass an ownership interest but rather physical possession. Mr. Horne and partners obtained physical possession of – thus they "acquired" – raisins when a grower brought raisins to the facility.

I also must address Mr. Horne and partners' position that they did not process the raisins but merely leased equipment to producers who processed their own raisins. The argument defies common sense. Mr. Horne and partners own raisin processing equipment. Growers bring raisins to the facility for processing. The grower pays Mr. Horne and partners for use of the equipment not by the hour or day like most equipment leases but by the pound, i.e., the amount of product processed. That price includes supervision of the equipment by Mr. Horne's son, whose salary is paid by the partnership. The price also includes other workers who are provided by a different, but interlocking, partnership consisting of two members of the Lassen Vineyards partnership, Mr. Horne's wife and mother-in-law. In addition, the "lease" price also includes all packing material (on which Mr. Horne's handler number has been imprinted). Furthermore, the grower "leasing" the equipment need not stay at the facility during the use of the

equipment but can leave the location allowing Lassen Vineyards' employees to supervise the processing. Mr. Horne and partners can call what they do a "lease" or anything else they might want to call it, but the reality is that Mr. Horne and partners are processing/handling raisins.

Mr. Horne and partners argue the ALJ erred by failing to use a higher standard of proof than preponderance of the evidence (Respondents' Appeal Brief at 32-35). Reviewing their earlier filings before the ALJ, I found no suggestion to the ALJ that a higher standard of proof should be utilized. Absent such a suggestion to the ALJ, I am reluctant to reverse the ALJ's use of the preponderance of the evidence standard. However, to satisfy myself that the appropriate standard was applied, I reviewed the argument. I found the argument significantly lacking. While there are proceedings in which a greater standard is appropriate,[8] this proceeding is not one of them. Mr. Horne and partners did not demonstrate that a standard of proof higher than the preponderance of the evidence standard was appropriate. Therefore, I hold that the ALJ's use of the preponderance of the evidence standard was not error.

Mr. Horne and partners also argue the Administrator failed to meet his burden to prove the case by a preponderance of the evidence.[9] I disagree. I do not provide a laundry list of "fact[s] sought to be proved," but I note that I read the entire transcript and examined the evidence. The greater weight of that evidence leaves me with but one conclusion which is that Marvin Horne and partners put in place a scheme to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, they obtained an unfair competitive advantage over everyone in the raisin industry who complied with the Raisin Order.

The Administrator alleges that Mr. Horne and partners violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) "by failing to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access." (Second

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[8]*See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745 (1982) (proceeding to terminate parental rights); *Addington v. Texas,* 441 U.S. 418 (1979) (involuntary commitment proceeding); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation).

[9]Preponderance of evidence. Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not [citation omitted]. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability.

Black's Law Dictionary 1064 (5th ed. 1979).

Amended Compl. at 5 ¶ 12.) Mr. Horne and partners deny this allegation stating "[t]here was no evidence of noncompliance with subpoenas, information requests, or failure to fully comply with Government requests for data." (Respondents' Appeal Brief at 30 ¶ 104.) The record belies that claim showing that Mr. Horne failed to allow access as required by section 989.77 of the Raisin Order (7 C.F.R. § 989.77).

The Raisin Order makes clear that handlers shall provide access to their facilities and records, as follows:

> **§ 989.77 Verification of reports and records.**
>
> For the purpose of checking and verifying reports filed by handlers and records prescribed in or pursuant to this amended subpart, the committee, through its duly authorized representatives, shall have access to any handler's premises during regular business hours and shall be permitted at any such times to inspect such premises and any raisins held by such handler, and any and all records of the handler with respect to the holding or disposition of raisins by him and promotion and advertising activities conducted by handlers under § 989.53.

7 C.F.R. § 989.77.

On August 29, 2001, Maria Martinez Esguerra, a compliance officer for the Agricultural Marketing Service in the Fresno, California, office, was assigned to investigate whether Mr. Horne was packing and shipping raisins without obtaining inspections (Tr. I at 420). During the course of her investigation, Ms. Esguerra met with Mr. Horne and asked to review his raisin production, acquisition, sales, and disposition records (Tr. I at 421). Mr. Horne told Ms. Esguerra "that he would not release any information without a subpoena." (Tr. I at 421.)

Ms. Esguerra's testimony continued:

> On May 14 I had prepared a subpoena, a request for a subpoena for the administrator. But my declaration here also stated basically in my conversation or interview with Mr. Horne to which he had admitted to me that he produced and packed organic raisins during the crop years 2000 and 2001.
>
> There were other questions that I had asked, and I'd asked him

> about if he had packed organic raisins in cellophane bags and he said he did. In fact he even showed us the sizes of those cello packaged raisins.
>
> They were in sizes 16 ounces, 8 ounce and 1.5 ounces. However, he disclosed to, he did - he refused to disclose any more information regarding his sales.
>
> He has raisin production and acquisition records, and sales and dispositions, but again he said he would not release any information without a subpoena.
>
> Following that we had a subpoena prepared, and on November 26 I receive that, and I subsequently served it to Mr. Horne on that same day.
>
> On December 9, I went back to the house of Marvin Horne on Modoc Avenue pursuant to that subpoena, and I asked if I could speak with him and he met me at the door. He told me why he will not produce any records for me to review.

Tr. I at 421-23. Ms. Esguerra was asked: "After you served Mr. Horne with the subpoena, did he produce any records?" She responded: "No, he did not." (Tr. I at 423-24.)

Ms. Esguerra's testimony demonstrates that she sought access to Mr. Horne and partners' records which she is authorized to do under the Raisin Order. Mr. Horne refused unless Ms. Esguerra obtained a subpoena. Even though a subpoena is not required under the Raisin Order, Ms. Esguerra obtained one (CX 154). When she presented the subpoena to Mr. Horne, he still refused to comply with the Raisin Order and give her access to the records. Therefore, I conclude Mr. Horne and partners violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by refusing to provide Ms. Esguerra access to their records.

There are three components of the Order in this Decision and Order that mandate Mr. Horne and partners make monetary payments as a result of their violations of the Raisin Order. First, the Raisin Order requires a handler, who fails to deliver reserve tonnage, to compensate the RAC, as follows:

> **§ 989.166 Reserve tonnage generally.**
>
> . . . .

> (c) *Remedy in the event of failure to deliver reserve tonnage raisins*. A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver.

7 C.F.R. § 989.166(c). This provision of the Raisin Order leaves me no discretion on the matter and requires that I order Mr. Horne and partners to compensate the RAC for the reserve tonnage raisins they failed to deliver to the RAC. The Raisin Order also instructs me as to how to calculate the compensation owed by Mr. Horne and partners to the RAC.

> **§ 989.166 Reserve tonnage generally**.
>
> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins*. . . . The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types.

7 C.F.R. § 989.166(c).

For the 2002-2003 crop year, Mr. Horne and partners packed out 98,550 pounds of raisins (CX 82-CX 87). Applying the shrinkage factor (CX 92 at 6) for weight loss during processing, Mr. Horne and partners received 105,000 pounds of raisins in the 2002-2003 crop year. The reserve obligation for the 2002-2003 crop year was 47 percent (CX 88 at 2). Mr. Horne and partners' reserve obligation for that crop year was 49,350 pounds (.47 x 105,000 = 49,350). The producer price for raisins was $394.85 per ton (CX 161 at 3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners owe $9,742.93 to the RAC for compensation for failing to deliver any reserve raisins to RAC (49,350 pounds divided by 2000 pounds per ton = 24.675 tons; 24.675 tons x $394.85 per ton equals $9,742.93).

Similarly, for the 2003-2004 crop year, Mr. Horne and partners packed out 1,965,650 pounds of raisins (CX 3-CX 56). These raisins included natural seedless raisins and other varieties. Applying the 2003-2004 shrinkage factor for each variety indicates that Mr. Horne

and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). Mr. Horne and partners' reserve obligation for the 2003-2004 crop year was 611,159 pounds (.30 x 2,037,196 = 611,158.8). The producer price for raisins was $567 per ton (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)).[10] Therefore, for the 2003-2004 crop year, Mr. Horne and partners owe $173,263.58 to the RAC for compensation for failing to deliver any reserve raisins to the RAC (611,159 pounds divided by 2000 pounds per ton = 305.5795 tons; 305.5795 tons x $567 per ton equals $173,263.58).

The Raisin Order requires that each handler contribute to the costs associated with operating the RAC, as follows:

> **§ 989.80 Assessments.**
>
> (a) Each handler shall, with respect to free tonnage acquired by him, . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year. . . . Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler . . . during the applicable crop year and the total free tonnage acquired by all handlers . . . during the same crop year.

7 C.F.R. § 989.80(a). The assessment rate was established at $8 per ton (CX 90).

As noted in this Decision and Order, *supra*, for the 2002-2003 crop year, Mr. Horne and partners received 105,000 pounds of raisins. The reserve obligation for the 2002-2003 crop year was 47 percent, therefore, the free tonnage was 53 percent (CX 88 at 2). Mr. Horne and

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[10]The Agricultural Marketing Service calculated the 2003-2004 reserve obligation compensation using a producer price of $810 per ton. The record citation for this producer price is CX 93, the RAC marketing policy for the 2003-2004 crop year. The RAC marketing policy for the 2003-2004 crop year mentions a "probable price" at $810 per ton (CX 93 at 4). However, the interim final rule setting the Final Free and Reserve Percentages for the 2005-2006 crop year identifies the producer prices for the 2003-2004 crop year as $567 (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)). The Administrator's Brief in Opposition to Respondents' Appeal of the ALJ's Decision and Order was filed well after the date the producer prices were published in the Federal Register. The Administrator had an obligation to notify me that the original calculations were erroneous.

partners' free tonnage for that crop year was 55,650 pounds (.53 x 105,000 = 55,650). Mr. Horne and partners' assessment obligation for the 2002-2003 crop year is $222.60 (55,650 pounds divided by 2000 pounds per ton = 27.825 tons; 27.825 tons x $8 per ton = $222.60).

The calculation of the assessment for the 2003-2004 crop year is complicated by the multiple varieties processed during that year, including varieties without reserve requirements. Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). The free tonnage of natural seedless raisins was 1,426,037.2 pounds (.70 x 2,037,196 = 1,426,037.2). In addition, there were 28,870 pounds of other varieties which were all free tonnage (2,066,066 - 2,037,196 = 28,870). Thus, the total free tonnage for the 2003-2004 crop year was 1,454,907.2 pounds. At an assessment rate of $8 per ton, Mr. Horne and partners' assessment obligation for the 2003-2004 crop year is $5,819.63 (1,454,037.2 pounds divided by 2000 pounds per ton = 727.4536 tons; 727.4536 tons x $8 per ton = $5,819.63). The total assessment due to the RAC by Mr. Horne and partners for both crop years is $6,042.23.[11]

I find it necessary to briefly note that, although the Raisin Order requires payment of the assessment "upon demand" and the record contains no evidence of such demand for the 2002-2003 crop year, my decision ordering payment is appropriate. I conclude Mr. Horne and partners' failure to file accurate forms with the RAC noting the volume of raisins processed incapacitated the RAC ability to make the demand for payment of the assessment. The RAC 1999-2000 Analysis Report states:

> The documentation of deliveries, on an individual grower basis, establishes the database on which most other functions are based. This includes: the accountability of all raisin deliveries, responsibility of packers' administrative assessments, packers' reserve pool obligations and the basis upon which the RAC staff distributes reserve pool equity to the grower.

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[11]The Administrator, as the party seeking enforcement of the Raisin Order, should have provided a better road map to calculate both the assessment and compensation for failing to deliver any reserve raisins to the RAC. The Administrator should have provided a specific formula for determining the money owed as well as a record cite where each number utilized in the calculation of the money owed could be located.

RX 70 at 8. Without the information to determine the amounts of payment, the RAC could not demand the payment. Now that I have calculated the amount of the administrative assessments and reserve pool obligations, those amounts are due and payable.

The AMAA authorizes civil penalties for violations of marketing orders, such as the Raisin Order, issued under the AMAA.

> **§ 608c. Orders**
>
> **. . . .**
>
> **(14) Violation of order**
>
> . . . .
>
> (B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation. . . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B) (Supp. V 2005).[12]

In determining the amount of the civil penalty for violations of the Raisin Order, certain factors should be considered including:

> nature of the violations, the number of violations, the damage or potential damage to the regulatory program from the type of violations involved here, the amount of profit potentially

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[12]Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under the AMAA (7 U.S.C. § 608c(14)(B)) for each violation of a marketing order, by increasing the maximum civil penalty from $1,000 to $1,100 (7 C.F.R. § 3.91(b)(vii) (2005)).

> available to a handler who commits such violations, prior warnings or instructions given to [the violator], and any other circumstances shedding light on the degree of culpability involved.

In re Onofrio Calabrese, 51 Agric. Dec. 131, 154-55 (1992), *aff'd sub nom. Balice v. USDA*, No. CV–F–92–5483–GEB (E.D. Cal. July 14, 1998), *printed in* 57 Agric. Dec. 841 (1998), *aff'd*, 203 F.3d 684 (9th Cir. 2000), *reprinted in* 59 Agric. Dec. 1 (2000).

I have reviewed the recommendation of the Administrator regarding a civil penalty. I have examined the factors to be considered for determining the amount of the civil penalty. I examined the actions of Mr. Horne and partners as these actions relate to the factors, including an examination of their tax returns (RX 13) to determine the impact of the violations on the revenue generated by the partners. I find that intentional violations of the Raisin Order's requirements that a handler shall pay assessments, have inspections performed, hold a percentage of the raisins handled in reserve, and file specified reports are serious violations of both the AMAA and the Raisin Order. Furthermore, I find the violations by Mr. Horne and partners significantly increased the revenue generated by the partnership (RX 13). Therefore, I conclude a significant civil penalty is warranted to deter Mr. Horne and partners, as well as other handlers, from committing similar violations in the future.

As discussed in this Decision and Order, *supra*, I have found that Mr. Horne and partners committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing inaccurate reporting forms to the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC in crop year 2002-2003 and crop year 2003-2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar equivalent of the raisins not held in reserve.

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow the Agricultural Marketing Service to have access to their records.

The appropriate civil penalties for these violations are: (1) $300 per violation for filing inaccurate reporting forms, in violation of 7 C.F.R. § 989.73, for a total of $6,000; (2) $300 per violation for the failure to obtain incoming inspections, in violation of 7 C.F.R. § 989.58(d), for a total of $17,400; (3) $1,000 for the failure to allow access to records, in violation of 7 C.F.R. § 989.77; (4) $300 per violation for the failure to pay the assessments, in violation of 7 C.F.R. § 989.80, for a total of $600; and (5) $300 per violation for the failure to hold raisins in reserve, in violation of 7 C.F.R. §§ 989.66, .166, for a total of $177, 600. The total civil penalties assessed against Mr. Horne and partners for violating the Raisin Order in the 2002-2003 and 2003-2004 crop years is $202,600. I conclude that civil penalties in these amounts are sufficient to deter Mr. Horne and partners from continuing to violate the Raisin Order and will deter others from similar future violations.

For the foregoing reasons, the following Order is issued.

ORDER

1. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are assessed a $202,600 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:

Frank Martin, Jr.
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to Mr. Martin within 100 days after this Order becomes effective.

2. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are ordered to pay to the RAC $6,042.23 in assessments for crop years 2002-2003 and 2003-2004, and $183,006.51 for the dollar

equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Payments of the $6,042.23 for owed assessments and of the $183,006.51 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the RAC within 100 days after this Order becomes effective.

3. This Order shall become effective on the day after service on Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership.

RIGHT TO JUDICIAL REVIEW

Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, have the right to obtain review of the Order in this Decision and Order in any district court of the United States in which they are inhabitants or have their principal place of business.[13]

In re: GERAWAN FARMING, INC.
01 AMA Docket No. F&V 916-1 & 917-1.
In re: GERAWAN FARMING, INC.
AMAA Docket No. 02-0008.
Decision and Order.
Filed May 9, 2008.

AMAA – Peaches – Nectarines – First Amendment – Government speech – Cease and desist order – Civil penalty.

Sharlene Deskins, for the Agricultural Marketing Service.
Brian C. Leighton, Clovis, California, and James A. Moody, Washington, DC, for Gerawan Farming, Inc.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On August 13, 2001, Gerawan Farming, Inc. [hereinafter Gerawan],

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[13] 7 U.S.C. § 608c(14)(B).

filed a Petition[1] under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA]; the federal order regulating the handling of "Nectarines Grown in California" (7 C.F.R. pt. 916) [hereinafter the Nectarine Order]; the federal order regulating the handling of "Fresh Pears and Peaches Grown in California" (7 C.F.R. pt. 917) [hereinafter the Peach 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). Gerawan alleges that, beginning in the 1998-1999 crop year, assessments under the Nectarine Order and Peach Order used for speech and advertising violated Gerawan's free speech rights under the First Amendment of the Constitution of the United States. Gerawan seeks: (1) a declaration that the advertising and promotion under the Nectarine Order and Peach Order violate Gerawan's right to freedom of speech under the First Amendment of the Constitution of the United States; (2) an order that no assessments for advertising, promotion, or other speech-related purposes be collected from Gerawan under the Nectarine Order and Peach Order in the future; and (3) reimbursement of assessments paid by Gerawan under the Nectarine Order and the Peach Order which were used for speech-related purposes from and including the 1998-1999 crop year through the present (Pet. at 6).

On October 3, 2001, the Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], filed an answer denying the material allegations of the Petition and raising the following three affirmative defenses: (1) the Petition fails to state a claim upon which relief can be granted; (2) the Petition is barred by the doctrine of res judicata; and (3) the Petition is barred by the doctrine of collateral estoppel.

On September 26, 2002, the Agricultural Marketing Service filed a Complaint against Gerawan. The Agricultural Marketing Service filed the Complaint under the AMAA; the Nectarine Order; the Peach Order; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). The Agricultural Marketing Service alleges that, since May 1, 2001, Gerawan has failed to pay the full amount of assessments due on nectarines and peaches in violation of 7 C.F.R. §§ 916.41 and 917.37.

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[1]Gerawan entitles its Petition "Petition to Modify the Nectarine and Peach Marketing Orders and Their Advertising Regulations and Assessments, to Exempt Petitioner from Various Provisions of the Nectarine and Peach Marketing Orders and Any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Petition].

The Agricultural Marketing Service seeks an order assessing Gerawan a civil penalty and an order requiring that Gerawan cease and desist from further violations of the Nectarine Order and the Peach Order (Compl. at 4). On November 19, 2002, Gerawan filed an answer admitting the material allegations of the Complaint, but stating the assessments which it failed to pay violate Gerawan's right to free speech protected under the First Amendment of the Constitution of the United States.

On January 2, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] consolidated the proceeding instituted by Gerawan under 7 U.S.C. § 608c(15)(A), *In re Gerawan Farming, Inc.*, 01 AMA Docket No. F&V 916-1 & 917-1, and the enforcement proceeding instituted by the Agricultural Marketing Service under 7 U.S.C. § 608c(14)(B), *In re Gerawan Farming, Inc.*, AMAA Docket No. 02-0008 (Order Consolidating Cases). On February 18-21, 2003, and September 8-9, 2003, the ALJ presided over a hearing in Fresno, California. Brian C. Leighton, Clovis, California, and James A. Moody, Washington, DC, represented Gerawan. Sharlene Deskins, Office of the General Counsel, United States Department of Agriculture, represented the Agricultural Marketing Service. Gerawan called three witnesses and introduced 18 exhibits. The Agricultural Marketing Service called seven witnesses and introduced 72 exhibits.

On June 15, 2006, after Gerawan and the Agricultural Marketing Service filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision]: (1) concluding the requirement that Gerawan finance generic advertising under the Nectarine Order and the Peach Order abridges Gerawan's right under the First Amendment of the Constitution of the United States to freedom of speech; (2) exempting Gerawan from its obligation to pay withheld assessments that relate to promotion under the Nectarine Order and the Peach Order; (3) exempting Gerawan from its obligation to pay future assessments that relate to promotion under the Nectarine Order and the Peach Order; (4) ordering Gerawan to pay to the California Tree Fruit Agreement the amount of withheld assessments, plus interest, that relate to research projects and activities under the Nectarine Order and the Peach Order; (5) ordering Gerawan to cease and desist from withholding payment of assessments that relate to research projects and activities under the Nectarine Order and the Peach Order; and (6) denying the Agricultural Marketing Service's request for an order assessing a $150,000 civil penalty against Gerawan (Initial Decision at 56-59).

Gerawan and the Agricultural Marketing Service appealed to the

Judicial Officer. On September 8, 2006, the Agricultural Marketing Service filed a response to Gerawan's appeal petition, and on September 29, 2006, Gerawan filed a response to the Agricultural Marketing Service's appeal petition. On October 3, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

DECISION

Decision Summary

Based upon *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and a careful consideration of the record, I conclude: (1) the requirement that Gerawan finance generic advertising under the Nectarine Order and the Peach Order does not implicate Gerawan's First Amendment right to freedom of speech; (2) generic advertising under the Nectarine Order and the Peach Order is government speech not susceptible to First Amendment compelled-subsidy challenge; and (3) Gerawan's failure to pay assessments violates the Nectarine Order and the Peach Order. Consequently, I: (1) reverse the ALJ's June 15, 2006, Initial Decision; (2) dismiss Gerawan's Petition, filed August 13, 2001, in which Gerawan seeks exemption from assessments imposed under the Nectarine Order and the Peach Order and used for generic advertising; (3) order Gerawan to comply with the AMAA, the Nectarine Order, and the Peach Order; (4) order Gerawan to pay all of its past due assessments under the Nectarine Order and the Peach Order; and (5) assess Gerawan a civil penalty for its violations of the AMAA, the Nectarine Order, and the Peach Order.

Discussion

Glickman v. Wileman Bros. & Elliott, Inc.

The Supreme Court of the United States held in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), that generic advertising under the Nectarine Order and the Peach Order does not implicate the First Amendment right to freedom of speech of those compelled to fund the advertising. Specifically, the Supreme Court found the Nectarine Order and the Peach Order are comprehensive regulatory programs that have displaced many aspects of independent business activity, as follows:

> The legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.
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> In answering that question we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Wileman, 521 U.S. at 468-69.

The Court concluded that compelled funding of advertising that is part of comprehensive regulatory programs, such as the Nectarine Order and the Peach Order, does not implicate the First Amendment and rejected a compelled speech analysis, as follows:

> Our compelled speech case law, however, is clearly inapplicable to the regulatory scheme at issue here. The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, cf. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943), require them to use their own property to convey an antagonistic ideological message, cf. *Wooley v. Maynard*, 430 U.S. 705 (1977); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 18 (1986) (plurality opinion), force them to respond to a hostile message when they "would prefer to remain silent," see *ibid.*, or require them to be publicly identified or associated with another's message, cf. *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 88 (1980). Respondents are not required themselves to speak, but are merely required to make contributions for advertising.

Wileman, 521 U.S. at 470-71.

The Court described the regulatory framework in which generic

advertising does not implicate the First Amendment rights of those compelled to fund the advertising, as follows:

> Congress enacted the Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq.,* in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities. § 602(1). Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets; they are expressly exempted from the antitrust laws. § 608b. Collective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets. In order "to avoid unreasonable fluctuations in supplies and prices," § 602(4), these orders may include mechanisms that provide a uniform price to all producers in a particular market, that limit the quality and the quantity of the commodity that may be marketed, §§ 608c(6)(A), (7), that determine the grade and size of the commodity, § 608c(6)(A), and that make an orderly disposition of any surplus that might depress market prices, *ibid*. Pursuant to the policy of collective, rather than competitive, marketing, the orders also authorize joint research and development projects, inspection procedures that ensure uniform quality, and even certain standardized packaging requirements. §§ 608c(6)(D), (H), (I). The expenses of administering such orders, including specific projects undertaken to serve the economic interests of the cooperating producers, are "paid from funds collected pursuant to the marketing order." §§ 608c(6)(I), 610(b)(2)(ii).
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> Marketing orders must be approved by either two-thirds of the affected producers or by producers who market at least two-thirds of the volume of the commodity. § 608c(9)(B). The AMAA restricts the marketing orders "to the smallest regional production areas . . . practicable." § 608c(11)(b). The orders are implemented by committees composed of producers and handlers of the regulated commodity, appointed by the Secretary, who recommend rules to the Secretary governing marketing matters such as fruit size and maturity levels. 7 CFR §§ 916.23, 916.62, 917.25, 917.30 (1997). The committees also determine the annual rate of assessments to cover the expenses of administration, inspection services, research, and advertising and promotion. §§ 916.31(c), 917.35(f).

> Among the collective activities that Congress authorized for certain specific commodities is "any form of marketing promotion including paid advertising." 7 U.S.C. § 608c(6)(I). The authorized promotional activities, like the marketing orders themselves, are intended to serve the producers' common interest in disposing of their output on favorable terms. The central message of the generic advertising at issue in this case is that "California Summer Fruits" are wholesome, delicious, and attractive to discerning shoppers. See App. 530. All of the relevant advertising, insofar as it is authorized by the statute and the Secretary's regulations, is designed to serve the producers' and handlers' common interest in promoting the sale of a particular product.

Wileman, 521 U.S. at 461-62 (footnotes omitted).

Gerawan argues and the ALJ concludes that *Wileman* is inapposite because the tree fruit industry is now more competitive than during the time period covered by *Wileman*. However, I find the Nectarine Order and the Peach Order have not substantially changed since the Supreme Court concluded that the business entities that are compelled to fund generic advertising under the Nectarine Order and the Peach Order "do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme." *Wileman*, 521 U.S. at 469. The Nectarine Order and the Peach Order continue to provide for committees to administer the orders (7 C.F.R. §§ 916.20-.34, 917.16-.35), specify the expenses the committees can accrue and the assessments that must be paid (7 C.F.R. §§ 916.40-.42, 917.36-.38), limit the research that the committees can conduct (7 C.F.R. §§ 916.45, 917.39), require reports to be filed by regulated persons (7 C.F.R. §§ 916.60, 917.50), regulate the containers that may be used for nectarines and peaches and the packing of nectarines and peaches (7 C.F.R. §§ 916.350, 917.442), establish procedures for the nomination and selection of committee members (7 C.F.R. §§ 916.20-.27, 917.16-.27), and specify the grade and size of nectarines and peaches that may be marketed (7 C.F.R. §§ 916.356, 917.459). In the years since the *Wileman* decision, there have been minor amendments to the Nectarine Order and the Peach Order (CX 11);[2] however, these

[2]The Agricultural Marketing Service's exhibits are designated by "CX."

amendments have not changed the fundamental characteristics of the Nectarine Order and the Peach Order as described by the Court in *Wileman*.

The Agricultural Marketing Service concedes that handlers of tree fruit have always competed intensely for customers. The ALJ appears to believe that the presence of competition among handlers of nectarines and peaches negates the applicability of *Wileman*. However, nowhere in *Wileman* does the Court find there was no competition among handlers. Instead, *Wileman* makes clear that it applies where marketing orders have displaced many, but not all, aspects of independent business activity: "California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by antitrust laws." *Wileman*, 521 U.S. at 469.

Gerawan further argues that *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), overruled *Wileman* (Gerawan's Response to AMS' Appeal Pet. at 4). In *United Foods*, the Supreme Court held that assessments imposed on fresh mushroom handlers pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112) [hereinafter the Mushroom Act], to fund advertisements promoting mushroom sales violated the First Amendment right to free speech where the assessments were not ancillary to a more comprehensive program restricting market autonomy and the advertising was the principal object of the regulatory scheme. However, the Court did not overrule *Wileman*, as Gerawan argues, but, instead, expressly reiterated the constitutionality of assessments imposed on handlers to fund advertisement of California tree fruit by distinguishing *United Foods* from *Wileman*, as follows:

> The program sustained in *Glickman*[3] differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.
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> In *Glickman* we stressed from the very outset that the entire regulatory program must be considered in resolving the case. In

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[3]The Court in *United Foods* refers to *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), as "*Glickman*."

> deciding that case we emphasized "the importance of the statutory context in which it arises." *Id*. at 469. The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity." *Id.* at 469. Indeed, the marketing orders "displaced competition" to such an extent that they were "expressly exempted from antitrust laws." *Id.* at 461. The market for the tree fruit regulated by the program was characterized by "[c]ollective action, rather than the aggregate consequences of independent competitive choices. *Ibid.* The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising "[d]id so as a part of a broader collective enterprise in which their freedom to act [wa]s already constrained by the regulatory scheme." *Id.* at 469. The opinion and the analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.
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> The features of the marketing scheme found important in *Glickman* are not present in the case now before us.

United Foods, Inc., 533 U.S. at 411-12.

I conclude *Wileman* is dispositive of this case and compelling Gerawan to pay assessments under the AMAA, the Nectarine Order, and the Peach Order does not violate Gerawan's First Amendment right to freedom of speech. Further, I conclude Gerawan's failure to pay assessments violates the AMAA, the Nectarine Order, and the Peach Order.

Johanns v. Livestock Marketing Ass'n

Moreover, I conclude advertising under the Nectarine Order and the Peach Order is government speech. In *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), the Supreme Court upheld the constitutionality of compelled assessments used to pay for generic advertising where the advertising is government speech. The Court concluded that generic advertising constitutes government speech not susceptible to compelled-subsidy challenge under the First Amendment

if the generic advertising is authorized by statute, funded by targeted assessments on producers of the agricultural commodity in question, and constitutes a message established and effectively controlled by the federal government, as follows:

> The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.

Livestock Marketing Ass'n, 544 U.S. at 563-64.

The advertising programs under the Nectarine Order and the Peach Order are identical in all material respects to the beef advertising program at issue in *Livestock Marketing Ass'n*. The AMAA authorizes the Secretary of Agriculture to issue marketing orders (7 U.S.C. § 608c(1) (Supp. V 2005)). Like the Beef Promotion and Research Act of 1985 [hereinafter the Beef Act], the AMAA authorizes generic advertising and establishes the federal policy of promoting and marketing specific agricultural commodities (7 U.S.C. § 608c(6)(I) (Supp. V 2005)). Like the promotional program under the Beef Act, the promotional programs under the Nectarine Order and the Peach Order are funded by targeted assessments on producers of the agricultural commodity in question. Advertising and promotional messages issued under both the Nectarine Order and the Peach Order are controlled by the federal government. As in the beef promotion program, the Secretary of Agriculture exercises final approval authority over every word used in every promotional campaign for the nectarine promotion program and the peach promotion program (Tr. 737-39).[4] A United

[4]In this Decision and Order, I designate transcript references by "Tr." The record contains two transcripts of the hearing. The first transcription of the hearing, which the ALJ designated as the "Initial Transcript," is not a complete transcription of the hearing. York Stenographic Services, Inc., prepared a second transcription of the hearing, which the ALJ designated as the "Final Transcript" and which is a complete transcription of

(continued...)

States Department of Agriculture representative attends and participates in Nectarine Order and Peach Order committee meetings (Tr. 726). Members of the Nectarine Order and Peach Order committees are appointed by the Secretary of Agriculture and can be removed by the Secretary of Agriculture (7 C.F.R. §§ 916.23, 916.62, 917.25, 917.30). The Secretary of Agriculture reviews and approves budgets for promotional activities and projects and ensures compliance with United States Department of Agriculture policies (Tr. 1137-38, 1234). Nectarine and peach promotion proposals are reviewed by United States Department of Agriculture employees for compliance with statutory requirements and United States Department of Agriculture guidelines and policy and United States Department of Agriculture employees direct changes to be made in promotion programs, if necessary (Tr. 1234-36). Only after this review and oversight procedure is completed does the United States Department of Agriculture grant final approval for the implementation of a promotion project. After the promotional items are produced, the Agricultural Marketing Service reviews them for compliance with its guidelines, policies, and statutory requirements (Tr. 1242-43).

In *Livestock Marketing Ass'n*, the Court explained that the beef promotion program is government speech because Congress directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products." *Livestock Marketing Ass'n*, 544 U.S. at 561. Here, likewise, the promotion programs under the Nectarine Order and the Peach Order are directed by Congress. The AMAA authorizes the establishment of marketing and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of certain agricultural commodities, including nectarines and peaches, and provides that the expense of such projects is to be paid from funds collected pursuant to marketing orders (7 U.S.C. § 608c(6)(I) (Supp. V 2005)). The Nectarine Order and the Peach Order each provide for the collection of funds from handlers of the products for promotion.

> "Compelled support of government"--even those programs of government one does not approve--is of course perfectly

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[4](...continued)
the hearing. The ALJ noted on each volume of the "Initial Transcript" that it is superceded by the "Final Transcript." All references in this Decision and Order are to the "Final Transcript."

> constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. "The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." [*Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000)].

Livestock Marketing Ass'n, 544 U.S. at 559.

In both the nectarine promotion program and the peach promotion program, like the beef promotion program, the message of the promotional campaigns is effectively controlled by the United States government. The degree of governmental control over the message funded by targeted assessments distinguishes these promotional programs from the state bar's communicative activities which were at issue in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). *See Livestock Marketing Ass'n*, 544 U.S. at 561-62.

"When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Livestock Marketing Ass'n*, 544 U.S. at 562.

Here, the nectarine and peach promotion programs are subject to political safeguards more than adequate to set them apart from private messages.

> The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.

Livestock Marketing Ass'n, 544 U.S. at 563-64 (footnotes omitted).

I conclude the instant case cannot be distinguished from *Livestock Marketing Ass'n*, and advertising under the Nectarine Order and the Peach Order is government speech.

Gerawan's Appeal Petition

Gerawan raises one issue in its appeal petition. The ALJ concluded, since research is conduct (not speech), Gerawan must pay that portion of the assessments under the Nectarine Order and the Peach Order that relates to research. Gerawan argues that the ALJ's conclusion is error. Gerawan contends research is worthless without disclosure of the information researched, the results of the research, and the reaction to the research; therefore, forcing Gerawan to pay for research performed pursuant to the Nectarine Order and the Peach Order violates Gerawan's First Amendment right to freedom of speech and Gerawan is exempt from paying assessments related to research.

Even if I were to find that research is speech (which I do not so find), I would reject Gerawan's contention that assessments under the Nectarine Order and the Peach Order used for research violate Gerawan's First Amendment right to freedom of speech. As discussed in this Decision and Order, *supra*, based upon *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and a careful consideration of the record, I conclude: (1) the requirement that Gerawan finance generic advertising under the Nectarine Order and the Peach Order does not implicate Gerawan's right under the First Amendment to freedom of speech; and (2) generic advertising under the Nectarine Order and the Peach Order is government speech not susceptible to First Amendment compelled-subsidy challenge.

Appropriate Sanction

The AMAA authorizes civil penalties for violations of marketing orders, such as the Nectarine Order and the Peach Order, issued under the AMAA.

§ 608c. Orders

. . . .

(14) Violation of order

> . . . .
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> (B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B) (Supp. V 2005).[5]

In determining the amount of the civil penalty for violations of the Nectarine Order and the Peach Order, certain factors should be considered including:

> nature of the violations, the number of violations, the damage or potential damage to the regulatory program from the type of violations involved here, the amount of profit potentially available to a handler who commits such violations, prior warnings or instructions given to [the violator], and any other circumstances shedding light on the degree of culpability involved.

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[5]Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, 28 U.S.C. § 2461 note, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under the AMAA (7 U.S.C. § 608c(14)(B) (Supp. V 2005)) for each violation of a marketing order, by increasing the maximum civil penalty from $1,000 to $1,100 (7 C.F.R. § 3.91(b)(vii) (2005)).

In re Onofrio Calabrese, 51 Agric. Dec. 131, 155 (1992).

I have reviewed the recommendation of the Agricultural Marketing Service regarding a civil penalty. I have examined the factors to be considered for determining the amount of the civil penalty. I examined the actions of Gerawan as these actions relate to the factors. I find that intentional violations of the Nectarine Order and Peach Order's requirements that a handler shall pay assessments are serious violations of the AMAA, the Nectarine Order, and the Peach Order. Therefore, I conclude a significant civil penalty is warranted to deter Gerawan, as well as other handlers, from committing similar violations in the future.

The appropriate civil penalty for Gerawan's failure to pay assessments since May 2001 is $100,000. Moreover, in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), in which the Supreme Court held that generic advertising under the Nectarine Order and the Peach Order does not implicate the First Amendment right to freedom of speech of those compelled to fund the advertising and in which Gerawan was a party, I do not find that Gerawan filed and prosecuted its August 13, 2001 Petition in good faith. I conclude that assessment of a $100,000 civil penalty against Gerawan is sufficient to deter Gerawan from continuing to violate the Nectarine Order and the Peach Order and will deter others from similar future violations.

Findings of Fact

1. Gerawan is a California corporation with its principal place of business in California (Pet.¶ 1a.).

2. Gerawan is a large producer and handler of California nectarines and peaches and subject to the Nectarine Order and the Peach Order (Pet. ¶ 2).

3. The AMAA was enacted to establish orderly marketing conditions for agricultural commodities. The AMAA authorizes the Secretary of Agriculture to issue marketing orders applicable to handlers (7 U.S.C. § 608c(1)). The Secretary of Agriculture promulgated the Nectarine Order (7 C.F.R. pt. 916) and the Peach Order (7 C.F.R. pt. 917) pursuant to the AMAA.

4. The AMAA authorizes the Secretary of Agriculture to include within marketing orders provisions for generic advertising and promotion. Specifically, the AMAA provides that marketing orders may contain terms and conditions providing for "production research,

marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order" and "such projects may provide for any form of marketing promotion including paid advertising." (7 U.S.C. § 608c(6)(I) (Supp. V 2005).)

5. The Secretary of Agriculture administers the Nectarine Order and the Peach Order through the Agricultural Marketing Service (7 C.F.R. §§ 2.22(a)(1)(viii)(G), 2.79(a)(8)(viii)). The Nectarine Order and the Peach Order constrain the market autonomy of regulated entities. The Nectarine Order and the Peach Order provide for: (a) a committee to administer the orders (7 C.F.R. §§ 916.20-.34, 917.16-.35); (b) appointment of committee members by the Secretary of Agriculture (7 C.F.R. §§ 916.23, 917.19); (c) the expenses the committees can accrue and the assessments that must be paid (7 C.F.R. §§ 916.40-.42, 917.36-.38); (d) the research the committees can conduct (7 C.F.R. §§ 916.45, 917.39); (e) the reports that must be filed by persons regulated by the orders (7 C.F.R. §§ 916.60, 917.50); (f) container and pack regulations for peaches and nectarines (7 C.F.R. §§ 916.350, 917.442); (g) nomination and selection of committee members (7 C.F.R. §§ 916.20-.27, 917.16-.27); and (h) regulation of the grade and size of peaches and nectarines that can be marketed (7 C.F.R. §§ 916.356, 917.459).

6. The Nectarine Order and the Peach Order are administered by the California Tree Fruit Agreement, which operates under the direction of the respective marketing order committees. The California Tree Fruit Agreement holds public meetings at which issues of importance to the nectarine and peach industries, such as container and pack requirements or quality standards, are discussed. The committees then establish subcommittees as necessary to handle issues such as domestic promotion, international promotion, inspection and compliance, grade, and size. The subcommittee members are typically handlers and/or growers of tree fruit, and reflect the knowledge and expertise of the tree fruit industry. (Tr. 559-70.)

7. Subcommittees make recommendations to the nectarine and peach committees. If a recommendation is approved by the committee, it is forwarded to the Secretary of Agriculture for final approval (Tr. 567-70, 1137-38; 7 C.F.R. §§ 916.30(d), 917.33(d), 917.35). After approval by the Secretary of Agriculture, notice and comment rulemaking is commenced to implement the recommended regulation (Tr. 1142-44).

8. The Secretary of Agriculture controls the administration of the

Nectarine Order and Peach Order. An Agricultural Marketing Service employee attends nectarine and peach committee meetings (Tr. 1136-37, 1230, 1233). The Secretary of Agriculture reviews and approves all nectarine and peach committee budgets (Tr. 1137). The Agricultural Marketing Service requires that nectarine and peach committee actions conform with Agricultural Marketing Service policies and directives before the Agricultural Marketing Service approves nectarine and peach committee budgets (Tr. 1137-39). If the Agricultural Marketing Service does not approve a project or expense listed in the budget, the nectarine committee and peach committee cannot engage in that activity. In addition, the Secretary of Agriculture approves any newsletters produced by the nectarine committee or the peach committee, as well as other activities that the committees conduct (Tr. 1232). The Secretary of Agriculture has authority to prohibit the nectarine committee and the peach committee from engaging any activity (Tr. 1138; 7 C.F.R. §§ 916.62, 917.30).

9. The Agricultural Marketing Service has guidelines and policies regarding the advertising conducted by the nectarine committee and the peach committee (Tr. 1152). Those guidelines include requirements that (a) all advertising be factual, (b) the advertising not disparage another commodity, (c) the advertising conform to Federal Trade Commission standards for advertising, and (d) the promotion not favor one handler over another (Tr. 1151-53). When the Agricultural Marketing Service believes that a promotional item is inconsistent with its policies, the Agricultural Marketing Service reviews the items and requires changes, if necessary. The Agricultural Marketing Service reviews and approves promotional items. (Tr. 1138.) When the Agricultural Marketing Service has a question about a promotional item's compliance with its policies, it will check with other federal agencies, including the Federal Trade Commission, to ensure that the item complies with pertinent laws on truth in advertising (Tr. 1151-54).

10. Every year the nectarine committee and the peach committee make recommendations to the Secretary of Agriculture for changes in marketing order requirements because of the continually changing nature of the tree fruit industry (CX 11, CX 12). The Nectarine Order and the Peach Order are comprehensive regulatory programs that have displaced many aspects of independent business activity.

11. The Nectarine Order and the Peach Order impose inspection requirements to ensure that nectarines and peaches meet regulatory requirements (7 C.F.R. §§ 916.55, 917.45).

12. Both the Nectarine Order and the Peach Order require the

payment of assessments to fund generic advertising. The advertising process begins with the submission of a budget to the Agricultural Marketing Service for approval. The budget includes an amount the committees propose to spend on advertising. If the budget is approved by the Agricultural Marketing Service, the California Tree Fruit Agreement undertakes the promotion of the commodities in the manner that it determines is most cost-effective (CX 79). The California Tree Fruit Agreement utilizes a variety of promotional formats to promote commodities. All advertising must be factually accurate and contain a generic message that promotes California tree fruit.

13. Starting on May 1, 2001, Gerawan shipped peaches and nectarines that were subject to assessments under the Nectarine Order and the Peach Order, but failed to pay the full assessments owed on those peaches and nectarines (CX 71). Gerawan believed that the assessments for generic advertising and promotional activities under the Nectarine Order and the Peach Order were not constitutional based upon the Supreme Court decision in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). Gerawan withheld from the assessments required to be paid under the Nectarine Order and the Peach Order approximately one-half of the amount owed. The withheld amount represents the amount Gerawan estimates is used for research and promotion of nectarines and peaches. (Tr. 339.)

14. Gerawan has refused to pay its assessments under the Nectarine Order and the Peach Order in full since 2001. For the 2001-2002 marketing year, Gerawan failed to pay $246,052.85 on peaches and nectarines that it shipped (CX 66). For the 2002-2003 marketing year, Gerawan failed to pay $242,639.27 in assessments for peaches and nectarines that it shipped (CX 71). As of October 13, 2005, Gerawan Farming, Inc., had failed to pay $1,391,981.97 in assessments on peaches and nectarines that it had shipped since May 31, 2001 (Status Report dated October 13, 2005).

Conclusions of Law

1. The AMAA specifically authorizes the Secretary of Agriculture to establish or provide for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of certain agricultural commodities, including nectarines and peaches grown in California (7 U.S.C. § 608c(6)(I) (Supp. V 2005)).

2. The AMAA provides that the expense of marketing and development projects designed to assist, improve, or promote the

marketing, distribution, and consumption of certain agricultural commodities, including nectarines and peaches grown in California, is to be paid from funds collected pursuant to marketing orders (7 U.S.C. § 608c(6)(I) (Supp. V 2005)).

3. Pursuant to the Nectarine Order (7 C.F.R. pt. 916) and the Peach Order (7 C.F.R. pt. 917), Gerawan is compelled to pay for the promotion of nectarines and peaches.

4. The Nectarine Order and the Peach Order are comprehensive regulatory programs that have displaced many aspects of independent business activity. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

5. Compelled funding of advertising that is part of comprehensive regulatory programs, such as the Nectarine Order and the Peach Order, does not implicate the First Amendment right to freedom of speech of those compelled to fund the advertising. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

6. Pursuant to the Nectarine Order and the Peach Order, Gerawan is compelled to pay for government speech with which it does not agree. Gerawan is not actually compelled to speak when it does not wish to speak, because advertising under the Nectarine Order and the Peach Order is not attributed to Gerawan; Gerawan is not identified as the speaker; and Gerawan is not compelled to "utter" the message with which it does not agree.

7. Gerawan has no constitutional right to avoid paying for government speech with which it does not agree. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. at 559.

8. The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. at 562.

9. In light of *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), Gerawan's Petition, filed August 13, 2001, must be denied.

10. Gerawan's failure to pay assessments for the promotion of nectarines and peaches violates the Nectarine Order and the Peach Order.

For the foregoing reasons, the following Order is issued.

ORDER

1. The relief requested by Gerawan is denied. Gerawan's Petition, filed August 13, 2001, is dismissed with prejudice.

2. Gerawan, its agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, shall comply with the AMAA, the Nectarine Order, and the Peach Order and, in particular, shall cease and desist from failing to pay timely its assessments under the Nectarine Order and the Peach Order.

3. Gerawan shall pay all of its past due assessments and applicable interest and late payment charges under the Nectarine Order to the Nectarine Administrative Committee. The past due assessments, interest, and late payment charges shall be paid by certified check or money order and shall be sent to the Nectarine Administrative Committee.

4. Gerawan shall pay all of its past due assessments and applicable interest and late payment charges under the Peach Order to the Control Committee. The past due assessments, interest, and late payment charges shall be paid by certified check or money order and shall be sent to the Control Committee.

5. Gerawan is assessed a civil penalty of $100,000. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Sharlene Deskins
Office of the General Counsel
U.S. Department of Agriculture
1400 Independence Avenue, SW
Room 2343 South Building
Washington, DC 20250-1417

6. This Order shall become effective 60 days after service of this Order on Gerawan.

RIGHT TO JUDICIAL REVIEW

Gerawan has the right to obtain review of the Order in this Decision and Order in any district court of the United States in which district Gerawan's principal place of business is located (7 U.S.C. §§ 608c(14)(B), 608c(15)(B) (Supp. V 2005)).

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ANIMAL QUARANTINE ACT

COURT DECISION

AG-INNOVATIONS, INC., LARRY FAILLACE, LINDA FAILLACE, HOUGHTON FREEMAN, DOREEN FREEMAN, SKUNK HOLLOW FARM, INC., & FREEMAN FAMILY LLC. v. USDA.
No. 05-776 C.
Filed May 30, 2008.

(Cite as: 82 Fed.Cl. 69).

AQ – TSE – Scrapie – Quarantine – Compensation, adequacy of.

Owners of non-domestic sheep, bred for their fine wool qualities, were slaughtered by the USDA because they were believed to be infected with transmissible spongiform encephalopathy (TSE). The USDA valued the animals by their meat value. In a pre-trial discovery contest, USDA moved for protective order to preclude taking of a expert's deposition on certain topics, and plaintiff cross-moved to compel such deposition. Prior to the TSE outbreak, USDA had approved the importation of the European sheep. (1) plaintiffs were entitled to depose governmental designee concerning documents relating to government's decision to permit them to import live sheep from Belgium, despite government's relevancy objection; (2) plaintiffs were entitled to depose governmental designee concerning what regulations were applicable to the outbreak of atypical TSE of foreign origin; and (3) government could not be compelled to a designate additional government witnesses who could testify about basis for paying certain shepherds for their sheep without an appraisal and decision to hire appraisers for plaintiffs' sheep.

United States Court of Federal Claims.

RULING ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND PLAINTIFFS' CROSS-MOTION TO COMPEL

SWEENEY, Judge.

This discovery dispute comes before the court upon Defendant's Motion for Protective Order to Preclude the Taking of a Rule 30(b)(6) Deposition on Certain Topics ("motion") and Plaintiffs' Cross-Motion to Compel the United States to Identify and Produce a Rule 30(b)(6) Designee(s) on Certain Topics ("cross-motion to compel"). The parties' dispute concerns eleven of a total of twenty-one topics contained in plaintiffs' notice of deposition of the United States Department of Agriculture ("USDA"). Following briefing and continued discussions,

the parties represented that they reached a resolution as to five of the eleven disputed topics. J. Status Report 1, Feb. 15, 2008. Therefore, the court addresses the remaining six topics in dispute. For the reasons set forth below, defendant's motion is granted in part and denied in part, and plaintiffs' cross-motion to compel is granted in part and denied in part.

I. BACKGROUND

A. Nature of Plaintiffs' Claims

In this takings case, plaintiffs allege that the USDA "slaughtered hundreds of healthy, valuable, European-imported and domestically bred milking sheep, and destroyed their genetic stock material, on the premise that the sheep were infected with what the Government termed 'an atypical [transmissible spongiform encephalopathy (TSE)] of foreign origin.'" Am. Compl. ¶ 10 (alteration in original); *see also id.* ¶ 44 (alleging that defendant "seized and destroyed germ plasm, gourmet cheese stock, crops, buildings, cheesemaking equipment, and other business-related assets"). Plaintiffs argue that an atypical TSE of foreign origin "is neither an actual nor a scientifically-recognized disease." Pls.' Mem. Supp. Pls.' Opp'n Def.'s Mot. Protective Order Preclude Taking Rule 30(b)(6) Dep. Certain Topics & Pls.' Cross-Mot. Compel United States Identify Produc. Rule 30(b)(6) Designee(s) Certain Topics ("Pls.' Opp'n & Cross-Mot.") 4. Rather, plaintiffs maintain that defendant "declared the sheep to be 'affected with or exposed to' this so-called 'disease' to justify their slaughter as a pretext for maintaining the perception that the United States was free of Bovine Spongiform Encephalopathy (BSE), a TSE commonly found in cattle." *Id.* Alternatively, plaintiffs allege that, "if the sheep are found to have been 'affected or exposed' to any communicable disease," then defendant "acted arbitrarily and capriciously and in abuse of its discretion in calculating the sheep's fair market value...." Am. Compl. ¶ 51; *see also id.* (alleging that defendant considered "irrelevant factors and unsupported assumptions" when making valuation assessments); *id.* ¶ 12 (claiming that, following the slaughter of plaintiffs' sheep, the USDA "improperly, arbitrarily, capriciously, and in abuse of its discretion, calculated the sheep's fair market value by failing to account for the sheep's superior quality and economic purpose as a business asset and by making unsupported assumptions regarding their use as meat and feed and their conformation"); *id.* ¶ 52 (alleging that defendant selected appraisers who exhibited bias and possessed conflicts of interest, which "prevent[ed] a proper, accurate assessment of the sheep's fair market

value”).

B. Procedural History

Plaintiffs filed their initial complaint on July 22, 2005, and the parties exchanged initial disclosures pursuant to Rule 26(a)(1) of the Rules of the United States Court of Federal Claims (“RCFC”) on March 14, 2006. *See* Pls.' Opp'n & Cross-Mot. 6. Pursuant to the court's April 5, 2006 order, fact and expert discovery were scheduled to conclude by December 15, 2006, and February 28, 2007, respectively. The parties commenced discovery in August 2006. Def.'s Mot. Protective Order Preclude Taking Rule 30(b)(6) Dep. Certain Topics (“Def.'s Mot.”) 3; Pls.' Opp'n & Cross-Mot. 6. By order dated September 13, 2006, the court extended the deadlines for the conclusion of fact and expert discovery to January 5, 2007, and March 19, 2007, respectively.

As discovery progressed, the parties encountered disagreements over depositions and other discovery. On April 6, 2007, the parties represented to the court that “[d]iscovery had not yet concluded” and that they “have not been able to agree upon how much additional time will be required to complete discovery....” J. Status Report 1, Apr. 6, 2007. By mid-June 2007, the parties were unable to agree upon plaintiffs' requests to depose witnesses pursuant to RCFC 30(b)(6). *See* Order 1, June 20, 2007. The following section details the dispute that precipitated the instant motions.

C. The Instant Discovery Dispute[1]

According to plaintiffs, a “large number” of individuals were involved in the events and decisions underlying the claims in this case.

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[1]In addition to defendant's motion and plaintiffs' cross-motion to compel, defendant filed a Reply to Plaintiffs' Memorandum in Support of Plaintiffs' Opposition to Defendant's Motion for Protective Order to Preclude the Taking of a Rule 30(b)(6) Deposition on Certain Topics & Defendant's Opposition to Plaintiffs' Cross-Motion to Compel the United States to Identify and Produce a Rule 30(b)(6) Designee on Certain Topics (“reply and opposition”), and plaintiffs filed their Reply in Support of Plaintiffs' Cross-Motion to Compel the United States to Identify and Produce a Rule 30(b)(6) Designee(s) on Certain Topics (“reply”). Defendant filed separate, consecutively paginated appendices with its motion and reply and opposition, and plaintiffs filed separate, consecutively paginated appendices with their cross-motion to compel and reply.

Pls.' Opp'n & Cross-Mot. 6. Accordingly, plaintiffs filed a motion seeking leave to conduct more than ten depositions on November 22, 2006. During a status conference held on January 22, 2007, the parties "agreed to utilize RCFC 30(b)(6) as a mechanism to target topics rather than individuals in order to pare down the individuals whom plaintiffs would have to depose." *Id.* at 7; *see also* Def.'s Reply Pls.' Mem. Supp. Pls.' Opp'n Def.'s Mot. Protective Order Preclude Taking Rule 30(b)(6) Dep. Certain Topics & Def.'s Opp'n Pls.' Cross-Mot. Compel United States Identify & Produc. Rule 30(b)(6) Designee Certain Topics ("Def.'s Reply & Opp'n") 3 ("During the January 22nd status conference, the Government agreed to go forward with Rule 30(b)(6) depositions upon the assumption that using this method would reduce the number of witnesses who had to be deposed, not increase the number of witnesses who would have to be deposed."). The court denied plaintiffs' motion without prejudice and instructed the parties to "cooperate to conduct discovery expeditiously." [2] Order 2, Jan. 24, 2007. Following the January 22, 2007 status conference, the parties proceeded with discovery, and plaintiffs deposed Dr. Linda Detwiler on January 30, 2007. Pls.' Opp'n & Cross-Mot. 8. According to plaintiffs, "[a]t no point prior to or during this deposition did the Government indicate that Dr. Detwiler could potentially be designated in response to any RCFC 30(b)(6) topic." *Id.*

Defendant notes that five depositions-those of Dr. Detwiler, Dr. Richard Rubenstein, Dr. William Smith, Dr. Wayne Zeilenga, and Mr. Yves Berger-occurred before plaintiffs served their RCFC 30(b)(6) deposition notices. Def.'s Reply & Opp'n 4. As such, defendant emphasizes that it "could not possibly have notified the plaintiffs that these witnesses were likely to be USDA Rule 30(b)(6) designees because the Government did not know what plaintiffs' USDA Rule 30(b)(6) deposition topics were until *after* these witnesses had been deposed." *Id.* at 4. Plaintiffs served two RCFC 30(b)(6) notices upon defendant in February 2007. The first, directed toward the National Veterinary Services Laboratory ("NVSL"), was served on February 8, 2007. Def.'s App. 4-11. The second, directed toward the USDA, was

[2]The court also denied defendant's motion for a protective order without prejudice. *See* Order 2, Jan. 24, 2007.

originally served on February 12, 2007.[3] *Id.* at 13-22. In their RCFC 30(b)(6) NVSL notice, plaintiffs identified fourteen topics "addressing certain information and methodologies relating to testing performed by or for the NVSL." Pls.' Opp'n & Cross-Mot. 8; *see also* Def.'s App. 4-11 (containing plaintiffs' RCFC 30(b)(6) NVSL notice). In their RCFC 30(b)(6) USDA notice, plaintiffs identified twenty-one topics "concerning certain decisions made by-and other critical information held by-USDA personnel." Pls.' Opp'n & Cross-Mot. 8; *see also* Def.'s App. 13-22 (containing plaintiffs' original RCFC 30(b)(6) USDA notice). These notices were, according to plaintiffs, "in line with the parties' discussions and agreements about focusing the depositions on the most important governmental personnel...." Pls.' Opp'n & Cross-Mot. 8.

In a February 12, 2007 letter to defendant's counsel that accompanied plaintiffs' RCFC 30(b)(6) USDA notice, plaintiffs' counsel stated:

> [S]everal of the topics identified in the Notice may already have been addressed by one or more individuals, or will be addressed by certain individuals whose depositions already have been scheduled. To the extent certain individuals already have been deposed, I am willing to discuss designating certain portions of such depositions as responsive to those topics so as to avoid having to recall such individuals. For other individuals yet to be deposed, I would appreciate you letting me know prior to the deposition what topic(s) each will address....

Def.'s App. 12.

However, plaintiffs state that, "[f]rom February 12, 2007, until mid-May, plaintiffs received no response from the Government on the Original USDA 30(b)(6) Deposition Notice, with the exception of Topic # # 3 and 21," despite "repeated[ ] request[s]" to schedule the RCFC 30(b)(6) USDA depositions. Pls.' Opp'n & Cross-Mot. 9; *see also id.* (recounting several attempts to schedule depositions); Pls.' Reply Supp. Pls.' Cross-Mot. Compel United States Identify & Produc. Rule 30(b)(6) Designee(s) Certain Topics ("Pls.' Reply") 2 ("For *more than five months,* the Government completely neglected [its] duty [to designate a live witness] as to all but two topics, leaving plaintiffs no choice but

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[3]As discussed *infra,* plaintiffs served upon defendant a revised RCFC 30(b)(6) USDA notice on June 28, 2007. Def.'s App. 116-25.

to move to compel."); *id.* ("The Government's lack of diligence and timely response to plaintiffs' 30(b)(6) deposition notice to the USDA created the issue about which the Government now complains."). *But see* Def.'s Reply & Opp'n 6 (stating that defendant defended five depositions, including the deposition of Dr. Mark Hall, who was defendant's designee in response to plaintiffs' RCFC 30(b)(6) NVSL notice, deposed six of plaintiffs' witnesses, and "worked with plaintiffs' counsel" to schedule four additional depositions of government witnesses); Pls.' App. 15-18, 21-26 (containing several April 2007 and May 2007 electronic mail communications between counsel regarding the scheduling of depositions). In its May 24, 2007 response to plaintiffs' RCFC 30(b)(6) USDA notice, defendant objected that the topics "covered many of the subject areas upon which the Government witnesses had previously provided deposition testimony." [4] Def.'s Mot. 4; *see also* Def.'s App. 24 ("We note further that you have already conducted a Rule 30(b)(6) deposition of topics numbered 10, 12, 15, 16, 17, and 18. Conducting another Rule 30(b)(6) deposition on these topics is unnecessarily duplicative."). Defendant instead agreed to proceed with live testimony concerning topic numbers 3 and 21, Def.'s App. 24, and designated previously obtained deposition testimony as responsive to RCFC 30(b)(6) USDA topic numbers 3-6 and 9-20, *id.* at 25-56. Defendant submitted a corrected copy of its response to plaintiffs on May 29, 2007. *Id.* at 63; Def.'s Mot. 5.

Throughout their dispute, the parties indicated that they "may need the Court's assistance." J. Status Report 1, Apr. 6, 2007. Accordingly, the court conducted two status conferences, the first on April 23, 2007, and the second on May 29, 2007.[5] According to plaintiffs, other depositions were taken following the April 23, 2007 status conference "with no reference to these deponents or their deposition testimony being used to satisfy any of the topics in the Original USDA 30(b)(6)

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[4]Plaintiffs emphasize that defendant's response came "almost four and one-half months after plaintiffs gave notice of their intent to seek an RCFC 30(b)(6) deposition of the USDA and almost three and one-half months after service of the Original USDA 30(b)(6) Deposition Notice...." Pls.' Opp'n & Cross-Mot. 12.

[5]During the first status conference on April 23, 2007, plaintiffs "raised the issue that the Government still had not designated any witnesses, with the exception of Dr. [Diane] Sutton, in response to the Original USDA 30(b)(6) Deposition Notice." Pls.' Opp'n & Cross-Mot. 11. The parties agreed that additional time was necessary to complete discovery. *See* Order 1, Apr. 23, 2007. The court scheduled a second status conference for May 29, 2007.

Deposition Notice." Pls.' Opp'n & Cross-Mot. 11; *see also id.* at 12 (stating that defendant "made no mention" of offering Dr. Katherine O'Rourke's testimony in response to any RCFC 30(b)(6) USDA topic). *But see* Pls.' App. 25 (containing a May 7, 2007 electronic mail communication from defendant's counsel stating that "the court has given [defendant] until May 24th to identify [its] Rule 30(b)(6) deposition witnesses"). Defendant states that, "[t]wo hours prior" to the May 29, 2007 status conference, "plaintiffs notified the Government that they believed that the Government's [May 24, 2007] designations of testimony in response to plaintiffs' Rule 30(b)(6) deposition notice were not adequate because they allegedly contained incorrect page references and the designations purportedly failed to satisfy plaintiffs' need for evidence on certain topics." Def.'s Mot. 5; Def.'s App. 58-62. Plaintiffs did agree, however, to accept designated testimony in response to topic numbers 6, 10, and 15-19, subject to certain revisions in defendant's designations. Pls.' Opp'n & Cross-Mot. 13; Def.'s App. 58.

During their May 29, 2007 status conference with the court, the parties agreed to "continue to work together to try to resolve these difficulties." Def.'s Mot. 5. To that end, plaintiffs, on June 1, 2007, proposed the following terms: they would agree to narrow the scope of RCFC 30(b)(6) USDA topic numbers 4-5, 7-9, 11-14, and 20 in exchange for defendant's agreement to provide live witness testimony for revised topic numbers 2, 4-5, 7-9, 11-14, and 20. Def.'s App. 64; *see also id.* at 64-66 (containing proposed revisions to these deposition topics). Defendant emphasizes that plaintiffs "did not serve their further revised USDA Rule 30(b)(6) deposition topics until June 28, 2007." Def.'s Reply & Opp'n 8; *see also* Def.'s App. 116-25 (containing plaintiffs' revised RCFC 30(b)(6) USDA deposition notice); *id.* at 126-27 (stating that plaintiffs "had not formally revised their Rule 30(b)(6) deposition topics in their June 1, 2007 letter)." In its June 19, 2007 response to plaintiffs' June 1, 2007 communication, defendant "declined plaintiffs' offer to designate any additional witness(es)." Pls.' Opp'n & Cross-Mot. 14; Def.'s App. 67-74. In doing so, defendant noted that it "do[es] not believe that [plaintiffs] have completely addressed [its] objections." Def.'s App. 68. It also indicated that it corrected references to testimony it previously designated in response to topic numbers 6, 10, and 15-19, proposed changes to topic number 21, proposed responses to plaintiffs' revised topics contained in the June 1, 2007 communication, and submitted its second corrected response to plaintiffs' RCFC 30(b)(6) USDA deposition topics. *Id.* at 67-107; Def.'s

Mot. 5.

On June 28, 2007, plaintiffs responded to defendant and cited "additional errors" in defendant's designations. Def.'s App. 108. Plaintiffs also enclosed their revised RCFC 30(b)(6) USDA notice "to capture in one document the changes that have been made to the original notice" and to further clarify and narrow the scope of disputed topics. *Id.* at 109. Plaintiffs proposed a solution to the parties' dispute:

> If Drs. Detwiler, Hall, [Richard] Race, Rubenstein, Smith, and Zeilenga are the most appropriate witnesses that the USDA has on these topics, then their entire deposition testimony should be attributed to the USDA. By designating the entirety of these witnesses' deposition testimony to Topic # # 2, 4, 5, 9, 11, 12, 13, 14, and 20, plaintiffs will no longer require a designee for these topics and will forego a designee on Topic # # 7 and 8. If the Government is not willing to agree to designate the testimony requested, then plaintiffs will require a designee(s) from the USDA on the eleven remaining topics (Topic # # 2, 4, 5, 7, 8, 9, 11, 12, 13, 14, and 20).

Id. at 111.

Plaintiffs also expressed their concern that defendant's "further delay in refusing to identify and produce a designee(s) prejudices [plaintiffs] and borders on obstructionism." *Id.* at 115.

Defendant responded to plaintiffs' proposal on July 24, 2007. In its response, defendant stated, among other things, that it revised its responses to topic numbers 4, 12, and 14 "to provide a context for the deposition testimony you requested us to include," *id.* at 127; Def.'s Mot. 7 (stating that defendant "accepted plaintiffs' proposal with respect to topics numbered 4, 12, and 14"), but it declined plaintiffs' proposal to designate the entirety of the depositions of Drs. Detwiler, Hall, Race, Rubenstein, Smith, and Zeilenga as responsive to topic numbers 2, 4-5, 9, 11-14, and 20 because "either your colleague or you asked the witness questions about issues for which (1) they were not the most knowledgeable person to provide testimony, and (2) they had not prepared to testify at the deposition," [6] Def.'s App. 127. On July 27,

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[6]Defendant stated that, although it designated "some of the testimony of Dr. Rubenstein as responsive to a few of plaintiffs' Rule 30(b)(6) Revised Deposition (continued...)

2007, plaintiffs accepted defendant's additional designations for topic number 4 subject to a correction, confirmed acceptance of defendant's revised designations for topic numbers 6, 10, and 15-19 as sufficient, reiterated their objection to "cherry-pick[ed] prior testimony that favors the USDA from depositions of witnesses it failed to designate as 30(b)(6) deponents," and renewed their request that defendant either designate the entirety of the Detwiler, Hall, Race, Rubenstein, Smith, and Zeilenga depositions or designate witnesses to address the relevant RCFC 30(b)(6) USDA topics. *Id.* at 163.

The parties' efforts to resolve their dispute without further court intervention proved unsuccessful. At the time defendant filed its motion, plaintiffs had conducted twelve fact and expert depositions, which included defendant's responses to plaintiffs' RCFC 30(b)(6) NVSL notice and plaintiffs' RCFC 30(b)(6) USDA topic number 3.[7] Def.'s Mot. 3. The parties also scheduled a deposition of an additional government witness, Dr. John Clifford, in response to plaintiffs' USDA Rule 30(b)(6) topic number 21. *Id.* Ultimately, the parties resolved their dispute as to USDA Rule 30(b)(6) topic numbers 5, 7-9, and 13. J. Status Report 1, Feb. 15, 2008. As such, the remaining issues before the court concern RCFC 30(b)(6) USDA topic numbers 2-3, 11-12, 14, and 20.

After briefing concluded on the instant motions, plaintiffs filed an amended complaint on January 25, 2008. On February 8, 2008, the parties filed a joint stipulation for dismissal of Count II of the amended complaint, wherein plaintiffs sought compensation for the quarantines imposed upon their real property. *See* Am. Compl. ¶¶ 47-49. The court dismissed with prejudice Count II of plaintiffs' amended complaint. *See* Order 1, Feb. 27, 2008.

Before the court proceeds to the substantive arguments set forth in

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[6](...continued)
topics," it would normally not have done so because Dr. Rubenstein "was not and has never been a federal employee." Def.'s App. 127.

[7]Plaintiffs deposed the following government witnesses: Drs. Detwiler, Hall, O'Rourke, Race, Bradley Reiff, Robert Rohwer, Rubenstein, Smith, Sutton, and Zeilenga; and Messrs. Berger, Axel Meister, and Peter Welkerling. Def.'s Mot. 3; Def.'s Reply & Opp'n 6 & n. 2. Dr. Hall was proffered in response to plaintiffs' RCFC 30(b)(6) NVSL notice, and Dr. Sutton was defendant's designee for plaintiffs' RCFC 30(b)(6) USDA topic number 3. Def.'s Mot. 3; Def.'s Reply & Opp'n 6.

defendant's motion and plaintiffs' cross-motion to compel, it notes that plaintiffs' allegation that defendant provided no notice that Dr. Detwiler could potentially serve as an RCFC 30(b)(6) designee is both wholly unfounded and disingenuous. *See* Pls.' Opp'n & Cross-Mot. 8. Dr. Detwiler's deposition, like the depositions of Drs. Rubenstein, Smith, Zeilenga, and Mr. Berger, all occurred prior to February 8, 2007, and February 12, 2007, the dates upon which plaintiffs served their RCFC 30(b)(6) NVSL and RCFC 30(b)(6) USDA notices, respectively. *See* Def.'s Reply & Opp'n 4 (indicating that these witnesses were deposed between November 15, 2006, and February 7, 2007). While defendant must respond to plaintiffs' RCFC 30(b)(6) notices, it is not required to either exhibit clairvoyance or resort to soothsaying to anticipate such notices. With limited exception, the parties have been unable to cooperate with each other, and each disagreement over the RCFC 30(b)(6) topics discussed below evidences the extent to which their counsel have exacerbated, rather than mitigated, this dispute. *See infra* Part III. Although it must address this dispute as the parties have presented it, the court believes that the situation in which the parties find themselves could have been wholly avoidable if discovery had been conducted in a more cooperative manner and had not been hampered by opposition at nearly every possible turn.

II. LEGAL STANDARDS

It is "axiomatic that a trial court has broad discretion to fashion discovery orders[.]" *White Mountain Apache Tribe of Ariz. v. United States,* 4 Cl.Ct. 575, 583 (1984); *see also Florsheim Shoe Co., Div. of Interco, Inc. v. United States,* 744 F.2d 787, 797 (Fed.Cir.1984) ("Questions of the scope and conduct of discovery are, of course, committed to the discretion of the trial court."); *Shell Petroleum, Inc. v. United States,* 46 Fed.Cl. 583, 585 (2000) ("Trial courts enjoy broad discretion in controlling discovery."). Although discovery rules "are to be accorded a broad and liberal treatment," *Hickman v. Taylor,* 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947), the court must, "[i]n deciding either to compel or quash discovery, ... balance potentially conflicting goals," *Evergreen Trading, LLC ex rel. Nussdorf v. United States,* 80 Fed.Cl. 122, 126 (2007). Thus, "discovery, like all matters of procedure, has ultimate and necessary boundaries." *Hickman,* 329 U.S. at 507, 67 S.Ct. 385.

A. RCFC 26(b)

RCFC 26(b)(1) is "the general provision governing the scope of discovery." *Sparton Corp. v. United States,* 77 Fed.Cl. 10, 21 n. 14 (2007). It permits parties to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." RCFC 26(b)(1). RCFC 26(b) mirrors Rule 26(b) of the Federal Rules of Civil Procedure ("FRCP").[8] *Sys. Fuels, Inc. v. United States,* 73 Fed.Cl. 206, 215 (2006). The 1946 amendment to FRCP 26(b) "ma[de] clear the broad scope of examination," which included not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, ... or any other matters which may aid a party in the preparation or presentation of his case. FRCP 26 advisory committee note (1946 amendment); *see also Int'l Paper Co. v. United States,* 36 Fed.Cl. 313, 317 (1996) (citing RCFC 26 and stating that "we are similarly mindful of the generally broad scope of discovery in this court").

FRCP 26(b)(1) was amended in 2000, at which time the advisory committee "introduce[d] a note of caution about the provision...." 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 2007 (2d ed.1994). The amendments were "intend[ed for] the parties and the court [to] focus on the actual claims and defenses involved in the action," FRCP 26(b)(1) advisory committee note (2000 amendment), whereas previously parties "were entitled to discovery of any information that was not privileged so long as it was relevant to the 'subject matter involved in the pending action,' " 6 James Wm. Moore et al., Moore's Federal Practice ¶ 26.41 (3d ed.2008)

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[8]"[T]o the extent permitted by this court's jurisdiction," the RCFC "shall be consistent with the FRCP...." RCFC 83(a). Interpretation of RCFC 26 "will be guided by case law and the Advisory Committee Notes that accompany the Federal Rules of Civil Procedure." RCFC rules committee note (2002); *see also Zoltek Corp. v. United States,* 71 Fed.Cl. 160, 167 (2006) (noting that interpretation of an FRCP "informs the Court's analysis" of the corresponding RCFC). The FRCP were amended on December 1, 2007, "as part of the general restyling of the Civil Rules." FRCP 26 advisory committee note (2007 amendment). As those changes were "stylistic only," *id.,* the court relies upon authorities construing the previous version of FRCP 26(b).

(quoting the 1983 version of FRCP 26(b)(1)). Accordingly, the 2000 amendments "narrowed the scope of party-controlled discovery to matters 'relevant to any party's claim or defense.' " *Id.* (quoting FRCP 26(b)(1)). While courts would "retain[ ] authority to order discovery of any matter relevant to the subject matter involved in the action for good cause," the amended rule was "designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery." [9] FRCP 26(b)(1) advisory committee note (2000 amendment). Under the current standard, courts are advised to focus upon the specific claims or defenses when determining the scope of discovery. *See id.* However, "[t]his does not mean that a fact must be alleged in a pleading for a party to be entitled to discovery of information concerning that fact. It means that the fact must be germane to a specific claim or defense asserted in the pleadings for information concerning it to be a proper subject of discovery." 6 Moore et al., supra, ¶ 26.41.

Additionally, a party's right to pretrial discovery is constrained by RCFC 26(b)(2)(C). Pursuant to this rule, the court is required to limit "[t]he frequency or extent of use of the discovery methods otherwise permitted under these rules" upon a determination that the discovery sought is unreasonably cumulative or duplicative, the requesting party had ample opportunity to obtain the information sought, or the burden or expense of the proposed discovery outweighs its likely benefit. RCFC 26(b)(2)(C). The court may act upon its own initiative after reasonable notice or pursuant to a motion under RCFC 26(c).

B. RCFC 26(c)

RCFC 26(c) "tempers the breadth of discovery by authorizing the court, for good cause shown, to issue a protective order 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.' " *Boston Edison Co. v. United States,* 75 Fed.Cl.

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[9]Thus, where a party objected that requested discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

FRCP 26(b)(1) advisory committee note (2000 amendment). The court's determination of the scope of discovery, when its intervention is sought by the parties, would be made "according to the reasonable needs of the action." *Id.*

557, 561 (2007) (quoting RCFC 26(c)); *see also* 8 Wright, Miller & Marcus, supra, § 2036 (stating that FRCP 26(c) was adopted "as a safeguard for the protection of parties and witnesses in view of the almost unlimited right of discovery given by Rule 26(b)(1)"). It provides that,

> [u]pon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.... [10]

RCFC 26(c) (footnote added). Such an order "is directed to the broad discretion of the court." *St. Matthew Publ'g, Inc. v. United States,* 41 Fed.Cl. 142, 145 (1998).

Like its FRCP counterpart, RCFC 26(c) "lists eight kinds of protective orders that may be made," although the court may also "be as inventive as the necessities of a particular case require in order to achieve the benign purposes of the rule." 8 Wright, Miller & Marcus, supra, § 2036. The court may, for example, order, among other things, that (1) the discovery may not be had at all, (2) the discovery may be had only on specified terms and conditions, including a designation of the time or place, (3) the discovery may be had by a method of discovery other than that selected by the party seeking discovery, or (4) certain matters may not be inquired into, or that the scope of the discovery be limited to certain matters. RCFC 26(c). Where the court denies a motion for protective order either in whole or in part, it may, "on such terms and conditions as are just, order that any party or other person provide or permit discovery." [11] *Id.*

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[10]The court notes that defendant's motion contains the requisite certification: "The parties have attempted to resolve amicably their disputes concerning the scope of these depositions through negotiation; ... However, despite several offers and counter-offers, the parties have been unable to reach agreement upon the remaining 11 deposition topics...." Def.'s Mot. 1-2.

[11]The rule also states that the provisions of RCFC 37(a)(4) apply to the award of expenses incurred in relation to the motion. RCFC 26(c). For a discussion of RCFC 37, (continued...)

RCFC 26(c) requires that "good cause" be shown for issuance of a protective order. The burden of demonstrating "good cause" rests with the party seeking to shield itself from discovery. *Capital Props., Inc. v. United States,* 49 Fed.Cl. 607, 611 (2001). In order to establish "good cause," a party must show "that the discovery request is considered likely to oppress an adversary or might otherwise impose an undue burden." *Sparton Corp. v. United States,* 44 Fed.Cl. 557, 561 (1999); *see also Forest Prods. Nw., Inc. v. United States,* 62 Fed.Cl. 109, 114 (2004) (indicating that good cause is established "by specifically demonstrating that 'disclosure will cause a clearly defined and serious injury' " (quoting *Glenmede Trust Co. v. Thompson,* 56 F.3d 476, 483 (3d Cir.1995))), *aff'd,* 453 F.3d 1355 (Fed.Cir.2006). The " 'good cause' requirement is strict.... [T]he party ... must make a particularized factual showing of the harm that would be sustained if the court did not grant a protective order." Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 Harv. L.Rev. 427, 433 (1991). Thus, broad allegations of harm, unsubstantiated by specific examples, are insufficient to justify issuance of a protective order. *Forest Prods. Nw., Inc.,* 62 Fed.Cl. at 114; *see also Cipollone v. Liggett Group, Inc.,* 785 F.2d 1108, 1121 (3d Cir.1986) ("[T]he party seeking the protective order must show good cause by demonstrating a particular need for protection."); 8 Wright, Miller & Marcus, supra, § 2035 ("[C]ourts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause.").

Courts may consider several factors, "which are neither mandatory nor exhaustive," *Glenmede Trust Co.,* 56 F.3d at 483, in their determination of whether to issue a protective order. These include:

(1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to the public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefiting from the order of confidentiality is a public entity or official; and (7) whether the case involves issue[s] important to the public.

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[11](...continued)
see infra Part II.C.

Forest Prods. Nw., Inc., 62 Fed.Cl. at 114 n. 9 (citing *Glenmede Trust Co.,* 56 F.3d at 483). The trial court "is best situated to determine what factors are relevant to the dispute...." *Glenmede Trust Co.,* 56 F.3d at 483. Although protective orders "are not exceptional with regard to interrogatories and requests to produce," it is "difficult to show grounds for ordering that discovery not be had when it is a deposition that is sought." 8 Wright, Miller & Marcus, supra, § 2037.

C. RCFC 37

RCFC 37 addresses the failure to make disclosures or cooperate in discovery and permits sanctions. Subsection (a)(2) pertains to depositions and provides:

> If a ... corporation or other entity fails to make a designation under RCFC 30(b)(6) or 31(a), ... the discovering party may move for an order compelling ... a designation.... The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

RCFC 37(a)(2)(B).

If the court grants the motion or the disclosure or requested discovery is provided after the motion was filed, "the court shall ... require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion," unless (1) the motion was filed without the moving party first engaging in a good faith effort to obtain discovery without court intervention; (2) the opposing party's nondisclosure, response, or objection was substantially justified; or (3) other circumstances make an award of expenses unjust. RCFC 37(a)(4)(A). "The decision whether to impose discovery sanctions rests within the sound discretion of the trial court." *Ingalls Shipbuilding, Inc. v. United States,* 857 F.2d 1448, 1450 (Fed.Cir.1988).

RCFC 37, like its FRCP counterpart, does not specify a time limit for filing a motion to compel. *Cabot v. United States,* 35 Fed.Cl. 80, 81 (1996); *see also Days Inn Worldwide, Inc. v. Sonia Invs.,* 237 F.R.D. 395, 396 (N.D.Tex.2006) (noting that FRCP 37 provides no deadline for the filing of motions to compel discovery). Nonetheless, "[i]f the

moving party has unduly delayed, the court may conclude that the motion is untimely." 8A Wright, Miller & Marcus, supra, § 2285. Thus, courts have looked to the deadline for completion of discovery when determining the timeliness of a motion to compel. *See Days Inn Worldwide, Inc.,* 237 F.R.D. at 396-97 (citing cases); *Cabot*, 35 Fed.Cl. at 81 (rejecting plaintiff's timeliness argument that the motion was brought after discovery closed, based upon plaintiff's prior unwillingness to respond to defendant's requests).

"In order to succeed on a motion to compel discovery, a party must first prove that it sought discovery from its opponent." *Petrucelli v. Bohringer & Ratzinger,* 46 F.3d 1298, 1310 (3d Cir.1995). Furthermore, the certification must evidence "good faith confer[ment]." RCFC 37(a)(2)(B). Good faith "cannot be shown merely through the perfunctory parroting of statutory language on the certificate to secure court intervention; rather it mandates a genuine attempt to resolve the discovery dispute through non-judicial means." *Shuffle Master, Inc. v. Progressive Games, Inc.,* 170 F.R.D. 166, 171 (D.Nev.1996). Conferment requires that the moving party "must personally engage in two-way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judicial intervention." *Id.* Although a party may satisfy the requirements of RCFC 37(a), the decision to grant a motion to compel discovery that meets the standards of RCFC 26(b), *see supra* Part II.A, is, like all questions of discovery, committed to the discretion of the court, *see Vons Cos., Inc. v. United States,* 51 Fed.Cl. 1, 5 (2001) ("A motion for protective order to limit the scope of discovery, and, contrapuntally, a motion to compel discovery, are both committed to that discretion."), *modified by* 2001 WL 1555306 (Fed.Cl. Nov.30, 2001).

D. RCFC 30(b)(6)

RCFC 30(b)(6) affords parties the right to serve a deposition notice upon a business or governmental entity. Because it is "not literally possible" to depose a corporation or other entity, 8A Wright, Miller & Marcus, supra, § 2103, the rule states:

> A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall

> designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.[12]

RCFC 30(b)(6) (footnote added).

The rule requires that the deposition notice describe the matters on which examination is requested with "reasonable particularity," RCFC 30(b)(6), and the governmental or business deponent has "an affirmative duty to make available persons who will be able to 'give complete, knowledgeable and binding answers' on its behalf," *Dairyland Power Coop. v. United States,* 79 Fed.Cl. 709, 714 (2007) (quoting *Reilly v. NatWest Mkts. Group, Inc.,* 181 F.3d 253, 268 (2d Cir.1999)). The deponent also has "an affirmative duty to produce a representative who can answer questions that are both within the scope of the matters described in the notice and are 'known or reasonably available' to the corporation." *King v. Pratt & Whitney,* 161 F.R.D. 475, 476 (S.D.Fla.1995) (quoting FRCP 30(b)(6)), *aff'd,* 213 F.3d 646 (11th Cir.2000). In this regard, RCFC 30(b)(6) "sets a high burden of knowledge, but only regarding the noticed topics, no more and no less." *Payless Shoesource Worldwide, Inc. v. Target Corp.,* No. 05-4023-JAR, 2008 WL 973118, at *10 (D.Kan. Apr.8, 2008).

"When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent." *Resolution Trust Corp. v. S. Union Co.,* 985 F.2d 196, 197 (5th Cir.1993). "In other words, the testimony of the Rule 30(b)(6) designee is deemed to be the testimony of the corporation itself." *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.,* No. 03-6516, --- F.R.D. ----, ----, 2008 WL 1977522, at *7 (E.D.Pa. May 7, 2008). Thus, RCFC 30(b)(6) "implicitly requires the designated representative to review all matters

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[12]The FRCP counterpart to RCFC 30(b)(6) was added to "reduce the difficulties now encountered in determining ... whether a particular employee or agent is a 'managing agent' " and to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it." FRCP 30(b)(6) advisory committee note (1970 amendment).

known or reasonably available to it in preparation for the Rule 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and to prevent ... a half-hearted inquiry...." *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.,* No. 05-2164-MLB-DWB, 2007 WL 1054279, at *3 (D.Kan. Apr.9, 2007). If a designee cannot answer questions within the scope of the noticed topics, then the deponent "has failed to comply with its Rule 30(b)(6) obligations...." *King,* 161 F.R.D. at 476; *see also Resolution Trust Corp.,* 985 F.2d at 197 ("If that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all.")

The preparation required for an RCFC 30(b)(6) deposition RCFC 30(b)(6) "can be burdensome." *Heartland Surgical Specialty Hosp.,* 2007 WL 1054279, at *3. Indeed, courts have recognized that the rule "imposes burdens on both the discovering party and the designating party" because the former must describe the matters on which testimony is sought with reasonable particularly, while the latter must produce at least one designee with knowledge about the subject matter contained in the deposition notice. *Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co.,* No. 2:06-CV-00911-BES-PAL, 251 F.R.D. 534, 538, 2008 WL 818947, at *3 (D.Nev. Mar.24, 2008). However, "the burden upon such a responding entity is justified since a corporation can act only through its employees." *ICE Corp. v. Hamilton Sundstrand Corp.,* No. 05-4135-JAR, 2007 WL 1732369, at *4 (D.Kan. June 11, 2007); *see also Heartland Surgical Specialty Hosp.,* 2007 WL 1054279, at *3 (stating that the burden "is merely the result of the concomitant obligation from the privilege of being able to use the corporate (or other organizational) form in order to conduct business"). One court has opined that this burden can be lessened through the designation of a single witness, *Khoa Hoang v. Trident Seafoods Corp.,* No. C06-1158 RSL, 2007 WL 2138780, at *1 (W.D.Wash. July 23, 2007).

In some circumstances, an RCFC 30(b)(6) designee may also be deposed in his or her individual capacity. Because "methods of discovery may be used in any sequence," RCFC 26(d), a witness may be deposed either prior to or following his or her testimony as an RCFC 30(b)(6) designee. Although RCFC 30(b)(6) and individual depositions are similar, they have an important distinguishing feature. Testimony obtained during the former "represents the knowledge of the corporation, not of the individual deponents." *United States v. Taylor,*

166 F.R.D. 356, 361 (M.D.N.C.), *aff'd,* 166 F.R.D. 367 (M.D.N.C.1996); *see also id.* (explaining that a Rule 30(b)(6) designee "does not give his personal opinions," but instead "presents the corporation's 'position' on the topic"). Testimony obtained during the latter is limited by "memory [that] is no more extensive than [the deponent's] life." *Id.* Unlike an individual, an entity "has a life beyond that of mortals." *Id.* As such, it has a "duty to present and prepare a Rule 30(b)(6) designee ... beyond matters personally known to that designee or to matters in which that designee was personally involved," *Alloc, Inc. v. Unilin Decor N.V.,* Nos. 02-C-1266, 03-C-342, 04-C-121, 2006 WL 2527656, at *2 (E.D.Wis. Aug.29, 2006). Due to this "qualitative difference in the testimony that one witness may give as an individual and as a Rule 30(b)(6) deponent," *id.,* "just because [plaintiff] may choose to designate certain individual[s] as its corporate designees whose fact depositions have already occurred does not insulate [plaintiff] from the requirements of Rule 30(b)(6). Such a finding would eviscerate Rule 30(b)(6)," *ICE Corp.,* 2007 WL 1732369, at *3 (alterations in original). Therefore, prior deposition testimony by a witness in his or her individual capacity does not preclude an RCFC 30(b)(6) deposition of the same witness, or vice versa. *See LendingTree, Inc. v. LowerMyBills, Inc.,* No. 3:05CV153-C, 2006 WL 2443685, at *2 (W.D.N.C. Aug.22, 2006) ("Although there is no binding case authority on point, ... there is no prohibition on deposing a witness in both individual and corporate capacities.").

III. DISCUSSION

In this case, discovery did not close until February 29, 2008. *See* J. Status Report 1, Feb. 15, 2008. Although plaintiffs' cross-motion to compel was timely, the court notes that plaintiffs did not file the necessary certification, as required by RCFC 37(a)(2)(B). Nevertheless, under the present circumstances, the court finds that such a deficiency is harmless because both plaintiffs' cross-motion to compel and the negotiations that continued through February 2008 clearly evidence the parties' attempts to engage in "good faith confer[ment]." RCFC 37(a)(2)(B). For example, plaintiffs detail throughout their cross-motion to compel the parties' efforts to resolve their dispute. *See* Pls.' Opp'n & Cross-Mot. 5-16. Moreover, plaintiffs supplemented their cross-motion to compel and reply with appendices exceeding 130 pages. While some courts have denied motions to compel because the moving party failed to comply with either FRCP 37, *see, e.g., Kelly v. MBNA Am. Bank,* No.

CIV.A.06-228 JJF, 2006 WL 2993268, *2 (D.Del. Oct.20, 2006) ("Plaintiff does not comply with the requisites of Rule 37(a) inasmuch as it does not contain a certification that Plaintiff in good faith conferred or attempted to confer ... to secure discovery without court action. Therefore, the motion will be denied."), or FRCP 37 and a corresponding local rule, *see, e.g., Pinkham v. Gen. Prods. Corp.,* No. 1:07-CV-174, 2007 WL 4285376, at *1 (N.D.Ind. Dec.3, 2007) ("Here, it is immediately apparent that the Defendant's motion should be denied because no good faith 'certification' was filed, as Local Rule 37.1 informs the term."), other courts have proceeded to the merits of the underlying motion despite the absence of a Rule 37 certification, *see, e.g., Harmon v. City of Southaven, Miss.,* No. 2:06cv183-P-A, 2008 WL 1821467, at *1 n. 1 (N.D.Miss. Apr.22, 2008) (stating that, because plaintiff's motion to compel was not accompanied by a good faith certification as required by local rule 37. 1, "[u]nder normal circumstances, this motion would be denied on the basis of this omission," but ultimately reaching the merits of the motion because the court was unaware of the absence of the certification until after briefing had been completed); *Vigilant Ins. v. E. Greenwich Oil Co.*, 234 F.R.D. 20, 24-26 (D.R.I.2006) (determining that "[b]oth [plaintiff's] failure to respond to the two discovery requests and [defendant's] failure to include a certification must be considered in crafting an appropriate sanction for the violations," denying defendant's motion to exclude expert damages testimony but imposing sanctions that "minimize[ ] the prejudice facing [defendant] and deal [ ] comprehensively with [plaintiff's] discovery digressions," and ordering that plaintiff's counsel bear defendant's costs in bringing its motion); *Travelers Cas. & Sur. Co. of Am. v. Gelbrich*, No. A04-0165CV(RRB), 2005 WL 1958418, at *2 (D.Alaska Aug. 12, 2005) (considering the merits of and ultimately granting defendant's motion to compel, with an award of partial fees, despite the fact that defendant did not file the requisite good faith certificate with its motion, as required by local rule 37.1, and that defendant "attempted to cure its failure to do so and resolve the present discovery matter in good faith, but to no avail"). Based upon the facts presented in this case, the court believes the latter approach is appropriate here. Accordingly, the court is satisfied that plaintiffs conferred with defendant in good faith despite the absence of an express certification in their cross-motion to compel. *See* supra Part I.C; *see also* J. Status Report 1, Feb. 15, 2008 (stating that the parties reached agreement as to five of the eleven disputed topics that are the subject of the instant motions).

In its motion, defendant requests that the court enter a protective order precluding plaintiffs from taking additional deposition testimony concerning revised RCFC 30(b)(6) USDA topic numbers 2-3, 11-12, 14, and 20. Def.'s Mot. 39. Plaintiffs contend that defendant "has completely manipulated the RCFC 30(b)(6) process." Pls.' Opp'n & Cross-Mot. 16. They allege that defendant, "in contravention of the appropriate and customary method of identifying and producing a live designee(s) in response to a deposition notice issued pursuant to Rule 30(b)(6)," seeks a protective order in an attempt to "bar[ ] plaintiffs from obtaining an RCFC 30(b)(6) deposition from the USDA on certain topics and, for others, seeks to designate testimony of certain fact and proposed expert witnesses who were deposed in their individual capacities." *Id.* at 1. Defendant argues that plaintiffs' proposed resolution of this dispute, namely designating the entirety of certain individuals' depositions, would have the effect of over-designating certain testimony as attributable to the Government under Rule 30(b)(6). Because the witness's testimony on each and every topic[ ] was not necessarily the position of the agency, it would be misleading to identify all of the deposition testimony ... as Rule 30(b)(6) testimony.

Def.'s Reply & Opp'n 30. Plaintiffs further maintain that defendant "knew the specific topics for which plaintiffs had requested a designee since receiving Plaintiffs' Rule 30(b)(6) Notice of Deposition of the USDA on February 12, 2007," but instead "sat back and allowed the depositions of the individuals from whose depositions it now wants to designate testimony to be scheduled" in order to avoid responding to plaintiffs' RCFC 30(b)(6) requests. Pls.' Opp'n & Cross-Mot. 1. Plaintiffs claim that they "have gone above and beyond their RCFC 30(b)(6) duties, trying repeatedly to schedule USDA 30(b)(6) deposition(s), and accepting the Government's retroactively-selected testimony for ... topics that are not at issue." Pls.' Reply 2 (citation omitted).

Plaintiffs request that the court order defendant to produce an appropriate designee or designee to address the disputed topics. Pls.' Opp'n & Cross-Mot. 48. Alternatively, plaintiffs request that the court order defendant to designate the entirety of certain individuals' depositions as responsive to these topics. *Id.* In the event that the court declines either of these options, plaintiffs request that the court permit them to depose certain decision-makers from the USDA "so the plaintiffs can gather the evidence which the RCFC 30(b)(6) process initially was intended to obtain." *Id.* Plaintiffs emphasize that, although

they "have no interest in duplicating work, having already accepted the Government's selections of prior testimony as that of the USDA on certain topics," they are entitled to additional testimony for topics that defendant's designees "did not fully address" or where "there exists no record evidence." Pls.' Reply 4; *see also id.* at 3 n. 5 (questioning whether plaintiffs actually deposed the primary witnesses who are capable of explaining agency action).

A. Plaintiffs' Revised RCFC 30(b)(6) USDA Topic Number 2

In topic number 2, plaintiffs seek testimony from a designee concerning "[d]ocuments relating to the decision to permit the Faillaces to import live sheep from Belgium in 1996."[13] Def.'s App. 121. According to defendant, a large proportion of these documents "appear to be applications to import sheep prepared by plaintiffs or plaintiffs' agents," while the remaining documents "include USDA regulations that govern the importation of sheep and other small ruminants ... and documents that were generated by USDA officials ... who otherwise have no knowledge of the facts that are at issue in this case...." Def.'s Mot. 12. Defendant argues that topic number 2 is irrelevant to a determination of "whether (1)[the] USDA violated plaintiffs' right to receive fair compensation under the Fifth Amendment when the USDA seized plaintiffs' sheep and quarantined a portion of their premises for five years, or (2)[the] USDA violated plaintiffs' right to receive fair market value for the sheep seized...." *Id.* at 12-13. According to defendant,

[a]ll of the parties have conceded that the sheep that were seized

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[13] Plaintiffs cite specific documents, indicated by Bates numbers, in their revised topic number 2. *See* Def.'s App. 121. Plaintiffs' previous version of topic number 2, which did not identify specific documents, sought a designee who could testify regarding

[t]he USDA's decision permitting the Faillaces to import live sheep in 1996 from Belgium, including but not limited to the timing of that decision, the parties involved in that decision, the basis for that decision, any communication about that decision, and any documents or other information relied upon in making that decision.

Id. at 18. In response to defendant's contention that topic number 2 was overly broad, plaintiffs "narrowed" topic number 2 "[i]n an attempt to reduce the scope of the deposition topic[ ] even further." *Id.* at 64. Plaintiffs emphasize that they "specifically deleted the reference 'including but not limited to' in order to make the limitations of the topic clear." Pls.' Opp'n & Cross-Mot. 45 n. 24.

> from the Faillace and Freeman premises were imported or descended from sheep that were imported from either Belgium or the Netherlands. Moreover, the parties agree that, as of mid-July 1996, there was concern expressed by members of the scientific community in Europe that bovine spongiform encephalopathy (BSE) had spread from England to the Netherlands and Belgium and that meat and bonemeal contaminated with BSE had been fed to the livestock population in those countries.

Def.'s App. 68.

While defendant acknowledges that the documents referenced in topic number 2 "discuss the status of the health of the sheep," Def.'s Mot. 13, it nonetheless maintains that "the import documents which the plaintiffs would like to use during their USDA Rule 30(b)(6) deposition have no bearing upon the question of whether plaintiffs' sheep were or were not infected with a transmissible spongiform encephalopathy (TSE) of foreign origin," Def.'s Reply & Opp'n 10; *accord id.* ("[T]he importation documents have no bearing upon whether plaintiffs' sheep were infected with a TSE of foreign origin."); Def.'s App. 76 (raising relevancy objections to topic number 2 in defendant's Second Corrected Response to Plaintiffs' Rule 30(b)(6) Notice of Deposition of the United States Department of Agriculture). In fact, according to defendant, "[g]iven the relatively long incubation periods for TSE and the lack of definitive information about how [TSEs] in sheep are spread, the scrapie status of plaintiffs' sheep has no bearing upon whether plaintiffs' sheep were at risk to develop a TSE other than scrapie." Def.'s Reply & Opp'n 10 (citation omitted). Accordingly, defendant believes that its relevancy objection warrants issuance of a protective order precluding plaintiffs from obtaining testimony on this topic. Def.'s Mot. 13.

Alternatively, defendant argues that, even if the court determines that topic number 2 is relevant, a protective order is appropriate for three reasons. First, defendant maintains that topic number 2 is overly broad because it identifies some, but not all, documents upon which a designee would be required to testify.[14] *Id.* Second, defendant interprets topic number 2 to require government witnesses to "shed light upon documents which the plaintiffs, their agents, or agents of a foreign

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[14]Defendant states, however, that plaintiffs "concede [that] they will not require ... [testimony] about any documents other than those identified in topic number 2." Def.'s Reply & Opp'n 10

government prepared," which, according to defendant, contravenes the purpose of an RCFC 30(b)(6) designee, who is only required to testify as to matters known or reasonable available to the organization. *Id.* at 13-14. Finally, defendant argues that topic number 2 is unduly burdensome because it identifies a significant number of documents that "were generated by USDA officials, such as importation officials, who otherwise have no knowledge of the facts in this case" and would require "[l]ocating such individuals or educating USDA witnesses regarding such documents." *Id.* at 14. As a result, defendant asserts that plaintiffs "do not explain how Government witnesses can be expected to testify about the information contained in documents that were prepared by plaintiffs' witnesses or by officials from foreign countries," Def.'s Reply & Opp'n 10, and "offer no explanation as to how the Government could possibly prepare its witness to testify concerning documents about which it has no knowledge," [15] *id.* at 11.

Plaintiffs respond that topic number 2 is relevant because it proves that their sheep were free of a TSE at the time of their importation.[16] Pls.' Opp'n & Cross-Mot. 44; Pls.' Reply 12-13 ("[Topic number 2] bears directly on whether plaintiffs' sheep carried a 'foreign' disease into the United States and demonstrates the foreign certifications that showed that plaintiffs' sheep were free of a TSE"). Plaintiffs argue that testimony about "specific documents relating to the USDA's decision to permit the Faillaces to import live sheep from Belgium in 1996" is necessary in order to "authenticate and to question a USDA witness about certain USDA import protocols." Pls.' Opp'n & Cross-Mot. 44. According to plaintiffs, these protocols "required confirmation that plaintiffs' sheep had no contact with any herd where scrapie disease had been diagnosed or suspected during the previous sixty months." *Id.; see also* Def.'s App.

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[15] Defendant further states that it "does not have any way to prepare itself about a number of the documents ... because they were prepared by the plaintiffs themselves or by officials from Belgium or the Netherlands." Def.'s Reply & Opp'n 10-11 (citation omitted); *see also id.* at 11 ("[G]iven the vast array of documents that come from a number of different sources, the task of preparing one or more witnesses to testify concerning the variety of documents plaintiffs have identified will be extremely burdensome.").

[16] Topic number 2 is also relevant, plaintiffs claim, because "the scrapie-status of the sheep goes directly to whether former 21 U.S.C. § 134a and the supposed 'other regulations' on which the Government relied are applicable.... Further, the scrapie-status of the sheep bears on whether the Government can assert a nuisance defense based on any allegedly foreign 'disease.' " Pls.' Reply 13.

165-233 (containing various applications for import, quarantine reservation forms, laboratory reports, health certificates, and United States rules and regulations concerning importation of sheep generally as well as importation specifically from Belgium). Plaintiffs seek testimony concerning the USDA's examination of these health certificates certifying that plaintiffs' sheep had no contact with scrapie within the sixty months prior to importation because "[t]he fact that the Government had in its possession documents certifying that the sheep did not have scrapie when they entered the United States makes it far less likely that plaintiffs' sheep carried a TSE into this country." Pls.' Opp'n & Cross-Mot. 45; *see also* Pls.' Reply 13 ("[T]he Government cannot deny that these documents do involve whether plaintiffs' sheep were infected with scrapie, which was at the time the only TSE believed naturally to infect sheep"). The documents encompassed by topic number 2, plaintiffs argue, "[n]ot only ... raise the question of where plaintiffs' sheep allegedly contracted this 'foreign' disease, they make it less likely that the sheep had scrapie...." Pls.' Opp'n & Cross-Mot. 45; *see also* Def.'s App. 72 (stating defendant's position that "plaintiffs' assumption that [the] USDA has ruled out the possibility that the disease with which plaintiffs' sheep were infected was not scrapie or BSE is incorrect"). Plaintiffs maintain that they should be permitted to disprove defendant's claim that the sheep were possibly infected by scrapie. Pls.' Opp'n & Cross-Mot. 45.

In response to defendant's alternative arguments, plaintiffs first emphasize that they revised topic number 2 such that it cannot be construed as overly broad. *See supra* notes 13-14; *see also* Pls.' Reply 13 n. 12 (indicating that topic number 2 requests a designee "to address less than 30 documents"). Next, with respect to defendant's arguments that plaintiffs, plaintiffs' agents, or agents of a foreign government prepared most of the documents at issue, plaintiffs argue that "the preparer of the documents is of no consequence in designating a[n] RCFC 30(b)(6) witness." Pls.' Opp'n & Cross-Mot. 45 n. 24 (citing *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co.,* 201 F.R.D. 33, 38 (D.Mass.2001) (rejecting arguments that witnesses could not testify on the grounds that tax returns were prepared by professional accountants because the witnesses "were still required to review all documentation and to educate themselves to the extent possible on all of the 30(b)(6) topics")). Additionally, plaintiffs note that defendant "reviewed and relied on the health certificates when it permitted the sheep to be imported, and the protocols were negotiated and followed by

the USDA itself." Pls.' Reply 13 (citations omitted). Finally, as to defendant's argument that the documents were generated by USDA officials "who otherwise have no knowledge of the facts in this case" and that "[l]ocating such individuals or educating USDA witnesses regarding such documents would be unduly burdensome," Def.'s Mot. 14, plaintiffs assert that defendant is "incorrect[ ]," Pls.' Opp'n & Cross-Mot. 45 n. 24. According to plaintiffs, defendant's designee need only have knowledge of the subject matter of the topic for which the witness is designated, rather than any personal knowledge of any facts of the case. *Id.* (citing *ICE Corp.,* 2007 WL 1732369, at *4 (stating that a party may not undermine the purpose of FRCP 30(b)(6) "by responding that no witness is available who personally has knowledge concerning the areas of inquiry")).

The court is not persuaded by defendant's relevancy objections. "Where there is doubt over relevance, [FRCP 26(b)(1)] indicates that the court should be permissive." *Heat & Control, Inc. v. Hester Indus., Inc.,* 785 F.2d 1017, 1023 (Fed.Cir.1986) (citing *Deitchman v. E.R. Squibb & Sons, Inc.,* 740 F.2d 556, 566 (7th Cir.1984)). The court finds that topic number 2 is relevant insofar as plaintiffs seek to disprove the belief held by defendant that plaintiffs' sheep had scrapie, *see* Def.'s App. 72, and to determine whether former section 134a and "other regulations" are applicable to plaintiffs' sheep, *see* Pls.' Reply 13. Additionally, topic number 2 implicates whether defendant can maintain a nuisance defense. *See id.; supra* note 16. Furthermore, plaintiffs assert that evidence accumulated during discovery suggests that defendant slaughtered plaintiffs' sheep for policy reasons in order to "maintain[ ] the perception that the United States was free of Bovine Spongiform Encephalopathy...." Pls.' Opp'n & Cross-Mot. 4. Given that topic number 2 will help develop their theory of the case and is related to defendant's nuisance defense, plaintiffs are entitled to obtain the discovery they seek.

The next inquiry is whether defendant is entitled to a protective order; the court determines that defendant has not demonstrated that requiring it to provide testimony concerning topic number 2 is "likely to oppress" or will "impose an undue burden." *Sparton Corp.,* 44 Fed.Cl. at 561. First, contrary to defendant's interpretation, the court does not construe topic number 2 as overly broad. Rather, it specifically enumerates a finite set of documents about which the government can readily prepare a witness to testify. *See* Pls.' Reply 13 n. 12 (stating that topic number 2 "is well within the Government's capability to prepare

a witness" for testimony). Additionally, plaintiffs have agreed not to seek testimony concerning any document not identified in topic number 2. Def.'s Reply & Opp'n 10; *supra* note 14. The court shall hold plaintiffs to their promise.

Second, the court is unpersuaded by defendant's broad allegation that it has no way to prepare a witness to testify about the documents identified within topic number 2. As to defendant's contention that it is only required to produce a witness who can testify as to matters reasonably known to the organization and not matters stemming from this litigation, the court notes that RCFC 30(b)(6) does not require that defendant produce a witness "with the greatest knowledge about a subject; instead, it need only produce a person with knowledge whose testimony will be binding" on it. *Rodriguez v. Pataki,* 293 F.Supp.2d 305, 311 (S.D.N.Y.), *aff'd,* 293 F.Supp.2d 315 (S.D.N.Y.2003). Moreover, as the *Fabiano Shoe Co.* court recognized, the obligation imposed by Rule 30(b)(6) is "not infinite." 201 F.R.D. at 38. Where a witness reviews available documentation "and still would not have been able to give complete answers ... and there were no other available witnesses who could do so," the *Fabiano Shoe Co.* court reasoned that an organization's obligations under Rule 30(b)(6) "cease, since the rule requires testimony only as to 'matters known *or reasonably available* to the organization.' " 201 F.R.D. at 38 (quoting *Dravo Corp. v. Liberty Mut. Ins. Co.,* 164 F.R.D. 70, 76 (D.Neb.1995)). Defendant satisfies its obligation only by adequately preparing and providing a knowledgeable witness whose testimony concerns matters known or reasonably available to the government.

Defendant may not insulate itself from providing responsive testimony concerning topic number 2. Accordingly, the court denies defendant's motion as it relates to topic number 2 and grants plaintiffs' cross-motion to compel an appropriate designee who can testify as to the matters contained-and documents specifically identified-in topic number 2.

B. Plaintiffs' Revised RCFC 30(b)(6) USDA Topic Number 3

Plaintiffs' topic number 3 seeks testimony concerning the following:

> Information relating to the USDA's scrapie regulatory programs, as addressed in Sections 54.1 and 54.2 and Subpart A of Title 9

> of the Code of Federal Regulations ("CFR") and Part 79 of the same; the Voluntary Scrapie Flock Certification Program ("VSFCP"), and Part IX of the Scrapie Eradication Uniform Methods and Rules ("SEUMR"), as applicable, regarding (a) the diagnosis of sheep and/or sheep flocks with scrapie or any other type of Transmissible Spongiform Encephalopathy ("TSE") from 1998-2004; (b) the identification and categorization of sheep and sheep flocks (e.g., suspect animal, suspect flock, exposed animal, exposed flock, high-risk animal, infected flock, scrapie-positive animal, scrapie suspect) from 1998-2004; (c) laboratory and testing procedures and interpretation from 1998-2004; (d) the USDA's coordination with the State of Vermont as related to an outbreak of scrapie or any other type of TSE in sheep and/or sheep flocks in 1998-April 2001; (e) the procedure for how sheep and sheep flocks were selected for culling based upon a diagnosis of scrapie or any other type of TSE from 2000-April 2001; and (f) the process for quarantining sheep and the property on which they were kept upon the diagnosis of scrapie or any other type of TSE in sheep and the process for re-evaluating the necessity of such quarantines from 2000-2004. The USDA's designee would also confirm that the aforementioned regulations and programs do not relate to the agency's response to the diagnosis of any TSE in sheep besides scrapie.

Def.'s App. 121.

Both parties indicate that they "extensively negotiated the scope of topic number 3" prior to the June 27, 2007 deposition of Dr. Sutton. Def.'s Mot. 37; *see also* Def.'s Reply & Opp'n 21 n. 9 ("We note that topic number 3 was 'heavily negotiated[.]' "); Pls.' Opp'n & Cross-Mot. 40 ("Prior to Dr. Sutton's deposition on June 27, 2007, the parties heavily negotiated the ... language of Topic # 3...."). According to plaintiffs, the underlying dispute over topic number 3 concerns the fact that the topic "was based entirely on the proposition that the Government would confirm that there were no regulations applicable to transmissible spongiform encephalopathies ('TSEs') in sheep other than the scrapie regulations about which Dr. Diane Sutton was put forward to testify." Pls.' Reply 16-17. The phrase "scrapie or any other type of [TSE]" lies at the center of the dispute.

Plaintiffs state that this phrase was included "based upon [counsel's] understanding that the Government would confirm that there were no applicable regulations relating to how the Government dealt with sheep

diagnosed with a TSE, other than those regulations used for scrapie." Pls.' Opp'n & Cross-Mot. 40; *accord id.* (indicating that plaintiffs included the phrase "scrapie or any other type of [TSE]" in order to "signify the fact that no other regulations applied to the diagnosis of TSEs in sheep"); Def.'s App. 551 ("[P]laintiffs originally included the phrase 'or any other type of TSE in sheep' ... with the understanding that there were no other applicable regulations relating to the diagnosis (or other associated event) of a TSE in sheep other than those identified in the topic."). According to plaintiffs, defendant "refused to confirm that there were no other regulations relating to how the Government dealt with sheep diagnosed with a TSE other than scrapie, so the phrase remained."[17] Pls.' Opp'n & Cross-Mot. 40; Pls.' App. 56-59; *accord* Def.'s App. 551 (stating that plaintiffs' counsel "learned from [defendant's counsel] that the USDA considered other regulations applicable to the diagnosis (or other associated event) of a TSE in sheep and presumably my clients' sheep. I asked you to identify what those regulations were, but you refused to do so"). Consequently, plaintiffs argue that they "do not have USDA testimony on the other regulations upon which the USDA purportedly relied in seizing plaintiffs' sheep." Pls.' Reply 17.

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[17]Defendant states that its counselexplained to plaintiffs' counsel that the scrapie regulations and programs that were the subject of topic number 3 do not apply to TSE[s] other than scrapie, and he requested that plaintiffs' counsel remove that phrase from the notice. Plaintiffs' counsel initially declined to remove the phrase, explaining that plaintiffs desired confirmation that the scrapie regulations and programs do not apply to TSE[s] other than scrapie.

Def.'s Reply & Opp'n 22. Defendant further indicates that its counsel "expressed concern that topic number 3, as it then existed, implied that the scrapie regulations did[,] in fact[,] apply to TSE[s] other than scrapie, but acknowledged that plaintiffs had a legitimate need for the confirmation they sought and suggested that the request be stated more clearly." *Id.* at 22-23. Although both parties agreed that the phrase "or any other type of TSE" be removed, defendant contends that plaintiffs failed to comply with that agreement. *Id.* at 23 & n. 10; *see also id.* at 23-24 (describing plaintiffs' belief that they were entitled to testimony "regarding the body of regulations *that are applicable* to TSE['s] other than scrapie"). *But see* Def.'s App. 551 (emphasizing that, because plaintiffs' counsel first learned that the USDA considered other regulations applicable to the diagnosis of a TSE in sheep, plaintiffs "could not remove the phrase 'or any other type of TSE in sheep' from Topic # 3 as you had requested"; expressing that plaintiffs "did not renege on any agreement"; and indicating that the parties' "arrangement was based on a misunderstanding of fact and was subject to confirmation that you could not and would not provide").

Defendant maintains that Dr. Sutton's testimony fully satisfied topic number 3. Def.'s Mot. 38; Def.'s Reply & Opp'n 20. According to defendant, Dr. Sutton "was fully prepared to testify and answered all of plaintiffs' questions that were within the scope of topic number 3," Def.'s Reply & Opp'n 20-21, and that this issue is before the court "because of plaintiffs' failure to articulate the testimony they sought by way of topic number 3," *id.* at 21 n. 9. Defendant notes that prior to Dr. Sutton's deposition, it stated its position concerning the scope of topic number 3. *See* Def.'s Reply & Opp'n 22-24. On June 26, 2007, defendant's counsel wrote to plaintiffs' counsel:

[I]n our view, Topic Number 3 does not request information about the regulations that are applicable to the diagnosis and USDA response to an outbreak of transmissible spongiform encephelopathies ("TSEs") other than scrapie.... Rather, the categories containing the language 'or TSEs other than scrapie' seek, in part, information about the applicability of the regulations and portions of program documents identified in Topic Number 3 ... to TSEs other than scrapie. Dr. Sutton will provide this information. The aforementioned categories in Topic Number 3 do not, however, seek information regarding the regulations that apply to the diagnosis of TSEs other than scrapie or the regulations that apply in the event of an outbreak of a TSE other than scrapie. The Government, therefore, does not designate Dr. Sutton to testify regarding the regulations that apply to the diagnosis of TSEs other than scrapie or the regulations that apply in the event of an outbreak of a TSE other than scrapie.

Def.'s App. 549-50; accord Def.'s Reply & Opp'n 24 ("The Government ... indicated that it would designate Dr. Sutton to testify in response to topic number 3, but further indicated that Dr. Sutton would not testify regarding the regulations applicable to TSE[s] other than scrapie because such testimony would not be within the scope of topic number 3."). "It was pursuant to this understanding," defendant states, "that Dr. Sutton's deposition took place on June 27, 2007." Def.'s Reply & Opp'n 24; *accord* Pls.' Opp'n & Cross-Mot 41 ("Dr. Sutton's deposition proceeded the next day with that understanding."); *see also* Def.'s App. 551 ("[P]laintiffs accept that Dr. Sutton is being designated to testify only with regards to the items identified in Topic # 3 as they relate to scrapie. However, we do not consider the Government to have satisfied its obligation....").

Defendant notes that, contrary to any assertion by plaintiffs that Dr.

Sutton " 'only provided testimony about the regulatory scheme as it related to scrapie,' " and not to " 'any other type of TSE,' " Def.'s Reply & Opp'n 25 (quoting Pls.' Opp'n & Cross-Mot. 40), Dr. Sutton "provided several hours of testimony regarding every aspect of the applicability of the scrapie regulations," *id.* at 24; cf. Pls.' Reply 17 ("The parties do not dispute that Dr. Sutton only was designated regarding the regulations applicable to scrapie, both classical and atypical scrapie[.]"). Specifically, defendant emphasizes that Dr. Sutton testified that the scrapie regulations: (1) do not relate to the diagnosis of any TSE in sheep other than scrapie, *see* Def.'s App. 554 (Sutton Dep. 53:16-20, June 27, 2007); *id.* at 557 (Sutton Dep. 61:13-18); (2) do not relate to BSE in sheep, *see id.* at 554-55 (Sutton Dep. 53:21-54:1); and (3) apply upon a diagnosis by the NVSL that an animal is scrapie positive, *see id.* at 555-56 (Sutton Dep. 54:2-55:10); *id.* at 558-61 (Sutton Dep. 183:2-186:1). Additionally, defendant notes that Dr. Sutton testified that: (1) if the NVSL does not identify an animal as scrapie positive, then the scrapie regulations do not apply, *see id.* at 556 (Sutton Dep. 55:11-14); (2) section 71 of title 9 of the CFR grants the USDA general authority to act in response to communicable diseases, *see id.* (Sutton Dep. 55:4-11); and (3) the USDA's authority to respond to the outbreak of diseases other than scrapie is derived from broad regulatory authority to act upon an outbreak of a communicable disease in livestock, *see id.* at 562-63 (Sutton Dep. 224:9-225:11). Consequently, defendant asserts that plaintiffs "have not identified a single question that Dr. Sutton did not answer on this topic" and "fail[ ] to explain why they believe the Government's designation of Dr. Sutton in response to topic number 3 was not adequate." Def.'s Reply & Opp'n 25. Finally, defendant emphasizes that while plaintiffs apparently seek information regarding the regulations that were applied to their sheep and maintain that "the Government is 'refusing to provide this information,' " *id.* at 26 (quoting Pls.' Opp'n & Cross-Mot. 26), such information was not sought by the language of topic number 3, which "does not contain any reference to plaintiffs' sheep at all," *id.*

Plaintiffs maintain that defendant has not fulfilled its obligation to designate a witness as to the entirety of topic number 3 because it "also covers additional regulations, *i.e.*, regulations applicable to TSEs in sheep other than scrapie." Pls.' Reply 17. Prior to Dr. Sutton's testimony, plaintiffs stated:

The USDA maintains that plaintiffs' sheep were diagnosed with an

"atypical TSE of foreign origin." That disease does not exist and has never before existed. Plaintiffs are entitled to understand the regulatory (or non-regulatory ...) framework that the Government utilized in assessing how to address the situation involving Plaintiffs' sheep. The Government contends that the scrapie regulations were inapplicable, yet at the same time it avers that it did not make a determination that plaintiffs' sheep did not have scrapie. This position is entirely inconsistent. If the USDA's contention is that this supposed "disease" is a generic name assigned to a specific TSE for which the Government did not and/or could not identify, then plaintiffs are entitled to understand what regulations were applicable to the outbreak of this alleged "disease" and what other regulations would apply to the diagnosis (or other associated event) of a TSE in sheep besides scrapie. By refusing to disclose this information, [defendant is] setting up plaintiffs for a trial by ambush. Def.'s App. 551.

Plaintiffs highlight portions of Dr. Sutton's testimony in which she testified that, although scrapie regulations applied to classical scrapie and atypical scrapie in sheep, *see* Pls.' App. 116-17 (Sutton Dep. 119:20-120:9), these applications did not apply to plaintiffs' sheep because the USDA made no affirmative determination that plaintiffs' sheep suffered from either disease, *see id.* at 118 (Sutton Dep. 236:8-18); *see also* Pls.' Reply 17 ("The Government now claims that ... it did not rely on the scrapie regulations for the authority to issue the Declaration of Extraordinary Emergency, but rather some other source."). Plaintiffs state that they "seek-as we always have sought-a designee who can explain what regulations were applied to plaintiffs' sheep and why such regulations were deemed applicable." Pls.' Opp'n & Cross-Mot. 41-42. Defendant's refusal to furnish this information, plaintiffs argue, constitutes an effort to "set the plaintiffs up for litigation by ambush[, which t]he discovery rules are designed to prevent...." *Id.* at 42 (citing cases).

It is clear that the parties advance different interpretations of the scope of topic number 3. Defendant accuses plaintiffs of imprecise drafting and a failure to understand the USDA's regulatory scheme.[18]

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[18] According to defendant, the USDA's "broad regulatory authority to take measures necessary to protect human and animal safety" permit it to "resort to the statutory authorities and the myriad of regulations available that permit it to act, depending upon the particular circumstances" or to undertake, on occasion, "creat[ion of] regulatory (continued...)

Def.'s Reply & Opp'n 21. Plaintiffs claim that defendant "admits that the language 'or any other type of TSE' in Revised Topic # 3 'implied that the scrapie regulations did in fact apply to TSE[s] other than scrapie.' " Pls.' Reply 17 (quoting Def.'s Reply & Opp'n 22-23) (alteration in original). The court is not persuaded that topic number 3 merely serves to confirm for plaintiffs that the scrapie regulations and programs do not apply to TSEs other than scrapie. Contrary to defendant's contention that the language of topic number 3 does not reference plaintiffs' sheep at all, the court believes that plaintiffs' objective in drafting topic number 3 was to understand which regulations apply to the diagnosis of scrapie in sheep and to determine how, and through what regulatory framework, the USDA responded to plaintiffs' sheep. It would be superfluous for the parties to conduct discovery about the USDA's scrapie regulation program generally without regard to the context of plaintiffs' sheep, particularly in light of defendant's apparent position that the scrapie regulations did not apply to plaintiffs' sheep. *See* Pls.' Reply 17 (citing Pls.' App. 118 (Sutton Dep. 236:8-18)).

The court therefore disagrees with defendant's interpretation that topic number 3 "does not request information about the regulations applicable to the diagnosis and [the] USDA's response to an outbreak of a TSE other than scrapie." Def.'s Mot. 38; *see also* Def.'s App. 549 ("Topic Number 3 do[es] not, however, seek information regarding the regulations that apply to the diagnosis of TSEs other than scrapie or the regulations that apply in the event of an outbreak of a TSE other than scrapie."). First, given the parties' numerous discussions and efforts to arrive at an understanding of the meaning and importance of the phrase "any other type of TSE," is it quite possible that topic number 3 does not encapsulate with exact precision the entire breadth of information plaintiffs seek. *See* Def.'s App. 551 (noting that the parties' discussions were tainted by a "misunderstanding of fact"). Even if this were the case, defendant certainly was aware prior to Dr. Sutton's deposition that plaintiffs' inquiry extended beyond the more limited scope of the

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[18](...continued)
programs designed to respond to particular health risks." Def.'s Reply & Opp'n 21. The USDA's scrapie program is an example of the latter. *Id.* Thus, defendant notes, when an animal within the United States tests positive for domestic classical scrapie, the USDA's response "is guided by the scrapie program regulations." *Id.* However, when an animal tests positive "for an exotic TSE, ... the USDA's authority to respond derives from its general statutory and/or regulatory authority...." *Id.*

USDA's scrapie regulatory programs, *see id.;* Pls.' Reply 17 ("[P]laintiffs made their understanding of this topic very clear to the Government ... two days before Dr. Sutton's deposition ...."), particularly since plaintiffs insisted upon inclusion of the disputed phrase pending confirmation that no other regulations applied.

Second, defendant's interpretation of topic number 3 is so narrow as to beg the question as to what regulations do, in fact, apply to the diagnosis and the USDA's response to an outbreak of "any other type of TSE," including an "atypical TSE of foreign origin." Plaintiffs assert that "the USDA's contention is that this supposed 'disease' is a generic name assigned to a specific TSE for which the Government did not and/or could not identify...." Def.'s App. 551. Therefore, the fact that "Dr. Sutton answered all of plaintiffs' questions regarding the applicability of the scrapie regulations to TSE[s] other than scrapie," Def.'s Reply & Opp'n 25, answers only part of the question. *See* Pls.' Reply 18 ("The Government alleges that plaintiffs have not identified a single question not answered ... but the Government itself indicated ... that Dr. Sutton was not being designated to testify to questions relating to the regulation of TSEs other than scrapie."). Indeed, plaintiffs' counsel stated in his June 26, 2007 electronic mail communication to defendant's counsel that, two days before Dr. Sutton's deposition, he learned "for the first time ... from you that the USDA considered other regulations applicable to the diagnosis (or other associated event) of a TSE in sheep and presumably my clients' sheep. I asked you to identify what those regulations were, but you refused to do so." Def.'s App. 551. Certainly plaintiffs cannot identify a question that was not answered by Dr. Sutton because any unanswered questions regarding "the regulations that apply to the diagnosis of TSEs other than scrapie or the regulations that apply in the event of an outbreak of a TSE other than scrapie," *id.* at 550, were preemptively excluded by defendant in the first instance based upon its refusal to designate Dr. Sutton in that area. It is clear that this testimony is what plaintiffs also intended to elicit through their topic number 3. As they acknowledge, plaintiffs "cannot now be faulted for failing to ask questions which the Government explicitly stated Dr. Sutton was not being designated to testify regarding...." Pls.' Reply 18.

Plaintiffs are entitled to obtain testimony concerning "what regulations were applicable to the outbreak of [an atypical TSE of foreign origin] and what other regulations would apply to the diagnosis (or other associated event) of a TSE in sheep besides scrapie" because defendant has refused to disclose this information. Def.'s App. 551.

Where, as here, defendant has adopted a position that particular regulations are inapplicable, plaintiffs are entitled to discovery in order to determine which regulations defendant deemed applicable. To the extent that topic number 3 contemplates testimony concerning the USDA's scrapie regulatory programs, including which regulations (1) apply to the diagnosis of TSEs other than scrapie, (2) apply in the event of an outbreak of a TSE other than scrapie, and (3) were applied to the diagnosis of plaintiffs' sheep with an atypical TSE of foreign origin, defendant has not satisfied its RCFC 30(b)(6) obligation.

Additionally, defendant has not made a good cause showing that a protective order is warranted with respect to topic number 3. Aside from advancing its interpretation that the testimony plaintiffs seek is beyond the scope of the plain language of the RCFC 30(b)(6) USDA notice, defendant has not demonstrated-and the court has not found-a "particular need for protection" from additional witness testimony. *Cipollone,* 785 F.2d at 1121. Accordingly, the court denies defendant's motion as it relates to topic number 3 and grants plaintiffs' cross-motion to compel an appropriate designee who can testify as to the matters described above.

C. Plaintiffs' Revised RCFC 30(b)(6) USDA Topic Number 11

In their revised USDA Rule 30(b)(6) topic number 11,[19] plaintiffs seek testimony concerning

> [t]he basis for the decision(s) to issue the June 2000 Orders to Dispose and the July 2000 Declaration of Extraordinary

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[19]The original topic number 11 sought information concerning [a]ny discussion(s) and information leading to the 2000 decision to issue the Declaration of Extraordinary Emergency and Orders to Dispose, including but not limited to the timing of those decisions, the parties involved in those decisions, the basis for those decisions, any communication about those decisions, any documents or other information relied upon in making those decisions, and the scope of that decision (*i.e.,* why the USDA included all of Mr. Freeman's sheep and the Faillaces' sheep within the Orders to Dispose). Def.'s App. 19. By stating that "[t]he language of the disputed topics from Plaintiffs' Revised USDA 30(b)(6) Deposition Notice fits squarely within the scope of RCFC's 30(b)(6)'s 'reasonable particularity' requirement," Pls.' Opp'n & Cross-Mot. 26, plaintiffs suggest that the original language of topic number 11 was, in fact, overly broad. *See id.* at 27 (stating that "[o]nce plaintiffs proffered reasonably-particular topics," defendant had an affirmative obligation to designate and prepare a witness to testify).

> Emergency, including why the Faillaces' sheep were included in the Order to Dispose and the Declaration and the rationale as to why the Western blot results on the four Freeman sheep found to be positive in June 2000 were not questioned, given other test [ ] results in its possession at the time.
>
> Def.'s App. 123.
>
> According to defendant, Drs. Detwiler, O'Rourke, and Hall "testified extensively" about other tests the USDA performed "as of the time it issued the Declaration of Extraordinary Emergency and the basis for [the] USDA's decision to issue a Declaration of Extraordinary Emergency, despite some of the negative test results they had obtained as of the time of [the] USDA's issuance of the Declaration."[20] Def.'s Mot. 32. As such, defendant states that it proffered Dr. Detwiler's testimony "as well as some of the testimony taken at the depositions of Drs. O'Rourke and Hall," but that plaintiffs refused to accept those designations. *Id.* at 33; *accord id.* at 28 (indicating that plaintiffs rejected defendant's offer "to designate the relevant and reliable testimony that is responsive to plaintiffs' USDA Rule 30(b)(6) deposition notice in lieu of requiring the Government to designate witnesses to respond" to topic number 11); *id.* at 33 (characterizing plaintiffs' refusal as "unreasonable" because the proffered designated testimony "is fully responsive to all of the sub-topics contained in topic number 11"). It argues that any additional testimony that the government could provide "would probably" be derived from the same witnesses, *id.,* which "would be unnecessarily duplicative and burdensome," *id.* at 34.

In its motion, defendant specifically identifies Dr. Detwiler's testimony as providing the USDA's "primary response" to topic number 11. *Id.* at 32. According to defendant, Dr. Detwiler testified that the USDA issued its Declaration of Extraordinary Emergency "because four of the sheep from Mr. Freeman's farm tested positive for the presence of a TSE and [because] the epidemiological evidence from Europe

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[20]In a June 19, 2007 letter to plaintiffs' counsel, defendant's counsel states that, because Dr. Detwiler already testified "extensively" concerning topic number 11, defendant designated Dr. Detwiler's testimony, along with "some relevant testimony" provided by Dr. O'Rourke and responsive testimony provided by Dr. Rubenstein. Def.'s App. 71. According to defendant, Dr. Rubenstein "would be in the best position to know why he did not conduct additional testing, [but] he testified that he did not recall why he did not do so." *Id.*

[indicated] that sheep may have been exposed to meat and bone meal contaminated with BSE." *Id.* at 33. Notwithstanding that the NVSL's test results did not indicate that plaintiffs' sheep were infected with scrapie and that other test results could not determine whether plaintiffs' sheep had scrapie or BSE, defendant notes that Dr. Detwiler testified that the USDA issued a Declaration of Extraordinary Emergency because "the western blot tests only detect[ ] the marker for a TSE." *Id.* Defendant also emphasizes that Dr. Detwiler's testimony indicates that the USDA seized the Faillaces' sheep in addition to Mr. Freeman's sheep because the flock belonging to the former "was made up predominantly" of sheep from the Freeman flock. *Id.*

Plaintiffs respond with various arguments. First, as noted above, plaintiffs object to defendant's attempts to designate testimony of individual who had already been deposed in their individual capacity and state that they "seek to depose the USDA about the policy decisions that led to the taking of plaintiffs' property." Pls.' Opp'n & Cross-Mot. 28. They note, however, that with respect to topic number 11, "all of the witnesses on which the Government relies were deposed in their individual capacities." *Id.* at 30-31 n. 18; cf. Def.'s App. 127 (stating that, although "it is true that Drs. Detwiler, Smith, Zeilenga, Race, and O'Rourke did not prepare themselves to testify as if they were Rule 30(b)(6) deposition witnesses," those witnesses "were in the best position to offer the government's testimony concerning those matters"). As such, plaintiffs allege that defendant "did not designate these witnesses as RCFC 30(b)(6) designees from the outset and did not prepare them to testify on matters outside their personal knowledge." Pls.' Opp'n & Cross-Mot. 31; *see also id.* at 30 (stating that RCFC 30(b)(6) witnesses must be prepared to testify about matters " 'not only known by the deponent, but those that should be reasonably known by the designating party' " (quoting *Alexander v. FBI,* 186 F.R.D. 137, 141 (D.D.C.1998))); *id.* at 31 (citing deposition testimony where government witnesses indicated that they either reviewed only their own files or did not review their own files in preparation for their depositions and, in some cases, did not speak to anyone about their depositions aside from government counsel).

Second, plaintiffs argue that defendant's witnesses "either affirmatively distanced themselves or were distanced from the USDA's decision-making authority at their respective depositions." *Id.* at 32. Such responses, plaintiffs claim, "undermine the entire purpose of an

RCFC 30(b)(6) deposition," which is designed to "prevent[ ] serial depositions of various witnesses without knowledge within an organization and eliminating 'bandying [.]' " *Id.* (quoting *Alexander,* 186 F.R.D. at 141) (second alteration in original). As one example, plaintiffs cite to portions of Dr. Detwiler's testimony in which she indicated that plaintiffs would " 'have to ask the USDA decision-makers' " for answers to policy questions. *Id.* (quoting Pls.' App. 69-70 (Detwiler Dep. 197:20-198:7, Jan. 30, 2007)). Plaintiffs highlight this example, along with several others, as "representative of the reason an RCFC 30(b)(6) [deposition] is necessary" because, they claim, it is "unfair for the Government to present these witnesses in their individual capacity, not having them prepared as they would have been had they been RCFC 30(b)(6) witnesses, and then seek to essentially retroactively designate the testimony of these witnesses as responsive to plaintiffs' Revised USDA 30(b)(6) Deposition Notice." *Id.*

Third, with respect to all of the disputed testimony, and not merely testimony related to topic number 11, plaintiffs argue that "[f]or over five months, the Government had the duty to identify and produce an RCFC 30(b)(6) designee(s) on behalf of the USDA for the disputed topics. With the exception of Topic # # 3 and 21, it failed to do so." *Id.* at 21. Now, plaintiffs claim, defendant "is scrambling to come up with a way to escape the alleged 'burden' of providing an RCFC 30(b)(6) deposition that it agreed to honor at the outset of deposition discovery." *Id.* Furthermore, plaintiffs allege that, although defendant "agreed to the RCFC 30(b)(6) mechanism," defendant nonetheless "made no effort to coordinate depositions so that certain individuals' testimonies would satisfy the Original USDA 30(b)(6) Deposition Notice." *Id.* at 22; *see also id.* at 27 (indicating that defendant had an affirmative duty to designate and prepare a witness who could address RCFC 30(b)(6) topics but that defendant "did not comply with that obligation").

The court agrees with plaintiffs. Here, plaintiffs rejected defendant's offer to designate testimony obtained from Drs. Detwiler, Smith, Zeilenga, Race, and O'Rourke concerning topic number 11 because these witnesses testified in their individual capacities. Indeed, plaintiffs are under no obligation to accept designated testimony in response to an RCFC 30(b)(6) notice. Additionally, because plaintiffs seek testimony that would be binding upon the USDA, they objected to what they describe as "cherry-pick[ed] prior [individual] testimony that favors the USDA." Def.'s App. 163. Due to the qualitative differences between testimony furnished during an individual's deposition and a designee's

RCFC 30(b)(6) deposition, *see Alloc, Inc.,* 2006 WL 2527656, at *2, plaintiffs' position is reasonable. Therefore, the court will not require plaintiffs to accept defendant's proposed designations of individual testimony as RCFC 30(b)(6) deposition testimony. The court will also not require defendant to designate the entirety of these witnesses' testimony, as plaintiffs request, *see* Pls.' Opp'n & Cross-Mot. 48, because doing so could attribute to the government binding testimony when it did not offer testimony through its own designee.

The court concludes that RCFC 30(b)(6) testimony concerning topic number 11 is appropriate and rejects defendant's argument that additional testimony would be unnecessarily duplicative and cumulative. *See* Def.'s Reply & Opp'n 26-27. Defendant has not demonstrated good cause for shielding itself from further testimony concerning topic number 11 with its assertion that any RCFC 30(b)(6) testimony "would probably" be derived from the same witnesses. Def.'s Mot. 33. Such an argument does not absolve defendant of its affirmative duty to produce an RCFC 30(b)(6) designee. *See Dairyland Power Coop.,* 79 Fed.Cl. at 714. Although defendant suggests that Drs. Detwiler, Smith, Zeilenga, Race, and O'Rourke "were in the best position to offer the government's testimony" concerning topic number 11, Def.'s App. 127, none of those witnesses offered the government's testimony during their depositions. Additionally, defendant, while not required to produce any of these individuals as its RCFC 30(b)(6) designee, *see Capital Props., Inc.,* 49 Fed.Cl. at 613 (noting that an entity "is free to prepare another witness to testify" if that witness has already provided testimony), nonetheless bears the responsibility of producing at least one designee with knowledge about the relevant subject matter when responding to an RCFC 30(b)(6) notice, *Vegas Constr. Co.,* 2008 WL 818947, at *3. Of course, defendant is not compelled to produce either the most knowledgeable witness or multiple witnesses in order to satisfy its obligation. Rather, defendant must designate at least one witness who possesses the necessary knowledge about the subject matter such that his or her testimony will be binding upon it. *See Rodriguez,* 293 F.Supp.2d at 311. The fact that defendant may choose to designate an individual who already offered testimony concerning topic number 11 in his or her individual capacity "does not insulate [it] from the requirements of Rule 30(b)(6)." *ICE Corp.,* 2007 WL 1732369, at *3.

Accordingly, the court denies defendant's motion as it relates to topic number 11 and grants plaintiffs' cross-motion to compel an appropriate

designee who can testify as to the matters described above. Defendant shall satisfy its affirmative obligation under RCFC 30(b)(6) by offering testimony from at least one designee who possesses sufficient knowledge about topic number 11 such that the testimony will be binding upon it.

D. Plaintiffs' Revised RCFC 30(b)(6)
USDA Topic Numbers 12 and 14

Because the parties raise similar arguments with respect to topic numbers 12 and 14, the court addresses both topics together. In their revised RCFC 30(b)(6) USDA topic number 12, plaintiffs seek testimony concerning the government's basis for diagnosing plaintiffs' sheep with "an atypical TSE of foreign origin." Topic number 12 states:

> The basis for diagnosing Plaintiffs' sheep as infected with or exposed to an "atypical transmissible spongiform encephalopathy [("TSE")] of foreign origin" in 2000, including identifying specific evidence demonstrating that the sheep were infected with "an atypical [TSE] of foreign origin" and not scrapie or BSE; identifying the individual(s) at the USDA who officially diagnosed the sheep with this disease and the information upon which he or she relied in making this diagnosis; explaining how the disease was named; and explaining the USDA's contention for how the sheep became infected.

Def.'s App. 123 (alterations in original). Revised RCFC 30(b)(6) USDA topic number 14 seeks additional testimony concerning the government's basis for determining that plaintiffs' sheep were infected with an "atypical TSE of foreign origin" and not scrapie:

> The basis for the USDA's contention that testing performed on plaintiffs' sheep subsequent to the seizure in March 2001 provided "further evidence" that the sheep were infected or exposed to an "atypical [TSE] of foreign origin," including the identification of any specific evidence demonstrating that these sheep were infected with "an atypical [TSE] of foreign origin" and not scrapie or BSE; and explaining the USDA's contention for how the sheep became infected.

Id. (alterations in original).

According to defendant, plaintiffs already deposed a government witness concerning the information contained in topic numbers 12 and

14 when it proffered Dr. Hall's testimony. Def.'s Mot. 22, 26; Def.'s Reply & Opp'n 16-17. Dr. Hall "was designated to respond to all topics identified in the NVSL Rule 30(b)(6) deposition notice, with the exception of topic number 6...." Def.'s Reply & Opp'n 17. Defendant argues that it satisfied its obligation to provide testimony concerning RCFC 30(b)(6) USDA topic numbers 12 and 14 because topic number 12 is "virtually identical" to plaintiffs' RCFC 30(b)(6) NVSL topic numbers 5 and 14 and topic number 14 is "virtually identical" to plaintiffs' RCFC 30(b)(6) NVSL topic numbers 5 and 9. *Id.* at 16; *accord* Def.'s Mot. 27 (stating that topic numbers 12 and 14 "are duplicative and cumulative because ... these topics were the subject of plaintiffs' NVSL Rule 30(b)(6) deposition notice"). Moreover, defendant maintains that plaintiffs "do not contest" the fact that these RCFC 30(b)(6) USDA topics are virtually identical to RCFC 30(b)(6) NVSL topic numbers 5, 9, and 14,[21] Def.'s Reply & Opp'n 16, and that "no basis exists for plaintiffs to re-depose a Government witness concerning these topics," Def.'s Mot. 24. Defendant also notes that it offered to designate certain testimony from Dr. Hall's RCFC 30(b)(6) NVSL deposition and Dr. Detwiler's testimony as responsive to topic numbers 12 and 14. Def.'s Reply & Opp'n 19; *accord* Def.'s Mot. 26-27 ("The Government proffered Dr. Detwiler's testimony in conjunction with Dr. Hall's testimony as responsive to topic number 14 of plaintiffs' USDA Rule 30(b)(6) deposition notice."). According to defendant, plaintiffs rejected this offer. Def.'s Mot. 27; Def.'s Reply & Opp'n 19.

Defendant further argues that "[b]ecause [the] USDA and [the] NVSL are both Federal entities, plaintiffs should be prohibited from deposing the Government a second time with respect to these topics." Def.'s Mot. 18; *see also* Def.'s Reply & Opp'n 17 ("[The] USDA and the

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[21] Plaintiffs' RCFC 30(b)(6) NVSL topic number 5 seeks testimony concerning "[t]he results of all NVSL testing obtained on the sheep, including but not limited to the negative results of the [immunohistological] and histological tests received prior to and after the seizure of the sheep." Def.'s App. 9. Plaintiffs' RCFC 30(b)(6) NVSL topic number 9 concerns communications with the New York Institute for Basic Research in Developmental Disabilities ("NYIBR") "regarding the results received from the NYIBR's testing of the sheep, the timing of those communications, and any documents exchanged between the NYIBR and the NVSL relating to such tests." *Id.* at 10. Plaintiffs' RCFC 30(b)(6) NVSL topic number 14 concerns "[t]he scientific definition of 'an atypical TSE of a foreign origin,' the source of that definition, any prior use of the phrase 'an atypical TSE of a foreign origin,' and any documents or other information referencing the phrase 'an atypical TSE of a foreign origin.' " *Id.*

NVSL are not separate Federal entities.... The NVSL and the USDA are not two separate governmental entities separated by numerous layers of bureaucracy, serving different purposes within the structure of Government, as plaintiffs contend."). According to defendant, the NVSL is a unit of the Veterinary Services ("VS"), the VS is a branch of the Animal Plant Health Services ("APHS"), and the APHS is an agency of the USDA.[22] Def.'s Mot. 18. Moreover, defendant emphasizes that it "has never represented that [the] USDA and [the] NVSL are separate governmental entities." Def.'s Reply & Opp'n 18. Accordingly, defendant submits that any entitlement plaintiffs claim for a right to depose "the Government a second time concerning these topics" stems from plaintiffs' "confus[ion] about the role of [the] NVSL with respect to [the] USDA."[23] Def.'s Mot. 18. Because plaintiffs "are unable to demonstrate that [the] USDA is a governmental entity separate from [the] NVSL for the purposes of deposing a USDA official in addition to an NVSL official," Def.'s Reply & Opp'n 19, defendant seeks a protective order precluding plaintiffs "from re-deposing the Government" concerning topic numbers 12 and 14, *id.* at 20 (citing *Ameristar Jet Charter v. Signal Composites, Inc.,* 244 F.3d 189, 192 (1st Cir.2001)).[24] Alternatively, if defendant is required to produce a

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[22]The APHS is an agency of the USDA that "provides leadership in insuring the health and care of animals and plants." Def.'s App. 481. Its mission is "[t]o protect the health and value of American agriculture and natural resources." *Id.* at 487. The VS fulfills this mission by "protecting and improving the health, quality, and marketability of our Nation's animals, animal products, and veterinary biologies. This is accomplished through preventing, controlling, and eliminating animal diseases, and by monitoring and promoting animal health and productivity." *Id.* at 503. When it conducts testing, the APHS relies upon the NVSL, Def.'s Reply & Opp'n 17, which "support[s] animal disease prevention, detection, control, and eradication programs and ... provide[s] diagnostic assistance to the livestock and poultry industries," Def.'s App. 508.

[23]Defendant contends that plaintiffs' theory would entitle plaintiffs to "command the appearance of a representative from each of the 19 agencies, as well as all of their branches, as well as [the] USDA when they serve a Rule 30(b)(6) deposition notice upon the United States simply because [the] USDA is comprised of separate agencies and agency branches." Def.'s Reply & Opp'n 18-19 (citation omitted). *But see* Pls.' Reply 11 (arguing that RCFC 30(b)(6) depositions are constrained by determinations of relevancy and that the only relevant entities at issue here are the USDA and the NVSL).

[24]In *Ameristar Jet Charter,* the United States Court of Appeals for the First Circuit held that the district court was "not 'plainly wrong' " when it granted a motion for a protective order to quash four subpoenas issued to employees of a nonparty corporation when that corporation had been previously subpoenaed pursuant to FRCP 30(b)(6) and

(continued...)

designee, it requests that the court enter an order precluding plaintiffs from asking its designee "the same question or series of questions plaintiffs have previously asked the Government's designated witness." Def.'s Mot. 28 (citing *Williams v. Sprint/United Mgmt. Co.,* No. CIVA032200JWLDJW, 2006 WL 334643 (D.Kan. Feb.8, 2006)).[25]

Additionally, defendant states that it is "significant ... that the Vermont district court has already issued rulings" on the issues encompassed by topic number 12. *Id.* at 23. Defendant notes that the district court concluded that plaintiffs' flock was comprised of " 'sheep of foreign origin which may have been exposed to BSE through their own consumption or their ancestors' consumption ... of contaminated food.' " *Id.* at 23-24 (quoting *Freeman v. USDA,* No. 1:00CV255, Ruling Mots. Prelim. Inj. 6 (D.Vt. Aug. 1, 2000) and *Ag-Innovations v. USDA,* No. 1:00CV257, Ruling Mots. Prelim. Inj. 6 (D.Vt. Aug. 1, 2000)). The district court, defendant states, determined that Dr. Rubenstein's test results suggested one of three conclusions and confirmed that plaintiffs' sheep were diseased. *Id.* at 24.

Finally, defendant argues that plaintiffs never alleged that defendant's

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[24](...continued)
presented two witnesses to testify in connection with those subpoenas. 244 F.3d at 191-93

[25]In *Williams,* plaintiffs sought to depose a witness in his individual capacity after he was previously deposed as an FRCP 30(b)(6) representative of defendant. 2006 WL 334643, at *1. The court permitted the deposition, finding that plaintiffs were not required to obtain leave from the court pursuant to FRCP 30(a)(2)(B) because the witness had already been deposed. *Id.* It ruled, however, that plaintiffs could not ask questions that they previously asked during the deponent's FRCP 30(b)(6) deposition as doing so "would be unreasonably duplicative and thus subject to the limitation of Rule 26(b)(2)." *Id.; see supra* Part II.A. (discussing RCFC 26).

Plaintiffs emphasize that *Williams* is distinguishable because that case involved the deposition of a witness in his individual capacity after he was deposed as an FRCP 30(b)(6) witness, whereas the instant case presents the reverse situation whereby plaintiffs seek to depose an RCFC 30(b)(6) witness after the witness previously testified in his individual capacity. Pls.' Opp'n & Cross-Mot. 36 n. 21. Plaintiffs instead rely upon *ICE Corp.* and emphasize that " 'a caution against duplicative questioning is not warranted [here] because such a caution would prevent [the party seeking the deposition] from effectively using [Federal Rule] 30(b)(6) depositions as they were designed, *i.e.*, to prevent sandbagging.' " *Id.* (quoting *ICE Corp.,* 2007 WL 1732369, at *4) (second & third alterations in original).

designee provided inadequate responses to RCFC 30(b)(6) NVSL topic numbers 5, 11, and 14. Def.'s Reply & Opp'n 19. In the event that such responses were inadequate, defendant emphasizes that plaintiffs could have sought-but ultimately did not seek-leave to conduct an additional RCFC 30(b)(6) deposition pursuant to RCFC 30(a)(2).[26] *Id.* Defendant asserts that plaintiffs' "fail[ure] to comply with the rules of this Court by [not] seeking leave of the Court to obtain additional discovery" militates against permitting plaintiffs to depose a designee on topic numbers 12 and 14. *Id.* at 19-20.

Plaintiffs reject defendant's assertion that the NVSL and the USDA are, for purposes of an RCFC 30(b)(6) motion, the same entity, Pls.' Opp'n & Cross-Mot. 33, and consider defendant's position "[o]ne of the most blatant examples of how the Government has distorted the RCFC 30(b)(6) process," Pls.' Reply 8; *accord* Pls.' Opp'n & Cross-Mot. 33 ("Not only did the Government fail to inform plaintiffs of its novel interpretation of the requirements of RCFC 30(b)(6), its position that a deposition of the NVSL is inherently one of the USDA is plainly wrong."). Arguing that the NVSL and the USDA are "two separate governmental entities, separated by numerous layers of bureaucracy, and serving different purposes within the structure of the Government," plaintiffs maintain they are entitled to depose both. Pls.' Opp'n & Cross-Mot. 33; *accord id.* at 35 ("[I]t makes practical sense to depose both the NVSL and the USDA separately when, as the Government itself points out, there are numerous layers of bureaucracy separating the two entities."); Pls.' Reply 9 ("[F]or purposes of the RCFC 30(b)(6) notices submitted in this case, the USDA and the NVSL are separate entities that plaintiffs have a right to depose separately."). Plaintiffs, relying upon *SEC v. Selden,* 484 F.Supp.2d 105, 106 (D.D.C.2007), and *In re Vitamins Antitrust Litigation,* 217 F.R.D. 229, 233 (D.D.C.2002), liken the relationship between the NVSL and the USDA to that of a wholly-owned subsidiary and its parent corporation and maintain that they may depose each separately.[27] Pls.' Opp'n & Cross-Mot. 34-35.

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[26]RCFC 30(a)(2) requires that a party obtain leave of court, "which shall be granted to the extent consistent with the principles stated in RCFC 26(b)(2)," if, among other things, "a proposed deposition would result in more than ten depositions being taken under this rule," RCFC 30(a)(2)(A), or "a person to be examined already has been deposed in the case," RCFC 30(a)(2)(B).

[27]In *Selden,* the Securities and Exchange Commission filed an enforcement action against defendant who, in preparing his defense, served two subpoenas on the United

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Furthermore, plaintiffs argue that defendant's after-the-fact assertion that Dr. Hall testified on behalf of both the NVSL and the USDA is flatly inconsistent with the Government's objections during the deposition that certain policy decision were "beyond the scope of the topics listed" and "beyond the scope of [Dr. Hall's] responsibilities" because he was "not a policy maker." Pls.' Reply 9 (quoting Pls.' App. 79-80 (Hall Dep. 124:17-125:3, Feb. 22, 2007)) (alteration in original); *see also* Pls.' Opp'n & Cross-Mot. 36 (stating that, "[p]rior to Dr. Hall's deposition, the Government had the option of designating him for USDA Topic ... 12[ ] and 14, but it chose not to do so"). The "only result consistent with RCFC 30(b)(6) and the understanding of both parties at the time Dr. Hall was deposed," plaintiffs argue, is to permit them to depose a designee from both the NVSL and the USDA. Pls.' Opp'n & Cross-Mot. 36.

Additionally, plaintiffs argue that the Vermont district court's rulings do not negate their need for the USDA's testimony concerning topic number 12. Citing *Rose Acre Farms, Inc. v. United States,* 373 F.3d 1177, 1195 n. 15 (Fed.Cir.2004), *cert. denied,* 545 U.S. 1104, 125 S.Ct. 2541, 2533, 162 L.Ed.2d 274 (2005), plaintiffs maintain that the United States Court of Appeals for the Federal Circuit ("Federal Circuit") "specifically rejected the argument that a plaintiff's challenge to federal agency action in a previous district court litigation collaterally estops

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[27](...continued)
States Food and Drug Administration ("FDA") and the Center for Biologics Evaluation and Review, a division of the FDA. 484 F.Supp.2d at 106. Referring to both agencies collectively as the FDA, the court denied the FDA's motion to quash the subpoenas on the grounds that the FRCP are not negated by the FDA's own regulations promulgated under the authority recognized by *United States ex rel. Touhy v. Ragen,* 340 U.S. 462, 468, 71 S.Ct. 416, 95 L.Ed. 417 (1951). 484 F.Supp.2d 105, 108-09. The *In re Vitamins Antitrust Litigation* court rejected arguments that it would be duplicative and unduly burdensome for two companies to produce FRCP 30(b)(6) witnesses when, during the relevant period, one company was a wholly-owned subsidiary of the other because defendant "previously and successfully argued that [the wholly-owned subsidiary] should not be required to respond to a request propounded on [the parent] because they are separate entit[ies]" and now advanced "the opposite position" in order to avoid the discovery request. 217 F.R.D. at 233. Defendant argues that plaintiffs' reliance upon *In re Vitamins Antitrust Litigation* is misplaced and that *Selden* is inapplicable. Def.'s Reply & Opp'n 18-19. With respect to the former, defendant emphasizes that the court rejected the companies' request based upon a prior, inconsistent argument that they were separate entities. *Id.* at 18. With respect to the latter, defendant states that it "has not alleged in this case that the agency's *Touhy* regulations preclude the Government from producing a witness...." *Id.* at 19.

that plaintiff from addressing the governmental interest issues related to a takings claim."[28] Pls.' Opp'n & Cross-Mot. 37. Here, plaintiffs emphasize that they are not challenging the validity of the underlying regulations; rather, plaintiffs "seek to build a case against the Government's asserted nuisance defense and explore whether payment for the Government's actions should be borne by the public." *Id.* Furthermore, plaintiffs assert that the district court "never made a judicial determination that plaintiffs' respective flocks were infected with a TSE." *Id.* Even if the court were to determine that the district court did, in fact, make such a determination, plaintiffs note that the district court's judgment was vacated as moot after defendant seized plaintiffs' sheep prior to the conclusion of plaintiffs' appeal to the United States Court of Appeals for the Second Circuit ("Second Circuit"). *Id.* at 38 (citing *Ag-Innovations, Inc. v. USDA,* 6 Fed.Appx. 97, 98 (2d Cir.2001)); *see also id.* at 38-39 (citing case law from the United States Supreme Court and the Federal Circuit indicating that a vacated judgment has no collateral estoppel effect). Lastly, plaintiffs note that even if findings on the actual health of the sheep had been made by the district court, plaintiff Mr. Freeman would not be bound by those findings. *Id.* at 39.

The court does not find that defendant's arguments justify issuance of a protective order precluding the testimony plaintiffs seek. First, although defendant argues at great length that the NVSL and the USDA are the same entity for purposes of an RCFC 30(b)(6) deposition, defendant fails to demonstrate how the taking of a deposition concerning plaintiffs' RCFC 30(b)(6) USDA topic numbers 12 and 14 will subject it to either serious injury or an undue burden. In fact, defendant makes no specific allegation other than opining that such a deposition would expose "each of the 19 agencies, as well as all of their branches" to potential RCFC 30(b)(6) notices. Def.'s Reply & Opp'n 18. This showing is not sufficient for issuance of a protective order. The rules of this court permit discovery "regarding any matter, not privileged, *that is relevant to the claim or defense of any party....*" RCFC 26(b)(1) (emphasis added); *see also Micro Motion, Inc. v. Kane Steel Co.,* 894 F.2d 1318, 1323 (Fed.Cir.1990) ("*Even if relevant,* discovery is not permitted where no need is shown ...." (citing FRCP 26(b)(1))). As plaintiffs note, the only relevant entities in this case are the NVSL and

[28] Defendant did not address plaintiffs' collateral estoppel arguments because "[n]one of the arguments [it] raised in [its] motion for protective order or in this brief depend upon the findings of the Vermont district court." Def.'s Reply & Opp'n 16 n. 6.

the USDA. *See* Pls.' Reply 11. Thus, defendant's concerns are overstated and unfounded, and defendant fails to persuade the court that an RCFC 30(b)(6) deposition is inappropriate on this basis.

Second, the court need not determine whether the NVSL and the USDA are, in fact, the same entity or separate entities for purposes of an RCFC 30(b)(6) deposition. The rules of this court permit an RCFC 30(b)(6) deposition of "a public or private corporation or a partnership or association *or governmental agency....*" RCFC 30(b)(6) (emphasis added). Although it argues that the NVSL and the USDA are the same "entity," defendant's description of their relationship indicates that the NVSL, as a unit of the VS, is part of the APHS, which, in turn, is an agency of the USDA. *See* Def.'s Mot. 18; *supra* note 22 and accompanying text. Because the NVSL is part of an agency that comprises the USDA, plaintiffs are not precluded from serving an RCFC 30(b)(6) notice upon both the USDA and a division of one of the USDA's agencies. By serving a notice upon both the USDA and the NVSL, plaintiffs have not sought a second bite at the apple. RCFC 30(b)(6) permits plaintiffs to serve a deposition notice upon governmental agencies, and plaintiffs have not run afoul of the rule here.[29]

Third, the court is not persuaded that any ruling by the Vermont district court is relevant to the instant dispute. Indeed, defendant concedes that its arguments do not rely upon the findings of the Vermont district court. *See supra* note 28. Moreover, as plaintiffs note, the district court's decision was vacated and remanded with direction to dismiss as moot by the Second Circuit. *See Ag-Innovations, Inc.,* 6 Fed.Appx. at 97; *id.* at 98 ("Where a case has been mooted on appeal, the appellate court is required ... to vacate the district court's order and remand with

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[29]Defendant's argument that plaintiffs failed to seek leave to conduct an additional RCFC 30(b)(6) deposition pursuant to RCFC 30(a)(2) is similarly unavailing. Although they note that Dr. Hall's responses to particular questioning indicated that he was not a policy maker, *see* Pls.' Reply 9, plaintiffs have not alleged that Dr. Hall's overall testimony was inadequate. Rather, plaintiffs question why Dr. Hall was also not designated to respond to the relevant RCFC 30(b)(6) USDA topics when defendant knew that they also sought binding testimony from the USDA. *See* Pls.' Opp'n & Cross-Mot. 36. Defendant maintains that certain questions posed to Dr. Hall were outside the scope of plaintiffs' RCFC 30(b)(6) USDA topic numbers 12 and 14, thereby rendering them objectionable even if Dr. Hall had testified as the USDA's designee. Def.'s Reply & Opp'n 20 n. 8.

direction that the district court dismiss the case for want of jurisdiction." (citing *United States v. Munsingwear,* 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950))). Therefore, the court does not address plaintiffs' collateral estoppel argument because, as the Federal Circuit has recognized, a "vacated judgment 'has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case.' " *U.S. Philips Corp. v. Sears Roebuck & Co.,* 55 F.3d 592, 598 (Fed.Cir.) (quoting *No E.-W. Highway Comm., Inc. v. Chandler,* 767 F.2d 21, 24 (1st Cir.1985)), *cert. denied,* 516 U.S. 1010, 116 S.Ct. 567, 133 L.Ed.2d 492 (1995).

Plaintiffs are entitled to obtain testimony from the USDA concerning topic numbers 12 and 14. Accordingly, defendant's motion is denied and plaintiffs' cross-motion to compel testimony concerning topic numbers 12 and 14 is granted. Furthermore, the court denies defendant's request that the court enter an order precluding plaintiffs from asking its designee "the same question or series of questions plaintiffs have previously asked the Government's designated witness." Def.'s Mot. 28. The cases upon which defendant relies are distinguishable from the situation presented in the instant case. *See supra* notes 24-25. Unlike in *Ameristar Jet Charter,* where the court granted a protective over to quash subpoenas issued to employees of a nonparty corporation after it had already produced designees, *see* 244 F.3d at 191-93, the defendant here is the United States. The USDA cannot be construed as a nonparty entity, and the issue is before the court specifically because defendant has refused to produce an RCFC 30(b)(6) designee to provide testimony relating to topic numbers 12 and 14. Thus, the USDA has not already presented a witness to testify concerning these topics. Furthermore, *Williams,* as noted previously, is factually distinguishable and therefore inapposite. There, the court precluded inquiry into "the same question or series of questions" that plaintiffs asked of a witness during his FRCP 30(b)(6) deposition in the witness's subsequent, individual deposition. 2006 WL 334643, at *1. As plaintiffs note, the *ICE Corp.* court addressed the reverse situation presented in *Williams. See supra* note 25. In *ICE Corp.,* the court denied plaintiff's motion for a protective order because "plaintiff fail[ed] to cite ... any authority whereby the previous [individual] deposition of certain witnesses prevents 30(b)(6) depositions of those same witnesses." 2007 WL 1732369, at *4. Rather, it determined that FRCP 30(b)(6) "anticipates such an occurrence." *Id.* The court finds *ICE Corp.* persuasive authority for the situation presented in this case. Moreover, like the plaintiff in *ICE Corp.,* defendant has not cited any authority that limits inquiry during an RCFC

30(b)(6) deposition on the basis of prior testimony furnished by the same witness during his or her individual deposition. Therefore, plaintiffs shall not be precluded from pursuing and addressing questions they may have asked of the government's designee during the RCFC 30(b)(6) NVSL deposition.

E. Plaintiffs' Revised RCFC 30(b)(6) USDA Topic Number 20

Finally, plaintiffs seek a government witness who can testify about "[t]he basis for the decision(s) to pay certain shepherds for their sheep without an appraisal and the decision to hire appraisers for Plaintiffs' sheep." Def.'s App. 124. Defendant argues that this topic is not relevant because "[t]he USDA['s] reason(s) for paying certain shepherds for one or more sheep the USDA purchased two or more years prior to the seizure of plaintiffs' sheep have no bearing upon the issue of whether plaintiffs have received fair market value for their sheep based upon an appraisal." Def.'s Mot. 36; *see also* Def.'s Reply & Opp'n 28 n. 12 (challenging the relevance of topic number 20 "to the extent that the plaintiffs seek to demonstrate that the plaintiffs bore a disproportionate impact of the agency's regulations"). Additionally, defendant indicates that plaintiffs deposed Dr. Smith "concerning his decision(s) to pay the shepherds other than Mr. Freeman and the Faillaces for their individual rams [the] USDA purchased in the period prior to the USDA's Declaration of Extraordinary Emergency." Def.'s Mot. 36. Because Dr. Smith "has already provided all of the relevant testimony pertaining to topic number 21," defendant argues that "no basis exists to re-depose Dr. Smith or anyone else from [the] USDA concerning its reason for purchasing the non-plaintiffs ['] sheep without the benefit of an appraisal."[30] *Id.* at 37; *see also* Def.'s Reply & Opp'n 27 ("Finally, with respect to topic number 20, plaintiffs have already deposed Dr. William

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[30]Plaintiffs' revised RCFC 30(b)(6) USDA topic number 21 seeks testimony concerning:

(a) The parties involved in the decision(s) and the basis for the agency's decision(s) as to what to pay plaintiffs for their sheep, cheese, and semen straws and any decision not to pay for the quarantines placed on plaintiffs' farms; (b) any discussions in which Dr. Clifford was involved concerning the amount to pay the plaintiffs for their sheep, cheese, and semen straws, and any decision not to pay for the quarantines placed on plaintiffs' farms.

Def.'s App. 124.

Smith[,] who made the decision to pay certain shepherds for their sheep without an appraisal.”).

Plaintiffs believe that topic number 20 is relevant because it “demonstrate[s] that the USDA paid plaintiffs less and treated them differently for refusing voluntarily to dispose of their sheep and for their outspoken protest of the destruction of their respective flocks.” Pls.' Opp'n & Cross-Mot. 47; *see also* Pls.' Reply 15 (stating that topic number 20 “address[es] the Government's decision to pay full value to other shepherds and leave their pastures unquarantined while, in response to plaintiffs' efforts to save their sheep, refusing to pay them full value for their sheep and by imposing years-long quarantines on their real property”). Plaintiffs characterize defendant's contention that topic number 20 is offered to illustrate that plaintiffs suffered a disproportionate burden as “unconvincing[ ],” Pls.' Opp'n & Cross-Mot. 47, and state that evidence presented at trial will demonstrate that

> other shepherds who voluntarily sold their East Friesian sheep-all of which were purchased from either Mr. Freeman or the Faillaces-to the USDA (1) were paid over two to three times more money per head than plaintiffs were; (2) were paid without their flocks being appraised; and (3) did not have quarantines placed on their properties by the USDA.

Id. at 47-48; *see also* Def.'s App. 62 (articulating plaintiffs' position that Dr. Smith's testimony “does not address why ... payments were not available to Mr. Freeman or the Faillaces or why appraisals were required for their sheep”).

As such, plaintiffs maintain that topic number 20 “bears directly” upon whether plaintiffs were paid fair market value for their sheep or whether “the value of their sheep was discounted through the guise of an appraisal to punish them for protesting the Government's actions.” Pls.' Opp'n & Cross-Mot. 48.

The court is not persuaded by defendant's relevancy objection because, as discussed above, plaintiffs are entitled to seek testimony that would aid in the development of their theory of the case. *See id.;* Pls.' Reply 16 (arguing that plaintiffs are entitled to “show ... significant differences in valuation to prove their case that the Government has not paid them fair market value for their sheep”). Because “[i]t is well established that ‘comparable sales are considered by the courts to be the best evidence of fair market value, and thus preferable to other forms of valuation,’ ” *Bassett, N.M. LLC v. United States,* 55 Fed.Cl. 63, 78

(2002) (quoting *Stearns Co., Ltd. v. United States,* 53 Fed.Cl. 446, 458 (2002)), plaintiffs are entitled to explore testimony bearing on the question of whether plaintiffs were, in fact, paid market value for their sheep. Due to the differences between RCFC 30(b)(6) and individual testimony, *see supra* Part II.C, defendant did not satisfy its RCFC 30(b)(6) obligation by merely proffering selections from Dr. Smith's individual testimony. Despite this determination, the parties, as discussed infra, indicate a willingness to agree that designated testimony is appropriate for topic number 20. Therefore, the court examines Dr. Smith's testimony in order to determine whether designations are adequate for topic number 20 or whether additional live testimony is required.

Plaintiffs contend that Dr. Smith's testimony did not explain why the USDA appraised plaintiffs' sheep. *See* Def.'s App. 62. Dr. Smith testified that he was involved in discussions related to the compensation plaintiffs received for their sheep based upon appraisals, *id.* at 460-61 (Smith Dep. 56:20-57:1, Nov. 15, 2006), and that he also determined the amounts that the USDA would pay other shepherds for their sheep, *id.* at 472 (Smith Dep. 87:18-20). Because he testified on his own behalf and not as the government's USDA designee, Dr. Smith was not in a position to opine as to the USDA's decision to appraise plaintiffs' sheep. Nevertheless, plaintiffs did obtain from Dr. Smith responsive answers related to the matters set forth in topic number 20.

Topic number 20 seeks, in part, the "basis for the decision(s) to pay certain shepherds for their sheep without an appraisal...." *Id.* at 124. Dr. Smith's testimony sheds light into this area of inquiry. First, Dr. Smith distinguished the amounts offered to other shepherds for their sheep from those amounts offered to plaintiffs and testified that comparing those transactions was akin to "comparing apples and oranges." *Id.* at 464 (Smith Dep. 79:6). He then explained that the amounts the USDA paid to other shepherds for their sheep "do not reflect fair market value," *id.* (Smith Dep. 79:12), because they represented an amount based upon the original purchase price of the sheep "plus a significant premium and financial incentive for me to buy those animals," *id.* (Smith Dep. 79:12-15). Dr. Smith testified that he offered a significant premium to other shepherds for their sheep in an attempt to control and contain an outbreak quickly:

[Y]ou need to understand that we had New York State involved,

> Vermont involved, I had F2 progeny in the State of New Hampshire and F2 progeny in Connecticut. And what was going through my mind at the time was, ... I need to shrink this outbreak from a multi-state, multi-flock to as few states and as few flocks as I can.
>
> So I went out on a professional limb and offered [the shepherds] a substantial premium for [the sheep] so they would allow me to buy those animals. So I do not think it is representative of the value of the sheep to just use what I paid for those certain rams, because I paid them a lot of money.

Id. at 464-65 (Smith Dep. 79:22-80:13).

As a result, Dr. Smith characterized the amounts paid to these shepherds as an "inflated price." *Id.* at 464 (Smith Dep. 79:16); *see also id.* at 478 (Smith Dep. 104:17-105:1) (indicating that the sheep purchased at a premium price were not appraised and were bought for "diagnostic purposes"). Additionally, Dr. Smith testified that these sheep were not appraised because "we knew what [the shepherds] paid for them. I had a baseline figure to pay for them." Pls.' App. 109 (Smith Dep. 107:7-8). The court finds that this testimony is responsive to topic number 20.

Topic number 20 also seeks information concerning "the decision to hire appraisers for Plaintiffs' sheep." Def.'s App. 124. Again, Dr. Smith offered testimony about this area of inquiry. Because he neither appraises sheep nor has experience or expertise in appraising sheep, *id.* at 462 (Smith Dep. 77:10-14); *cf. id.* 465-66 (Smith Dep. 80:16-81:9) (indicating that, although he is not an expert appraiser, Dr. Smith has "been around the fence a couple times" and testified that certain animals within a herd are "superior genetically, superior in their confirmation, genetics, [and] milk production," as opposed to others that are "a degree or two less," "an average group," and "poor doers"); *id.* at 468 (Smith Dep. 83:17-19) (indicating that "some animals may be worth more, and some people may be willing to buy them at that higher price"), Dr. Smith testified that he relied upon the "opinion and appraisal of the appraisers" when he offered plaintiffs compensation for their sheep, *id.* at 462 (Smith Dep. 77:19-20); *see also id.* at 463 (Smith Dep. 78:15-20 (indicating that Dr. Smith "accepted" the "data provided ... on what the fair market value was for the sheep that [the appraisers] inspected ... based on information they had")); *id.* at 469 (Smith Dep. 84:8-10 ("[T]hat's what the appraiser told me the fair market value was, so I

based it on what the appraisers were telling me.”)). Moreover, Dr. Smith testified that he “handled” plaintiffs' sheep “with consultation with the Agency” and “didn't feel empowered to negotiate with them at all,” whereas he “dealt with [the other shepherds'] flocks [him]self.” Pls.' App. 110 (Smith Dep. 108: 16-19).

Additionally, Dr. Smith provided testimony related to plaintiffs' contention that topic number 20 supports their theory that the value of plaintiffs' sheep was discounted. *See* Pls.' Opp'n & Cross-Mot. 48. As noted above, Dr. Smith testified to his belief that it would be difficult to determine an appropriate benchmark for calculating fair market value, Def.'s App. 465 (Smith Dep. 80:16), and that payments to other shepherds did not represent fair market value because those payments reflected “what [those shepherds] paid for the rams plus ... a significant premium and financial incentive for me to buy those animals,” *id.* at 464 (Smith Dep. 79:12-15). Dr. Smith characterized the amounts paid to these shepherds as an “inflated price,” *id.,* at 464 (Smith Dep. 79:16), that reflected his professional judgment to offer a substantial premium so that he could purchase the animals, rather than a calculation based upon the value of the sheep, *id.* at 465 (Smith Dep. 80:8-13). According to Dr. Smith's testimony, those payments made by the USDA to other shepherds were high because those amounts “included ... what they paid for those animals,” *id.* at 466 (Smith Dep. 81:19-22); *see also id.* at 474-75 (Smith Dep. 89:10-22 (stating that the other shepherds provided invoices as to what price they paid for their sheep)), whereas plaintiffs did not provide additional documentation to “justify additional costs” for their sheep, *id.* at 469 (Smith Dep. 84:8-14). Additionally, Dr. Smith was authorized to handle negotiations with the other shepherds on his own, but consulted with the USDA with respect to plaintiffs' sheep. Pls.' App. 110 (Smith Dep. 108:16-20). Moreover, Dr. Smith testified that plaintiffs were advised to “hire [their] own ... professional appraiser and give [the USDA] the documentation, [but] they did not do that.” Def.'s App. 470 (Smith Dep. 85:3-6).

Although plaintiffs are entitled to obtain testimony concerning topic number 20 from an RCFC 30(b)(6) designee, plaintiffs have indicated a willingness to accept designations of Dr. Smith's testimony as defendant's response to topic number 20 with one caveat. In addition to the portions of Dr. Smith's testimony that defendant proffered, plaintiffs seek designation of additional excerpts of testimony that they believe are relevant. *See id.* at 111 (seeking designation of Dr. Smith's testimony

concerning (1) the price range that the USDA paid other shepherds for their rams that were originally purchased from plaintiffs, (2) the USDA's refusal not to offer to purchase plaintiffs' sheep without an appraisal due to the large number of animals in their flocks, and (3) the USDA's concern that the same amount of payment made to the plaintiffs that were made to other shepherds would have been extremely high). Defendant has agreed "to designate the testimony of Dr. Smith which plaintiffs proposed to designate," Def.'s Reply & Opp'n 28 n. 12, but with a caveat of its own. It will make those designations "so long as (1) additional testimony from Dr. Smith's deposition is also included, specifically from pages 92, [line] 4 through 120, [line] 5, and (2) testimony from Dr. John Clifford, who was deposed on August 31, 2007, is also included."[31] *Id.*

The parties' respective positions with respect to designated testimony for topic number 20 are, of course, distinguishable from their positions with respect to topic number 11. *See supra* Part III.C. Here, defendant does not object to additional testimony being added to designated testimony it has already proffered. In fact, it seeks inclusion of additional testimony in light of and in response to plaintiffs' request. Moreover, plaintiffs are willing to accept designated testimony for topic number 20. Under these circumstances, the court believes that the parties' proposed designations for topic number 20 are reasonable. Because the parties are willing to proceed with these designations, the court finds that it would be unnecessarily duplicative to reopen Dr. Smith's deposition or seek additional testimony from a different designee on the matters encompassed by topic number 20. Accordingly, plaintiffs' motion to compel additional testimony for topic number 20 is denied, and defendant's motion is granted. In lieu of additional live testimony, defendant shall designate those portions of Dr. Smith's testimony requested by plaintiffs, *see* Def.'s App. 111, as well as the testimony it cites between page 92, line 4 and page 120, line 5 of Dr. Smith's deposition transcript. Additionally, defendant shall review the testimony of Dr. Clifford, *see supra* note 31, identify any testimony that is relevant to topic number 20, and make designations accordingly.

F. Award of Expenses Pursuant to RCFC 37(a)(4)

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[31]According to defendant, it had not received a transcript from Dr. Clifford's deposition at the time it filed its reply and opposition. Def.'s Reply & Opp'n 28 n. 12. Therefore, it was "not prepared to identify what that testimony would be." *Id.*

As mentioned above, RCFC 26(c) states that the provisions of RCFC 37(a)(4) apply to the award of expenses incurred in relation to a motion for a protective order, RCFC 26(c); *supra* note 11, and to a motion to compel, *supra* Part II.C. The court finds no grounds that warrant the imposition of fees against defendant at this time. Despite the highly contentious nature of this dispute and the parties' apparent inability to reach common ground on many of these issues, the court finds that, because plaintiffs have not intentionally sought to burden defendant with duplicative requests for discovery and that defendant has not deliberately attempted to evade its obligations under the rules of the court, an award of expenses would be unjust. *See* RCFC 37(a)(4)(A). Accordingly, plaintiffs shall not be awarded any fees associated with bringing their cross-motion to compel.

IV. CONCLUSION

For the reasons stated above, defendant's motion for a protective order is **GRANTED in part and DENIED in part,** and plaintiffs' cross-motion to compel the United States to identify and produce an RCFC 30(b)(6) designee(s) on certain topics is **GRANTED in part and DENIED in part** as follows:

1. Defendant shall provide a designee or designees who can provide testimony concerning topic number 2. Plaintiffs shall not seek testimony about any document not already identified in topic number 2.

2. Defendant shall provide a designee or designees who can provide testimony in the areas contemplated by topic number 3, including which regulations (a) apply to the diagnosis of TSEs other than scrapie, (b) apply in the event of an outbreak of a TSE other than scrapie, and (c) were applied to the diagnosis of plaintiffs' sheep with an atypical TSE of foreign origin.

3. Defendant shall provide a designee or designees who can provide testimony concerning the matters identified in topic number 11.

4. Defendant shall provide a designee or designees who can provide testimony concerning the matters identified in topic numbers 12 and 14. Plaintiffs shall be permitted to inquire into the same matters that were addressed during their RCFC 30(b)(6) NVSL deposition of Dr. Hall.

5. Defendant shall not be required to provide additional live testimony concerning topic number 20. Instead, defendant shall designate those portions of Dr. Smith's deposition testimony cited by the parties above. Defendant shall also, to the extent it has not already done so, review the testimony of Dr. Clifford and designate testimony that is relevant to topic number 20.

In accordance with the parties' request, discovery in this case shall not be extended, except to the extent that additional depositions are required pursuant to this Opinion and Order. The parties shall, **by no later than June 27, 2008,** file a status report proposing deadlines for the completion of additional depositions and the disclosure of additional designated testimony. No costs.

IT IS SO ORDERED.

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ANIMAL QUARANTINE ACT

DEPARTMENTAL DECISION

In re: MITCHELL B. STANLEY.
A.Q. Docket No. 07-0023.
Decision and Order.
Filed April 25, 2008.

AQ – Slaughter horse transportation – Blind in both eyes.

Thomas Bolick, for APHIS.
Respondent, Pro se.
Decision and Order issued by Administrative Law Judge Jill S. Clifton.

Decision Summary

1. I decide that Mitchell B. Stanley, Respondent, an owner/shipper of horses (9 C.F.R. § 88.1) who commercially transported horses for slaughter to BelTex Corporation in Ft. Worth, Texas during May and June 2005, failed to comply with the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note) and the Regulations promulgated thereunder. I decide further that Respondent Stanley is responsible for errors and omissions of those who acted as agents on his behalf in the commercial transportation of horses for slaughter, such as Robert Estelle and truck drivers. I decide further that $10,550 in civil penalties (9 C.F.R. § 88.6) for remedial purposes is reasonable, appropriate, justified, necessary, proportionate, and not excessive.

Procedural History

2. The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "Complainant"). The Complaint, filed on November 14, 2006, alleged that the Respondent, Mitchell B. Stanley, violated the Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 note (frequently herein "the Act"), and the regulations promulgated thereunder (9 C.F.R. § 88 *et seq*.) (frequently herein the "Regulations").
3. APHIS is represented by Thomas Neil Bolick, Esq., Office of the General Counsel, Regulatory Division, United States Department of Agriculture, South Building, 1400 Independence Ave. SW, Washington,

D.C. 20250.

4. The Respondent, Mitchell B. Stanley (frequently herein "Respondent Stanley" or the "Respondent"), did not appear at the hearing. Respondent Stanley did file an Answer, on November 30, 2006. In his Answer, Respondent Stanley did not deny the allegations in the Complaint. Instead, he apologized. Further, Respondent Stanley claimed that the violations alleged in the Complaint had been committed by his "buyer," Robert Estell [*sic*] (true spelling "Estelle"), who had been told that there were to be no blind horses delivered and who knew the rules and how to complete the paperwork and all the tasks required. Respondent Stanley stated further in his Answer that he had released (dismissed) Mr. Estelle; and that he, Respondent Stanley, had had no more violations.

5. The hearing was conducted on April 23, 2008, by audio-visual telecommunication[1] between the Little Rock, Arkansas site and the Washington, D.C. site, Administrative Law Judge Jill S. Clifton presiding. The transcript will be prepared by Neal R. Gross & Co., Inc., Court Reporters. I issue this Decision and Order without waiting for the transcript.

6. Three witnesses testified, each an APHIS employee: Joseph Thomas Astling, David B. Head, and Dr. Timothy Cordes (D.V.M.).

7. Fifteen exhibits (Complainant's exhibits) were admitted into evidence: CX 1, CX 2, CX 6, CX 10 through CX 13, CX 15 through CX 17, CX 21, CX 22, and CX 27 through CX 29.

8. APHIS sought civil penalties authorized by section 903(c)(3) of the Act (7 U.S.C. § 1901 note) and 9 C.F.R. § 88.6.[2] The Rules of Practice applicable to this proceeding are 7 C.F.R. § 380.1 *et seq*. and 7 C.F.R. § 1.130 *et seq*.

Introduction

9. Four shipments of horses are addressed here, all in 2005, in May and in June, all to BelTex Corporation in Ft. Worth, Texas. These four shipments were commercial transportation of horses for slaughter between May 7, 2005, and June 26, 2005, and there were violations of

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[1] *See* section 1.141 of the Rules of Practice (7 C.F.R. § 1.141) regarding using **audio-visual** telecommunication.

[2] The Secretary of Agriculture is authorized to assess civil penalties of up to $5,000 per violation of the regulations, and each equine transported in violation of the regulations will be considered a separate violation.

9 C.F.R. § 88 during each of the four shipments.

10. The most serious allegation (for which APHIS recommended a $5,000 civil penalty) involved a horse that was blind in both eyes and never should have been loaded in the first place. Commercially transporting to slaughter a horse that was blind in both eyes was in violation of 9 C.F.R. § 88.4(c). That horse (CX 11) was transported on or about May 7, 2005 to BelTex Corporation.

11. The next most serious allegations were the failures, twice, after delivering the loads of horses to the slaughtering facility outside normal business hours, to stay for inspection by the USDA representative during normal business hours or to return during normal business hours for inspection by the USDA representative, in violation of 9 C.F.R. § 88.5(b). APHIS recommended $2,000 in civil penalties for these two violations, being $1,000 for each. One occurred on or about May 8, 2005; the other occurred on or about June 11, 2005.

12. For noncompliant paperwork regarding three shipments with a total of 47 horses, APHIS recommended $3,550 in civil penalties. The owner-shipper certificates, Veterinary Services (VS) Form 10-13, for three shipments of horses being commercially transported for slaughter, were prepared improperly, in violation of 9 C.F.R. § 88.4(a)(3).

13. Respondent Stanley was the owner/shipper of all four commercial shipments of horses to slaughter, on or about May 7, June 10, June 24, and June 26, 2005, and responsible for the violations more fully described below in Findings of Fact and Conclusions.

14. Two counts involving a blind pinto stallion were dismissed.[3]

Findings of Fact and Conclusions

15. Pararaphs 16 through 28 contain intertwined Findings of Fact and

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[3] At the opening of the hearing, counsel for the Complainant amended the Complaint to dismiss count IV(b), which alleges that on or about June 10, 2005, respondent commercially transported to BelTex Corporation for slaughter 14 horses, including a stallion, USDA back tag # USCE 0055, that was blind in both eyes but was not loaded on the conveyance so that it was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii). Counsel for the Complainant also dismissed count IV(c), which alleges that on or about June 10, 2005, respondent commercially transported to BelTex Corporation for slaughter 14 horses, including a stallion, USDA back tag # USCE 0055, that was blind in both eyes and thus was not handled as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

Conclusions.

16. The Secretary of Agriculture has jurisdiction over Respondent Mitchell B. Stanley and the subject matter involved herein.

17. The testimony was credible and persuasive, that being the testimony of Joseph Thomas Astling, David B. Head, and Dr. Timothy Cordes.

18. Respondent Mitchell B. Stanley is an individual with a mailing address of **156** Stanley Road, Hamburg, Arkansas 71646 (as shown in his Answer) **or 154** Stanley Road, Hamburg, Arkansas 71646 (as shown in the Complaint).

19. Respondent Stanley is now and was at all times material herein, a commercial buyer and seller of slaughter horses who commercially transported horses for slaughter. He was and is an owner/shipper of horses within the meaning of 9 C.F.R. § 88.1.

20. Respondent Stanley is responsible not only for what he himself did or failed to do in violation of the Commercial Transportation of Equine for Slaughter Act and Regulations, but also for what others did or failed to do on his behalf, as his agents, in violation of the Act and Regulations.

21. Respondent Stanley's agents include not only his business partner Robert Estelle acting in furtherance of partnership activities, but also others acting as agents on behalf of Respondent Stanley or his business partner or the partnership, including truck drivers. Thus, actions described below as having been done by Respondent Stanley may have been done by such agents.

22. Respondent Stanley is responsible for errors and omissions of those who acted as agents on his behalf in the commercial transportation of horses for slaughter.

23. On or about May 7, 2005, Respondent Stanley shipped 13 horses in commercial transportation to BelTex Corporation in Ft. Worth, Texas (hereinafter, BelTex), for slaughter. One horse in the shipment, a sorrel mare bearing USDA back tag # USCE 0101 (CX 11), was blind in both eyes such that she walked into fences unless she was being led, yet Respondent Stanley or his agents shipped her with the other horses. This horse's blindness was likely due to anterior uveitis, an inflammation of the eye causing greater than 70% of the eye problems in horses, called moon blindness by the ancients. The horse had probably been blind for at least the better part of a year. During commercial transportation as was done here, the horse was a liability to herself, the other horses and the handlers. By transporting her commercially, Respondent Stanley or his agents failed to handle the blind horse as expeditiously and carefully as possible in a manner that did not cause her unnecessary discomfort, stress, physical harm or

trauma, in violation of 9 C.F.R. § 88.4(c). CX 10, CX 11.

24. On or about May 7, 2005, Respondent Stanley shipped 13 horses in commercial transportation to BelTex for slaughter. Respondent Stanley or his agent(s) delivered the horses outside of BelTex's normal business hours, at approximately 3:50 a.m. on May 8, 2005, and left the slaughtering facility and did not remain at BelTex for a USDA representative to inspect the horses and did not return to BelTex to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b). CX 2.

25. On or about June 10, 2005, Respondent Stanley shipped 14 horses in commercial transportation to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv) (CX 16, CX 21); and (2) not all the boxes indicating the fitness of the horses to travel at the time of loading were checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii). CX 21.

26. On or about June 10, 2005, Respondent Stanley shipped 14 horses in commercial transportation to BelTex for slaughter. Respondent Stanley or his agent(s) delivered the horses outside of BelTex's normal business hours, at approximately 12:12 a.m. on June 11, 2005, and left the slaughtering facility and did not remain at BelTex for a USDA representative to inspect the horses and did not return to BelTex to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b). CX 17, CX 22.

27. On or about June 24, 2005, Respondent Stanley shipped 10 horses in commercial transportation to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's telephone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the name of the auction/market was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii); (3) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii); and (4) there was no statement that the horses had been rested, watered, and fed prior to the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x). CX 28.

28. On or about June 26, 2005, Respondent Stanley shipped 23 horses in commercial transportation to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's telephone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the form did

not indicate the breed/type of each horse, one of the physical characteristics that could be used to identify each horse, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) there was no statement that the horses had been rested, watered, and fed prior to the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x). CX 29.

Discussion

29. As a businessman, as an owner/shipper, Respondent Mitchell B. Stanley is responsible to control the work being done in connection with transporting horses to slaughter.
30. Respondent Stanley remains responsible for noncompliance when others, while working on behalf of Respondent Stanley (Robert Estelle, for example, and truck drivers working for Respondent Stanley or Robert Estelle), failed to maintain compliance with the Commercial Transportation of Equine for Slaughter Act and the Regulations. 9 C.F.R. § 88 *et seq*.
31. Respondent Stanley is responsible for the noncompliance of such agents acting on his behalf, even when Respondent Stanley had instructed them properly.
32. Robert Estelle attempted fraud with regard to a paint/pinto stallion, backtag USCE 0055, shipped to BelTex Corporation on June 10, 2005. CX 21. Robert Estelle's Affidavit states, "Mitch Stanley and I are full partners in the horse business." CX 13.
33. Robert Estelle asked a woman who worked for him, Trenia Martin, maiden name Thurman, to show on an Owner/Shipper Certificate (CX 21) that she, Trenia Thurman, was the owner of a paint/pinto stallion, backtag USCE 0055, when she was not the owner, "to keep Mitch Stanley out of trouble." CX 27. Sr. Investigator David Head, USDA APHIS Investigative and Enforcement Services, obtained Trenia Martin's statement in Affidavit form. CX 27.
34. Robert Estelle's Affidavit confirms what Ms. Martin stated and makes clear that he, Robert Estelle, not Trenia Martin, was the owner of the paint/pinto stallion. CX 13. Robert Estelle's Affidavit makes clear that he, Robert Estelle, was trying to avoid trouble in case the paint/pinto stallion was called blind at BelTex. CX 21.
35. Neither Trenia Martin nor Robert Estelle suggested that Respondent Stanley knew about Robert Estelle's attempted fraud with regard to the June 10, 2005 shipment of the paint/pinto stallion, backtag USCE 0055.
36. Robert Estelle also tried to avoid trouble with regard to the sorrel mare that was blind in both eyes, backtag USCE 0101 (CX 11) that was shipped on or about May 7, 2005. CX 6. Whereas Mitch Stanley was

shown as the owner/shipper for 12 of the 13 horses in the load, Kevin Martin was shown as the owner/shipper for the double-blind horse. Kevin Martin's Affidavit (CX 12) indicates that he, Kevin Martin, was the double-blind horse's owner, and that Robert Estelle shipped the horse to BelTex for him using backtag USCE 0101 which "came from Mitch Stanley as Robert Estelle and Mitch have some type of agreement allowing Robert Estelle to sell horses at Bel Tex." CX 12.

37. Robert Estelle confirmed that he included Kevin Martin's double-blind horse, back tag USCE 0101, in the load. CX 13. Respondent Stanley is liable as the owner/shipper under these circumstances. (Kevin Martin is not a commercial shipper; Robert Estelle was Respondent Stanley's business partner in the commercial shipping.)

38. Kevin Martin is Robert Estelle's brother in law (CX 13). Neither Kevin Martin nor Robert Estelle suggested that Respondent Stanley knew about Robert Estelle's attempt to escape the requirements of commercial slaughter horse transportation with regard to the May 7, 2005 shipment of the sorrel mare that was blind in both eyes, backtag USCE 0101. I conclude that Respondent Stanley probably did not know until afterwards about Robert Estelle's inclusion of the double blind mare in the load, in violation of 9 C.F.R. § 88.4(c).

39. Resorting to fraud in an attempt to escape the requirements of commercial slaughter horse transportation could have been prosecuted criminally. Those involved in the May 7, 2005 shipment of the sorrel mare that was blind in both eyes, backtag USCE 0101, and the June 10, 2005 shipment of the paint/pinto stallion who was blind in one eye, backtag USCE 0055, are highly culpable.

40. Compliance Specialist[4] Joey Thomas Astling, USDA APHIS VS, testified that he was aware of Respondent Stanley putting horses in other people's names to keep the attention off him. Mr. Astling's Affidavit states: "in the past Mitch Stanley has tried to pass blind or cripple [*sic*] horses through inspection by putting them in someone else's name (that is not a commercial shipper) on the VS Form 10-13." CX 10.

41. Respondent Stanley gave a statement by telephone to Sr. Investigator David Head on August 11, 2005, which is consistent with Respondent Stanley's Answer filed November 30, 2006. The August 11, 2005 statement includes:

> [Respondent Stanley] "and Robert Estelle are partners on the horses going to BelTex" [Respondent Stanley] "has not bought

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[4]Formerly Animal Health Technician.

> any horses in the past 3-4 months and he had nothing to do with the blind horses Robert Estelle had shipped. He had been told by BelTex that Robert Estelle had shipped a blind horse and he directed Estelle not to ship blind horses. Robert Estelle makes all purchases and shipping arrangements."

CX 15.

42. Respondent Stanley would be highly culpable if he contributed in any way to the wrongdoing that occurred in connection with the May 7, 2005 shipment of the sorrel mare that was blind in both eyes, backtag USCE 0101, and the June 10, 2005 shipment of the paint/pinto stallion who was blind in one eye, backtag USCE 0055. I conclude that Respondent Stanley's culpability (blameworthiness, or guilt) in both these occurrences is that of a principal whose business partner Robert Estelle disappointed him.[5]

43. When Respondent Stanley's shipments of slaughter horses arrived at the slaughterhouse outside normal business hours, and no effort was made to arrange inspection by a USDA representative, it appears that Respondent Stanley (and/or his agents) was making a deliberate effort to get away from or evade Mr. Astling and to try to avoid responsibilities under the Commercial Transportation of Equine for Slaughter Act and the Regulations.

44. The shipment that arrived at BelTex at 3:50 a.m. on May 8, 2005 (CX 2) was inspected by then Animal Health Technician Joey Astling on May 9, 2005, and no one on behalf of the owner/shipper ever returned during normal business hours so that Mr. Astling could inspect the conveyance. Regarding the shipment that arrived at BelTex just after midnight (12:12 a.m. and 12:15 a.m.) on June 11, 2005 (CX 17, CX 22), Joey Astling testified that nobody met with him, and he received not as much as a phone call.

45. The Slaughter Horse Transportation Program recommended civil penalties totaling $10,550 (ten thousand five hundred fifty dollars). The Program recommendations were presented by Dr. Timothy Cordes, D.V.M., the National Coordinator of Equine Programs within USDA APHIS Veterinary Services (VS). Dr. Cordes is a Doctor of Veterinary Medicine with post-graduate work in orthopedic surgery. Dr. Cordes' veterinary experience treating horses is impressive and included an emphasis in orthopedic, ophthalmologic, and abdominal surgery on

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[5]The definition of an owner/shipper in 9 C.F.R. § 88.1 says that an owner/shipper may be any individual or partnership, and Respondent Stanley may be held responsible for the actions of his business partner Robert Estelle both under this definition and under a theory of ***respondeat superior***.

horses during 20 years of referral practice.

46. Dr. Cordes testified that the overall number of violations by Respondent Stanley in this case was six, a relatively small number. Dr. Cordes testified that one of the six violations, the commercial transportation of a blind horse for slaughter on May 7, 2005, was so serious as to merit the imposition of a $5,000 civil penalty, the maximum civil penalty allowable under 9 C.F.R. § 88.6(a) for a single violation.

47. Dr. Cordes testified that two of the six violations were moderately serious, both of which involved Respondent Stanley's or his agents' delivery of horses to a slaughter plant outside its normal business horses and their subsequent failure either to remain at the slaughter plant until a USDA representative had inspected the horses or to return to the slaughter plant to meet the USDA representative upon his arrival there. Dr. Cordes recommended that a $1,000 civil penalty be imposed for each of these two violations, for a total of $2,000.

48. The three remaining violations involved paperwork and were the least serious violations of the six violations. For these three violations Dr. Cordes recommended a total of $3,550, calculated as follows:

$ 50	June 10	vehicle license no. shown as "N/A" VS Form 10-13 CX 21
$ 50	June 10	no indication that pinto stallion USCE 0055 was "not blind in both eyes" (fitness to travel) VS Form 10-13 CX 21
$ 50	June 24	missing name of auction/market VS Form 10-13 CX 28
$ 50	June 24	BelTex phone no. missing VS Form 10-13 CX 28
$ 500	June 24	$50 x 10 horses, fitness to travel missing VS Form 10-13 CX 28
$ 500	June 24	$50 x 10 horses, fed/watered/rested missing VS Form 10-13 CX 28
$ 50	June 26	BelTex telephone number missing VS Form 10-13 CX 29
$1,150	June 26	$50 x 23 horses, breed/type missing VS Form 10-13 CX 29
$1,150	June 26	$50 x 23 horses, fed/watered/rested missing VS Form 10-13 CX 29

49. Dr. Cordes testified that Respondent Stanley's culpability is greater because this is the second enforcement action brought against him under 9 C.F.R. part 88. On June 14, 2006, Administrative Law Judge Peter M. Davenport issued a Default Decision and Order against Respondent Stanley that imposed a $12,800 (twelve thousand eight hundred dollar) civil penalty. The offenses in that earlier case occurred in October 2003, offenses charged under both the Animal Health Protection Act and the Commercial Transportation of Equine for Slaughter Act. Although the Complaint in that earlier case was filed in January 2006, after the offenses here had already occurred, Respondent Stanley no doubt had a heightened awareness of the requirements of the Commercial Transportation of Equine for Slaughter Act during the investigation that

led to that earlier Complaint being filed.

50. The civil penalty recommendation of the Slaughter Horse Transportation Program is persuasive. I conclude that $10,550 (ten thousand five hundred fifty dollars) in civil penalties for remedial purposes is reasonable, appropriate, justified, necessary, proportionate, and not excessive. 9 C.F.R. § 88.6.

Order

51. The **cease and desist** provisions of this Order (paragraph 52) shall be effective on the first day after this Decision and Order becomes final.[6] The remaining provisions of this Order shall be effective on the tenth day after this Decision and Order becomes final.

52. Respondent Mitchell B. Stanley, 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 Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 note, and the Regulations promulgated thereunder (9 C.F.R. § 88 *et seq*.).

53. Respondent Mitchell B. Stanley is assessed a civil penalty of **$10,550.00** (ten thousand five hundred fifty dollars),[7] which he shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**."

54. Respondent Stanley shall reference **A.Q. Docket No. 07-0023** on his certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties shall be sent to, and received by, APHIS, at the following address:

United States Department of Agriculture
APHIS, Accounts Receivable
P.O. Box 3334
Minneapolis, Minnesota 55403.

within sixty (60) days from the effective date of this Order. [See paragraph 51 regarding effective dates of the Order.]

Finality

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[6] *See* paragraph 55.

[7] The Slaughter Horse Transport Program recommended a $10,550 civil penalty. The Program recommendations were presented by Dr. Timothy Cordes (D.V.M.), the National Coordinator of Equine Programs within USDA APHIS Veterinary Services.

55. 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). [See paragraph 51 regarding effective dates of the Order.]

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, with **two** mailings to Respondent Stanley, one at **156** Stanley Road, Hamburg, Arkansas 71646 (as shown in his Answer), and one at **154** Stanley Road, Hamburg, Arkansas 71646 (as shown in the Complaint).

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

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ANIMAL WELFARE ACT

COURT DECISIONS

JEWEL BOND, d/b/a BONDS KENNEL v. USDA.
No. 06-3242.
Filed April 29, 2008.

(Cite as: 275 Fed. Appx. 574).

AWA – Suspension of License – Willful – Correction of violations – Repeated.

United States Court of Appeals,
Eighth Circuit.

Before BYE, SMITH, and BENTON, Circuit Judges.

PER CURIAM.

Jewel Bond petitions for review of an order of the Secretary of the United States Department of Agriculture (USDA) finding that she willfully violated the Animal Welfare Act (AWA) and ordering her to cease and desist from violating the AWA, suspending her AWA license for one year, and imposing a $10,000 civil penalty. We conclude that substantial evidence supports the Secretary's decision, *see Cox v. USDA,* 925 F.2d 1102, 1104 (8th Cir.1991) (standard of review), and that the Secretary's choice of sanction is not "unwarranted in law or unjustified in fact,"*see Lesser v. Espy,* 34 F.3d 1301, 1309 (7th Cir.1994). Accordingly, we deny the petition for review. *See* 8th Cir. R. 47B.

COPLEY TOWNSHIP and THE BOARD OF HEALTH SUMMIT COUNTY GENERAL HEALTH) DISTRICT v. LORENZA PEARSON and BARBARA PEARSON.
CASE NO. CV 2008-03-2480.
Filed May 9, 2008.

[Editor's Note: We apologize in advance for minor typographical errors that may have resulted from re-purposing a scanned copy of this decision.]

AWA – Public nuisance – Abatement of nuisance – Exotic animals – Statutory injunction.

Pending an appeal to an adverse finding in an USDA Animal welfare case, local public authorities seek injunctive relief and abatement of a public nuisance resulting from a finding of a poorly maintained exotic animal facility.

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY OHIO

ORDER

This matter comes before the Court on the Plaintiffs' Copley Township (hereafter [Copley) and The Board of Health Summit County General Health District, (hereafter the County) Motion for a Preliminary Injunction and Defendants' Lorenza Pearson (hereafter Pearson) and Barbara Pearson aka Brown (hereafter Brown) Response thereto. The Court has been duly advised, having reviewed all pending motions, memoranda in support and against, pre and post hearing briefs, evidence presented at the hearing, property inspection, pleadings, Exhibits and applicable law. The Court hereby finds that the Plaintiffs' have met the burden of proof by clear and convincing evidence applicable for a preliminary injunction herein and grants a statutory preliminary injunction and an equitable preliminary injunction via Civ. Rule 65.

FACTS

The instant action was filed on March 25,2008, for a Declaratory Judgment, Injunctive Relief and Nuisance Abatement. A preliminary injunction hearing was held on April 17 - 18, 2008 and a site view was conducted on April 18, 2008 after closing arguments by the parties. Defendants have owned exotic animals for close to thirty years as testified to by Defendant Brown. The "farm" started as an animal rescue. The name under which their "farm" operates is L&L Exotic Animal Farm (hereafter L&L). Defendant Pearson has an exhibitor's permit from the United States Department of Agriculture (USDA) which allows Defendant Pearson to breed the animals and show the animals. The Defendants have been involved in prior litigation in Summit County as well as Federal Litigation with the USDA. In case number CV 2002-06-3473, Summit County Judge Cosgrove affirmed the underlying Summit County Board of Health decision finding that Defendant Pearson's property was a public health nuisance. The Ninth District Court of Appeals affirmed Judge Cosgrove's Decision on May 5,2004 in case number CA 21666. On April 6, 2007, Federal Administrative Law Judge Victor W. Palmer ordered the Defendant Pearson's license to

be permanently revoked, thus prohibiting him or anyone else from doing business as L&L Exotic Animal Farm or obtaining a license under the Animal Welfare and the regulations. Judge Palmer's Federal order is currently being appealed. As such, an automatic stay is in place regarding the subject property. Therefore, Defendants and L&L are operating under a valid license.

In 2002, Defendants had close to 60 large cats such as lions, tigers, cougars, and lynxes. Defendants also had bears and various other sundry animals. At the time this lawsuit was filed, Defendants had 8 bears, a lioness, 3 tigers, a wolf-hybrid, 5 horses, 3 ponies, 2 goats, pigeons, and a number of domestic animals. By the time of the preliminary injunction hearing, the tigers had been moved to a facility in Zanesville Ohio, but according to the testimony[1], this facility is not a USDA licensed facility. The next day at the site view, all of the horses except one were moved to a neighbors pasture and were unavailable for viewing, and the one horse at the property was not removed from the small shed where it was housed. A variety of allegations have been made and testimony from both sides was offered in support of and in response to the allegations. The parties dispute whether one or two different types of injunctions have been alleged, equitable injunction and/or statutory injunction. Therefore, an analysis of the law relevant to the instant case is appropriate at this time prior to a full recitation of the facts.

APPLICABLE LAW

EQUITABLE INJUNCTION

The law on equitable preliminary injunctions is relatively standard. In order for an equitable preliminary injunction to be issued, "the court must consider whether: (1) the movant as shown a substantial likelihood of success on the merits, (2) the movant will suffer an irreparable injury, (3) a preliminary injunction could harm third parties, and (4) the interest of the public will be served by granting a preliminary injunction."[2] *Pelster v. Millsaps, Jr.*, (1999), 1999 Ohio App. LEXIS 5012 *4-5, (9th

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[1]Testimony of Randy Coleman

[2]Stated another way, "(1) whether there is a substantial likelihood that plaintiff will prevail on the merits; (2) whether plaintiff will suffer irreparable injury if the injunction is not granted; (3) whether third parties will be unjustifiably harmed if the injunction is granted; and (4) whether the public interest will be served by the: injunction." *Valco Cincinnati, Inc. v. N & D Machining Service, Inc.* (1986),24 Ohio St. 3d 41.

Dist. C.A. No. 19375), *citing Gobel* v. *Laing* II (1967), 12 Ohio App. 2d 93,94, *citing Johnson v. Morris* (1995), 108 Ohio App. 3d 343, 352. The Ninth District Court of Appeals in *Smead v. Graves,* 2008 Ohio 115, stated that irreparable harm exists when "there is no plain, adequate, and complete remedy at law, and where money damages would be impossible, difficult or incomplete."[3] Each element must be proven by clear and convincing evidence. *Vanguard Transp. Sys. Inc. v. Edwards Transfer and Storage Co., Gen. Commodities Div.* (1996), 109 Ohio App. 3d 786. "In resolving whether the movant has demonstrated a likelihood of success by clear and convincing evidence, the movant must support its claim through the strength of its own case, not by any weakness in the nonmoving party's case." *Union Twp. v .Union Twp. Professional Firefighters' Local* 3412, 163 L.R.R.M. *2748, citing Cleveland Constr. Inc. v. Ohio Dept. of Adm. Serv., Gen. Servo Adm.,* (1997), 121 Ohio App. 3d 372. "Issuance of a preliminary injunction is appropriate 'where the [movant] fails to show a strong or substantial probability of ultimate success on the merits of [its] claims, but where [the movant] at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to [the non-moving party] if an injunction is issued." *Union Twp. Professional Firefighters Local* 3412 *citing In re DeLorean Motor Co.* (CA6, 1985), 755 F.2d 1223, 1229.

Defendants argue that Plaintiffs' did not properly plead a claim for an equitable injunction, while also arguing that Plaintiffs' have not proven irreparable harm. The Court will address the second argument at the appropriate time; however, the Complaint filed by Plaintiffs' requests injunctive relief in Count 1 on behalf of Plaintiff Copley due to a request of a finding of a public nuisance, and Count 2 on behalf of Plaintiff Summit County due to a request of a finding of a public nuisance. Ohio is a notice pleading state and as long as the Pleadings put the opposing party on notice of the claims or potential claims, the pleadings in the complaint are adequate. Therefore, the Court finds that Plaintiffs' have properly pled a request for an equitable injunction on behalf of both Plaintiffs.

STATUTORY INJUNCTION

To be eligible for a statutory injunction, a party must first come

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[3]Smead at ¶10 *citing to Crestmont Cadillac Corp. v. Gen. Motors Corp.* 2004 Ohio 488 at ¶36.

under the umbrella of a specific statute that within its language provides as a remedy an injunction. Plaintiff Copley pleads in Count 3 that the conditions that exist on Defendants' property constitute violations of the Copley Township Zoning Resolution and requests the Court declare such. Additionally, in Count 4 of the Complaint, Plaintiff Copley requests the Court enter both a preliminary and permanent injunction based upon the fact that the conditions upon Defendants property violate Copley Township Zoning Resolutions. In Count 5, Plaintiff notes that Judge Cosgrove's final and appealable order which was affirmed by the Ninth District Court of Appeals on May 5, 2004, affirmed the Summit County Board of Health's finding that Defendant's property was a public nuisance. Count 5 requests an order entitling the Summit County Board of Health to enter the property and remove the animals. Count 6 notes various Summit County ordinances that Copley alleges the Defendants are in violation of and requests an injunction by and through its Chief of Police due to violation of these ordinances. Count 7 again cites to the various Summit County Ordinances and requests an injunction both for Copley through its Chief of Police and for the Board of Health.

The first item to review when a statutory injunction has been requested is the statute. O.R.C. Ann. 3707.01 provides that "[t]he board of health of a city or general health district shall abate and remove all nuisances within its jurisdiction." The statute continues and states the board may prosecute, compel persons to abate and remove any nuisance. The Ninth District Court of Appeals in *Bd. of Health, Lorain Cty. Gen. Health Dist. v. John Diewald, aka, Chu Bbakka,* 2006 Ohio 1547, reviewed almost this identical issue. In *Diewald,* the General Health District served Defendant with a citation. A hearing was then held several weeks later. Defendant was given an additional two weeks to clean up his property at which time it was inspected again. Due to the fact that he did not clean up his property, enforcement actions were taken. The *Diewald* Court determined that the Board of Health had followed the procedures as set forth in O.R.C. Ann. 3707.02 and that Defendant's due process rights had not been violated. In the above-captioned case, there is already a judicial determination that Defendants' property constitutes a public nuisance as it pertains solely to the Summit County Board of Health and the 2002 order which was properly appealed and affirmed twice. As indicated, the Ninth District Court of Appeals has already indicated that injunctive relief is available pursuant to O.R.C. 3707.01 and O.R.C. 3707.02. Therefore, the Court finds that the Summit County Board of Health comes within a 'special' statute under which injunctive relief is available.

Plaintiff Copley claims to fall under the umbrella of O.R.C. 519.24. This statute clearly states that the Board of Township Trustees may employ special counsel to bring an injunction action if any "land is or is proposed to be used in violation of section 519.01 to 519.99 inclusive."[4] The Court finds that Plaintiff Copley falls within a 'special' statute under which injunctive relief is available.

The Ohio Supreme Court in *Ackerman* v. *Tri-City Geriatric* &*Health Care Inc., (1978),* 55 Ohio St. 2d 51 stated "[i]t is established law in Ohio that, when a statute grants a specific injunctive remedy to an individual or to the state, the party requesting the injunction 'need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be... done for which he has not adequate remedy at law."[5] "* * * [W]here an injunction is authorized by a statute designed to provide a governmental agent the means to enforce public policy, 'no balancing of equities is necessary,'[6] and '[i]t is enough if the statutory conditions are made to appear.'"[7] Statutory injunctions and equitable or common-law injunctions have different histories which is the reason why the proof standard differs. The statutory injunction is a creature of the General Assembly and once it has been proven, it is no longer necessary for the equities to be balanced or for irreparable harm to be proven because the General Assembly determined by statute that once the violation was proven, the injunction should issue since these types

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[4] Bd. of Brimfield Twp. Trs. v. Bush, (2007), 2007 Ohio 4960 (ORC 519.24 creates a right of enforcement for a township against a landowner who either "uses or proposes to use his or her land in violation of any of the provisions of RC Chapter 519 or any township zoning resolution." ¶20; *MoskafJv. Bd. of Trustees of Deerfield Twp.* (1994), 1994 Ohio App. LEXIS 5712 *5 *citing Barbeck v. Twinsburg Twp.(1990),* 69 Ohio App. 3d 837, 840.

[5] *Ackerman citing Stephan v. Daniels* (1875), 27 Ohio St. 527, 536. (See, also, *State v. Alexander Brothers, Inc.* (1974), 43 Ohio App. 2d 154; 29 Ohio Jurisprudence 2d 176, Injunctions, Section 13; and 42 American Jurisprudence 2d 776; Injunctions Section 38, for further support of the proposition that the traditional concepts for the issuance of equity injunctions do not apply in statutory injunction action.)

[6] *Ackerman citing Brown v. Hecht Co.* (C.A.D.C. 1942), 137 F.2d 689,692; *State v. OK. Transfer Company,* (1958), 215 Ore. 8,15,330 P.2d 510.

[7] *Ibid., at pages* 15-16; See, also, *United States v. San Francisco* (1940), 310 U.S. 16, 30; *Conway v. State Board of Health,* 1965), 252 *Miss.* 315,173 *So. 2d* 412; Nevada Real Estate Comm. v. Ressel, (1956), 72 Nev. 79, 294 P. 2d 1115; *Arizona State Board of Dental Examiners v. Hyder* (1977), 114 Ariz. 544, 562 P.2d 717.

of injunctions are not designed primarily to do justice to the parties but to prevent harm to the public. *Ackerman* at 58.

NUISANCE

The Ohio Supreme Court has distinguished the terms absolute and qualified nuisance as follows:

> 1. An absolute nuisance, or nuisance [per se], consists of either a culpable and intentional act resulting in harm, or an act involving culpable and unlawful conduct causing unintentional harm, or a nonculpable act resulting in accidental harm, for which, because ofthe hazards involved, absolute liability attaches notwithstanding the absence of fault.
> 2. A qualified nuisance, or nuisance dependent on negligence, consists of an act lawfully but so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another.[8]

APPLICABLE ORDINANCES AND STATUTES

In addition to the Supreme Court's recognized definition of nuisance, Summit County has defined prohibited nuisance conditions and Plaintiff Copley has defined nuisance. Copley's definitions of nuisance can be found under Section U of Sec. 302 Supplementary Regulations. Section U is titled Prohibited Uses and states:

> No use shall be permitted or authorized to be established which, when conducted in compliance with the provisions ofthis Resolution, and any additional conditions and requirements prescribed, is or may becomes (sic) hazardous, noxious, or offensive due to the emission of odor, dust, smoke, cinders, gas, fumes, noise, vibrations, electrical interference, refuse matters or water carried wastes.

Summit County has several applicable ordinances including the following:

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[8] *Angerman v. Burick,* 2003 Ohio 1469, *9, *citing Taylor v. Ci ty ofCincinnati,* 143 Ohio St. 426, approved and followed. *Metzger v. Pennsylvania, Ohio &Detroit RR Co.,* (1946), 146 Ohio St. 406, paragraphs one and two of the syllabus.

S.C. Ord. 505.31 Exotic Animals Definitions:
As used in this chapter, certain terms are defined as follows:

(a) "Exotic animal" includes lions, tigers, leopards, cheetahs, jaguars, panthers, cougars, lynx, bobcat, hyenas, wolverines, bears, bison, elk, moose, wildebeest, wolves, coyotes, foxes, gorillas, baboons, orangutans, gibbons, chimpanzees, monkeys of a species whose average adult weight exceed twenty (20) pound, elephants, rhinoceroses, hippopotami, caimans, gavials, alligators and crocodiles exceeding thirty-six inches in length, constricting snakes exceeding forty-eight inches in length and all forms of poisonous or venomous reptiles.

S.C. Ord. 505.32 Exotic Animals Prohibited

(a) No person shall keep, or permit to be kept, upon his premises within the County any exotic animal, except for the display or exhibition, and such display or exhibition is in a circus, zoo or zoological park certified by the American Association of Zoological Parks and Aquariums, or such animal is kept for scientific research purposes in schools or research institutions, or such animal is kept for commercial sale in a retail wholesale pet store or otherwise properly zoned for that purpose, or unless properly licensed by the United States or the State of Ohio.

S.C. Ord. 505.33 Unsecured Exotic Animals

(a) No person shall keep, or permit to be kept, unsecured upon his premises within the County any exotic animal.

S.C. Ord. 505.34 Exotic Animals at Large

(a) No person shall allow any exotic animal to be at large within the County or to be removed from the premises of the owner, except for the purposes of transport to a public exhibition or training for a public exhibition, for scientific study at a school or research institution, for medical treatment at a licensed veterinarian or delivery for sale to any buyer of such exotic animal.

S.C. Ord. 505.36 Physical Harm by Exotic Animals

(a) No person, being the owner or having the care, custody or control of any exotic animal within the County, whether being exhibited or otherwise, shall suffer or permit such exotic animal to cause physical harm to any person, or serious physical harm to

another animal or exotic animal.
(b) It is hereby determined that possession of an exotic animal is of such a danger to the public and inimical to the public safety and good order of the County, that lack of intent, negligence or fault on the part of such person, or the lack of knowledge of the violent propensities of the exotic animal is not a defense to a violation of this section.

S.C. Ord. 505.37 Insurance for Exotic Animals
(a) No owner of an exotic animal shall fail to obtain liability insurance with an insurer authorized to write liability insurance in this State providing coverage in each occurrence, subject to a limit exclusive of interest and costs, of not less than one hundred thousand dollars ($100,000) because of damage to property or bodily injury to or death of a person caused by the exotic animal.

S.C. Ord. 505.05 Nuisance Conditions Prohibited
(a) No person shall keep or harbor any animal within the County:
(1) So as to create offensive odors or unsanitary conditions which are a nuisance or a menace to the health, comfort or safety of the public;
(2) Which, by frequent and habitual barking, howling, yelping or any other audible nuisance created unreasonably loud and disturbing noises of such a character, intensity and duration as to disturb the peace, quiet and good order of the County;
(3) Which molests, menaces or interferes with persons in the public right of way;
(4) Which scatters refuse which is bagged or otherwise contained in trash receptacles;
(5) Which damages any public or private property not the property of the owner of such animal.

Finally, Plaintiffs allege that as to the Board of Health, a finding of a public nuisance is not necessary as it would be res judicata. Plaintiffs argue that the affirmance by the Ninth District Court of Appeals and Judge Cosgrove of the Administrative findings in 2002, including a finding that Defendants' property constituted a public nuisance means this Court only need to find conditions have not changed or are still in a state that constitutes a nuisance. Plaintiff Summit County draws its statutory authority from O.R.C. Ann. 3707.01 and 3707.02.

ISSUES

1. Whether Plaintiff Copley is entitled to a statutory injunction?
2. Whether Plaintiff Summit County Board of Health is entitled to a statutory injunction?
3. Whether Plaintiff Copley is entitled to an equitable injunction?
4. Whether Plaintiff Summit County Board of Health is entitled to an equitable injunction?
5. Whether Plaintiff Copley is entitled to a declaration that Defendants' property is a public nuisance?
6. Whether Plaintiff Summit County Board of Health is entitled to a declaration that Defendants' property is a public nuisance or does the prior litigation make such a declaration moot due to res judicata?
7. If any injunctions are issued are the exotic animals going to be immediately removed?

DISCUSSION

As previously noted, to be eligible for a statutory injunction, one must fall within the umbrella of a specific statute that provides the authority for an injunction for violation of that or another specific statute. Referencing both statute and case law, this Court earlier found that both Plaintiffs have pleaded cases within at least two different statutes which permit ir0unctions as a remedy. Plaintiff Copley is permitted to bring its action pursuant to O.R.C. 519.24[9] while Plaintiff Summit County is permitted to bring its action pursuant to O.R.C. Ann. 3707.01. For the statutory injunctions to issue, Plaintiffs must prove the violations of the statutes or ordinances as statutory injunctions are created to protect the public and prevent harm to the public.

The allegations as to the Defendants are for the most part the same for all of the causes of actions. Therefore, in the interest of judicial economy, the Court will summarize the testimony of the witnesses at the hearing and the Court's observations at the site view.

Plaintiffs' offered four witnesses while the Defendants offered 2 witnesses. Plaintiff offered Robert Hasenyager, Director of the Environmental Health Division for the Summit County General Health

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[9] Bd. of Brimfield Twp. Trs. v. Bush, (2007), 2007 Ohio 4960 (ORC 519.24 creates a right of enforcement for a township against a landowner who either "uses or proposes to use his or her land in violation of any of the provisions of RC Chapter 519 or any township zoning resolution." ¶20; *Moskoff v. Bd. of Trustees of Deerfield Twp.* (1994), 1994 Ohio App. LEXIS 5712 *5 *citing Barbeck v. Twinsburg Twp.(*1990*),* 69 Ohio App. 3d 837, 840.

District; Susan Schultz, Copley's Assistant Zoning Inspector; Michael Mier, Chief of Police for Copley Township; and Randy Coleman, inspector for the United States Department of Agriculture. The Defendants offered Barbara Pearson-Brown, Defendant. Lorenza Pearson's ex-wife, co-owner of the land and of L&L, and Robert Hasenyager as if on cross-examination.

Copley Township Chief of Police Michael Mier testified that he has been a police officer for 27 years and Chief of Police in Copley for 8 years. The Chief became familiar with the basic conditions of Defendants, property during routine patrols over the years and has personally visited the property during inspections, including recently. The Chief testified that his first encounter with the Defendants and their property was in 2001. Chief Mier testified he has concerns not only for the personal safety of the Defendants but also for the safety of the citizens of Copley for several reasons. Particularly, Chief Mier is concerned with the diminished integrity of the enclosures and cages. He testified that, in the time he's been visiting the Defendants' property, the structures have gone downhill, noting that as they are presently rusting, the timber supports are rotting or coming loose, and parts of the enclosures move rather freely. The Chief also noted the lack of a secure perimeter around the Pearson's acreage, a problem should a big animal escape its cage and/or a trespasser come on the property. Furthermore, he added that no responsible person is on hand and that the facility remains without any consistent supervision. He noted that should a big animal escape its cage, it could be hours before the police are notified. On cross-examination the Chief did agree that the enclosures/cages had additional perimeter fences around them, but noted there was not proper fencing around the entire property. On re-direct, the Chief was presented with a portion of Randy Coleman's USDA report. After reading the report, the Chief testified that he agreed with the report regarding the concerns for the safety and welfare of the public and citizens of Copley.

Susan Schultz, an Assistant Zoning Inspector with Copley Township, testified on behalf of Plaintiffs. Ms. Schultz testified that she has worked in her position for 19 years and that part of her job duties include inspecting properties. She testified that she inspected the subject property during her last visit on March 18,2008. Ms. Schultz testified that Defendants' property is designated OC, which stands for open space

and conservation, and is approximately one acre.[10] Ms. Schultz also testified that Paragraph U from the Zoning Resolutions is the portion of the Copley Zoning Resolutions that the Defendants are allegedly violating including the portion regarding noxious, offensive odors, noise, waste, fumes, etc. Lastly, Ms. Schultz testified that she considers the odor present at L&L to be offensive and stated that it can be smelled prior to reaching the property. She testified that the pictures taken for exhibit G were taken in her presence and at her direction and represented an accurate depiction of what she saw on her site visit on March 18, 2008. Ms. Schultz indicated that based on her 19 years of experience, she considers the Defendants' property a nuisance, noting the property has never been cleaned up as required.

Randy Coleman, an animal care inspector for the United States Department of Agriculture, was declared an expert by the Court over the Defendants' objection. Mr. Coleman first inspected Defendants' property in June 2003. Mr. Coleman stated that on subsequent attempts to inspect the property, normally no one was at the property. Not until January 9, 2008 did Mr. Coleman have an opportunity to re-inspect the property with Ms. Pearson-Brown present. He testified regarding the January 2008 inspection as follows. The doors to the lioness and bear cages were rusted and rapidly deteriorated. There were dairy calves' carcasses in the tiger cages and Mary Turner, Defendant Lorenza Pearson's current wife, did not know how the calves had died. The water receptacle with the bears was dirty and there was an accumulation in excess of several days of feces in the lioness' cage. Although multiple persons were available to inspect Defendants' property on March 18, 2008, Mr. Coleman was refused entry as Defendant Pearson was unavailable and since he holds the license, he must be there or someone he has given permission to must be there for the inspection. On April 1, 2008, Mr. Coleman again attempted to inspect the premises and was told Mr. Pearson was unavailable. However, Mr. Pearson spoke to Mr. Coleman via telephone and Mr. Coleman asked Defendant Pearson about the fact that his son Bucky was at the facility and wanted to move the animals. Defendant Pearson still said no inspection. Bucky told Mr. Coleman that they were moving the tigers to another facility and they were going to move the lioness from one enclosure to another. The tigers were moved to a facility in Zanesville and the required paperwork was provided to Mr. Coleman on April 9, 2008. Mr. Coleman stated

[10]Based on personal observations during the site visit, this Court believes the property to be considerably more land that just one acre.

that the new facility in Zanesville is not a USDA licensed facility.

Mr. Coleman was finally granted entry on April 9, 2008. Pursuant to Mr. Coleman's testimony many of the observed non-compliant items are similar to the prior non-compliant items. The bars on the bear cage have rusted off. The bears could escape because the structural supports are rotting at ground level. The primary enclosure will not hold the bears. Since the fire in May 2006, the lack of running water at the facility makes the watering and husbandry of the animals problematic. Also on premises were baked goods and open bags of dog food not protected from rodents etc. The perimeter fence should be eight feet in height and around the lioness the fence is bowed and around the bears the railroad ties are rotted out.

Finally, Robert Hasenyager, a licensed registered sanitarian and Director of Environmental Health for the Summit County Department of Health, testified extensively as to his experience with the Defendants. Mr. Hasenyager became aware of the Defendants during the Summer of 2001. Mr. Hasenyager then identified Resolution 160-02 which found the Pearson property to be a public nuisance and was the basis of the litigation before Judge Cosgrove. Mr. Hasenyager was present at the March 18, 2008, inspection and identified and read a portion of his report as well as identified photographs taken by him that day that accurately depict the property as it existed on March 18, 2008. He opined that the need for a wastewater treatment system still exists and that Mr. Pearson remains in violation of the requirement to install a system.

The following items were noted by Mr. Hasenyager on March 18, 2008. A pressure tank with a power jet pump was sitting near the well but did not extend into the well. When the house burned down in 2006, the well pump became disconnected and was abandoned. However, to abandon a well, a person needs a permit and is required to undertake various actions so as not to contaminate neighboring wells. With no running water on Defendants' property, the Defendants are unable to properly clean the cages and handle waste. Mr. Hasenyager opined the issues with the lack of water and proper water treatment system present a public health nuisance. Furthermore, he had a concern regarding proper sanitation because if contaminates get into Pearson's well, adjoining neighbor wells may also be contaminated. He noted observing open waste in the bear enclosure near the main gate, and a pile of straw and animal waste near the dumpster, along with animal fur, flesh, bone and waste of an unknown animal being present.

He further testified that an odor of manure and rotting flesh exists around the entire facility. Mr. Hasenyager testified the odor is not

typical of a zoo or farm but is that of rotting flesh and that the odor varies upon temperature and humidity. The odor can be very objectionable and strong even if not directly on the property. Mr. Hasenyager also noted that the lioness' cage door had a bar missing and the base of the bars were rusted through from corrosion. The bear cage door, an old jail cell door, is missing bars and has rusting bars, and the bear enclosure had ponding water. The storage shed was open with barrels full of old bakery products, providing an unprotected source of food for rodents. The railroad ties used as structural support on the upper left side are rotting away and getting smaller causing Mr. Hasenyager to question the structural support of the building. The shed and tiger enclosures both show rodent burrows. Various posts at the back of the enclosures for the lion and bears are leaning, some in and some out. Overall, the structures on the property reveal a pattern of deterioration.

The tiger cage contains flesh feed and puddles of water which concerns Mr. Hasenyager because standing water mixes with waste which causes mosquito problems and the animals stay wet. The wolf-hybrid den has an excessive waste accumulation and water accumulation. The waste accumulation includes some fresh waste, but some waste had been present for quite some time. Various pictures were taken by Mr. Hasenyager of bones outside the wolf-hybrid den and in an old den that was not in use and apparently the bones had been there for quite sometime. Defendants' property also contains burn piles in an open area containing garbage from the house. Mr. Hasenyager also noted horse manure piles that had been present since at least January and rimless scrap tires, the latter ofwhich are a nuisance pursuant to the dministrative Code.

On cross-examination, Mr. Hasenyager reiterated that the well is not being used as the ower is disconnected to the property which means there is no power to the well and the pump is not connected. Mr. Hasenyager also stated that rodent control problem with a mismanaged facility housing a large number of animals could be a problem. Although there have never been any actual written reports, Mr. Hasenyager testified that they have received complaints that animals have escaped from Defendants' property. Mr. Hasenyager has seen dead carcasses of animals on Defendants' property in the past.

Finally, and although testimony was not taken on this issue, Plaintiffs presented written documentation that the Lioness and wolf-hybrid, if removed, could go to Noah's Lost Ark and the Bears and Lioness could go to Wild Animal Sanctuary in Colorado. In defense of the allegations, Defendant Barbara Pearson Brown took the stand. She testified as

follows. L&L started approximately 30 years ago as an animal rescue. Defendant Brown has been with L&L the entire time and the facility had no significant problems until 2001. Over the years, the number of workers has ranged from 8 to 25. The process for cleaning the cages of the various animals was described without hesitation, as Defendant Brown originally determined what the process should be. The lioness' cage is cleaned once a day, as are the bears in the winter. In the summer however, the bears' cages get cleaned up to three times a day. However, Ms. Brown also testified that the lioness' cage do not get watered down due to the mixture of sand and special gravel used as a flooring material.

For the last one and one half years, Defendant Brown has been living next door at 2078 Columbus Ave. which adjoins the Pearson property. This property was bought after the fire in May 2006 burned down the house down on the Pearson property. Defendant Brown testified that she runs electricity with an extension cord from her house next door to L&L at the well. In addition they hook up a hose from her house which stretches to the bear cages. The bear cages are not hosed down in the winter because the water freezes. Defendant Brown testified that spring is the busiest time for repair but they are constantly updating and repairing the cages. Several of the Mr. Hasenyager's pictures were shown to Defendant Brown and she gave her opinion for the conditions as depicted in the pictures. For instance, one of the doors has since been replaced; one local church gives away food and bread which Defendants feed to the bears and horses. For rodent control Defendants' use rat baits and alternate brands.

Defendant Brown and Mary Turner Pearson, Defendant Lorenza Pearson's current wife, took pictures Tuesday and Wednesday of the week of the preliminary injunction hearing. Defendant Brown testified that the particleboard on the outside of the lioness' cage was put there to block the view of the cat and for security, not for safety (so even if the particle board is rotting, it's not structural). The burn pile has been cleaned up now, but has existed for years, although Defendant Brown unaware it was illegal. The structures left on the property are two horse barns, a storage shed, a pigeon house, and two compounds, one for the bears and one for the lioness.

Defendant Brown testified that she worked a full time job and was not home during the entire day to monitor the animals. The Court notes that Defendant Pearson was unable to stay for the full hearing as he had to attend his dialysis which he attends three times a week. Defendant Pearson supervises the work taking place on the property, but is unable to physically perform any work.

On conclusion of the hearing and at the request of the Defendants,

the Court conducted a field trip to the Pearson property. Counsel for the parties were present along with the Defendants Barbara Pearson-Brown and Lorenzo Pearson, who was transported to those parts of the property accessible by wheelchair.

The Court observed very recent efforts by Pearson's volunteers to attempt to remedy some of the problems on the property, including the partial construction of a second perimeter fence just outside the original one; expansion with additional securing of the bear cage; and some cleanup, including removal of a large manure pile.

The Court also observed the permeating, fetid smell; the decrepit structures with gerry-rigged repairs; the wild animals caged in constrained conditions; and the accumulated litter of animal excrement and discarded human debris - all of which not only demonstrated the long term, systemic problems related to the property but also sickened the senses.

On review, the Court is left with the distinct impression that the various officials who testified clearly have good reason for their stated concerns. Safety issues cited by Chief Mieir; lack of appropriate water treatment system and accumulation of various kinds of debris described by the Summit County Environmental Health Director, Mr. Hasenyager; and the inadequate animal husbandry detailed by the U.S.D.A. Animal Inspector, Randy Coleman - all clearly raise legitimate issues.

STATUTORY PRELIMINARY INJUNCTION

As to Plaintiff Copley Township's request for a statutory injunction based upon O.R.C. 519.24, Plaintiff Copley Township has clearly shown by clear and convincing evidence a violation of Section U of the Copley Township Zoning Regulations. The Defendants have maintained a facility that is hazardous due to the risk of dangerous animal escape and animal waste contaminating the ground water, to say nothing of the offensive odors. **Therefore, Plaintiff Copley Township's Motion for a Statutory Preliminary injunction is well taken and is granted.**

Plaintiff Summit County Board of Health's Motion for a Statutory Preliminary Injunction is based upon O.R.C. Ann. 3707.01. Res judicata requires this Court to recognize the fact that the Defendants' property has already been declared a public nuisance through past litigation by the Plaintiff Summit County Board of Health. Therefore, the pertinent question is whether any violations of county ordinances prohibiting said nuisance continue to occur.

Upon review of the current conditions of the premises, the Court

finds that the Defendants have harbored their animals in a way that has created both offensive odors and unsanitary conditions which represent not only a nuisance but a menace to the health, comfort and safety of nearby residents. These conditions are due, in part, to the lack of a wastewater system, and the potential contamination caused from the concentration of urine, the built-up animal waste through-out the property, and the accumulation of trash, burn piles, and garbage that have attracted rodents. **Therefore, Plaintiff Summit County Board of Health's Motion for a Statutory Preliminary Injunction is hereby well taken and is granted**.

EQUITABLE PRELIMINARY INJUNCTION

Although the question of whether either Plaintiff is entitled to an equitable preliminary injunction is moot since both Plaintiffs were issued statutory injunctions, the Court will analyze this issue as well. As previously stated, to be eligible for an equitable injunction, a party must prove a substantial likelihood of success on the merits, the movant will suffer an irreparable injury, whether any third parties will be unjustifiably harmed if the injunction is granted; and whether the public interest will be served by the granting of the preliminary injunction.

Clearly the public interest is served if a preliminary injunction is granted as it is the public interest that both Plaintiffs are trying to protect. Chief Mier testified that he is concerned about the health and safety of the citizens of Copley especially since no one is living on the land to oversee the animals. Mr. Hasenyager testified about the potential health hazards, failing to have an appropriate wastewater system in place, and the proper care for the animals in this regard.

Plaintiffs have a substantial likelihood of success on the merits as Plaintiffs have clearly raised serious issues regarding this property and the care of these animals. The only third parties that will be affected by this order are Defendant Pearson's family members and persons who volunteer at L&L and this Court does not believe they will be unjustifiably harmed.

The Ninth District Court of Appeals in *Smead* v. *Graves,* 2008 Ohio 115, stated that irreparable harm exists when "there is no plain, adequate, and complete remedy at law, and where money damages would be impossible, difficult or incomplete."[11] In the instant case, Plaintiffs' have no remedy other than one at equity. Money damages will

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[11] Smead at ¶10 *citing to Crestmont Cadillac Corp. v. Gen. Motors Corp.,* 2004 Ohio 488 at ¶36.

not solve these chronic problems existing on the Pearson property. **Therefore, the Court hereby finds that both Plaintiffs' Motions for an Equitable Injunction are well-taken and Granted.**

DECLARATION OF PUBLIC NUISANCE

This Court finds that the prior declaration that the Defendants' property is a public nuisance as it applies to the Summit County Board of Health is res judicata as that decision was appropriately appealed to this Court and then further appealed to the Ninth District Court of Appeals. Both Judge Cosgrove's Court and the Ninth District Court of Appeals have previously affirmed the decision of the Summit County Board of Health declaring the property a public nuisance. Now this Court, having independently heard evidence and conducted a field trip to the property, sees no reason to disturb that finding.

Plaintiff Copley Township requests this Court declare the Defendants' land a public nuisance. As previously noted, the Ohio Supreme Court has divided nuisance law into absolute nuisance and qualified nuisance. A qualified nuisance depends upon some act of negligence whereas an absolute nuisance does not. The definition of an absolute nuisance " • • • consists of either a culpable and intentional act resulting in harm or an act involving culpable and unlawful conduct causing unintentional harm, or a non-culpable act resulting in accidental harm, for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault." [12] "'Intentional,' in this context, means 'not that a wrong or the existence of a nuisance was intended but that the creator of [it] intended to bring about the conditions which are in fact found to be a nuisance.'"[13] In the instant case, Defendants could fall within several of the categories of an absolute nuisance.

The Court finds by clear and convincing evidence that Defendants have continued to maintain exotic animals on this property, apparently without the will or perhaps the wherewithal to make changes to correct the problems their operations have caused, thereby causing the harms

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[12] *Angerman v. Burick,* 2003 Ohio 1469, *9, *citing Taylor v. City of Cincinnati,* 143 Ohio St. 426, approved and followed. *Metzger v. Pennsylvania, Ohio &Detroit RR Co.,* (1946), 146 Ohio St. 406, paragraphs one and two of the syllabus.

[13] *Angerman* at 10 *citing Dingwell v. Litchfield* (Conn. 1985), 4 Conn. App. 621, 496 A.2d 213, *quoting Beckwith v. Stratford* (1942), 129 Conn. 506, 29 A.2d 775.

that have created the nuisance. **Therefore, the Court hereby finds that Defendants property and the animals upon it constitute an absolute nuisance.**

ORDERS

1. IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT THE DEFENDANTS LORENZA PEARSON AND BARBARA PEARSON-BROWN, D.B.A. L&L EXOTIC ANIMAL FARM, BE RESTRAINED AND ENJOINED FROM MAINTAINING ANY "EXOTIC ANIMAL" ON THE PROPERTY, INCLUDING BUT NOT LIMITED TO, THE EIGHT BEARS, THE LION, AND THE WOLF-HYBRID THAT ARE CURRENTLY ON THE PREMISES.
2. IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT THE PLAINTIFFS COPLEY TOWNSHIP AND SUMMIT COUNTY BOARD OF HEALTH BE PERMITTED TO ENTER INTO AND UPON DEFENDANTS' PROPERTY IMMEDIATELY WITH SUCH OTHER GOVERNMENTAL, INCLUDING THE U.S.D.A., AND PRIVATE ENTITIES AND REMOVE THE ABOVE REFERENCED ANIMALS TO BE TRANSPORTED TO U.S.D.A. LICENSED FACILITIES.
3. IT IS HEREBY ORDERED, ADJUDGED AND DECREED PLAINTIFFS BE PERMITTED TO ENTER THE LAND OF DEFENDANTS WITH ANY APPROPRIATE PERSONNEL AND VETERINARY STAFF TO INSPECT THE HEALTH AND WELFARE OF THE REMAINING DOMESTIC ANIMALS.
4. IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT THE DEFENDANTS SHOULD BE RESTRAINED AND ENJOINED FROM BRINGING ANY OTHER "EXOTIC" ANIMALS BACK ONTO THE PREMISES, INCLUDING BUT NOT LIMITED TO, BEARS, LIONS, TIGERS, WOLVES, LYNX, LEOPARDS, OR ANY OTHER SIMILAR ANIMALS; OR ANY DOMESTIC ANIMALS UNTIL THE CONCLUSION OF THIS CASE.
5. IT IS ORDERED ADJUDGED AND DECREED THAT DEFENDANTS NOT INTERFERE WITH THE REMOVAL OF THE ABOVE REFERENCED ANIMALS, THE REMOVAL OF THE CAGES AND ENCLOSURES, OR THE CLEAN UP OF THE PROPERTY.
6. IT IS ORDERED ADJUDGED AND DECREED THAT DEFENDANTS REMOVE ALL MATERIALS THAT CONSTITUTE VIOLATIONS OF THE SUMMIT COUNTY HEALTH CODE AND COPLEY TOWNSHIP ZONING RESOLUTION FROM THE

PROPERTY WITHIN FORTY-FIVE (45) DAYS OF THE DATE OF THIS ORDER. THIS WOULD INCLUDE REMOVAL AND PROPER DISPOSAL OF ALL JUNK, TRASH, DEBRIS, TIRES, SCRAP METAL, ETC. THE REMOVAL MUST BE PERFORMED BY A LICENSED TRASH HAULER WHO MUST PROVIDE WRITTEN DOCUMENTATION TO PLAINTIFFS AS TO WHERE THE MATERIALS HAVE BEEN TAKEN FOR PROPER DISPOSAL.
7. IT IS ORDERED ADJUDGED AND DECREED THAT ALL COSTS OF THE REMOVAL OF THE ABOVE REFERENCED ANIMALS AND MATERIALS BY COPLEY TOWNSHIP AND SUMMIT COUNTY BE TAXED AS COSTS OR PLACED AS A LIEN UPON THE PREMISES.

The Court set a status conference on this matter for MAY 29,2008 at 8:45 AM.
IT IS SO ORDERED IN THIS COURT OF COMMON Pleas

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: COASTAL BEND ZOOLOGICAL ASSOCIATION, FORMERLY KNOWN AS CORPUS CHRISTI ZOOLOGICAL ASSOCIATION, A TEXAS CORPORATION, d/b/a CORPUS CHRISTI ZOO; ROBERT BROCK, AN INDIVIDUAL; MICHELLE BROCK, AN INDIVIDUAL; BODIE KNAPP, AN INDIVIDUAL, d/b/a WAYNE'S WORLD SAFARI; AND CHARLES KNAPP, AN INDIVIDUAL.
AWA Docket No. 04-0015.
Decision and Order as to Robert Brock and Michelle Brock.
Filed January 24, 2008.

AWA – Cease and desist order – Civil penalty – Disqualification – Judicial review – Failure to obey consent decision – Veterinary care – Failure to keep and maintain required records – Operating as dealers without AWA licenses – Attorneys' fees.

Colleen A. Carroll, for the Administrator.
Roland Garcia, Houston, Texas, for respondents Robert and Michelle Brock.
Phillip Westergren, Corpus Christi, Texas, for respondents Bodie and Charles Knapp.
Initial decision issued by Victor W. Palmer, 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 March 17, 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 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 Complaint alleges that each of the Respondents, between October 13, 2003, and December 17, 2003, violated the Animal Welfare Act and the Regulations and Standards by mishandling animals; failing to provide animals with requisite veterinary care; and failing to make, keep, and maintain requisite records. The Complaint also alleges that Corpus Christi Zoological Association, Robert Brock, and Michelle

Brock failed to obey a consent decision and order and violated the Animal Welfare Act by engaging in activities for which an Animal Welfare Act license is required while unlicensed.

The violations charged took place subsequent to the issuance of a Consent Decision and Order on October 17, 2003. The Consent Decision and Order required that Corpus Christi Zoological Association "place all of its animals . . . by donation or sale, with persons who have demonstrated the ability to provide proper care for said animals in accordance with the Act and the Regulations, and as approved by the complainant." The Consent Decision and Order imposed cease and desist requirements and, effective December 15, 2003, revoked the exhibitor's license Corpus Christi Zoological Association held under the Animal Welfare Act.

The most egregious of the violations alleged in the Complaint pertain to the handling of two lions and two tigers that Bodie Knapp moved on December 11, 2003, and December 17, 2003, from the premises of the Corpus Christi Zoological Association's zoo. All four of the animals were shown to have died soon after Bodie Knapp, using a dart gun, injected them with immobilizing drugs to facilitate their physical handling for transport from the zoo's premises. Charles Knapp, Bodie Knapp's father, was charged on the basis that he accompanied Bodie Knapp when the lions and tigers were darted and helped Bodie Knapp move the animals to the transport truck. Charles Knapp and Bodie Knapp were charged with failing to have a veterinarian provide adequate advice and assistance at the time of the incidents; failing to handle transferred animals in a manner that does not cause trauma, stress, harm, or unnecessary discomfort; and failing to comply with transportation standards. Bodie Knapp was further charged with failing to file requisite reports regarding these and other animals acquired from the Corpus Christi Zoological Association.

Respondents Robert Brock and Michelle Brock were charged individually and as agents of the Corpus Christi Zoological Association. Their alleged violations include acting as animal dealers without having required Animal Welfare Act licenses; failing to record requisite information respecting the animals that were transferred; failing to provide needed veterinary care to animals; failing to handle transferred animals in a manner that does not cause trauma, stress, harm, or unnecessary discomfort; and failing to establish and maintain adequate programs of veterinary care that gave animal care guidance to personnel.

The Corpus Christi Zoological Association was charged with violating the Consent Decision and Order, the Animal Welfare Act, and

the Regulations and Standards by engaging in activities for which an Animal Welfare Act license is required after its license was revoked; failing to make, keep, and maintain requisite records of all animals transported, sold, euthanized, or otherwise disposed of; exhibiting or acting as an animal dealer without an Animal Welfare Act license; failing to provide needed veterinary care to animals; failing to handle transferred animals in a manner that does not cause trauma, stress, harm, or unnecessary discomfort; and failing to establish and maintain adequate programs of veterinary care that gave animal care guidance to personnel.

Each Respondent filed an answer denying all of the charges asserted against them. Moreover, Robert Brock and Michelle Brock asserted they were only volunteers assisting Corpus Christi Zoological Association, a non-profit corporation. The Brocks further asserted that the charges were frivolous and asked that they be awarded attorneys' fees. Charles Knapp stated he was merely helping his son and he had no legal liability under the Animal Welfare Act or the Regulations and Standards for the way in which the lions and tigers were darted and transported.

Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] conducted an oral hearing on April 19-22, 2005 (Transcript I), and August 30-31, 2005 (Transcript II), in Corpus Christi, Texas. Colleen A. Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Corpus Christi Zoological Association was unrepresented and did not participate. Roland Garcia, attorney, Greenberg Traurig, LLP, Houston, Texas, represented Robert Brock and Michelle Brock. Phillip Westergren, attorney, Corpus Christi, Texas, represented Bodie Knapp and Charles Knapp.

The ALJ found that the Corpus Christi Zoological Association, Robert Brock, and Michelle Brock violated the Animal Welfare Act and the Regulations and Standards on December 17, 2003, when the Brocks, as the Corpus Christi Zoological Association's agent and on their own behalf, acted as a dealer without a requisite Animal Welfare Act license. The ALJ issued a cease and desist order against the Corpus Christi Zoological Association and the Brocks. In addition, the ALJ assessed a $2,750 civil penalty against the Brocks and disqualified them from being issued a license under the Animal Welfare Act for 10 years. The ALJ also held that the Brocks should not be awarded attorneys' fees because they violated the Animal Welfare Act.

The ALJ further found that Bodie Knapp violated the Animal Welfare Act and the Regulations and Standards on or about

December 11, 2003, and December 17, 2003. The ALJ issued a cease and desist order against Bodie Knapp and assessed Bodie Knapp a $5,000 civil penalty. The ALJ dismissed the charges against Charles Knapp that he violated the Animal Welfare Act.

On November 6, 2006, Robert Brock and Michelle Brock filed a timely petition appealing the ALJ's decision to the Judicial Officer. Neither Bodie Knapp nor the Corpus Christi Zoological Association sought review of the ALJ's decision.

Findings of Fact

1. In May 1996, Robert Brock and Michelle Brock purchased 145.5 acres of land and formed a corporation named Corpus Christi Zoo, Inc. Robert Brock and Michelle Brock were the corporation's officers and directors. On August 6, 1996, Robert Brock and Michelle Brock applied for an Animal Welfare Act exhibitor's license stating they had two rabbits and 160 farm animals and used the business name "The Corpus Christi Zoo, Inc." (CX 24, CX 56, CX 88.)

2. On August 27, 1996, Corpus Christi Zoological Association was formed as a Texas non-profit corporation and filed its articles of incorporation with the Texas Secretary of State (CX 25). Robert Brock and Michelle Brock were listed as directors on the articles of incorporation. However, at the organizational meeting of the board of directors held on November 1, 1996, five persons other than the Brocks became the directors of the Corpus Christi Zoological Association (RX 154). One of these directors was Annie M. Garcia, Michelle Brock's mother (Transcript I (Tr. I) at 1096). The Brocks testified they decided not to serve as directors because their attorney explained to them that they could not serve on the board of directors and also be paid employees of the Corpus Christi Zoological Association (Tr. I at 941). The board of directors of the Corpus Christi Zoological Association agreed to enter into leases for the land on which the zoo was located with the Brocks and with Roland Garcia, Sr., Michelle Brock's father. The board also agreed to purchase the assets and assume the liabilities of Corpus Christi Zoo, Inc., from the Brocks (RX 154). The Corpus Christi Zoological Association assumed the name "The Corpus Christi Zoo" as its trade name and conducted business in that name (Tr. I at 946; CX 2; Consent Decision and Order at 1).

3. The Brocks failed to make the payments on the 145.5 acres of the land they had purchased for building the zoo. In a letter dated May 6, 1997, Annie M. Garcia, as the chair of the board of directors, responded

to a request for information by the Internal Revenue Service stating Roland Garcia assumed the land payments on January 21, 1997, with the agreement that the zoo would lease the land from him for the value of the note payment plus taxes (CX 56). I find that, at all times material to this proceeding, the land on which the zoo facilities stood was owned by the Corpus Christi Zoological Association (Tr. I at 831-35).

4. On April 15, 1997, the board of directors of the Corpus Christi Zoological Association appointed Robert Brock as general manager and Michelle Brock as assistant manager of the zoo (CX 63).

5. On June 12, 1997, the zoo's board of directors met. Michelle Brock reported to the board, among other things, that the operation of the zoo was slow but on schedule and that there was a need for additional volunteers who would only be paid reimbursement of their expenses. It was further reported that Robert Brock had made arrangements to rent to Steve Dornin, an individual who owned tigers, a small area behind the zoo's fenced area as a temporary holding caged area for Mr. Dornin's tigers until the zoo could find a sponsor for a permanent structure to house the tigers. Annie Garcia reported that application for IRS 501(c)(3) (designation as a non-profit for federal tax purposes) was being processed and was pending. (CX 102.)

6. During another board of directors meeting on November 12, 1997, Michelle Brock made a motion to amend the minutes of a meeting held the week before passed. The minutes show an extensive discussion of many topics, including a discussion of a lawsuit against the zoo concerning the housing of the big cats. During that discussion, Michelle Brock announced that Steve Dornin wanted to sell the big cats to the zoo for $800. "She said this was a good price considering the regular price of $2,000." (CX 103.)

7. Under the terms of an employment contract that began on February 4, 1999, the board of directors hired Michelle Brock, at a salary of $36,000 per year, as executive director to perform the zoo's management duties (CX 65).

8. At a board of directors meeting held in March 2001, it was reported that Robert Brock and Michelle Brock were not renewing their management contract due to Robert Brock's having other work and Michelle Brock's taking care of her grandmother full-time (RX 146).

9. Robert Brock was the manager at the Corpus Christi Zoo from 1997 through 1999 (Tr. I at 941, 946). Michelle Brock followed her husband as the zoo's manager in 1999 and ended her official management role in 2001 (RX 146).

10. In 2002, Sonny Kelm, an investigator for the Animal and Plant Health Inspection Service [hereinafter APHIS], conducted interviews

with Robert Brock, Michelle Brock, and Al Bolin, a manager of the zoo at the time (CX 81-CX 82, CX 95). The memoranda Mr. Kelm prepared of these interviews and his testimony respecting his observations indicate that, even though Mr. Bolin was responsible for the on-site management of the zoo, Robert Brock took an active leadership role in the overall conduct of the zoo. Mr. Brock was the person who obtained legal counsel to defend the zoo from the complaint (AWA Docket No. 02-0016) the Administrator had filed against it. Furthermore, Mr. Brock identified himself as the owner of the Corpus Christi Zoo. (CX 81-CX 82.) When Mr. Kelm observed Robert Brock and Al Bolin together at the zoo, Robert Brock was the one giving the orders (Tr. II at 780).

11.On October 10, 2003, there was a zoo meeting attended by Michelle Brock and three other individuals at which they discussed the case (AWA Docket No. 02-0016) brought by the Administrator against the zoo. At the meeting, it was decided to settle the case and agree to a consent decision that included the surrender of the zoo's Animal Welfare Act license. (CX 71 at 1.)

12.On October 13, 2003, Colleen A. Carroll, attorney for the Administrator, sent a facsimile transmission to Roland A. Garcia, attorney for the zoo, "to memorialize our conversations regarding settlement . . . ." (CX 62; RX 96). In her concluding paragraph, Ms. Carroll stated:

> I also write to reconfirm APHIS's agreement to assist your client in the placement of its existing regulated animals by December 15, 2003. In the event that such animals are not able to be placed by December 15, 2003, despite the best efforts of respondent, and with APHIS's assistance, APHIS agrees to move for issuance by December 14, 2003, of an order modifying paragraphs 2 and 3 of the Order (providing for the effective date of revocation and deadline for placement of animals) to provide for an appropriate later effective date and deadline, and to move for additional such orders if necessary.

13.On October 17, 2003, a Consent Decision and Order was issued in resolution of the complaint filed by the Administrator that had alleged the Corpus Christi Zoological Association violated the Animal Welfare Act and the Regulations and Standards on March 13, April 25, May 7, May 10, May 22, and September 4, 2002 (AWA Docket 02-0016; CX 2). The Order required that:

1. Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.

2. Respondent's Animal Welfare Act license (number 74-C-0407) is revoked, effective December 15, 2003.

3. By December 15, 2003, respondent shall place all of its animals, as that term is defined in the Act and the Regulations, by donation or sale, with persons who have demonstrated the ability to provide proper care for said animals in accordance with the Act and the Regulations, and as approved by the complainant.

14. Neither Robert Brock nor Michelle Brock signed the Consent Decision and Order (CX 2).

15. Efforts to place the animals were undertaken by the zoo, but no one would take its big cats, i.e., the lions and tigers (Tr. I at 986, 998; RX 95). Mr. Garcia informed Ms. Carroll of the difficulty with the placement of the big cats in an e-mail he sent to her on October 16, 2003 (RX 95).

16. In seeking placements for the big cats, Bodie Knapp was approached in late October 2003, and Robert Brock discussed with him the possibility of Mr. Knapp's taking the big cats (Tr. I at 988-89). The zoo had previously placed three lions and two snow macaques with Mr. Knapp on February 3, 2002 (Tr. I at 983). A report of the February 3, 2002, placement had been made by the zoo to APHIS and APHIS did not assert any objections to those transfers (Tr. I at 750-51, 1042-44). Charles Currer, a United States Department of Agriculture animal care inspector, testified that such transfers were allowed because there were not the restrictions of the October 17, 2003, Consent Decision and Order in place when the February 3, 2002, transfers were made (Tr. I at 751).

17. On November 15, 2003, a zoo meeting was held that was attended by Michelle Brock and two other individuals during which discussions covered placement of the animals and possibilities for the zoo after the Animal Welfare Act license terminated (CX 72).

18. On November 18, 2003, Bodie Knapp replied to a proposal from the zoo regarding the terms for Mr. Knapp to take ownership of the zoo. Mr. Knapp's response read as follows:

Robert & Michelle

The following is the agreement you sent us:

- $12,000 Mortgage to Roland Garcia, rated at 0% interest, $250/mo payment for 36 months, balance due at 36 months.
- Papers would be from Seller (Corpus Christi Zoological Association) To Buyer (Titled, Corpus Christi Zoological Association)
- Clean out one building per week/Sunday, except Thanksgiving, 3 buildings, (i.e. cleaned out before Christmas)
- Carousel belongs to Brocks
- Michelle's agreement for Lynx & Skunk
- Meet to do Board Papers & Taxes
- Michelle promote park, maybe have you guys bring animals (Good).

The following are clarifiers I would like to see added.

- Mortgage – I understand that the Corpus Christi Zoological Association (CCZA), is in debt to Roland Garcia for $12,000. Bodie & Jennifer Knapp (Personally) will agree to accept and pay this debt for the association, in turn the association agrees to turnover deed ownership of the real estate to Bodie & Jennifer Knapp (Personally) the terms of the $12,000 debt payment to Roland Garcia are as follows: rated at 0% interest, $250/mo payment for 36 months, balance due at 36 months.
- Papers – I do not understand the papers statement, perhaps it is included in the above.
- Clean Out - Cleaning the inside of the buildings would be beneficial, but I was more concerned with the costs associated with removing the larger amounts of debris. I would prefer to have large dumpsters spotted each week for three weeks, and some plan to remove the larger pieces (roof sections etc.) I would like the same timeline, before Christmas.
- Carousel – I would like to discuss keeping carousel in the park, we have some ideas for it.
- Michelle's Agreement, I have no problem giving Michelle free access to the park and I plan to keep the lynx.

> However, this is the first I've heard of the Skunk. I do not have the permits to keep Texas Species and I am [sic]

(RX 86). The record only contains the first page of what appears to be a multi-page document.

19. On November 20, 2003, a zoo meeting was held that was attended by Robert Brock and three other individuals at which the board of directors gave Michelle Brock two mobile homes in lieu of payment of back wages (CX 73).

20. On November 25, 2003, Bodie Knapp signed the proposal identified in Finding of Fact number 18 (RX 86 at 2).

21. On November 28, 2003, the board of directors of the Corpus Christi Zoo met and agreed to accept Mr. Knapp's offer. Robert Brock and three other individuals attended this meeting (Tr. I at 995-96; RX 140 at 2).

22. Ms. Carroll sent Mr. Garcia, counsel for the zoo, an e-mail on December 2, 2003, listing "approved persons and facilities" located by APHIS that the zoo should contact regarding placement of the animals (CX 76 at 2-6).

23. Mr. Garcia replied inquiring about financial assistance from APHIS to the zoo to provide transportation of the animals to the new facilities (CX 76 at 2).

24. In response, Ms. Carroll stated:

> Although we certainly discussed APHIS's agreement to assist in securing facilities for the placement of existing animals (and APHIS has found homes or potential homes for all of the animals), your assumption that APHIS would also transport or provide transportation for those animals is incorrect. I know of no "previous discussions" in which I participated that could have left you with that assumption. The arrangements for the transfer of the animals in this case are between the Corpus Christi Zoo and the facilities, and do not involve APHIS. In fact, APHIS does not provide or arrange for any animal transportation except in confiscation cases pursuant to section 2.129 of the AWA regulations. Moreover, in those cases, all costs are borne by the dealer or exhibitor from whom the animals were confiscated.

(CX 76 at 5).

25. On December 6, 2003, Bodie Knapp began removing animals from the Corpus Christi Zoo (CX 13; RX 157). On December 11, 2003, Bodie Knapp transported two lions from the Corpus Christi Zoo (RX 158).

26. On December 13, 2003, Mr. Garcia e-mailed Ms. Carroll advising her that "none of the exhibitors you identified were willing or able to accept the big cats." Mr. Garcia stated that "[t]he small animals are no problem, and all are gone except the wolf and skunk as I understand it, which are anticipated to be picked up in the next two or three weeks." Mr. Garcia also notified Ms. Carroll that Mr. Knapp had already taken possession of two lions and one tiger with the remaining animals scheduled to be removed within 2 to 3 weeks. (CX 76 at 2.)

27. On December 15, 2003, Ms. Carroll responded to Mr. Garcia by e-mail:

> I am dismayed to learn that your client has placed animals without adhering to the terms of the consent decision – to wit: "with persons who have demonstrated the ability to provide proper care for said animals in accordance with the Act and the Regulations, and as approved by the complainant." Please immediately provide the identities of those individuals and persons to whom your client has placed the various animals. I look forward to hearing from you soon.

(CX 76 at 9).

28. On December 17, 2003, Bodie Knapp removed and transported a fox, two sheep, a pony, and two tigers from the Corpus Christi Zoo (RX 158).

29. On December 11, 2003, and December 17, 2003, Bodie Knapp administered tranquilizing drugs to sedate the lions and tigers for transport. It was later reported that the lions and tigers died during transport. (Tr. I at 382-89, 417-25.)

Conclusion of Law

During the months of October, November, and December 2003, and specifically on December 6, 2003, December 11, 2003, and December 17, 2003, Robert Brock and Michelle Brock, both as agents for the Corpus Christi Zoological Association and on their own behalf,

without a requisite license under the Animal Welfare Act, acted as a dealer, as defined in 7 U.S.C. § 2132 and 9 C.F.R. § 1.1, in that they, in commerce, for compensation or profit, delivered for transportation or negotiated the sale of a fox, two sheep, two lions, and two tigers, as well as other animals, for exhibition, in violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1. In addition, these transactions violated the October 17, 2003, Consent Decision and Order that required the Corpus Christi Zoological Association to obtain APHIS's prior approval of the persons with whom the Corpus Christi Zoological Association placed the animals. Although neither Robert Brock nor Michelle Brock were parties to the October 17, 2003, Consent Decision and Order, as agents of the Corpus Christi Zoological Association, they were required to ensure that their actions on behalf of the zoo were in conformity with the Consent Decision and Order. Their failure to comply with the requirements of the October 17, 2003, Consent Decision and Order is a violation individually and for the Corpus Christi Zoological Association. For these violations:

1. Robert Brock and Michelle Brock are ordered to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, as authorized under 7 U.S.C. § 2149(b).
2. Robert Brock is assessed a $2,750 civil penalty, as authorized under 7 U.S.C. § 2149(b), as amended by 28 U.S.C. § 2461 and implemented by 7 C.F.R. § 3.91(a), (b)(2)(v) (2004).
3. Michelle Brock is assessed a $2,750 civil penalty, as authorized under 7 U.S.C. § 2149(b), as amended by 28 U.S.C. § 2461 and implemented by 7 C.F.R. § 3.91(a), (b)(2)(v) (2004).
4. Robert Brock and Michelle Brock are denied licenses under the Animal Welfare Act for a period of 10 years as authorized under 9 C.F.R. § 2.1(e).

Discussion

Robert Brock and Michelle Brock thwarted effective administration of the Animal Welfare Act by APHIS by negotiating for the placement of and by placing the animals owned by the Corpus Christi Zoological Association with Bodie Knapp without obtaining APHIS approval as the October 17, 2003, Consent Decision and Order required. They did so largely because they had negotiated favorable terms with Bodie Knapp that would reduce the adverse economic impact of the October 17, 2003, Consent Decision and Order on themselves and Michelle Brock's father.

APHIS first learned on December 13, 2003, just 2 days before the

revocation of Corpus Christi Zoological Association's Animal Welfare Act license was to take effect, that animals had been placed with unapproved persons. In an e-mail sent by its attorney on December 15, 2003, APHIS expressed dismay that Corpus Christi Zoological Association was not adhering to the terms of the October 17, 2003, Consent Decision and Order and asked for the identities of the persons with whom the Corpus Christi Zoological Association's animals had been placed.

Despite this warning by APHIS that Corpus Christi Zoological Association was not in compliance with the terms of the Consent Decision and Order, 2 days later, on December 17, 2003, the placement of animals with Bodie Knapp was completed at a time when neither Corpus Christi Zoological Association nor the Brocks had a valid license as required by the Animal Welfare Act. The Brocks had arranged the deal with Bodie Knapp. (Findings of Fact numbers 16, 18, and 20.) The deal benefitted the Brocks, and, during the months of October, November, and December 2003, the Brocks controlled the meetings during which the deal was approved. Whether they had official status as members of the board of directors is uncertain, but they were the ones who negotiated the deal with Bodie Knapp and at least one of the Brocks participated at each of the zoo meetings where the deal and its terms were approved. The only others in attendance and voting at these meetings were the zoo's onsite caretakers and occasionally a volunteer. As a result of the deal, the two caretakers were made to vacate the premises. The Brocks, on the other hand, obtained a commitment that Michelle would keep a carousel, that Michelle would be allowed to continue to house animals she personally owned at the zoo, and that a loan her father had made to the zoo would be repaid. The Brocks also benefitted from a zoo meeting on November 20, 2003, in which two mobile homes were given to Michelle Brock in lieu of back wages owed Michelle (Finding of Fact number 19). The fact that the two caretakers voted for these results raises a strong inference that they recognized themselves to be subordinates of the Brocks.

At any rate, when the remaining zoo animals were transferred to Bodie Knapp on December 17, 2003, it was the culmination of the deal the Brocks had made with him; a deal the Brocks took no steps to stop after being warned that their arrangements for animal transfers were not in compliance with the October 17, 2003, Consent Decision and Order. They allowed the final transfer of animals to Bodie Knapp to proceed after the revocation of the zoo's Animal Welfare Act license. They thereby, together with the zoo, became subject to sanction for acting as

a dealer without an Animal Welfare Act license.

The Administrator has requested that the Brocks be made subject to a cease and desist order, that civil penalties be assessed against the Brocks as agents of the zoo, and that the Brocks be disqualified for 10 years from becoming licensed under the Animal Welfare Act.

I agree with the Administrator that the Brocks should be made subject to a cease and desist order and that the Brocks should be assessed civil penalties and disqualified from future licensing under the Animal Welfare Act. I base this sanction on the fact that, throughout October, November, and December 2003, and specifically on December 17, 2003, the Brocks acted as a dealer while unlicensed and did so not merely as the zoo's agent, but as a way to reduce adverse personal consequences to themselves due to the zoo's closing and to secure payment of a loan the zoo still owed to Michelle Brock's father.

The record evidence does not support the Administrator's assertion that the Brocks violated the regulations that require the making and keeping of records concerning the disposition of animals. Respondents have provided exhibits showing such records were in fact made. (RX 157-RX 158.)

The Administrator also asserted that Robert Brock and Michelle Brock violated regulations governing the provision of veterinary care to animals, transportation of animals in proper enclosures, and careful handling of animals so as not to cause them behavioral stress, physical harm, or unnecessary discomfort. Under the arrangements for and the circumstances of the transfer of the zoo's animals to Bodie Knapp, Mr. Knapp assumed each of these responsibilities. He was the one who sedated the lions and tigers. He personally removed the animals from the zoo's premises. Again, the record does not support the Administrator's allegations in this area.

The Administrator argued that both the Corpus Christi Zoological Association and a predecessor corporation, The Corpus Christi Zoo, Inc., were alter egos of Robert Brock and Michelle Brock. The record evidence, however, fails to adequately substantiate these alter ego arguments. The minutes of the Corpus Christi Zoological Association show that, although the Brocks formed this non-profit corporation and were listed as directors on its articles of incorporation, they were replaced at the very first organizational meeting by a very active board of directors who conducted frequent meetings that, prior to the end of 2003, were well attended with extensive discussions and decision-making respecting the zoo's promotion, funding, and operation. Officers other than the Brocks were elected that included a treasurer who kept and spent the Corpus Christi Zoological Association's funds in an

account separate and apart from any belonging to or controlled by the Brocks. The predecessor for-profit corporation, The Corpus Christi Zoo, Inc., was not operated by the Brocks after the not-for-profit Corpus Christi Zoological Association purchased its assets and liabilities and assumed its name during the Corpus Christi Zoological Association's August 27, 1996, organizational meeting. (Tr. I at 928.)

In re Marysville Enterprises, Inc., 59 Agric. Dec. 299, 315 (2000), upon which the Administrator relies, lists six factors to be examined before the corporate form may be ignored. When those six factors are examined in the light of the present facts, there is an insufficient showing that the Brocks were the alter egos of the Corpus Christi Zoological Association.

1. Though the Corpus Christi Zoological Association was initially formed at the direction of the Brocks, they turned over its control at the initial organizational meeting to a board of directors that did not include them.

2. The Brocks appear to have been under the direction and control of the Corpus Christi Zoological Association's officers and board of directors until late 2003; therefore, the Brocks could not be said to have controlled the corporation until late 2003.

3. The corporate funds were not commingled with individual funds belonging to the Brocks.

4. Persons other than the Brocks functioned as the Corpus Christi Zoological Association's directors and officers.

5. Corporate formalities, such as keeping minutes and corporate records, appear to have been observed.

Under these circumstances, the corporate form of the licensee cannot be disregarded. The Administrator respected the corporate form at the time he entered into the October 17, 2003, Consent Decision and Order with the Corpus Christi Zoological Association. The Brocks were not asked either to sign or to be included as parties subject to the terms of the October 17, 2003, Consent Decision and Order.

However, 7 U.S.C. § 2139 provides that, when construing violations of the Animal Welfare Act, acts of an agent shall be deemed acts of the licensee "as well as such person." In other words, an agent's act will be construed to be a violation of the Animal Welfare Act and the Regulations and Standards by the licensee for whom the agent acts and may also be a personal violation by the agent that can subject the agent to the imposition of sanctions under the Animal Welfare Act. On December 17, 2003, it was a violation of the Animal Welfare Act and the Regulations and Standards for both the Corpus Christi Zoological

Association and the Brocks to engage in conduct encompassed by the dealer definition when neither the Corpus Christi Zoological Association nor the Brocks had a valid Animal Welfare Act license.

Therefore, I conclude Robert Brock and Michelle Brock violated the Animal Welfare Act and the Regulations and Standards on that date when the Brocks, as the Corpus Christi Zoological Association's agent and on their own behalf, acted in the capacity of a dealer while unlicensed, by allowing animals to be transferred to Bodie Knapp under the deal negotiated by the Brocks. Under these circumstances, Robert Brock and Michelle Brock should be made subject to a cease and desist order, Robert Brock and Michelle Brock should be assessed appropriate civil penalties, and Robert Brock and Michelle Brock should be disqualified for 10 years from obtaining an Animal Welfare Act license. The maximum civil penalty for a single violation is $2,750 under 7 U.S.C. § 2149(b), as amended by 28 U.S.C. § 2461 and implemented by 7 C.F.R. § 3.91(a),(b)(2)(v) (2004). The entry of an order to cease and desist from continuing the violation is also authorized. Both sanctions are appropriate under the circumstances of this violation by Robert Brock and Michelle Brock. Moreover, a violation of the Animal Welfare Act or the Regulations and Standards constitutes grounds for denial of a license, and I conclude the recommendation by the Administrator that both Brocks should be disqualified from becoming licensed under the Animal Welfare Act for 10 years, is appropriate.

In assessing the civil penalty, I have given due consideration to the fact that a small business was involved and there is no prior history of violations by Robert Brock or Michelle Brock. On the other hand, I have also considered the fact that Robert Brock and Michelle Brock have shown a lack of good faith and that the circumstances of their conduct make the violation grave in nature. One of the ways their lack of good faith is shown is by their testimony at the hearing. As an example, Robert Brock testified that, during 2003, his participation with the Corpus Christi Zoo was limited to "donat[ing] money and stuff . . . when they contacted [him]," and volunteering "from time to time." (Tr. I at 969.) However, earlier he testified that he served on the board of directors of the zoo until late 2004 (Tr. I at 914). Further, Robert Brock attempted to bolster his testimony that he sought to place the animals with the persons approved by APHIS by introducing a list with notations he testified he made in December 2003 (Tr. I at 1179-85; RX 83). On cross-examination, Robert Brock admitted that the list was a photo copy of a portion of the complaint that he first received after its filing in March 2004 (Tr. I at 1192-95). When Michelle Brock testified, she implied that an APHIS investigator was seeking bribes to provide

easier inspections of facilities and easier approval of plans (Tr. II at 196-200). Cross-examination showed her accusations to be without factual basis (Tr. II at 354-56).

Robert Brock and Michelle Brock deliberately confounded the objectives of the October 17, 2003, Consent Decision and Order to reduce its adverse economic consequences for themselves and a family member. The Brocks also did not respect the oath they gave to give only truthful testimony at the hearing. I find the imposition of the maximum civil penalty of $2,750 each on Robert Brock and Michelle Brock for violations of the Animal Welfare Act and the Regulations and Standards, together with the other sanctions, necessary to deter the Brocks and others from engaging in similar conduct in the future so that the ability of APHIS to achieve the objectives of the Animal Welfare Act is maintained.

Robert Brock and Michelle Brock's Appeal Petition

Robert Brock and Michelle Brock filed an Appeal Petition. The arguments raised are the same arguments raised before the ALJ and rejected by him. In fact, substantial portions of the Appeal Petition are identical to Robert Brock and Michelle Brock's Proposed Findings of Fact and Conclusions of Law and Reply to Complainant's Brief.

With no new arguments presented, I find no cause to overturn the ALJ's well-reasoned decision. Because the ALJ addressed the issues raised by the Brocks and nothing new was raised by the Brocks, I find it unnecessary to comment on each issue in the Appeal Petition. However, I will discuss a few points raised by the Brocks.

One of the Brocks' main arguments is that they were not agents of the Corpus Christi Zoo (Appeal Pet. at 8, 29-31). However, Robert Brock's own testimony belies that argument. When asked when he resigned from the board of directors of the Corpus Christi Zoological Association, Robert Brock responded, "I had been on the board, you know, like when I signed it to Bodie, we signed off to Bodie Knapp in November I think, late November '03." (Tr. I at 914.) Further testimony by Robert Brock also demonstrates he acted as an agent for the Corpus Christi Zoo. When asked about the United States Department of Agriculture's list of facilities that possibly would take animals from the zoo, Robert Brock responded:

> We didn't get it till in December, and Bodie and I's dealings were, like they started October something, 25th or 28th, and then

> we started meeting. We talked -- I faxed stuff to him I think on the 16th or 17th of November, and we met around the 18th or 17th, and then there's a couple back and forth. We faxed stuff back and forth after that.
>
> . . . .
>
> Well, after we had done the deal and Bodie started picking up animals in the first week of December, and then I think it wasn't until late December or early January before we could get a hold of anybody at Wayne's World, and as I understand it, and I didn't do the phone call, but as I understand I think Jennifer and Michelle spoke, and they had been told they could not have any contact with us, and USDA told them that they couldn't take over the park.

Tr. I at 918-19.

This testimony by Robert Brock that he served on the board of directors of the zoo through at least 2003 and his testimony that the Brocks and Mr. Knapp were negotiating about the transfer of the animals from the zoo leads me to conclude that the Brocks were acting as agents of the zoo and negotiated the transfer of the animals to Bodie Knapp.

The Brocks cite four cases to support their position that they were not agents of the zoo. However, the principle from each case cited by the Brocks, while accurate, fails to give the total picture of the law of agency. As an example, the Brocks cite to *Grace Cmty. Church v. Gonzales*, 853 S.W.2d 678 (Tex. App. 1993), for the proposition that "[a]n agent is one who is authorized by the principal to transact business or manage some affair on the principal's behalf." (Appeal Pet. at 30.) However, the Brocks fail to mention the next sentence that states: "The agency relationship does not depend on express appointment or assent by the principal; rather it may be implied from the conduct of the parties under the circumstances." *Grace Cmty. Church*, 853 S.W.2d at 680.

Under the circumstances, it is understandable that the Administrator and others, including Bodie Knapp, viewed the Brocks as agents for the zoo.[1] One of the Brocks participated in every zoo board of directors meeting in 2002 and 2003 (CX 71-CX 74, CX 77); the Brocks negotiated with Mr. Knapp for transfer of the animals; and even as late

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[1]Corporations such as the zoo can only conduct business through its agents. *W.G. Construction Co. v. Occupational Safety and Health Review Comm'n*, 459 F.3d 604, 607 (5th Cir. 2006).

as January 4, 2004, Michelle Brock was still seeking legal advice from her brother for the zoo[2] (CX 75 at 2).

Through their entire association with the Corpus Christi Zoo, Robert Brock and Michelle Brock acted in a manner consistent with individuals who had the authority to act for the zoo. They were original incorporators of the zoo, they served in zoo management, they participated in board of director meetings, and they negotiated the sale of the animals to Bodie Knapp.[3] Considering counsel for the zoo, Michelle Brock's brother, never informed the Brocks or anybody else that the Brocks did not have the authority to act on the zoo's behalf, I conclude the zoo approved of the Brocks' actions on its behalf. Therefore, Robert Brock and Michelle Brock were agents for the Corpus Christi Zoo.

The Brocks also argue that the animals were a donation to Bodie Knapp, not a "purchase or sale"; therefore, the Brocks' position is that the Animal Welfare Act "dealer" provision was not triggered. "Most important, there was no 'purchase or sale' of any animals which could possibly invoke the 'dealer' statute. *See* 7 U.S.C. § 2132. *See also* 9 C.F.R. § 1.1. It is undisputed that the Zoo was placing the animals with Mr. Knapp as a 'donation,' not as a 'sale' for any money." (Appeal Pet. at 10.) The ALJ's discussion addressing the consideration received by the Brocks as a result of the deal with Bodie Knapp is sufficient to conclude there was a sale of the animals that required the Brocks to be licensed dealers. However, even more telling regarding whether Bodie Knapp purchased the animals is the answer to the Complaint filed by the Corpus Christi Zoo and the Brocks. In the answer, the zoo and the Brocks state unequivocally that Bodie Knapp purchased the animals from the zoo. "Bodie and Jennifer Knapp of Wayne's World Safari had purchased the animals and park operations as of November 25, 2003." (Answer at 2; RX 89 at 2.)

Robert Brock and Michelle Brock's Motion for Injunction and Supplement to Appeal Petition

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[2]Michelle Brock contacted her brother for legal advice for the zoo even though he informed APHIS on December 21, 2003, that he no longer represented the zoo (CX 76 at 10).

[3]Even in August 2004, Michelle Brock was the person responsible for approving who took over the zoo (Tr. I at 831-32).

On January 8, 2008, Robert Brock and Michelle Brock filed a motion to enjoin the United States Department of Agriculture, Marketing and Regulatory Programs, Financial Management Division [hereinafter Financial Management Division], from making demands on the Brocks for payment of the civil penalty assessed by the ALJ and to sanction the Financial Management Division for its premature demands for payment of the assessed civil penalty.

Based on the filings of the parties, I find the Brocks are correct that the Financial Management Division prematurely demanded payment of the civil penalty assessed by the ALJ. Nonetheless, I am dismayed that this issue is before me, as it is apparent from the parties' January 2008 filings that the Brocks made no effort to communicate directly with the Financial Management Division regarding the demand for payment despite the instructions to do so in demand letters sent by the Financial Management Division to the Brocks. While I decline to sanction the Financial Management Division for its apparent inadvertent premature demand for payment, in order to resolve this issue, I instruct counsel for the Administrator to inform the Financial Management Division that no funds are currently due from the Brocks. The civil penalties assessed against Robert Brock and Michelle Brock in this Decision and Order as to Robert Brock and Michelle Brock are not due until 60 days after service of this decision and order on the Brocks.

As for the portion of the Brocks' January 8, 2008, filing that constitutes a supplement to their Appeal Petition, the Brocks did not file a motion for an opportunity to supplement their Appeal Petition or to file a second appeal petition. The Brocks filed the supplement to their Appeal Petition well after the deadline for filing an appeal petition had passed. I find the Brocks' supplement to their Appeal Petition constitutes a supernumerary, late-filed appeal petition. Therefore, I strike those aspects of the Brocks' January 8, 2008, filing which do not relate to the Financial Management Division's premature demand for payment.

Attorneys' Fees

The Equal Access to Justice Act, 5 U.S.C. § 504, and the regulations promulgated under the Equal Access to Justice Act, identify the appropriate procedures to be followed when a party seeks an award of attorneys' fees. Failure of the party to follow the procedures makes an award of fees inappropriate.

The Brocks' request for an award of attorneys' fees does not comply with the statutory and regulatory requirements. Therefore, the Brocks' request for attorneys' fees is denied.

The Administrator's Points of Error

The Administrator raised points with which he disagreed with the ALJ's decision. The primary area of disagreement was the ALJ's conclusion that the Corpus Christi Zoo was not the alter ego of the Brocks. While the zoo appears to have been a Garcia family enterprise, I find ample evidence that the Garcia family maintained sufficient corporate formalities to maintain a distinction between the Garcia family and the zoo. Therefore, the Administrator's argument is without merit.

I do find it necessary to specifically address the Administrator's argument that "Corporate and individual funds were commingled." (Response to Appeal Pet. at 8.) The Administrator's use of the term "commingling of funds" is exactly opposite the common usage. Here, the Brocks took personal funds and provided them to the zoo. "Commingling" is the act of a fiduciary in taking "funds of his beneficiary, client, employer, or ward" and mingling those funds with his own, such as when an attorney takes client funds and places them in his account rather than in a trust account. *Black's Law Dictionary* 271 (6th ed. 1990). Had the Brocks taken funds generated by the zoo and placed them in personal accounts, a finding of commingling would have been appropriate.

In closing, I find it appropriate to issue a comment on this proceeding. At various times during my tenure as Judicial Officer, I have noted that a case is ripe for settlement. This case is one of those cases that I found ripe for settlement. With recent personnel additions in the Office of the Judicial Officer, I will be selecting some cases to attempt a mediated solution. That was done in this proceeding. I had the attorney examiner in my office contact the parties in an effort to assist them reach a settlement. The attorney examiner reported back to me that settlement was not possible.[4] That was disappointing considering the Brocks indicated that they did not want an Animal Welfare Act license (Tr. II at 7) and the most significant sanction imposed by the ALJ was a prohibition on the Brocks' receiving a license for 10 years. It seems to me that with agreement on that part of the

[4]I do not know if it was one or both parties who were impediments to settlement.

sanction, the remaining issues could have been resolved.

For the forgoing reasons, the following Order is issued.

ORDER

1. Robert Brock and Michelle Brock shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards. The cease and desist provisions of this Order shall become effective on the day after service of this Order on Robert Brock and Michelle Brock.

2. Robert Brock is assessed a $2,750 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States.

3. Michelle Brock is assessed a $2,750 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States.

4. The payments of the civil penalties shall be sent, within 60 days of service of this Order, to:

Colleen A. Carroll
Office of the General Counsel
U.S. Department of Agriculture
1400 Independence Avenue, SW
Room 2343 South Building
Washington, DC 20250-1417

5. Robert Brock and Michelle Brock are disqualified from receiving licenses under the Animal Welfare Act for a period of 10 years. The disqualification periods shall become effective on the 60th day after service of this Order on Robert Brock and Michelle Brock.

RIGHT TO JUDICIAL REVIEW

Robert Brock and Michelle Brock have the right to seek judicial review of the Order in this Decision and Order as to Robert Brock and Michelle Brock in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Robert Brock and Michelle Brock must seek judicial review within 60 days after entry of the Order in this Decision and Order as to Robert Brock and Michelle Brock.[5] The date of entry of the Order in this Decision and Order as to Robert Brock

[5] 7 U.S.C. § 2149(c).

and Michelle Brock is January 24, 2008.

In re: AMARILLO WILDLIFE REFUGE, INC.
AWA Docket No. 07-0077.
Decision and Order.
Filed March 24, 2008.

AWA – License termination – Criminal conviction, animal related.

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

DECISION AND ORDER

Procedural History

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 contended 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.

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.

In response to rulings that a more dispositive motion was needed, APHIS filed, on January 15, 2008, a motion for summary judgment with a Declaration by Robert M. Gibbens, DVM, APHIS, Animal Care, Regional Director – Western Region explaining why Mr. Azzopardi's criminal conviction for violating the Endangered Species Act constitutes an appropriate cause for terminating the license held by Amarillo Wildlife Refuge, Inc. under the Animal Welfare Act (AWA), and for a two-year disqualification of both Respondent and Carmel Azzopardi from obtaining a new AWA license. Thereupon, Respondent requested and was granted an extension of time until March 18, 2008 to respond to the motion. No response was filed.

Decision

I agree with Complainant 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, and 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.

As explained by Complainant's Memorandum in support of the Motion for Summary Judgment, and the Declaration of Dr. Gibbens, the activities governed by the Animal Welfare Act and the Endangered Species Act overlap. Persons who meet the AWA's definition of a dealer or exhibitor must be licensed or registered with the Secretary of Agriculture to help assure that, among other goals of the AWA, animals receive humane treatment when transported in commerce (7 U.S.C. §§ 2131, 2132, 2133, 2134). Holding such a license is also a prerequisite for obtaining a permit from the United States Department of the Interior to sell, deliver, carry, transport or ship "endangered species"(16 U.S.C. §§ 1538, 1539, 1540; 50 C.F.R. §§ 17.3, 17.21(g)(2)(iv)).

The regulations issued under the Animal Welfare Act authorize the termination of an AWA license at any time for any reason that an initial license application may be denied (9 C.F.R. § 2.12), and an initial license application may be denied to any applicant who:

> (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been

> found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

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. In his Declaration, Dr. Gibbens states that this conviction of the Endangered Species Act, a statute aimed at protecting animals, makes both Mr. Azzopardi and his company, Amarillo Wildlife, Inc. unfit to hold an AWA license. Mr. Azzopardi was convicted of illegally transporting and selling endangered animals, thereby commercializing endangered species and promoting both the black market for the animals and incentives to illegally take endangered species from their habitat. In doing so, Mr. Azzopardi operated as a "dealer" as defined in the AWA and used the AWA license issued to Amarillo Wildlife Refuge, Inc., to transport them to a site where he illegally sold them to a person he knew did not have a permit to own them. Dr. Gibbens has determined that, in light of these facts, the issuance of a license to either Mr. Azzopardi or Amarillo Wildlife Refuge, Inc. would be contrary to the AWA's stated purposes of ensuring humane treatment of animals in that Mr. Azzopardi used the existing AWA license for unlawful purposes that exposed animals in his care to harm. Based on his experience in enforcing the AWA and given the seriousness of Mr. Azzopardi's violations of the Endangered Species Act and their impact under the AWA, Dr. Gibbens advises that a two-year period of license disqualification of the Respondent corporation and its directors, officers and agents, is the minimal time needed to ensure that they will abide by federal statutes enacted to protect animals and understand that there are consequences for violating those laws.

In keeping 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 and defer to them when appropriate, the following order is being entered in accordance with Dr. Gibbens' declaration.

ORDER

It is hereby ORDERED that Animal Welfare license number 74-C-0486 issued to Amarillo Wildlife Refuge, Inc. is terminated, and that Amarillo Wildlife Refuge, Inc., its directors, officers and agents, and any legal entity in which they may have a substantial interest, are disqualified from obtaining an AWA license for a two-year period.

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: DAVID MCCAULEY, AN INDIVIDUAL d/b/a DAVE'S ANIMAL FARM.
AWA Docket No. 06-0009.
Decision and Order.
Filed April 16, 2008.

AWA – Civil penalty – Cease and desist – Dealer – Commerce – Operating without license – Judicial review.

Colleen A. Carroll & Brian T. Hill, 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 proceeding by filing a Complaint on January 27, 2006, alleging David McCauley had committed a number of violations of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations] during the period January 18, 2005, to December 15, 2005. In particular, the Administrator alleges Mr. McCauley operated as a "dealer" under the Animal Welfare Act, even though his Animal Welfare Act license had previously been revoked; sold and transported a wallaby to the Guatemala National Zoo; sold and transported to Germany two wallabies for use as pets; and

offered animals for sale for exhibition and for use as pets (Compl. ¶ 3).

Mr. McCauley filed a timely Answer denying he had violated the Animal Welfare Act and the Regulations. Mr. McCauley stated he had been told by United States Department of Agriculture personnel that it was not unlawful to ship animals from the United States to another country without an Animal Welfare Act license and further contended he had not acted as a dealer of regulated animals once his Animal Welfare Act license was revoked.

On March 9, 2006, the Administrator moved that a date be set for a hearing. Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a conference call on July 28, 2006, at which Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented the Administrator and Mr. McCauley represented himself. At the conference call, the parties agreed to a hearing date of December 12, 2006. The Administrator agreed to deliver to Mr. McCauley, no later that September 15, 2006, a list of anticipated witnesses, a brief summary of anticipated witness testimony, and copies of exhibits intended to be introduced at the hearing. Similarly, Mr. McCauley agreed to deliver his witness list, summary of anticipated witness testimony, and copies of exhibits by October 20, 2006. On November 15, 2006, Brian T. Hill, Office of the General Counsel, United States Department of Agriculture, submitted a Notice of Appearance on behalf of the Administrator, replacing Ms. Carroll.

The Chief ALJ conducted a hearing in San Antonio, Texas, on December 12, 2006. At the outset of the hearing, Mr. McCauley notified the Chief ALJ that he had never received the initial exchange from the Administrator, nor had he submitted his exchange to the Administrator. Mr. Hill, who had not been involved in the case until 2 months after the Administrator's submission was due, could not document that the Administrator had mailed the exchange to Mr. McCauley, nor was he able to reach Ms. Carroll.[1] Mr. McCauley stated he was thus unable to fully prepare for the hearing (Tr. 16). The Chief ALJ stated the hearing would proceed, and he would "reserve the right to continue the hearing" if Mr. McCauley needed additional time to prepare his cross-examination of witnesses (Tr. 19-20).

At the hearing, the Administrator called five witnesses and

[1]An exchange is normally not filed with the Hearing Clerk; therefore, the record does not indicate that the Administrator complied with the Chief ALJ's July 28, 2006, order regarding the exchange.

introduced 25 exhibits. Mr. McCauley testified on his own behalf and introduced no exhibits. At the conclusion of the hearing, the parties and the Chief ALJ agreed that there was no need to continue the hearing, as Mr. McCauley had "put on all his evidence and said everything he wanted to say." (Tr. 206.) Both parties submitted briefs in early February 2007.

On May 14, 2007, the Chief ALJ concluded that Mr. McCauley violated the Animal Welfare Act by acting as a dealer of regulated animals with respect to at least one transaction even though his Animal Welfare Act license had been revoked in a prior decision. The Chief ALJ found the Administrator did not show by a preponderance of the evidence that Mr. McCauley acted as a dealer with respect to two wallabies he transported to Germany. The Chief ALJ assessed Mr. McCauley a $2,000 civil penalty.

On July 9, 2007, Mr. McCauley's appeal was filed with the Hearing Clerk. I found that Mr. McCauley's appeal was timely filed.[2] Based upon a careful consideration of the record, I adopt the Chief ALJ's decision, with minor changes, as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusions of law.

DECISION

Statutory and Regulatory Background

The Animal Welfare Act regulates "animals and activities . . . in interstate or foreign commerce or [which] substantially affect such commerce or the free flow thereof . . . in order—(1) to insure that animals intended for . . . exhibition purposes or for use as pets are provided humane care and treatment[.]" (7 U.S.C. § 2131.) The Animal Welfare Act authorizes the Secretary of Agriculture to issue licenses to dealers (7 U.S.C. § 2133) and forbids any dealer from selling or offering to sell regulated animals without a license (7 U.S.C. § 2134). The Animal Welfare Act defines "dealer" as "any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of," any animal (7 U.S.C. § 2132(f)).

The Regulations define "commerce" as "trade, traffic, transportation, or other commerce: (1) Between a place in a State and any place outside

[2]Notice of Receipt of Respondent's Appeal Petition.

of such State, including any foreign country, 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 the commerce described in this part." (9 C.F.R. § 1.1.) The Regulations also provide that a person whose license has been revoked "shall not be licensed in his or her own name or in any other manner" (9 C.F.R. § 2.10(b)) and that any person whose license has been revoked "shall not buy, sell, transport, exhibit, or deliver for transportation" any animal (9 C.F.R. § 2.10(c)).

Facts

David McCauley is an individual doing business as Dave's Animal Farm, whose current mailing address is in McQueeney, Texas. Mr. McCauley was licensed as a dealer under the Animal Welfare Act and was in the business of selling Bennetts wallabies and other macropods and exotic pets. He is also a published author whose book "Macropods: Their Care, Breeding, and the Rearing of Their Young" is sold through his website.[3] He is an expert in macropod health and has for years consulted and published in that field.

Mr. McCauley's Animal Welfare Act license was revoked by a decision issued January 30, 2004, *In re David McCauley*, 63 Agric. Dec. 79 (2004) (CX 8).[4] That decision became final on March 17, 2004. Mr. McCauley has not held an Animal Welfare Act license since that time. The Complaint charges Mr. McCauley with two specific transactions

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[3]The United States Department of Agriculture library lists this book in its catalog.

[4]At the hearing and again in his brief before the Chief ALJ, Mr. McCauley continues to urge that this earlier decision be reversed, even though he did not appear at the hearing, did not file a motion for rehearing, and did not timely appeal the decision. While Mr. McCauley stated he did not receive notice of the exact date of the hearing, and the file contains no evidence as to whether he received the exact time and location of the hearing, he knew what day the hearing was scheduled to occur and elected to not appear rather than call the Chief ALJ's office or the Hearing Clerk's office to inquire why he had not been notified. Further, Mr. McCauley signed a receipt for the decision at his usual place of business on February 11, 2004 (CX 8 at 1). The decision explicitly states that it would become final 35 days after service, unless appealed, and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) provide that an appeal must be filed within 30 days after receiving service of an administrative law judge's decision. On May 13, 2004, 2 months after the appeal was required to have been filed, Mr. McCauley filed his appeal to the Judicial Officer who denied the late appeal for lack of jurisdiction.

that the Administrator believes constitutes acting as a dealer without an Animal Welfare Act license, as well as a general violation for advertising sales of regulated animals through his website.

The Guatemala transaction. The Administrator presented evidence that Mr. McCauley shipped a wallaby to the Guatemala National Zoo in January 2005. The wallaby was shipped from San Antonio, Texas, on Continental Airlines (CX 3) with the requisite health certificates (CX 4, CX 5). Mr. McCauley does not deny this transaction, but consistently has maintained that he was specifically and clearly told, by an unnamed United States Department of Agriculture veterinarian, that he was allowed to ship animals outside the United States even though his Animal Welfare Act license was revoked. He testified that he called the United States Department of Agriculture's regional office, was transferred to a staff veterinarian, and asked him a great many questions so that it was clear that the person knew what Mr. McCauley was asking. Mr. McCauley stated he was told "what you do outside of this country is your business." (Tr. 162.) Unfortunately, Mr. McCauley has no recollection as to the name of the individual who gave him this advice. Even if this advice was actually given, the fact is that the activity did not take place entirely outside the United States, since Mr. McCauley shipped the wallaby from Texas (CX 3).

Mr. McCauley also testified that, after he received the Complaint, he spoke to his custom broker, who referred him to a Dr. Okino, another United States Department of Agriculture veterinarian, who also told him that the United States Department of Agriculture did not require an Animal Welfare Act license for exporting wallabies outside the United States (Tr. 163-66). Mr. McCauley did not attempt to subpoena Dr. Okino.

Thus, it is undisputed that Mr. McCauley sold and shipped a wallaby to the Guatemala National Zoo in January 2005.

The Germany transaction. The Administrator alleges Mr. McCauley acted as a dealer with respect to two joey[5] wallabies he transported to Germany in May 2005. Mr. McCauley states he did not act as a dealer, but rather instead brought the wallabies to Germany in furtherance of his business as an expert animal consultant and to participate in the taping of a television program/video on wallabies. Mr. McCauley testified he was only paid his expenses for his trip to Germany (Tr. 181-82) with the hope that the marketing of the video that was produced would net him a profit (Tr. 203). While the Administrator proposes a finding of fact

[5]A joey is a juvenile wallaby.

that Mr. McCauley received two air tickets to Germany, Mr. McCauley testified that he received only one such ticket, as part of his expenses, and that he used accumulated airline miles to purchase a ticket for his daughter, who accompanied him on the trip (Tr. 150-51). The record contains no testimony to support the Administrator's proposed conclusion of law that the funds advanced to Mr. McCauley by Dagmar Grubnau, his German contact, were used to purchase Mr. McCauley's daughter's airplane ticket. However, it is undisputed that Mr. McCauley received approximately $1,150 to cover his airline ticket and fees such as the international health certificate and other inspection costs.

Mr. McCauley testified that he did not sell the wallabies to Dagmar Grubnau. He stated he gave them away because Grubnau's wife had bonded with them and because he had an arduous trip to Germany with the wallabies (Tr. 165-68). However, the health certificate relating to the shipment of the wallabies from the United States to Germany lists Dagmar Grubnau as the consignee (CX 17). In addition, describing the transaction on his website, Mr. McCauley states he had traveled to Germany and had "delivered a pair of bennetts joeys to a customer for use in a TV documentary" and the documentary would follow "the joey's [sic] lives until they are parents themselves." (CX 2 at 1.) While there is evidence that the price for wallabies can run well over $1,000 apiece, there is no evidence of any transaction between Mr. McCauley and Grubnau that would indicate an actual sale of the two wallabies.

The Administrator also contends, with respect to securing the possession of a female wallaby to take to Germany, Mr. McCauley acted as a dealer in regards to a complicated three-way transaction.[6] In essence, Mr. McCauley arranged for Arnold Sorenson to trade a male wallaby to Mike Smith, with the understanding that Mike Smith would give Mr. McCauley a female wallaby to take to Germany. Mr. Sorenson understood that Mr. McCauley would eventually provide him a male wallaby and $300 to complete the deal, but apparently Mr. McCauley has not yet provided Mr. Sorenson with the wallaby and $300 (CX 7; Tr. 84-89).

The Administrator also contends Mr. McCauley has acted as a dealer by maintaining a website which, until at least early May 2005, indicated that Mr. McCauley was selling wallabies and other macropods, and even posted the price for some wallabies (CX 1 at 3). Mr. McCauley's

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[6]This contention is not alleged in the Complaint.

homepage indicates that he "is available for future consulting and presentations and still owns his large mob of Bennetts wallabies in Texas, which he supplies to zoos, exotic animal breeders, and the bottle-fed joeys to the public as pets." (CX 1 at 1.) Some time subsequent to May 2005 and before August 2005, the price listings were left blank on Mr. McCauley's website. Mr. McCauley contended at the hearing that he was not in the business of selling wallabies and essentially blamed all his difficulties with the website on his webmaster, Mike Clayton, who he stated was constantly delinquent in complying with his requests to update his website (Tr. 197-202). Mr. McCauley stated that he was paying him too much money to switch to someone else. He did not attempt to subpoena Mr. Clayton, even though Clayton's whereabouts is known to Mr. McCauley since he is apparently an assistant professor at a local university (Tr. 197). Mr. McCauley also offered no explanation as to why Mr. Clayton was able to update his website to include details of his Germany trip, but did not eliminate the page "Pricing for Wallabies" on the website.

Discussion

I find that Mr. McCauley has violated the Animal Welfare Act by acting as a dealer without an Animal Welfare Act license. However, I only find that he violated the Animal Welfare Act with regard to the transaction with the Guatemala National Zoo. Although it is a close question, I find that Mr. McCauley did not act as a dealer with regard to the transaction involving the shipment of wallabies to Germany. In addition, although I find Mr. McCauley was clearly holding himself out as a dealer on his website, and continues to do so, that in itself is not a violation of the Animal Welfare Act—a transaction must occur for there to be a violation, and only the Guatemalan transaction was proven by a preponderance of the evidence. Accordingly, I order Mr. McCauley to cease and desist from violations of the Animal Welfare Act and the Regulations and assess Mr. McCauley a $2,000 civil penalty.

At the outset, it is unequivocally clear that "commerce," as used in the Animal Welfare Act and Regulations, covers the sale and shipment of animals from within the United States to a point outside of the United States. There is no dispute that such a transaction took place with respect to the sale of a wallaby to the Guatemala National Zoo. The principal area of dispute centers on Mr. McCauley's claim that he was told by an unidentified veterinarian that it was permissible for him to ship wallabies outside the United States without an Animal Welfare Act license, and was told after-the-fact by another United States Department

of Agriculture veterinarian that his shipping of animals outside the country without an Animal Welfare Act license was legal. The problem with Mr. McCauley's claim of "justifiable reliance" is that the Regulations clearly define commerce as including transactions between a place in a state and any foreign country. There is nothing ambiguous about this language, and it was easily discernable to Mr. McCauley, who had a copy of the Regulations (Tr. 137-38). Even if Mr. McCauley could produce United States Department of Agriculture witnesses who gave him incorrect advice, he still would not prevail on this issue. The clear language of the Regulation prevails over the incorrect interpretation of an employee. While clear proof of bad agency advice might go to the issue of Mr. McCauley's good faith on this issue and have an impact on the sanction, the failure to name the person who allegedly gave him the bad advice before the transaction and the failure to subpoena the person who allegedly confirmed this bad advice after-the-fact, leads me to reject this defense. Further, the alleged advice does not appear to cover Mr. McCauley's transaction anyway, since the undisputed evidence clearly demonstrates that the wallaby was shipped from within the United States.

The German transaction presents a closer question. Bearing in mind that the Administrator has the burden of proof, I must rule in favor of Mr. McCauley on this issue. The revocation of Mr. McCauley's Animal Welfare Act license does not require Mr. McCauley to abandon all activities involving macropods. The loss of his license does not ban Mr. McCauley from utilizing his expertise by, for instance, writing, lecturing, and consulting about macropods. The record does not contain sufficient evidence to contradict Mr. McCauley's account of his trip to Germany. He stated he was being paid his expenses for a documentary on wallabies, and there is no evidence in this record to the contrary. The approximately $1,100 Mr. McCauley states he was paid for his airline tickets and other expenses does not seem excessive, particularly in light of the length of the trip—less than 2 weeks. The record does not contain any evidence that he was paid any amount that would approach the amount he normally charged for joey wallabies. The record contains no evidence to support the Administrator's contention that the costs of Mr. McCauley's daughter's ticket to Germany was borne by anyone in Germany, rather than Mr. McCauley's unrebutted statement that he used his accumulated airline miles to finance her ticket and paid her taxes with his own money. Basically, Mr. McCauley's account—that he took the trip to help create a documentary film/video with the hope that he would receive a share of the profits, if any, as well as an increase in

profits from the sales of his book, has not been countered by the Administrator. Even though I find Mr. McCauley's account that he decided to donate the wallabies to be less than convincing,[7] the Administrator needs more than surmise to meet his burden of proof.

Similarly, Mr. McCauley's role in the three-way transaction in which Mr. McCauley participated to obtain a female joey wallaby to take with him to Germany does not appear to be that of a dealer as defined in the Animal Welfare Act. The net impact of the transaction is that Mr. McCauley arranged for a trade to allow him to obtain a female joey for his own benefit to take with him to Germany to utilize in the preparation of a documentary on wallabies.

I also find, even if Mr. McCauley advertised that he had wallabies for sale, that does not make him a dealer. The Administrator has consistently proven its unlicensed dealer cases, against Mr. McCauley and others, by demonstrating sales of animals at a time when the seller did not have an Animal Welfare Act license. *E.g.*, *In re Marilyn Shepherd*, 65 Agric. Dec 1019 (2006). Each time a person without an Animal Welfare Act license acts as a dealer—generally by buying or selling a regulated animal—that person commits a violation of the Animal Welfare Act. Advertising prices for regulated animals does not in itself constitute a violation, as advertising is not listed as one of the regulated acts for which an Animal Welfare Act license is required. The Administrator's brief is devoid of case citations on this issue, and I have found nothing to indicate that the mere act of advertising constitutes violative conduct.

I assess a $2,000 civil penalty for the violation committed by selling and shipping a wallaby to the Guatemala National Zoo. Dealing animals without an Animal Welfare Act license is among the most serious violations of the Animal Welfare Act. Mr. McCauley was fully aware that his Animal Welfare Act license had been revoked. His refusal to pay the civil penalty assessed in *In re David McCauley*, 63 Agric. Dec. 79 (2004); the fact that he has a history of prior violations; and the unambiguous language in the Regulations support a finding that his violation here was willful and that his conduct can be characterized as lacking good faith.

Findings of Fact

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[7]Mr. McCauley's website narrative of the trip, where he indicates that the documentary would follow the joeys "until they are parents themselves," is flatly inconsistent with his testimony that he had intended to bring wallabies back to the United States (CX 2 at 1).

1. David McCauley is an individual doing business as Dave's Animal Farm and whose current mailing address is in McQueeney, Texas 78123.

2. Mr. McCauley at one time held Animal Welfare Act license # 74-B-0439. This license was revoked (and a $10,000 civil penalty assessed) on January 30, 2004, in *In re David McCauley*, 63 Agric. Dec. 79 (2004). The revocation became a final decision of the Secretary of Agriculture on March 17, 2004.

3. On or about January 18, 2005, Mr. McCauley sold a wallaby to the Guatemala National Zoo.

4. On or about January 18, 2005, Mr. McCauley transported a wallaby from Texas to the Guatemala National Zoo.

5. On or about May 11, 2005, Mr. McCauley transported two wallabies to Dagmar Grubnau in Germany. These wallabies were transported in order to allow Mr. McCauley to assist in the preparation of a documentary. Mr. McCauley received some expenses and a promise of a percentage of profits that would be generated from the documentary. Although the wallabies remained in Germany after Mr. McCauley returned to the United States, there is no evidence that Mr. McCauley sold the wallabies.

6. From on or about the time Mr. McCauley's Animal Welfare Act license was revoked through at least August 22, 2005, Mr. McCauley advertised the sale of wallabies on his website.

Conclusions of Law

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

2. Mr. McCauley's sale and transportation of a wallaby to the Guatemala National Zoo in January 2005, when he did not possess an Animal Welfare Act license, was a willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

3. Mr. McCauley's transporting of two wallabies to Germany did not constitute a violation of the Animal Welfare Act or the Regulations.

4. Mr. McCauley's advertising wallabies for sale on his website did not in itself constitute a violation of the Animal Welfare Act.

5. Upon consideration of the factors enumerated in the Animal Welfare Act, I assess Mr. McCauley a $2,000 civil penalty.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Mr. McCauley raises due process concerns in his appeal petition. He claims the Administrator never provided a list of anticipated witnesses, a brief summary of anticipated witness testimony, and copies of exhibits intended to be introduced at the hearing, as he was ordered to do by the Chief ALJ. The Administrator failed to provide a satisfactory explanation as to whether the documents were provided and if not, why not.[8] Mr. McCauley's suggested recourse for the Administrator's failure to provide the documents is dismissal of the case. Such a remedy is inappropriate.

The appropriate remedy is to ensure that Mr. McCauley had ample opportunity to present his case.[9] The Chief ALJ accomplished this. After noting that Mr. McCauley had an obligation to notify the Chief ALJ about the missed delivery of documents, the Chief ALJ stated "the witnesses are going to testify." (Tr. 15.) Addressing Mr. McCauley, the Chief ALJ stated:

> I think both parties are at fault here. We've got all the witnesses here. We can at least get their testimony on the record, and at the conclusion of the testimony, if there's a need to continue the hearing, we may be able to do something through audiovisual -- you know, we have these television set-ups, and I'm sure there's one around here somewhere where you could -- if you had further questions to ask or if you had other witnesses that you might want to call, that you would have called if you had known about this

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[8]The Administrator's suggestion, at page 3 of its Opposition to Respondents [sic] Petition of Appeal, that Mr. McCauley's use of a Post Office Box, which he argues "does not lend itself to the usage of certified mail that is signed in order to provide validation of receipt," is the cause of the problems regarding production of the documents, borders on the absurd. The United States Postal Service's Direct Mail Manual (DMM) states "any individual box customer or organization may receive through the box any mail properly addressed to the box number." DMM 508 § 4.4.1 located at http://pe.usps.gov/text/dmm300/508.htm.

[9]As the Chief ALJ noted during the hearing, Mr. McCauley is not without fault with respect to his failure to receive the Administrator's witness list, summary of anticipated testimony, and copies of proposed exhibits prior to the hearing. Mr. McCauley was aware of the date on which the documents were to be sent, yet he failed to raise the issue until he arrived for the hearing. Furthermore, Mr. McCauley failed to comply with the order himself, in that he did not provide his witness list, summary of anticipated testimony, and copies of proposed exhibits to the Administrator as the Chief ALJ ordered.

> stuff, we might have to make some sort of accommodation.

Tr. 15-16. Then, to counsel for the Administrator, the Chief ALJ said:

> I'm going to let you call them. If Mr. McCauley can demonstrate that he's been prejudiced by the fact that, you know, he doesn't know what to ask these people or he isn't prepared, I may have to continue the hearing, and we may have to, you know, either call witnesses back or do something via audiovisual communication . . . so that he has a chance to prepare and recross-examine them. We may have to do that.

Tr. 18. After all the testimony and an off-the-record discussion with both parties, the Chief ALJ concluded:

> Mr. McCauley, I believe, pretty much has gotten his whole case on, so I don't see any need to continue the hearing to another date. I mean, he's put on all his evidence and said everything he wanted to say.

Tr. 206. Mr. McCauley did not object to this conclusion, he did not ask for a continuation of the hearing, nor did he indicate at a later date that he had additional evidence to provide. Absent any disagreement by Mr. McCauley that he fully presented his case, I must conclude that additional hearing was not necessary.

There is one other point that must be addressed. In his Appeal Petition, Mr. McCauley notes that he plans to continue with his "writing and macropod consulting business." He continues that he has been unable to determine the parameters of authorized actions and unauthorized actions as he continues his business. Based on the revocation of his Animal Welfare Act license in *In re David McCauley,* 63 Agric. Dec. 79 (2004), Mr. McCauley cannot act as a dealer. Mr. McCauley should seek advice from the Animal and Plant Health Inspection Service regarding the limits on his consulting business.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. McCauley, 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 in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and Regulations without being licensed as required.

2. Mr. McCauley is assessed a $2,000 civil penalty, which shall be paid by a certified check or money order with the notation "AWA Docket No. 06-0009" on the front of the check or money order made payable to the Treasurer of United States and shall be sent, within 60 days after service of this Order, to:

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

RIGHT TO JUDICIAL REVIEW

David McCauley has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Mr. McCauley must seek judicial review within 60 days after entry of the Order in this Decision and Order.[10] The date of entry of the Order in this Decision and Order is April 16, 2008.

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[10] 7 U.S.C. § 2149(c).

In re: FOR THE BIRDS, INC., JERRY LEROY KORN, AND MICHAEL SCOTT KORN.
AWA Docket No. 06-0005.
Filed April 29, 2008.

AWA – Exhibiting without license – Proper care, lack of.

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

DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 et seq.)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 et seq.). This initial decision and order is entered pursuant to section 1.142(c) of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.142(c).

The Administrator of the Animal and Plant Health Inspection Service ("APHIS") initiated this case in furtherance of USDA's statutory mandate under the Act to ensure that animals transported, sold or used for exhibition are treated humanely and carefully.[1] In its complaint, APHIS seeks penalties against respondents for violating the Act and the regulations and standards promulgated thereunder, 9 C.F.R. § 2.1 et seq. (the "Regulations" and "Standards"). The respondents filed answers denying the material allegations of the complaint.

On April 29, 2008, I presided over an oral hearing in this matter in Boise, Idaho. Complainant was represented by Colleen Carroll, Office of the General Counsel, U.S. Department of Agriculture. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn were *pro se*.

None of the aforementioned respondents appeared at the oral hearing. All of the respondents were duly -notified of the hearing. None of the

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[1]The Animal Welfare Act, 7 U.S.C. § 2131 et seq. (the "Act"), was originally passed by Congress specifically to address the public's interest in preventing the theft of pets and in ensuring that animals used in research were treated humanely. The Act was amended to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals used for exhibition purposes or as pets

respondents had good cause not to appear at the hearing. Said respondents are deemed to have waived the right to an oral hearing and to have admitted any facts that may have been presented at the hearing. Such failure by each of the respondents shall also constitute an admission of all of the material allegations of fact contained in the complaint. The complainant orally moved for issuance of a decision pursuant to section 1.141(e) of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.141(e)).

I granted complainant's motion, and issue this initial decision and order on April 29, 2008.

Findings of Fact

1. Respondent For the Birds, Inc., is an Idaho corporation whose agent for service of process is Jerry L. Korn, 1506 Happy Valley Road, Nampa, Idaho 83687. At all times mentioned herein, respondent For the Birds, Inc., was an exhibitor as that term is defined in the Act and the Regulations.

2. Respondent Jerry LeRoy Korn is an individual whose mailing address is 1506 Happy Valley Road, Nampa, Idaho 83687. At all times mentioned herein, said respondent was an exhibitor as that term is defined in the Act and the Regulations. Between 2001 and May 23, 2003, said respondent held Animal Welfare Act license number 82-C-0035, issued to "JERRY L. AND SUSAN F. KORN DBA FOR THE BIRDS," which license was cancelled on May 23, 2003. That license was revoked by an order of the Secretary of Agriculture issued on June 22, 2005.

3. Respondent Michael Scott Korn is an individual whose mailing address is 1506 Happy Valley Road, Nampa, Idaho 83687. At all times mentioned herein, said respondent was an exhibitor as that term is defined in the Act and the Regulations.

4. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn have a moderate-sized business exhibiting farm, wild and exotic animals. The gravity of the violations alleged in this complaint is great, and include repeated instances in which these respondents knowingly exhibited animals without having a valid license, and failed to handle animals humanely. Said respondents have continually failed to comply with the Regulations, after having been repeatedly advised of deficiencies. Respondents For the Birds, Inc., and Jerry LeRoy Korn have not shown good faith, having demonstrated an unwillingness to comply with the Act's and the Regulations' prohibition against exhibiting animals without having a valid license. Respondents For the Birds, Inc., and Jerry LeRoy Korn have a history of previous violations.

See In re For the Birds, Inc., et al., 64 Agric. Dec. 306 (2005), WL 1524662 (Decision and Order as to For the Birds, Inc., and Jerry L. Korn).

Conclusions of Law

1. On November 13, 2004, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn exhibited animals at 2400 Greenhurst Road, Nampa, Idaho 83686, without having been licensed by the Secretary to do so, in willful violation of sections 2.1(a) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.1(a), 2.100(a).

2. On November 26, December 4, December 11, and December 18, 2004, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn exhibited animals at Sportsmens' Warehouse in Meridian, Idaho, without having been licensed by the Secretary to do so, in willful violation of sections 2.1(a) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.1(a), 2.100(a).

3. On or about January 12, 2005, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn exhibited animals at Meridian Middle School, Meridian, Idaho, without having been licensed by the Secretary to do so, in willful violation of sections 2.1(a) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.1(a), 2.100(a).

4. On November 13, 2004, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to handle infant tigers as expeditiously and carefully as possible in a manner that would not cause them trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of the handling regulations. 9 C.F.R. § 2.131(b)(1).

5. On November 13, 2004, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, in willful violation of the handling regulations, and specifically allowed the public to handle infant tigers without any barrier or distance. 9 C.F.R.§ 2.131(c)(1).

6. On November 13, 2004, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn exposed young animals (infant tigers approximately five weeks old) to excessive public handling, or exhibited them for periods of time that would be detrimental to their health or well-being, in willful violation of the handling regulations. 9 C.F.R.§ 2.131(c)(3).

7. On November 13, 2004, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn exhibited animals under conditions that were inconsistent with the animals' well-being, and specifically, said respondents exhibited infant (5-week-old) tigers to the public outside of any enclosures, and allowed the public to handle the infant tigers for extended periods of time, for the purpose of selling "photo shoot" opportunities, in willful violation of the handling regulations. 9 C.F.R.§ 2.131(d)(1).

8. On December 11 and December 18, 2004, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to handle young tigers during public exhibition at Sportsman's Warehouse in Meridian, Idaho, as expeditiously and carefully as possible in a manner that would not cause them trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of the handling regulations. 9 C.F.R. § 2.131(b)(1).

9. On December 11 and December 18, 2004, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to handle animals during public exhibition at Sportsman's Warehouse in Meridian, Idaho, so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, in willful violation of the handling regulations, and specifically exhibited young tigers to the public without any barrier or distance. 9 C.F.R.§ 2.131(c)(1).

10. On December 11 and December 18, 2004, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn exposed young tigers to excessive public handling, or exhibited them for periods of time that would be detrimental to their health or well-being, at Sportsman's Warehouse in Meridian, Idaho, in willful violation of the handling regulations. 9 C.F.R.§ 2.131(c)(3).

11. On December 11 and December 18, 2004, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn exhibited animals during public exhibition at Sportsman's Warehouse in Meridian, Idaho, under conditions that were inconsistent with the animals' well-being, and specifically, said respondents allowed the public to handle young tigers for extended periods of time, for the purpose of selling "photo shoot" opportunities, in willful violation of the handling regulations. 9 C.F.R.§ 2.131(d)(1).

12. On January 12, 2005, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to handle young tigers during public exhibition at Meridian Middle School, Meridian, Idaho, as expeditiously and carefully as possible in a manner that would not cause them trauma, unnecessary discomfort, behavioral stress, or

physical harm, in willful violation of the handling regulations. 9 C.F.R. § 2.131(b)(1).

13.On January 12, 2005, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to handle animals at Meridian Middle School, Meridian, Idaho, so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said respondents exhibited juvenile tigers to the public, without any distance or barriers between the animals and the public, in willful violation of the handling regulations. 9 C.F.R.§ 2.131(c)(1).

14.On January 12, 2005, respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn exhibited animals at Meridian Middle School, Meridian, Idaho, under conditions that were inconsistent with the animals' well-being, and specifically, said respondents allowed the public to handle young tigers for extended periods of time, for the purpose of selling "photo shoot" opportunities, in willful violation of the handling regulations. 9 C.F.R.§ 2.131(d)(1).

Order

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder.

2. Respondents are each assessed a civil penalty of $57,750, for their 21 violations herein, to be paid by certified check or money order made payable to the Treasurer of the United States, within 60 days of the date of this decision and order, and remitted to:

Colleen A. Carroll
Office of the General Counsel
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Room 2325B, South Building
Washington, D.C. 20250-1417

The provisions of this order shall become effective immediately. Copies of this decision shall be served upon the parties.
Done at Boise, Idaho

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In re: DANIEL J. HILL AND MONTROSE ORCHARDS, INC.
AWA Docket No. 06-0006.
Decision and Order.
Filed May 16, 2008.

AWA – Exhibiting animals without license – Cease and desist order.

Sharlene Deskins, for the Administrator.
Respondents, 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 proceeding by filing a Complaint on January 18, 2006. The Administrator alleges Daniel J. Hill and Montrose Orchards, Inc. [hereinafter Montrose Orchards], operated as an exhibitor under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations], without obtaining the requisite license. Mr. Hill and Montrose Orchards filed a joint Answer contesting the allegations of the Complaint, principally stating they were entitled to a "farm exemption" since all the animals they were charged with exhibiting were farm animals.

Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a prehearing conference via telephone on July 25, 2006, and scheduled a hearing for December 6, 2006, in Flint, Michigan. At the hearing, Sharlene Deskins represented the Administrator, and Mr. Hill represented himself and Montrose Orchards. The Administrator called two witnesses and introduced seven exhibits. Mr. Hill testified on behalf of himself and Montrose Orchards and introduced three exhibits. Post-hearing briefs were filed on January 26, 2007.

On April 18, 2007, the Chief ALJ issued a Decision [hereinafter Initial Decision]: (1) finding that Mr. Hill and Montrose Orchards were exhibitors under the Animal Welfare Act and required to obtain an exhibitor's license to exhibit animals to the public; (2) ordering Mr. Hill and Montrose Orchards to cease and desist from violating the Animal Welfare Act and the Regulations, and in particular, to cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act including but not limited to the exhibition of animals; and (3) assessing Mr. Hill and Montrose Orchards, jointly and

severally, a $1,000 civil penalty (Initial Decision at 12-13).

On June 18, 2007, Mr. Hill and Montrose Orchards filed a timely appeal of the Chief ALJ's Initial Decision. On July 18, 2007, the Administrator filed his opposition to the appeal petition. The Administrator's opposition included his own appeal petition, challenging portions of the Chief ALJ's Initial Decision. For the reasons stated below, I find Montrose Orchards violated the Animal Welfare Act by exhibiting animals without obtaining an Animal Welfare Act license. I order Montrose Orchards to cease and desist from committing further violations of the Animal Welfare Act and the Regulations. Based on the record as presented, I do not find the imposition of a civil penalty is warranted. Furthermore, the Administrator presented no evidence why Mr. Hill should be treated as an independent licensee apart from Montrose Orchards. His actions were actions as Montrose Orchards' president. Absent a statutory or regulatory requirement that corporate officers must be individually licensed, I find Mr. Hill did not violate the Animal Welfare Act or the Regulations, and I dismiss the Complaint against him.

DECISION

Statutory and Regulatory Background

The Animal Welfare Act is a comprehensive statutory scheme, the purpose of which is to "regulate . . . the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use." (7 U.S.C. § 2131.) Specifically, Congress intended the Animal Welfare Act:

> (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
> (2) to assure the humane treatment of animals during transportation in commerce; and
> (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

7 U.S.C. § 2131. The Animal Welfare Act defines "animal" for

purposes of the statute to include:

> any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmblooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet[.]

7 U.S.C. § 2132(g) (Supp. V 2005). The statute excludes certain groups of animals from the definition. These include:

> (1) birds, rats of the genus Rattus, and mice of the genus Mus, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.

7 U.S.C. § 2132(g) (Supp. V 2005).

The Animal Welfare Act requires all dealers and exhibitors of animals to obtain a valid license.

> 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. The statute defines "dealer" and "exhibitor." A "dealer" is:

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

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

7 U.S.C. § 2132(f). An "exhibitor" is:

> 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, as may be determined by the Secretary[.]

7 U.S.C. § 2132(h).

The Regulations generally mirror the statute with respect to these definitions (9 C.F.R. § 1.1). Additionally, the Animal and Plant Health Inspection Service [hereinafter APHIS] has issued several documents and policies interpreting, to some degree, several of the concepts that are at question in this proceeding. *Program Aid 1117*, *Licensing and Registration Under the Animal Welfare Act, Guidelines for Dealers, Exhibitors, Transporters, and Researchers* (May 2002), states that "Normal farm-type operations that raise, or buy and sell, animals only for food and fiber . . . are exempt . . ." from the licensing requirement. (RX 4[1] at 7.) These guidelines also state that "Anyone who arranges and takes part in showing farm animals at agricultural shows, fairs, and exhibits is exempt. However, anyone exhibiting farm animals for nonagricultural purposes (such as petting zoos) must be licensed." (RX 4 at 15-16.) Additionally, Policy # 26 issued by APHIS in

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[1]Throughout this Decision and Order, "Tr." refers to the transcript, "CX" refers to the Administrator's exhibits, and "RX" refers to Mr. Hill and Montrose Orchards' exhibits.

November 1998, states:

> Farm animals, such as domestic cattle, horses, sheep, swine, and goats that are used for traditional, production agricultural purposes are exempt from coverage by the AWA. Traditional production agricultural purposes includes use as food and fiber, for improvement of animal nutrition, breeding, management, or production efficiency, or for improvement of the quality of food or fiber.

http://www.aphis.usda.gov/animal_welfare/downloads/policy/policy26.pdf. Absent from the Animal Welfare Act and the Regulations is any provision concerning the applicability of the Animal Welfare Act to situations in which an animal functions as an exempt animal but also meets the criteria for regulation under the Animal Welfare Act.

Facts

Montrose Orchards is a closely-held family corporation whose president is Daniel J. Hill (Tr. 127-28). The main crops at Montrose Orchards, which is located in Montrose, Michigan, are blueberries and apples. Montrose Orchards also grows asparagus, pumpkins, strawberries, and Christmas trees. (Tr. 131.) Several crops are offered to the public on a pick-your-own basis. All products grown at Montrose Orchards are offered for sale at a gift shop on the premises. All produce grown on the Montrose Orchards premises is sold directly to the public rather that through middlemen and wholesalers. (Tr. 131-32.) Montrose Orchards also operates a cider press, processing apples into cider. School groups occasionally visit Montrose Orchards to see the cider press operations. Montrose Orchards charges a fee to conduct the group tours. (Tr. 137-38.) Several animal pens are located at Montrose Orchards. In these pens, Montrose Orchards displays various farm animals including a pig, a cow, several English fallow deer, Barbados sheep, and goats (Tr. 12-13; CX 3). At the entrance to Montrose Orchards' property, a sign directs the public to the different pick-your-own crops. At times, the sign has also pointed the way to the animals. (CX 3 at 1.) The animal pens are fairly large and are not typical of the pens used for animals being raised for commercial purposes (Tr. 53-56). There are signs on the pens identifying the animals contained in the pens (Tr. 14; CX 3 at 5-6, 10).

"Bubble gum" type machines located on the Montrose Orchards premises are available to the public for the purchase of food to feed the animals in the pens (Tr. 31, 147-48). There is also a hand-washing

station so that people can wash their hands after contacting the animals (CX 3 at 4; Tr. 31). Montrose Orchards is listed in the *Michigan Directory of Farm Markets* as having animals on the premises (Tr. 14-15).

Montrose Orchards does not charge an admission fee to enter on its premises or to view the animals that are displayed. However, school groups are occasionally given tours of the facility, particularly Montrose Orchards' cider press, and these groups do pay a fee. (Tr. 137-38.)

Most of the animals raised at Montrose Orchards eventually are slaughtered, creating food for human consumption. Mr. Hill testified that the pig, the cow, the goats, and even the fallow deer are destined for the slaughterhouse, the freezer, and the dinner table. (Tr. 118-19.) He brought to the hearing, but did not offer as an exhibit, what he stated was deer sausage. Mr. Hill identified which of the English fallow deer was the source of the sausage. (Tr. 99-100.)

APHIS employees first inspected Montrose Orchards in September 2003, after observing Montrose Orchards' listing in the *Michigan Directory of Farm Markets* (Tr. 11). The first inspection was conducted by Dr. Kurt Hammel, a veterinary medical officer. He observed the farm animals on display and asked to speak to the person in charge. (Tr. 12-14.) Upon meeting Mr. Hill, Dr. Hammel advised Mr. Hill that the animals were on display and that an exhibitor's license under the Animal Welfare Act was required (Tr. 14). The following month, Dr. Hammel returned to Montrose Orchards, observed much the same situation, and again advised a representative of the facility (not Mr. Hill) that the Animal Welfare Act required a facility to have a license to exhibit animals (Tr. 15-17).

On December 1, 2003, Dr. Hammel again returned to Montrose Orchards, this time accompanied by his supervisor Dr. Rick Kirsten and Thomas Rippy, a senior investigator for APHIS (Tr. 17-18, 61). They presented Mr. Hill with what Dr. Hammel described as "an official notice of violation," and Dr. Kirsten advised Mr. Hill of the need to comply with the Animal Welfare Act and the Regulations (Tr. 19).

Dr. Hammel conducted another inspection on June 16, 2004 (Tr. 20). Dr. Hammel completed a search form (CX 2). During this inspection, Dr. Hammel took a number of photographs (CX 3) documenting that a clearly marked sign pointed the way to the animals (CX 3 at 1), that the animal pens were visible from the parking lot (CX 3 at 2), that there was a hand-washing station proximate to the animal pens (CX 3 at 4), and that the animals on display on the date of that inspection included at least four Barbados sheep (CX 3 at 5), a pig (CX 3 at 6), a cow (CX 3

at 8), at least three goats (CX 3 at 7, 9), and at least three English fallow deer (CX 3 at 10). Once again, Dr. Hammel advised Mr. Hill of the need to have an exhibitor's license issued by APHIS (Tr. 29-30).

Dr. Hammel and Mr. Rippy revisited Montrose Orchards on May 16, 2005 (Tr. 30-31, 62-63). Animals were still on display to the public (Tr. 31). Dr. Hammel observed an animal feeding station where the public could deposit coins and buy food to feed to the animals (Tr. 31). Subsequent inspections occurred in September 2005, May 2006, and August 2006, with the only change being that at the last visit the sign directing visitors to the animals was no longer evident (Tr. 33-38.) Dr. Hammel also visited Montrose Orchards in March and April 2006, but the facility was not open to the public at that time (Tr. 34-35).

Throughout the course of these inspections, Mr. Hill consistently maintained that it was lawful for Montrose Orchards to exhibit animals without an exhibitor's license. Mr. Hill claimed that the Montrose Orchards facilities fell under several exemptions to the Animal Welfare Act. (Tr. 76-77, 114-18; CX 4, CX 5.) Mr. Hill persistently inquired of APHIS personnel who inspected Montrose Orchards as to whether there was an official interpretation of the Animal Welfare Act or the Regulations which supported APHIS' contention that Montrose Orchards was required to have an exhibitor's license. Mr. Hill went so far as to inquire of the Office of Administrative Law Judges whether there was case law in which there was a ruling which would indicate whether Montrose Orchards was entitled to an exemption from the exhibitor's license requirement (RX 1). Office of Administrative Law Judges attorney James Hurt (who Mr. Hill refers to as Judge Hurt) responded that Office of Administrative Law Judges decides cases and does not give advisory opinions. Mr. Hurt referred Mr. Hill to the APHIS website. (RX 1, RX 2.)

The exemptions Mr. Hill contends apply to the Montrose Orchards operation are:

- the farm animal exemption (7 U.S.C. § 2132(g) (Supp. V 2005)); and
- the under $500 in sales exemption (7 U.S.C. § 2132(f)(ii)).

In the Answer, at the hearing, and in the Appeal Petition, Mr. Hill consistently argued that all the animals exhibited at Montrose Orchards were raised for food and Montrose Orchards had less than $500 in sales of animals in any year. Furthermore, Mr. Hill maintained at the hearing, and again in his brief, that if an official written interpretation of the Animal Welfare Act and Regulations indicates Montrose Orchards is not entitled to an exemption, it would seek an exhibitor's license (CX 5).

Discussion

After careful review of the facts and the applicable law, I conclude Montrose Orchards is an exhibitor as that term is defined in the Animal Welfare Act (7 U.S.C. § 2132(h)). Furthermore, I find Montrose Orchards' operations were in interstate commerce or at least affected commerce and the exhibition of animals at the Montrose Orchards facility is an inducement to the public to visit and purchase products from Montrose Orchards' primary operation. I deem that this inducement provides an economic benefit to Montrose Orchards and, therefore, is a form of compensation.

The Administrator, in the Complaint, named Montrose Orchards, Inc., and Daniel J. Hill, its president, as Respondents. While, as discussed below, the evidence establishes that Montrose Orchards is required to have an Animal Welfare Act license to exhibit animals, nothing in the record points to any reason that Mr. Hill personally must obtain an Animal Welfare Act exhibitor's license. Testimony in the record indicates that Montrose Orchards is a family-owned corporation that has a corporate meeting annually (Tr. 127-30). The Administrator presented no evidence to justify ignoring the corporate form. Furthermore, the Administrator has presented no citation to a statute or regulation that creates an Animal Welfare Act licensing requirement for the president, any officer, or any owner of an otherwise valid corporation. Finally, the Administrator did not present any evidence that Mr. Hill, in his personal capacity, is responsible for exhibiting animals at Montrose Orchards without an Animal Welfare Act license. Therefore, I dismiss the Complaint with regard to Daniel J. Hill.

Montrose Orchards, on the other hand, is an exhibitor and must have an Animal Welfare Act license if it intends to continue exhibiting its animals. I find that, while the animals on display at Montrose Orchards were ultimately raised for food, the fact that they also were exhibited requires an exhibitor's license.

The "in commerce" requirements of the Animal Welfare Act are interpreted liberally.[2] While Montrose Orchards often obtains animals for free, it also buys some animals and it sells some animals at auction

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[2]For example, the Department of Justice's Office of Legal Counsel concluded "that the Animal Welfare Act applies to activities that take place entirely within one State, as well as to those that involve traffic across State lines." (3 U.S. Op. Off. Legal Counsel 326 (1979).)

(Tr. 143-44, 159-62). Montrose Orchards is listed in the *Michigan Directory of Farm Markets*, it is mentioned in numerous websites as a place to purchase a variety of products, it is in the process of developing its own website, and it accepts credit cards as a form of payment for purchases (Tr. 50-51, 132-33). Congress indicated that it wanted to extend the application of the Animal Welfare Act broadly to cover any activity that "affects" commerce, rather than require the activity actually be in interstate commerce (7 U.S.C. § 2131). The purchase and sale of animals at auction, the acceptance of credit cards for purchases, and the use of internet sites for promotion of the business lead me to the conclusion that Montrose Orchards is a business that Congress intended to be regulated under the Animal Welfare Act when it exhibits animals to its produce buying/picking customers.

Montrose Orchards also contends that because it does not charge an admission fee to view the animals on display, it does not meet the statutory definition of "exhibitor" in that Montrose Orchards does not exhibit "to the public for compensation." (7 U.S.C. § 2132(h).) Montrose Orchards' argument ignores the next clause in the definition "as determined by the Secretary." The Judicial Officer, acting for the Secretary of Agriculture, has long held that the use of displayed animals to attract customers to a facility is sufficient to meet the compensation requirement, even though no money changes hands in exchange for the right to view the animals. *In re Lloyd A. Good, Jr.*, 49 Agric. Dec. 156 (1990). In *Good*, the Judicial Officer affirmed the ALJ's finding that the display of a dolphin at a resort was for the purpose of attracting visitors to the resort. "Although it is true that no fee, as such, is charged for viewing the dolphin's performance, the exhibition is maintained with the expectation of economic benefit to the resort. The dolphin act is an unitemized service which the resort provides to its patrons as well as an advertised attraction to draw patrons to the resort's premises." *Id.* at 163. It is not unreasonable to assume that the business model of Montrose Orchards is such that the viewing of the animals on display is indeed an attempt to differentiate Montrose Orchards from other similar operations, and as such the analysis in *Good*, that the animals are displayed in this manner with the intention of providing an economic benefit to Montrose Orchards, is applicable.

Montrose Orchards contends that at least two exemptions – the under $500 per year in sales exemption and the farm animal exemption – allow Montrose Orchards to avoid the Animal Welfare Act's license requirements. Neither exemption benefits Montrose Orchards. First, the under $500 in sales exemption is actually an exclusion from the definition of a dealer under the Animal Welfare Act (7 U.S.C. § 2132(f)(ii)). The Administrator does not allege that Montrose

Orchards is required to have a license as a dealer – the Administrator alleges that Montrose Orchards is required to have a license as an exhibitor. This exemption does not apply to Montrose Orchards' operation. Montrose Orchards' reliance on this exemption is misplaced.

Next, Montrose Orchards relies on the farm animal exception to the definition of animals that are protected under the Animal Welfare Act to contend that it does not need a license to exhibit its animals. There is no dispute that Montrose Orchards does, in fact, raise many or most of the animals it displays for eventual use as food. Furthermore, the Animal Welfare Act exempts "farm animals . . . used or intended for use as food[.]" (7 U.S.C. § 2132(g) (Supp. V 2005).) The Administrator contends that the primary intention with respect to these animals was not for use as food, but as animals to be exhibited. I find that, in reality, Montrose Orchards' animals serve two purposes–they are being exhibited first and used for food later. If the animals were raised only for use as food, it is reasonable to assume that large pens openly visible to the public, signs directing the public to the animals, signs identifying the animals, food dispensing machines from which the public can purchase food to feed the animals, hand-washing stations for the use of the public after visiting the animals, and the listing in the *Michigan Directory of Farm Markets* as a facility where animals are displayed, would not be evident. It is equally evident that if the animals were intended only for display to the public, the animals would not wind up on the dinner table and the venison sausage Mr. Hill brought to the hearing might still be on the hoof.

There is no clear guidance, either in the Animal Welfare Act, the Regulations, or previous Judicial Officer decisions, regarding the applicability of the Animal Welfare Act to a person whose animals have two purposes, one covered by the Animal Welfare Act and one exempt from Animal Welfare Act requirements.[3] In order to resolve that lack of clarity, I hold, as a matter of law, that when a person utilizes animals for multiple purposes, at least one of which is exempt from the Animal Welfare Act requirements, and at least one of which requires an Animal

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[3]APHIS hints at this multi-purpose possibility in *Program Aid 1117, Licensing and Registration Under the Animal Welfare Act, Guidelines for Dealers, Exhibitors, Transporters, and Researchers* (RX 4). In the introduction to Program Aid 1117, APHIS notes that the various exemptions apply to persons/organizations whose animal business participates "only" in exempt operations. "Normal farm-type operations that raise, or buy and sell, animals only for food and fiber . . . are exempt by law[.]" *Id.* at 7.

Welfare Act license, that person must obtain an Animal Welfare Act license that covers each and all regulated purposes. Here, the displayed animals are unquestionably one of the means that Montrose Orchards uses to attract customers to its facilities; therefore, Montrose Orchards must obtain an Animal Welfare Act license to continue exhibiting its animals.

The Administrator sought assessment of a $4,000 civil penalty against Montrose Orchards. The Chief ALJ assessed Montrose Orchards a $1,000 civil penalty. The primary basis for the Chief ALJ's decision regarding the sanction was that Mr. Hill's repeated efforts to obtain a written interpretation of APHIS' reasoning why the exemptions Montrose Orchards claimed did not apply demonstrated good faith. The Chief ALJ further found that Montrose Orchards was not a scofflaw who was trying to squirm out of a statutory requirement, but simply wanted APHIS to show, in writing, why Montrose Orchards was not covered by one of the claimed Animal Welfare Act exemptions. The Administrator appealed the Chief ALJ's sanction determination arguing Montrose Orchards' actions did not show good faith.

Mr. Hill, as president of Montrose Orchards, reviewed the Animal Welfare Act and the Regulations and determined, in his view, that, because Montrose Orchards' animals were destined for slaughter and the dinner table, Montrose Orchards fell under the exemption to the requirements of the Animal Welfare Act for "farm animals . . . intended for use as food[.]" (7 U.S.C. § 2132(g) (Supp. V 2005).) While there was no testimony from the APHIS investigators regarding their response to Montrose Orchards' claim of exemption and request for written explanation why the exemption did not apply, the Administrator now argues that "providing [Montrose Orchards] with copies of the Act and regulations does constitute responding to [Montrose Orchards] in writing." (Complainant's Opposition to the Respondent's Appeal at 13.) The Administrator also claims that providing Montrose Orchards with two inspection reports that state in their entirety: "The facility is exhibiting animals to the public without a valid USDA license. This is a violation of section 2.1. No covered activities are permitted without a valid USDA license" (CX 1, CX 6) is the appropriate response to Montrose Orchards' request for an explanation about the applicability of the exemptions. (Complainant's Opposition to the Respondent's Appeal at 13, n.8.)

Just as the Chief ALJ would not impose upon APHIS a duty to respond to such an inquiry in writing, I too find that APHIS has no legal obligation to respond in writing. I do consider APHIS' response to Montrose Orchards, or lack thereof, as a factor in my sanction decision. In further examining factors to determine the appropriate sanction, I find

the lack of discussion in the Animal Welfare Act and the Regulations regarding animals that have a dual purpose, left a significant ambiguity whether Montrose Orchards was required to obtain an Animal Welfare Act license to exhibit its animals – which ultimately became food.

The Animal Welfare Act also requires that I consider the violator's size of business, the gravity of the violation, good faith, and history of previous violations (7 U.S.C. § 2149(b)). Montrose Orchards' animal business is very small. I agree with the Chief ALJ that Montrose Orchards' effort to get an interpretation of the Animal Welfare Act and the Regulations, as well as Montrose Orchards' assurance that it would obtain an Animal Welfare Act license if such a written policy existed, demonstrated good faith. Normally, I would find a refusal to obtain an Animal Welfare Act license to be a serious violation. However, considering the ambiguity of the Animal Welfare Act and the Regulations as applied to the facts before me, combined with Montrose Orchards' efforts to clarify the ambiguity, I find this violation to be minor. Therefore, I find a civil penalty is not warranted.

Findings of Fact

1. Respondent Montrose Orchards, Inc., is a family-owned Michigan corporation located in Montrose, Michigan. Respondent Daniel J. Hill is the president of Montrose Orchards.

2. Montrose Orchards operates a business which offers the public an opportunity to purchase apples, blueberries, Christmas trees, asparagus, pumpkins, and other products. Most products are sold in the Montrose Orchards' gift shop, and some products are also offered to the public on a pick-your-own basis.

3. Montrose Orchards exhibits to the public a number of animals, including, at various times, a pig, a cow, English fallow deer, Barbados sheep, and goats. These animals were displayed in large pens. There were signs directing the public to these pens. There were signs on some of the pens identifying the animal(s) inside the pens. There were food dispensing machines from which the public could buy food to feed the animals, and a hand-washing station near the pens available for public use.

4. During a series of inspections occurring between September 2003 and August 2006, APHIS inspectors consistently indicated to Montrose Orchards that an exhibitor's license was required to exhibit Montrose Orchards' animals. Just as consistently, Montrose Orchards, through its president Mr. Hill, insisted that the display of animals was exempt from

the exhibitor's license requirement.

5. Mr. Hill, on behalf of Montrose Orchards, made numerous inquiries to the United States Department of Agriculture requesting a written statement that the exhibition of Montrose Orchards' animals required an exhibitor's license. APHIS did not provide the requested statement.

6. Most of the animals exhibited by Montrose Orchards, eventually, are slaughtered and used for food.

Conclusions of Law

1. Between September 2003 and August 2006, Montrose Orchards was an exhibitor under the Animal Welfare Act. As such, Montrose Orchards was required to obtain an exhibitor's license to exhibit the animals on its premises to the public.

2. Daniel J. Hill was president of Montrose Orchards. As president, he was not required to obtain an Animal Welfare Act license in his own name. Therefore, the Complaint with regard to Mr. Hill is dismissed.

ORDER

Montrose Orchards, its 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 in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act, including but not limited to the exhibition of animals, until such time Montrose Orchards obtains the appropriate Animal Welfare Act license. This Order shall become effective on the day after service on Montrose Orchards.

RIGHT TO JUDICIAL REVIEW

Montrose Orchards 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. Montrose Orchards must seek judicial review within 60 days after entry of the Order in this Decision and Order.[4] The date of entry of the Order in this Decision and Order is May 16, 2008.

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[4]7 U.S.C. § 2149(c).

DEBARMENT NON-PROCUREMENT

DEPARTMENTAL DECISION

In re: AWB LTD. AND ITS AFFILIATED COMPANIES.
DNS-FAS Docket No. 08-0053.
Decision and Order.
Filed April 21, 2008.

DNS-FAS – Bribery – Kickbacks – Presently responsible – Oil for Food.

AWB Ltd. appealed its 2 year debarment/suspension for its participation in a fraud and kickback scheme in the "Oil for food program" in Iraq. AWB defended that the procedure was untimely, flawed, and invalid under 7 CFR § 3017.890. AWB offered no defense of its past activities, but instead relied on the " presently responsible" defense under 7 C.F.R. § 3017.110 (b) and stated that they have a new general manager, new executive staff, new general counsel and that none of the responsible individuals were still part of the AWB management. However, the company did not make these changes until well after the kickback scheme was uncovered in the Volker report.

Steven Gusky for USDA.
Stanley McDermott for Respondent.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

This decision and order is issued pursuant to 7 C.F.R. § 3017.890 that governs appeals of debarment and suspensions under 7 C.F.R. §§ 3017.25-.1020, the regulations that implement a governmentwide system of debarment and suspension for the United States Department of Agriculture's nonprocurement activities. The purpose of the regulations is stated at 7 C.F.R. § 3017.110:

> (a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.
>
> (b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.
>
> (c) An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person for the purposes of punishment.

AWB LTD has appealed the December 20, 2007 decision of Michael W. Yost, Administrator of the Foreign Agricultural Services ("FAS"), United States Department of Agriculture, to debar AWB and certain of its affiliates from participation in government programs for two years. AWB argues that the decision should be reversed and vacated because: (1) it is untimely and procedurally flawed; (2) it is invalid under 7 C.F.R. § 3017.890; and (3) it failed to consider the time AWB had already been suspended.

Upon consideration of the Administrator's decision, the underlying administrative record ("AR") and the arguments of the parties, I am affirming the two-year debarment of AWB LTD and the named affiliated companies as fully supported by the administrative record and the controlling regulations.

Findings

Concerns about manipulation of the United Nations' Oil-For-Food Programme by Iraq while its government was headed by Saddam Hussein, led to the creation of an Independent Inquiry Committee Chaired by Paul A. Volker. On October 27, 2005, the committee issued a 623 page report. ("Volker Report"). It identified AWB Limited, an Australian company selling wheat to Iraq under United Nations authorized humanitarian goods contracts, as having paid kickbacks disguised as trucking fees, to Saddam Hussein's government. In a letter to Chairman Volker, dated October 25, 2005 and signed by both AWB's Managing Director and its Chairman, AWB stated that it did not know that the trucking fees it paid were to a company that was a front for the government and that the fees were not used to provide trucking services. (Volker Report at 395-399).

In response to the request of the Secretary-General of the United Nations, the Australian Government established its own Commission headed by The Honourable Terence RH. Cole AO RFD QC. This Commission employing Royal Commission powers, conducted an independent investigation and issued a report ("Cole Report") documenting corruption by Australian companies that participated in the U.N. Oil-For-Food Programme while Saddam Hussein was in power.

> …(The Commission) worked tirelessly through 76 days of hearings, hundreds of witness statements and tens of thousands of pages of documents.

(Statement dated November 27, 2006, by the Attorney General, the

Honorable Philip Ruddock MP., included as a preface to the Cole Report). The Cole Report's Prologue begins with the September 18, 2006 finding by Justice Young, Federal Court of Australia:

> AWB knew that paying inland transportation fees to Alia (the Iraqi company used as a front) was a means of making payments to the Iraqi Government. This plan was concealed from the United Nations.

(Cole Report at xi).

Commissioner Cole then stated his findings from the investigation of AWB's payment of kickbacks to the Saddam Hussein government:

> I have examined in detail the transactions between AWB Limited and Iraq and the relationship of those transactions to United Nations sanctions and the law in Australia. The facts are now not in doubt. It is not my function to make findings of breach of the law; my function is to indicate circumstances where it might be appropriate for authorities to consider whether criminal or civil proceedings should be commenced, I found such circumstances to exist….
>
> …. The Federal Court has found that a 'transaction was deliberately and dishonestly structured by AWB so as to misrepresent the true nature and purpose of the trucking fees and to work a trickery on the United Nations'….
>
> How could AWB have conducted itself in such a way as to produce such consequences? I asked Mr. Lindberg, without objection from AWB or its directors, 'Are you able to give me any understanding as to how you think this came about? How it happened in a company like AWB?' Mr. Lindberg gave no answer other than to say that it should not have happened. AWB submitted that the question I asked was 'obviously a question the directors must consider and answer'.
>
> I consider the answer obvious.
>
> The conduct of AWB and its officers was due to a failure in corporate culture. The question posed within AWB was:
>
> What must be done to maintain sales to Iraq?

The answer given was:

> Do whatever is necessary to retain the trade. Pay the money required by Iraq. It will cost AWB nothing because the extra costs will be added into the wheat price and recovered from the UN escrow account. But hide the making of those payments for they are in breach of sanctions.
>
> No one asked, 'What is the right thing to do?' Instead, much time and money was spent trying to determine if arrangements could be formulated in such a way as to avoid breaching the law or sanctions, whether conduct could be protected, by various subterfuges, from discovery or scrutiny, and whether actions were legal or illegal. There was a lack of openness and frankness in AWB's dealing with the Australian Government and the United Nations. At no time did AWB tell the Australian Government or the United Nations of its true arrangements with Iraq. And when inquiries were mounted into its activities it took all available measures to restrict and minimize disclosure of what had occurred. Necessarily, one asks, 'Why?'
>
> The answer is a closed culture of superiority and impregnability, of dominance and self-importance. Legislation cannot destroy such a culture or create a satisfactory one. That is the task of boards and the management of companies. The starting point is an ethical base. At AWB the board and the management failed to create, instill or maintain a culture of ethical dealing….

(Cole Report at xi-xii).

> Based on discussions with officers of AWB and the Saddam Hussein Iraq government, and a meticulous review of contracts, AWB's internal memoranda and other documents, the Commission ascertained that:
>
> Between 1999 and March 2003 AWB paid in excess of US $224 million in inland transportation fees, including the 10 per cent after-sales-service fee (where that fee was imposed), in respect of 28 contracts concluded under the Oil-for-Food Programme.

(Cole Report at 43 of Vol. 2).

On December 20, 2006, based on his review of the Cole Report, Michael W. Yost, Administrator of the Foreign Agricultural Service

(FAS), suspended and proposed to debar AWB Limited indefinitely from participation in programs of the United States. Mr. Yost advised AWB of its right under the regulations, to submit information in opposition to the suspension and proposed debarment, and to do so by written submission or to request an opportunity to present information orally. In his concluding paragraph to AWB, Mr. Yost stated:

> If I determine that a submission raises a genuine dispute over facts material to the suspension or the proposed debarment, AWB Limited, its affiliates or both will be afforded an opportunity to appear with a representative, present witnesses and other evidence, and confront any witnesses that the United States presents. After reviewing the official record, including any submissions by AWB Limited or its affiliates, I will decide, in accordance with the applicable regulations, whether to terminate the suspension and proposed debarment action or to impose debarment.

(AR at 1-5).

AWB responded by a letter from its attorney dated February 16, 2007, challenging the evidentiary and legal basis for the proposed debarment, and requesting an oral hearing. (AR at 14).

On March 20, 2007, the request for an oral hearing was granted by a letter to AWB's attorney from Roy Henwood, Confidential Assistant to the Administrator. The letter advised that the hearing would be informal, would be transcribed, and that AWB's "…representatives, counsel or both may present additional arguments or information for the record, expand on arguments already offered, and present witnesses." It further advised that Constance Jackson, Associate Administrator of FAS would preside, and that Mr. Yost, the suspending and debarring official for FAS, would not be at the hearing. Also, that Mr. Yost, as the suspending and debarring official, was:

> …required to make a written decision whether to continue, modify, or terminate AWB's suspension or debar AWB within 45 days of closing the official record, although he may extend that period for good cause.

The closing paragraph of Mr. Henwood's letter stated:

> You may find further information about the conduct of the hearing in 7 CFR part 3017, particularly in subparts G and H. If I may

> clarify any of the above information, I am available at (202) 720-5864 or at roy.henwood@fas.usda.gov.

(AR at 27).

On April 24, 2007, AWB's attorney supplemented his letter of February 16, 2007, stating that AWB would focus at the hearing on three subject areas of interest to the USDA. First, it had closed its United States office in Portland, Oregon. Second, AWB's board of directors in keeping with its efforts to reform its corporate culture in wake of the Oil-for-Food-Programme investigations had implemented an "AWB Reform Agenda", and was seeking shareholder approval to split AWB into two separate companies. Third, the Australian Government was expected to announce shortly the results of its independent review of wheat export marketing arrangements. (AR at 29).

The transcribed oral hearing was held before Ms. Jackson on April 25, 2007. (AR at 41-91).

At the opening of the hearing, Ms. Jackson told the attorneys who appeared on behalf of AWB that it was her intention:

> …to make sure there's sufficient opportunity to explore all the issues raised by all parties, and we're not going to be reaching a decision here at the hearing. This is information gathering. We'll take that information into consideration.
>
> The record will be open for 30 days, a time period we may need to extend….Once the record is closed, there will be a written decision made within 45 days.
>
> We're going to give you the first opportunity to present some information….

(AR at 44-45).

The attorneys for AWB presented no evidence to deny its past payment of disguised kickbacks to the Saddam Hussein government as found and described in the Cole Report. Instead, they confined themselves to furnishing information to show that AWB should not be excluded from Federal programs because it no longer came within the "not presently responsible" standard of 7 C.F.R. § 3017.110 (b). They provided information showing that AWB now has a new managing director, a new executive staff and a new general counsel. They advised

that AWB presently operates under the directives of a new managing director pursuant to policies instituted by him to transform the culture of the company and make it more transparent. They argued that the corrupt practices that were the subject of the Cole Report and the Volcker Report had ended by 2003, and that none of the responsible individuals were still part of AWB's management. Moreover, the Board of Directors of AWB publicly expressed its regret for what happened. (AR at 49-51).

At the hearing, Ms. Jackson expressed concerns about AWB's Board of Directors. She inquired as to the turnover in the Board of Directors since the events that were the subject of the Cole Report, and what kind of training or reviews had been put in place for the Board to have more future accountability for the actions of the company. (AR at 53). The response to this question and a similar question by Mr. Henwood respecting fraud awareness training for AWB's staff, was:

> I don't think there's been a separate program created for that - - for that purpose. I can inquire, but I don't - - I don't think there has been a sort of institutional program created that would be - - that would be dedicated to that - - to that single purpose. I don't know - - I don't know that the Board - - I don't know that the Board considers it necessary for anything. It certainly - - the Board certainly considered it efficient for the managing director to be given the - - the instructions to be quite proactive in making certain that there is a new openness within the company.

(AR at 55-56).

Concerns were also expressed as to which members of the Board and the staff were the same as those in place in 2002. (AR 59).

The closing statement for AWB argued that its debarment would constitute punishment that is not allowed by 7 C.F.R. § 3017.110 (c) in that there was a lack of evidence necessary under 7 C.F.R. § 3017. 800 (d) for debarment based on a cause of so serious or compelling nature that the national interest is imperiled or that the company's present responsibility is affected. (AR at 80).

On May 11, 2007, FAS wrote to counsel for AWB requesting: (1) an explanation of facts that had come to its attention that could serve as an independent cause for AWB's debarment due to inappropriate business conducted with Iran; and (2) information respecting a company that might have been an AWB affiliate. (AR at 92-93).

On May 23, 2007, counsel for AWB sent Ms. Jackson additional information that included AWB's annual report for 2006 devoted to Corporate Governance, and rosters of its executive officers and its directors from 2002 through May 1, 2007. As part of this submission, information was supplied to demonstrate AWB's present responsibility through its giving a power-point presentation and distributing materials to its employees under two working versions of a "Values workshop", and by AWB's response to recommendations from KPMG, an entity it commissioned to report on the company's existing governance structures and practices. (AR at 96-173).

Also on May 23, 2007, counsel for AWB responded to the FAS letter of May 11, 2007. (AR at 94-95). The explanations provided for AWB in respect to dealings with Iran were found satisfactory by FAS and it so advised AWB's counsel by a letter dated July 3, 2007. However, in the letter, FAS requested additional information concerning a possible AWB affiliate. (AR at 174).

On July 16, 2007, counsel for AWB submitted information respecting the possible affiliate. (AR at 175-337). By letter dated August 17, 2007, Ms. Jackson advised that the explanations provided were satisfactory. (AR at 338).

On October 3, 2007 and October 12, 2007, counsel for AWB requested that the suspension of AWB and the proposed debarment be vacated because the record had closed on July 16, 2007, and under 7 C.F.R. § 3017.870(a) the mandatory 45-day period in which to make a decision had passed. (AR at 339 and 340).

On October 15, 2007, Mr. Henwood responded to these letters and stated that the official record had not yet closed because findings of fact as contemplated by the regulations, had not yet been presented to the Administrator. (AR at 341).

On November 12, 2007, AWB filed a Petition that was assigned to me, requesting a declaratory order to vacate the December 20, 2006 Notice of Suspension and Proposed Debarment and terminating the proceedings for procedural irregularities and lack of timeliness. (DNS FAS Docket No. 08-0016).

On November 16, 2007, Ms. Jackson issued findings of fact pursuant to 7 C.F.R. § 3017.745(a)(2) and 3017,840(a)(2), that closed the official

record. (AR at 345-351).

On December 17, 2007, I dismissed AWB's petition without prejudice. The dismissal was based on my lack of jurisdiction. As stated in that decision, an Administrative Law Judge's powers are limited to those set forth at 7 C.F.R. §§ 3017.765 and 3017.890 which do not authorize a proceeding to be vacated before the issuance of a debarring official's decision. (DNS FAS Docket No. 08-0016).

On December 20, 2007, Michael W. Yost, Administrator of FAS, and "the debarring official" as defined in 7 C.F.R. § 3017.935(a), debarred AWB Limited and named affiliates from participation in programs of the United States Government for a period of two years. (AR at 353-367).

On January 25, 2008, AWB filed an appeal from the Debarment Decision.

On March 31, 2008, FAS filed: (1) a motion to dismiss the appeal, (2) the appearance of its counsel, (3) the transmitted record on appeal, and (4) a declaration of Michael W. Yost in which Mr. Yost explained that acting as the debarring official:… I considered a three-year debarment to be appropriate. However, in light of the one year during which AWB had already been suspended, I determined that a two-year debarment should be imposed.

On April 18, 2008, AWB filed a Reply Brief in Support of its Appeal from the Debarment Decision.

Conclusions

1. The debarment decision that was issued on December 20, 2007 was timely and within 45 days after the official record was closed as specified in the controlling regulation, in that the official record was not closed until the receipt by the debarring official of findings of fact on November 16, 2007.

AWB's contention that the debarment decision was untimely is based on inapplicable legal precedents, mischaracterizations of statements by the Administrator and other FAS officials, and its assertion that the hearing held at its request was not a "Fact Finding Proceeding" under 7 C.F.R. §§ 3017.830(b)-(c) and 3017.840(a)(2).

The regulation that controls whether a debarment decision is timely is 7 C.F.R. § 3017.870(a) that provides:

> (a) The debarring official must make a written decision whether to debar within 45 days of closing the official record. The official record closes upon the debarring official's receipt of final submissions, information and findings of fact, if any. The debarring official may extend that period for good cause.... (emphasis added).

This regulation, together with 7 C.F.R. § 3017.755 that sets forth an identical requirement for suspension decisions, was promulgated on November 26, 2003 (68 FR 66544, 66563 and 66565). The new regulations replaced earlier regulations that had been interpreted and applied in the 1994-1997 Agriculture Decisions that AWB has cited to urge that the 45-day period the debarring official had for his issuance of his decision started before his receipt of findings of fact.

In addition to arguing that the debarment decision was not issued within the 45-day period contemplated by the regulations, AWB urges that the debarment was not conducted "...in a reasonably expeditious manner consistent with the regulations or principles of fundamental fairness." That was the stated reason for vacating a debarment decision by a USDA agency in *In re Indeco Housing Corp*., 56 Agric. Dec. 738, 743 (1997). But the circumstances underlying the *Indeco* decision were vastly different from those in the instant proceeding. The Respondent in *Indeco* had been debarred under procedures that took almost a year and a half to complete; was not properly served with notice of the proposed debarment; was not allowed to submit information and argument after first learning of the proposed debarment at a bankruptcy hearing; and was debarred for five years, a period in excess of the three year general maximum, without explanation. In contrast, the challenged decision to debar AWB was issued only after AWB was given every opportunity to contest the proposed debarment and show itself to be presently responsible.

Here, Ms. Jackson conducted the oral hearing AWB had requested. She and the Administrator allowed and invited AWB to submit additional information after the hearing. FAS continued to receive information from AWB through July 16, 2007, when its counsel explained by letter of that date, AWB's relationship with another company that appeared to be an affiliate. FAS wrote back on August 17, 2007 to advise that the

explanations given in the July 16, 2007 letter respecting its relationship with the company that appeared to be an affiliate, were found to be satisfactory. About 90 days later, on November 16, 2007, Ms. Jackson issued Findings of Fact that had required her to review and analyze not just the transcribed hearing record, but voluminous written submissions by AWB's counsel, the 623 page Volker report, and the five volume, over 2000 page, Cole Report. The Administrator then evaluated those findings and materials, and issued his decision on December 20, 2007, 34 days later. In sum, FAS was required to assimilate and analyze a huge mass of information, and my review shows that it did so in a most workmanlike and expedient manner that was in every sense fair to AWB.

AWB's argument that the decision was not issued within 45 days after the close of the hearing is contrary to the present controlling regulations. An official record does not close until after the debarring official has received findings of fact. Nothing in the communications between AWB's counsel and the Administrator, or other FAS officials modified this provision.

At the time AWB's request for an oral hearing was granted, the Administrator's Assistant directed AWB's counsel to the regulations that would control the hearing's conduct, and gave him his telephone number and e-mail address if any clarification was needed. (AR at 27).

None of the subsequent communications from FAS relied upon by AWB eliminated the receipt of findings of fact as a needed step before the official record would close.

In his July 2, 2007 letter to AWB's attorney seeking additional information about a possible AWB affiliate, Mr. Yost merely stated:

> Once we have satisfied ourselves that the venture has been established with independent control, we will be able to close the record.

This statement hardly implied that Mr. Yost would dispense with his receipt of findings of fact from Ms. Jackson, the person who actually presided over the hearing, before preparing his decision.

Nor is there such an implication in the FAS letter of August 17, 2007 that acknowledged the receipt of requested information about a possible AWB affiliate, and then stated:

> FAS has reviewed your correspondence…and is satisfied with the explanations contained therein relative to the RD1 joint venture between AWB and Fonterra….

AWB's third argument that the debarment decision was untimely is that the hearing held at its request was "…simply a 'Presentation in Opposition' under § 3017.835, not a 'Fact Finding Proceeding' under §§ 3017.830(b)-(c) and 3017.840(a)(2)". (Appeal at 26). This argument is baseless. The governing regulations do not provide for different types of hearings. When AWB's counsel requested an oral hearing in his letter of February 16, 2007, AWB was afforded just that. It was a hearing to determine facts. It had no other purpose. AWB was invited to present witnesses. The hearing had a presiding officer and was transcribed. It was of course informal as the regulations require. The regulations also require that when fact-finding is conducted:

> The fact-finder must prepare written findings of fact for the record.

(7 C.F.R. § 3017.840 (b)).

Upon the fact finder so doing and sending her findings of fact to the debarring official, the official record then closed. Within 45 days of that event, the debarring official then issued a timely decision in accordance with the governing regulation.

2. The debarment decision may not be vacated under 7 C.F.R. § 3017.890 since the administrative record shows it to be in accordance with law, based on the applicable standard of evidence, and is not arbitrary, capricious and an abuse of discretion.

The debarment is based upon the debarring official's determination that a cause of action exists of so serious or compelling a nature that it affects the present responsibility of AWB and named affiliates to participate in programs of the United States Government. (AR at 353). This is a stated ground for debarment under 7 C.F.R. § 3017.800(d).

AWB argues that the ground does not apply because its conduct does not reach the "conviction or civil judgment" standard of § 3017.800(a). AWB is in effect contending that since it has not as yet been convicted of the corrupt practices that its officers admitted during the course of the Cole investigation, it is premature to debar it from participation in contracts with the Federal Government. It supplies no legal precedent in

support of this premise. Debarment proceedings based on section 3017.800(d) often involve conduct that could be construed as criminal or serve as grounds for a civil judgment. In the words of the regulation itself, a person may be debarred for:

> Any other cause of so serious or compelling a nature that it affects…present responsibility.

(7 C.F.R. § 3017.800(d)).

Acceptance of AWB's argument would mean that the government must continue to do business with persons whose actions show them to be untrustworthy and irresponsible until after they are actually convicted of a crime or have a civil judgment entered against them. If accepted, this argument would vitiate the basic purpose of suspensions and debarments to "… ensure the integrity of Federal programs by conducting business only with responsible persons." (7 C.F.R. § 3017.110(a)). It is therefore rejected.

Hearsay evidence is customarily allowed in administrative proceedings. The Cole Report contains admissions by AWB officers and members of the Saddam Hussein government proving that AWB engaged in corrupt and reprehensible practices that it at first denied. Moreover, as stated in the Debarment Decision:

> AWB submitted no evidence to FAS to deny any information, facts or findings contained within the Volcker Report or the Cole Report and, therefore, such information, facts and findings were adopted within the findings of fact.

(AR at 361).

In every sense, AWB's conduct and practices were in the words of the regulation "of so serious or compelling nature that it affects…present responsibility."

FAS having met its burden of proving a cause for debarment, AWB had the burden of demonstrating itself to be presently responsible and that debarment is not necessary:

> Once a cause for debarment is established …a respondent…(has) the burden of demonstrating to the satisfaction of the debarring official that..(the respondent is) presently responsible and that debarment is not necessary.

(7 C.F.R. § 3017.855(b)).

The Administrator's determination that a three year debarment, reduced to two years in light of the one year of suspension, is completely reasonable. Though AWB submitted information to show it has taken positive action to change its management personnel and corporate policies since it ended its participation in the Oil-For-Food Programme("OFFP"), the Administrator found insufficient evidence that the corporate culture that allowed and fostered the wrongdoing has been fully transformed. He listed five factors of concern:

> (1) AWB did not institute serious changes in its management until the issuance of the Volcker Report and the establishment of the Cole Commission.
> (2) Several members of AWB's Board of Directors, as of May 1, 2007, were on the Board during the period of AWB's participation in the OFFP.
> (3) Counsel for AWB has indicated that procedures for ethical business practices and transparent governance have been adopted by AWB; however, as of the date of the issuance of the findings of fact, AWB had not submitted proof that it has actually implemented these procedures.
> (4) AWB had not acted to amend its constitution, as of May 23, 2007, to act on some of KPMG's recommendations to improve its internal corporate governance.
> (5) During the additional proceedings, Mr. McDermott (AWB's counsel) stated that he didn't think that AWB had created a separate institutional program dedicated to the purpose of providing fraud awareness to its staff.

(AR at 362).

These are important concerns, and it is reasonable under all the circumstances to impose a debarment for three years less the one year period of suspension, to be fully assured that a company that engaged in such reprehensible conduct has truly reformed and is now presently responsible. This is not punishment; it is appropriate action taken by the debarring official in applying the various factors set forth in 7 C.F.R. § 3017.860(a)-(s).

3. The Debarment Complies with 7 C.F.R. § 3017.865(b).

A debarring official is required by 7 C.F.R. § 3017.865(b) when

determining the period of debarment to consider the length of time a suspension was in effect. Mr. Yost did so and has furnished his declaration to that effect.

Order

The decision of the debarring official is affirmed.

This order shall take effect immediately. This decision is final and is not appealable within USDA. 7 C.F.R. § 3017.890(d).

Copies of this Decision and Order shall be served upon the parties.

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EQUAL CREDIT OPPORTUNITY ACT

COURT DECISIONS

VICTORIA NICHOLSON, SAM NICHOLSON v. USDA.
No. 07-15868.
Non-Argument Calendar.
Filed April 29, 2008.

(Cite as: 275 Fed. Appx. 878).

ECOA – Prima facie, failure to make – Untimely filed.

Female farmer alleged she was discriminated against by FSA on the basis of her sex. Her claim was filed 2 years after the expanded time limits under the S.O.L. regulations had expired and that a prima facie claim of discrimination on the basis of sex was not made.

United States Court of Appeals,
Eleventh Circuit.

Before TJOFLAT, MARCUS and WILSON, Circuit Judges.
PER CURIAM:

The complaint in this case alleges that the Department of Agriculture erroneously, arbitrarily and with intent to discriminate against Victoria Nicholson and her husband placed Victoria Nicholson's loan in foreclosure in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq*. The Secretary moved the district court for summary judgment, and the court granted his motion on two alternative grounds: the claim was time-barred, and the Nicholsons failed to make out a *prima facie* case of discrimination.

The Nicholsons now appeal. We agree that the claim is time-barred and that the Nicholsons failed to establish a *prima facie* case. The district court's judgment is, accordingly,

AFFIRMED.

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SHERRY ROBINSON v. USDA[1]
No. 7:07-cv-167 (HL).
June 27, 2008.

(Cite as: 2008 WL 2622796 (M.D.Ga.).

ECOA – Discrimination on grounds of sex.

Although female farmer had pursued her claim though USDA administrative channels, she failed to make the requisite written claim of discrimination under the strictly construed requirements of Section 741 (S.O.L.) regulations in a timely manner and her claim was two years late filed.

United States District Court,
M.D. Georgia,
Valdosta Division.

ORDER

HUGH LAWSON, Chief Judge.

Currently pending before the Court is Plaintiff's Motion for Permission to Proceed In Forma Pauperis and Affidavit (doc. 19). Although not styled as such, Plaintiff's motion is a request to proceed in forma pauperis on appeal. This Court reserved ruling (doc. 23) on Plaintiff's motion to allow her an opportunity to submit an affidavit thereby complying with the Federal Rules of Appellate Procedure. On June 24, 2008, Plaintiff submitted the required affidavit (doc. 24). Having read and considered Plaintiff's motion and subsequent affidavit, the Court presents its findings below.

I. BACKGROUND

A thorough recitation of the substantive facts was set forth in the Court's May 6, 2008 Order granting Defendant's Motion to Dismiss (doc. 16), and will not be fully recounted here. However, a brief recitation of the facts and the procedural history is in order. Plaintiff Sherry Robinson is a female farmer engaged in a commercial squash farming operation.

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[1]The Complaint named Mike Johanns, former Secretary of Agriculture, as the party defendant. The Court now substitutes Ed Schafer, the current secretary, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

She filed the present action against the Secretary of the United States Department of Agriculture ("USDA"), alleging discrimination in the credit arena on the basis of her sex. At issue in this case were various credit transactions that allegedly provide the basis for violations of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691-1691f. The ECOA was enacted to prevent discrimination in the consumer credit arena. The controversial transactions in this case were credit applications submitted to the Farmer's Home Administration ("FmHA") and its successor, the Farm Service Agency ("FSA"), that were summarily denied. Plaintiff pursued her claims of gender discrimination through the administrative channels of the Department of Agriculture, ultimately to no avail. Unfortunately, by the time Plaintiff filed her Complaint with the District Court, over two years had elapsed since the last controversial transaction was deemed to have occurred. Plaintiff's Complaint was eventually dismissed by this Court for being untimely filed.

II. DISCUSSION

Plaintiff is requesting permission to proceed in forma pauperis for purposes of appealing the Court's Order dismissing her Complaint. Congress promulgated provisions specific to motions to proceed in forma pauperis on appeal: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."*Id.* § 1915(a)(3). An appeal is not taken in good faith as contemplated by § 1915 when an in forma pauperis applicant seeks the review of issues which can be deemed frivolous from an objective standpoint. *See Coppedge v. United States,* 369 U.S. 438, 445, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); *Busch v. County of Volusia,* 189 F.R.D. 687, 691 (M.D.Fla.1999); *United States v. Wilson,* 707 F.Supp. 1582, 1583 (M.D.Ga.1989), *aff'd.,*896 F.2d 558 (11th Cir.1990). Further, the Federal Rules of Appellate Procedure also govern motions to proceed in forma pauperis:

> Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that: (A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs; (B) claims an entitlement to redress; and (C) states the issues that the party intends to present on appeal.

In this case, Plaintiff submitted the requested affidavit to bring her in

forma pauperis motion in compliance with Rule 24. The affidavit and her earlier motion satisfy the three elements of the appellate rule, and this Court sees no reason to certify that this appeal is taken in bad faith. Specifically, Plaintiff claims that her Complaint should be treated as being timely filed because her pursuit of redress through administrative channels tolled the statute of limitations. Based on Plaintiff's financial situation and her compliance with federal rules, she should be allowed to proceed on appeal in forma pauperis.

III. CONCLUSION

Accordingly, Plaintiff's Motion for Permission to Proceed In Forma Pauperis and Affidavit is GRANTED.

SO ORDERED.

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EQUAL CREDIT OPPORTUNITY ACT

DEPARTMENTAL DECISIONS

WILBUR WILKINSON, on behalf of ERNEST AND MOLLIE WILKINSON v. USDA.
SOL Docket No. 07-0196.
Decision and Order - Part I.
Filed June 3, 2008.

EOCA – S.O.L. – B.I.A. – Discrimination, claim of – Native American – Notice of claim, what constitutes – Tribal lands, trust beneficiary of – Foreclosure, state laws regarding – Assignment of trust income, whether race based requirement – I.I.M. (Individual Indian Money).

Steven Bremmar for FSA.
John Mahoney for Respondents.
Decision and Order by Administrative Law Judge Victor W. Palmer.

DETERMINATION: PART ONE

1. The Nature of this Proceeding

This proceeding is an administrative 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) and the applicable rules of practice (7 C.F.R. Part 15f). Section 741, waives an otherwise applicable two-year statute of limitations. It allows a person who, during the period 1981-1996, filed an eligible complaint of discrimination against the United States Department of Agriculture ("USDA") for having violated the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f) to obtain a determination of the complaint's merits by USDA, and receive the relief provided by the Equal Opportunity Act to those who have suffered discrimination by USDA acting as a creditor in respect to any aspect of a credit transaction, or in USDA's administration of a commodity assistance or disaster relief program. The rules of practice allow the complainant to have the complaint determined by an Administrative Law Judge ("ALJ") after a hearing, or, after requesting such a hearing, to request the ALJ to issue a decision without a hearing (7 C.F.R. § 15f.11-.16). Complainant after several initial telephone conferences respecting the scope of the hearing and discussion of various motions by the Agency, elected to have the issue of whether there is actionable discrimination decided by me as the assigned ALJ without a hearing and, if I find in complainant's favor, to then assess damages after holding a hearing. Respondent has as part of its

response to Complainant's Motion for Summary Judgment, filed a Cross-Motion for Summary Judgment. Therefore, this Determination: Part One concerns whether the complaint before me states a timely, eligible complaint of discrimination against USDA. For the reasons hereinafter stated, I find that it does. The assessment of damages shall be made in Determination: Part Two after an evidentiary hearing scheduled for June 25-26, 2008.

2. General Background

Complainant, Wilbur Wilkinson, is the son and a principal heir of Ernest and Mollie Wilkinson, a Native American husband and wife, who were members of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota. Mollie Wilkinson died in September 1991. Ernest Wilkinson died in November 1997. On his parents behalf, Complainant seeks redress for racial discrimination against them under the Equal Credit Opportunity Act ("ECOA"; 15 U.S.C. § 1691(a)). Wilbur and Mollie Wilkinson were dispossessed from their family farm/ranch that consisted of allotments of land held in trust for them by the United States Department of Interior's Bureau of Indian Affairs ("BIA"). The dispossession resulted from collaborative action by BIA and the United States Department of Agriculture's Farm Service Agency (formerly the Farmers Home Administration; "FSA" shall be used for both).

A mission of FSA is to extend financing to farmers through farm ownership loans. Ernest and Mollie Wilkinson, as registered members of the Three Affiliated Tribes, owned descendable possessory interests in allotted Indian Land held in trust for them by BIA. Through a family farming enterprise with their children, the Wilkinsons farmed these lands together with land owned by the children. Starting in the 1970's, Ernest and Mollie Wilkinson borrowed against their own allotted trust land by encumbering them with mortgages as individual Indian owners are permitted to do under 25 U.S.C. § 483a, to obtain loans from FSA. The Secretary of the Interior approved the mortgage loans.

As a precondition for receiving and renewing the FSA loans, Ernest and Mollie Wilkinson were required by FSA to execute, in addition to the mortgages, BIA "Assignment of Income from Trust Property" forms. When payments of these loans to the Wilkinsons were considered to be too-long overdue and the accrued debt excessive, FSA would notify BIA officials who then leased the trust lands that made up the Wilkinsons' farm to other farmers and the proceeds from the leases were turned over

by BIA to FSA. The Wilkinsons were thereby dispossessed from their farm, their homestead, and associated personal property without FSA going through mortgage foreclosure proceedings. This collaborative use of these income assignment forms in avoidance of mortgage foreclosure has been the subject of federal court litigation brought by the Wilkinsons' heirs against BIA.

An initial dismissal on the jurisdictional ground that the heirs lacked standing, was reversed and remanded with instructions on applicable law by the Eighth Circuit in *Wilkinson v. U.S.*, 440 F.3d 970 (8th Cir. 2006). In rejecting a government argument that the land could be taken without honoring applicable state law procedural safeguards for the protection of mortgagors because the debt exceeded the value of the mortgaged land, the Eighth Circuit Court held:

> Although the government argues that the loan and assignment documents provided for this 'self-help' remedy, the controlling federal law that authorizes mortgages on allotted Indian lands makes clear that tribal law (if any) or state law limits the availability of foreclosure or sale.

25 U.S.C. § 483a provides:

> (a) The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust *in accordance with the laws of the tribe which has jurisdiction over such land or, in the case where no tribal foreclosure law exists, in accordance with the laws of the State or Territory in which the land is located….*

Id. (emphasis added).

There is no applicable tribal foreclosure law in this instance, so North Dakota law applies. Under North Dakota law, a mortgagor is entitled to a right of redemption during a redemption period. N.D. Cent. Code §§ 28-24-02 & 32-19-01 (1997). Also, the government has identified no authority under North Dakota law authorizing a mortgagee to take possession under an assignment of rents outside judicial proceedings. As a matter of public policy intended to prevent desperate borrowers from waiving valuable rights when trying to secure a loan, North Dakota does not permit borrowers to waive redemption rights prior to foreclosure. *See,*

e.g., First State Bank of New Rockford v. Anderson, 452 N.W.2d 90, 92 (N.D.1990) (explaining that a mortgagor may not "bargain away" his or her redemption rights). Accordingly, as a matter of law, no provisions in the loan documents or assignments of trust income that Ernest and Mollie executed could have suspended the application of North Dakota's law governing redemption rights nor waived a debtor's protection against extrajudicial appropriation of mortgaged land. As such, the government's argument that the loan and assignment of income documents granted the FSA the right to take possession of the land fails….
440 F.3d at 975-976, fn. 5.

Pursuant to the remand order, Judge Rodney S. Webb, United States District Court for the District of North Dakota, Southwestern Division, entered an opinion and order holding BIA liable for damages in *Virgil Wilkinson, et al v. United States of America*, Case No. 1:03-cv-02; 2007 WL 3544062 (November 9, 2007).

The Court found that the leasing of the Wilkinsons' trust lands that caused third parties to enter and interfere with the allotments of the Wilkinsons, met the definition of trespass under North Dakota law. Moreover, when BIA leased these allotments:

> …its intent was to benefit FSA by generating revenue to pay the outstanding FSA debt.

Slip opinion, at 10-11.

The Court further found that the United States converted the equipment on the Wilkinsons' farmland:

> 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.

Slip opinion, at 14.

> The actions of the United States were held to have intentionally inflicted emotional distress ("IIED") upon the Wilkinsons.
>
> 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 ignored a directive of the IBIA (Interior Board of Indian Appeals July 6, 1998 decision, Complainant's Exhibit B-68). 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 element of IIED.

Slip opinion, at 15-16.

In assessing non-economic damages in addition to economic damages, the Court was asked to base them on the same ratio used in *In re: Warren*, USDA Docket No. 1194, HUDALJ No. 00-19-NA (USDA Dec. 19, 2002) to assess damages for racially discriminatory denial of farm benefits. The Court did not apply the Warren methodology for assessing damages, but stated:

> Like *Warren*, however, this case also presents outrageous conduct of a government agency. For practical purposes, two agencies, the BIA and the FSA, conspired with each other to deprive a family of its farming operation…

Slip opinion, at 25.

3. The Complaint in this Proceeding is an Eligible Complaint that was Timely Filed

On March 5, 1990, before the institution of the litigation in the federal courts against BIA, the Complainant, Wilbur Wilkinson, filed a discrimination complaint against the Farmers Home Administration (FmHA) on behalf of his parents and other Native Americans who had obtained farm ownership loans on land held in trust by BIA at the Fort Berthold Reservation. The stated basis of the complaint was:

> (B)ecause of their race as American Indians the attached list of Indian FmHA loan clients were required to sign Assignments of Income from trust property and non-Indians are not required to sign such or similar documents.

The facts stated as underlying the complaint were:

> Because of their race as American Indians the Farmers Home Administration implemented a policy that Indian loan clients as a matter of course and solely because they are by birth American Indians, submit as a precondition for loan approval a form entitled "Assignment of Income from Trust Property" authorizing FmHA to withdraw funds from Individual Indian Money ("IIM") at will, in violation of the Equal Protection and Due Process Clauses of the United States Constitution. Non-Indian borrowers are not required to sign Assignments of Income nor are their checking and savings accounts subject to attachment without due process.

Complainant's exhibit B-1.

It is this complaint that is the subject of this present proceeding. The reason why the date it was filed with the Farmers Home Administration, the predecessor of the Farm Service Agency, is critical in this proceeding was explained in *Love v. Connor*, 525 F.Supp.2d 155, 157(D.D.C. 2007):

There is little dispute that USDA dismantled its civil rights investigation program between the early 1980's and the mid-1990's, and did so without informing farmers that their discrimination complaints would be either ignored or summarily denied. *See generally USDA Civil Rights Action Team Report: Civil Rights at the U.S. Dept. of Agriculture* …; 144 Cong. Rec. S11,433 (Sen. Robb). When Congress learned of this state of affairs, it extended for two years the period of limitations for any cause of action that a plaintiff might bring to redress claims she had filed with USDA in an 'eligible complaint.' *See* Pub.L.No. 105-277, 112 Stat. 2681-30, Title VII, Sec. 741 (codified at 7 U.S.C. § 2279 Note) (hereafter "§ 741"). Eligible complaints were defined as complaints filed with USDA between 1981 and 1996 that complained of violations of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 et seq., or of discrimination in the administration of a commodity assistance or disaster relief program. *See* "§ 741 (e)…."

On its face, the complaint (A-1) that Wilbur Wilkinson filed on behalf of his parents and other members of the Three Affiliated Tribes of the Berthold Reservation, was a timely and eligible complaint as required by Section 741:

1. The date of its filing, March 5, 1990, places it squarely within the critical 1981-1996 time period that exempts it from the otherwise operable statute of limitations.
2. The complaint was an eligible complaint that alleged a discriminatory violation of the ECOA. It unequivocally stated that FmHA had required

Ernest and Mollie Wilkinson because they were American Indians to sign BIA "Assignment of Income Trust Property" forms, whereas FmHA did not require non-Indians to sign these or similar forms.

3. The complaint, just below "Complaint # FB-008", at the top left-hand corner, was correctly addressed to:

USDA Farmers Home Administration
Mr. William S. True
Director, Equal Opportunity Staff
14th and Independence Ave., SW
Room 5050 – S
Washington, D.C. 20250

4. A copy of the complaint was also sent and addressed at the top right-hand corner to:

Federal Trade Commission
Equal Credit Opportunity
Washington, D.C. 20580

5. Proof of the complaint's mailing in March of 1990 is provided by a receipt from the Parshall, North Dakota post office, dated March 12, 1990, for the copy sent by certified mail to the Federal Trade Commission (A-2).

6. Complainant swore in the affidavit he gave, in 1999, to two investigators from the USDA's Office of Civil Rights that he mailed this and other complaints to FmHA and the FTC in Washington, D.C. (Complainant's Exhibit C-1 at page 19).

The fact that Complainant has provided this receipt and not one for the copy sent to FmHA, is being used by the Agency as the basis for a challenge first expressed in the Cross-Motion for Summary Judgment it filed on May 9, 2008, that there is no proof that FSA received the complaint and it should for that reason be rejected and dismissed as not timely filed.

However, in a letter to Wilbur Wilkinson, dated April 3, 2003, from Ruihong Guo, Acting Chief, Program Investigations Division, Office of Civil Rights, United States Department of Administration, the complaint and its filing on March 5, 1990 is acknowledged. The second paragraph of the letter states:

> Please note that the complaint you filed on March 5, 1990, has been assigned SOL Docket Number 2478 and is now being processed under section 741 of the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriation Act of 1999, Public Law 105-227, also

known as the SOL processing.
(A-5).

If the complaint had not been received by FmHA, but had instead been routed to it from the Federal Trade Commission, it would be expected that Mr.Guo, the acting Chief and spokesman for the Program Investigations Division would have said so. It is therefore reasonable to infer that the complaint was received in the regular course of business by FSA's predecessor FmHA by way of certified mail delivered to it in the normal manner by the United States Postal Service.

Respondent also alleges that the complaint is untimely because it does not comply with the requirement of 7 C.F.R. § 15d.4(a) that a complaint must be filed within 180 days from the date the person knew or reasonably should have known of the alleged discrimination. Respondent bases this argument on the fact that Ernest Wilkinson wrote to Senator Kent Conrad, on April 26, 1989, complaining that the reservation supervisor, "…has acted in extremely bad faith bordering on criminal actions in his dealing with me."(B-53). Obviously, Ernest Wilkinson had by that time come to believe that the reservation supervisor was not dealing with him fairly, but his stated concern gives no indication that he or his son, Wilbur, then appreciated that the Assignment of Income from Trust Property forms he and his wife were being required to sign constituted discriminatory treatment actionable under the ECOA.

Accordingly, I conclude that the Complaint was timely filed in compliance with both Section 741 and 7 C.F.R. § 15d.4(a).

4. The Actionable Discrimination under ECOA

The way in which the Assignment of Income from Trust forms were illegally used by BIA at the behest of the FSA to confiscate the farmland possessed by Ernest and Mollie Wilkinson is set forth at length in the decisions by the United States Circuit Court for the Eighth Circuit and, after remand, by the United States District Court for the District of North Dakota. The fact that the District Court decision is presently on appeal does not alter the fact that it has binding effect unless and until it is reversed. In accordance with the doctrine of issue preclusion, both decisions shall be applied as controlling in the instant proceeding as they pertain to common issues of law. *See In re: Kreider Dairy Farms, Inc.*, 62 Agric. Dec. 406, 423-425 (2003), *citing United States v. Musick*, 534 F. Supp. 954, 956-957 (N.D.Cal. 1982).

> …the general rule is that a decision in one case is controlling as the law in a related action if it involves the same subject matter

and if the points of the decision and facts are identical.
Id. at 425.

The two decisions by the Federal courts are controlling law in this proceeding in respect to their holdings that the government circumvented North Dakota mortgage foreclosure laws that: (1) if they had been observed, would have provided the Wilkinsons procedural protections against the confiscation of their land and related chattels; and (2) the BIA Assignment of Income from Trust forms were illegally employed to accomplish these confiscations in order to help FSA collect its loans to the Wilkinsons.

The issue now before us is whether FSA's instigation of these illegal actions constituted discrimination against the Wilkinsons under the ECOA (15 U.S.C. § 1691 (a) (1) that provides:

(a) 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).

Complainant has furnished copies of Income Assignments required of the Wilkinsons and other Native Americans by FSA as a precondition for farm loans (B-7), and copies of those FSA employs for White borrowers (B-6). FSA has also supplied forms it requires for income assignments by White farmers in North Dakota, and argues that it shows equal treatment to Native American and White farmers. (Radintz Declaration Exhibit 1). But the income assignment forms Native American farmers were required to sign were written differently from those used for White farmers. More importantly, the Income Assignments required of Native Americans can be used, and in the case of the Wilkinsons were used, to confiscate their farms in circumvention of the protections North Dakota affords mortgagors under its foreclosure laws.

Complainant filed an affidavit (Complainant's Exhibit C-1), dated November 17, 1999, that he gave to two investigators for USDA's Office of Civil Rights in which he swore that his parents upon becoming delinquent in paying their loans were treated differently than were White farmers. His affidavit alleges FSA just took the Income Assignment from delinquent Native American farmers such as his mother and father, across the street to BIA and filed it, whereas nothing comparable occurred when a White farmer's loan became delinquent (Complainant's Exhibit C-I, at page 6). He also swore that White farmers enjoyed a "chummy" relationship with the supervisor of the FSA county office where FSA

farm loans were made and administered. "White farmers could just drop in anytime and you could hear how chummy everyone was….The treatment of Indian customers was completely different – definitely not 'chummy'. You could only come in after making an appointment on one day of the week…." The allegations set forth in his 1999 affidavit were reiterated and expanded upon in the affidavit Complainant gave on January 22, 2008, that is attached to Complainant's Position Paper in which he attests that its stated facts are true and accurate and have not been disputed by USDA. Once again, Complainant swore in attesting to the factual accuracy of his Position Paper, that when he went to the local county FSA offices he observed White farmers being treated better than Native Americans. The White farmers were treated as friends and neighbors; Native American farmers were patronized. In sum, his descriptions of the visits he made to FSA's County office with and on behalf of his parents, attest to his parents being denied more beneficial financing and refinancing of their loans with less onerous methods for satisfying these loans that FSA could provide and customarily did provide to White Farmers.

Despite the fact that the Complainant's first affidavit was given to USDA investigators in 1999, and that the Agency has had the latest more expansive affidavit since its filing in January, Respondent has not provided any evidence to refute these charges other than to say they consist of unsupported speculation by Complainant. To the contrary, the statements contained in the affidavits constitute unrefuted evidence from an eyewitness who swears he observed animus and prejudice in the way the FSA official in charge of the County office treated Native American farmers when compared with the treatment he showed White farmers in his administration of the FSA farm loan program.

His affidavits provide the only sworn testimony in evidence going to the reason why the Wilkinsons were dispossessed from their farm and homestead by the collaborative actions of BIA and FSA that the federal courts have held to be illegal. Actions these government agencies could not have taken against any farmer of another race in North Dakota since only Native Americans have their land held in trust for them by the government.

As against this, the Agency argues that Complainant was once convicted of misappropriation of tribal funds and false statements, and for that reason his testimony should be rejected as lacking credibility. Certainly, this circumstance affects the weight that should be given his testimony when compared to that of others. But there is no other evidence before me from anyone besides that contained in the declarations of two

employees of FSA stationed in Washington, D.C. whose statements are limited to their review of the loan paperwork that was generated.

The declarations do show that the loans to the Wilkinsons were adjusted by FSA through debt restructuring and forbearance; circumstances that will be taken into consideration as possible mitigating factors when damages are assessed. However, they do not controvert Complainant's sworn testimony about the way his parents as Native American were treated compared to the treatment shown Whites by the FSA County office.

The fact that the Income Assignments were taken pursuant to regulations, as the Agency points out, does not mean that FSA officials had authority to use them illegally. It is illegal to circumvent a North Dakota mortgagor's protections under that State's foreclosure laws, and this is how the Income Assignments were used and how racial discrimination was practiced by FSA against the Wilkinsons as Native American farmers. They were used to dispossess and confiscate the Wilkinson homestead and farmland so that FSA could collect on the indebtedness through the land being leased out for farming by others over the objections of the Wilkinsons.

Nine years have passed since Complainant gave his first affidavit to the Agency.[1] In all that time the Agency has developed no evidence to

[1] Shortly after Complainant gave his November 17, 1999 affidavit to USDA investigators, all action on his complaint came to a halt. On November 24, 1999, a class action was filed in the United States District Court, District of Columbia, on behalf of Native American members of the Three Affiliated Tribes of the Fort Berthold Reservation who experienced discrimination in FSA's financing program via farm ownership loans. *Keepseagle v. Johanns,* Civil Action No. 99-3119. Though Complainant has contended he was not a party to this lawsuit, USDA required him to formally opt out of it before his discrimination complaint would be considered. On November 10, 2005, such an opt-out order was obtained. Meetings and correspondence with OCR to settle this discrimination complaint then took place. On August 30, 2006, OCR denied Complainant's claim and stated that settlement negotiations would not be considered. On September 29, 2006, Complainant requested OCR to reconsider and, alternatively, filed a Request For Formal Proceedings before an Administrative Law Judge. On December 11, 2006, OCR wrote to Complainant's attorney that it was processing the request for formal proceeding and that a record for submission to the Administrative Law Judge was being prepared. On September 17, 2007, the proceeding was docketed with the Hearing Clerk for the Office of Administrative Law Judges and was assigned to me on September 18, 2007. Since then, teleconferences were conducted to narrow the issues in anticipation of holding a hearing and various motions have been filed. To date, the Casetrak docket for this proceeding shows 29 separate entries for the filing of position statements, summaries of teleconferences, orders, and a number of motions including motions that my rulings and orders be reconsidered. On March 20, 2008, complainant moved for Summary Judgment and it was decided that the issue of whether there is actionable discrimination would be based on the record, and if decided

(continued...)

refute his charges. The officials who were accused of discriminatory racist conduct towards the Wilkinsons as Native Americans are employees of the Agency and the ability to ascertain the truth and validity of Complainant's charges have always been within the Agency's control. There was an investigation in 1999 that referenced an earlier one in 1995. *See* Memorandum to Rosalind D. Gray, Director Office of Civil Rights from Investigators Sheppard and Wright, dated December 3, 1999 (Complainant's Exhibit C-2, at page 2). But the Agency has not produced any evidence to refute Complainant's charges other than the two declarations and exhibits prepared by its employees in Washington, D.C. that: (1) give the details of the Wilkinson loans emphasizing restructuring efforts and instances of forbearance; and (2) show that income assignments were also taken from White farmers under vastly different conditions and without the dire consequences visited upon Ernest and Mollie Wilkinson. In these circumstances a negative inference is necessarily drawn against the Agency. *See In re: Sid Goodman and Co., Inc.,* 49 Agric. Dec. 1169, 1188 (1990); *Ludwig Casca*, 34 Agric. Dec. 1917, 1929-1930 (1975), *Baxter v. Palmigiano,* 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L Ed. 2d 810 (1976). As stated in *Casca*, 34 Agric. Dec., at 1930:

'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted.' Lord Mansfield, in *Blatch v. Archer*, Cowp. 66 quoted with approval in Wigmore, *Evidence* (3rd ed. 1940), § 285.

The preponderance of evidence in this proceeding proves that Ernest and Mollie Wilkinson as Native Americans, and because they were Native Americans, were discriminated against by FSA in violation of the ECOA in FSA's administration of its farmer loan program when they were required to execute BIA "Assignment of Income from Trust Property" forms that were used when their loans became delinquent to illegally dispossess them from their farmland and homestead.

1. There was direct evidence proving this discrimination was not inadvertent in the form of the uncontroverted eyewitness testimony by Complainant who observed ongoing animus, prejudice and

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[1](...continued)
in Complainant's favor, a hearing to determine the damages that should be awarded would then be held. This explanatory footnote has been included to show what has transpired to delay action on this Complaint that was initiated in 1990; and why its present resolution within 180 days of the filing of the Section 741 Complaint Request as envisioned by the rules of practice (7 C.F.R. § 15 f.16(b)), cannot be achieved.

discriminatory intent by the FSA local officials who administered the loan program when they dealt with his parents.

2. In addition, analysis of the impact of this FSA requirement that was imposed on his parents shows that there was no equivalent negative consequence to White North Dakota farmers when their loan payments became delinquent. FSA did not undertake to force any White farmers to involuntarily lose their farmlands and homesteads without observance of the protections of North Dakota's mortgage foreclosure laws.

3. Moreover, the Wilkinsons, as Native Americans, suffered discrimination in the form of disparate treatment in that no White Farmer in North Dakota was required to sign a form that could be used in the way the BIA form was used. Though FSA has supplied a Declaration by the Director of its Loan Making Division of FSA Farm Loan Programs stating that assignments of income were also employed as a condition of loans to White farmers, the illustrative USDA-FmHA form attached to the Declaration captioned "Request for Obligation of Funds", that a White North Dakota farmer apparently gave to FmHA in 1989, is not equivalent to the BIA "Assignment of Income from Trust Property" form that the Wilkinson's were required to execute that resulted in the illegal confiscation of their farm and homestead as a consequence of the collection of their FSA loans. Inasmuch as White farmers do not have their farms held in trust for them by a government entity akin to the BIA, an assignment of income form could not be used in avoidance of the protections they have under North Dakota's foreclosure laws.

In every sense then, Ernest and Mollie Wilkinson, as Native Americans, were discriminated against by FSA in violation of the ECOA. *See, Faulkner v. Glickman,* 172 F.Supp.2d 732, 737 (D.Md. 2001); *AB & S Auto Service, Inc. v. South Shore Bank of Chicago*, 962 F. Supp. 1056, 1060(N.D. Ill.1997); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

The next stage of this proceeding shall be to hold a hearing on June 25-26, 2008, in Washington, D.C. to develop evidence respecting the damages that should be awarded to Complainant for the losses suffered by his parents as a result of the discrimination against them by FSA.

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WILBUR WILKINSON, on behalf of ERNEST AND MOLLIE WILKINSON v. USDA.
SOL Docket No. 07-0196.
Decision and Order-Part II.
Filed June 18, 2008.

ECOA – S.O.L. – Damages.

Steven Bremmar for FSA.
John Mahoney for Respondents.
Decision and Order by Administrative Law Judge Victor W. Palmer.

DETERMINATION: PART TWO

On June 3, 2008, as the assigned ALJ in this proceeding, I issued a proposed "Determination: Part One" in which I decided that the complaint filed on behalf of Ernest and Mollie Wilkinson, a Native American husband and wife, who are both deceased, stated a timely, eligible complaint of discrimination against USDA in violation of the Equal Credit Opportunity Act. Initially, complainant had sought a hearing, but after several telephone conferences he elected, as is his right under section 15f.16 of the governing rules of practice (7 C.F.R. § 15f.16), to have me issue a decision without a hearing. In the course of the teleconferences that I conducted with the attorneys for the parties, it was decided that this proceeding would be bifurcated so that, in the event I found in complainant's favor, a hearing on damages would be held to allow respondent to controvert Complainant's expert witness through his interrogation and the presentation of testimony by an expert witness of Respondent's choosing. This bifurcated approach was recommended by the parties. In my rulings on March 20, 2008, that made it applicable, I noted that it was "consistent with an earlier request by the Agency (FAS) representatives that this proceeding be bifurcated to consider damages subsequent to a determination of liability by FAS under the ECOA". It was therefore decided upon, even through 7 C.F.R. §15f.16 contemplates that when an ALJ makes a proposed finding of discrimination under this section, the ALJ will also recommend the award of "… such relief as would be afforded under the applicable statute or regulation under which the eligible complaint was filed…." The section also contemplates that all of the proposed determination shall be based not on an evidentiary hearing, but instead be "… based on the original complaint, the Section 741 Complaint Request, the OCR report, and any other evidence or

written documents filed by the parties." The date for the damages hearing was originally scheduled for June 3-4, 2008. In teleconferences conducted on April 1 and April 29, 2008, the feasibility of that hearing date was reviewed and rulings were included at Respondent's request, requiring Complainant to make his expert witness available on specific dates for his deposition to be taken in advance of the scheduled hearing. On May 12, 2008, the damages hearing was postponed to June 25-26, 2008, in deference to Respondent's request for that date, to allow more time for the filing of the Respondent's expert's report who together with one of Respondent's attorneys was scheduled to be out of the office during the week of June 16, 2008.

However, after my June 3rd issuance of the proposed "Determination: Part One", Respondent, on June 9th, filed a request with the Assistant Secretary for Civil Rights for a stay of the June 25-26, 2008 damages hearing, and for her review of the June 3 "Determination: Part One". On June 12, 2008, the Assistant Secretary issued her Ruling granting both requests over Complainant's objections that the request was premature, untimely, and counter to the Rules of Practice that specifically provide: "Interlocutory review of rulings by the ALJ will not be permitted." (7 C.F.R. § 15f.21(d)(8)).

On June 16, 2008, Complainant filed a motion that requested, in part, that I confirm the scheduled hearing in that under the rules of practice the Assistant Secretary does not have jurisdiction to stay a hearing scheduled by an ALJ, or to review my June 3, proposed determination until after I have completed my function of recommending an award when finding that USDA discriminated against Complainant's parents.

I agree with Complainant that my functions pursuant to the Rules of Practice are not completed until I recommend an award of appropriate relief. I intended to do so after the scheduled hearing in which Respondent would be permitted to examine Complainant's expert and present testimony by its own expert on the subject. However, as previously noted, a proceeding conducted pursuant to 7 C.F.R. §15f.16, does not contemplate that the relief proposed to be awarded will be based upon the presentation of testimony at a hearing, and Respondent's request that the scheduled hearing not be held is construed to be an election that I complete my functions without one. Both Respondent and the Assistant Secretary apparently believe my proposed determination is ripe for review. For it to be completely ripe for review, and to avoid the necessity for a future remand in the event my proposed determination on discrimination is accepted or upheld, I am herewith proposing an award of relief to Complainant in the amount of $5,284,647.00 that I find to be appropriate upon consideration of the affidavits filed by Complainant and

the certified report by his expert as measured against the *Will Sylvester Warren* case, USDA Docket No. 1194; HUDALJ No. 00-19-NA, December 19, 2002, and other applicable authorities.

Professor Saxowsky is an Associate Professor and Assistant Dean, Department of Agribusiness and Applied Economics, North Dakota State University. His Curriculum Vitae is attached and clearly establishes that he is an expert on agribusiness and applied economics as those subjects apply to farming in the region of North Dakota where the Wilkinson farmlands and homestead were located. He testified on the losses sustained by the Wilkinsons in *Virgil Wilkinson, et al v. United States of America,* Case No. 1:03-cv-02; 2007 WL 3544062 (November 9, 2007, USDC, ND). The United States District Court accepted Professor Saxowsky as an expert testifying to the value of the loss of use of the Wilkinsons' property due to its unlawful confiscation by BIA at the behest of FSA. The reports he prepared to aid the Court were largely accepted subject to some modifications. (Slip opinion at 17-20).

In addition to his assessment of economic damages for the case against BIA, Professor Sakowsky also offered testimony on the non-economic damages that should be awarded based on *Warren, supra*. The Court did not accept this appraisal because *Warren* was a discrimination case and therefore unrelated to the damage issues before the Court that concerned tort law rather than discrimination. However, *Warren* has direct application to the present proceeding. The attached report with cover letter by Professor Sakowsky filed in this proceeding applies the methodology used in *Warren* that the Assistant Secretary for Civil Rights accepted. It provides authoritative precedent to be presently applied and followed.

Warren (Slip Opinion at 22-23) held that a creditor who violates the ECOA is subject to civil liability for actual damages suffered by the individual to compensate for losses sustained as a direct result of the injury suffered that may fit within two categories:

There are two categories of actual or compensatory damages: tangible and intangible. Tangible includes economic loss. Intangible damages include compensation for emotional distress, and pain and suffering, *Bohac v. Dept. of Agriculture*, 239 F.3d 1334, (Fed. Cir. 2001); injury to personal and professional reputation, *Fabry v. Comm'r of IRS*, 223 F.3d 1261 at 1265, (11th Cir. 2000); injury to credit reputation, mental anguish, humiliation or embarrassment, (*Fischl v. General Motors Acceptance Corp*., C.A.5 (La.) 1983, 708 F. 2d 143); impairment of reputation and standing in the community, personal humiliation, mental anguish and suffering' *U.S. v. Burke*, 504 U.S. 229, 112 S. Ct. 1867 at 1874 (1992);

and intentional infliction of emotional distress, *Ricci v. Key Bancshares, Inc.,* 662 F. Supp. 1132 (D.C.Me. 1987 and *HUD v. Wilson,* 2 FH-FL (Aspen) ¶ 25,146, (HUDALJ 200).

Professor Sakowsky has estimated the tangible losses of the Wilkinsons resulting from the discriminatory treatment they endured when they were dispossessed from their farm and farm equipment, and lost income from their farming operations, to be $1,534,647.00. This sum is consistent with the evidence before me.

In respect to the intangible losses of the Wilkinsons, I find that using the same 4.687 factor that Professor Sakowsky derived from Warren that would add $7, 192,890.00, for a total of $8,727,537.00, would be excessive. The Wilkinsons lost their farmland and their homestead. Mrs. Wilkinson was required shortly after surgery to be taken to and carried into the County office of FSA to sign the BIA "Assignment of Income from Trust Property" forms which were later used to dispossess the Wilkinsons against their will from their farmland and homestead in circumvention of their protections under applicable North Dakota mortgage foreclosure laws. When they died they were no longer connected to their farm and the life of farming that they loved. Though their anguish and emotional suffering was truly considerable, I do not find that it reached the level of suffering found and described by the ALJ in *Warren*. In my opinion, the appropriate sum to be awarded for the Wilkinsons' intangible losses is $3,750,000.00, or approximately two and a half times the amount awarded for tangible losses.

The total amount of relief that should be awarded against USDA for the effects of the discrimination suffered by the Wilkinsons therefore is $5,284,647.00.

In re: ROBERT A. SCHWERDTFEGER.
SOL Docket No. 07-0170.
OCR No. 1139.
Decision and order.
June 25, 2008.

ECOA – S.O.L. – Familial status discrimination as basis of claim – Eligibility requirement, change of – Laches ordinarily inapplicable to government.

Brandi A. Cain for FSA.
Respondent Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

In this action, the Complainant, Robert A. Schwerdtfeger, seeks a determination that Farmers Home Administration ("FmHA"), now known as the Farm Service Agency ("FSA") unlawfully discriminated against him in violation of the Equal Credit Opportunity Act (ECOA) and requests damages. The matter is before me upon the motion of the Respondent to dismiss the action and/or for summary judgment. The Complainant has been afforded an opportunity to respond to the Motion. For the reasons set forth below, the Respondent's motion will be granted and the Complaint will be dismissed.

Procedural History

The original complaint was filed by the Complainant by letter dated September 17, 1994, alleging that the Agency's County Supervisor employees in Effingham County, Illinois committed fraud and discriminated against him on the basis of age. (GX-1).[1] On October 5, 1994, the USDA Office of Civil Rights (OCR) agreed to investigate the case and provide a report of their findings. (GX-2). On September 9, 1997, OCR recommended that the complaint be adjudicated. (GX-3). A handwritten notation dated March 12, 1998 on the September 9, 1997 memorandum directed that the case be sent to the Decision Writing Team. (*Id.*) On January 15, 1999 (incorrectly dated 1998), the Final Agency Decision was issued, finding no discrimination and advising that no further action would be taken on his complaint, but advising the Complainant of his options for further review. (GX-4). A hearing before an Administrative Law Judge had been conditionally requested by the Complainant by a letter dated December 6, 1999 in the event the Director of the Office of Civil Rights for the United States Department of Agriculture could not negotiate a settlement. (GX-7). On December 16, 2002, the Deputy Director of the Office of Civil Rights determined that the complaint was inappropriate for informal resolution. (GX-8). In December 16, 2002, the USDA Office of Civil rights issued a determination that "familial status" was not a covered status under the Equal Credit Opportunity Act.[2] (GX-8). In a Supplementary Report of

[1] Mr. Schwerdtfeger's exhibits are designated as "CX"; the Agency's exhibits are designated as "GX", and the ALJ's exhibits are designated as "ALJX."

[2] Although the Web page of the Office of Assistant Secretary for Civil Rights which does list "familial status" as one of the 12 prohibited bases for discrimination in "USDA

(continued...)

Investigation dated July 21, 2006, OCR conducted a fresh investigation resulting in a Finding of Facts. (GX- 9).

By transmittal received in the Hearing Clerk's Office on August 14, 2007, the case and attachments were forwarded to Marc R. Hillson, Chief Administrative Law Judge, Office of Administrative Law Judges for the United States Department of Agriculture and the case was docketed.[3] On August 14, 2007, Judge Hillson issued a Notice and Order describing the proceedings to follow and scheduling of documents to be filed. On November 26, 2007, Complainant filed a Response to the June 2007 OCR Position Statement along with numerous attachments.[4] (ALJX–1). On January 3, 2008, Respondent filed the Agency's Motion To Dismiss And/Or For Summary Judgment. On March 10, 2008, Complainant filed his Response To Agency's Motion, etc.

Allegations of the Complaint (As Amended)

The original Complaint alleges that discrimination occurred on multiple occasions. As the proceeding continued, additional allegations were added.

(a) That on or about May 1976, Norbert L. Soltwedel, the Agency's County supervisor allegedly discriminated against Complainant on the basis of age when he made statements to and/or wrote letters to Complainant and his brother, Howard Schwerdtfeger, owners of an family dairy farm as an oral partnership later known as Schwerdtfeger Dairy. Slotwedel's statements and/or letters allegedly caused the Schwerdtfeger family farm real estate and improvements to be unfairly and unevenly split between the siblings initially and thereafter during the several, sequential FmHA loan events from the Agency. It is further

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[2](...continued)
programs" (circa 5/2008), the term as used there applies to individuals with children under the age of 18 living in the household and is not involved under the facts of this action. See, http://www.ascr.usda.gov/complaint_filing.html

[3]Pursuant to a Memorandum of Understanding between the United States Department of Housing and Urban Development and the United States Department of Agriculture, cases brought under Section 741 are referred to the Office of Administrative Law Judges, United States Department of Agriculture.

[4]Complainant's Response has been numbered as CX-1 thru CX-22. (See attached Addendum for a summary listing of Complainant's exhibits and their description. These exhibits were scanned and are available to the parties in pdf format.

alleged that Mr. Soltwedel deliberately mis-informed the Complainant and unfairly required that Howard (the older brother) to receive the homestead portion of the farm with all its improvements, thereby starting a chain of events whereby Complainant would be financially disadvantaged in relation to his older brother, Howard.

(b) That on or about November 27, 1979, Mr. Soltwedel allegedly discriminated against Complainant because of his age by requiring Complainant to co-sign an Economic Emergency Loan along with his brother and to mortgage his parcel of land for improvements made not on his land, but upon his brother's land.

(c) That on/about April 17, 1985, Mr. Soltwedel allegedly discriminated against Complainant by deception, fraud, misleading and improper loan procedures, malfeasance and/or misfeasance by offering options only to his brother Howard that would be harmful to Complainant's property when he arranged a partnership consolidation loan, but failed to provide for reversing the process that had divided the previously single tract into the two separately titled parcels of land, a procedure that had been required as a condition of FmHA financing due to the prohibition against loans to joint owners.

(d) That on/about July 1, 1994, Keith Hopkins, then Acting County Supervisor, allegedly discriminated against Complainant by denying him equal participation in the FSA's Preservation Loan Preservation Program when his older brother was given options to participate in that program.[5] (GX-1, 5). As a result of this disparate treatment, his multiple farm loans proceeded to go into default and/or foreclosure status because he was ineligible for a homestead exemption and/or the leaseback-buyback benefits of the FmHA Preservation Loan program for his unimproved, non-homestead portion of the farm whereas his brother with the homestead portion of the farm was eligible.

(e) Complainant filed an amendment to his Complaint (CX-5) dated August 23, 2005 adding the new allegations (sounding in tort and addressed to the Inspector General) of retaliation, fraud, [being] recklessly negligent, misleading, and deceptive, [being] threatening, intimidating, coercive and crisis creating by Norbert Soltwedel, then Agency county supervisor, in that Soltwedel did not secure joint

[5] See 7 CFR §1951.950. The Preservation Loan Servicing Program is an FmHA or FSA program that is in the nature of a "last ditch effort" to allow financial recovery of the seriously delinquent borrowers while maintaining the required adequate security for the financial integrity of the Agency's Program whereby seriously delinquent borrowers convey in-fee title to the Agency and become tenants, instead of owners, with the guaranteed right to buy back their land if payments are brought current.

ownership (between Howard and Robert) of the family dairy farm.

(f) In his November 26, 2007 statement, Complainant alleged that his older brother Howard forged (CX–12) Complainant's signature on FmHA documents ("with total acceptance") by County Supervisor Soltwedel. See ASCS-36 form "Assignment of Payment" dated March 6, 1984. (CX–11).

(g) In a letter filed on/about December 6, 1999, Complainant raised a new issue of "familial [status] discrimination"[6] or "any other category of discrimination that would apply." (GX-7).

(h) In his Response[7] to Respondent's Motion for Summary Judgment, Complainant argues that the government's (USDA) right to continue to contest this instant case is waived (in the nature of laches), time barred, unworthy of credence, not credible or valid, abandon[ed], and forfeit[ed] due to the slow handling of the Complainant's claim.

The Agency Position Concerning the Allegations

The Agency position argues that the allegations concerning 1976 requirement that the jointly owned tract be divided is outside the jurisdiction of the § 741 process which contains the threshold requirement that the discriminatory act complained of must fall within the period between January 1, 1981 and December 31, 1996. As to the other allegations involving conduct within the eligible period, the Agency's position is there is no basis to find age discrimination.

Factual Background

The Complainant, Robert A. Schwerdtfeger, is a resident of Effingham County, Altamont, Illinois, born on April 10, 1953. (GX-1, 12) An older brother, Howard M. (Howard) Schwerdtfeger was born on April 3, 1951. (GX-12)[8]. For four generations, the Schwerdtfeger family has owned farm land in Effingham County, having been originally

[6]See 7 CFR 1944.66 which was promulgated on/about July 31, 1996, added the discrimination definitions "familial status", and "handicap" to the prior definitions of (race, color, religion, national origin, sex or marital status or age).

[7]Complaint's Response to Agency's Motion To Dismiss And/Or For Summary Judge filed March 10, 2008 at page 2-3.

[8]GX -12 is a loan application filled out on behalf of Howard and Robert giving the birth dates of October 4, 1953 and September 4, 1951 respectively; however, Complainant indicated that his birth date is April 10, 1953 and his older brother was born April 3, 1951. (The age difference is still two years). See CX – 22.

purchased by the Complainant's great-grandfather. The farm land has passed from the original settler to the grandfather and then to the Complainant's father, Elmer M. Schwerdtfeger (Elmer). Elmer and his two sons operated a dairy on the property. (CX-4).

Sometime after the death of his wife Paula in 1973, Elmer began to consider retiring and in 1975 and faced with continued loan delinquency, he opted to retire and withdraw his equity from the farm by selling the dairy to his sons, Howard and Robert. As Elmer had encumbered the property with both a FmHA farm operating loan (FO) and a FmHA Residential Housing loan (RH), due to lending restrictions at that time precluding joint loans to the brothers, as a precondition to the brothers assuming the loans, FmHA required the brothers to divide the farm into two tracts and enter into assumption agreements covering the indebtedness. (ALJX-2, GX-14, 19, 21). In a letter dated December 1, 1975, addressed to both brothers, R. Keith Hoskins, the Acting County Supervisor wrote: "As I explained earlier, we cannot make a joint loan between brothers, so you must agree who will own which half of the farm and how much each half is worth." (GX-14).

The property division was agreed upon, with the older brother Howard being deeded the homestead tract, which included the family home, the two silos, the milking parlor and all of the other dairy buildings on 43.07 acres.[9] The Complainant received the remaining 59.4 unimproved acres. Although the original property was divided into two tracts when conveyed to the brothers, they operated the farm together and continued to live together with their father in the family home on Howard's tract. In order to make the equity payment to their father, the brothers were to have obtained loans from the Federal Land Bank; however, as that institution's closing instructions were in conflict with those of the Regional Attorney, the brothers obtained the loan from First National Bank in Altamont.[10]

On May 7, 1976, the brothers assumed their father's loans, with the Complainant executing a Farm Ownership loan which incorporated and

[9] The 43.07 acre tract with the improvements on the north side of the Interstate was appraised by FmHA's appraiser at 51,500.00 and the Complainant's unimproved non homestead 59.4 acre tract on the south side of the Interstate was valued at 53,000.00.

[10] Robert borrowed $14,000 and Howard borrowed $21,000. Both loans were closed on May 3, 1976 and were secured by mortgages on the respective tracts deeded to the brothers.

replaced three of Elmer's promissory notes dated October 30, 1969, November 23, 1970 and October 29, 1971 in the amount of $32,794.84; Howard's Farm Ownership loan replaced his father's note dated November 23, 1970 in the amount of $25,818.48. (GX-21, 21). FmHA took liens subordinate to the first mortgages of First National Bank. (GX-23).

On April 28, 1978, Howard obtained a Rural Housing loan from FmHA in the amount of $32,800. As Elmer and the Complainant were residing in the house with Howard, all three were required to co-sign the note. (GX-24). On May 2, 1979, the County Supervisor informed Howard that he was eligible to receive a loan to add a parlor and machine shed and indicated that a joint loan might be appropriate since FmHA had since been authorized to grant partnership loans, suggesting a meeting in a subsequent letter to both brothers which indicated that both of them would be needed in order for the loan to be approved. (ALJX-3, GX-25, 26). On November 27, 1979, the two brothers signed a promissory note for a $100,000 Economic Emergency loan secured by mortgages on their respective tracts of land. (GX-27).

On February 13, 1985, the County Supervisor contacted Howard by letter, suggesting transfer of both brothers' notes to a partnership which would allow FmHA to give them a larger set aside of the higher interest notes. (GX-30). On April 17, 1985, without any title change reversing the separate ownership of the tracts of land, the partnership assumed all four of the prior loans to the brothers, including each brother's Farm Ownership loan, the Rural Housing loan and the Economic Emergency loan. Promissory notes were also executed for a $7,006.47 Emergency loan, an $18,000 Operating loan, a $35,210 Emergency loan and a $35,857 Emergency loan. (GX-28).[11]

The dairy operation under the brothers' ownership fared little better than it had under their father's and continued to need infusion of loan

[11] In 1985, FmHA's farm loan portfolio peaked at $24.5 billion, representing 13.8% of all farm debt. *Farmer Bankruptcies and Farm Exits in the United States, 1889-2002/ AIB-788.* In early 1984, Judge Bruce Van Sickle of the United States District Court of North Dakota imposed a nationwide moratorium on foreclosure actions by FmHA pending adequate notification to the borrowers of servicing options and appeal rights. *Coleman v. Block*, 580 F. Supp. 194 (D.N.D. 1984). The moratorium was lifted by the court in November of 1985 with the publication by FmHA of revised serving regulations; however, further adverse actions by FmHA were discontinued with the reimposition of the moratorium in an additional ruling by Judge Van Sickle in *Coleman v. Lyng*, 663 F. Supp 1315 (D.N.D. 1987).

funds to operate. On June 16, 1992, FmHA sent a Notice of Program Availability to the partnership, addressed to Howard, explaining the primary and preservation servicing and debt settlement programs. (GX-32). The brothers returned the form acknowledging that they had received the Notice of Program Availability and asked that they be considered. (GX-32). By letter dated March 2, 1993 to the partnership, FSA informed the brothers that they were ineligible for primary loan servicing because the Debt and Loan Restructuring System (DALR) analysis computation indicated that the partnership "was not able to restructure the debts so that [it would be] .... able to make the required debt repayments even with a 100% debt write down of all debt eligible for write down." (GX-33). Howard appealed the determination of ineligibility; however, his appeal was denied by the National Appeals Divisions (NAD) on January 28, 1994. (GX-34).

FSA continued to correspond with the partnership and in letters dated May 5, 1994 and May 25, 1994 addressed to Schwerdtfeder Dairy informed the Complainant and his brother that they would consider Schwerdtfeger Dairy for preservation servicing in the form of homestead protection and leaseback/buyback. The letters indicated that the Complainant would have to provide a list of 14 documents in order for them to process any request. (GX-35). No action was taken by the partnership to avail itself of the preservation servicing and on July 1, 1994, FmHA denied preservation loan serving for failure to provide any of the information or documents requested on May 5, 1994 and May 25, 1994. (GX-36). On August 26, 1994, FmHA issued a Notice of Acceleration declaring the account(s) due for failure to pay the indebtedness. (GX-38).

Applicable Standards

As noted in the OCR Position Statement, courts have generally applied the shifting burden analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a three part, burden shifting test for Title VII cases, to determine whether there has been unlawful discrimination in a disparate treatment case. The Complainant bears the initial burden of making a *prima facie* showing of discrimination. The establishment of a *prima facie* case creates a presumption of discrimination. *McDonnell Douglas,* 411 U.S. at 802. At the next stage, the Agency may rebut the presumption of discrimination with a legitimate, non-discriminatory reason for its actions. At the third stage, the Complainant must persuade the fact finder that the Agency's explanation was a pretext for unlawful

discrimination.

In order to be eligible for consideration under § 741, a complaint must meet the following requirements:

1. Be a non-employment complaint
2. Be filed prior to July 1, 1997
3. Allege discrimination by USDA occurring between January 1, 1981 and December 31, 1996
4. Allege:

(a) A violation of the Equal Credit Opportunity Act (ECOA) in the administration of:

i. Farm Ownership Loan,
ii. Farm Operating Loan,
iii. Emergency Loan, or
iv. Rural Housing Loan; or

(b) Discrimination in the administration of a Commodity Program or Disaster Assistance Program. Eligible status areas of discrimination under § 741 are race, color, religion, national origin, sex or marital status, age.

Summary Judgment is appropriate if the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Discussion

The Complaint fulfills the initial threshold § 741 requirement of being a non-employment claim as well as the second requirement of being filed before July 1, 1997. The Complaint seeks relief under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691, *et seq*. and alleges a violation of the ECOA in connection with the administration of the Farm Ownership, Farm Operating and Emergency Loan programs on the basis of age, which is a protected basis. Aside from the conclusory allegations of age discrimination; however, there is little support for a *prima facie* showing of age discrimination, given the *de minimus* difference in age between the Complainant and his brother who is only two years his senior. Nonetheless, each of the allegations will be examined.

The acts of discrimination which were alleged to have occurred in 1976 that required the Complainant to purchase the non-homestead tract while his brother purchased the homestead tract and the 1979 allegation that he was required to co-sign an Emergency Loan for improvements

located on land other than his are beyond the jurisdiction of the § 741 process as they occur outside the specified period of time between January 1, 1981 and December 31, 1996. Accordingly, those allegations cannot be considered under § 741 and must be dismissed.

During 1985, the Agency desired to reduce the loan servicing complexities by having one borrower, i.e. the Schwerdtfeger Dairy partnership,[12] even though the partners were still individually liable. Complainant complains of non-feasance on the part of the Agency's County Supervisors during the 1985 Loan consolidation as there was no re-titling of the land effecting a merger of the two parcels back to one parcel owned as 50% shares each. The Agency's function was to administer the FmHA or FSA loan program for proper farm related purposes and to see that adequate security[13] in favor of the Agency was maintained. As a co-signer, at any time during the transaction, the Complainant retained the ability to refuse to acquiesce in the April 17, 1985 loan documents unless his demands were met of re-titling the underlying property of the Schwerdtfeger Dairy operation to both brothers in equal shares. Consequently, his claim of malfeasance or non-feasance resulting in discrimination during the processing of April 1985 loan consolidation are without merit. A title merger with or without the Agency's help or permission could have been effected at any point in time after the Agency acquired authority to loan to partnerships. (GX–25). The Agency's security interest would have been unchanged and unharmed. The record contains no documents that suggest that FmHA would have or did interfere with merging of the two parcels after 1979. Non-feasance and/or mal-feasance in loan processing procedures sound in tort and are beyond the reach of § 741. Accordingly, the allegations as to 1985 conduct must also be dismissed.

The alleged denial of loan servicing (Preservation Loan Program) also falls within the time boundaries and subject matter prescribed by the regulations. During 1992, the Agency offered a program for seriously delinquent FmHA (now FSA) loans. In order to qualify for the loans,

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[12] The name "Schwerdtfeger Dairy" does not appear to have the normal partnership naming elements of a separate legal entity and the record is silent as to whether a written partnership existed.

[13] FHA form 465-1 (reverse) has check boxes as follows: THE PROPOSED TRANSACTION [WILL] [WILL NOT] PREVENT OR MAKE MORE DIFFICULT THE SUCCESSFUL OPERATION OF THIS PROPERTY and [WILL] [WILL NOT] REDUCE THE EFFICIENCY OF THE PROPERTY. (GX – 16)

FSA required 14 documents[14] to be completed as a part of the application process. Complainant failed to provide the documents or to complete the application process. The letter dated July 1, 1994, addressed to the Complainant makes it clear that FSA denied preservation loan services to the Complainant not because of his age, but because of his failure to provide FSA with any of the information requested or to complete the application process.[15] (GX–36). While Howard's parcel included the family residence and Robert's parcel contained no improvements, the Agency's Notice of the availability of Preservation Loan Servicing for the "Homestead" portion of the farm might at first glance appear to be unequal as between the brothers. (CX–2 @ p. 6). However, given that the division of the property was agreed upon many years before, the fact that Howard had full title to the improved portion of the original farm fully satisfies any inquiry into Robert's complaint concerning the Agency's action surrounding Preservation Loan Servicing.

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[14] The following documents were to have been submitted:
1. Completed Form FmHA 410-1, "Application for FmHA services," signed by all partners.
2. A signed Form FmHA 410-9.
3. A complete list of partners showing the address, citizenship, principal occupation, and the percentage of ownership by each.
4. A signed current personal financial statement from each of the members of the partners of a partnership.
5. A copy of any Partnership Agreement and a resolution adopted by the partnership to apply for and obtain the desired servicing action and execute the required instruments and agreements.
6. Form 440-32, "Request for Statement for Debts and Collateral" from each creditor.
7. Form FmHA 1910-5, "Request for Verification of Employment," if applicable.
8. Form 1924-1, "Development Plan," if development is needed.
9. Form AD-I 026 and AD-I 026 (A) "Highly Erodible Land Conservation and Wetland Conservation Certification."
10. Form SCS CPA-026, "Highly Erodible Land and Wetland Determination" for each tract farmed.
11. The ASCS photo of the farm, on which the applicant must show the portion of the farm and approximate acres to be considered in a request for Homestead Protection, if applicable.
12. Income tax returns and supporting documents for 1992 and 1993.
13. A signed Debarment Form AD-I047.
14. A copy of any lease, contract option or agreement entered into by the applicant which may be pertinent to consideration of the application or where a written lease is not obtainable, a statement setting forth the terms and conditions of the agreement.

[15] Robert's allegations of discrimination without submitting the requested documents or completing the application process might be compared to one complaining about not winning the Lottery without purchasing a ticket.

The allegations contained in the purported amendment to his Complaint addressed to the Inspector General, even were they to be entertained as part of this action sound in tort and as previously indicated fall outside the review of this action. Similarly, the allegation of forgery by the Complainant's brother will likewise fail for the same reason. The allegation of familial status was previously discussed as being inapplicable to the facts of this case.[16] Laches, a defense based upon undue delay in asserting a legal right or privilege also raised by the Complainant in his Response to the Motion for Summary Judgment, has been long held to be inapplicable to actions of the government. *United States v. Kirkpatrick*, 22 U.S. (9 Wheat) 720 (1824); See also, *Gaussen v. United States*, 97 U.S. 584, 590 (1878); *German Bank v. United States*, 148 U.S. 573, 579 (1893); *United States v. Verdier*, 164 U.S. 213, 219 (1896); *United States v. Mack*, 295 U.S. 480, 489 (1935).

Conclusion

For the foregoing reasons, there is no genuine issue of material fact and summary judgment is appropriate.

ORDER

For the reasons set forth above, upon consideration of the entire record, the Respondent's Motion for Summary Judgment is **GRANTED** and the Complaint will be **DISMISSED**.

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

[16] See Footnote 2.

FEDERAL CROP INSURANCE ACT

COURT DECISION

LYNN OLSEN, d/b/a OLSEN AGRIPRISES; CARR FARMS, LLC v. USDA.
No. CV-06-5020-FVS.
Filed March 10, 2008.

(Cite as: 546 F.Supp.2d 1122).

FCIA – Reinsurance – Substitute insurer.

Farmers obtained crop insurance with AGIC brokers. After a crop loss, Farmers made a claim for crop losses and were not able to reach a negotiated damage award and thus entered into an arbitration and received a favorable award. Subsequently, AGIC was liquidated by State of Nebraska. Farmers now seek to enforce the successful arbitration award against FCIC which was the reinsurer of AGIC. Court held that there was no privity of contract between farmers and FCIC. FCIC was not a substituted insurer that tied its relationship to the farmers. FCIC had not agreed to the arbitration. FCIC would agree to review the farmers crop loss claim anew.

United States District Court,
E.D. Washington.

SUMMARY JUDGMENT ORDER

FRED VAN SICKLE, District Judge.

THIS MATTER came before the Court for oral argument on the parties' cross motions for summary judgment. John G. Schultz appeared on behalf of the Plaintiffs. Rolf H. Tangvald appeared on behalf of the Defendant.

The Plaintiffs, Lynn Olsen and Carr Farms, LLC ("Carr"), brought this action to enforce two arbitration awards against the Federal Crop Insurance Corporation ("FCIC"), a division of the United States Department of Agriculture ("DOA"). The Court finds that the FCIC did not agree to submit to arbitration, being neither a party to the crop insurance policies at issue nor otherwise in privity of contract with the Plaintiffs. Given the dispute between the parties concerning the existence of an arbitration agreement, the arbitrators did not have jurisdiction to preside over the disputes between the parties. The arbitrators also proceeded to arbitrate the disputes in violation of a valid court order. The

Defendant's motion for summary judgment will accordingly be granted, the Plaintiffs' denied, and the arbitration awards vacated.

BACKGROUND

REGULATORY FRAMEWORK

Since 1996, the FCIC has acted primarily[1] as a reinsurer of crop insurance policies issued by private insurance companies. The FCIC enters into cooperative financial agreements with private insurance companies referred to as "Standard Reinsurance Agreements" ("SRAs"). In this capacity, the FCIC establishes the terms and conditions of the insurance policies and subsidizes insurance rates. 7 U.S.C. §§ 1508; 1502(b)(2). The FCIC's reinsurance program is administered by the Risk Management Agency ("RMA"). 7 U.S.C. § 6933.

Subpart J of the FCIC's regulations governs appeals of "adverse decisions made by personnel of the [FCIC] with respect to ... contracts of insurance of private insurance companies and reinsured by the FCIC."7 C.F.R. § 400.91. An "adverse decision" is broadly defined as, "a decision by an employee or Director of the Agency that is adverse to the participant." 7 C.F.R. § 400.90. Subpart J provides that a participant may only seek judicial review of an adverse determination after exhausting the available administrative remedies.[2] 7 C.F.R. § 400.96(c). Section 400.96(c) further provides, "Nothing in this section can be construed to create privity of contract between the Agency and a participant." *Id.*

FACTUAL BACKGROUND

The Plaintiffs owned and grew crops in 2001 and 2002. They purchased crop insurance policies called Adjusted Gross Revenue Pilot Insurance Policies ("the Policies") from American Growers Insurance Company ("AGIC"). AGIC entered into SRAs with the FCIC that were effective for 2001 and 2002. Pursuant to the Federal Crop Insurance Act,

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[1] In addition to reinsuring the policies of private insurers, the FCIC offers insurance directly through local offices of the DOA. 7 U.S.C. § 1508(a); 7 C.F.R. § 457.2(b).

[2] This Court has previously ruled that the Plaintiffs were not required to exhaust their administrative remedies prior to seeking review of the Agency's refusal to comply with the arbitration awards. This conclusion was based on a statutory exception to the exhaustion requirement for questions of a purely legal nature. (Ct.Rec.38.)

7 U.S.C. §§ 1501 *et seq.,* FCIC thereby became a reinsurer of the Plaintiffs' policies. The Policies specifically provide,

> Throughout this policy, "you" and "your" refer to the named insured shown on the accepted application and "we," "us," and "our" refer to the insurance company providing insurance.

Declaration of William J. Murphy, October 10, 2007 ("Murphy Decl.") Ex. 1 at 1.

The Policies indicate that, if AGIC could not pay a claim, the FCIC would pay the claim "in accordance with the provisions of this policy." Mem. Of Authorities In Supp. Of Mot. To Stay Civil Proceedings, Att. 1 ¶ 13. The Policies further provide,

> If you and we fail to agree on any factual determination, you may seek resolution of the disagreement. The disagreement will be resolved in accordance with the rules of the America Arbitration Association. Failure to agree with any factual determination made by the FCIC must be resolved through the FCIC appeal provisions published at 7 CFR Part 11.
>
> *Id.*

In 2001 and 2002, the Plaintiffs sought to recover under the Policies for crop losses allegedly incurred in 2001 and 2002. Neither Plaintiff could reach an agreement with AGIC concerning the amount due and both filed demands for arbitration in August of 2004.

On February 28, 2005, the State of Nebraska liquidated AGIC. Declaration of Donald A. Brittenham, October 10, 2007 ("Brittenham Decl.") Ex. 5. The Order of Liquidation provides, "No action in law or in equity or in arbitration, whether in this state or elsewhere, may be brought against AGIC or its liquidator, nor shall any existing actions be maintained or further presented after issuance of this Order of Liquidation." *Id.* ¶ 14. The FCIC notified the Plaintiffs of the liquidation and advised them that the FCIC would review their claims. Affidavit of John G. Schultz, April 26, 2007 ("Schultz Aff.") Ex. 5 at 63-64.

On June 16, 2005, John R. Zeimantz, the arbitrator appointed by the AAA for the Carr proceeding, issued an order indicating that the arbitration would proceed as scheduled. Schultz Aff. Ex. 6 at 72-73. Mr. Brittenham responded by letter on behalf of the FCIC. Brittenham Decl. Ex. 6 at 130-31. This communication explained that the arbitrator did not have jurisdiction over the FCIC, the FCIC had never agreed to participate in arbitration, and the FCIC had not waived its sovereign immunity. *Id.*

at 20. Mr. Brittenham wrote to Mr. Zeimantz again on August 30 and reiterated that the FCIC did not recognize the AAA's jurisdiction. Brittenham Decl. Ex. 6 at 130-31.

On July 11, 2005, James Wagner, the arbitrator appointed by the AAA for the Olsen proceeding, substituted the FCIC for AGIC. Schultz Decl. Ex. 13 at 192-94. Mr. Brittenham again responded for the FCIC by letter, explaining that the arbitrator did not have jurisdiction over the FCIC, the FCIC had never agreed to participate in arbitration, and the FCIC had not waived its sovereign immunity. Brittenham Decl. Ex. 7.

On September 20, 2005, Mr. Zeimantz held an evidentiary hearing in the Carr case. Brittenham Decl. Ex. 8. On October 17, 2005, he awarded Carr $ 2,969,341. *Id.* On August 22, 2005, Mr. Wagner held an evidentiary hearing in the Olsen case. Brittenham Ex. 9. On September 15, 2005, he awarded Olsen $477,114 for the 2001 crop year and $2,608,699 for the 2002 crop year. *Id.* The arbitration awards are the subject of the present litigation.

DISCUSSION

I. THE ARBITRATION CLAUSE IS NOT BINDING ON THE FCIC

A. The FCIC Is Not a Party to the Arbitration Agreement

"It is axiomatic that '[a]rbitration is a matter of contract and a party cannot be required to submit any dispute which he has not agreed so to submit.'" *Sanford v. Memberworks, Inc.,* 483 F.3d 956, 962 (9th Cir.2007) (quoting *AT & T Tech., Inc. v. Commc'n Workers of Am.,* 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). Consequently, only disputes that the parties have agreed to submit to arbitration may be so submitted. *First Options v. Kaplan,* 514 U.S. 938, 943, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985, 992 (1995). Issues concerning the existence of a contract or the existence of an agreement to arbitrate are for the district court to decide. *Sanford,* 483 F.3d at 962. In ruling on such issues, the courts generally "should apply ordinary state-law principles that govern the formation of contracts." *Kaplan,* 514 U.S. at 944, 115 S.Ct. at 1924, 131 L.Ed.2d at 993 (1995).

Applying these principles, the Court finds that the FCIC was a party

to neither the Policies nor the arbitration agreements they contain. As the Defendant has argued, the Policies' preambles indicate that AGIC and the insured are the only parties to the contract. While the FCIC is mentioned as a reinsurer, the FCIC's role and responsibilities are set forth in full in the SRA. Thus, the Policies governed only the relationship between the Plaintiffs and AGIC; the FCIC's obligations as a reinsurer are governed by the SRA.

The Plaintiffs argue that the Policy held the FCIC out as a party by representing that the FCIC would "assume all obligations or unpaid losses" if AGIC was unable to fulfill its obligations. However, the Plaintiffs cite no caselaw in support of the proposition that such a statement raises issues of equitable estoppel. In addition, the analytical basis for this argument is insufficiently developed to be persuasive.

More importantly, there is no evidence before the Court that the FCIC ever agreed to arbitration. Even if the FCIC could be considered a party to the Policies, Paragraph 13(a) indicates that the arbitration agreement was not meant to bind the FCIC. Paragraph 13(a) explains that factual disagreements between the insured and AGIC will be resolved through arbitration. It further explains that factual disagreements between the insured and the FCIC must be resolved through the administrative process. As the Plaintiffs have remarked, Paragraph 13(a) does not specify the procedures that will govern in the event that, as in this case, AGIC becomes insolvent after a factual dispute has arisen. However, the distinction Paragraph 13(a) draws between the procedures that will govern disputes involving AGIC and the procedures that will govern disputes involving the FCIC indicates that the FCIC did not agree to enter into arbitration.

B. The FCIC Is Not In Privity of Contract With the Plaintiffs

1. Privity in general

The Defendant argues that the Plaintiffs lack standing to sue the FCIC because they are not in privity of contract with the FCIC. While the Court agrees that the Plaintiffs lack privity of contract with the FCIC, the Court is not persuaded that the Plaintiffs necessarily lack standing to bring suit. It is true that, as a general rule, "there is no privity of contract that would enable the original insured to bring an action against the reinsurer." *Litho Color, Inc. v. Pacific Employers Ins. Co.,* 98 Wash.App. 286, 301-02, 991 P.2d 638, 646 (Wash.Ct.App.1999). However, the general rule has its exceptions and the Defendant has not justified its assertion that the

general rule applies in this case.

Moreover, the Plaintiffs have argued that the relationship between themselves and the FCIC can not be properly qualified as "reinsurance" for the purposes of state law. The Court, therefore, declines to rule on the question of standing in this instance.

The Defendant is correct that neither the Policies nor the SRA establish a contractual relationship between the Plaintiffs and the FCIC. The Plaintiffs entered into an agreement with AGIC and AGIC entered into an agreement, the SRA, with the FCIC. Section 400.96 negates the Plaintiffs' contention that the Policy and the SRA established privity of contract. This provision indicates, "Nothing in this section can be construed to create privity of contract between the Agency and a participant 7 C.F.R. § 400.96(c). Reading this statement in context, it is clear that the act of filing a lawsuit pursuant to the FCIC's regulations does not, by itself, create privity. It would not be necessary for the regulation to address the effect of a lawsuit on privity if, as the Plaintiffs argue, privity existed solely by virtue of the FCIC's role as reinsurer.

The Plaintiffs contention that Subpart J is inapplicable to the present action is unavailing. The Plaintiffs are correct that Subpart J would not apply to an appeal of AGIC's determinations. However, as this Court's Order Denying Motion to Stay, Ct. Rec. 38, made clear, the Plaintiffs' action before this Court is not an appeal of AGIC's factual findings. Rather, it is a challenge to the FCIC's refusal to recognize the arbitration awards. Given Subpart J's broad definition of "adverse action," Subpart J applies to the present litigation.

2. Substituted insurance versus reinsurance

As a general rule, "reinsurance" properly refers to the relationship that exists when one insurance company, the reinsurer, agrees to indemnify another insurance company, the insurer, against a portion of the losses that the insurer may incur in connection with a policy. 14 Eric Mills Holmes & L. Anthony Sutton, Appleman on Insurance § 109.1 (2d Ed.1999.) When a so-called reinsurer assumes direct liability to the policy holder, the relationship is properly characterized as "substituted insurance" rather than reinsurance. *Id.*

The Plaintiffs argue that the FCIC is in privity of contract with the

Plaintiffs because the FCIC provided substitute insurance rather than reinsurance. However, federal law preempts the application of this principle to the present situation. The FCIC's regulations preempt state and local law to the extent that they conflict with the statute and regulations governing the FCIC. 7 U.S.C. § 1506(*l*).[3] Likewise, inconsistent state and local laws are inapplicable to the contracts of the FCIC. *Id.;* 7 C.F.R. § 400.352(a). The federal regulations governing the FCIC refer to "reinsurance," rather than "substituted insurance." Section 400.96 also indicates that, however the relationship between a participant and the FCIC might be described, the mere existence of that relationship does not create privity of contract between an insured and the FCIC. The creation of privity via state contract or insurance law would be inconsistent with these regulations. Consequently, federal law prohibits the inference that the FCIC provided substitute insurance.

II. THE ARBITRATION AWARDS MUST BE VACATED

A. The Arbitrators Lacked Jurisdiction

The Federal Arbitration Act ("FAA" or "the Act") acknowledges the validity of arbitration agreements and establishes a liberal federal policy in favor of their enforcement. *Lozano v. AT & T Wireless Servs.,* 504 F.3d 718, 725 (9th Cir.2007) (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). Consistent with this policy, the Act authorizes the parties to an arbitration agreement to petition the district court to compel arbitration in appropriate circumstances. 9 U.S.C. § 4. The court must direct the parties to arbitrate the dispute as set forth in their agreement "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." *Id.* If, however, "the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." *Id.*

An arbitrator's authority to adjudicate a dispute is derived solely from the agreement of the parties. *Three Valleys Municipal Water Dist. v. E.F.*

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[3] 7 U.S.C. § 1506(*l*) provides,

The Corporation may enter into and carry out contracts or agreements, and issue regulations, necessary in the conduct of its business, as determined by the Board. State and local laws or rules shall not apply to contracts, agreements, or regulations of the Corporation or the parties thereto to the extent that such contracts, agreements, or regulations provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts, agreements, or regulations

Hutton & Co., 925 F.2d 1136, 1140-41 (9th Cir.1991). He or she "has no independent source of jurisdiction apart from the consent of the parties." *I.S. Joseph Co. v. Michigan Sugar Co.,* 803 F.2d 396, 399 (8th Cir.1986). Consequently, the question of whether a particular party entered into a contract containing an arbitration agreement "must first be determined by the court as a prerequisite to the arbitrator's taking jurisdiction." *Id.; Sanford,* 483 F.3d at 962. Similarly, challenges to the validity of an agreement to arbitrate must be resolved by a court. *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444, 126 S.Ct. 1204, 1208, 163 L.Ed.2d 1038, 1043 (2006). In contrast, the validity of a contract that contains an arbitration clause is a question for the arbitrator. *Buckeye,* 546 U.S. at 449, 126 S.Ct. at 1210, 163 L.Ed.2d at 1046.

The Court holds that the arbitrators did not have jurisdiction to determine the effectiveness of the arbitration agreement against the FCIC. As explained above, an arbitrator's jurisdiction is premised on the agreement of two or more parties to arbitrate a dispute. Both the Ninth Circuit and the FAA indicate that a court must decide whether such an agreement exists in the first instance. An arbitrator does not have the authority to decide this issue for him or herself. Here, the arbitrators assumed jurisdiction and proceeded to arbitrate the disputes without the benefit of a court decision. The arbitration awards are therefore invalid and will be vacated.

B. The Arbitrators Proceeded with Arbitration In Violation of State Law

The Nebraska court's Order of Liquidation expressly prohibited the continuation of any arbitration proceeding that had been previously brought against AGIC. Contrary to the Plaintiffs' contention, this order was not preempted by federal law. As the Defendant has argued, the Act and the FCIC's regulations only preempt state law to the extent that it is inconsistent with federal law. Here, the SRA provides for the immediate transfer of the crop insurance policies to the FCIC in the event that AGIC is "unable to fulfill [its] obligations" to any policyholder by reason of a directive or order duly issued by ..."any court of law having competent jurisdiction." The SRA thus not only contemplates that a state court order might impair AGIC's ability to meet its obligations, such an order is a prerequisite to the SRA's effectiveness. Given the validity of the Nebraska court's order, this Court is persuaded that the Plaintiffs and the arbitrators proceeded to arbitration in violation of a valid court order.

C. The Defendant Did Not Waive Its Objection to Arbitration

It is well established that a party who has voluntarily participated in arbitration waives any challenge he or she may have had to the arbitrator's authority. *See Nagrampa v. MailCoups, Inc.,* 469 F.3d 1257, 1279 (9th Cir.2006) (citing cases). However, when a party "forcefully objected to arbitrability at the outset of the dispute, never withdrew that objection, and did not proceed to arbitration on the merits of the contract claim," waiver does not occur. *Id.* at 1280.

The Court finds that the FCIC did not waive its challenges to the arbitrators' authority. The FCIC's letters to Mr. Zeimantz and Mr. Wagner clearly state that the FCIC does not recognize the AAA's jurisdiction over the cases and "will not be bound by any future award in this case." Brittenham Decl. Ex. 6; Brittenham Decl. Ex. 7. The letters further advised the arbitrators that the FCIC would not participate in arbitration. While the letters do mention the legal basis for the FCIC's refusal to arbitrate, neither amounts to a substantive legal argument that could be considered an appearance. Each letter is less than two pages in length and neither relies upon legal citations. The letters are intended to inform the arbitrators of the FCIC's position and create a record of its objections. They do not rise to the level of involvement that the Ninth Circuit has found to constitute waiver. *See Nagrampa,* 469 F.3d at 1279 (citing cases). The Court being fully advised,

IT IS HEREBY ORDERED,

1. The Defendant's Motion For Summary Judgment, and, Alternatively to Vacate Arbitration Awards, **Ct. Rec. 43,** is **GRANTED.**

2. The Plaintiffs' Motion For Summary Judgment, **Ct. Rec. 13,** is **DENIED.**

3. The arbitration award of October 17, 2005 in the amount of two million, nine hundred sixty-nine thousand, three hundred and forty-one dollars ($2,969,341) that Mr. Zeimantz awarded to Carr, American Arbitration Association, 75 430 Y 00351 04 DEAR, is **VACATED.**

4. The arbitration award of September 15, 2005, in the amount of four hundred seventy-seven thousand one hundred and fourteen dollars ($477,114) for the 2001 crop year and two million six hundred eights thousand six hundred sixty-nine dollars ($2,608,669) for the 2002 crop

year that Mr. Wagner awarded to Mr. Olsen, American Arbitration Association, Commercial Arbitration Tribunal, 75 430 Y 00340 04 DEAR, is **VACATED**

5. The District Court Executive shall **ENTER JUDGMENT** in favor of the Defendant.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order, furnish copies to counsel, and **CLOSE THE FILE.**

MARVIN TAYLOR BARNHILL, ET AL. v. USDA, ET AL.
Nos. 07-1145, 07-1146.
Filed May 8, 2008.

(Cite as: 524 F.3d 458).

FCIA – Detrimental reliance, when not – Re-insurance – Quota price – Non-quota price.

Under the Agricultural Adjustment Act (circa 1930), the USDA established quotas for various agricultural products, including peanuts, whereby there was commodity price support (the quota price) for the farmers' production quota of the agricultural product and the product in excess of the quota was known as the "non-quota" price which is the "market price."
A class action filed by peanut farmers in North Carolina alleging the reimbursement rates for crop losses as a result of a severe drought were inadequate. The peanuts crops were reinsured by FCIC. The farmers were indemnified at the 17.75 ¢/lb. "non-quota" rate instead of the 31 ¢/lb "quota" rate and which were based upon the USDA's allocations of peanut poundage quotas in prior years. USDA has appealed a finding for the farmers in the district court. The terms of the policy are set forth in 7 U.S.C. §1508 where the basic coverage is losses in excess of 50% of the crops normal year indemnified at 55% of the crops expected "market price." The court found that the market price is the unsupported non-quota ¢/lb. rate.

United States Court of Appeals,
Fourth Circuit.

Before WILKINSON and KING, Circuit Judges, and HENRY F. FLOYD, United States District Judge for the District of South Carolina, sitting by designation.

Vacated and remanded by published opinion. Judge KING wrote the opinion, in which Judge WILKINSON and Judge FLOYD joined.

OPINION

KING, Circuit Judge:

These appeals relate to lawsuits being pursued by several classes of peanut farmers (the "Farmers") who insured their 2002 peanut crops under a Multiple Peril Crop Insurance Policy (the "MPCI Policy") that, under federal law, was issued by private insurers and reinsured by the Government.[1] After suffering heavy losses to their 2002 peanut crops, due primarily to a severe drought during the growing season, the Farmers filed claims under the MPCI Policy. They were indemnified for their losses at a "non-quota" rate of 17.75 cents per pound-rather than at the claimed "quota" rate of 31 cents. The Farmers' expectations of indemnity at the 31 cent quota rate were premised largely on the Government's allocations of peanut poundage quotas in previous years. However, federal farm legislation enacted in May 2002 eliminated the peanut quota program that had been in effect in some form since 1941. *See* Farm Security and Rural Investment Act of 2002, Pub.L. No. 107-171, §§ 1301-1310, 116 Stat. 134, 166-83 (2002) (the "2002 Farm Bill").

After the Farmers were indemnified at the 17.75 cent non-quota rate for their 2002 crop losses, they initiated a series of civil actions against the Government in several federal jurisdictions, alleging, inter alia, that the MPCI Policy had been breached and that their due process rights had been violated.[2] The district court eventually had before it a district-wide class action on behalf of the Farmers situated in the Eastern District of North Carolina, as well as several other district-wide class actions first initiated in other jurisdictions and then transferred to the Eastern District of North Carolina by the Multi-District Litigation Panel (the "MDL Panel"). In disposing of the Farmers' contentions, the court, on July 22, 2004, certified a district-wide class action on behalf of the Farmers in the Eastern District of North Carolina (the "North Carolina case"). The court then awarded summary judgment to those Farmers on their breach of

[1]A copy of the MPCI Policy is found at J.A. 40-59. (Citations herein to "J.A. ____" refer to the contents of the Joint Appendix filed by the parties in this appeal.)

[2]The Farmers initiated their lawsuits against multiple defendants, including the Secretary of Agriculture, the Administrator of the Risk Management Agency, the Department of Agriculture, the United States, the Federal Crop Insurance Corporation, and others. We refer to the defendants collectively as the "Government."

contract claims. *See Barnhill v. Davidson,* No. 4:02-cv-00159-H (E.D.N.C. July 22, 2004) (the "SJ Opinion").[3] On March 31, 2005, the court entered an order establishing a formula to be used in computing damage awards. *See In re Peanut Crop Insurance Litigation,* No. 4:05-cv-00008-H (E.D.N.C. Mar. 31, 2005) (the "Damages Order").[4] On March 31, 2005, and again on December 20, 2006, the court extended its SJ Opinion (including the class certification ruling), as well as its Damages Order, to the lawsuits brought by the Farmers in other jurisdictions (the "MDL cases"). *See In re Peanut Crop Insurance Litigation,* No. 4:05-cv-00008-H (E.D.N.C. Mar. 31, 2005) ("MDL Order I"); *In re Peanut Crop Insurance Litigation,* No. 4:05-cv-00008-H2 (E.D.N.C. Dec. 20, 2006) ("MDL Order II").[5]

On December 20, 2006, the district court entered Final Judgment on the Farmers' breach of contract claims, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[6] The Government has appealed, contending, inter alia, that the court erred by (1) concluding that the MPCI Policy obligated the insurers to indemnify the Farmers at the 31 cent quota rate in the absence of 2002 peanut poundage quota allocations having been made to individual farms; and (2) determining that the Government's failure to allocate such quotas breached the MPCI Policy, based on the court's conclusion that the enactment of the 2002 Farm Bill hindered the performance of the Government's statutory duty to allocate such quotas. The Government also contends that the court erroneously premised its SJ Opinion, in part, on the Farmers' alternative theory of detrimental reliance. The Farmers have cross-appealed, asserting that the district court erred in failing to certify a nationwide class of farmer-plaintiffs, and also in denying the requests of certain plaintiffs for transfers of venue. As explained below, we disagree with the district court's breach of contract ruling, and thus vacate its SJ Opinion and remand.

I.

In order to properly assess these appeals, we first review the

[3]The SJ Opinion can be found at J.A. 237-85.

[4]The Damages Order can be found at J.A. 295-302.

[5]The MDL Order I can be found at J.A. 303-07, and the MDL Order II can be found at J.A. 362-67.

[6]The Final Judgment can be found at J.A. 368.

background of the federal crop insurance and peanut quota programs.[7] We then examine the relevant provisions of the MPCI Policy and the 2002 Farm Bill. Finally, we relate the procedural history of this litigation, as well as the appellate contentions of the parties.

A.

Although crop insurance under the MPCI Policy is provided by private insurers, it is reinsured by a governmental entity called the Federal Crop Insurance Corporation (the "FCIC"), pursuant to the Federal Crop Insurance Act, 7 U.S.C. §§ 1501 *et seq.*[8] The FCIC is a wholly owned government corporation that operates under the umbrella of the Department of Agriculture (the "USDA"), and it is statutorily responsible for regulating the crop insurance industry. *See Tex. Peanut Farmers v. United States,* 409 F.3d 1370, 1372 (Fed.Cir.2005). The FCIC is itself regulated by the USDA's Risk Management Agency (the "RMA"). *Id.* As specified by Congress, the FCIC's purpose is "to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance." 7 U.S.C. § 1502(a). The crop insurance program implements the public policy of protecting farmers from the risks associated with drought, flood, and other natural disasters. 7 U.S.C. § 1508(b). The basic coverage provisions of crop insurance protect insured farmers against catastrophic risk, and serve to indemnify those farmers on losses in excess of 50% of the crop's normal yield, indemnified at 55% of the crop's expected market price. 7 U.S.C. § 1508(b); 7 C.F.R. § 402.1. Pursuant to the governing provisions of the crop insurance program, insured farmers are also entitled to purchase additional insurance coverage at a greater percentage of their expected yields. 7 U.S.C. § 1508(c).

Prior to 2002, the extent to which the MPCI Policy indemnified lost

[7]Although various terms have been used in the record, sometimes interchangeably, we refer to the components of the peanut price support program as follows. First, we refer to the general price support program at issue as the "peanut quota program." We use the term "national pound-age quota" to describe the total peanut poundage quota set by the United States Department of Agriculture for the entire country, and we refer to the peanut quota allocations made to individual farms as the "farm poundage quota."

[8]Section 1508(j) of Title 7 provides that, if a "claim for indemnity is denied by the [FCIC] or an approved provider, an action on the claim may be brought against the [FCIC] or Secretary [of Agriculture] only in the United States district court for the district in which the insured farm is located." 7 U.S.C. § 1508(j)(2). The various public officials and entities named as defendants in this litigation are apparently proper parties thereto, pursuant to the MPCI Policy and § 1508(j)-and the parties have made no contention to the contrary.

or damaged peanut crops varied, depending on whether the insured crops were designated as "quota" or "non-quota" peanuts, as defined by the peanut quota program. This peanut quota program was recently addressed and described by the Federal Circuit in *Members of the Peanut Quota Holders Ass'n v. United States,* 421 F.3d 1323 (Fed.Cir.2005) (concluding that 2002 Farm Bill's changes in quota program did not result in compensable taking under Fifth Amendment). That court's description of the background of the program is helpful, and was spelled out, in part, as follows:

In the 1930s the United States' economic depression particularly affected the agricultural community. Congress, in an attempt to mitigate the effects of the depression on agricultural products, enacted the Agricultural Adjustment Act of 1938 ("AAA"), ch. 30 tit. III, § 301*et seq.,*52 Stat. 31, 38, which regulated the production and sale of tobacco and wheat within the United States. The statute instituted acreage allotments to prevent oversupply of the targeted agricultural commodities. In 1941, the AAA was amended to include farm acreage allotments for peanuts. The Agricultural Adjustment Act of 1938, *as amended,* ch. 39, tit. III, §§ 357-359, 55 Stat. 88, 88-91 (the "1941 Act"). The 1941 Act sought to regulate the production of peanuts to avoid severe fluctuations in price caused by rapid changes in market demand and the year-long lag in response to that demand caused by crop growing cycles. 1941 Act, 55 Stat. at 88. Since 1941, Congress has regulated peanut production primarily through quotas set by the Secretary of Agriculture... but the nature and reach of the quota system has not remained constant.
Peanut Quota Holders Ass'n, 421 F.3d at 1325-26.

The peanut quota program was, prior to 2002, a price support system for each year's peanut crop. "Quota" peanuts were peanuts used for domestic edible consumption, whereas "non-quota" peanuts (a/k/a "additional peanuts" or "excess peanuts") were either crushed or exported. Non-quota peanuts had a lower value than quota peanuts, and, in the crop years preceding 2002, the vast majority of peanuts grown by the Farmers were quota peanuts.

The value of quota peanuts and the related national poundage quota for such peanuts in a specific crop year were determined by the USDA.[9]

[9]Because the peanut quota program was repealed by the 2002 Farm Bill, we refer to it in the past tense.

Farm poundage quota allocations to individual farms were made by the Farm Service Agency (the "FSA"), which administers the price support programs of the USDA. During the crop years immediately preceding 2002, quota peanuts lost due to covered occurrences were indemnified at the rate of 31 cents per pound, and non-quota peanuts lost due to such occurrences were indemnified at a 16 cent rate. The peanut quota program thus supplied the MPCI Policy with the value per pound of both quota and non-quota peanuts, and those values were used for determining the applicable coverage and indemnification rates. Based on whether-and to what extent-farm poundage quotas were allocated to individual peanut farms, these rates were used to calculate the allowable indemnification for peanut crop losses under the Policy.

B.

1.The coverage provisions of the MPCI Policy were published in the Federal Register and are codified in Title 7 of the Code of Federal Regulations. *See*7 C.F.R. §§ 457.1 *et seq*. The USDA, acting through the RMA and the FCIC, is responsible for satisfying certain deadlines and for general oversight of the MPCI Policy. *See*7 U.S.C. §§ 1501 *et seq*. The MPCI Policy also imposes certain obligations on insured farmers. The following MPCI Policy terms relate to dates and dead-lines that are pertinent to these appeals:

• All changes to the MPCI Policy's coverage provisions, price elections, coverage limits, premium rates, and program dates must generally be made prior to a "contract change date." The Policy defines the "contract change date" as the "calendar date by which we make any policy changes available for inspection in the agent's office." MPCI Basic Policy ¶ 1. For the 2002 crop year, the contract change date was November 30, 2001.

• Price elections can be offered after the contract change date, so long as they are offered no later than fifteen days prior to the "sales closing date," and are not less than those available on the contract change date. MPCI Basic Policy ¶¶ 3(e) & 4(b). The MPCI Policy defines the "sales closing date" as "a date contained in the Special Provisions by which an application must be filed. The latest date by which you may change your crop insurance coverage for a crop year." *Id*. ¶ 1. The sales closing date, which varied from state to state, was February 28, 2002, for the Farmers in the North Carolina case.[10]

[10]The sales closing dates for the MPCI Policy in the various districts outside North Carolina were in or about February 2002. For example, the sales closing date in Virginia

(continued...)

• The "cancellation date," or the date on which coverage would automatically renew unless cancelled in writing, was also February 28, 2002, in North Carolina.[11] After the cancellation date, the Farmers were bound by the MPCI Policy and could neither rescind nor alter it.

• The "earliest planting date" for North Carolina Farmers was April 16, 2002. The MPCI Policy defines the "earliest planting date" as the "earliest date established for planting the insured crop." MPCI Basic Policy ¶ 1.

• The North Carolina Farmers had until the "final planting date" of May 31, 2002, to plant their peanut crops. The "final planting date" is the "date contained in the Special Provisions for the insured crop by which the crop must initially be planted in order to be insured for the full production guarantee or amount of insurance per acre." MPCI Basic Policy ¶ 1.[12]

2. The MPCI Policy includes several other provisions and definitions that are pertinent to an understanding of these proceedings, including:

• The MPCI Policy defines "price election" as the "amounts contained in the Special Provisions or an addendum thereto, to be used for computing the value per pound ... for the purposes of determining premium and indemnity under the policy." MPCI Basic Policy ¶ 1. The price election is generally based on the FCIC's projection of market prices for a given commodity. 7 U.S.C. § 1508(c)(5) & (6).

• The MPCI Policy required each insured Farmer to file an annual "acreage report" detailing the peanut crop acreage to be planted by the farm and the "effective poundage marketing quota, if any, that is

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[10](...continued)
was March 15, 2002.

[11]The cancellation dates provided by the MPCI Policy were as follows: January 15, 2002, for certain counties in Texas; February 28, 2002, for certain other counties in Texas and all states not otherwise mentioned; and, March 15, 2002, for New Mexico, Oklahoma, Virginia, and the remaining Texas counties.

[12]FN12. Farmers outside North Carolina were also required to plant their Peanut crops in the Spring of 2002. For example, Virginia Farmers had an initial planting date of April 11, 2002, and a final planting date of June 10, 2002

applicable" to an individual farm for the current crop year. MPCI Policy Peanut Provision ¶ 6.

• The term "effective poundage marketing quota" is important with respect to this litigation and federal crop insurance, and is defined by the MPCI Policy as the "number of pounds reported on the acreage report as eligible for the average support price per pound ... not to exceed the Marketing Quota established by [the FSA] for the farm serial number." MPCI Policy Peanut Provision ¶ 1.

• The MPCI Policy defines "quota peanuts" as "[p]eanuts that are eligible to be valued at the average support price per pound." MPCI Policy Peanut Provision ¶ 1. "Non-quota peanuts," in turn, are simply defined as"[p]eanuts other than quota peanuts." *Id.*

• The "production guarantee" is defined in the MPCI Policy as the "number of pounds ... determined by multiplying the approved yield per acre by the coverage level percentage you elect." MPCI Basic Policy ¶ 1.

The MPCI Policy provides that "[t]he maximum pounds that may be insured at the quota price election" are the lesser of "the effective poundage marketing quota," or the "insured acreage multiplied by the production guarantee"-but, to the extent that the resulting figure "exceeds the effective poundage marketing quota, the difference will be insured at the non-quota peanut price election." MPCI Policy Peanut Provision ¶ 3(b). Although the MPCI Policy explains how quota peanuts are insured, it also authorizes and provides for coverage where lost or damaged crops do not involve quota peanuts. For example, the MPCI Policy makes reference to the "effective poundage marketing quota, *if any*." *Id.* ¶ 6. In calculating the maximum poundage that may be insured as quota peanuts, the MPCI Policy looks to the lesser of the effective poundage marketing quota, on the one hand, or the insured acreage multiplied by the production guarantee, on the other. If, with respect to an insured farm, the insured acreage multiplied by the production guarantee exceeds the effective poundage marketing quota, the difference is insured and indemnified at the non-quota rate only. If an insured farm has not been allocated an effective poundage marketing quota, its entire insured acreage, multiplied by the production guarantee, would exceed a quota allocation of zero and the entire production would be insured at the non-quota rate. Thus, when an annual farm poundage quota allocation for an insured farm is "zero," none of that farm's peanut production is insured at the quota rate.

The MPCI Policy similarly provides for the calculation of indemnity in the event that part or all of a Farmer's lost crops are non-quota peanuts. Specifically, the indemnity formula provides that the value of lost or damaged peanuts is computed by first multiplying the insured acreage by the production guarantee per acre. MPCI Policy Peanut Provision ¶ 14(c). The second step of this indemnity formula requires the effective poundage marketing quota of the farm to be subtracted from the resulting sum, to determine the amount of insured quota and non-quota peanuts (the amount in excess of the effective poundage marketing quota is the amount of non-quota peanuts). *Id.* After determining the amount of insured quota and non-quota Peanuts, those amounts are multiplied by their respective price elections. Thus, in the event a farm poundage quota allocation is not made to a farm with an insured crop, the MPCI Policy provides that the loss to be indemnified must be determined on the basis of the price election for non-quota peanuts. *Id.*

C.

On November 30, 2001 (the contract change date), an addendum to the MPCI Policy was issued and made effective. The addendum provided that losses suffered by 2002 crop year peanuts would be indemnified at 31 cents per pound for quota peanuts and 16 cents per pound for non-quota peanuts (as they had been indemnified for the previous several years). Two weeks later, on December 14, 2001, the USDA announced a national poundage quota for peanuts for the 2002 crop year, at the same level as the 2001 national poundage quota. The USDA announcement stated that the "2002-crop national poundage quota will be allocated to each state based on the state's share of the 2001-crop national poundage quota." J.A. 75. This announcement, however, also alerted the Farmers to the possibility that the peanut quota program for the 2002 crop year could be altered or eliminated by statute. Specifically, it advised that:

> The Farm Bill currently being considered by Congress would dramatically change the peanut program. Poundage quotas would be eliminated and price support would be replaced with a target price and deficiency payment plan. *If pending legislation is enacted as law, the 2002 poundage quota and price support announced by this release may be altered or rescinded.*

J.A. 75 (emphasis added).

As noted, this USDA announcement was made two weeks after the contract change date of November 30, 2001. On January 15, 2002, the

USDA announced that the national poundage quota for peanuts would remain the same in 2002 and "will be allocated to eligible quota and non-quota farms." J.A. 77. This announcement again warned, however, that:

> The Farm Bill currently being considered by Congress would change the peanut program. Poundage quotas would be eliminated and price support would be replaced with a target price and deficiency payment plan. *If pending legislation is enacted as Law for 2002, the 2002 poundage quota announced according to this notice will be altered or rescinded.*

J.A. 78 (emphasis added).

As these USDA announcements forecast and warned, the FSA did not allocate farm poundage quotas to individual farms in 2002. Instead, on May 3, 2002, the FSA directed its county offices not to allocate any such quotas to individual peanut farms for 2002. Ten days later, on May 13, 2002, the President signed into law the 2002 Farm Bill, which, inter alia, repealed the FSA's statutory authority to allocate farm poundage quotas to peanut farms and substantially and materially altered the federal crop assistance program for peanut farmers.

In the place and stead of the peanut quota system, the 2002 Farm Bill provided for several programs: continued price supports through non-recourse loans at rates substantially below the quota rates; a program of direct payments to farmers; a new price support program of payments triggered by the rise and fall of market prices; a marketing quota buy-out program; and a mandated increase-from 16 cents to 17.75 cents per pound-in the price election for non-quota peanuts, to be used to compute premiums and indemnity payments under the 2002 MPCI Policy. 2002 Farm Bill § 1310(c).[13]

On May 28, 2002, in response to the major statutory revisions made by the 2002 Farm Bill to the peanut quota program, the USDA sent a bulletin to the crop insurance companies, advising them that all 2002

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[13]FN13. Section 1310(c) of the Farm Bill provides, in pertinent part, that:

(c) Treatment of crop insurance policies for 2002 crop year-

(1) Applicability-This subsection shall apply for the 2002 crop year only notwithstanding any other provision of law or crop insurance policy.

(2) Price Election-the non-quota price election ... shall be 17.75 cents per pound and shall be used for all aspects of the policy relating to the calculations of premium, liability and indemnities.

peanuts were to be treated as non-quota peanuts for purposes of the MPCI Policy in the 2002 crop year. Accordingly, all indemnities made pursuant to the MPCI Policy for 2002 peanut crops were made at the non-quota rate of 17.75 cents.[14]

D.

Unfortunately, the Farmers' 2002 peanut crops suffered heavy losses and damages, primarily due to a severe drought during the growing season. When they filed their claims for indemnification under the MPCI Policy, the Farmers were informed that their losses would only be indemnified at the non-quota rate of 17.75 cents per pound, although they had been expecting indemnification at the 31 cent quota rate. Indeed, quota peanuts had usually constituted a majority of the Farmers' annual crops. When their claims for indemnification at the 31 cent rate were denied, the Farmers initiated this series of lawsuits, alleging that the MPCI Policy had been breached and that the Government had violated their due process rights.

1. The North Carolina case was filed on November 19, 2002, "on behalf of all peanut farmers in North Carolina and Virginia who are eligible for the Multiple Peril Crop Insurance Policy for crop year 2002 and are similarly situated to the named Plaintiffs." J.A. 11. Put succinctly, the complaint sought declaratory, injunctive, and compensatory relief, and requested that the proceeding be certified as a class action. It alleged that the Government had breached the MPCI Policy by the unilateral and untimely modification of its coverage terms, and asserted that the Government had violated the Farmers' due process rights by, inter alia, arbitrarily and capriciously altering the Policy by unilateral and retroactive action.

In ruling on the class certification issue in its SJ Opinion, the district court certified a class of insured Farmers whose farms were situated within the Eastern District of North Carolina and who had been assigned

[14]Thus, while the Farmers were bound to the MPCI Policy on February 28, 2002, and were obligated to plant their peanut crops between April 16 and May 31, 2002, the 2002 Farm Bill repealed the peanut quota pro-gram on May 13, 2002. This enactment occurred subsequent to the date when the Farmers were entitled to withdraw from the MPCI Policy or able to reevaluate the planting of their 2002 peanut crops-although the Farmers had twice been placed on notice by the USDA (on December 14, 2001, and, again on January 15, 2002) of likely changes to the peanut quota program.

farm poundage quotas for the 2001 crop year. *See* SJ Opinion 11-23. The court concluded, however, pursuant to § 1508(j) of Title 7, that it lacked jurisdiction over insured Farmers whose farms were situated outside the Eastern District of North Carolina, and thus excluded them from the certified class. *Id.* at 12, 19.[15]

The district court then proceeded to address the parties' cross-motions for summary judgment, and ruled in favor of the Farmers on the merits of their breach of contract claims. *See* SJ Opinion 32-46. In so ruling, the court concluded that the Government had breached its contractual obligation under the MPCI Policy to indemnify the Farmers' 2002 lost peanut crops at the 31 cent quota rate. The court reasoned that the Government, by the 2002 Farm Bill's repeal of the FSA's authority to allocate farm poundage quotas, had hindered the occurrence of a condition that would have given rise to coverage and indemnity at the 31 cent rate, and that the Government was thus barred from denying liability under the MPCI Policy. *Id.* at 35-38. The court also determined that neither the "sovereign acts doctrine" nor the "unmistakability doctrine" afforded the Government a valid defense to liability. *Id.* at 39-47.

With respect to the "sovereign acts doctrine," the court recognized that the Government would possess a valid defense to the Farmers' breach of contract claims if a "public and general" law prevented the occurrence of a condition giving rise to liability. SJ Opinion 39-42. It concluded, however, that the 2002 Farm Bill, in repealing the poundage marketing quota program, included a provision that "obviously and specifically targeted the contractual obligations under the peanut farmers' pre-existing crop insurance policies for the 2002 crop year." *Id.* at 44. The court concluded that "the reduction of insurance coverage was direct, not merely incidental to the accomplishment of a broader governmental objective." *Id.* (internal quotation marks omitted). It thus determined that the sovereign acts doctrine did not authorize the Government to escape liability for the Farmers' breach of contract claims. *Id.* at 46.

The court next concluded that, "because the [2002 Farm Bill] was not 'public and general,' the unmistakability doctrine does not apply." SJ Opinion 46. With respect to the due process claims, the court determined that the "plaintiffs' due process arguments are primarily based on their

[15] As noted above, § 1508(j) of Title 7, as relied upon in the SJ Opinion, provides that if a "claim for indemnity is denied by the [FCIC] or an approved provider, an action on the claim may be brought against the [FCIC] or Secretary [of Agriculture] only in the United States district court for the district in which the insured farm is located." *See supra* note 8.

contract claims." *Id.* at 47-48. Concluding that it had "already discussed the plaintiffs' contract claim at length and found for the plaintiffs as to this claim," the court found it unnecessary to resolve the plaintiffs' due process claims. *Id.*[16]

2. When the district court made its rulings in the SJ Opinion, several similar lawsuits were being pursued in other federal courts. One such proceeding, filed in the Court of Federal Claims on behalf of Farmers in Texas, Georgia, Alabama, Florida, and South Carolina, was dismissed on December 16, 2003, for lack of jurisdiction. On appeal, the Federal Circuit concurred in the jurisdictional ruling, but vacated the dismissal and remanded to the Court of Federal Claims for transfers of the lawsuits to the appropriate district courts. *Tex. Peanut Farmers Ass'n v. United States,* 409 F.3d 1370 (Fed.Cir.2005). The Farmers in those cases then requested the MDL Panel to transfer their claims to the Eastern District of North Carolina, pursuant to 28 U.S.C. § 1407. The MDL Panel agreed, and transferred these and other cases to the district court "for coordinated or consolidated pretrial proceedings." J.A. 292 (citing 28 U.S.C. § 1407).[17]

On March 31, 2005, and December 20, 2006, the district court certified several additional district-wide classes in the MDL cases.[18] The class certification orders entered with respect to the MDL cases tracked the court's class certification ruling in the SJ Opinion in the North Carolina case-certifying district-wide classes of Farmers whose insured peanut crops were located within the district in which their cases had

[16]The district court also appears to have based its SJ Opinion, at least in part, on a theory of detrimental reliance. In its breach of contract analysis, the court concluded that "it was fundamentally wrong for the government to tell the farmers that they would have insurance coverage at $0.31 per pound for as many peanuts as the FSA declared to be quota peanuts, and then, after the farmers had planted their crops, to tell the FSA not to declare any quota peanuts." SJ Opinion 38.

[17]On October 26, 2004, the MDL Panel first transferred six MDL cases to the Eastern District of North Carolina for coordinated or consolidated pretrial proceedings. Thereafter, on June 21, 2006, the Panel transferred several additional MDL cases to the Eastern District of North Carolina. These lawsuits were consolidated in the Eastern District of North Carolina pursuant to 28 U.S.C. § 1407, which authorizes the judicial panel on multidistrict litigation to transfer civil actions involving one or more common questions of fact to a single district for "coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a).

[18]The ten additional district-wide classes certified by the district court in the MDL cases include Farmers in the Middle District of Alabama, the Northern District of Florida, the Southern and Middle Districts of Georgia, the District of South Carolina, the Northern, Southern, Eastern, and Western Districts of Texas, and the Eastern District of Virginia.

originally been pending. *See* MDL Order I at 3; MDL Order II at 5. The court also ruled that its SJ Opinion, rendering the Government liable on the Farmers' breach of contract claims, extended to each of the certified classes of Farmers in the MDL cases. *See* MDL Order I at 2; MDL Order II at 4.

On March 31, 2005, after receiving recommendations from the Farmers and the Government, the district court entered its Damages Order, explaining the formula it would apply to the calculation of the Farmers' damages. The formula first provided for the calculation of the Farmers' hypothetical 2002 farm poundage quota and non-quota amounts. This initial calculation was a necessary starting point because there had been no 2002 farm poundage quota allocations made to individual peanut farms. The Damages Order called for these hypothetical farm poundage quota and non-quota amounts to be determined by multiplying each individual Farmer's 2002 production guarantee by the district-specific percentage of quota liability for 2001 to arrive at a quota amount. *See* Damages Order 2. The amount of lost "quota" production for each Farmer was then multiplied by the difference between the 2002 rate for non-quota peanuts (17.75 cents) and the 31 cent quota rate that had been announced prior to the 2002 Farm Bill. *Id.* at 2-3.[19] After calculating the damage awards under this formula, the court, on December 20, 2006, entered Final Judgment for the Farmers in the aggregate sum of approximately $ 30.1 million.

3. The district court's Final Judgment made its rulings appealable under Rule 54(b) of the Federal Rules of Civil Procedure, ordering as follows:

[P]ursuant to Rule 54(b), ... more than one claim for relief has been presented and multiple parties are involved, the Court hereby enters Final Judgment in favor of all plaintiffs and class members who presently have cases pending before this Court as to the breach of contract claim. The Court further finds that there is no just reason for delay.

The court thus determined that its judgment was final with respect to the breach of contract claims, and also found that there was no just reason for delay. The Government filed its notice of appeal on February 16,

[19] Although the court authorized reductions in this formula to account for unpaid premiums, it rejected the Government's contention that the damage awards should be further reduced by disaster relief payments the Farmers received to compensate for their 2002 peanut crop losses. The court also declined to deduct benefits received by the Farmers from the commodity assistance program that the 2002 Farm Bill authorized to replace the peanut quota program.

2007, and the Farmers have cross-appealed. We possess jurisdiction pursuant to 28 U.S.C. § 1291. *See Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 428-29, 76 S.Ct. 895, 100 L.Ed. 1297 (1956).

II.

We review de novo a district court's award of summary judgment, viewing the facts and inferences drawn therefrom in the light most favorable to the non-moving party. *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.,* 377 F.3d 408, 418 (4th Cir.2004). An award of summary judgment is appropriate only "if ... there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact is one "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). We also review de novo a district court's assessment of an insurance policy, in that issues of contract interpretation constitute questions of law. *See Hendricks v. Central Reserve Life Ins. Co.,* 39 F.3d 507, 512 (4th Cir.1994).

III.

The Government's contention that the district court erred in awarding summary judgment to the Farmers on their breach of contract claims is premised on two basic propositions: (1) that the court erred by concluding that the MPCI Policy obligated the insurers to indemnify the Farmers at the 31 cent quota rate in the absence of 2002 farm poundage quota allocations having been made to individual farms; and (2) that the court incorrectly determined that the Government's failure to allocate such 2002 farm poundage quotas breached the MPCI Policy, based on its conclusion that the enactment of the 2002 Farm Bill hindered the performance of the Government's statutory duty to allocate such quotas. The Government also maintains that the court erroneously premised its SJ Opinion, in part, on the Farmers' alternative theory of detrimental reliance. As explained below, we agree with the Government that the district court erred in awarding summary judgment to the Farmers on their breach of contract claims.

A.

Before turning to the Government's contentions of error, we must first ascertain the body of law that applies to our analysis of these contract

issues. As an initial proposition, "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *United States v. Winstar Corp.,* 518 U.S. 839, 895, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) (internal quotation marks omitted). And, as the Federal Circuit recently observed, "[i]t is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law, which become federal common law." *Long Island Sav. Bank, FSB v. United States,* 503 F.3d 1234, 1245 (Fed.Cir.2007) (internal quotation marks omitted). The Federal Circuit further concluded that "[t]he Restatement of Contracts reflects many of the contract principles of federal common law." *Id.; see also Mobil Oil Exploration & Producing Se., Inc. v. United States,* 530 U.S. 604, 608, 120 S.Ct. 2423, 147 L.Ed.2d 528 (2000) (relying on Restatement of Contractsfor principles of repudiation and restitution); *Franconia Assocs. v. United States,* 536 U.S. 129, 141-43, 122 S.Ct. 1993, 153 L.Ed.2d 132 (2002) (applying principles of general contract law by relying in part on Restatement (Second) of Contracts). Both the district court and the parties in this litigation, through their reliance on the Restatement of Contracts and other general principles of contract law, have impliedly agreed that the contract principles of federal common law should govern this dispute. Because neither the Government nor the Farmers contend that Congress promulgated or mandated a different standard, we will apply such principles in our assessment of the breach of contract issues. *Cf. Battle v. Seibels Bruce Ins. Co.,* 288 F.3d 596, 607 (4th Cir.2002) (concluding that "the law is well settled that federal common law *alone* governs the interpretation of insurance policies issued pursuant to the [National Flood Insurance Program]"). We now turn to the Government's contentions of error on the district court's breach of contract rulings.

B.

First, we agree with the Government that the MPCI Policy did not create any contractual obligation for the insurers to indemnify the Farmers for lost peanuts in 2002 at the 31 cent quota rate. Instead, the indemnity obligation at the quota rate was contingent on 2002 farm poundage quota allocations being made to individual peanut farms. Absent such 2002 allocations, there was no obligation under the MPCI Policy for the Farmers to be indemnified at the 31 cent quota rate. Put simply, to be indemnified at the 31 cent rate, an insured farm had to be assigned a 2002 farm poundage quota by the FSA. Because the FSA did not assign farm poundage quotas for the 2002 crop sea-son, the Farmers

were never insured at the 31 cent quota rate, and their claims were properly indemnified at the 17.75 cent non-quota rate. *See Studio Frames, Ltd. v. Std. Fire Ins. Co.,* 483 F.3d 239, 245 (4th Cir.2007) (applying federal common law to interpretation of federal insurance policy and determining that "if the policy language in issue is clear and unambiguous, we apply it directly").

This interpretation is supported by the express terms of the MPCI Policy, which required each Farmer to file an "acreage report," detailing the farm's peanut acreage and the "effective poundage marketing quota, *if any,* that is applicable" to the farm for the current crop year. MPCI Policy Peanut Provision ¶ 6 (emphasis added). The MPCI Policy provides that "the effective poundage marketing quota, *if any,* for each unit" is not to exceed the farm poundage quota allotment-a provision that specifically contemplates the contingency of no quota allocations being made to an insured farm. *Id.* ¶¶ 1, 6 (emphasis added). As the Government asserts, the MPCI Policy was applicable to all insured peanut farms, including those that had not previously been allocated any farm poundage quotas. Thus, the MPCI Policy makes no promise to provide coverage and indemnification at the 31 cent quota rate in the absence of the FSA's allocation of 2002 poundage quotas to individual farms.

This point is further supported by the fact that, absent the 2002 farm poundage quota allocations, it would be impossible to insure the Farmers at the 31 cent quota rate. This is so because the MPCI Policy provides that "[t]he maximum pounds that may be insured at the quota price election" may not exceed "the effective poundage marketing quota"-defined in turn as a quantity of peanuts "not to exceed the Marketing Quota established by FSA for the farm serial number." MPCI Policy Peanut Provision ¶¶ 1, 3. As a result, if the FSA farm poundage quota for an insured farm is "zero," none of that farm's Peanut crop is insured at the 31 cent quota rate.

The MPCI Policy's indemnity formula also supports the interpretation that, absent 2002 farm poundage quota allocations, the insurers have no obligation to indemnify the Farmers at the 31 cent quota rate. As noted above, the Policy's indemnity formula provides that the value of insured peanuts must first be computed by determining an insured farm's amounts of quota and non-quota peanuts (by subtracting the effective poundage marketing quota from the production guarantee), and then multiplying these amounts by their respective price elections. Thus, the MPCI Policy does not, absent the allocation of 2002 farm poundage quotas, authorize

indemnification at the 31 cent quota rate. *See* MPCI Policy Peanut Provision¶ 14. This point is illustrated by the fact that the district court was unable to calculate the Farmers' damages at the 31 cent quota rate without resorting to an extrinsic source, i.e., 2001 poundage quota amounts, in the formula provided by its Damages Order. *See* Damages Order 2-3.

The Farmers, on the other hand, maintain that the Government's announcements, as well as the MPCI Policy, contain both express and implied promises that the Farmers would be indemnified at the 31 cent quota rate for what should have been their lost 2002 farm poundage quota peanuts, and that enactment of the 2002 Farm Bill and the Government's handling of their indemnity claims breached those promises. In particular, the Farmers point to the MPCI Policy provision that coverage will not be reduced:

> In addition to the price election or amount of insurance available on the contract change date, we may provide an additional price election or amount of insurance no later than 15 days prior to the sales closing date.... These additional price elections ... will not be less than those available on the contract change date.

MPCI Basic Policy ¶ 3(e); *see also id.* ¶ 4 (providing that any changes in policy provisions, including price elections, will be provided no later than the contract change date, except that price elections may be offered after that time in accordance with paragraph 3).

As noted above, the 2002 Farm Bill specifically altered the price election (although expressly for *non-quota peanuts* only), by providing that

> the non-quota price election ... shall be 17.75 cents per pound and shall be used for all aspects of the policy relating to the calculations of premium, liability and indemnities.

2002 Farm Bill § 1310(c)(2).

Put succinctly, under the 2002 Farm Bill, all peanuts were "non-quota peanuts." The Farmers, however, contend that the alteration to the price election for non-quota peanuts made by the 2002 Farm Bill was in fact a change to the price election for quota peanuts-reducing overall coverage and directly contravening the MPCI Policy Peanut Provisions. *See* MPCI Policy Peanut Provision ¶ 3 (providing that "additional price elections ... will not be less than those available on the contract change date"). Because the price election of 17.75 cents, as specified in the 2002 Farm Bill, actually *raises* the price election for non-quota peanuts, we disagree

with the Farmers on this point. This aspect of the 2002 Farm Bill thus does not constitute a breach of the MPCI Policy.

The Farmers nevertheless contend that section 1310(c) of the 2002 Farm Bill not only altered the price election, it did so after the date specified for such alterations in the MPCI Policy. Even if the terms of the MPCI Policy were somehow violated when the 2002 Farm Bill raised the price election for non-quota peanuts after the Policy's deadlines, we would decline to award relief on that basis. Put simply, the Farmers cannot demonstrate that the increase made by the 2002 Farm Bill to their indemnity for non-quota peanuts (to 17.75 cents), even if made after the change date specified in the Policy, resulted in an injury to them. *See, e.g., Santana, Inc. v. Levi Strauss & Co.,* 674 F.2d 269, 275 (4th Cir.1982) (concluding that, in order to maintain action for breach of contract, plaintiff must show that alleged breach caused injury, and finding no injury occurred when alleged breach benefited plaintiff).

The Farmers' primary contention, of course, is not that the 2002 Farm Bill raised the indemnity rate for non-quota peanuts, but that the Government was able to avoid indemnifying them at the 31 cent quota by enactment of the 2002 Farm Bill. Although the MPCI Policy provides that "additional" price elections may be offered after the contract change date, the Farmers' contention that the 2002 Farm Bill *replaced* the price elections available under the MPCI Policy (rather than offering additional ones) is unpersuasive. In the absence of farm poundage quotas being allotted to individual farms, the Farmers were unable to avail themselves of the 31 cent quota rate, regardless of whether the 2002 Farm Bill replaced that rate or simply provided price elections in addition to it.

We are similarly unpersuaded by the Farmers' contention that the two USDA announcements of December 14, 2001, and January 15, 2002, made express or implied warranties to them with respect to the 2002 farm poundage quotas for peanuts. Although the USDA announcements indicated that the 2002 national poundage quotas would remain the same as in the previous year, and that such quotas would be allocated to eligible farms in the future, the announcements explicitly warned the Farmers that Congress was considering a Farm Bill that would change the peanut price support program by eliminating poundage quotas. Importantly, these announcements specified that, if the 2002 Farm Bill was enacted, the national poundage quotas for peanuts would be either altered or rescinded.

In these circumstances, we agree with the Government's contentions, and reject those of the Farmers'. Although we have great sympathy for the hard-working peanut farmers of this country, our obligation is to rule on the basis of the factual underpinnings and the applicable legal principles. The MPCI Policy and the USDA's announcements neither expressly nor impliedly promised to indemnify the Farmers at the 31 cent quota rate, absent farm poundage quota allocations being made by the FSA for the 2002 crop year. The MPCI Policy thus did not, absent 2002 farm poundage quota allocations being made to individual farms, create a contractual obligation on the part of either the Government or the insurers to indemnify the Farmers for their 2002 peanut crop losses at the 31 cent quota rate. *See Studio Frames, Ltd. v. Std. Fire Ins. Co.,* 483 F.3d 239, 245 (4th Cir.2007) (applying federal common law to interpretation of federal insurance policy and determining that "if the policy language in issue is clear and unambiguous, we apply it directly").

C.

Our analysis of the Farmers' breach of contract claims does not end here, however. The district court, in part, premised its finding of a breach on the legal principle that, in the proper circumstances, a contract condition (here, the allocation of 2002 farm poundage quotas) may be excused if the promisor prevents or hinders the occurrence of the condition and it would have otherwise occurred. Accordingly, although the court appears to have concluded that, under the terms of the MPCI Policy, the Government was not obligated to indemnify the Farmers at the 31 cent quota rate, the court nevertheless found a breach by the Government, concluding that it had prevented the FSA from allocating farm poundage quotas to individual farms for the 2002 crop year. In its ruling, the court relied for this conclusion on section 295 of the Restatement (First) of Contracts, which provides:

> If a promisor prevents or hinders the occurrence of a condition, ... and the condition would have occurred ... except for such prevention or hindrance, the condition is excused, and the actual or threatened nonperformance of the return promise does not discharge the promisor's duty, unless ... (a) the prevention or hindrance by the promisor is caused or justified by the conduct or pecuniary circumstances of the other party.

SJ Opinion 35-36 (citing Restatement (First) of Contracts § 295 (1932) as quoted in *Powers v. Sims & Levin,* 542 F.2d 1216, 1226 (4th Cir.1976) (Winter, J., concurring and dissenting)).

Based on this Restatement provision, the court concluded that such a hindrance had occurred when the 2002 Farm Bill, enacted on May 13, 2002, eliminated the statutory directive to the FSA to allocate farm poundage quotas to individual farms for each crop year. *Id.* at 36-38 (citing 7 U.S.C. § 1358-1(b)(1)(A) (2001)). The court further concluded that, as "the FSA would have assigned the farm poundage quotas had the [2002 Farm Bill] not prevented or hindered it from doing so, the [requirements] of § 295[are] met." *Id.* at 35-36.

Although Judge Parker recognized years ago, in *Fuller Co. v. Brown,* that "[i]t is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance ... of a condition upon which his own liability depends, he cannot take advantage of the failure,"*see*15 F.2d 672, 678 (4th Cir.1926) (quoting 2 *Williston on Contracts* § 677), that legal principle is inapplicable to this appeal. The indemnification of the Farmers under the MPCI Policy did not "depend" on FSA's allocation of 2002 farm poundage quotas. The district court thus erred in excusing what it viewed as the "condition" of 2002 farm poundage allocations. A "condition," as defined by the Restatement (Second) of Contracts, is "an event, not certain to occur, which *must* occur, unless its non-occurrence is excused, *before* performance under a contract becomes due." Restatement (Second) of Contracts § 224 (emphasis added); *see also*13 *Williston on Contracts* § 38:7 (4th ed. 2006) ("A condition precedent is either an act of a party that must be performed or a certain event that must happen before a contractual right accrues or contractual duty arises."); *Moore Bros. Co. v. Brown & Root, Inc.,* 207 F.3d 717, 725 (4th Cir.2000) ("The prevention doctrine is a generally recognized principle of contract law according to which if a promisor prevents or hinders fulfillment of a *condition to his performance,* the condition may be waived or excused."(emphasis added)).[20]

The only condition to the indemnification of the Farmers under the MPCI Policy was the occurrence of a natural cause of covered loss. *See* MPCI Policy Peanut Provision ¶ 11 (providing coverage for loss caused by, inter alia, adverse weather conditions, fire, insects, plant disease, wildlife). When a covered loss occurs, the obligation of the insurer to indemnify under the MPCI Policy is triggered. There is, however, no

[20]In addition to not being a "condition" to its performance under the MPCI Policy, the Farmers failed to demonstrate that the Government made an enforceable promise to allocate poundage quotas to individual peanut farms. As the Restatement (Second) of Contracts provides, "[n]on-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur."Restatement (Second) of Contracts § 225.

Policy provision that conditions such indemnification on whether farm poundage quotas are allocated to an individual farm for a particular crop year. Instead, the farm poundage quota allocations simply play a role in the *computation* of the indemnification to be paid to the Farmers for their covered losses. Thus, the Government is also correct on this point-performance under the MPCI Policy is not conditioned on the allocation of farm poundage quotas by the FSA.

Importantly, our conclusion on this contention is supported by the fact that the Farmers have already been indemnified for their 2002 crop losses under the MPCI Policy-although they were indemnified at the non-quota rate of 17.75 cents, rather than at the 31 cent quota rate they seek in this litigation. Thus, the Government did not hinder the occurrence of any condition that had to occur before an indemnification obligation under the MPCI Policy was triggered. Indemnification was due when the Farmers presented their claims for covered losses under the MPCI Policy, and the insurers performed under the Policy by indemnifying those losses at the non-quota rate of 17.75 cents.

Because the allocation of the 2002 crop year farm poundage quotas was not a "condition" of performance under the MPCI Policy, we disagree with the SJ Opinion on this issue. Although the 2002 farm poundage quota allocations were an essential precursor to the Farmers being indemnified at the 31 cent quota rate, they were not a condition to the insurers' performance under the coverage and indemnification provisions of the MPCI Policy. As a result, the district court erred in concluding in its SJ Opinion that a breach of the MPCI Policy occurred, and in awarding summary judgment to the Farmers on their breach of contract claims. We must therefore vacate the court's ruling in this regard.[21]

D.

Finally, the Government disagrees with the Farmers' alternative contention that they are entitled to indemnification for their crop losses at the 31 cent rate because they had expended substantial sums of money and resources in reliance on the MPCI Policy and on the USDA announcements (which had forecast allocations of poundage quotas in

[21] The Government also argues that the district court erred in its application of the unmistakability and sovereign acts doctrines. These doctrines create exceptions from government liability when a breach is caused by an act of the government. Because, as explained herein, the Government is not liable for any breach of the MPCI Policy, we need not assess assertions in this regard.

2002 at the same rates and percentages as in earlier years). Such reliance by the Farmers included, inter alia, planting their peanut crops, entering into leases and bank loans, foregoing other farming options, and cancelling other insurance coverage. Because the peanut quota program was not repealed by the 2002 Farm Bill until after the announcement of the national poundage quota for the 2002 crop year-when the MPCI Policy was already final and after the beginning of the 2002 planting season-the Farmers contend that they are entitled to recover their damages. The elements of such a detrimental reliance claim are: (1) a promise, (2) which the promisor should reasonably expect to cause action by the promisee, (3) which does cause such action, and (4) which should be enforced to prevent injustice to the promisee. *C & K Petrol. Prods., Inc. v. Equibank,* 839 F.2d 188, 192 (3d Cir.1988) (citing Restatement (Second) of Contracts § 90).

The Government asserts, on the other hand, that the Farmers' unilateral expectation that farm poundage quota authority would remain in effect for the 2002 crop year does not afford them any basis for imputing to the MPCI Policy an implied promise to indemnify at the 31 cent quota rate. *See Maccaferri Gabions, Inc. v. Dynateria Inc.,* 91 F.3d 1431, 1444 (11th Cir.1996) (looking to Restatement (Second) of Contracts § 90 and concluding that "[i]t is axiomatic that a plaintiff cannot recover for reasonable, detrimental reliance on a promise with-out proving that the defendant made the promise"). Furthermore, the Government contends that the Farmers could not reasonably rely on the fact that poundage quota allocations were made in previous years, because earlier amendments to farm support programs clearly indicated that the peanut quota program was subject to congressional modification.

Modifications to government programs by congressional action are not at all out of the ordinary, and had indeed occurred recently in the context of the peanut quota program. For example, in 1996, Congress barred the allocation of such quotas to farms controlled by public entities or non-producers residing out of state. *See* Federal Agriculture Improvement and Reform Act, Pub.L. No. 104-127, § 155(i)(1)(A)(v), 110 Stat. 888, 927 (1996) (adding 7 U.S.C. § 1358-1(b)(1)(D)). Similarly, Congress eliminated statutory provisions establishing specific minimums on the national poundage quota, an amendment that substantially reduced the peanut quota allocations to individual farms. *Id.*§ 155(i)(2) (amending 7 U.S.C. § 1358-1(a)(1)). Accordingly, as the Government asserts, there has been a "'persistent congressional refinement of the peanut quota program.'" Br. of Appellants 29 (quoting *Members of the Peanut Quota*

Holders Assoc. v. United States, 60 Fed.Cl. 524, 530 (2004)).

Finally, the USDA's warnings of forthcoming alterations or revisions to the peanut quota program, received by the Farmers in late 2001 and early 2002, substantially undermine their reliance contentions. As detailed above, the events immediately preceding the 2002 crop year made clear to the Farmers that congressional action on the peanut quota program was likely to occur. For example, in its December 14, 2001 announcement of the national poundage quota for Peanuts, the USDA warned:

> The Farm Bill currently being considered by Congress would dramatically change the peanut program. Poundage quotas would be eliminated and price support would be replaced with a target price and deficiency payment plan. *If pending legislation is enacted as law, the 2002 poundage quota and price support announced by this release may be altered or rescinded.*

J.A. 75 (emphasis added).

Similarly, in its January 15, 2002 announcement, the USDA again warned that "[t]he Farm Bill currently being considered by Congress would change the peanut pro-gram....*If pending legislation is enacted as Law for 2002, the 2002 poundage quota announced according to this notice will be altered or rescinded.*" J.A. 78 (emphasis added). Significantly, legislation repealing the peanut quota program had passed the House of Representatives in October 2001, well before the MPCI Policy for the 2002 crop year became final. *See*147 Cong. Rec. H6407 (Oct. 5, 2001).

In these circumstances, the Farmers were on ample notice in late 2001 and early 2002 of the possibility-indeed, the likelihood-of major changes (i.e., alteration or rescission) being made to the peanut quota program. Although the timing of the 2002 Farm Bill was unfortunate for the Farmers, their assertions of reliance on the 2002 farm poundage quota allocations being made to individual peanut farms are misplaced, particularly when viewed in the context of the specific announcements of the USDA.[22]

IV.

[22]In light of our disposition of these appeals, we need not reach the Government's assertions of error concerning the Damages Order. To the extent the Farmers seek to pursue the class and venue contentions they have raised on cross-appeal, the district court may revisit these issues in light of this opinion.

Pursuant to the foregoing, we vacate the district court's award of summary judgment to the Farmers and remand for such further proceedings as may be appropriate.

VACATED AND REMANDED

GREAT AMERICAN INSURANCE COMPANY v. WAYNE C. MILLS AND WAYNE C. MILLS FARM, INC.
Civil Action No. 4:06-cv-01971-RBH.
Filed May 29, 2008.

Cite as: 2008 WL 2250256 (D.S.C.).

FCIA – Substantial beneficial interest – Insurable interest, bone fide .

Wayne Mills, as an individual, had for several years purchased crop loss insurance as an individual. As a result of tax advice, he transferred the farm to his corporation of which he is the only stockholder. Although the crop loss insurance program required the insured to provide information regarding a change in substantial beneficial interest, his declaration of ownership interest did not change thus was a violation of crop insurance policy. Great American Insurance dutifully paid a crop loss claim to the individual and then when the ownership error (the Corporation's 100% ownership) was discovered sued to recover the indemnities paid. Mills defended on unjust enrichment, and negligence in the insurer's agent. The court determined that the Wayne Mills does not have a bone fide insurable interest and his wholly owned corporation is not listed on the crop loss policy as an insured.

United States District Court,
D. South Carolina,
Florence Division.

ORDER

R. BRYAN HARWELL, District Judge.

Plaintiff Great American Insurance Company initiated this action on July 7, 2006, for declaratory and other relief relating to certain federally reinsured Multiple Peril Crop Insurance policies. The defendants filed an Answer and Counterclaim on August 7, 2006, alleging as counterclaims negligence, bad faith refusal to pay insurance benefits, breach of fiduciary duty, unjust enrichment, fraud, breach of contract, conversion, and unfair

trade practices.

Plaintiff filed a Motion for Summary Judgment with supporting memorandum and other documentation on July 17, 2007. The defendants filed a response to the motion on August 20, 2007. Plaintiff filed a Reply on August 30, 2007. A hearing was held on the motion before the undersigned on March 20, 2008.

Background and Undisputed Facts

Based on a review of the record and the arguments of counsel, the court will first set forth the undisputed facts.

1. Defendant Wayne C. Mills ("Mills") is a South Carolina farmer who has purchased crop insurance since 1988. Defendant Wayne C. Mills Farm, Inc. is a South Carolina corporation whose sole shareholder is Wayne C. Mills.

2. Great American Insurance Company ("Great American") is an insurance company which is authorized to issue federally-reinsured crop insurance, subject to the Federal Crop Insurance Act ("FCIA"), 7 U.S.C. Section 1501, *et. seq.* Great American is a party to a Standard Reinsurance Agreement ("SRA") with the United States Department of Agriculture ("USDA") Federal Crop Insurance Corporation ("FCIC"). The Risk Management Agency ("RMA") is an agency of the United States Department of Agriculture which administers the FCIC.

3. Mills applied individually for crop insurance with the plaintiff, Great American Insurance Company, in 1995. He applied for Multi-Peril Crop Insurance ("MPCI") for his crops located in Chesterfield and Marlboro Counties, in South Carolina. Great American accepted the applications and issued Mills coverage in Chesterfield County under policy number 1995-030-855918 and Marlboro County under policy number 199-030-855913. The policies renewed annually until cancelled or transferred to another carrier. (*See* Affidavit of Terry Young ¶ 7 and Affidavit Exhibits A and B.) Neither party cancelled the coverage, and it was not transferred to another carrier during the pertinent time frame.

4. Between 1995 and 2005, Mills obtained MPCI with Great American through Mr. Frankie Gardner with Lydia Insurance Agency.[1] Gardner

[1]Mills testified in his deposition that he had purchased crop insurance from Great American since 1988.

was an authorized agent for Great American.

5. On February 25, 2002, Mills incorporated his business on the advice of his accountant. He was the 100% shareholder for the company and the name of the entity was Wayne C. Mills Farm, Inc.

6. As of sometime in 2002, Wayne C. Mills Farm, Inc. owned the crops insured by the MPCI policies.

7. From 2002 to 2005, Wayne C. Mills Farm, Inc. made all premium payments on the policies in question.

8. The named insured on the policies was not changed from Mills individually to the corporation at the time the corporation acquired ownership of the crops. However, Mills did notify the USDA Farm Service Agency ("FSA") that Wayne C. Mills Farm, Inc. was the owner of the crops starting in crop year 2002.

9. In 2003, Jerry Mills (brother of Wayne Mills and holder of durable power of attorney for him individually) submitted an application for crop insurance on Mills' behalf individually, requesting that additional coverages be added.

10. Mills individually submitted 2004 Acreage Reporting Forms for Chesterfield and Marlboro Counties to Great American on which he reported that he had a 100% share in the crops.

11. In 2004, Mills individually claimed losses on the corn crops in Chesterfield and Marlboro Counties and received two indemnities from Great American. Mills received $14,448 under Policy No. 855913 and $16,199 under Policy No. 855918.

12. In 2005, Mills submitted 2005 Acreage Reporting Forms to Great American on which he again reported that he individually had a 100% share in the crops.

13. In 2005, Mills claimed losses individually on the Marlboro County soybean crop. Great American sent Mills a check, on which it subsequently stopped payment, in the amount of $21,596.

14. In June 2005, MPCI policy change forms were submitted to the company and Great American changed the named insured entity from

Wayne C. Mills to Wayne Mills Farm, Inc.

15. The federal crop insurance program requires that "if any of the information regarding persons with a substantial beneficial interest changes during the crop year, you must revise your application by the next sales closing date applicable under your policy to reflect the correct information."*See* Affidavit of Terry Young and attached MPCI Common Crop Insurance Policy Terms and Conditions, ¶ 2(b) (Docket Entry # 59-6). For corn and soybean crops in the 2005 crop year, the sales closing date was February 28, 2005. *See* Special Provisions of Insurance 2005 (Docket Entry # 59-6). The policy defines "sales closing date" as "a date contained in the Special Provisions by which an application must be filed. The last date by which you may change your crop insurance coverage for a crop year." ¶ 1.

16. When it received the policy change forms advising that the corporation Wayne C. Mills Farm, Inc. was the true owner of the crops, Great American stopped payment on the 2005 indemnity payment check and refunded to Mills individually premiums paid under the 2005 policies in the amount of $877 and $817, respectively. This was because the deadline for the application change was February 28, 2005, and Mills individually, who was the named insured, did not own the crops.

17. Great American kept $2781 of the 2004 premium payment that was paid by the corporation and applied it to reduce the 2004 alleged improperly paid indemnities of $14,448 and $16,199 which were paid to Mills individually, but allegedly should not have been paid since Mills' corporation was the owner of the crops, and since the Mills corporation was not listed as the named insured on the policy.

Motion for Summary Judgment by Great American

Plaintiff has moved for summary judgment on several grounds. It first requests a declaratory judgment that defendant Mills was the only named insured and that he did not have an insurable interest in the crops which he purported to insure under the 2004 and 2005 policies. As a result, the company contends that Great American is entitled to reimbursement from Mills for the 2004 indemnities in the total amount of $30,647 and interest at the rate of 1.25% simple interest per calendar month. Great American also requests a declaratory judgment that Mills intentionally concealed or misrepresented the material facts relating to his ownership of the crops and that he must pay Great American 20% of the premiums due under the 2004 and 2005 policies. In the alternative, Plaintiff requests a declaratory

judgment based upon unjust enrichment that Mills must reimburse Great American for the 2004 indemnities paid in addition to interest. Finally, it asserts that summary judgment should be granted in its favor on each of the defendant's counterclaims.

Defendants contend that the carrier's claims are barred by equitable estoppel, waiver and/or laches and that the motion for summary judgment should be denied on the counterclaims. However, Defendants do not make any arguments relating to the fraud counterclaim; thus, the Court finds that the motion for summary judgment on the counterclaim for fraud should be granted. The parties' arguments regarding the other counterclaims will be discussed hereinbelow.

Summary Judgment Standard

Plaintiff filed its motion for summary judgment pursuant to Rule 56, Fed.R.Civ.P. The moving party bears the burden of showing that summary judgment is proper. Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Fed.R.Civ.P; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment is proper if the non-moving party fails to establish an essential element of any cause of action upon which the non-moving party has the burden of proof. *Celotex,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265. Once the moving party has brought into question whether there is a genuine issue for trial on a material element of the nonmoving party's claims, the non-moving party bears the burden of coming forward with specific facts which show a genuine issue for trial. Fed.R.Civ.P. 56(e); *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The non-moving party must come forward with enough evidence, beyond a mere scintilla, upon which the fact finder could reasonably find for it. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. *Shealy v. Winston,* 929 F.2d 1009, 1011 (4th Cir.1991). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *Baber v. Hosp. Corp. of Am.,* 977 F.2d 872, 874-75 (4th Cir.1992). The evidence relied upon must meet "the substantive evidentiary standard of proof that would apply at trial on the merits."*Mitchell v. Data General Corp.,* 12 F.3d 1310, 1316 (4th Cir.1993).

Relevant Policy Provisions and Regulations

The Multiple Peril Crop Insurance policies provide in the introduction thereto:

> This insurance policy is reinsured by the Federal Crop Insurance Corporation (FCIC) under the provisions of the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*) (Act). All provisions of the policy and rights and responsibilities of the parties are specifically subject to the Act. The provisions of the policy are published in the *Federal Register* and codified in chapter IV of title 7 of the Code of Federal Regulations (CFR) under the Federal Register Act (44 U.S.C. 1501 *et seq.*) And may not be waived or varied in any way by the crop insurance agent or any other agent or employee of FCIC or the company. In the event we cannot pay your loss, your claim will be settled in accordance with the provisions of this policy and paid by FCIC.

The 2004 and 2005 Basic Provisions of the policy, ¶ 1, define "insured" as follows:

> The named person as shown on the application accepted by us. This term does not extend to any other person having a share or interest in the crop (for example, a partnership, landlord, or any other person) unless specifically indicated on the accepted application.

Paragraph 10, "Share Insured," of the Basic Provisions provides: "(a) Insurance will attach only to the share of the person completing the application and will not extend to any other person having a share in the crop unless the application clearly states that: (1) The insurance is requested for an entity such as a partnership or a joint venture ..." Section 14, "Duties in the Event of Loss", provides in the section entitled "Our Duties" that "we recognize and apply the loss adjustment procedures established or approved by the Federal Crop Insurance Corporation."

Paragraph 26(a), "Payment and Interest Limitations," provides: "Under no circumstances will we be liable for the payment of damages (compensatory, punitive, or other), attorney's fees, or other charges in connection with any claim for indemnity, whether we approve or disapprove such claim."

Paragraph 27 relates to "Concealment, Misrepresentation, or Fraud." It provides:

> (a) If you have falsely or fraudulently concealed the fact that you are ineligible to receive benefits under the Act or if you or anyone assisting you has intentionally concealed or misrepresented any material fact relating to this policy:
>
> (1) This policy will be voided ...
>
> (b) Even though the policy is void, you may still be required to pay 20 percent of the premium due under the policy to offset costs incurred by us in the service of this policy. If previously paid, the balance of the premium will be returned.
>
> (c) Voidance of this policy will result in you having to reimburse all indemnities paid for the crop year in which the voidance was effective.

Paragraph 28 provides, regarding transfer of coverage and right to indemnity:

> If you transfer any part of your share during the crop year, you may transfer your coverage rights, if the transferee is eligible for crop insurance. We will not be liable for any more than the liability determined in accordance with your policy that existed before the transfer occurred. **The transfer of coverage rights must be on our form and will not be effective until approved by us in writing.** Both you and the transferee are jointly and severally liable for the payment of the premium and administrative fees. The transferee has all rights and responsibilities under this policy consistent with the transferee's interest. (Emphasis added).

The Loss Adjustment Manuals ("LAM")[2] for crop years 2004 and 2005 require in ¶ 14 "Entities" that, when an application is submitted, Great American "from information obtained from the insured, FSA or other reliable sources, and from the criteria for each entity type found below; verify that the person qualifies for the entity shown on the application or qualifies for a separate entity from another household

[2]The Loss Adjustment Manuals are issued by the USDA Risk Management Agency and must be utilized by insurance carriers who issue crop insurance policies. *See* MPCI Basic Provisions, ¶ 14.

member, relative, corporation, etc., and that the entity on the application has a *bona fide* interest in the crop. Incorrect entities, in most cases, will result in an invalid policy (e.g., separate policies written for a husband and wife who do not qualify as two separate individual entities, but rather as a corporation or a joint entity ...) The LAMs further provide:

> **NOTE:** Insurance providers do not have to verify entities through the FSA; however, they are encouraged to do so since insurance providers must ensure that producer-certified information is accurate and that liability is established and indemnities are paid according to policy provisions ...
>
> (4) If the entity type reported is questionable, document the facts and refer the case to the next line of supervision or to whom the insurance provider has instructed. If an entity is verified at FSA and there is a discrepancy between the entity recorded for crop insurance and the local FSA office, insurance providers will try to resolve the discrepancy with the FSA. If the discrepancy cannot be resolved and the insurance provider has evidence supporting its position, the insurance provider should retain the entity type reported to them; and keep on file all documentation and evidence supporting this decision.
>
> (5) If it is determined the entity shown on the application has no insurable share in the crop, the policy must be voided; e.g., the insured's application shows "individual" but all FSA documents, marketing records, etc., show the entity that has the *bona fide* share in the crop is a Corporation. Even if the individual is a member of the Corporation, the insured as an "individual entity" does not have the *bona fide* share in this crop policy.

The Loss Adjustment Manual implements the requirements of the Code of Federal Regulations, which provides in 7 C.F.R. § 457.8(a) as follows:

> Application for insurance on a form prescribed by the Corporation, or approved by the Corporation, must be made by any person who wishes to participate in the program, to cover such person's share in the insured crop as landlord, owner-operator, crop ownership interest, or tenant. No other person's interest in the crop may be insured under an application unless that person's interest is clearly shown on the application and unless that other person's interest is insured in accordance with the procedures of the Corporation. **The application must be submitted to the**

Corporation or the reinsured company through the crop insurance agent and must be submitted on or before the applicable sales closing date on file. (Emphasis added).

Plaintiff's Declaratory Judgment Action

The 2004 and 2005 MPCI policies issued to Wayne C. Mills are not typical insurance policies; rather, crop insurance is a federal benefit program that Congress created in the form of insurance partially funded by the federal treasury. The Federal Crop Insurance Corporation ("FCIC") reinsured Mills' 2004 and 2005 MPCI policies, and federal law defines and governs the policy terms and any claims. "Although crop insurance under the MPCI Policy is provided by private insurers, it is reinsured by a governmental entity called the Federal Crop Insurance Corporation (the "FCIC"), pursuant to the Federal Crop Insurance Act, 7 U.S.C. §§ 1501 *et seq*. The FCIC is a wholly owned government corporation that operates under the umbrella of the Department of Agriculture (the "USDA"), and it is statutorily responsible for regulating the crop insurance industry."*In Re: Peanut Crop Insurance Litigation,* No. MDL 1634, 07-1145, 07-1146, 524 F.3d 458, 2008 WL 1971025 at *2 (4th Cir., May 8, 2008).*See also, Clarke v. Federal Crop Insurance Corporation,* 2 F.3d 1149, nt. 2 (4th Cir.1993) (unpublished) ("Under the FCIC's reinsurance program, a farmer can apply for crop insurance with a participating private insurance agency and the FCIC will reinsure the agency's policy."). The Risk Management Agency ("RMA"), an agency of the United States Department of Agriculture, administers FCIC. Under their rulemaking authority, RMA and FCIC have promulgated rules and regulations setting the terms and conditions of the crop insurance contracts that reinsured private companies, such as Great American, issue to farmers. The policies and related regulations found in 7 CFR Parts 400 and 457 set certain prerequisite conditions to coverage, set burdens that must be met by the insured to establish and maintain coverage, and require strict compliance with the policy terms as a prerequisite to legal action.

MPCI policies provide coverage only for the insured's share in a crop. As indicated above, MPCI Basic Provisions, ¶ 10(a) provides, "Insurance will attach only to the share of the person completing the application and will not extend to any other person having a share in the crop unless the application clearly states that ... [t]he insurance is requested for an entity ..." "Share" is the insured's percentage of interest in the crop at the time insurance attaches. The policyholder is responsible for proving which if

any of the acres and crops he farms are insurable for the given crop year.

The undisputed material facts show that Defendants have not complied with all terms and conditions of his MPCI policy contracts and that Great American did not owe an indemnity to either defendant. Federal law mandates that "[n]o indemnity shall be paid unless the insured complies with all terms and conditions of the contract[.]" An insured must have an insurable interest in the crop in order for insurance to attach. Under the policy, an insured is the "named person" as shown on the application that Great American accepts and the term does not extend to any other person or entity having an interest in the crop. Crop insurance only attaches to the share that the person completing the application has in the crop. The policy defines share as the insured's "percentage of interest in the insured crop as an owner, operator, or tenant at the time insurance attaches."Here, Wayne C. Mills applied for crop insurance individually but did not timely notify the insurance company that a corporation owned the crops as required by the policy. Therefore, the policies became void and do not provide coverage for the crop years 2004 and 2005.

Defendants assert that Great American's claims are barred by the doctrines of equitable estoppel, waiver, and/or laches, since Great American accepted checks in the name of the company for premium payments and thus had knowledge of the incorporation; its agent, Mr. Gardner, allegedly admitted that the company had notice of the incorporation; and three years passed between the submission of the claims for the 2004 crop year and the request for reimbursement, allegedly resulting in prejudice to the defendants.

The essential elements of equitable estoppel are (1) ignorance of the party invoking it of the truth as to the facts in question; (2) representations or conduct of the party estopped which mislead; (3) reliance upon such representations or conduct; and (4) prejudicial change of position as the result of such reliance ... The presence of these elements is not essential to the establishment of implied waiver, which results merely from conduct of the party against whom the doctrine is invoked from which voluntary relinquishment of his known right is reasonably inferable. But the two doctrines are related, and have this in common: that the applicability of each in a particular situation results from conduct of the party against whom it is invoked which has rendered it inequitable that he assert a right to which, in the absence of such conduct, he would be entitled.
Pitts v. New York Life Ins. Co., 247 S.C. 545, 148 S.E.2d 369, 371

(1966).

"Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done ... Importantly, delay in the assertion of a right does not, in and of itself, constitute laches; rather, '[s]o long as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts, there can be no laches."*Mid-State Trust, II v. Wright,* 323 S.C. 303, 474 S.E.2d 421, 423 (1996).

A policyholder is bound by the regulations and policy terms promulgated under the Federal Crop Insurance Act, which are binding irrespective of the farmer's knowledge. Plaintiff's policy terms are federal law. No person or entity has the power to waive or expand the terms of a federally reinsured crop insurance policy; nor can anyone extend the coverage beyond what Congress and FCIC have authorized. "An agent of the FCIC could not extend crop insurance where there was none because the doctrine of estoppel cannot extend the coverage beyond that authorized by Congress and the rules promulgated by the FCIC. *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380, 384-395, 68 S.Ct. 1, 92 L.Ed. 10 (1947); *Clarke,* 2 F.3d at*2 ("We share the district court's concern for the proper and fair adjudication of 'claims by little guys against the big Government'..., especially in light of the muddled determinations that Clarke received from the FCIC. Nevertheless, as the Supreme Court has stated '[m]en must turn square corners when they deal with the Government,' and 'not even the temptations of a hard case can elude the clear meaning' of the FCIC's memorandum."); *In re Peanut Crop Insurance Litigation,* 524 F.3d 458, 2008 WL 1971025 at *12 ("Although we have great sympathy for the hard-working peanut farmers of this country, our obligation is to rule on the basis of the factual underpinnings and the applicable legal principles. The MPCI Policy and the USDA's announcements neither expressly nor impliedly promised to indemnify the Farmers at the 31 cent quota rate ... The MPCI Policy thus did not ... create a contractual obligation on the part of either the Government or the insurers to indemnify the Farmers for their 2002 peanut crop losses at the 31 cent quota rate.")

In the case at bar, defendant Wayne Mills submitted applications to Great American for insurance in his individual name and social security number for crops in which he had no insurable share. Because Defendant Mills had no insurable share in the crop he purported to insure, no insurance attached to those crops under his policy and he is not entitled

to an insurance indemnity on them under his policy terms and federal crop insurance program rules. *See Felder v. Federal Crop Ins. Corp.,* 146 F.2d 638, 640-641 (4th Cir.1944) ("We might point out that this case involves no element of technical estoppel. No act of any official prevented the timely filing of proofs of loss; but, on the contrary, the period for filing such proofs had already elapsed before even the commission of any of these acts.") *See also, Mann v. Federal Crop Insurance Corp.,* 710 F.2d 144, 147 (4th Cir.1983) ("The FCIC valued the crop according to the explicit language of the regulations and policy and the valuation was not contrary to past practices and policies of the agency. The farmer is charged with knowledge of the regulation and the policy; the doctrine of estoppel cannot be used to expand the coverage.")

In the case at bar, there is no showing that Plaintiff prevented the timely filing of the change form showing the change in the legal entity which owned the crops. In addition, the company cannot be held to have been provided with notice of the change in the entity which owned the crops merely by the payment of the premium on a company check but without utilizing the required change form. In addition, the plaintiff's delay in requesting reimbursement was caused by the failure of Mills to properly notify the company that the name of the insured needed to be changed. Therefore, the doctrines of waiver, estoppel, and laches do not apply and Great American is entitled to summary judgment on its coverage claim. However, Plaintiff is not entitled to retain 20% of the premium on the basis of intentional misrepresentation by the defendants. This right to the 20% arises from paragraph 27 of the policies, which by its own language refers to intentional misrepresentation or concealment, not mere accident or innocent mistake. As admitted by plaintiff's counsel at the hearing, there is no evidence of intentional misrepresentation regarding the corporate entity.

Defendants' Counterclaims

Great American contends that defendants' state law claims are preempted pursuant to the Crop Insurance Act, 7 U.S.C. § 1506(d), and the regulations governing private insurance companies who issue federally-insured crop insurance policies. *See*7 C.F.R. § 400.176(b) ("No policy of insurance reinsured by the Corporation and no claim, settlement, or adjustment action with respect to any such policy shall provide a basis for a claim of punitive or compensatory damages or an award of attorney fees or other costs against the Company issuing such policy, unless a determination is obtained from the Corporation that the Company, its employee, agent or loss adjuster failed to comply with the

terms of the policy or procedures issued by the Corporation and such failure resulted in the insured receiving a payment in an amount that is less than the amount to which the insured was entitled.") In *O'Neal v. CIGNA Property and Casualty Insurance Co.,* 878 F.Supp. 848 (D.S.C.1995), United States District Judge Cameron Currie held that the Federal Crop Insurance Act did not preempt state common law claims against a private insurance company for negligence, breach of contract, bad faith refusal to pay, and unfair trade practices. The court held that the Act only preempts actions against the government and not actions against private insurers based upon the actions of their agents. The South Carolina Court of Appeals has also concluded that the FCIA does not preempt state law claims against private insurance companies who issue reinsured policies. *See Lyerly v. American National Fire Ins. Co.,* 343 S.C. 401, 540 S.E.2d 469 (Ct.App.2000).*See also, Williams Farms of Homestead, Inc. v. Rain and Hail Ins.,* 121 F.3d 630, 635 (11th Cir.1997), relying on the legislative history of the FCIA and finding that "Congress intended to leave insureds with their traditional contract remedies against their insurance companies." Other courts which have addressed the issue of complete preemption of state law claims by the FCIA have also held no such preemption exists. *See Buchholz v. Rural Community Ins. Co.,* 402 F.Supp.2d 988 (W.D.Wis.2005); *Holman v. Laulo-Rowe Agency,* 994 F.2d 666, 669 (9th Cir.1993) (finding lack of complete preemption because no provision in Federal Crop Insurance Act amendment places suits against agents for errors and omissions within exclusive jurisdiction of federal courts); *Bullinger v. Trebas,* 245 F.Supp.2d 1060, 1066 (D.N.D.2003) ("The majority of courts have held that the Federal Crop Insurance Act does not completely preempt state law causes of action.") (citing *Halfmann v. USAG Ins. Services, Inc.,* 118 F.Supp.2d 714 (N.D.Tex.2000); *Bullard v. Southwest Crop Ins. Agency, Inc.,* 984 F.Supp. 531 (E.D.Tex.1997); *Horn v. Rural Community Ins. Services,* 903 F.Supp. 1502 (M.D.Ala.1995); *Hyzer v. Cigna Prop. Casualty Ins. Co.,* 884 F.Supp. 1146 (E.D.Mich.1995); *O'Neal;* and *Holman*).

This Court finds, for the same reasons, that the state law counterclaims pleaded by the defendants are not preempted.

1. Negligence

Defendants allege a First Counterclaim for common law negligence. They assert in Paragraph 27 of the Answer that Great American owes them a duty of due care and that the duty was breached by Great

American or its agent's:

> failing to procure the insurance desired by the Defendants; failing to follow the directions of the Defendants; which was void and/or materially deficient; failing to provide the coverage Defendants undertook to obtain; failing to timely and properly process requested policy changes; failing to properly inform the Defendants of policy changes; failing to timely and properly process insurance applications, claims, and change forms; and failing to properly advise the Defendants.

Plaintiff asserts that Great American owed no duty to Defendant WMFI. In addition, it asserts that Defendant Wayne Mills is deemed to know policy terms and that he cannot claim that Great American was negligent in failing to inform him of program requirements. It relies upon South Carolina case law holding that, as a general rule, an insurance agent has no duty to advise an insured at the point of application, absent an express or implied undertaking to do so. *See e.g., Houck v. State Farm Fire and Cas. Ins. Co.,* 366 S.C. 7, 620 S.E.2d 326 (2005).

"Ordinarily, the common law imposes no duty on a person to act. An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance."*Rayfield v. South Carolina Department of Corrections,* 297 S.C. 95, 374 S.E.2d 910, 913 (1988)."Generally, an insurer and its agents owe no duty to advise an insured. If the agent, nevertheless, undertakes to advise the insured, he must exercise due care in giving advice."*Trotter v. State Farm Mut. Auto. Ins. Co.,* 297 S.C. 465, 377 S.E.2d 343 (Ct.App.1988), citing *Riddle-Duckworth, Inc. v. Sullivan,* 253 S.C. 411, 171 S.E.2d 486(1969). The South Carolina Court of Appeals has held that "independent insurance agents' licenses with several insurers are, with respect to policies issued on the agents' efforts, evidence of agency with and authority to speak for the insurer for which they are licensed."*Holmes v. McKay,* 334 S.C. 433, 513 S.E.2d 851, 856 (Ct.App.1999)."[A]n insurance agent or broker must exercise good faith, reasonable skill, care and diligence. If, because of his fault or neglect, the agent fails to procure insurance, or does not follow instructions, or the policy issued is void, or materially deficient, or does not provide the coverage he undertook to supply, the agent is liable to his principal."*Sullivan Co., Inc. v. New Swirl, Inc.,* 313 S.C. 34, 437 S.E.2d 30, 31 (1993)."Absent an express undertaking to assume such a duty, a duty can be impliedly created ... In determining whether an implied duty has been created, courts consider several factors, including whether: (1)

the agent received consideration beyond a mere payment of the premium, (2) the insured made a clear request for advice, or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on."*Houck,* 620 S.E.2d at 329.

In the case at bar, the court finds that there was at least an implied duty by the agent of Great American to procure or accurately renew the crop insurance policy for the correct entity that owned the crops, here Wayne C. Mills Farm, Inc. The evidence taken in the light most favorable to the plaintiff shows a course of dealing between the parties from at least 1988 to 2005. There are also factual questions regarding the procurement of a void policy,[3] especially where new applications for insurance were submitted in 2003, after the incorporation of the business.

Moreover, Defendants were not barred as a matter of law from recovering for negligence, based on failure to read the policy or to know the crop insurance rules. "[W]hile an insured cannot abandon all care, the rules which require one to inform himself of the terms of his contract and to take precautions for his own protection are less exacting when dealing with one's own insurance agent or broker in the procurement of an insurance contract."*Riddle-Duckworth,* 171 S.E.2d at 492. This also applies to renewal of a policy, where a layman would not have known about a coverage problem.[4]*See Orangeburg Sausage Co. v. Cincinnati Insurance Co.,* 316 S.C. 331, 450 S.E.2d 66, 71 (Ct.App.1994). Therefore, the motion for summary judgment is denied as to the negligence claim of Wayne Mills Farm, Inc. and granted as to the negligence claim of Wayne Mills individually.

2. Breach of Fiduciary Duty

The question whether a fiduciary relationship exists is an equitable issue for determination by the Court. *Hendricks v. Clemson University,* 353 S.C. 449, 578 S.E.2d 711 (2003)."A confidential or fiduciary

[3]As noted hereinabove, ¶ 14 of the LAM provides that insurance providers do not have to verify entities through the FSA; however, they are encouraged to do so since insurance providers must ensure that producer-certified information is accurate and that liability is established and indemnities are paid according to policy provisions."Here, the corporation was apparently listed with the FSA since 2002.

[4]Mills testified that, in his mind, "nothing changed" when the incorporation occurred and that he did not understand that a corporation was an entity that could own property or that the corporation was separate and apart from himself, where he was the sole shareholder. (Mills Dep., p. 19).

relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence."*Id.,* 578 S.E.2d at 715, citing *O'Shea v. Lesser,* 308 S.C. 10, 416 S.E.2d 629, 631 (1992). In South Carolina, sale of insurance is an arms length transaction, which normally does not give rise to a fiduciary relationship. "Because an applicant is still operating in the marketplace at the point of purchase, the insurer is in a decidedly different position than after the contract has been entered into ..."*Pitts v. Jackson National Life Insurance Co.,* 352 S.C. 319, 574 S.E.2d 502 (2002). Therefore, it is clear that at the time of initial purchase of the crop insurance policy, no fiduciary relationship existed between Mills and the insurance company or its agent. However, a more difficult question is presented by the situation in the case at bar in which Mills did business with the company and its agent for over fifteen years and the agent was allegedly notified of the incorporation. However, the court is reluctant to recognize a fiduciary relationship between an insurance company and an insured where South Carolina courts have not done so. Therefore, the plaintiff's motion for summary judgment is granted on the counterclaim for breach of fiduciary duty.

3. Bad Faith Refusal to Pay Insurance Benefits

Bad faith refusal to pay benefits under a contract of insurance includes: (1) the existence of a mutually binding contract of insurance between the parties; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured. *Howard v. State Farm Mut. Auto. Ins. Co.,* 316 S.C. 445, 451, 450 S.E.2d 582, 586 (1994). In the case at bar, the court has already found that no valid contract of crop insurance was in effect between the plaintiff and either defendant. Therefore, no claim exists for bad faith refusal to pay benefits and the motion for summary judgment is granted as to this claim.

4. Unfair Trade Practices Act

As to the defendants' counterclaim under the South Carolina Unfair Trade Practices Act, the Act contains an exemption in Section 39-5-40(c) for "unfair trade practices covered and regulated under Title 38, Chapter 55, §§ 38-55-10 through 38-55-410."Section 38-57-30 provides that "[n]o person shall engage in this State in any trade practice, which is defined in this chapter as, or determined pursuant to this chapter to be, an unfair

method of competition or an unfair or deceptive act or practice in the business of insurance."In addition, Section 39-5-40(a) contains an exemption for "transactions permitted under laws administered by any regulatory body ..." Since the activities of Great American are regulated by the South Carolina Insurance Commission and also the Risk Management Agency (RMA) and Federal Crop Insurance Corporation (FCIC), then the Unfair Trade Practices Act does not apply in the case at bar. *See Trident Neuro-Imaging Laboratory v. Blue Cross and Blue Shield of South Carolina, Inc.,* 568 F.Supp. 1474 (D.S.C.1983), cited with approval by *Ward v. Dick Dyer and Associates, Inc.,* 304 S.C. 152, 403 S.E.2d 310 (1991).

5. Breach of Contract

The court has ruled in favor of Great American on the coverage issue. Therefore, the motion for summary judgment is granted as to the breach of contract claim.

6. Unjust Enrichment/Conversion

"Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff."*Ellis v. Smith Grading and Paving, Inc.,* 294 S.C. 470, 366 S.E.2d 12 (Ct.App.1988)."Conversion is defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights."*Moseley v. Oswald,* 376 S.C. 251, 656 S.E.2d 380 (2008). With regard to the conversion and unjust enrichment claims, the plaintiff asserts that it had the right to retain 20% of the premium payments under paragraph 27 of the policy. The record is unclear as to the exact amounts. The Court notes that the defendants kept the entire $2781, which the affidavit of its manager appears to indicate was the entire 2004 policy premium[5] and applied it to the improperly paid indemnity payments of $14,448 and $16,199; yet, they seek a judgment for the total amount of $30,647. The plaintiff seems to claim that it retained 20% of the 2005 premium and kept the entire 2004 premium of $2781. In other words, regarding the 2004 premium, it kept

[5] The record before the Court contains a copy of a check on the Wayne Mills Farm, Inc. bank account to Great American for crop insurance dated September 14, 2004 in the amount of $3805.00 and a check from Wayne Mills Farm, Inc. for crop insurance dated October 20, 2005 in the amount of $3876.00. *See* attachments to Defendants' Memorandum in Opposition to Motion for Summary Judgment. (Docket Entry # 74-5).

100% of it on a policy that it has argued was void. Even assuming there is a policy provision that permits the 20% retention, the plaintiff points to no policy provision allowing for more than a 20% retention, and simply has on its own, prior to obtaining any judgment kept the entire $2781 and sought a judgment, not for $30,647 less the $2781, but for the total amount of $30,647. Plaintiff at most was entitled to keep 20% of the 2004 and 20% of the 2005 premiums and then only if it were shown that there was intentional concealment or misrepresentation under paragraph 27. The record is unclear as to what this amount is and leaves issues such as those discussed above which should be determined by the finder of fact, or at least developed more completely at trial. Therefore, the motion for summary judgment is denied as to the conversion and unjust enrichment claims as to Wayne C. Mills Farm, Inc.

Fraud

Defendants have not argued the fraud claim in their brief or at oral argument. Therefore, this claim is deemed abandoned.

Conclusion

The Court **GRANTS** the plaintiff's motion for summary judgment as to Count 1 and declares that defendant Wayne C. Mills is the only named insured under the 2004 and 2005 policies; that defendant Wayne C. Mills Farm, Inc. is not an insured under the 2004 or 2005 policies; Great American has a right to reimbursement from Wayne C. Mills individually for the indemnities which it paid to him under the 2004 MPCI policies; and that Great American has no liability to either defendant under the 2005 policies.

As to Count 2, the Court **GRANTS** the plaintiff's motion for summary judgment and awards Plaintiff a money judgment for the $14,448 indemnity under Policy No.2004-SC-030-855913 and the $16,199 indemnity under Policy No.2004-SC-030-855918, plus interest at the rate of 1.25 percent simple interest per calendar month on the combined balance of $30,647.00.

The Plaintiff's motion for summary judgment is **DENIED** as to Count 3, which requested a declaratory judgment that defendant Mills must pay Great American 20 percent of the premium paid under the 2004 and 2005 policies. The Plaintiff's motion for summary judgment is **DENIED** as to Count 4 for unjust enrichment.

The Plaintiff's motion for summary judgment is **DENIED** as to the FIRST counterclaim for negligence by Wayne C. Mills Farm, Inc and **GRANTED** as to the FIRST counterclaim for negligence by Wayne C. Mills, individually. The motion for summary judgment is **DENIED** as to the FOURTH counterclaim for unjust enrichment and as to the SEVENTH counterclaim for conversion by Wayne C. Mills Farm, Inc. and granted as to these counterclaims by Wayne C. Mills, individually. The plaintiff's motion for summary judgment is **GRANTED** as to the SECOND, THIRD, FIFTH, SIXTH, and EIGHTH counterclaims for bad faith refusal to pay insurance benefits, breach of fiduciary duty, fraud, breach of contract, and unfair trade practices.

The motion for summary judgment is accordingly **GRANTED IN PART AND DENIED IN PART.**

AND IT IS SO ORDERED.

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FEDERAL MEAT INSPECTION ACT

COURT DECISION

GOETZ AND SONS WESTERN MEAT LLC v. USDA.
No. C07-00986MJP.
Filed Feb. 19, 2008.

(Cite as: 2008 WL 449654 (W.D.Wash.)).

FMIA – Ready to eat (RTE) program.

A meat processor (Goetz) in the Ready-to-eat program claimed to be the subject of an overly aggressive USDA meat inspector who had issued numerous citations for violations which involved positive findings of Listeria monocytogenesis, heating deviations, and sale of beef strips (meat) that had been put on a "hold status." The processor's meat inspection privileges were suspended and the processor sued the USDA for negligent supervision of its employee, intentional trespass, breach of regulatory duty, and malicious prosecution. Goetz may invoke jurisdiction of liability of governmental employee/agent only if those employee/agents are acting outside the exceptions of 28 U.S.C. §2680(a).

United States District Court, W.D. Washington,
at Seattle.

ORDER GRANTING MOTION TO DISMISS

MARSHA J. PECHMAN, District Judge.

Background

Plaintiff Goetz and Sons Western Meat L.L.C. ("Goetz"), owned by James D. Horton, produces and distributes meat products in Washington. (Am.Compl.¶ ¶ 1.1, 2.1.) For most of 2005, Danese Smith was the United States Department of Agriculture ("USDA") inspector for Goetz. (Am.Compl.¶ 3.1.) Between January 1, 2005 and April 10, 2005, Ms. Smith issued three non-compliance reports ("NRs") on Goetz, and three more between July 10, 2005 and September 22, 2005. (Am.Compl.¶ ¶ 3.2-3.3.)

During an inspection on September 20, 2005, Ms. Smith noted uncovered meat and the presence of flies. (Am.Compl.¶ 3.4.) When she returned to the plant the next day, she was unable to enter the premises through the garage door, and she became "animated" and accused nearby employees of "hiding things." (Am.Compl.¶ 3.5.) Mr. Horton complained

about Ms. Smith's conduct to her direct supervisor, Dr. Gregory Sherman, who asked that Mr. Horton prepare a written complaint. (Am.Compl.¶ 3.6.)

On September 28, 2005, Ms. Smith tested a two-pound sample of natural juice ham for the bacteria Listeria monocytogenesis; the test came back positive. (Am.Compl.¶ 3.7.) Plaintiff alleges that Ms. Smith did not gather the sample in accord with USDA procedure, which requires that samples be taken from "commercial production run[s]." (Am.Compl.¶ 3.7.)

On November 1, 2005, Ms. Smith was notified that the Goetz plant experienced a "heating deviation" while preparing beef strips and honey-cured hams. (Am.Compl.¶ 3.8.) On November 22, 2005, the USDA asked Goetz if it had taken measures against Staphylococcal aureus enterotoxin after the heating deviation. (Am.Compl.¶ 3.10.) Goetz had re-cooked the affected beef strips and ham but had not tested for the pathogen, and placed a hold on the affected meat after the USDA's inquiry. (Am.Compl.¶ ¶ 3.8, 3.10.) On November 23, 2005, the USDA suspended operation of Goetz's "Ready-to-Eat" ("RTE") program until proper testing for the pathogen could be completed. (Am.Compl.¶ 3.10.) The tests were conducted by a Puget Sound agent and indicated a 95% statistical confidence that the pathogen was not present. (Am. Compl. ¶ ¶ 3 .10-3.11.) A report was presented indicating the 95% confidence level to Dr. James Adams, co-manager of the Denver District Office of the USDA, who required additional testing. (Am. Compl. ¶ ¶ 3 .11, 3.17.) Plaintiff alleges that 70% is the "normal" confidence level required for this pathogen and that the heightened requirement and additional testing was not mandated by regulations. (Am.Compl.¶ 3.11.)

On December 1, 2005, the USDA reinstated Goetz's RTE program. (Am.Compl.¶ 3.13.) When Ms. Smith later inspected the hold items on December 16, 2005, she noticed that almost 50 pounds of beef strips were missing. (Am.Compl.¶ 3.14.) Plaintiff alleges that the hold tags were accidentally removed on November 31, 2005 and the meat was sold. (Am.Compl.¶ 3.14.) The USDA then ordered Goetz to suspend all operations, including products with no known problems. (Am.Compl.¶ 3.14.) On December 29, 2005, the USDA allowed Goetz to resume operations for "raw and pass-through products." (Am.Compl.¶ 3.16.)

Plaintiff alleges that Ms. Smith generated an "extremely aberrational" number of NRs against it-39 NRs between September 27, 2005 and December 31, 2005. (Am.Compl.¶ 3.17.) Plaintiff's amended Complaint

states five causes of actions against the United States: 1) negligent supervision of an employee of the USDA; 2) negligent supervision of Plaintiff's business operation; 3) malicious prosecution by the USDA employee; 4) intentional trespass; and 5) breach of a regulatory duty. (Am.Compl.¶ ¶ 4.1-8.5.)

The United States moves to the dismiss on the ground that the Court lacks subject matter jurisdiction under Fed.R.Civ.P. 12(b) (1) and for failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6).

Discussion

Defendant brings a facial attack and asserts that the allegations in the Complaint are "insufficient on their face to invoke federal jurisdiction."*Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1039 (9th Cir.2004). In considering this motion, the Court may not look to material outside the Complaint. *See White v. Lee,* 227 F.3d 1214, 1242 (9th Cir.2000).[1]

I. Federal Tort Claim Act

The federal government and its agencies are immune from suit unless it consents to waive that immunity. *Hercules, Inc. v. United States,* 516 U.S. 417, 422, 116 S.Ct. 981, 134 L.Ed.2d 47 (1996). The FTCA provides a limited waiver of sovereign immunity for:

> injury or loss of property ... caused by the negligent wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b)(1). However, the discretionary function exception provides that FTCA jurisdiction cannot be based on "the exercise or performance or the failure to exercise or perform *a discretionary function or duty* on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused."28 U.S.C. § 2680(a) (emphasis added).

[1]The Court need not address Defendant's Motion to Strike the declaration of Mr. Horton and facts asserted in Plaintiff's response because the merits of the motion to dismiss are based only on the content of the Amended Complaint.

Although the government has the burden to prove the discretionary function applies, Plaintiff can invoke jurisdiction "only if the complaint is facially outside the exceptions of § 2680."*Prescott v. United States,* 973 F.2d 696, 701 (9th Cir.1992). The government must show that (1) a statute, regulation, or policy contains an element of discretion; and (2) the disputed conduct was based on considerations of public policy. *Berkovitz v. United States,* 486 U.S. 531, 536-37, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). There is a "strong presumption" that discretionary acts are based on an underlying policy decision. *United States v. Gaubert,* 499 U.S. 315, 324, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991).

II. Plaintiff's Claims

The discretionary function exception precludes subject matter jurisdiction over Plaintiff's claims because all of the alleged actions of Defendant were discretionary and presumed to serve underlying policy purposes. Plaintiff does not allege that Defendant violated any statute, regulation, or policy with the force of law in taking the ham sample, in issuing the NRs, in requiring the "higher than normal" statistical confidence level for testing for Staphylococcal aureus enterotoxin, or in shutting down Goetz's business operations. *See Starrett v. United States,* 847 F.2d 539, 541 (9th Cir.1988) (plaintiff must plead the specific mandatory regulation that government violated to overcome discretionary function exception). USDA inspectors and their supervisors have broad discretion in their decisions to test a company's compliance with safety standards. *See* 9 C.F.R § 417.8(g) (listing "sample collection" as one of eight methods FSIS may use to verify business' Hazard Analysis and Control Plan ("HAACP")). Additionally, Plaintiff fails to cite any mandatory provision that requires a FSIS inspector to only test from a "commercial production run." Likewise, 9 C.F.R. § 417 governs the USDA's general response to potential contamination of a product but leaves the substance of that review to the discretion of the inspector. *See In re Supreme Beef Processors, Inc.* 468 F.3d 248, 252 (5th Cir.2006) (USDA's implementation of food safety standard immune because involved "discretionary acts"). Finally, 9 C.F.R. § 500.3 gives Defendant the discretionary authority to suspend or withhold products without prior notice if any of eight grounds are found.

Likewise, the management decisions of Ms. Smith's supervisors are discretionary. Plaintiff fails to allege that Ms. Smith's supervisors were prescribed or mandated by statute, regulation, or any other policy that had the effect of law to take a particular action. *See GATX/Airlog Co. v. Evergreen Intern. Airlines,* 81 F.Supp.2d 1003, 1009 (9th Cir.1999)

(negligent supervision claim dismissed because it failed to "allege any federal statute, regulation or policy that would have required [employee's supervisors] to take particular action"); *see also Nurse v. United States,* 226 F.3d 996, 1001 (9th Cir.2000) (ruling that claims of negligent supervision "fall squarely within the discretionary function exception."). Instead, Defendant's supervisory authority over its FSIS agents is broad and discretionary. *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense,* 467 U.S. 797, 816-20, 104 S.Ct. 2755, 81 L.Ed.2d 660 (Secretary of Transportation given broad discretion to enforce minimum safety standards, and in enforcing such standards, "[the agency] is exercising discretionary regulatory authority of the most basic kind").

Although Plaintiff contends that further discovery will uncover internal policies governing the protocol for an inspector's actions, (Pl. Resp. at 12), internal policies do not have the effect of law and could not transform Plaintiff's claims into claims properly asserting subject matter jurisdiction. *See United States v. One 1985 Mercedes,* 917 F.2d 415, 423-24 (9th Cir.1990) (unpublished and interpretive internal policies do not have force of law).

Additionally, Plaintiff fails to overcome the strong presumption that the actions of Defendant were based on policy considerations. The USDA is given broad authority to establish compliance requirements from private business owners. Those who inspect and those who supervise inspectors have to balance limited governmental resources in deciding whom, when, and how often to inspect, how much scrutiny to apply, and how to best serve the underlying goal of public safety. Decisions involving resource allocation and distribution from governmental agencies are "the type of administrative judgment that the discretionary function was designed to immunize from suit."*Fang v. United States,* 140 F.3d 1238, 1241 (9th Cir.1998). This process requires a malleable system of oversight, consistent assessment of public and industry risk, and must afford inspectors the freedom to make objective decisions. Absent a specific regulation or policy with the effect of law requiring Defendant to act in a contrary manner, the above actions are presumed to be grounded in policy considerations. *See Gaubert,* 499 U.S. 328-29 (immunity applied because statutes gave government agency discretion to take a variety of actions to enforce regulatory requirements).

In some instances, clearly wrongful actions of government agents may render the discretionary function exception inapplicable. *Sabow v. United States,* 93 F.3d 1445, 1454 (9th Cir.1996) (exception did not apply when there could be no policy rationale for threatening family members of dead

officers). Plaintiff argues that because Ms. Smith had a retaliatory intent in testing the ham sample and in issuing the 39 NRs, (Pl. Resp. at 13), and because Dr. Adams might have been acting with malice when he made his 95% statistical confidence level requirement, (Pl. Resp. at 15), Defendant's actions are not protected by the discretionary function exception. However, Plaintiff's argument fails because it has not alleged that any of Defendant's actions was groundless. Instead, the facts in the Complaint provide reasonable grounds for an inspector to issue NRs, to require a higher statistical confidence level for the presence of a pathogen, and to shut down business operations: exposed meat, the presence of flies, a positive test for Listeria monocytogenesis, almost 50 pounds of possibly tainted meat placed on hold and then accidentally sold to the public, and Goetz' failure to test for Staphylococcal aureus enterotoxin after a heating deviation. (Am.Compl.¶¶ 3.4-3.12.) Several of these events are expressly made grounds for suspension. *See*9 C.F.R. § 500.3(a).

Additionally, even if the actions of Ms. Smith or Dr. Adams were motivated by a retaliatory intent, both the language in 28 U.S.C. § 2680(a) and case law indicates that if the discretionary actions were negligent, wrongful, or an abuse of discretion, the government may still be protected by the discretionary function exception if the action is susceptible to policy analysis. *Miller v. United States,* 163 F.3d 591, 593 (9th Cir.1998) (disputed conduct need not actually be grounded in policy considerations). It is the nature of the action and not the subjective intent of the government agent that is the subject of inquiry. *See Gaubert,* 499 U.S. at 325. Because all of the actions alleged by Plaintiff were both discretionary and presumed to serve a legitimate policy purpose, this Court lacks subject matter jurisdiction to hear Plaintiff's claims.

Conclusion

Because Plaintiff has failed to assert subject matter jurisdiction under the FTCA, the Court GRANTS Defendant's motion. All claims are dismissed without prejudice.

The Clerk is directed to send a copy of this order to all counsel of record.

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HORSE PROTECTION ACT

COURT DECISION

PERRY LACY v. USDA.
No. 07-3961.
Filed May 22, 2008.

(Cite as: 278 Fed. Appx. 616).

HPA – Soring – Substantial evidence – West Nile virus as defense.

After reviewing the evidence, JO reversed ALJ decision and found owner of horse violated HPA. Owner's primary defense was that horse tested positive for West Nile virus which had similar symptomology as soring, but JO found substantial evidence of soring.

United States Court of Appeals,
Sixth Circuit.

BEFORE: SUHRHEINRICH, CLAY, and COOK, Circuit Judges.
SUHRHEINRICH, Circuit Judge.

Perry Lacy ("Lacy"), owner of the horse "Mark of Buck," seeks review of the decision by the United State Department of Agriculture's ("USDA") Judicial Officer ("JO") that he violated the Horse Protection Act ("HPA"), 15 U.S.C. §§ 1821-1831, by attempting to show Mark of Buck when the horse was "sore." Because substantial evidence supports the JO's decision, we DENY Lacy's petition for review, and AFFIRM the decision of the JO.

I.

On the evening of August 25, 2002, Lacy entered Mark of Buck in the 64th Annual Tennessee Walking Horse National Celebration ("Celebration"), in Shelbyville, Tennessee. Lacy employed Donald Campbell ("Campbell") as Mark of Buck's trainer, and Campbell presented the horse for inspection at the Celebration.

Several Designated Qualified Persons ("DQP")[1] were working that

[1] DQPs are employed by horse industry organizations and are delegated authority to determine if horses are sore. 15 U.S.C. § 1823; 9 C.F.R. § 11.7. DQPs need not be veterinarians, but must attend USDA-certified horse industry organization DQP training programs. DQPs examine every horse before it is permitted to show at a horse show, and they examine post-show all horses finishing first in Tennessee Walking horse events. 9 C.F.R. § 11.20.

evening at the Celebration to check for soreness.[2] DQPs Henry Chaffin and Ira Gladney examined Mark of Buck. Both found that the horse "led slow" and reacted strongly to palpation of the front feet, and agreed that the horse was sore. The DQPs documented their findings in affidavits, issued Lacy a DQP ticket stating that Mark of Buck was sore in violation of the HPA, and disqualified the horse from showing.

The USDA's Animal and Plant Health Inspection Service ("APHIS") assigned two Veterinary Medical Officers ("VMO"), Drs. Michael Guedron and Lynn Bourgeois, to monitor the DQPs and inspect horses at the Celebration that evening. After observing the DQPs' examinations of Mark of Buck, Dr. Guedron inspected Mark of Buck and elicited "strong, repeatable, reproducible pain responses" on the horse's front feet. VMO Dr. Bourgeois inspected the horse, and noted that it displayed "strong, repeatable, reproducible pain responses" upon palpation of its front pasterns, including severe clenching of its abdominal muscles and attempts to withdraw its limb and redistribute its weight to the hind legs. Dr. Bourgeois concluded that Mark of Buck "was sored with caustic chemicals and/or overwork in chains." Drs. Guedron and Bourgeois conferred and agreed that Mark of Buck was sore.

Eleven days later, on September 5, 2002, Campbell, Mark of Buck's trainer, reported to Lacy that the horse appeared "tired" and "lifeless," and that the horse needed to be seen by a veterinarian. Campbell transported the horse to Dr. John O'Brien, a private veterinarian in Bowling Green, Kentucky, who examined the horse. Dr. O'Brien inspected the horse, and observed that Mark of Buck had a scared and anxious look, was hypersensitive to touch, and had a "somewhat ataxic" gait. Dr. O'Brien described the horse's symptoms as "mild at the time we saw it." Dr. O'Brien took a blood sample from the horse, which tested positive for West Nile Virus.

On January 18, 2006, the Acting Administrator of the APHIS instituted a disciplinary administrative proceeding under the HPA by filing a complaint against Lacy. The complaint alleged that Lacy violated the HPA by: (1) entering Mark of Buck in the Celebration for the purpose of showing or exhibiting the horse while the horse was sore, in violation

[2]Soring occurs when an injury to or sensitization of a horse's legs, rather than training and breeding, is used to induce the high stepping gait for which Tennessee Walkers are known. *Rowland v. United States Dep't of Agric.,* 43 F.3d 1112, 1113 (6th Cir.1995) (citing *Thornton v. United States Dep't of Agric.,* 715 F.2d 1508, 1510 (11th Cir.1983)).

of 15 U.S.C. § 1824(2)(B); and (2) allowing such showing or exhibiting, in violation of 15 U.S.C. § 1824(2)(D). In his answer, Lacy admitted that he owned Mark of Buck and that he entered the horse in the Celebration, but denied he entered, or allowed to be entered, the horse in the Celebration while it was sore.

On August 22, 2006, an Administrative Law Judge ("ALJ") conducted a hearing. The Agency presented the testimony of an APHIS investigator and VMO Dr. Bourgeois, introduced nine exhibits, and offered a copy of a videotape taken of the pre-show inspections of Mark of Buck on the evening of August 25, 2002. Lacy presented the testimony of Dr. O'Brien, introduced two exhibits, and testified on his own behalf. The ALJ refused to enter into the record the copy of the videotape, concluding that APHIS had not provided a copy of the videotape to Lacy in a timely manner.

On October 23, 2006, the ALJ issued a Decision and Order dismissing the complaint after finding that: (1) Mark of Buck was not sore within the meaning of the HPA on August 25, 2002; and (2) although the Agency presented sufficient evidence to satisfy the HPA's presumption that a horse is sore when it exhibits sensitivity to palpation in both of its front feet, Lacy adequately rebutted the presumption because: (i) Lacy presented evidence that Mark of Buck had contracted West Nile Virus; and (ii) the presence of West Nile Virus explained the horse's bilateral sensitivity at the pre-show inspection.

The Agency appealed the ALJ's decision to the JO,[3] and on June 29, 2007, the JO reversed. The JO concluded that Lacy violated the HPA by entering Mark of Buck in the Celebration while the horse was sore, because Lacy's evidence that the horse tested positive for West Nile Virus eleven days later did not rebut the HPA's presumption of soreness. The JO also found that the ALJ erred in excluding the videotape, but the exclusion was not "unduly prejudicial." The JO imposed a civil penalty of $2,200 on Lacy and disqualified him from showing, exhibiting, or entering any horse, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction for a period of one year.

II.

A.

[3]The Secretary of Agriculture has delegated authority to the JO to act as final deciding officer in the USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 & 557. 7 C.F.R. § 2.35

In his petition for review, Lacy contends that the JO's finding that he failed to rebut the statutory presumption of soreness was not supported by substantial evidence. Lacy also argues that we should affirm the JO's determination that the ALJ's exclusion of the videotape in the August 22, 2006 hearing was not unduly prejudicial.

This Court reviews an administrative decision of the Secretary of Agriculture under the HPA to determine whether the proper legal standards were employed and substantial evidence supports the decision. *Bobo v. USDA,* 52 F.3d 1406, 1410 (6th Cir.1995). "Substantial evidence means 'more than a scintilla but less than a preponderance' of the evidence," and "'must be based upon the record taken as a whole.'" *Bobo,* 52 F.3d at 1410 (quoting *Elliott v. Administrator, Animal & Plant Health Inspection Serv.,* 990 F.2d 140, 144 (4th Cir.1993); *Gray v. United States Dep't. of Agric.,* 39 F.3d 670, 675 (6th Cir.1994)).

Unlike a federal court, a JO "sitting in review of an ALJ's initial decision, is authorized by statute to substitute [his] judgment for that of the ALJ."*Parchman v. USDA,* 852 F.2d 858, 860 n. 1 (6th Cir.1988) (quoting *Farrow v. USDA,* 760 F.2d 211, 213 (8th Cir.1985)) (internal quotations omitted). However, where findings of fact are based on determinations of witness credibility, the ALJ's findings are given greater weight. *Rowland v. USDA,* 43 F.3d 1112, 1114 (6th Cir.1995).

B.

Section 1824(2) prohibits showing a sore horse. A horse is sore if chemicals or other implements have been used on its front feet to make them highly sensitive to pain. 15 U.S.C. § 1821(3). A horse is presumed to be sore "if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs." *Id.*§ 1825(d)(5).

The JO concluded that the horse met the statutory definition for being sore, relying on the statutory presumption of soreness. *See id.* We find no error in the JO's conclusion that the horse met the statutory presumption of soreness because substantial evidence supports this finding.

Seven documents in the record constitute substantial evidence that Mark of Buck was "abnormally sensitive":

First: the APHIS Form 7077, entitled "Summary of Alleged Violations." The form was completed and signed by VMO Dr. Guedron, and later

signed by VMO Dr. Bourgeois. The form contains a checkbox indicating that the horse was "sore" as defined under the HPA, and also a chart noting the locations on the horse where Drs. Guedron and Bourgeois found "[a]reas of consistent, repeatable pain responses."

Second: the "DQP Ticket" form, number 23383. The form was completed by DQPs Chaffin and Gladney after their inspection of Mark of Buck, and states that Mark of Buck was "bilateral sore" in violation of the HPA, and a checkbox notes that the DQPs "notified Show Management that [Mark of Buck] was excused or disqualified."

Third: the DQP Examination Form. The form was completed by DQP Chaffin, and notes that the horse "led slow," and exhibited "strong takeaway motion" upon palpation of the medial and anterior surfaces of both limbs.

Fourth: the affidavit of DQP Chaffin. The affidavit, sworn to on the date of inspection, states that Campbell, Mark of Buck's trainer, presented the horse for inspection, and that "the horse was bilateral sore in both front feet," "led slowly," "turned ... slowly," and had "strong takeaway motion" on the front limbs upon palpation.

Fifth: the DQP Examination Form. The form was completed by DQP Gladney, and notes that the horse "led slowly," "turned slow[ly]," "reacted to palpation" on the front of the left foot's coronary band, and "reacted strongly" to palpation on the front of the right foot's coronary band.

Sixth: the affidavit of DQP Gladney. The affidavit, sworn to on the date of inspection, states that Campbell presented the horse for inspection, and that "the horse was bilateral sore in both front feet," "led slowly," "turned ... slowly," and upon palpation the horse "reacted on [the] left front foot coronary band and [the] right front foot ... coronary [band] and outside."

Seventh: the affidavit of VMO Dr. Bourgeois. The affidavit, sworn to on September 5, 2002, states that: Dr. Bourgeois observed DQP Gladney's inspection of the horse, in which the horse "lead[ ] slowly," and "digital palpation of anterior aspects of both fore pasterns elicited repeatable pain responses characterized by withdrawal, abdominal tucking and tucking back on hind limbs"; DQPs Chaffin and Gladney then diagnosed the horse as "bilateral sore"; Dr. Bourgeois observed VMO Dr. Guedron's examination, in which the horse "led slowly and reluctantly," and Dr. Guedron "elicit[ed] strong, repeatable, reproducible pain responses

characterized by strong withdrawal, rocking back on hind limbs to redistribute weight[,] and marked tucking of abdominal muscles"; and Dr. Bourgeois conducted her own inspection of the horse, in which "visual observation and digital palpation" of the posterior pasterns was normal, but palpation of each "entire anterior pastern elicited strong, repeatable, reproducible pain responses characterized by attempts [by the horse] to withdraw [the] limb from [her] grasp, rocking back onto [its] hind limbs to redistribute [its] weight[,] and severe clenching of [its] abdominal muscles."

Lacy challenges the documentary evidence relating to VMO Dr. Guedron and DQPs Chaffin and Gladney for the reason that they did not testify. This argument lacks merit. First, "the Administrative Procedure Act (APA) provides that an agency conducting a hearing may receive '[a]ny oral or documentary evidence.'"*Gray,* 39 F.3d at 676 (quoting 5 U.S.C. § 556(d)). Second, although our "missing witness rule" provides for an adverse inference to arise in some instances from a party's failure to present live testimony, Lacy never raised the issue below. According to the "missing witness rule," an adverse inference arises "when a party fails to call a witness peculiarly within his power to produce and whose testimony would elucidate the transaction."*Bennett v. United States Dep't of Agric.,* 219 Fed.Appx. 441, 447 (6th Cir.2007) (quoting *United States v. Blakemore,* 489 F.2d 193, 195 (6th Cir.1973) (quotation marks and alterations omitted)). The Secretary of Agriculture also applies this adverse inference in proceedings under the HPA. *See Bennett,* 219 Fed.Appx. at 447 n. 4 (citing *In re David Tracy Bradshaw,* 59 Agric. Dec. 228, 2000 WL 799108, at *16 (June 14, 2000)). Although we need not determine whether or how the "missing witness rule" applies-because Lacy never raised the issue below-we note that the rule would not apply, in any event, to the affidavit of VMO Dr. Bourgeois, who did testify. In the proceedings below, Dr. Bourgeois testified consistently with her affidavit that the horse "present[ed] pain responses upon palpation of the anterior pasterns."She also testified that she observed the inspections conducted by VMO Dr. Guedron and DQP Gladney, which were, in turn, consistent with the forms and affidavits that they submitted.

Lacy argues that JO erred in crediting the affidavit of Dr. Bourgeois because her testimony at the August 22, 2006 hearing was not based on a present recollection of her examination of Mark of Buck. Dr. Bourgeois's testimony was instead based on past recollections recorded in her affidavit and on the Summary of Alleged Violation Form. Lacy's argument lacks merit, however, because "this Court has previously held that the affidavits of VMOs and Summary of Alleged Violations Forms

are reliable and probative." *Turner v. USDA,* 217 Fed.Appx. 462, 467 (6th Cir.2007) (citing *Gray,* 39 F.3d at 676). In *Gray* we held that the affidavits of the VMOs and a Summary of Alleged Violations Form satisfied the admissibility criteria where the VMOs in that case had no independent recollection because "[t]hey were signed and/or prepared by individuals who were experienced in their tasks and who had no reason to record their findings in other than an impartial fashion. Moreover, the documents were created almost contemporaneously with the observations they relay." *Gray,* 39 F.3d at 676. The affidavit and Summary of Alleged Violations Form of VMO Dr. Bourgeois satisfy this criteria: Dr. Bourgeois is an experienced veterinarian; there is no evidence that she did not conduct her inspection of Mark of Buck in an impartial fashion; and she prepared her statement for her affidavit on August 30, 2002,[4] only five days after inspecting of the horse. Thus, the JO did not err in crediting VMO Dr. Bourgeois's affidavit.

Accordingly, we find that the USDA produced substantial evidence that the horse was "abnormally sensitive" sufficient to trigger the § 1825(d)(5) statutory presumption of soreness.

C.

Although a horse is presumed 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), "it is well settled that the presumption of soreness is rebuttable." *Zahnd v. Sec'y of Dep't of Agric.,* 479 F.3d 767, 772 (11th Cir.2007) (quoting *In re Martin,* 53 Agric. Dec. 212, 223 (Mar. 16, 1994)). Lacy contends that the JO's conclusion that Lacy failed to rebut the statutory presumption that Mark of Buck was sore was not supported by substantial evidence.

The ALJ found that Lacy rebutted the statutory presumption of soreness by presenting the testimony of Dr. O'Brien. Dr. O'Brien testified that Mark of Buck had contracted West Nile Virus, a condition that explained the horse's bilateral sensitivity on the date of the inspection. He further testified that Mark of Buck reacted with hypersensitivity associated with encephalitis resulting from West Nile Virus rather than soring during its inspection at the Celebration.

The JO disagreed with the ALJ's conclusion that Lacy rebutted the statutory presumption of soreness. The JO found that Dr. O'Brien did "not

[4]The affidavit was sworn on September 5, 2002.

identify a clear connection between his diagnosis on September 5, 2002, that Mark of Buck contracted West Nile Virus[,] and the observation of USDA veterinarians and the DQPs 11 days earlier." The JO first noted Dr. O'Brien's testimony that he had little knowledge of the examinations done on the horse on August 25, 2002. Next, the JO noted that Dr. O'Brien did "not explain how the encephalitis caused hypersensitivity in Mark of Buck that was limited to pinpoint spots on the front of the horse's feet." The JO then noted that Dr. O'Brien's observation of Mark of Buck's presentation on September 5, 2002, was markedly different from the observations of the DQPs and VMOs on August 25, 2002; while Dr. O'Brien found the horse exhibiting ataxia, hypersensitivity, and anxiousness, VMO Dr. Bourgeois found none of these symptoms.

We find that the substantial evidence supports the JO's conclusion that Lacy failed to rebut the statutory presumption of soreness. The JO was reasonable in discounting Dr. O'Brien's testimony that West Nile Virus was responsible for Mark of Buck's bilateral sensitivity during the horse's inspections at the Celebration. First, the presentation of Mark of Buck during its inspection at the Celebration was consistent with soring, not West Nile Virus as described by Dr. O'Brien. *See In re Billy Gray,* 52 Agric. Dec. 1044, 1993 WL 308542, at *21 (July 23, 1993) (noting that USDA VMOs "follow a simple procedure to distinguish [high-strung, or nervous, or silly] horses from those that are experiencing pain...."[T]hey look for ... specific spots which were painful when palpated."), *aff'd sub nom. Gray v. USDA,* 39 F.3d 670 (6th Cir.1994). The horse exhibited pinpoint pain responses solely in the front surfaces of the pasterns at the Celebration. VMO Dr. Bourgeois testified that West Nile Virus, conversely, would *not* cause pin-point pain responses solely in the front surfaces of the pasterns. Second, although Dr. O'Brien did not observe pin-point pain responses on the horse's front pasterns during his exam, finding no response to digital palpation of the coronary band through the pastern area, he acknowledged that the temporal proximity from the inspections on August 25, 2002, to his inspection on September 5, 2002, may have explained the horse's responses on the latter date.

Lacy also argues that the JO erred in crediting VMO Dr. Bourgeois's testimony, because Dr. Bourgeois had no training or experience with West Nile Virus. We disagree, because Dr. Bourgeois testified that she had studied and was familiar with encephalitis, a symptom of West Nile Virus.

D.

The JO found that the ALJ's exclusion of the videotape of Mark of Buck's examination was erroneous but not unduly prejudicial to the Agency, and that substantial evidence, exclusive of the videotape, supported its finding that the horse was sore when it was entered in the Celebration. Because we find that substantial evidence supports the JO's decision that Mark of Buck was sore, we need not reach the issue of the videotape's admissibility.

III.

For the foregoing reasons, we **DENY** Lacy's petition for review, and **AFFIRM** the decision of the Judicial Officer.

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INSPECTION AND GRADING

COURT DECISION

LION RAISINS, INC. v. USDA.
No. 1:05-CV-00640 OWW-SMS.
Filed March 20, 2008.

(Cite as 2008 WL 783337 (E.D.Cal.)).

I&G – Inspections, who can order/request – Raisin Marketing Order.

Producer and handler of raisins under California Raisin Marketing order contends that not only handlers, but also growers and packers can cause an inspection and certification. Lion also contends that handlers can compel another "interested party" to apply for inspection. The JO had previously ruled on Lion's prior petition and the court agreed with the JO that many of the issues in Lion's second petition were res judicata.
The court determined that even if viewed in the light most favorable to Lion, the evidence in the form of the administrative records of both the September Petition of 2003 and the November Petition of 2004, instituted by Lion-establishes that there is no genuine issue of material fact to be adjudicated. The USDA properly found Lion's November Petition barred by *res judicata.*

United States District Court,
E.D. California

MEMORANDUM DECISION RE GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT (DOC. 36, 41)

OLIVER W. WANGER, District Judge.

1. INTRODUCTION

Plaintiff Lion Raisins, Inc. ("Lion") seeks review of a Decision and Order issued by the USDA Judicial Officer on its petition challenging provisions of the California raisin marketing order. Lion initiated this case in federal court by filing a complaint pursuant to section 608c(15)(B) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* ("AMAA") and the Administrative Procedure Act, 5 U.S.C. § 702-706 ("APA"). This case arises from the administration of a federal California raisin marketing order, enacted under the authority of the AMAA, which regulates raisins in the California raisin marketing

area. *See*7 C.F.R. § 989.1-.801. ("Raisin Marketing Order").

Lion challenges the ruling of the USDA Judicial Officer ("Judicial Officer" or "JO") who affirmed, but did not adopt, the decision of the Administrative Law Judge ("ALJ"), granting USDA's motion to dismiss Lion's November 10, 2004 petition ("November Petition"), and USDA's motion to strike the amended petition, filed February 9, 2005 ("February Amended Petition"), finding the February Amended Petition premature. The Judicial Officer also dismissed the November Petition with prejudice. Currently before the court are USDA's Motion for Summary Judgment and Lion's Cross-Motion for Summary Judgment. Oral argument was heard on February 25, 2008.

2. PROCEDURAL BACKGROUND

A. Administrative Record

1. Lion initiated proceedings on November 10, 2004, by filing the November Petition with the USDA pursuant to section 608c(15)(A) of the AMAA. (Doc. 43, Administrative Records, 2005 AMA Docket No. F & V 989-1, submitted by Defendant in Support of Motion for Summary Judgment ("AR 2005"), Tab 1.)

2. On December 29, 2004, Defendant USDA filed a Motion to Dismiss the November Petition. (Doc. 43, AR 2005, Tab 5.)

3. On February 9, 2005, Plaintiff filed the February Amended Petition. (Doc. 43, AR 2005, Tab 9.)

4. On February 14, 2005, Defendant filed a Motion to Strike the February Amended Petition. (Doc. 43, AR 2005, Tab 11.)

5. On March 7, 2005, the ALJ issued an order dismissing the November Petition, striking the February Amended Petition as premature, and granting Lion an opportunity to file an amended petition within twenty (20) days. (Doc. 43, AR 2005, Tab 13.)

6. On March 11, 2005, USDA appealed the ALJ decision, seeking dismissal of the November Petition with prejudice and opposing the decision to permit Lion to file an amended petition. (Doc. 43, AR 2005, Tab 15.)

7. On March 24, 2005, Lion re-filed the February Amended Petition

("Re-Filed Amended Petition") pursuant to the March 7, 2005 Order. (Doc. 43, AR 2005, Tab 17.)

8. On March 30, 2005, Lion filed a response to USDA's appeal petition. (Doc. 43, AR 2005, Tab 19.)

9. On March 30, 2005, USDA filed a Motion to Strike the Re-Filed Amended Petition. (Doc. 43, AR 2005, Tab 20.)

10. On April 21, 2005, Lion Raisin filed an opposition to USDA's Motion to Strike the Re-Filed Amended Petition. (Doc. 43, AR 2005, Tab 22.)

11. On April 25, 2005, the Judicial Officer dismissed the November Petition with prejudice, finding it was barred by *res judicata,* technical deficiencies, and failure to present a cognizable claim. The Judicial Officer also struck the February Amended Petition as premature, because it was filed before the March 7, 2005 ALJ Order. (Doc. 43, AR 2005, Tab 24.) The Judicial Officer did not rule on the Re-filed Amended Petition.

12. On May 3, 2005, the ALJ dismissed the Re-Filed Amended Petition (filed in March 2005). (Doc. 43, AR 2005, Tab 26.)

13. On June 3, 2005, Lion filed an appeal to the Judicial Officer from the ALJ May 3, 2005 Order dismissing the Re-Filed Amended Petition (filed in March 2005).

14. On June 27, 2005, USDA filed a response to Lion's petition for appeal. (Doc. 43, AR 2005, Tab 29.)

15. On July 13, 2005, the Judicial Officer struck Lion's Re-Filed Amended Complaint (filed in March 2005). (Doc. 43, AR 2005, Tab 32.)

B. Federal Court

1. On May 16, 2005, Lion filed a complaint for judicial review of the Judicial Officer's April 25, 2005 Decision and Order, dismissing with prejudice the November Petition and striking the February Amended Petition. (Doc. 1, Complaint.)

2. On August 10, 2005, USDA filed an Amended Answer to Complaint. (Doc. 13, Answer.)

3. On April 24, 2007, USDA filed a Motion for Summary Judgment. (Doc. 36, USDA's MSJ.)

4. On April 25, 2007, Lion filed a Cross-Motion for Summary Judgment. (Doc. 42, Lion's Cross-MSJ.)[1]

5. On May 24, 2007, USDA filed an opposition to Lion's Cross-MSJ. (Doc. 46, USDA Opposition.)

6. On May 24, 2007, Lion filed an opposition to USDA's MSJ. (Doc. 47, Lion Opposition.)

3. FACTUAL HISTORY

Lion Raisins, Inc., (or Lion), is a California corporation, that purchases raisins in the State of California which are then processed and packed for sale in intrastate, interstate and foreign commerce for human consumption. Lion also produces its own raisins, performing the same processing functions. Lion is considered a handler of California Raisins.[2]

The AMAA delegates authority to the Secretary of the United States Department of Agriculture to issue marketing orders, upon the request of producers, regulating the sale and delivery of various commodities, including raisins, "in order to avoid unreasonable fluctuations in supplies and prices."*Kyer v. U.S.,* 369 F.2d 714, 717, 177 Ct.Cl. 747 (1966), *cert. denied* 387 U.S. 929, 87 S.Ct. 2050, 18 L.Ed.2d 990 (1967); 7 U.S.C. § 608c, 602(4) (2000)."The AMAA was originally enacted during the Depression, with the objective of helping farmers obtain a fair value for their agricultural products."*Lion Raisins, Inc. v. U.S.,* 416 F.3d 1356, 1358 (Fed.Cir.2005)."The Act contemplates a cooperative venture among

[1]On April 26, 2007, Lion filed an application for late filed documents as to Plaintiff's Cross-Motion for Summary Judgment pursuant to F.R.C.P. Rule 6(b), L.R. 5-135(c) and L.R. 6-144(d). (Doc. 45, Application.) The deadline to file cross-motions for summary judgment was April 24, 2007. Plaintiff had attempted to electronically file its motion for summary judgment on April 24, 2007 but encountered a technical failure and inadvertently filed a wrong version of the motion in its rush to address the technical failure. Upon Plaintiff's notice that it filed the incorrect version of the motion, it promptly filed an *Errata* on April 25, 2007, and informed opposing counsel who agreed the filing would be unopposed. Plaintiff filed the application for acceptance of late filing thereafter on April 26, 2007. (Doc. 45, Application.) Finding no prejudice to the parties, the Court GRANTS the requested extension of time is GRANTED through April 25, 2007 for Plaintiff to file the cross-motion for summary judgment *Errata* and its supporting documents.

[2] (Doc. 46-2, Plaintiff's Statement of Undisputed Facts, (PSUDF), No. 1-2)

the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them."*Block v. Community Nutrition Institute,* 467 U.S. 340, 346, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). The principal mechanism is through the implementation of marketing orders.

The marketing order for the California raisin market, the Raisin Marketing Order, was promulgated in 1960 under Parts §§ 989.1-989.801, covering the region of the State of California. 7 C.F.R. § 989.1-.801. Before a marketing order is issued under the AMAA, the Secretary must give notice and an opportunity for a hearing upon the contemplated marketing order. 7 U.S.C. § 608c(3),(4). Under 7 U.S.C. § 608c(7)(C)(i)-(iv), the Secretary can delegate the responsibility of implementing the Raisin Marketing Order to marketing committees and to empower the marketing committees to issue rules and regulations. The Raisin Administrative Committee (RAC), appointed by the USDA, is the committee charged with overseeing and administering the Raisin Marketing Order. 7 C.F.R. § 989.35(a),(b). The RAC is composed of 47 members, the majority from the raisin production industry, including 35 producers and 10 handlers, in addition to one member from the public and one member from the industry's collective bargaining association. 7 C.F.R. § 989.26.

Part 989.58(d) and .59(d) requires "handlers" of California raisins to "cause" an "inspection and certification ... of all natural condition raisins ..." for both incoming and outgoing raisins. 7 C.F.R. § 989.58(d) and § 989.59(d).

The inspections of raisins generally are governed pursuant to the authority of the USDA under the Agricultural Marketing Act of 1946, as amended. 7 U.S.C. § 1621, *et seq*. ("AMA"). The USDA has issued regulations under Title 7, Part 52 ("Part 52") pursuant to its authority under the AMA governing the inspection and certification of certain agricultural products, including raisins, and has established standards for grades of commodities, including raisins. 7 C.F.R. § 52.5. Section 52.5 states that "[a]n application for inspection service may be made by any interested party ..." 7 C.F.R. § 52.5.

The Agricultural Marketing Service ("AMS") is in charge of administering the inspection regulations, including providing inspection services to any applicant in accordance with the regulations established pursuant to the AMA and the AMAA. It is undisputed in this suit that

Lion exhausted its administrative remedies.[3]

Lion, a handler, disputes this interpretation of Part 989.58(d) and 989.59(d) provisions and claim it is not only "handlers" that can "cause" an "inspection and certification" of raisins. Lion contends that the "growers," the front-end of the raisin process, or the "packers," the back-end of the raisin process, can "cause an inspection and certification" of raisins. Lion provides facts to support its contention that the provision requiring handlers to "cause an inspection and certification" should be interpreted to mean that handlers can apply for inspection services directly *or compel another interested party to apply,* namely growers of natural condition raisins and buyers of packed raisins. However, while these facts are informative, the Judicial Officer's April 25, 2005 Decision and Order did not reach the merits of Lion's petition and dismissed the petition on *res judicata* grounds and failure to comply with the Rules of Practice. The Court is limited to reviewing the decision and evidence before the Judicial Officer. In addition, the Judicial Officer's decision granted USDA's Motion to Strike on the basis that the February Amended Petition was premature. The Judicial Officer Decision and Order did not address the underlying merits of the petition and therefore there is no decision in the administrative record determining whether Lion, as the handler, is the only party that can "cause" an inspection and certification.

Defendant USDA opposes Lion's Undisputed Statement of Facts arguing that only the facts in the administrative record are undisputed for purposes of review of this matter. (Doc. 46, Defendant's Response to Plaintiff's Undisputed Facts) Therefore, Lion's facts concerning the 989.58(d) and 989.59(d) provisions re: "cause an inspection and certification" are omitted from the factual section.

4. STANDARD OF REVIEW

A. Motion for Summary Judgment

Summary judgment is warranted only "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

[3] Plaintiff Lion's Statement of Undisputed Facts also states facts regarding its contention that the USDA's interpretation and application of Part 989 provisions concerning who can cause "an inspection and certification" under the Raisin Marketing Order is arbitrary, an abuse of discretion and not otherwise in accordance with the law. The USDA has interpreted Part 989 provisions regarding "who" causes an inspection of incoming and outgoing raisins to mean only the "handler" of raisins.

fact." Fed.R.Civ.P. 56(c); *California v. Campbell,* 138 F.3d 772, 780 (9th Cir.1998). To defeat a motion for summary judgment, the non-moving party must show (1) that a genuine factual issue exists and (2) that this factual issue is material. *Id.* A genuine issue of fact exists when the non-moving party produces evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. *See Triton Energy Corp. v. Square D Co.,* 68 F.3d 1216, 1221 (9th Cir.1995); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252-56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Facts are "material" if they "might affect the outcome of the suit under the governing law."*Campbell,* 138 F.3d at 782 (quoting *Anderson,* 477 U.S. at 248).

The nonmoving party cannot simply rest on its allegations without any significant probative evidence tending to support the complaint. *Devereaux v. Abbey,* 263 F.3d 1070, 1076 (9th Cir.2001). [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex Corp. v. Catrell,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The more implausible the claim or defense asserted by the nonmoving party, the more persuasive its evidence must be to avoid summary judgment. *See United States ex rel. Anderson v. N. Telecom, Inc.,* 52 F.3d 810, 815 (9th Cir.1996). Nevertheless, the evidence must be viewed in a light most favorable to the nonmoving party. *Id.;Anderson,* 477 U.S. at 255. A court's role on summary judgment is not to weigh evidence or resolve issues; rather, it is to determine whether there is a genuine issue for trial. *See Abdul-Jabbar v. G.M. Corp.,* 85 F.3d 407, 410 (9th Cir.1996).

B. Agency Action

The starting point for judicial review of agency action is the administrative record already in existence, not a 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); *Southwest Center for Biological Diversity v. U.S. Forest Service,* 100 F.3d 1443, 1450 (9th Cir.1996). The court may, however, consider evidence outside the administrative record for

certain limited purposes, *e.g.,* to explain the agency's decisions, *Southwest Center,* 100 F.3d at 1450; or to determine whether the agency's course of inquiry was insufficient or inadequate. *Love v. Thomas,* 858 F.2d 1347, 1356 (9th Cir.1988), *cert. denied,* 490 U.S. 1035, 109 S.Ct. 1932, 104 L.Ed.2d 403 (1989); *Animal Defense Council v. Hodel,* 840 F.2d 1432, 1436 (9th Cir.1988). In addition, a court, in certain instances, may require supplementation of the record or allow a party challenging agency action to engage in limited discovery. *Southwest Center,* 100 F.3d at 1450.[4]

> (1) when the record need be expanded to explain agency action;
>
> (2) when the agency has relied upon documents or materials not included in the record;
>
> (3) to explain or clarify technical matter involved in the agency action; and
>
> (4) where there has been a strong showing in support of a claim of bad faith or improper behavior on the part of the agency decision makers.

674 F.2d at 793-94.

Supplementation of an administrative record is the exception, not the rule.

C. Procedures for Review of Agency Action under the AMAA

Under the AMAA, handlers may petition the Secretary for relief from any provision of a marketing order believed *not to be in accordance with the law*.7 U.S.C. § 608c(15)(A) (emphasis added).

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 may seek a modification of or to be exempted from that order. The handler shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition

[4] In *Public Power Council v. Johnson,* 674 F.2d 791 (9th Cir.1982), the Ninth Circuit isolated four circumstances where supplementation or discovery may be justified:

which shall be final, if in accordance with law. 7 U.S.C. § 608c(15)(A). The Rules of Practice Governing Procedures on Petitions to Modify or to Be Exempted from Marketing Order apply to petitions filed under § 608c(15)(A).7 C.F.R. § 900.50-64.

Such a petition is first heard by the ALJ. A handler may appeal any ALJ decision to the Judicial Officer of the USDA. After the Judicial Officer issues a decision, a handler, under Section 608c(15)(B), may appeal any Judicial Officer decision to the district court in the district in which handler is an inhabitant or has a principal place of business. The statute limits the district court's review to the following:

> If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.

7 U.S.C. § 608c(15)(B).

The Administrative Procedure Act has been applied in prior Ninth Circuit cases concerning challenges to Marketing Orders under § 608c(15)(B) to the marketing orders. *See, e.g., Cal-Almond, Inc. v. United States Dep't Agric.,* 14 F.3d 429, 444 (9th Cir.1993) (challenge to the California almond marketing order).

5. DISCUSSION

Plaintiff's Complaint contains a single claim for, declaratory relief from the Judicial Officer's April 25, 2005 Decision and Order striking Plaintiff's February 9, 2005 Amended Petition, (February Amended Petition), and dismissing with prejudice Plaintiff's November 10, 2004 Petition, (November Petition). Plaintiff's cause of action is as follows:

> 24. The JO's decision and order of April 25, 2005, is arbitrary, capricious, and not in accordance with law. 7 U.S.C. § 608c(15)(A) allows a handler subject to an order (which Lion is) to file an administrative petition with the secretary alleging 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."That section also provides that the handler "shall thereupon be given an opportunity for a hearing upon such

petition, in accordance with regulations made by the Secretary of Agriculture... [and that] after such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, it in accordance with law."

25. The Judicial Officer did not permit a hearing in this matter. The Judicial Officer arbitrarily and capriciously held that the petition should be dismissed with prejudice, as opposed to without prejudice.

26. The JO's decision was arbitrary, capricious, and not in accordance with law because the Judicial Officer claimed that: (1) Lion's petition was barred by res judicata and should have been dismissed with prejudice because of a previous petition that was dismissed was erroneous; (2) Lion did not comply with the requirement of the rules of practice requiring the petition to contain the names, addresses and respective positions held by the corporate officers of Lion (a mere formality easily correctable); (3) Lion failed to specifically allege which "corollary" raisin order terms and/or provisions Lion was challenging (not true or irrelevant); and (4) none of Lion's claims can be adjudicated in an administrative petition proceeding because Lion does not make a "legally-cognizable claim" because Lion is complaining about matters that cannot be adjudicated in an administrative petition proceeding setting-which is not true.

27. The JO's decision was arbitrary, capricious and not in accordance with law. The JO's decision was further arbitrary and capricious when the JO struck the amended petition, and dismissed the petition with prejudice instead of allowing Lion to amend the petition to clear-up any problems the JO had. The decision was also arbitrary, capricious and not in accordance with law since the matters complained of by Lion can be adjudicated pursuant to the administrative petition proceedings, because the claims were that the marketing order provisions and the obligations imposed in connection therewith were not in accordance with law, and requesting a modification thereof or to be exempted therefrom.

28. This matter must be decided on the merits, after a hearing. Under the APA, this JO's decision now must be decided on the administrative record.

(Doc. 1, Complaint, ¶ ¶ 24-28)

In sum, Plaintiff's Complaint alleges that the Judicial Officer's decision is arbitrary, capricious and not in accordance with the law for the following reasons:

• JO did not permit a hearing on the matter;

• JO found the petition was barred by *res judicata* and dismissed it with prejudice;

• JO found that Plaintiff failed to comply with the required rules of practice requiring the petition to contain the names, addresses and respective decisions held by Plaintiff's corporate officers;

• JO found Plaintiff failed to specifically allege which "corollary" Raisin Order terms and/or provisions Plaintiff was challenging;

• JO found Plaintiff's claims cannot be adjudicated in an administrative petition proceeding as there are no "legally-cognizable claims" that can be adjudicated in such proceeding; and

• JO struck the amended petition and failed to permit Plaintiff to amend the petition to clear any issues in accordance with the Judicial Officer's order.

Defendant moves for summary judgment claiming the record contains substantial evidence to demonstrate the USDA's decision was in accordance with the law:

• USDA was not required to hold a hearing on Plaintiff's petition.

• Plaintiff's claims were previously adjudicated by the USDA;

• The claims in Plaintiff's November Petition are identical to those in the petition filed by Lion on September 10, 2003, the September Petition, and are therefore barred by the doctrine of *res judicata* and the USDA properly dismissed the petition;

• Plaintiff did not seek judicial review of the prior October 19, 2004 Decision and Order on the September Petition and instead filed a separate petition alleging the same complaints; and

• USDA correctly struck Plaintiff's February Amended Petition since it was indisputably filed in violation of the Rules of Practice.

(Doc. 36, USDA's MSJ, p. 2:1-11)

Plaintiff cross-moves for summary judgment and seeks an order relieving Plaintiff from certain obligations imposed under the Raisin Marketing Order, or in the alternative seeks an order to remand this case to the USDA with instructions to hold an administrative hearing on Plaintiff's petition. Plaintiff also provides the history of the larger dispute between Plaintiff and USDA over inspection services. It is unnecessary to re-state the alleged acrimonious history as the merits of that dispute are not at issue in either of the motions for summary judgment.

Lion's cross-motion for summary judgment, requests the Court issue an order relieving it from obligations imposed under the Raisin Marketing Order, specifically that Plaintiff:

> (1) can comply with the incoming and outgoing inspection obligations of the Raisin Marketing Order by "causing" its grower (for incoming) and customer (for outgoing) to apply for inspections from the USDA; or
>
> (2) can have inspection services performed by a non-USDA agency such as the well-recognized Dried Fruit Association; or in the alternative
>
> (3) can comply with all applicable rules and regulations, and require the USDA to provide an adequate number of inspectors consistent with Plaintiff's obligation to pay for these services under the Raisin Marketing Order.

(Doc. 37, Lion's Cross-MSJ, pp. 27:22-28:10)

The Judicial Officer did not address any relief requested by Plaintiff, because the petition was dismissed before its merits were adjudicated. The Judicial Officer found Plaintiff's November Petition barred by *res judicata* based on its similarity to a previously filed petition, and dismissed the November Petition on *res judicata* grounds with prejudice, and also dismissed the petition because Plaintiff failed to comply with the Rules of Practice, specifically: section 900.52(b)(1) requiring that a petition contain the names, addresses, and respective positions held by corporate petitioner's officers; section 900.52(b)(2) requiring each petition to contain a reference to the specific terms or provisions of the

marketing order, or the interpretation or application of the marketing order, about which the petitioner complains; and section 900.52(b)(4) requiring each petition contain a statement of grounds upon which the terms or provisions of the marketing order, or the interpretation or application of the marketing order, are challenged as not in accordance with law.

Specifically, the November Petition was dismissed with prejudice upon the Judicial Officer's finding that the petition was barred on *res judicata* grounds and the petition failed to "to state a legally-cognizable claim" because it challenged inspection obligations under the raisin marketing order, which the Judicial Officer found to be a matter of policy, desireability [so in original] and a challenge to the effectiveness of the order provisions. The Judicial Officer found proceedings under AMAA section 8c(15)(A) (7 U.S.C. § 608c(15)(A) did not afford relief for such claims.

A district court's review of a Judicial Officer's Decision and Order is limited to a review of whether the Judicial Officer's Decision and Order is "in accordance with the law."

> The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling ... If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.

7 U.S.C. § 608c(15)(B).

Judicial review of the agency action is also limited to the administrative record in existence and Plaintiff has provided no legal justification for the Court to go beyond the administrative record.

While Plaintiff requests in its cross-motion for summary judgment an order addressing Lion's inspection obligations under the Raisin Marketing Order, judicial review is limited to reviewing the Judicial Officer's Decision and Order to determine if the Decision and Order is in accordance with the law. The underlying merits of the petition cannot be addressed.

A. *Res Judicata*

On April 25, 2005, the Judicial Officer filed his Decision and Order which dismissed the November Petition with prejudice. (AR 2005, Tab 24) The decision found that the November Petition raised the same claims Lion had raised in an earlier filed petition filed on September 14, 2003 ("September Petition") that was dismissed by the same Judicial Officer on October 19, 2004 in *In re Lion Raisins, Inc.,* 63 Agric. Dec. ---- (October 19, 2004) (Doc. 36-4, Administrative Records, 2003 AMA Docket No. F & V 989-7, submitted by Defendant in Support of Motion for Summary Judgment ("AR 2003"), September Petition, Tab1 and October Decision and Order, Tab. 15). The Judicial Officer concluded that the November Petition was barred by *res judicata* and dismissed the November Petition with prejudice. The Judicial Officer specifically found:

> Petitioner's Petition raises the same claims Petition raised in the petition filed by Petition in *In re Lion Raisins, Inc.,* 63 Agric. Dec. ---- (October 19, 2004). I dismissed with prejudice the petition filed by Petitioner in *In re Lion Raisins, Inc.,* 63 Agric. Dec. ---- (October 19, 2004). A dismissal with prejudice has the effect of final adjudication on the merits favorable to the defendant and bars future suits brought by the plaintiff on the same cause of action. A dismissal with prejudice constitutes a final judgment with the preclusive effect of *res judicata* not only as to all matters litigated and decided by the dismissal, but as to all relevant issues that could have been raised and litigated in the suit. Therefore, Petitioner's Petition is barred by *res judicata* and should be dismissed with prejudice.

(AR 2005, Tab 24, at p. 10)

Under the doctrine of *res judicata,* a prior adjudication may have two distinct types of preclusive effects: claim preclusion (*res judicata*) and issue preclusion (collateral estoppel).

Res judicata ensures the finality of decisions. Under res judicata, 'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.'Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. Res judicata thus encourages reliance on judicial

decisions, bars vexatious litigation, and frees the courts to resolve other disputes.

Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979), *superceded by statute on other grounds* (citations and quotations omitted).“Under the doctrine of res judicata, a final judgment on the merits precludes the parties from relitigating claims which were or could have been raised in that action.”*Amaro v. Continental Can Co.,* 724 F.2d 747, 749 (9th Cir.1984) (citing *Nevada v. United States,* 463 U.S. 110, 103 (1983)).“A factor to be considered in determining whether the same claim is involved is whether the two suits involve infringement of the same right.”*Id.* (citations and quotations omitted).

A comparison of Lion's November Petition with its September Petition reveals not only that the two petitions allege the same claims regarding inspection requirements under the Raisin Marketing Order, but Lion uses substantially the same language in both.

First, the title reflects the similarity of claims advanced sought by the two petitions:

September Petition Title:

> Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Eliminate as Mandatory the use of USDA's Processed Products Inspection Branch Services for All Incoming and Outgoing Raisins, as Currently Required by 7 C.F.R. §§ 989.58 & 989.59, And to Exempt Petitioner from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins and/or Any Obligations Imposed in Connection Therewith That are Not in Accordance with Law

(AR 2003, Tab 1)
November Petition Title:

> Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Eliminate as Mandatory the Use of USDA's Processed Products Inspection Branch Services for All Incoming and Outgoing Raisins, as Currently Required by 7 C.F.R. §§ 989.58 & 989.59, To Exempt Petitioners from the Mandatory

> Inspection Services by USDA for Incoming and Outgoing Raisins and/or Any Obligations Imposed in Connection Therewith That are Not in Accordance with Law

(AR 2005, Tab 24)

The title of the petitions show Lion makes the same challenge to the identical provisions, 7 C.F.R. § 989.58 and § 989.59, the inspection and certification regulations for incoming and outgoing raisins. The relevant portions of 7 C.F.R. § 989.58 and § 989.59 are as follows:

> § 989.58 Natural condition raisins.
>
> (d) Inspection and certification.
>
> (1) *Each handler shall cause an inspection and certification* to be made of all natural condition raisins acquired or received by him, ... The handler shall submit or cause to be submitted to the committee a copy of such certification, together with such other documents or records as the committee may require. Such certification shall be issued by inspectors of the Processed Products Standardization and Inspection Branch of the U.S. Department of Agriculture, *unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency would improve the administration* of this amended subpart ...

7 C.F.R. § 989.58(d)(1) (emphasis added).

> § 989.59 Regulation of the handling of raisins subsequent to their acquisition by handlers.
>
> (d) Inspection and certification....*each handler* shall, at his own expense, before shipping ...*cause and inspection to be made of such raisins* to determine whether they meet the then applicable minimum grade and condition standards for natural condition raisins or the then applicable minimum grade standards for packed raisins. Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted to the committee a copy of such certificate together with such other documents or records as the committee may require. The certificate shall be issued by the Processed Products Standardization and Inspection Branch of the

> United States Department of Agriculture, *unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency will improve the administration* of this amended subpart.

7 C.F.R. § 989.59(d) (emphasis added).

In addition, to challenging the same provisions, the issues Lion is addressing are predominately similar in both the November 10, 2004 Petition and September 10, 2003 Petition:

> (1) USDA's inspection fees were not established through formal rulemaking.

September Petition:

The fees imposed by the USDA Inspection Service have not been properly adopted under the Marketing Order and are also arbitrary and capricious, and not based on the actual costs of providing the service to Petitioners.

Without complying with the Administrative Procedures Act, the USDA Inspection Service unilaterally comes out every year stating what its inspection fee will be and what Petitioners must pay.

(AR 2003, Tab 1, ¶¶ 8, 16)

November Petition:

The fees imposed by the USDA Inspection Service have not been properly adopted under the Marketing Order and are also arbitrary and capricious and not based on the actual costs of providing the service to Lion.

(AR 2005, Tab 1, ¶ 8)

These claims are in substance identical.

(2) USDA's inspection fees are unreasonably high and not based on actual cost; and Lion is often shorted inspectors.

September Petition:

> Petitioner Lion runs approximately 15 tons per hour, for which it is paying USDA approximately $135.00 per hour for inspection services. There are only two USDA inspectors working at Lion at any one time, and, on many occasions there is only one inspector.
>
> At the $9.00 per ton fee the USDA charges, this equates to a cost of only $9.00 per hour for one inspector. A consumer pack-oriented packed could have as many as six inspectors on various consumer lines and only incur $54.00 per hour in inspection fees. In comparisons, ... Lion incurs approximately $135.00 per hour one inspector.

(AR 2003, Tab 1, ¶¶ 8, 9)
November Petition

> Lion runs approximately 15 tons per hour which means that Lion is paying for USDA inspections at approximately $135.00 per (it will be more now since the rate has increased to $10.00 per ton), and there are generally only two USDA inspectors working at any one time, and, on many occasions only one inspector is working at Lion.
>
> At the $9.00 per ton fee the USDA charges, this equates to a cost of only $9.00 per hour for one inspector. A consumer pack-oriented packer could have as many as six inspectors on various consumer lines and only incur $54.00 per hour in inspection fees. In comparisons, ... Lion incurs approximately $135.00 per hour one inspector.
>
> Lion is shorted USDA inspectors, and does have their very own USDA area supervisor, whereas a major competitor of Lion has far more inspectors and have their very own area supervisor and thus receive far better service than Lion receives for the same price per ton ...
> (AR 2005, Tab 1, ¶¶ 8-9, 13)

These claims are in substance identical.

(3) The USDA's Inspection Service performs “negligent” inspections and “cannot be trusted.”

September Petition:

> ... With the few checks that the USDA performs, even less [raisin stems] are found, making their [USDA's] inspection results inadequate and a misrepresentation of the product's actual quality.
>
> Dating back to at least 1996, on an industry-wide basis, the USDA Inspection Service has been and is engaged in a pattern and practice of negligently accounting for the grade and quality of incoming and outgoing raisins, in addition to generating negligent incoming and outgoing Inspection Reports at Petitioners' facilities ... These negligent incoming and outgoing Inspection Reports authored by the USDA Inspection are ratified and approved by USDA Inspection Service supervisors, agent in change, and even at USDA headquarters in Fresno, California and Washington, D.C. Petitioners have filed formal and informal complaints to the Raisin Administrative Committee and to the USDA officials in Fresno, California and in Washington D.C. regarding the USDA inspection negligence; however, the USDA refuses to change its procedures and accounting;

(AR 2003, Tab 1, ¶ 14, 15.A)
November Petition:

> ... USDA has proven to have an error rate of 20% on their documentation ... Lions' Quality Control knows that the USDA Inspector error rate is high and if it continues at this level, Lion fees the USDA's negligent behavior may rub off and threaten the integrity of Lion's in-house Quality Control personnel.
>
> Dating back to at least 1996 and continuing to the present, and on an industry-wide basis, the USDA inspection service has been, and is, engaged in a pattern and practice of negligently inspecting the raisins on an incoming and outgoing basis, and negligently recording the grade and quality of incoming and outgoing raisins ... Outgoing USDA inspection now actually violates the Marketing Order for Processed Raisins by allowing raisins to be shipped into the market when they exceed 18.4% in moisture.
>
> It is arbitrary, capricious and not in accordance with law for Lion to: (1) pay USDA inspection service for negligently performed inspection services and for the faulty and erroneous inspection results; (2) ... to pay for that service when the USDA

> inspection service erroneously and negligently inspects and records the grade of incoming inspections; and (3) for the marketing order to require that the Lion to use the USDA inspection service for incoming and outgoing raisin[s] when that service is negligently and erroneously performed ...
>
> When USDA inspectors and their aides negligently perform incoming inspections ... It is thus arbitrary, capricious and not in accordance with law for the marketing order to require Lion to use the USDA inspection service ... but then negligently inspect and record the grade and quality ... When USDA negligently performs the inspection service and grading results showing that there are more "meeting" raisins than what the actual grade indicates ...

(AR 2005, Tab 1, ¶ ¶ 10-12, 14) The substance of the claims are identical although the November Petition includes more factual detail.

(4) Lion's "quality control" department is more efficient and better than USDA inspectors, and Lion's standards are higher than USDA's.

September Petition:

> Both Petitioners have their own quality control departments whose duties range from product inspection, sanitation, pest control, metal detection, etc. At Petitioners' daily average volumes, Petitioners could employ 8-9 quality control people for the 100 plus dollar per hour that USDA charges Petitioners, or approximately $1,000.00 per day or more for one inspector at each of the Petitioners' plant.
>
> Further, Petitioners' inspect their processed products to their own standards, which are much more stringent than the USDA standards for processed product.

(AR 2003, Tab 1, ¶¶ 13-14)

November Petition:

> Lion has their own quality control department whose duties range from processed product inspection, sanitation, pest control, metal detection, etc. At Lions' daily average volume Lion could employ 10 quality control people for the 135 plus dollars per hour that USDA charges Lion. USDA has proven to have an error rate

> of 20% on their documentation. Lions' Quality Control are not allowed such a loose rein on their errors.

(AR 2005, Tab 1, ¶ 10) The petitions contain the same claim with more factual detail in the November Petition.

(5) USDA's inspection fees "are biased towards consumer-oriented [rather than bulk] processors" like Lion.

September Petition:

> The Inspection Service Fees are biased toward the consumer-oriented processors; all processors are charged $9.00 per ton, but the consumer lines (those that pack the retail package of raisins) do far less volume per hour (one ton per hour) versus the bulk line, which are Petitioners' majority of business. With Petitioners paying $9.00 per ton at 12-15 tons per hour, Petitioners are subsidizing the consumer processor lines of their competitors who run approximately one ton per hour with the same number or more inspectors than those at Petitioners' facilities ...

(AR 2003, Tab 1, ¶ 15.D)

November Petition:

> Generally, a consumer-pack oriented processor/handler (unlike Lion), on the other hand, with a full line of products, packages product at an approximate average of one ton per hour. At the $9.00 per ton fee the USDA charges, this equates to a cost of only $9.00 per hour for one inspector. A consumer pack-oriented packed could have as many as six inspectors on various consumer lines and only incur $54.00 per hour in inspection fees. In comparisons, ... Lion incurs approximately $135.00 per hour one inspector.

(AR 2005, Tab 1, ¶ 9) These claims are substantially similar.

(6) The USDA's inspections are "biased" towards raisin growers.

September Petition:

> The USDA has a built-in bias with the inspection of the

> producers of incoming raisins to insure that the raisins pass inspection with little or no rejections ... The USDA has a built-in bias to force the packers, not the producers, to pay. The USDA also permits persons affiliated with or related to producers to inspect raisins who have a built-in bias for raisin producers, causing an extreme conflict of interest.

(AR 2003, Tab 1, ¶ 15.F)
November Petition:

> ... Dating back to at least 1996, and continuing to present, USDA inspectors and the inspector aides performing incoming inspections will grade raisins in such a way, and/or record the results of the raisins in such a way, to favor the producer receiving a higher price for the raisins than what the grower otherwise deserved to receive, and the USDA inspection service would erroneously provide the grower with more weight of "meeting" raisins than what the grower deserved ...
>
> When USDA inspectors and their aides negligently perform incoming inspections and the grading results to the benefit of the producers but to the corresponding detriment of Lion ...

(AR 2005, Tab 1, ¶ ¶ 11, 14) These claims are substantially similar.

Lion's September Petition was dismissed with prejudice by the ALJ on July 15, 2004. (AR 2003, Tab 10). Lion appealed the decision and on October 19, 2004 the Judicial Officer issued its' October Decision and Order dismissing the September Petition with prejudice. (AR 2003, Tab 11, 15) Lion did not challenge the October 19, 2004 Decision and Order by the Judicial Officer in District Court, although it was represented by knowledgeable counsel and had the opportunity to do.

In the November Petition, Lion challenged the same regulations of the Raisin Marketing Order on the same grounds and employed the same arguments, and often, identical language of its earlier petition. Attempts to relitigate issues previously adjudicated have been specifically rejected by the USDA. In *In re Gerawan Co. Inc., A California Corporation,* 90 AMA Docket Nos. F & V 916-6 and 917-7, 50 Agric. Dec. 1363, 1991 WL 333618 (U.S.D.A. October 31, 1991), the JO affirmed an ALJ decision dismissing a petition under the doctrine of *res judicata* because the petition attempted to re-litigate the same issues previously dismissed in an earlier case.

The record in Gerawan I clearly shows that petitioner could have had its challenges to the 1988 interim final rules determined in that proceeding if it had chosen to do so. It neglected to do so, and the ALJ's determination of dismissal "with prejudice" correctly applied the standard of res judicata in the instant proceeding.

However, the instant Petition alleges the same wrong (the 1988 interim final rules are not in accordance with law) which infringes the same right (the handling of nectarines, plums, and peaches), is based on the same statutory authority, and is made in virtually identical language as the dismissed allegations of Gerawan I.

The challenged regulations are the same regulations, imposing the same restrictions on the petitioner as were dismissed with prejudice in Gerawan I.

In re Gerawan Co. Inc., A California Corporation 90, AMA Docket Nos. F & V 916-6 and 917-7, 50 Agric. Dec. 1363, 1369-70, 1991 WL 333618 *4 (U.S.D.A. October 31, 1991).

Even if viewed in the light most favorable to Lion, the evidence-in the form of the administrative records of both the September Petition of 2003 and the November Petition of 2004, instituted by Lion-establishes that there is no genuine issue of material fact to be adjudicated. The USDA properly found Lion's November Petition barred by *res judicata*.[5]

The Judicial Officer's decision concerning *res judicata* is in accordance with the law.

B. Request for Hearing

[5]The Judicial Officer's decision also dismissed the November Petition on Plaintiff's failure to abide by certain Rules of Practice, § 900.52(b)(1)-(2) and (4). Neither Defendant USDA nor Plaintiff Lion has addressed this portion of the Judicial Officer's decision in their motions for summary judgment. It is unclear whether this portion of the Judicial officer's decision is arbitrary, capricious or not in accordance with law because neither party addresses whether pleading standards established by the Federal Rules of Civil Procedure apply to USDA petitions. However, because the November Petition was dismissed with prejudice on *res judicata* grounds and the Decision and Order is in accordance with law and any decision on the Rules of Practice would not change the dismissal on prejudice grounds, there is no need to address this portion of the Decision and Order.

Lion claims that the Judicial Officer arbitrarily denied Lion "a mandatory hearing to determine what it means to 'cause' an inspection and certification."(Doc. 47, Reply to Defendant's Motion for Summary Judgment or Partial Summary Judgment, p. 2:19-20; Doc. 37, Plaintiff's Memorandum of Points and Authorities in Support of Cross-Motion for Summary Judgment, p. 5:16-17; Doc. 1, Complaint, ¶ 24)

Section 7 U.S.C. § 608(c)(15)(A) provides handlers the opportunity to file a petition for a review of a provision or obligation under any marketing order that is not in accordance with the law. As part of the petition process, a handler is also provided an opportunity for hearing on the petition. However, the statute specifically states, "He shall thereupon be given an opportunity for a hearing upon such petition, *in accordance with regulations made by the Secretary of Agriculture,* with the approval of the President." 7 U.S.C § 608c(15)(A) (emphasis added).[6] Although, a hearing is permitted for an action filed under 7 U.S.C. § 608c(15)(A), it is subject to regulations promulgated by the Secretary of Agriculture with the approval of the President.

In this suit, the regulations of 7 C.F.R. § 900.50-71 titled "Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted From Marketing Orders" are regulations governing the filing of such a petition, including, but not limited to, regulations on service of a petition (§ 900.52(a)), the contents of a petition (§ 900.52(b)), motions to dismiss petitions (§ 900.52(c)), judges (§ 900.55), depositions (§ 900.61) and applications to reopen hearings (§ 900.68). Under these regulations, a petition may be subject to a motion to dismiss before a hearing is conducted. If the Administrator of the AMS files a motion to dismiss because it is "of the opinion that the petition, or any portion thereof, does not substantially comply, in form or content, with the act or with the requirements of paragraph (b) of this section [§ 900.52(b)], or is not filed in good faith, or is filed for purposes of delay ...," 7 C.F.R. §

[6]7 U.S.C. § 608c(15)(A) states in total:

(15) Petition by handler and review

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

900.52(c), and the motion to dismiss is granted with prejudice, there will be no hearing.

Here, a motion to dismiss was filed by the Administrator against Lion's November Petition pursuant to § 900.52(b) and (c) on the ground that a matter of policy was raised, that the bar of *res judicata* applies, and that the petition factually does not comply with specific pleading requirements. If the motion to dismiss was properly granted, then a hearing was not required. Plaintiff does not assert the regulations governing a petition hearing are arbitrary, capricious and not in accordance with law.

Although technical pleading issues could have been satisfied by amendment in accordance with AMA Rules, *res judicata* bars the Petition for Hearing for the reasons stated above. It is unnecessary to remand on the ground that the issues raised addresses now justiciable policies. The Judicial Officer's decision not to hold a hearing is in accordance with the law.

C. Motion to Strike

The USDA also moves for summary judgment claiming that the Judicial Officer properly ordered that Lion's February Amended Petition be stricken. On February 9, 2005, before the ALJ ruled on the pending motion to dismiss the November Petition, Lion filed an amended petition, the February Amended Petition. (AR 2005, Tab 9). On February 14, 2005, the AMS filed a motion to strike Lion's February Amended Petition as premature and not in accordance with the applicable Rules of Practice. (AR 2005, Tab 11) On March 7, 2005, the ALJ issued an order striking Lion's February Amended Petition as premature. (AR 2005, Tab 13) The ALJ also provided Lion with leave to file an amended petition. (AR 2005, Tab 13 at p. 3) On March 11, 2005, AMS appealed the ALJ's decision. (AR 2005, Tab 17)

On April 25, 2005, the Judicial Officer's Decision and Order not only dismissed the November Petition with prejudice but granted the motion to strike the February Amended Petition on the basis that it was premature. (AR 2005, Tab 24)

Lion alleges in its Complaint that the Judicial Officer's decision to strike the February Amended petition was arbitrary and capricious and Lion should have been permitted to address any remaining issues that the

Judicial Officer had with the November Petition and to file the February Amended Petition pursuant to § 900.52b. (Doc. 1, Complaint ¶ 27)

USDA rejoins that when a motion to dismiss is filed, the Rules of Practice provide that a petitioner may file an amended petition only *after* the ALJ has issued an order dismissing all or a portion of the petition. USDA contends the Judicial Officer properly ordered Lion's petition stricken because it was filed prematurely-more than one month *before* the ALJ issued a decision on the pending motion to dismiss.

The motion to dismiss provisions, provide in part:

(2) Decision by the Judge. The Judge, after due consideration, shall render a decision upon the motion stating the reasons for his action. Such decision shall be in the form an order and shall be filed with the hearing clerk who shall cause a copy therefore to be served upon the petitioner and a copy thereof to be transmitted to the Administrator.. Any such order shall be final unless appealed pursuant to § 900.65: *Provided,* That within 20 days following the service upon the petition of a copy of the order of the Judge dismissing the petition, or any portion thereof, on the ground that it does not substantially comply in form and content with the act or with paragraph (b) of this section, the petitioner shall be permitted to file an amended petition.

7 C.F.R. § 900.52(c)(2).

The Judicial Officer ruled on USDA's motion to strike the February Amended Petition stating:

> Section 900.52(c) (2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)) provides, when a motion to dismiss has been filed, a petitioner may file an amended petition after the Hearing Clerk serves the petitioner with the [ALJ's] order dismissing the petitioner's petition or any portion of the petitioner's petition. Petitioner filed the Amended Petition on February 9, 2005, 33 days prior to the date the Hearing Clerk served the Petition with the ALJ's March 3, 2005, Order dismissing Petitioner's Petition. Therefore, Petitioner's Amended Petition should be stricken as premature.

(2005, A.R. Tab 24 at pp. 9-10 (fn.Omitted))

Plaintiff claims that the Judicial Officer applied the wrong Rule of

Practice and the applicable rule is § 900.52b governing amended pleadings which states:

> At any time before the close of hearing the petition or answer may be amended, but the hearing shall at the request of the adverse party, be adjourned or recessed for such reasonable time as the judge may determine to be necessary to protect the interests of the parties. Amendments subsequent to the first amendment or subsequent to the filing of an answer may be made only with leave of the judge or with the written consent of the adverse party.

7 C.F.R. § 900.52b.

Lion contends that based on § 900.52b it had the right to file the February Amended Petition as there was no hearing or answer filed by Defendant USDA and the February Amended Petition was its first amended petition. USDA responds that "It would be unfair, and a waste of resources, to allow a petitioner to postpone administrative decisions on faulty petitions by prematurely amending them. A petition could repeatedly attempt to revise his petition through piecemeal amendment, while the Secretary would be required to expend departmental resources seeking dismissal of multiple faulty petitions-with no final decision in sight." (Doc. 36, USDA's MSJ, p. 22:16-23). USDA's argument is misplaced. The regulations governing amended petitions only permit one amended petition to be filed before the filing of an answer or a hearing, not serial amendments. Any further amended petitions require with leave of the judge or consent of the adverse party. USDA's concern that continuing amendments would prevent a decision if Lion were permitted to amend its petition before the ALJ issued a decision on the motion to dismiss is incorrect. While the case cited by Plaintiff, *In re: Handlers Against Promoflor,* FCFGPIA Docket No. 96-0001, 56 Agric. Dec. 1529, 1997 WL 57747 (U.S.D.A. September 8, 1997), did not directly address this issue, the Court in passing noted that after the USDA had filed a motion to dismiss under Section 900.52(c)(2), the petitioner in the suit filed two amendments to cure deficiencies under Section 900.52b. The Court did not take issue with the first amended petition and noted that the second amended petition was filed with leave. It denied leave to file a third amended complaint. *Id.* at * 9.

The Judicial Officer had no reason to ignore the regulations regarding amendments to petitions, particularly, a petitioner's right to file a first amended petition before USDA filed an answer or a hearing has been

conducted, pursuant to § 900.52b. "As a general rule, courts attribute to the words of a statute their ordinary meaning. Similarly administrative orders, like statutes, are not to be given strained and unnatural constructions." *Reddi-Wip Co. of Philadelphia v. Hardin,* 315 F.Supp. 1117, 1118 (E.D.Pa.1970). Section 900.52b provides for the "orderly conduct of administrative cases" by requiring leave or consent to file a second amended petition. It appears, the Judicial Officer ignored the plain meaning of § 900.52b, did not analyze the provision, and solely based the decision on § 900.52(c)(2), which governs when an amended petition can be filed after an ALJ decision is filed (in a motion to dismiss).

At oral argument, USDA's counsel argued that although the Judicial Officer did not address in its order the right of Lion to file an amended petition under § 900.52b, based on the February Amended Petition, allegedly filed pursuant to § 900.52b, it was not appropriate to do so due to the fact that the February Amended Petition was substantially the same as the dismissed November Petition.

The title to the two petitions are as follows:

November Petition Title:

> Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Eliminate as Mandatory the Use of USDA's Processed Products Inspection Branch Services for All Incoming and Outgoing Raisins, as Currently Required by 7 C.F.R. §§ 989.58 & 989.59 To Exempt Petitioners from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins and/or Any Obligations Imposed in Connection Therewith That are Not in Accordance with Law.

(AR 2005, Tab 24, p. 1)
February Amended Petition Title:

> *Amended* Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations; To Exempt Petitioner from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins, To Preclude the Raisin Administrative Committee and/or USDA from Receiving the Raisin Administrative Committee and/or USDA from Receiving the Otherwise Required Raisin Administrative Committee Forms; Therewith that are Now

Not in Accordance with Law

(AR 2005, Tab 9, p. 1)

Plaintiff's February Amended Petition is largely similar to the November Petition save for one additional allegation regarding disclosure of confidential information. Plaintiff's introductory paragraph to the petition titled "Nature of Action" states:

> 4. This petition is brought because Petitioner believes certain obligations imposed in connection with the Raisin Order are not in accordance with law ... For example, Part 52 includes regulations regarding USDA inspection and certification services required under Section 989.58(d) and 989.59(d).
>
> 5. Petitioner must *cause* inspection and certification of raisins upon acquiring them from its Producers, and prior to shipping them to its Customers; Sections 989.58(d) and 989.59(d) respectively. Said inspections and certification shall be made by a specific branch on of the USDA, unless the Raisin Administrative Committee (hereinafter "RAC") determines, and the Secretary of Agriculture concurs, that "inspection by another agency would improve the administration ..."
>
> 6. *Any* "interested party" may apply for USDA inspection and certification services. An "interested party" is defined as any business entity with a "financial interest in the commodity involved;" Section 52.2. It is axiomatic that Petitioner, its Producers and Customers are interested parties.

(AR 2005, Tab 9, pp. 2-3)

Plaintiff's February Amended Petition then provides a "Statement of Facts" which describes the same issues of who can "cause" an incoming and outgoing inspection of the raisins, negligent inspection results, and excessive inspection charges being paid by Lion, including allegations of being charged the same inspection fees per ton as "slower handlers" and receiving the same number of inspectors as "slower handlers." Plaintiff however, does alleges new facts regarding disclosure of their confidential information by USDA and RAC that were not alleged in the November Petition.

> 11. During the course of incoming and outgoing Inspection services, USDA and RAC obtained and disclosed Petitioner's

> nonexempt confidential information in violation of Section 989.75; 7 U.S.C. § 608d; and 18 U.S.C.1905... On or about January 10, 2005, a RAC employee disclosed Petitioner's confidential information to one of Petitioner's chief competitors.

(AR 2005, Tab 9, p. 4)

Plaintiff's February Amended Petition then provides a "Statement of Grounds" which largely mirror the November Petition[7] except for additional grounds of disclosure of Plaintiff's confidential information by RAC and USDA. The section discusses the alleged unlawful disclosure by USDA and RAC of Lion's confidential information. Lion states that it:

> obligates Petitioner [Lion] to withhold paperwork that is requested by USDA and/or RAC. Their conduct is arguably a federal offense that calls for criminal penalties and removal from office under 18 U.S.C. § 1905. Moreover their conduct is arbitrary, capricious, abuse of discretion, and not otherwise in accordance with law, including Section 989.75 and 7 U.S.C. § 608d.

(AR 2005, Tab 9, pp. 5-6)

The "Prayer for Relief" of Plaintiff's February Amended is largely similar to the relief requested in the November Petition, except for the additional relief sought to remedy disclosure of Lion's confidential information. The ALJ and the Judicial Officer should have addressed this additional disclosure of confidential information claim, alleged in Lion's February Amended Complaint.

The Judicial Officer's order striking Lion's February Amended Petition is not in accordance with law and the suit is remanded for further proceedings in accordance with this decision to address the confidential disclosure of information claim in the February Amended Petition.

CONCLUSION

For the reasons set forth above,

(1) Defendant USDA's motion for summary judgment is GRANTED IN PART AND DENIED IN PART. The February Amended Petition is

[7] Plaintiff again discusses the issue of who can "cause" an inspection of the incoming and outgoing raisins pursuant to § 989.58(d) and § 989.59(d); the high cost of inspection results; the shortage of inspectors; and the negligent inspections.

remanded to the Judicial Officer for further proceedings in accordance with this decision.

(2) Plaintiff's cross-motion for summary judgment is DENIED.

IT IS SO ORDERED.

END OF DOCUMENT

_____

ORGANIC FOODS PRODUCTION ACT

COURT DECISION

In re: AURORA DAIRY CORP. ORGANIC MILK MARKETING AND SALES PRACTICES LITIGATION.
MDL No. 1907.
Filed February 20, 2008.

(Cite as: 536 F.Supp.2d 1369).

OFPA – Organic Milk – False labeling – Prices, artificially high.

This preliminary matter is a consolidation of class actions brought by several adversely affected entities against a single supplier of milk labeled as USDA "Organic." The aggrieved entities contend Aurora sold milk at prices higher than non-Organic milk when the milk may not have met USDA Organic standards and thus they paid artificially high prices.

U.S.Jud.Pan.Mult.Lit.,2008.

Before D. LOWELL JENSEN, Acting Chairman, JOHN G. HEYBURN II, Chairman [FN*], J. FREDERICK MOTZ, ROBERT L. MILLER, JR., KATHRYN H. VRATIL, DAVID R. HANSEN, ANTHONY J. SCIRICA, Judges of the Panel.

FN* Judge Heyburn took no part in the disposition of this matter.

TRANSFER ORDER

D. LOWELL JENSEN, Acting Chairman.

Before the entire Panel [*]: Plaintiffs in the District of Colorado *Freyre* action have moved, pursuant to 28 U.S.C. § 1407, for centralization of this litigation in the District of Colorado. Defendant in all actions, Aurora Dairy Corp. (Aurora), opposes plaintiffs' motion but, alternatively, supports selection of the District of Colorado as the transferee forum. Plaintiffs in the District of Colorado *Still* action and two potential tag-along actions pending in the District of Colorado support centralization in the District of Colorado. Plaintiffs in the Eastern District of Missouri action support centralization in the Eastern District of Missouri.

This litigation currently consists of four actions listed on Schedule A

and pending, respectively, in the following three districts: two actions in the District of Colorado, and an action each in the Southern District of Florida and the Eastern District of Missouri.[1]

On the basis of the papers filed and hearing session held, we find that these four actions involve common questions of fact, and that centralization under Section 1407 in the Eastern District of Missouri will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. Plaintiffs in all four actions, which are brought on behalf of putative nationwide classes, contend that Aurora misled them into believing that the milk that they purchased was "organic" or "USDA organic" when in fact the milk failed to meet organic standards, including those established by the U.S. Department of Agriculture and the federal Organic Foods Production Act, 7 U.S.C. § 6501, *et seq.* As a result, plaintiffs bring a variety of state law claims, asserting that, *inter alia,* they have paid artificially high prices for Aurora's organic milk. Centralization under Section 1407 will eliminate duplicative discovery; prevent inconsistent pretrial rulings (particularly with respect to the issue of class certification); and conserve the resources of the parties, their counsel and the judiciary.

Aurora opposes centralization, asserting that, *inter alia,* transfer of the actions under Section 1407 is unnecessary because voluntary alternatives to Section 1407 are superior. We respectfully disagree. Transfer under Section 1407 has the salutary effect of placing all actions in this docket before a single judge who can formulate a pretrial program that: (1) allows discovery with respect to any non-common issues to proceed concurrently with discovery on common issues, *In re Smith Patent Litigation,* 407 F.Supp. 1403, 1404 (J.P.M.L.1976); and (2) ensures that pretrial proceedings will be conducted in a streamlined manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties and the judiciary.

We are persuaded that the Eastern District of Missouri, where the first-filed action is pending, is an appropriate transferee forum for this

[1] In addition to the four actions now before the Panel, the parties have notified the Panel of eleven related actions pending, respectively, as follows: four actions in the District of Colorado, two actions in the Northern District of California, and an action each in the Eastern District of Arkansas, the District of Minnesota, the Eastern District of New York, the Southern District of New York, and the Western District of Washington. These actions and any other related actions will be treated as potential tag-along actions. *See*Rules 7.4 and 7.5, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001).

litigation. Given the geographic dispersal of the constituent actions and the potential tag-along actions, the Eastern District of Missouri offers a relatively convenient forum for this litigation.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the actions listed on Schedule A and pending outside the Eastern District of Missouri are transferred to the Eastern District of Missouri and, with the consent of that court, assigned to the Honorable E. Richard Webber for coordinated or consolidated pretrial proceedings with the action listed on Schedule A and pending in that district.

SCHEDULE A

MDL No. 1907 - **IN RE: AURORA DAIRY CORP. ORGANIC MILK MARKETING AND SALES PRACTICES LITIGATION**

District of Colorado

Rebecca Freyre, et al. v. Aurora Dairy Corp., C.A. No. 1:07-2183

Mona Still, et al. v. Aurora Dairy Corp., C.A. No. 1:07-2188

Southern District of Florida

Maya Fiallos v. Aurora Dairy Corp., C.A. No. 1:07-22748

Eastern District of Missouri

Kristine Mothershead, et al. v. Aurora Dairy Corp., C.A. No. 4:07-1701

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PLANT PROTECTION ACT

DEPARTMENTAL DECISION

In re: CONWAY WHOLESALE PRODUCE.
P.Q. Docket No. 07-0003.
Decision and Order.
Filed February 15, 2008.

PPA – Hass avocados, Mexican – Restricted importation and transport – Faulty labeling – Missing labeling– Interstate transhipment and re-distribution.

Thomas N. Bolick for APHIS.
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision

In this decision I find that the Animal Plant and Health Inspection Service did not meet its burden of proving by the preponderance of the evidence that Respondent Conway Wholesale Produce violated the Plant Protection Act. Accordingly, I dismiss the complaint against Respondent.

Procedural Background

On October 5, 2006 a Complaint was filed by Kevin Shea, Acting Administrator of the United States Department of Agriculture's Animal Plant and Health Inspection Service (APHIS), alleging that Respondent Conway Wholesale Produce violated the Plant Protection Act (the Act) on or about January 4, 2003, by distributing five cases of Mexican Hass avocados to local Mexican restaurants in and around Conway, Arkansas, without the required compliance agreement. Respondent, through its vice president Raymond Kelley, filed an answer on October 24, 2006, denying the allegations.

On March 1, 2007, Complainant moved that an oral hearing be set. I scheduled a telephone conference for August 29, 2007. Even though he had agreed to participate in the telephone conference, Mr. Kelley declined to participate, hanging up on my secretary, Diane Green. I conducted the conference without Mr. Kelley. Thomas Bolick, Esq., participated on behalf of Complainant. As a result of the telephone conference, a telephone hearing was scheduled to commence in Washington, D.C. on October 3, 2007.

On August 31, 2007, Complainant filed a motion to amend the complaint, to correct the alleged violations to distributing the five cases

of Mexican Hass avocados when such distribution was not authorized rather than without the required compliance agreement.

On October 3, 2007, I convened a telephone hearing in Washington, D.C. Thomas Bolick, Esq. represented Complainant. At the start of the hearing, efforts to reach Mr. Kelley were unsuccessful. However, approximately 35 minutes after the hearing convened, during the examination of the second witness, Mr. Kelley called in and participated in the hearing from that time forward.

Before the first witness testified, I granted Complainant's motion to amend the complaint, which had been unopposed.

Complainant called four witnesses, and Mr. Kelley testified on behalf of Respondent. A total of six exhibits, all on behalf of Complainant, were admitted into evidence.

At the conclusion of the hearing, I allowed the parties until October 31 to submit additional written materials, including briefs, and proposed findings of fact and conclusions of law. Complainant filed its brief on October 31. No brief was filed by Respondent.

Statutory and Regulatory Background

Section 7712 of the Plant Protection Act allows the Secretary to:

> prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination of a plant pest or noxious weed within the United States.

7 U.S.C. § 7712(a).

The Act further gives the Secretary the authority to issue regulations to implement this provision.

The Secretary has issued regulations concerning the importation of Hass avocados from Mexico. 7 CFR § 319.56-2ff. When the regulations were first promulgated in the mid 1990's, there was a major concern with preventing the importation of several insect pests that Mexican Hass avocados were known to harbor. Thus, the importation of these avocados was restricted generally to states outside the southeast and the southwest.[1] The regulations allowed importation into the United States during only

[1] The geographical restrictions have been eased considerably since the time of the alleged violations.

for a few months each year and incorporated numerous safeguards to assure that the avocados would not be sold in states where they were banned. Among the safeguards was the requirement that a label be attached to each shipping box at the time of packing the avocados, specifically stating that these avocados were not to be distributed in the banned states, which included Arkansas. Further, avocados that were repackaged were required to be clearly marked with the same information concerning the prohibited geographic distribution. In addition, each avocado was required to be labeled with a sticker indicating the number of the Mexican packing house where the avocado was prepared for shipment. "We believe this stickering requirement will make it easier to identify Mexican-origin avocados at terminal markets and present an additional obstacle to transshipments of the fruit to non-approved states." 62 Fed. Reg. 5299.

Facts

In 2003, the importation of Hass avocados grown in Mexico into the United States was subject to a number of restrictions. Among the restrictions was a prohibition against distributing the avocados into numerous states, including the State of Arkansas Joel Bard, the APHIS state plant health director for Arkansas, testified that he had been advised by Blaine Powell, the State Smuggling Interdiction and Trade Compliance Officer, that Mexican Hass avocados had come into Arkansas. Tr. 93-94. In particular, Kyzer Produce, a wholesaler located in Little Rock, had received the avocados and they were being distributed throughout the state. *Id*. He asked other USDA personnel to conduct an investigation to determine how the avocados made it into Arkansas. Tr. 21.

No USDA inspector ever observed any of the avocados in question. The bulk of the evidence in this case consists of affidavits taken by government witnesses of individuals who did not appear at the hearing and documentary evidence obtained during the investigation.

The USDA investigation established that Kyzer Produce purchased several shipments of avocados from Proffer Wholesale, Park Hills, Missouri. Proffer had purchased avocados wholesale throughout the United States, Mexico and Canada. On October 1, 2002, they signed a Compliance Agreement with APHIS relating to Mexican Avocados and understood that it was illegal for Mexican Hass avocados to enter Arkansas. CX 1. Yet Proffer's records established that between October 23, 2002 and the date the affidavit at CX 1 was taken on February 5, 2003, many Mexican avocado sales were made to businesses in Arkansas. Id. The list of invoices referenced in the affidavits indicates that at least

three shipments of avocados were delivered by Proffer to Kyzer Produce's facility in Little Rock. *Id*.

An invoice dated January 4, 2003, CX 4, appears to indicate that five boxes of avocados, each containing 48 avocados, were purchased by Conway Wholesale Produce for a total of $125. The purchase was signed for by Conway's driver, Bill Robinson. An after the fact addition to the invoice was made by APHIS Senior Investigator David B. Head, while taking the affidavit of Linda Davis, Kyzer's office manager, four years after the transaction took place. Tr. 65. Ms. Davis falls far short of stating that the avocados were even labeled as required by the regulations, but merely stated, in her affidavit, that the avocados picked up by Mr. Robinson "would have been packed in the original boxes." *Id*.

Nowhere on the invoice did it indicate where the avocados were grown, nor does it indicate that the purchase was for avocados that could not legally be distributed in Arkansas. Moreover, the information on the invoice stating that the avocados were all purchased from Proffer on 12/23/02 was not added to the invoice until the affidavit was taken in January of 2007 and it was added by Mr. Head, not Ms. Davis. There is nothing in this record that would even hint as to how Ms. Davis made that determination, since Complainant did not call her to testify.

Joel Bard likewise indicated that he had never seen the avocados in question, that there was no indication on the invoice as to the origins of the avocados, Tr. 99, and that the only way he could think of that Conway would know of the origin would be to look at the boxes which should indicate that distribution was prohibited in Arkansas. Tr. 99-100.

Raymond Kelly, the Manager of Conway Wholesale Produce, testified that he never saw the avocados in question and that Respondent would not have any way of knowing they were of Mexican origin. Tr. 115-116.

Virtually all of the substantive evidence in this case came in through the affidavits of individuals who the government did not call as witnesses. The main testimony of the witnesses who did testify was to confirm that they were the ones who took the affidavits that Complainant sought to have admitted.

Discussion

I find that Complainant has fallen woefully short of meeting its burden of proving, by a preponderance of the evidence, that Respondent Conway Wholesale Produce violated the regulation prohibiting the importation or distribution of Mexican Hass avocados in Arkansas. While it appears likely that the avocados purchased by Conway and sold to restaurants in Arkansas were in fact Mexican Hass avocados, I reject the implied contention that Respondent would be liable even if it could not

reasonably have known that the avocados were from Mexico.

Respondent sold Mexican Hass avocados to one or more restaurants in Conway at a time when it was illegal to distribute or import such avocados in Arkansas. While proof of even this basic fact is somewhat shaky, being that it is based solely on hearsay testimony, I am inclined to believe the material in the affidavits, since they were timely taken and were admissions of facts that were against the interests of the affiants.[2] Thus, though I do not have the actual copies of invoices from Proffer indicating that avocados of Mexican origin were purchased, the listing of invoices clearly establishes that Proffer knowingly purchased Mexican Hass avocados, and resold these avocados to a number of entities, including those doing business in Arkansas. One of these entities, Kyzer, produced an invoice indicating that Conway had purchased five boxes of avocados from it, and that these avocados were part of the boxes of Mexican Hass avocados they had purchased from Proffer. Thus, it is reasonable to conclude that these five boxes of avocados, which Conway concedes its driver picked up from Kyzer, were in fact Mexican Hass avocados of the type forbidden to be distributed or imported into Arkansas.

Complainant did not demonstrate, by a preponderance of the evidence, that the avocados purchased by and resold by Conway were labeled or stickered as required by the regulations. No witnesses testified who saw the avocados in question. Complainant elected not to call Respondent's driver as a witness. The only testimony in support of Complainant's case on this issue is contained in an affidavit prepared four years after the fact by Linda Davis, Kyzer's office manager, who indicated that the avocados "would have" been labeled. No foundation whatsoever has been established for this apparent belief of Ms. Davis. I find that this is inadequate evidence to support a finding that the avocados, at the time they were purchased by Conway, bore any indication that they were Mexican Hass avocados which were by regulation not to be imported or distributed in Arkansas.

It is well established that hearsay evidence is admissible in administrative hearings[3], and I did not hesitate to admit the affidavit of Linda Davis when it was proffered by Complainant. However,

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[2] Even so, there was no foundation evidence offered that the information contained in the affidavits was generated as a result of examining business records which were usual and customary in the business.

[3] See, *e.g., In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 817 (2003). " . . . responsible hearsay has long been admitted in the United States Department of Agriculture's administrative proceedings."

acceptance of a document into evidence does not automatically entitle it to great weight. The fact that the document was hearsay, that it was prepared fully four years after the fact, and that Ms. Davis could only surmise that the boxes of avocados would have contained the required warnings renders this piece of evidence virtually without worth. If Ms. Davis could positively state that she saw the labels on the boxes that would be worth something; if her affidavit was taken during the time of the initial investigation that too might have given the document some probative value. But the fact that her statement was merely surmise at best, coupled with the fact that Respondent would have no opportunity to cross examine her, leads me to conclude that there is no credible evidence to support a finding that the avocados were labeled. Accordingly, I find that Complainant has not met its burden of proof on this issue.

In the absence of any showing that the avocados in question were labeled or otherwise identified as Mexican Hass avocados not for sale or distribution in Arkansas, I find that Complainant has failed to meet its burden of proof that the violations alleged in the amended complaint were committed by Respondent. I agree with Complainant's contention in its brief that failure to be aware of the law itself is not an excuse for the alleged violations. However, I do not recall Mr. Kelley ever making such an argument on behalf of Conway. Rather, his principal contention, repeated in his questioning of Complainant's witnesses and his own direct testimony, was that there was no direct evidence that would indicate that Respondent had any notice that the avocados he purchased were Mexican Hass avocados illegal for sale or distribution in Arkansas. He repeatedly asked witnesses how he or his driver could have known that the avocados were from Mexico rather than Chile or Florida, particularly since the invoice gave no indication of the provenance of the avocados. Tr. 115. He questioned why the only person mentioned at the hearing who surmised that the avocados were properly labeled was not called by Complainant, who also failed to call the driver, Bill Robinson, to testify.

Complainant's principal theory for holding Conway liable is that even if Conway did not know and could not have known that the avocados purchased and distributed by them were Hass avocados from Mexico, Conway would still be liable as knowledge was not "an element of the violation that merits the assessment of a civil penalty." Under Complainant's theory, the Secretary's requirements concerning labeling and stickering are mere window dressing. It is stunningly obvious to me that a major, if not the sole, purpose of labeling and stickering requirements is to alert the produce handler concerning the legal

distribution of Mexican Hass avocados. Complainant's interpretation would essentially nullify the labeling aspects of this carefully crafted regulatory program, which specifically mandated not one but two labeling requirements to alert potential bulk purchasers of the origin of the avocados to prevent their unlawful sale or distribution. Complainant made no effort to show that the avocados had the required stickers, and only a lame effort through hearsay surmise to show that the boxes were properly labeled.

The importance of labeling and stickering, while self-evident, is worth discussing further. With respect to stickering, the regulations required:

> (vi) Prior to being packed in boxes, each avocado fruit must be cleaned of all stems, leaves, and other portions of plants and labeled with a sticker that bears the Sanidad Vegetal registration number of the packinghouse.

7 C.F.R. § 319.56-2ff(c)(3)(vi).

"We believe this stickering requirement will make it easier to identify Mexican-origin avocados at terminal markets and present an additional obstacle to transshipment of the fruit to nonapproved States." 62 Fed. Reg. 5299. Thus, the requirement was clearly intended to alert companies such as Conway, which purchased avocados at terminal markets, of the origin of the avocados, to prevent their transshipment into a state, such as Arkansas, which was not approved for Mexican Hass avocados. Complainant made no attempt to show the avocados purchased by Conway were stickered as required by the regulations.

With respect to labeling, the regulations required:

> (vii) The avocados must be packed in clean, new boxes, or clean plastic reusable crates. The boxes or crates must be clearly marked with the identity of the grower, packinghouse, and exporter, and the statement "Not for distribution in AL, AK, AZ, AR, CA, FL, GA, HI, LA, MS, NV, NM, NC, OK, OR, SC, TN, TX, WA, Puerto Rico, and all other U.S. Territories." 7 C.F.R. § 319.56-2ff(c)(3)(vii).

As I have already concluded, there was no probative evidence to support the contention that the boxes were labeled so that Conway, through its driver Bill Robinson, could have known that the avocados were of Mexican origin. Complainant seems to have abandoned or at least downplayed this aspect of the case and is focusing its argument on the premise that, even if there were no proper labels and stickers, Conway would be liable just because these were in fact Hass avocados. The

Valkering[4] case relied on by Complainant to show that knowledge is not a prerequisite to liability in this case is easily distinguishable. In that case there was no labeling requirement. More significantly, the Respondent in *Valkering* was knowingly engaged in a certification process where it hired another company, on a commission basis, to purchase trees for which certain inspections were required. The ALJ, the Judicial Officer and the Court of Appeals all found it significant that Valkering was directly involved in the shipment of the uncertified trees. Indeed, Valkering was involved in the transaction from the time before the trees were even dug up, let alone transported and sold. Here, Conway was merely a wholesale purchaser of a small amount of avocados from a warehouse, having no involvement in any of the transactions that brought the avocados to Little Rock in the first place.

Furthermore, I have some question as to whether the regulation even impacts avocados that have already been illegally imported into one of the banned states. The purpose of the regulation, and the labeling requirements, is to prevent avocados from ever even entering the states from which they were banned. Here, through the combined activities of Proffer and Kyzer, the act of illegally shipping the Mexican Hass avocados into Arkansas was already accomplished before Conway ever arrived on the scene. Complainant's theory—essentially one of absolute liability since knowledge is irrelevant—becomes even more onerous when a company purchasing unlabeled avocados already in the state of Arkansas can be held liable for an illegal activity performed by the prior handlers of the avocados, in which Respondent had absolutely no involvement. While I think it a stretch to find a party potentially liable for transporting avocados which are unlabeled into a state where their importation is forbidden, I find that an interpretation of this regulation which would hold a party liable for the purchase and distribution of unlabeled avocados purchased within the state to be well outside the purview of this regulation.

Findings of Fact

1. Respondent Conway Wholesale Produce is located at 1202 Markham Street, Conway, Arkansas 72032.

2. On or about January 4, 2003, Respondent, through its driver Bill Robertson, picked up five cases of avocados from Kyzer Produce in North Little Rock, Arkansas. These avocados were Mexican Hass

[4] In re: *Unique Nursery and Garden Center, Butternut Creek Sales., Inc., Valkering U.S.A., Inc., Heyl Truck Lines, Inc., and Lebarnold, Inc.*, 53 Agric. Dec. 377 (1994), *affirmed sub nom Valkering, U.S.A., Inc. v. United States Department of Agriculture*, 48 F.3d 305, 54 Agric. Dec. 386 (C.A. 8, 1995).

avocados, which were not approved for distribution in Arkansas.

3. The avocados purchased by Respondent did not bear any indicia of their origin, even though the regulations required that Mexican Hass avocados bear a sticker indicating their provenance, and that the cases containing the avocados were required to be labeled with information indicating that the avocados were not to be distributed in Arkansas.

4. The avocados purchased by Respondent were delivered to restaurants in the Conway, Arkansas area.

Conclusion of Law

Complainant did not prove, by a preponderance of the evidence, that Respondent violated the regulations at 7 C.F.R. § 319.56-2ff.

Order

The complaint against Respondent Conway Wholesale Produce is dismissed.

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

Copies of this decision shall be served upon the parties.

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SUGAR MARKETING ACT

COURT DECISION

ROSS L. BAIR, ET AL. AND WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES v. USDA.
No. 2007-5049.
Filed Feb. 5, 2008.

(Cite as: 515 F.3d 1323).

SMA – CCC super-priority lien – Fifth amendment taking – State law preempted.

Despite claims of state & common law notions of "property interests" and claims of an unconstitutional taking, creditors of a defunct sugar processing company were left without recourse when the Commodity Credit Corporation (CCC) acquired a super-priority lien to the raw beets and subsequently to any sugar refined therefrom in accordance with 7 U.S.C. § 7284(d).

Rehearing and Rehearing En Banc Denied March 31, 2008.

United States Court of Appeals,
Federal Circuit.

Affirmed.
Before LINN, DYK, and MOORE, Circuit Judges.

DYK, Circuit Judge.

This case involves a takings claim. The alleged taking resulted from the Commodity Credit Corporation's ("CCC") enforcement of its super-priority lien interest in sugar produced from sugar beets under 7 U.S.C. § 7284(d) (2000). Appellants Ross L. Bair, et al. ("appellants") are sugar beet growers whose state-law liens on the sugar were rendered valueless by the enforcement of CCC's super-priority lien. They appeal from the decision of the United States Court of Federal Claims granting summary judgment in favor of the government. Because we conclude that the Court of Federal Claims correctly determined that there was no taking, we affirm.

BACKGROUND

Appellants are producers of sugar beets in Washington state. They contracted with processor Pacific Northwest Sugar Company ("PNSC") to process their 2000 sugar beet crop into refined beet sugar. The beets

were delivered for processing. Payment for the beets was to occur over the course of several months, but PNSC only made the first 55% of those payments. Under Washington law, upon delivery of an agricultural product to a processor, "the producer has a first priority statutory lien, referred to as a 'processor lien.' " Wash. Rev.Code. § 60.13.020 (2007). This lien "attaches to the agricultural products ... delivered, to the processor's or conditioner's inventory, and to the processor's or conditioner's accounts receivable." *Id.* Appellants delivered their beets to PNSC on or before December 1, 2000, and therefore had state statutory processor liens that attached by that date. Both parties agree that the liens gave appellants a lien on the sugar beets, the sugar refined from those beets, and any proceeds from the sale of that sugar. If PNSC failed to make a payment under the contract, appellants were entitled to foreclose and enforce the lien by a civil action in state court. *See id.* § 60.13.070 ("The processor ... liens may be foreclosed and enforced by civil action in superior court.").

The CCC, an agency of the United States within the Department of Agriculture, makes loans to sugar beet processors in order to provide price support to the domestic sugar market. Between October 10, 2000, and February 12, 2001, the CCC issued twenty-one nonrecourse loans to PNSC. Upon making these loans, the CCC acquired a security interest in the refined sugar produced by PNSC from appellants' beets. Appellants' state processor liens, which attached upon delivery of the beets and later attached to the sugar produced from the beets, necessarily predated the later CCC loans, which were secured by the sugar refined from those beets. Nonetheless, the CCC's loans received super-priority over appellants' loans under 7 U.S.C. § 7284(d), which provides:

A security interest obtained by the Commodity Credit Corporation as a result of the execution of a security agreement by the processor of sugarcane or sugar beets shall be superior to all statutory and common law liens on raw cane sugar and refined beet sugar in favor of the producers of sugarcane and sugar beets and all prior recorded and unrecorded liens on the crops of sugarcane and sugar beets from which the sugar was derived.

On March 5, 2001, after paying about half of what it owed to appellants, PNSC defaulted on its agreement with them. After this default by PNSC, appellants timely filed statements evidencing their processor liens on March 22, 2001. SeeWash. Rev.Code. § 60.13.050 (requiring

producers to file liens within twenty days of payment due date in order to maintain priority over earlier-filed liens and perfected security interests). On September 19, 2001, appellants brought suit in Washington state court, against both PNSC and CCC, seeking foreclosure of those liens and recovery of $8,714,690.

The government removed this action to the United States District Court for the Eastern District of Washington. The district court granted summary judgment in favor of the CCC because it concluded that the plain language of 7 U.S.C. § 7284(d) afforded super priority to the CCC's liens. *Bair v. Pac. Nw. Sugar Co.,* No. CS-01-0310, slip op. at 24 (E.D.Wash. Feb. 21, 2002) (unpublished), *aff'd,*85 Fed.Appx. 555 (9th Cir.2004) (not selected for publication in the Federal Reporter). As a result of these rulings, the CCC was able to recover $4,540,803 of its outstanding loans, through a combination of the remaining processed sugar and the proceeds from its sale, and wrote off $10,411,089 of PNSC's debt. No sugar or proceeds remained to pay PNSC's debt to appellants, and their liens were rendered worthless.

On November 19, 2004, appellants filed a complaint in the United States Court of Federal Claims, alleging that the application of 7 U.S.C. § 7284(d) constituted a taking under the Fifth Amendment. The Court of Federal Claims determined that "[t]he Federal statute created a pre-existing limitation on the property rights that the Growers could acquire under state law." *Bair v. United States,* No. 04-CV-1689, slip op. at 10 (Fed.Cl. Jan. 11, 2007). The court therefore held that the application of that statute did not constitute a taking, and granted summary judgment in favor of the government. *Id.* at 12.

Appellants timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review the Court of Federal Claims's decision to grant summary judgment without deference. *Old Stone Corp. v. United States,* 450 F.3d 1360, 1367 (Fed.Cir.2006).

The Supreme Court has recognized two types of regulatory takings-categorical regulatory takings and partial regulatory takings. If a partial regulatory taking is alleged, we must undertake the fact-based inquiry set out by the Supreme Court in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

The Supreme Court has identified several relevant factors that have particular significance, including: (i) "the character of the governmental action"; (ii) "[t]he economic impact of the [action] on the claimant"; and (iii) "the extent to which the [action] has interfered with distinct investment-backed expectations." *Id.* at 124, 98 S.Ct. 2646. If a categorical regulatory taking is alleged, we ask only whether the regulatory imposition is one that "denies all economically beneficial or productive use of [the property]." *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *see also Maritrans Inc. v. United States,* 342 F.3d 1344, 1353 (Fed.Cir.2003). Appellants contend that such a categorical taking occurred here because their liens were rendered valueless by the government's foreclosure on the CCC liens and consequent enforcement of its statutory super-priority right, which left no collateral or proceeds from which the appellants' liens could be satisfied.

We assume without deciding that the correct date from which to judge whether a taking occurred is, as appellants contend, the date on which the government asserted its super-priority interest against the appellants and that this action rendered their property valueless. However, under either type of alleged regulatory taking (categorical or partial), before we undertake a *Penn Central* or Lucas analysis, we must determine as a threshold matter whether the claimant has established a property interest for purposes of the Fifth Amendment. *See Members of the Peanut Quota Holders Ass'n v. United States,* 421 F.3d 1323, 1330 (Fed.Cir.2005); *Am. Pelagic Fishing Co. v. United* States, 379 F.3d 1363, 1372 (Fed.Cir.2004); *Maritrans Inc.,* 342 F.3d at 1351. In other words, we ask "whether the claimant possessed a 'stick in the bundle of property rights.'" *Adams v. United States,* 391 F.3d 1212, 1218 (Fed.Cir.2004) (citation omitted). "It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." *Wyatt v. United States,* 271 F.3d 1090, 1096 (Fed.Cir.2001). Once the claimant has identified a valid property interest, we must determine whether the challenged governmental action constituted a compensable taking of that property interest. *See Am. Pelagic,* 379 F.3d at 1372.

The central dispute in this case is whether appellants possessed a compensable property interest in their right to lien priority over the CCC's liens on PNSC's refined sugar. The Supreme Court in *Lucas* made clear that property interests are acquired subject to "background principles" of law, and that limitations on property rights that otherwise would effect a

categorical taking are permissible if they "inhere in the title itself." 505 U.S. at 1029, 112 S.Ct. 2886. The parties do not dispute that, under Washington law, appellants' interests were created in 2000, with the last date of creation being December 1, 2000. At that time both state law and federal law existed purporting to define the priority of the appellants' liens.

Appellants argue, however, that only the states, and not the federal government, have the power to create and define property rights, and that the federal statute therefore cannot constitute a "background principle" of law in derogation of appellants' state-created right to lien priority.[1] We reject appellants' argument.

We first note that the Supreme Court has held that federal law determines what constitutes "property" for purposes of applying federal statutes. In particular, the Court has made clear that "the priority of liens stemming from federal lending programs must be determined with reference to federal law." *United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 726, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979); *see also United States v. Craft,* 535 U.S. 274, 278-79, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002) ("State law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' for purposes of the federal tax lien statute is a question of federal law.").

Despite the statements in a number of Supreme Court cases referring to the creation of property interests by state law, the Court has recognized that state-created property interests may be limited by federal laws, even in the area of real property. In *Lucas* itself, the Supreme Court recognized that federal law can constitute a "background principle" for purposes of categorical takings. For example, the *Lucas* majority approvingly cited *Scranton v. Wheeler,* 179 U.S. 141, 21 S.Ct. 48, 45 L.Ed. 126 (1900), 505 U.S. at 1029, 112 S.Ct. 2886. There the Court held that the construction of a pier by the federal government, which destroyed a riparian owner's access to navigable waters, did not effect a taking because the riparian owner's title "was acquired subject to the rights which the public have in the navigation of such waters." *Scranton,* 179 U.S. at 163, 21 S.Ct. 48.

In cases of personal property, the background principles are defined by the law existing at the time that the property came into existence. Any

[1]Appellants "maintain that property rights are created and defined by state law, and such rights cannot be abridged by federal legislation, for if this was the case, Congress could effectively legislate around the Takings Clause. This point of disagreement is the sole issue on appeal." Br. of Plaintiffs-Appellants at 23.

lawful regulation defining the scope of the property interest that predates the creation of that interest will "inhere in the title" to the property.[2]

For example, in the bankruptcy context, the Supreme Court has strongly suggested that 11 U.S.C. § 522(f)(2), which permits debtors in bankruptcy proceedings to avoid liens on certain property, can limit the extent of a lienholder's interest in such property after the enactment of the statute. *See United States v. Sec. Indus. Bank,* 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982). In the absence of clear congressional intent, the Court refused to construe the statute to apply retroactively because such an interpretation would require the Court to face "difficult and sensitive questions" arising out of the Takings Clause. *Id.* at 82, 103 S.Ct. 407. The Court found no such difficulty with prospective application of the statute, despite its effect on lien interests that might later be created under state law. Our sister circuits have specifically held that prospective application of section 522(f) does not create takings liability. *See In re Weinstein,* 164 F.3d 677, 686 (1st Cir.1999) ("[A]t its inception, the lien was subject to and limited by the debtor's power to avoid the lien under § 522(f)."); *In re Thompson,* 867 F.2d 416, 422 (7th Cir.1989) (lien avoidance under federal bankruptcy statute "is not a taking when it is authorized *before* the creditor makes the secured loan in question"); *In re Leicht,* 222 B.R. 670, 682-83 (B.A.P. 1st Cir.1998).

The *Armstrong* case, heavily relied on by the appellants here and discussed below, reached a similar conclusion. *Armstrong v. United States,* 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). There the petitioners provided materials to a private contractor for use in the construction of a Navy ship, and obtained liens on those materials under state law. Pursuant to 34 U.S.C. § 582,[3] the government later made

[2]We also have made clear that, in the second step of the takings analysis, the "distinct investment-backed expectations" factor of the *Penn Central* test is to be judged at the time the personal property was acquired. *See Commonwealth Edison Co. v. United States,* 271 F.3d 1327, 1350 & n. 22 (Fed.Cir.2001) (citing *Palazzolo v. Rhode Island,* 533 U.S. 606, 633-34, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (O'Connor, J., concurring)); *see also Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1006, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). The question whether the *Penn Central* test has been satisfied, however, is separate from the question of whether a property interest exists in the first place.

[3]This statute, later codified at 10 U.S.C. § 7521 and subsequently repealed in 1994, Federal Acquisition Streamlining Act of 1994, Pub.L. No. 103-355, § 2001(j), 108 Stat. 3243, 3303, provided authorization to the Secretary of the Navy "to make partial (continued...)

progress payments and was entitled to a "paramount" lien on the work done on account of each payment. The Court made clear that the enforcement of the government lien for progress payments did not result in a taking, because the petitioners' property interest was limited to "whatever proceeds the property might bring over and above the Government's claim to the amount of its progress payments." *Id.* at 45, 80 S.Ct. 1563. The federal statute thus limited the petitioners' later-arising, state-created property interests, even though the state liens arose before the progress payments were made[4] and the enforcement of the federal statute reduced the value of the state liens.

In other contexts our own cases have recognized that a federal statute or authority can constitute a "background principle" that inheres in the title to property interests arising after its enactment, therefore precluding a takings claim based on the application of the statute to those property interests. *See, e.g., Air Pegasus of D.C., Inc. v. United States,* 424 F.3d 1206, 1218 (Fed.Cir.2005) (federal government's longstanding exercise of "dominant control over the navigable airspace" limited property rights in use of that airspace); *Am. Pelagic,* 379 F.3d at 1379 (Magnuson Act was a background principle that inhered in after-acquired title to vessel and thus limited rights to uses of vessel contrary to the Act); *M & J Coal Co. v. United States,* 47 F.3d 1148, 1154 (Fed.Cir.1995) (Surface Mining Control and Reclamation Act of 1977 limited company's right to mine under state permit issued after enactment of federal statute).[5]

Here there can be no question of the authority of the federal government to make loans to sugar processors. The loans provided by the CCC to processors like PNSC are part of a federal program designed to stabilize and support the domestic sugar market. Loans from the CCC to processors of domestic sugar beets are a major component of this program. Federal regulations guarantee that the loan proceeds will be

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[3](...continued)
payments from time to time during the progress of the work under all contracts made under the Navy Department for public purposes, but not in excess of the value of work already done," and stated that such contracts "shall provide for a lien in favor of the Government, which lien is made paramount to all other liens, upon the articles or thing contracted for on account of all payments so made." 34 U.S.C. § 582 (1952).

[4]See Br. for the Pet'rs at 10, *Armstrong,* 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554.

[5]See also Ruckelshaus, 467 U.S. at 1003-04, 104 S.Ct. 2862; *Colvin Cattle Co. v. United States,* 468 F.3d 803, 807 (Fed.Cir.2006); *Maritrans,* 342 F.3d at 1352 (noting that " 'background principles' derived from an independent source, such as state, *federal,* or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking" (emphasis added)).

used to make certain minimum payments to sugar beet producers, like appellants, who provide beets for processing. 7 C.F.R. § 1435.104(c). The loan proceeds therefore benefit both processors and growers, and support the national sugar industry in general. There is also no doubt as to the federal government's authority to obtain and enforce security of the federal loans. *See Kimbell Foods,* 440 U.S. at 726, 99 S.Ct. 1448. As the Supreme Court has explained, "state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). The federal statute, guaranteeing super-priority for the CCC loans to PNSC, and the state statute, guaranteeing first priority for the appellants' processor liens in the sugar refined by PNSC, clearly are in direct conflict. Because the federal statute legitimately altered the priority of liens arising after the statute was enacted, it preempted state law to the contrary.

To be sure, takings questions may arise where the federal statute has a retroactive effect. For example, as noted above, in *Security Industrial Bank* the Court stated that if it construed section 522(f), permitting debtors to avoid liens on certain property, to apply retroactively, it would "call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the Takings Clause." 459 U.S. at 82, 103 S.Ct. 407 (internal quotation marks omitted). Similarly, in *Preseault v. United States,* 100 F.3d 1525 (Fed.Cir.1996), we rejected the government's argument that the property interests could be defined "by the *evolving enactment and implementation of federal railroad law* " after the creation of the property rights in question. *Id.* at 1537 (emphasis added). "[B]road general legislation authorizing a federal agency to engage in future regulatory activity," *id.* at 1538, did not effectively limit the property right.[6]

However, this is not a situation in which a federal statute restricting the state lien was enacted after the state property interest came into existence. Beginning in 1977, Congress amended the Agricultural Act of 1949, Pub.L. No. 81-439, 63 Stat. 1051, to provide price support to the

[6]In *Lucas,* the Supreme Court indicated that, as to personal property, even retroactive application of a statute might permissibly alter a state-created property interest. *See* 505 U.S. at 1027-28, 112 S.Ct. 2886 ("[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless....").

sugar industry through loans made to processors of sugar beets in certain crop years. *See* Food and Agriculture Act of 1977, Pub.L. No. 95-113, § 902, 91 Stat. 913, 949 (providing loans for 1977 and 1978 crop years). In 1991, Congress added a provision ensuring the super-priority of CCC loans to sugar processors over statutory and common law producer liens. *See* Food, Agriculture, Conservation, and Trade Act Amendments of 1991, Pub.L. No. 102-237, § 111(b), 105 Stat. 1818, 1830. In 1996, the Agricultural Market Transition Act reauthorized sugar beet processor loans, and again provided for the super-priority of the federal loans over statutory and common law liens in favor of sugar beet producers. *See* Pub.L. No. 104-127, tit. 1, §§ 156(b), 164(d), 110 Stat. 896, 931, 935-36.[7] This act was in effect in December 2000, when appellants' state liens attached. Contrary to appellants' argument, the fact that the statute only had an effect in this case after the state lien was created is irrelevant. The federal statutory limit existed long before that time, and its later application does not create a retroactivity problem.

Appellants finally argue that other cases support their argument that a federal statute may not alter property interests created by state law. These cases are all distinguishable. In each case, the state-created property interest was rendered unenforceable not by operation of a preexisting federal statute but as a consequence of sovereign immunity. In *Armstrong,* materials on which the plaintiffs held state-law liens were transferred to the United States by operation of a contract to which the plaintiffs were not a party. 364 U.S. at 46-47, 80 S.Ct. 1563. As a result, "the liens were still valid, but they could not be enforced because of the sovereign immunity of the Government and its property from suit." *Id.* at 46, 80 S.Ct. 1563 (internal citation omitted). In both *Shelden v. United States,* 7 F.3d 1022 (Fed.Cir.1993) and *United States v. Metmor Financial, Inc.* (*In re Metmor Financial, Inc.*), 819 F.2d 446 (4th Cir.1987), title to property on which the plaintiffs held mortgage lien interests was transferred to the government under forfeiture provisions of federal criminal statutes. In these cases, sovereign immunity prevented the mortgage holders from enforcing their interests against the United States. *See Shelden,* 7 F.3d at 1030; *Metmor,* 819 F.2d at 450. Thus "transfer ... altered, not the lien itself, but its enforceability." *Metmor,* 819 F.2d at 450. Similarly, in *Murray v. United States,* 817 F.2d 1580

[7]The 1996 Act also suspended, for the 1996 through 2002 crop years, 7 U.S.C. § 1421(e)(2)(a), a provision that had guaranteed payment by the government to sugar beet producers whose liens were not paid in full because of the insolvency of the processor. Agricultural Market Transition Act § 171(b)(1)(J), 110 Stat. at 937. Appellants allege that, prior to 1996, section 1421(e)(2)(a) had provided "just compensation" for what they claim would otherwise have been an unconstitutional taking.

(Fed.Cir.1987), the United States acquired property through a tax lien foreclosure, and refused to allow mortgage holders to redeem the property. *Id.* at 1582. The mortgage holders were unable to bring suit against the government based on this refusal because of sovereign immunity. *Id.* In each of these cases the assertion of the defense of sovereign immunity was held to create a taking; none of the cases held that a federal statute limiting property interests created under state law and enacted before the property came into existence constituted a taking of those interests. To the contrary, as noted above, in *Armstrong* the Supreme Court specifically recognized that the enforcement of a superior government lien for progress payments, arising under a preexisting federal statute, and the consequent reduction in value of the plaintiffs' liens, did not result in a taking. 364 U.S. at 45, 80 S.Ct. 1563. The Court held only that plaintiffs were entitled to recover the value of their state-law liens remaining after the enforcement of the government liens. *Id.*

In summary, the background principles of law at the time appellants' liens were created therefore provided for super-priority of CCC's security interest over "all statutory and common law liens on ... refined beet sugar in favor of the producers." 7 U.S.C. § 7284(d). State law provisions to the contrary were preempted to the extent that they could not and did not grant appellants any compensable property interest at the time of lien enforcement above the government's super-priority lien interest based on federal law. Because we hold that appellants had no compensable property interest in the priority of their state-created liens, we need not address the second step of the takings analysis-namely, whether the government action in fact resulted in any categorical or partial taking of a property interest.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims is

AFFIRMED.

COSTS

No costs.

MISCELLANEOUS ORDERS

In re: MARVIN AND LAURA HORNE, HUSBAND AND WIFE, d/b/a RAISIN VALLEY FARMS; DON DURBAHN; RAISIN VALLEY FARMS MARKETING ASSOCIATION, AN ENTITY WHICH DOES NOT NOW EXIST, BUT HAS IN THE PAST; RAISIN VALLEY FARMS MARKETING, LLC., A CALIFORNIA LIMITED LIABILITY COMPANY; RAISIN VALLEY FARMS, LLC., A CALIFORNIA LIMITED LIABILITY COMPANY; LASSEN VINEYARDS, LLC., A CALIFORNIA LIMITED LIABILITY COMPANY; AND LASSEN VINEYARDS, A CALIFORNIA GENERAL PARTNERSHIP.
2007 AMA Docket No. F&V 989-0069.
Ruling Granting Administrator's Motion to Dismiss.
Filed February 4, 2008.

Frank Martin, Jr., for the Administrator.
Brian C. Leighton, Clovis, CA, and David A. Domina, Omaha, NE, for Petitioners.
Order issued by Peter M. Davenport, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On March 5, 2007, Marvin Horne and Laura Horne, d/b/a Raisin Valley Farms; Don Durbahn; Raisin Valley Farms Marketing Association; Raisin Valley Farms Marketing, LLC; Raisin Valley Farms, LLC; Lassen Vineyards, LLC; and Lassen Vineyards [hereinafter Petitioners] filed a Petition.[1] Petitioners filed the Petition under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674 (Supp. V 2005)) [hereinafter the AMAA]; the federal marketing order regulating the handling of "Raisins Produced From Grapes Grown In California" (7 C.F.R. pt. 989) [hereinafter the Raisin Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice]. Petitioners seek a declaration that they are raisin producers not subject to the Raisin Order, or, if they are subject to the Raisin Order, a declaration that the Raisin Order violates

[1]Petitioners entitle their Petition "Petition to Modify Raisin Marketing Order Provisions/Regulations and/or Petition to Terminate Specific Raisin Marketing Order Provisions/Regulations, and/or Petition to Exempt Petitioners from Various Provisions of the Raisin Marketing Order and Any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Petition].

the AMAA which does not regulate producers in their capacity as producers.

On March 23, 2007, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed "Respondent's Motion to Dismiss" in which the Administrator contends: (1) Petitioners lack standing to file a petition pursuant to 7 U.S.C. § 608c(15)(A) (Supp. V 2005) because only handlers can file a petition pursuant to 7 U.S.C. § 608c(15)(A) (Supp. V 2005) and Petitioners are not handlers under the Raisin Order; (2) Petitioners' statuses under the Raisin Order have been previously litigated and the doctrine of res judicata precludes Petitioners from relitigating their claim that they are producers; and (3) Petitioners did not file their Petition in good faith. On April 20, 2007, Petitioners filed "Petitioners' Opposition to Respondent's Motion to Dismiss."

On May 15, 2007, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order denying Respondent's Motion to Dismiss. The ALJ rejected the Administrator's contentions that Petitioners lack standing, that doctrine of res judicata precludes Petitioners from relitigating their claims that they are producers, and that Petitioners did not file their Petition in good faith. On June 4, 2007, the Administrator filed "Respondent's Appeal of the ALJ's Decision Denying His Motion to Dismiss" [hereinafter Appeal Petition] and a memorandum in support of the Appeal Petition. On June 15, 2007, the Administrator filed a request to file a revised memorandum in support of the Appeal Petition and to strike from the record the June 4, 2007, memorandum in support of the Appeal Petition. Simultaneously, the Administrator filed a revised memorandum in support of the Appeal Petition.[2] On July 5, 2007, Petitioners filed a response to the Administrator's Appeal Petition. On July 9, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

The Administrator's June 15, 2007, Requests

On June 15, 2007, the Administrator requested that I substitute his June 15, 2007, memorandum in support of the Appeal Petition for his June 4, 2007, memorandum in support of the Appeal Petition and strike

[2]The Administrator does not appeal the ALJ's rejection of the Administrator's contention that Petitioners did not file their Petition in good faith.

from the record his June 4, 2007, memorandum in support of the Appeal Petition. Petitioners have not filed any objection to the Administrator's June 15, 2007, requests, and I find no basis for denying the Administrator's June 15, 2007, requests. Therefore, I grant the Administrator's June 15, 2007, requests to substitute his June 15, 2007, memorandum in support of the Appeal Petition for his June 4, 2007, memorandum in support of the Appeal Petition and to strike from the record his June 4, 2007, memorandum in support of the Appeal Petition.

Petitioners Lack Standing to File a Petition Pursuant to 7 U.S.C. § 608c(15)(A) (Supp. V 2005)

The AMAA allows any handler subject to an order to file a petition with the Secretary of Agriculture requesting modification of the order or exemption from the order, as follows:

> **§ 608c. Orders**
>
> . . . .
>
> **(15) Petition by handler and review**
>
> (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. § 608c(15)(A) (Supp. V 2005). The term *handler* is defined in the Rules of Practice to include any person to whom a marketing order is sought to be made applicable, as follows:

> **§ 900.51 Definitions.**
>
> . . . .
>
> (i) The term *handler* means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable[.]

7 C.F.R. § 900.51(i). Petitioners, citing 7 C.F.R. § 900.50(i) and *Midway Farms v. U.S. Dep't of Agric.*, 188 F.3d 1136 (9th Cir. 1999), assert they have standing to file the Petition under 7 U.S.C. § 608c(15)(A) (Supp. V 2005) because they are persons to whom the Raisin Order is sought to be made applicable.

In *Midway Farms*, the court found, although Midway Farms denied in its petition that it was a handler subject to the Raisin Order, the Raisin Administrative Committee had sent Midway Farms a letter "requiring it to complete and to submit certain forms because it was a processor and, as such, a 'handler' subject to the Raisin Marketing Order." *Midway Farms*, 188 F.3d at 1138. The court concluded that the Raisin Administrative Committee sought to apply the Raisin Order to Midway Farms and that this action was sufficient to make Midway Farms a handler with standing to file a petition under 7 U.S.C. § 608c(15)(A).

The Administrator admits the United States Department of Agriculture is conducting an investigation to determine if Petitioners violated the AMAA and the Raisin Order during the period December 1, 2003, through July 31, 2006, but asserts the United States Department of Agriculture's investigation of Petitioners does not cause Petitioners to be persons to whom the Raisin Order is sought to be made applicable (Respondent's Motion to Dismiss at 6, Burnett Decl. ¶¶ 4-5, Worthley Decl. ¶¶ 4-5). The ALJ, however, concluded that, by conducting this investigation, the United States Department of Agriculture seeks to apply the Raisin Order to Petitioners; therefore, the investigation is sufficient to make Petitioners handlers with standing to file the Petition under 7 U.S.C. § 608c(15)(A) (Supp. V 2005), as follows:

> While in *Midway* the forms were sent to Midway by the Committee, there, as here, the Department sought additional information by subpoena. Despite the Department's assurances in this action that neither the Raisin Advisory Committee nor the Department have told the Petitioners that they are subject to the marketing order (Respondent's Motion to Dismiss, Exhibits 1 and 2), those declarations also make it abundantly clear that the purpose of the investigation being pursued is to determine whether the AMAA and the Raisin Marketing Order have been violated. *Id.* As it is difficult to conceive how a person to whom the marketing order is not applicable would have violated the Act or the order, [t]he Department's actions are consistent with an overt intention to make the Petitioners persons to whom the marketing order is being sought to be made applicable. As such, the Petitioners will be found to have the standing to file the administrative petition and have the ultimate merits determined.

ALJ's Order at 3-4.

I disagree with the ALJ's conclusion. The Secretary of Agriculture's

exercise of investigatory authority under 7 U.S.C. § 610(h) does not make the subjects of the investigation persons to whom a marketing order is being sought to be made applicable or confer standing on all such persons to file petitions under 7 U.S.C. § 608c(15)(A) (Supp. V 2005).[3] Instead, the investigation relevant to the instant proceeding is merely designed to determine if Petitioners should be subject to the Raisin Order.

Res Judicata Does Not Preclude Petitioners From Litigating Their Statuses Under the Raisin Order During the Period December 1, 2003, Through July 31, 2006

The Administrator argues that Petitioners should be barred under the doctrine of res judicata from relitigating whether they are handlers, which issue was decided by Administrative Law Judge Victor W. Palmer in *In re Marvin D. Horne*, 65 Agric. Dec. 805 (2006).[4] However, as the ALJ states in his May 15, 2007, Order and, as Petitioners argue in Petitioners' Opposition to Respondent's Motion to Dismiss and Petitioners' Response to Respondent's Appeal of the ALJ's Decision Denying Respondent's Motion to Dismiss, *In re Marvin D. Horne*, 65 Agric. Dec. 805 (Dec. 8, 2006), does not address Petitioners' statuses under the Raisin Order during the period at issue in the instant proceeding, December 1, 2003, through July 31, 2006. Therefore, I agree with the ALJ that the doctrine of res judicata does not bar Petitioners from litigating their statuses under the Raisin Order during the period December 1, 2003, through July 31, 2006.

For the forgoing reasons, the following Order is issued.

ORDER

1. The ALJ's May 15, 2007, Order denying the Administrator's motion to dismiss is vacated.
2. The Administrator's March 23, 2007, motion to dismiss is granted.
3. Petitioners' March 5, 2007, Petition is dismissed.

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[3] *Cf. In re Foster Enterprises*, 62 Agric. Dec. 8, 16-17 (2003) (holding the Secretary of Agriculture's investigation of the petitioners' records pursuant to the Secretary of Agriculture's authority under section 18 of the Egg Research and Consumer Information Act (7 U.S.C. § 2717) does not make the petitioners persons subject to the Egg Order or confer standing on the petitioners to file a petition under section 14(a) of the Egg Research and Consumer Information Act (7 U.S.C. § 2713(a)).

[4] *In re Marvin D. Ho ne*, 65 Agric. Dec. 805 (2006), is currently on appeal to the Judicial Officer.

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In re: MARVIN D. HORNE AND LAURA R. HORNE, D/B/A RAISIN VALLEY FARMS, A PARTNERSHIP AND D/B/A RAISIN VALLEY FARMS MARKETING ASSOCIATION, A/K/A RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION
and
MARVIN D. HORNE, LAURA R. HORNE, DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D/B/A LASSEN VINEYARDS, A PARTNERSHIP.
AMAA Docket No. 04-0002.
Order Seeking Clarification.
Filed June 19, 2008.

AMAA – Raisins – Clarification.

Frank Martin, Jr. and Babak A. Rastgoufard, for Complainant.
David A. Domina and Michael Stumo, Omaha, NE, for Respondents.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], instituted this administrative proceeding by filing a Complaint alleging that, during crop years 2002-2003 and 2003-2004, Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, and others [hereinafter Mr. Horne and partners], did not comply with the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674), and the federal order regulating the handling of Raisins Produced from Grapes Grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]. On April 11, 2008, I issued a Decision and Order in which I found that Mr. Horne and partners committed 673 violations of the Raisin Order. I ordered Mr. Horne and partners to pay to the Raisin Administrative Committee [hereinafter the RAC] $6,042.23 in assessments for crop years 2002-2003 and 2003-2004, and $183,006.51 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Finally, I assessed a civil penalty of $202,600 against Mr. Horne and partners for their violations of the Raisin Order.

On May 12, 2008, the Administrator filed a timely Petition to Reconsider the Decision and Order of the Judicial Officer. In the

petition, the Administrator alleges that the calculation of the assessments owed to the RAC by Mr. Horne and partners, as well as the calculations for the value of the raisins that Mr. Horne and partners failed to hold in reserve, are not correct and should be modified. As support for the argument that the calculations should be modified, the Administrator included "Exhibit A" which he defines as "a road map that shows how the assessments were calculated and the specific exhibit numbers that show the volume of the raisins packed by Respondents for crop year 2002-2003." (Pet. to Reconsider at 3.)

Exhibit A is a good start to the process of determining the volume of raisins packed. Column B of the table on page 1 of Exhibit A lists the total packed weight by varietal type. Page 2 of Exhibit A "contains a list of the specific exhibit numbers that were used in the computation of the packed weight." The problem I am having in confirming the packed weight is that each of the 147 exhibits cited contain numerous pages. Determining the weight from each exhibit involves searching through hundreds if not thousands of pages for the correct number from each exhibit. Considering the Administrator has already completed such a search in order to provide the numbers in column B of Exhibit A, my duplicating the task is not a good use of my office's limited resources. Therefore, I order the Administrator to provide to me, no later than July 11, 2008, a breakdown of the weights from each exhibit, including the specific page within the exhibit from which the information may be obtained, that were used to calculate the totals in column B of Exhibit A.[5] The Administrator will send, via fax, a copy of this filing to counsel for Mr. Horne and partners on the same day it is filed with the Hearing Clerk. Mr. Horne and partners will have 21 days from the date the Administrator files with the Hearing Clerk to comment on the Administrator's filing.

In re: SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC., A FLORIDA CORPORATION.
AWA Docket No. D-05-0002.
Remand Order.

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[5]While I will not mandate the specific format to be used in providing the information, I will suggest that a table or spreadsheet will facilitate review. Suggested headings include:

Exhibit #	Page	Natural Seedless	Other Seedless	Monukka	Comments

Weights of each varietal type would be provided under the appropriate column. The comments column can be used to clarify, if necessary, any entry, including calculations used to reach the number entered.

Filed January 8, 2008.

AWA – License application – Remand Order.

Colleen Carroll for Respondent
Thomas John Dandar, Tampa, FL, for Petitioner.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

This proceeding is before me on the Animal and Plant Health Inspection Service's [hereinafter APHIS] appeal petition, filed on December 21, 2006. APHIS seeks an order vacating rulings and decisions of Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] issued in this proceeding, including the June 7, 2006, Decision in which the Chief ALJ "sustain[ed] the determination of . . . APHIS to deny the application of Suncoast Primate Sanctuary Foundation, Inc. for a license to exhibit animals under the Animal Welfare Act" and "remand[ed] the case to APHIS to conduct a complete investigation as to whether [Suncoast Primate Sanctuary Foundation, Inc.,] qualifies as a licensee under the [Animal Welfare] Act." (Chief ALJ's Decision at 1.) APHIS also seeks an order vacating the Chief ALJ's July 28, 2006, Ruling Denying Motion for Reconsideration and the Chief ALJ's October 27, 2006, Ruling and Order Granting Motion for Order to Issue Exhibitor's License.

In its appeal petition, APHIS also requested that the Judicial Officer "issue a decision and order upholding the determination of APHIS to deny the license application submitted by petitioner Suncoast Primate Sanctuary Foundation, Inc." (Respondent's Appeal Pet. at 45).

I have reviewed the record in the case, including the rulings and decisions issued by the Chief ALJ, the filings of the parties, the transcript of the November 15, 2005, hearing, and the exhibits presented by the parties. Based on my review of the record, I conclude the rulings and decisions of the Chief ALJ should be vacated. In addition, my review of the record finds sufficient evidence to hold that Suncoast Primate Sanctuary Foundation, Inc., and The Chimp Farm, Inc., are not so intertwined that issuance of a license to Suncoast Primate Sanctuary Foundation, Inc., "would be tantamount to issuing a license to The Chimp Farm, Inc." (August 17, 2004, letter from APHIS denying Suncoast Primate Sanctuary Foundation, Inc.'s application for an Animal Welfare Act license.) Furthermore, the evidence in the record concerning the corporate relationship between Suncoast Primate Sanctuary Foundation, Inc., and The Chimp Farm, Inc., leads me to conclude that 9 C.F.R. § 2.10(b) and 9 C.F.R. § 2.11(a)(3) are inapplicable in this proceeding.

Therefore, I hold APHIS erred in concluding that issuing an Animal Welfare Act license to Suncoast Primate Sanctuary Foundation, Inc., would circumvent the Secretary of Agriculture's order in *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999).

ORDER

1. The rulings and decisions of the Chief ALJ, including the June 7, 2006, Decision; the July 28, 2006, Ruling Denying Motion for Reconsideration; and the October 27, 2006, Ruling and Order Granting Motion for Order to Issue Exhibitor's License, are vacated.

2. The matter is remanded to the Administrator, APHIS, with instructions to review Suncoast Primate Sanctuary Foundation, Inc.'s application for an Animal Welfare Act license and to determine if Suncoast Primate Sanctuary Foundation, Inc., meets the requirements of 7 U.S.C. § 2133 and 9 C.F.R. § 2.1(c).

In re: BRIDGEPORT NATURE CENTER, INC., HEIDI M. BERRY RIGGS, AND JAMES LEE RIGGS, d/b/a GREAT CATS OF THE WORLD.
AWA Docket No. 00-0032.
Remand Order.
Filed January 18, 2008.

AWA – Remand order.

Colleen Carroll, for the Administrator.
S. Cass Weiland and Robert A. Hawkins, Dallas, TX, for Respondents.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this administrative proceeding by filing a Complaint and Order to Show Cause on May 5, 2000. 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 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 that Bridgeport Nature Center, Inc., Heidi M. Berry Riggs, and James Lee Riggs [hereinafter Respondents] exhibited tigers and other exotic cats during the summer of 1999 in violation of the Animal Welfare Act and the Regulations. In addition, the Complaint and Order to Show Cause states James Lee Riggs applied for an Animal Welfare Act license which was denied because of the allegations in the Complaint and Order to Show Cause. The Administrator seeks sanctions for the violations, as well as an order to show cause why James Lee Riggs' Animal Welfare Act license application should not be denied.

Respondents filed a timely answer on May 25, 2000. Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing, in Dallas, Texas, from February 25, 2002, through February 28, 2002. In August 2006, the ALJ asked the parties to address whether the Animal Welfare Act and the Regulations applied to Respondents because the alleged violations took place at state fairs. On November 1, 2006, the ALJ issued what she captioned "Decision." In the Decision, the ALJ found Respondents were subject to the Animal Welfare Act and the Regulations and also found Respondents committed a single violation of the Regulations. The ALJ's Decision did not include a discussion of James Lee Riggs' Animal Welfare Act license application, a discussion of a sanction for Respondents' violation of the Regulations, or an order addressing the disposition of the proceeding. Rather the ALJ stated:

> Only the issues related to whether any of the Respondents violated the regulations, as alleged, have been heard - - that is, the "liability" portion of the hearing. Consideration of the license application and denial was deferred; also deferred was consideration of any consequences that would flow if any of the Respondents did violate the regulations, such as what the appropriate sanction would be.

ALJ Decision at 7 ¶ 24.

On March 15, 2007, the Administrator filed Complainant's Appeal Petition in which the Administrator argues that the Decision issued by the ALJ is not a "decision" as that word is defined in the Rules of Practice. 7 C.F.R. § 1.132. The Administrator also argues, in the alternative, that, if I were to find the ALJ's Decision satisfied the definition of the word "decision," I should find the ALJ erred in her interpretation of the Regulations. On May 9, 2007, Respondents filed a Response to Appeal Petition in which they disagreed with the Administrator's position.

I have examined the ALJ's Decision and reviewed Complainant's Appeal Petition, as well as Respondents' Response to Appeal Petition. I need not address the issues raised on appeal and do not decide if the ALJ's Decision satisfies the requirements for a decision set forth in the Rules of Practice. 7 C.F.R. § 1.132. In addition, I do not discuss if the ALJ's Decision is based on correct or incorrect interpretations of the Regulations.

The primary authority of the Judicial Officer is to issue final decisions in adjudicatory proceedings arising from various United States Department of Agriculture programs. 7 C.F.R. § 2.35. Such decisions are final for the purposes of judicial review. 7 C.F.R. § 1.145(i). I conclude that a decision issued by me addressing the ALJ's Decision would be little more than an advisory opinion. Such a decision, absent significant additions discussing issues not addressed by the ALJ, would not be a final decision for the purposes of judicial review. A decision without all issues discussed is likely to lead to piecemeal review of the case.

Federal appellate courts have long held, with few exceptions, that their jurisdiction is limited to reviewing final judgments. *Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113 (3d Cir. 1999). One of the underlying purposes of the final judgment rule is to discourage piecemeal appeals and to promote efficient judicial administration. *Id.* at 122 (Sloviter, J., concurring). While the constitutional underpinnings of the judicial final judgment rule are not implicated if I were to decide a case that lacked finality, I find that limiting my decisions to cases in which my decision renders a final appealable order provides a more efficient process. Therefore, I will only review cases that can result in a final appealable order.[1]

For the foregoing reasons, I remand the case to the ALJ for further proceedings consistent with this Remand Order. This remand will afford the ALJ the opportunity to further review all the filings in this proceeding, including Complainant's Appeal Petition and Respondents' Response to Appeal Petition, and to issue a complete decision addressing all issues in the proceeding, including the question of violations, sanctions, and James Lee Riggs' Animal Welfare Act license application.

ORDER

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[1]The one obvious exception to the final judgment rule is the certified question. Under the Rules of Practice, an administrative law judge may certify a "motion, request, objection, or other question to the Judicial Officer . . . ." 7 C.F.R. § 1.143(e). If the ALJ's intent in bifurcating the case and issuing a non-final decision was to seek my views on her interpretation of the Regulations (or any other issue in the proceeding), she should have certified the question to me.

This case is remanded to the ALJ for further proceedings as discussed in this Remand Order.

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.
Stay Order as to Lancelot Kollman Ramos.
Filed March 19, 2008.

AWA – Stay Order.

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.
Stay Order issued by William G. Jenson, Judicial Officer.

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).[1] On November 15, 2007, Lancelot Kollman Ramos filed a petition for rehearing, which I denied.[2] On March 19, 2008, Lancelot Kollman Ramos filed a motion for a stay of the Orders in *In re Octagon Sequence of Eight, Inc.* (Decision as to Lancelot Kollman Ramos), 66 Agric. Dec. 1093 (2007), and *In re Octagon Sequence of Eight, Inc.* (Order Denying Petition for Rehearing as to Lancelot Kollman Ramos), 66 Agric. Dec. 1283 (2007), pending the outcome of proceedings for judicial review. Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, has consented to the entry of a stay order.

In accordance with 5 U.S.C. § 705, Lancelot Kollman Ramos' request for a stay is granted.

For the foregoing reasons, the following Order is issued.

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[1] *In re Octagon Sequence of Eight, Inc.* (Decision as to Lancelot Kollman Ramos), 66 Agric. Dec. 1093 (2007).

[2] *In re Octagon Sequence of Eight, Inc.* (Order Denying Petition for Rehearing as to Lancelot Kollman Ramos), 66 Agric. Dec. 1283 (2007).

ORDER

The Orders in *In re Octagon Sequence of Eight, Inc.* (Decision as to Lancelot Kollman Ramos), 66 Agric. Dec. 1093 (2007), and *In re Octagon Sequence of Eight, Inc.* (Order Denying Petition for Rehearing as to Lancelot Kollman Ramos), 66 Agric. Dec. 1283 (2007), are stayed pending the outcome of proceedings for judicial review. This Stay Order as to Lancelot Kollman Ramos shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: PATTI J. VAN METER AND GREEN ACRES EXOTICS, INC.
AWA Docket No. 07-0154.
Ruling.
Filed April 16, 2008.

Babak Rastgofard for APHIS.
Respondent Pro se.
Ruling by Administrative Law Judge Marc R. Hillson.

Ruling Denying Motion for Decision and Order By Reason of Admission of Facts

I am denying Complainant's motion to adopt a decision and order by reason of admission of facts because many of the material facts necessary to support a finding that Respondents violated the Animal Welfare Act were either denied outright by Respondents in their answer, or Respondents stated that they had insufficient knowledge to admit or deny the allegations in their answer to the complaint.

The complaint in this matter was filed against Respondents on June 28, 2007, and was served by certified mail on July 2, 2007. After I granted an extension of time to file an answer, Respondents' answer was filed on August 27, 2007. In the answer, filed by Ms. Van Meter on her own behalf and on behalf of Respondent Green Acres Exotics, Inc., Ms. Van Meter variously admitted, denied or stated Respondents were without sufficient knowledge to admit or deny the allegations presented in the complaint. On November 13, 2007, Counsel for Complainant wrote to Ms. Van Meter seeking confirmation that the paragraphs of the complaint that she admitted, denied or were without sufficient knowledge to admit or deny were "correct." There is no record that this letter was received by Ms. Van Meter, and it appears that no response was ever received by counsel for Complainant.

On December 28, 2007, Complainant filed a Motion for Adoption of Proposed Decision and Order which stated, in essence, that Respondents in their answer had admitted the material facts alleged in the complaint. A proposed decision was submitted for the signature of an administrative law judge, which included many, if not all, of the allegations specifically denied by respondents, as well as those where respondents stated they did not have sufficient knowledge to admit or deny. These documents were served on Respondents on January 18, 2008. Ms. Van Meter filed a request for a 30-day extension of time to file her response to the motion via fax on February 7, 2008, which I granted.[1] Respondents Objections to Complainants Motion for Decision and Order was filed with the Hearing Clerk on March 19, 2008. In her response, Ms. Van Meter vehemently denies ever violating the Animal Welfare Act.

While Complainant urges that I issue a decision "by reason of admission of facts" there are few, if any, material facts admitted that would justify the imposition of the highest civil penalty provided by the statute combined with a three year license suspension. Rather, the admission relied on by Complainant is the conclusion of law alleged in the complaint:

ALLEGED VIOLATION OF THE ACT AND REGULATIONS

33. On or about April 2004, Respondents failed to provide veterinary care to one black bear cub, in willful violation of section 2.40(b) of the Regulations.

Respondents admitted paragraph 33, which does not allege any material facts except for a failure to provide veterinary care to one black bear cub. However, Respondents denied the allegations in paragraph 11, which stated they had a disregard for the requirements of the Act, they denied the allegations of paragraph 15, which stated they owed a portion of a previously assessed civil penalty, they denied the allegations of paragraph 16 concerning the quality of care they provided for a bear cub, they denied the allegations of paragraph 17, concerning their alleged lack of good faith and history of previous violations, and they denied the allegations of paragraph 18 concerning the gravity of the violation. In spite of these specific denials, Complainant has included each of these allegations as an admitted matter in its proposed decision and order. Likewise, the ten allegations to which Respondents indicated they had

[1] For reasons undetermined, the request for a continuance was not served on Complainant. Since the document did not reach my desk for over a week, I granted the continuance until March 20, 2008.

insufficient knowledge to admit or deny are essentially treated as admitted by Complainant in its proposed decision and order.

Respondents have not admitted the **facts** that would support the proposed decision. While Respondents did admit, presumably through carelessness or confusion, that they willfully failed to provide veterinary care for a bear cub, they have denied virtually every material fact necessary to support that conclusion. Further, the factors Complainant cites to establish a severe sanction—a maximum civil penalty and a three year license suspension—are not supported by any facts admitted by Respondents in their answer. They denied not paying the previous penalty, their alleged lack of good faith, and the gravity of the violation. At the very least, their answer creates a conflict between all the material facts that were denied or which they had insufficient knowledge to admit or deny, and their apparent admission to a legal conclusion.

The rule under which Complainant is seeking this decision, 7 CFR § 1.139 of the Rules of Practice, seems to provide some guidance. The first sentence of the rule reads: "The failure to file an answer, or the admission by the answer of **all the material allegations of fact** contained in the complaint, shall constitute a waiver of hearing." (Emphasis supplied). Here, where there is a denial or lack of knowledge of 15 different paragraphs of the allegations of the complaint, it would appear that the prerequisites to meeting this rule are not met on their face.

Thus, I deny the Motion for a Decision and Order by Reason of Admission of Facts.

In re: MARTINE COLETTE, WILDLIFE WAYSTATION; and ROBERT H. LORSCH.
AWA Docket No. 03-0034.
Miscellaneous Order.
Filed April 28, 2008.

Colleen A. Carroll for APHIS.
David Krantz and Robert M. Yaspan for Respondents.
Miscellaneous Order by Chief Administrative Law Judge Marc R. Hillson.

Order Striking Motion for Order Dismissing Action

On April 22, 2008, the Office of the Hearing Clerk received a Motion, dated April 7, 2008, asking that I dismiss the above-captioned action against Respondent Lorsch. A Response to the Motion, asking that I either strike or deny it, was filed on April 24, 2008. I grant the Motion to Strike.

This case has already involved 19 days of hearings, and extensive briefing by the parties. Respondent Lorsch filed a 168 page brief which included a number of pages on the "one-satisfaction rule," the very issue that he is raising on this Motion to Dismiss. The time for briefing in this case is over, and I am presently engaged in writing the decision. Raising the very issues already raised in his lengthy brief, but couching it as a Motion to Dismiss, does not change the basic fact that this is a legal argument that has already been raised, and that Lorsch's Motion appears to me to be simply an ill-disguised attempt to supplement an already extensive brief well after the time for his brief has passed.

Accordingly, I grant the Motion of Complainant to Strike.

WILBUR WILKINSON, ON BEHALF OF ERNEST AND MOLLIE WILKINSON v. USDA.
SOL Docket No. 07-0196.
SUMMARY OF TELECONFERENCE RULINGS AND HEARING NOTICE.
Filed February 29, 2008.

ECOA – S.O.L.

Steven C. Brammer for USDA
John Mahoney for Complainant.
Pre-Hearing Rulings by Administrative Law Judge Victor W. Palmer.

On Thursday, February 28, 2008, at 1:00 PM Eastern Time, I held a teleconference with John Mahoney, Esq., Attorney for Complainant and with Thomas F. Barnett, Esq., Attorney for Respondent. We first discussed Complainant's Motion to Amend the Complaint.

Based upon my review of the complaint filed in 1990, the Department of Agriculture's response to it, and applicable law, I ruled that the complaint may be amended to encompass all discriminatory treatment of Complainant respecting credit transactions with the Farmers Home Administration, or its successor agencies, during the period beginning on January 1, 1981 and ending on December 31, 1996. This ruling is based on the following:

(a) Mr. Wilkinson is a layman who was unassisted by legal counsel when he filed the 1990 claim.

(b) Mr. Wilkinson was never advised of any need to file additional, formal complaints or to amend his existing complaint at the various times he complained to Department officials about additional discriminatory practices in respect to loans given or requested by the Wilkinson family.

(c) In correspondence with the Department, Mr. Wilkinson's 1990 complaint (USDA Docket Number 2478) was seemingly treated as having been expanded to include all of the issues raised on behalf of the "Three Affiliated Tribes". For example, in a December 10, 2005 letter to James W. Myart, the attorney for the Three Affiliated Tribes, the Director of the Office of Civil Rights, explained that, (the bottom of page one) his clients' claims (set forth on page two) had been accepted by her office for investigation on May 21, 1999 and were: "… encompassed by a single complaint… Complaint Number 990201-3216 (or USDA Number 2478)". When Mr. Wilkinson's Section 741 complaint was specifically addressed on page two, she stated that "…Aside from reserving a case number, USDA Docket Number 2478, no further processing of the complaint occurred because of the Keepseagle class action."

(d) Evidence of other discriminatory actions by Farmers Home Administration officials in their credit transactions would serve as corroborative proof that the Wilkinsons were discriminated against when, as a precondition for loan approval, they were required, unlike Non-Indian borrowers, to sign assignments of income.

However, the amendment of the complaint shall take place at the conclusion of the hearing when it will be conformed to proof of discriminatory treatment coming within a Section 741 complaint.

Evidence of discriminatory treatment or inappropriate handling of Mr. Wilkinson's Complaint by the Office of Civil Rights will not be a basis for amending the Complaint since it would be outside of the Wilkinsons' credit transactions with the Farmers Home Administration and therefore not includable within Mr. Wilkinson's Section 741 complaint. But inasmuch as it is assumed the Assistant Secretary for Civil Rights, upon review of my decision, will wish to be made aware of any facts showing that his office has itself engaged in discriminatory conduct so that he may take necessary and appropriate corrective action, such evidence will be received.

I ruled that discovery will not be permitted in this proceeding other than allowing the deposition of Complainant's economist to be taken. My ruling is based on the fact that Complainant's allegations have been before the Department for many years and because of their egregious nature, the Department was obliged to be proactive and conduct investigations to obtain and preserve evidence on whether

personnel under its control was engaging in unlawful, discriminatory conduct, and should not have waited until now to determine the facts. Additionally, discovery has been interpreted as not being permitted under the Department's Rules of Procedure that apply to formal adjudicatory administrative proceedings instituted by the Secretary (7 CFR §§ 1.130-1.151), and it would be unfair to do differently when the Secretary is the respondent.

We discussed the Complainant's damages claim and the fact that the economist engaged to make a presentation on complainant's behalf will probably need to review and adjust the appraisal he previously made for the case filed against the Bureau of Indian Affairs that is presently on appeal

It was decided that it is now appropriate for settlement discussions. They shall commence in mid April and be concluded by mid May.

A hearing is scheduled in this proceeding to be held on June 3-4, 2008, commencing each day at 10:00 AM (not 11:00 AM as inadvertently stated in the teleconference), in the OALJ hearing room located at:

Room 1037, South Building
U. S. Department of Agriculture
1400 Independence Avenue, SW
Washington, D.C. 20250-9200

Participation by telephone shall be permitted.

Either party may request additional teleconferences as may be necessary.

WILBUR WILKINSON, ON BEHALF OF ERNEST AND MOLLIE WILKINSON v. USDA.
SOL Docket No. 07-0196.
Miscellaneous Order.
Filed June 17, 2008.

Ruling Denying Requests for Confirmation of Hearing Dates and Recusal of Margo M. McKay

On June 16, 2008, Wilbur Wilkinson requested that:

(1) Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] confirm that the damages hearing previously scheduled for June 25-26, 2008, is not stayed; and (2) I recuse myself from any further review or rulings in the instant proceeding. On June 17, 2008, the Farm Service Agency, United States Department of Agriculture [hereinafter the FSA], filed a response opposing Mr. Wilkinson's June 16, 2008, requests. On June 17, 2008, Mr. Wilkinson filed a reply to FSA's response.

Ruling Denying Request for Confirmation of Hearing Dates

On June 3, 2008, the ALJ issued a proposed determination and scheduled a damages hearing. In a ruling issued June 12, 2008, I exercised my discretion to review the ALJ's proposed determination and stayed the damages hearing scheduled by the ALJ. Once I exercised my discretion to review the ALJ's proposed determination, the ALJ ceased to have jurisdiction over this proceeding, and the ALJ cannot rule on Mr. Wilkinson's request to confirm the dates of the previously scheduled damages hearing. To ensure there is no mistake regarding the previously scheduled damages hearing, I reiterate my June 12, 2008, stay order: The damages hearing scheduled by the ALJ for June 25-26, 2008, is stayed pending my filing a final determination in the instant proceeding.

Ruling Denying Recusal of Margo M. McKay

Mr. Wilkinson's request that I recuse myself from further review or rulings in this proceeding is also denied. Contrary to the allegations in Mr. Wilkinson's request for recusal, I have never attended meetings with Inga Bumbary-Langston and others in which the merits of the instant proceeding or litigation strategies with respect to the instant proceeding were discussed. Nothing in Mr. Wilkinson's June 16, 2008, request, supports my recusal, and I decline to recuse myself from the instant proceeding.

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In re: FRANK CRAIG AND JEAN CRAIG, d/b/a FRANK'S WHOLESALE MEATS.
FMIA Docket No. 05-0002.
PPIA Docket No. 05-0003.
Order Denying Second Petition to Reconsider.
Filed April 2, 2008.

FMIA – Federal Meat Inspection Act – PPIA – Poultry Products Inspection Act – Requisites for second petition to reconsider.

Carlynne S. Cockrum and Rick D. Herndon, for Complainant.
Frank Craig and Jean Craig, San Bernardino, CA, Pro se.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On February 21, 2007, I issued a Decision and Order indefinitely suspending inspection services under title I of the Federal Meat Inspection Act and under the Poultry Products Inspection Act from Frank Craig and Jean Craig, d/b/a Frank's Wholesale Meats [hereinafter Respondents].[1] On March 8, 2007, Respondents filed a petition to reconsider *In re Frank Craig*, 66 Agric. Dec. 353 (2007), which I denied.[2]

On March 13, 2008, Respondents filed a second petition to reconsider *In re Frank Craig*, 66 Agric. Dec. 353 (2007). On March 31, 2008, the Food Safety and Inspection Service, United States Department of Agriculture, filed a response in opposition to Respondents' second petition to reconsider, and on April 1, 2008, the Hearing Clerk transmitted the record to the Office of the Judicial Officer to reconsider *In re Frank Craig*, 66 Agric. Dec. 353 (2007).

CONCLUSION BY THE JUDICIAL OFFICER ON RECONSIDERATION

Section 1.146(a)(3) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite. . . .*

[1] *In re Frank Craig*, 66 Agric. Dec. 353 (2007).

[2] *In re Frank Craig* (Order Denying Pet. to Reconsider), 66 Agric. Dec. 611 (2007).

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Respondents' second petition to reconsider, which Respondents filed approximately 1 year after the date the Hearing Clerk served the Decision and Order on Respondents, was filed too late to be considered, and, accordingly, Respondents' second petition to reconsider must be denied.[3]

For the foregoing reason, the following Order is issued.

ORDER

Respondents' second petition to reconsider, filed March 13, 2008, is denied.

In re: FRANK CRAIG AND JEAN CRAIG, d/b/a FRANK'S WHOLESALE MEATS.
FMIA Docket No. 05-0002.
PPIA Docket No. 05-0003.
Order Denying Third Petition to Reconsider.
Filed April 16, 2008.

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[3]*See In re Heartland Kennels, Inc.* (Order Denying Second Pet. for Recons.), 61 Agric. Dec. 562 (2002) (denying, as late-filed, a petition for reconsideration filed 50 days after the Hearing Clerk served the respondents with the decision and order); *In re David Finch* (Order Denying Pet. for Recons.), 61 Agric. Dec. 593 (2002) (denying, as late-filed, a petition for reconsideration filed 15 days after the Hearing Clerk served the respondent with the decision and order); *In re JSG Trading Corp.* (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409 (2002) (denying, as late-filed, a petition for reconsideration filed 2 years 2 months 26 days after the date the Hearing Clerk served the respondent with the decision and order on remand).

FMIA – Federal Meat Inspection Act – PPIA – Poultry Products Inspection Act – Petition to reconsider.

Carlynne S. Cockrum and Rick D. Herndon, for Complainant.
Frank Craig and Jean Craig, San Bernardino, CA, Pro se.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On February 21, 2007, I issued a Decision and Order indefinitely suspending inspection services under title I of the Federal Meat Inspection Act and under the Poultry Products Inspection Act from Frank Craig and Jean Craig, d/b/a Frank's Wholesale Meats [hereinafter Respondents].[1] On March 8, 2007, Respondents filed a petition to reconsider *In re Frank Craig*, 66 Agric. Dec. 353 (2007), which I denied.[2] On March 13, 2008, Respondents filed a second petition to reconsider *In re Frank Craig*, 66 Agric. Dec. 353 (2008), which I denied.[3]

On April 15, 2008, Respondents filed a third petition to reconsider *In re Frank Craig*, 66 Agric. Dec. 353 (2007), and the Hearing Clerk transmitted the record to the Office of the Judicial Officer to reconsider *In re Frank Craig*, 66 Agric. Dec. 353 (2007).

CONCLUSION BY THE JUDICIAL OFFICER ON RECONSIDERATION

Section 1.146(a)(3) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite. . . .*

[1] *In re Frank Craig*, 66 Agric. Dec. 353 (2007).

[2] *In re Frank Craig* (Order Denying Pet. to Reconsider), 66 Agric. Dec. 611 (2007).

[3] *In re Frank Craig* (Order Denying Second Pet. to Reconsider), 67 Agric. Dec. ___ (Apr. 2, 2008).

> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Respondents' third petition to reconsider, which Respondents filed approximately 1 year 1 month after the date the Hearing Clerk served the Decision and Order on Respondents, was filed too late to be considered, and, accordingly, Respondents' third petition to reconsider must be denied.[4]

For the foregoing reason, the following Order is issued.

ORDER

Respondents' third petition to reconsider, filed April 15, 2008, is denied.

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[4]*See In re Heartland Kennels, Inc.* (Order Denying Second Pet. for Recons.), 61 Agric. Dec. 562 (2002) (denying, as late-filed, a petition for reconsideration filed 50 days after the Hearing Clerk served the respondents with the decision and order); *In re David Finch* (Order Denying Pet. for Recons.), 61 Agric. Dec. 593 (2002) (denying, as late-filed, a petition for reconsideration filed 15 days after the Hearing Clerk served the respondent with the decision and order); *In re JSG Trading Corp.* (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409 (2002) (denying, as late-filed, a petition for reconsideration filed 2 years 2 months 26 days after the date the Hearing Clerk served the respondent with the decision and order on remand).

In re: FALCON AIR EXPRESS, INC., AND AEROPOSTAL AIRLINES, INC.
P.Q. Docket No. 07-0018.
Order.
Filed February 20, 2009.

Darlene Bolinger for APHIS.
Respondent Pro se.
Order filed by Chief Administrative Law Judge Marc R. Hillson.

Order Amending Caption

I issued a Default Decision and Order with respect to Respondent Falcon Air Express, Inc. on December 19, 2007. This Order became final and effective on February 1, 2008. Unfortunately, the title of the document did not make clear that the default was only as to Falcon Air Express, Inc. Accordingly, I am amending the title of the document I issued on December 19, 2007 to "Default Decision and Order for Falcon Air Express, Inc."

Since Aeropostal Airlines, Inc is the only party remaining in this case, I direct that the caption be amended as of today by removing Falcon Air Express, Inc. as a party.
The case caption should read as follows:

In re: Aeropostal Airlines, Inc. P.Q. Docket No. 07-0018

Respondent

In re: BRADLEY BOSWELL, D.V.M.
VA Docket No. 08-0005.
Order of Dismissal.
Filed May 5, 2008.

Krishna G. Ramaraju for APHIS.
Edward M. Mansfield for Respondent.
Order of Dismissal by Administrative Law Judge Jill S. Clifton.

Order Dismissing Case and Hearing Cancellation

The Administrator of the Animal and Plant Health Inspection

Service, United States Department of Agriculture ("APHIS" or "Complainant"), is represented by Krishna G. Ramaraju, Esq. Bradley Boswell, D.V.M. ("Respondent Boswell"), is represented by Edward M. Mansfield, Esq.

By letter dated April 29, 2008, a copy of which is attached, Respondent Boswell indicated that he no longer contests APHIS's denial of his veterinary reaccreditation, in part because of the anticipated expense of the upcoming hearing. In response, APHIS, by Concurrence filed May 1, 2008, agreed that this case should be dismissed.

Accordingly, APHIS's denial of Respondent Boswell's application for veterinary reaccreditation, communicated by letter dated April 24, 2007, remains in effect, and this case is DISMISSED.

The hearing scheduled for **June 3-4, 2008**, in **Des Moines, Iowa** is hereby CANCELLED.

Copies of this Order Dismissing Case and Hearing Cancellation, together with Respondent Boswell's letter dated April 29, 2008, and APHIS's Concurrence filed May 1, 2008, shall be served by the Hearing Clerk upon each of the parties. This Order shall also be **FAXed to Neal R. Gross & Co., Inc., Court Reporters**.

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DEFAULT DECISIONS

ANIMAL QUARANTINE ACT

In re: GUSTAVO GARCIA, a/k/a GUSTAVO G. PEREZ,
A.Q. Docket No. 07-0067.
Default Decision and Order.
Filed January 4 , 2008.

AQ – Default.

Lauren C. Axley 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 movement of birds or poultry that could spread exotic Newcastle disease ("END") (9 C.F.R. §§ 82.1 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. §§ 82.1 et seq.), by a complaint filed on March 2, 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. Gustavo Garcia, aka Gustavo G. Perez, hereinafter referred to as Respondent, is an individual with a mailing address of 18714 Altario

St., La Puente, California 91744-6105.
2. On or about January 29, 2003, the Respondent moved seven (7) chickens from Los Angeles County, California, a quarantined area, to Monterey County, California. Respondent violated 9 C.F.R. § 82.4(a)(5) by moving intrastate a flock of live birds infected with or exposed to END.

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 one thousand dollars ($1,000.00). 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 shall indicate that payment is in reference to: A.Q. Docket No. 07-0067.

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: WASHINGTON DAVILA d/b/a DAVILATRAVEL.
A.Q. Docket No. 07-0125.
P.Q. Docket No. 07-0125.
Default Decision.
Filed March 27, 2008.

AQ – Default.

Cory Spiller for APHIS.
Respondent Pro se.
Default decision by Administrative Law Judge Jill S.Clifton.

Default Decision and Order

1. The Complaint, filed on June 12, 2007, alleged violations by the Respondent of the Plant Protection Act, as amended (7 U.S.C. § 7701 *et seq*.), and the Animal Health Protection Act (7 U.S.C. § 8301 *et seq*.), and regulations promulgated under those Acts (7 C.F.R. § 319.56-3; 9 C.F.R. § 94.4(a); 9 C.F.R. § 94.9(b); and 9 C.F.R. § 94.12(b)).

Parties and Counsel

2. The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, is the Complainant (frequently herein "Complainant" or "APHIS"). APHIS is represented by Mr. Krishna Ramaraju, Esq. and was previously represented by Mr. Cory S. Spiller, Esq., both with the Office of the General Counsel (Regulatory Division), United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington D.C. 20250-1400.
3. Washington Davila, an individual, doing business as DavilaTravel, is the Respondent (frequently herein "Respondent Davila" or "Respondent"), with an address of 112 Tonnele Ave. Apt #5, Jersey City, New Jersey 07306.

Procedural History

4. APHIS's Motion for Adoption of Proposed Default Decision and Order, filed January 14, 2008, is before me. Respondent Davila was served on March 3, 2008 with a copy of that Motion and a copy of the proposed Default Decision and Order, and Respondent Davila failed to respond. The time to file a response expired on March 24, 2008.
5. Respondent Davila was served with a copy of the Complaint on

June 27, 2007. The Complaint was accompanied by a copy of the Hearing Clerk's Notice Letter and a copy of the Rules of Practice. Respondent Davila's answer was due to be filed no later than July 17, 2007, 20 days after service of the Complaint (7 C.F.R. § 136(a)). Respondent Davila never filed an answer.

6. Respondent Davila was informed in the Complaint, and in the Hearing Clerk's letter accompanying the Complaint, that an answer should be filed with the Hearing Clerk within 20 days after service of the complaint, and that failure to file an answer within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

7. Accordingly, the material allegations in the Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq*.

Findings of Fact and Conclusions

8. The Secretary of Agriculture has jurisdiction over Respondent Washington Davila d/b/a DavilaTravel and the subject matter involved herein.

9. Respondent Washington Davila d/b/a DavilaTravel is an individual doing business with an address of 112 Tonnele Ave. Apt #5, Jersey City, New Jersey 07306.

10.On or about March 16, 2003, Respondent Washington Davila d/b/a DavilaTravel imported from Ecuador into the United States, one bunch of lemongrass, two apples, a box of peaches, and a box of tree tomatoes, in violation of 7 C.F.R. § 319.56-3.

11.On or about March 16, 2003, Respondent Washington Davila d/b/a DavilaTravel imported from Ecuador into the United States, pork in a food mixture, in violation of 9 C.F.R § 94.4(a), 9 C.F.R. § 94.9(b), and 9 C.F.R. § 94.12(b).

12.On or about April 1, 2003, Respondent Washington Davila d/b/a DavilaTravel imported from Ecuador into the United States, 3 pounds of pork, in violation of 9 C.F.R § 94.4(a), 9 C.F.R. § 94.9(b), and 9 C.F.R. § 94.12(b).

13.Respondent Washington Davila d/b/a DavilaTravel has violated the Plant Protection Act, as amended (7 U.S.C. § 7701 *et seq*.), and the Animal Health Protection Act (7 U.S.C. § 8301 *et seq*.), and certain

regulations, specifically 7 C.F.R. § 319.56-3; 9 C.F.R. § 94.4(a); 9 C.F.R. § 94.9(b); and 9 C.F.R. § 94.12(b).

14. The civil penalty is limited to $1,000, in the case of an initial violation by an individual moving regulated articles not for monetary gain, under both Section 424(b) of the Plant Protection Act, 7 U.S.C. § 7734(b), and Section 10414 of the Animal Health Protection Act, 7 U.S.C. § 8313(b).

15. APHIS requests that a $5,000 civil penalty be imposed as appropriate and necessary to achieve the remedial purposes of the Acts. 16. There is scant evidence before me on the factors to be used in determining civil penalties, enumerated in 7 U.S.C. § 7734(b)(2) and in 7 U.S.C. § 8313(b)(2).

17. I conclude that a $500 civil penalty for the violation described in paragraph 10; a $500 civil penalty for the violation described in paragraph 11; and a $1,000 penalty for the violation described in paragraph 12; is in accordance with 7 U.S.C. § 7734(b) and 7 U.S.C. § 8313(b) and is appropriate and proportionate and will achieve the remedial purposes of the Acts. I conclude further that the $2,000 total civil penalty ($500 + $500 +$1,000) is adequate to deter Respondent Davila and others from committing like violations.

Order

18. Respondent Washington Davila d/b/a DavilaTravel is hereby assessed a civil penalty of **$2,000.00**. Respondent shall pay the $2,000.00 by cashier's check or certified check or money order, 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 Washington Davila d/b/a DavilaTravel shall indicate that payment is in reference to **P.Q. Docket No. 07-0125** and **A.Q. Docket No. 07-0125**.

Finality

19. This Decision and Order shall be final and effective thirty five (35)

days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to 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

In re: JIM HENDREN.
A.Q. Docket No. 08-0010.
Default Decision.
Filed April 22, 2008.

AQ – Default.

Darlene Bolinger for APHIS.
Respondent Pro se.
Default Decision by Administrative Law Judge Jill S.Clifton.

Default Decision and Order

1. The Complaint, filed on October 31, 2007, alleged violations during 2003 by the Respondent of the Animal Health Protection Act (7 U.S.C. § 8301 *et seq*.) and regulations promulgated thereunder (9 C.F.R. § 71.18 regarding identification, § 77.10 regarding tuberculosis, and § 78.9 regarding brucellosis).

Parties and Counsel

2. The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, is the Complainant (frequently herein "Complainant" or "APHIS"). APHIS is represented by Ms. Darlene M. Bolinger, Esq., with the Office of the General Counsel (Regulatory Division), United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington D.C. 20250.
3. Jim Hendren is the Respondent (frequently herein "Respondent Hendren" or "Respondent"), with a mailing address in Vinita, Oklahoma 74301.

Procedural History

4. APHIS's Motion for Adoption of Proposed Default Decision and Order, filed February 26, 2008, is before me. Respondent Hendren was served with a copy of that Motion by certified mail on March 20, 2008 and did not respond.
5. Respondent Hendren was served with a copy of the Complaint, together with a copy of the Hearing Clerk's notice letter and a copy of the Rules of Practice, by certified mail on November 7, 2007.
6. Respondent Hendren's answer was due to be filed no later than November 27, 2007, 20 days after service of the Complaint. 7 C.F.R.

§ 1.136(a). Respondent Hendren never filed an answer.

7. Respondent Hendren was informed in the Complaint, and in the Hearing Clerk's letter accompanying the Complaint, that an answer should be filed with the Hearing Clerk within 20 days after service of the complaint, and that failure to file an answer within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

8. Accordingly, the material allegations in the Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. § 1.130 *et seq*. and 9 C.F.R. § 99.1 *et seq*.

Findings of Fact

9. Respondent Jim Hendren has a mailing address in Vinita, Oklahoma 74301.

10. On or about September 27, 2003, Respondent Hendren moved interstate 9 cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, in violation of 9 C.F.R. § 71.18(a)(1)(iii) because the cows were not officially identified, and the official identification was not recorded on the owner statement.

11. On or about September 27, 2003, Respondent Hendren moved interstate 9 cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, in violation of 9 C.F.R. § 77.10(d) because the cows were moved without the required certificate stating that the cattle were negative to an official TB test within 60 days prior to the movement.

12. On or about September 27, 2003, Respondent Hendren moved interstate 9 cows from Texas, a Class A state, to Kansas, a Class Free state, in violation of 9 C.F.R. § 78.9(b)(3)(ii) because the cows were not accompanied during the movement by a certificate indicating, inter alia, the consignor, the consignee, or that the cows had been tested for brucellosis and the results of the brucellosis testing.

13. On or about October 11, 2003, Respondent Hendren moved interstate 9 cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, in violation of 9 C.F.R. § 71.18(a)(1)(iii) because the cows were not officially identified, and the official identification was not recorded on the owner statement.

14. On or about October 11, 2003, Respondent Hendren moved

interstate 9 cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, in violation of 9 C.F.R. § 77.10(d) because the cows were moved without the required certificate stating that the cattle were negative to an official TB test within 60 days prior to the movement.

15.On or about October 11, 2003, Respondent Hendren moved interstate 9 cows from Texas, a Class A state, to Kansas, a Class Free state, in violation of 9 C.F.R. § 78.9(b)(3)(ii) because the cows were not accompanied during the movement by a certificate indicating, inter alia, the consignor, the consignee, or that the cows had been tested for brucellosis and the results of the brucellosis testing.

16.On or about October 19, 2003, Respondent Hendren moved interstate 9 cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, in violation of 9 C.F.R. § 71.18(a)(1)(iii) because the cows were not officially identified, and the official identification was not recorded on the owner statement.

17.On or about October 19, 2003, Respondent Hendren moved interstate 9 cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, in violation of 9 C.F.R. § 77.10(d) because the cows were moved without the required certificate stating that the cattle were negative to an official TB test within 60 days prior to the movement.

18.On or about October 19, 2003, Respondent Hendren moved interstate 9 cows from Texas, a Class A state, to Kansas, a Class Free state, in violation of 9 C.F.R. § 78.9(b)(3)(ii) because the cows were not accompanied during the movement by a certificate indicating, inter alia, the consignor, the consignee, or that the cows had been tested for brucellosis and the results of the brucellosis testing.

Conclusions

19. The Secretary of Agriculture has jurisdiction over Respondent Jim Hendren and the subject matter involved herein.
20. Respondent Jim Hendren, while moving 27 head of cattle during September and October of 2003, violated, as to each of the 27 head, the Animal Health Protection Act (7 U.S.C. § 8301 *et seq*.) and regulations promulgated thereunder, specifically 9 C.F.R. § 71.18(a)(1)(iii), 9 C.F.R. § 77.10(d), and 9 C.F.R. § 78.9(b)(3)(ii).
21. Civil penalties are authorized by Section 10414 of the Animal Health Protection Act, 7 U.S.C. § 8313(b). In the case of an individual, $50,000 per violation is authorized.
22. APHIS recommends that a $4,500 civil penalty be imposed as appropriate and warranted under the circumstances.
23. Factors in determining civil penalties are enumerated in 7 U.S.C. § 8313(b)(2). Regarding gravity, identification of animals being moved is essential to the ability to trace an animal backward and forward: (a) traceback to the herd of origin, to determine which animals may have been in contact with a diseased animal or may have shared a contaminated feed supply; (b) trace forward, to locate an animal moved from a premises of concern. Tuberculosis eradication and Brucellosis eradication are obviously extremely important objectives of regulations that the Respondent violated. APHIS's Motion is valuable in showing the need for compliance with the regulations that the Respondent violated. See attached Appendix B.
24. I conclude that a $4,500 civil penalty (for the violations of 3 regulations each, for each of the 27 head, which can be considered as 81 or more violations) is in accordance with 7 U.S.C. § 8313(b) and is appropriate and proportionate and will achieve the remedial purposes of the Animal Health Protection Act and is adequate to deter Respondent Hendren and others from committing like violations.

Order

25. Respondent Jim Hendren is hereby assessed a civil penalty of **$4,500** (four thousand five hundred dollars). Respondent shall pay the $4,500.00 by cashier's check or certified check or money order, 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
Accounts Receivable
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent Hendren shall include on the cashier's check or certified check or money order the docket number of this proceeding, **A.Q. Docket No. 08-0010**.

Finality

26. This Decision and Order shall be final and effective thirty five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to 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

In re: IRENE HANG.
A.Q. Docket No. 08-0004.
Default Decision.
Filed June 9, 2008.

AQ – Default.

Carlynne S. Cockrum for APHIS.
Respondent Pro se.
Default Decision by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Animal Health Protection Act (7 U.S.C. §§ 8303)(the Act), in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 et seq. and 9 C.F.R. §§ 70.1 et seq.

The proceeding was instituted under the Act by a complaint filed on October 4, 2007, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture and served by ordinary mail on Respondent Irene Hang on March 3, 2008.[5] Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent Irene Hang 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 March 24, 2008, twenty days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent Irene Hang never filed an answer to the complaint and the Hearing Clerk's Office mailed her a No Answer Letter on March 25, 2008.

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 the

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[5]An initial attempt to serve respondent by certified mail was returned as undeliverable. A corrected address was provided and a second attempt at certified mail was attempted. This second certified mailing was returned by the postal service as unclaimed. Pursuant to 7 C.F.R. §1.147, the document was remailed by ordinary mail, and is deemed to be received by the respondent on the date of remailing.

allegations of the complaint shall be deemed an admission of the allegations in the complaint. As the admission of the allegations in a 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. Irene Hang, herein referred to as Respondent, is an individual with an address of 5306 Tabor Avenue, Philadelphia, Pennsylvania 19120.

2. On or about January 30, 2003, the Respondent, in violation of Section 10404 of the Act (7 U.S.C. § 8303) and Section 94.4 of the Code of Federal Regulations (9 C.F.R. § 94.4), imported two (2) kilograms of beef and two (2) kilograms pork from Vietnam.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. By reason of the foregoing Findings of Fact, Irene Hang has violated the Act and the Regulations.

ORDER

Respondent Irene Hang 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 Irene Hang shall indicate that payment is in reference to P.Q. Docket No. 08-0004.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent Irene Hang 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).

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

Done at Washington, D.C.

DEFAULT DECISIONS

ANIMAL WELFARE ACT

In re: JUDY SARSON.
AWA Docket No. 07-0166.
Default Decision.
Filed January 17, 2008.

AWA – Default.

Babak A. Rastgoufard for APHIS.
Respondent Pro se.
Default Decision by Administrative Law Judge Jill S. Clifton.

Decision and Order by Reason of Default

PROCEDURAL HISTORY

1. The Complaint, filed on August 2, 2007, alleged violations of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131 - 2159) (herein frequently the "AWA" or "Act"), and the regulations and standards issued pursuant to the Act (9 C.F.R. §§ 1.1 - 3.142) (the "Regulations").
2. The Complaint alleged that Judy Sarson, an individual, the respondent (herein frequently "Respondent Sarson" or "Respondent"), sold dogs in commerce without being licensed, repeatedly, thereby willfully violating the Animal Welfare Act and the Regulations, particularly 7 U.S.C. §§ 2131-2134 and the Regulations, particularly 9 C.F.R. § 2.1.
3. The Complainant, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (herein frequently "APHIS" or "Complainant"), is represented by Babak A. Rastgoufard, Esq., Office of the General Counsel (Marketing Division), United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington D.C. 20250-1417.
4. On August 3, 2007, the Hearing Clerk mailed a copy of the Complaint to Respondent Sarson by certified mail. The Complaint (together with the Hearing Clerk's notice letter dated August 3, 2007 and a copy of the Rules of Practice) was delivered and signed for by Respondent Sarson on August 7, 2007. [See Domestic Return Receipt for Article Number 7004 2510 0003 7022 9187.] No answer to the Complaint has been received. The time for filing an answer expired on

August 27, 2007.
5. The Complainant's Motion for Adoption of Proposed Decision and Order, filed November 27, 2007, is before me. A copy of the Motion and the proposed Decision and Order was delivered and signed for by Respondent Sarson on December 3, 2007; she failed to respond. [*See* Domestic Return Receipt for Article Number 7004 2510 0003 7022 9859.]
6. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.
7. Accordingly, the material allegations in the Complaint, which are admitted by Respondent Sarson'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*., especially 7 C.F.R. § 1.139.

FINDINGS OF FACT

8. Respondent Judy Sarson is an individual whose mailing address is in Diamond, Missouri 64840.
9. Respondent Judy Sarson, at all times material herein, was operating as a dealer as defined in the Act and the Regulations.
10. In or about April 2001, Respondent submitted an "Application for License" for an Animal Welfare Act license.
11. On or about July 25, 2001, APHIS conducted a pre-license inspection of Respondent's facility, at which time APHIS identified noncompliant items, and informed Respondent that "No regulated activities can legally occur without first obtaining a USDA (United States Department of Agriculture) license."
12. On or about August 9, 2001, APHIS issued to Respondent AWA license number 43-A-3393.
13. On or about August 20, 2002, Respondent submitted to APHIS an "Application for License" License Renewal form for Animal Welfare Act license number 43-A-3393, issued to Judy Sarson.
14. Respondent included a check for $130.00 with her License Renewal form.
15. On or about September 13, 2002, APHIS notified Respondent that the check referred to above in paragraph 14 above (¶ 14) "was returned by the bank for non-sufficient funds."
16. Additionally, on or about September 13, 2002, APHIS notified

Respondent that "[a]ccordingly, your license to conduct regulated business activities has been terminated…if you are currently conducting regulated activities without a valid USDA license, you will be considered in violation of the AWA and subject to legal action."

17. Sometime thereafter, Respondent purportedly submitted to APHIS a money order to cover the amount of the check referred to above in paragraph 14 above (¶ 14), plus a return check fee, imposed by APHIS.

18. The purported money order referred to above in paragraph 17 (¶ 17), was never received by APHIS.

19. Subsequently, sometime after January 28, 2003, APHIS again informed Respondent that she does not hold a valid USDA license and that engaging in or conducting regulated activities without a valid USDA license would be a violation of the AWA and subject Respondent to legal action.

20. Respondent, nevertheless, continued to engage in activities regulated under the Act and Regulations.

21. On or about March 12, 2003, Respondent, without being licensed, sold, in commerce, seven border collie puppies to H & H Pets.

22. H & H Pets is a division of the Hunte Corporation, which is a licensed dealer (AWA license number 43-B-0123) [hereinafter "H & H Pets" or "The Hunte Corporation"].

23. Respondent sold these puppies to H & H Pets for resale for use as pets or breeding purposes.

24. On or about March 12, 2003, Respondent received a check made payable to "Judy Sarson, 12638 Birch Dr, Diamond, MO 64840-8256" in the amount of $973.00 from "The Hunte Corporation" for the sale of the dogs referred to in paragraph 21 above (¶ 21). This check was received and endorsed by "Judy Sarson."

25. On or about March 12, 2003, Respondent, without being licensed, sold, in commerce, two west highland white terrier puppies to H & H Pets.

26. Respondent sold these puppies to H & H Pets for resale for use as pets or breeding purposes.

27. On or about March 12, 2003, Respondent received a check made payable to "Judy Sarson, 12638 Birch Dr, Diamond, MO 64840-8256" in the amount of $483.00 from "The Hunte Corporation" for the sale of the dogs referred to in paragraph 25 above (¶ 25). This check was received and endorsed by "Judy Sarson."

28. On or about March 13, 2003, Respondent, without being licensed, sold, in commerce, five Australian Sheppard (also known as Australian Shepherd) puppies to H & H Pets.

29. Respondent sold these puppies to H & H Pets for resale for use as pets or breeding purposes.
30. On or about March 18, 2003, Respondent received a check made payable to "Judy Sarson, 12638 Birch Dr, Diamond, MO 64840-8256" in the amount of $745.00 from "The Hunte Corporation" for the sale of the dogs referred to in paragraph 28 above (¶ 28). This check was received and endorsed by "Judy Sarson."
31. On or about April 3, 2003, Respondent, without being licensed, sold, in commerce, two welsh corgi puppies to David Demery, Big 8 Kennel.
32. David Demery, Big 8 Kennel is a licensed breeder (AWA license number 43-A-3850) [hereinafter "Big 8 Kennel"].
33. Respondent sold these puppies to Big 8 Kennel for breeding purposes or for resale for use as pets.
34. On or about September 12, 2003, Respondent, without being licensed, sold, in commerce, one west highland white terrier puppy and one welsh corgi puppy to Joyce Walters, Select Pets.
35. Joyce Walters, Select Pets is a licensed dealer (AWA license number 43-B-0178) [hereinafter "Select Pets"].
36. Respondent sold these puppies to Select Pets for resale for use as pets or breeding purposes.
37. On or about October 3, 2003, Respondent, without being licensed, sold, in commerce, one welsh corgi puppy to Select Pets.
38. Respondent sold this puppy to Select Pets for resale for use as a pet or breeding purposes.
39. On or about September 12, 2003 and October 3, 2003, Respondent received two checks made payable to "Judy Sarson" in the amounts of $185.00 and $335.00, respectively, from "Select Pets, Garland or Joyce Walters" for the sale of the dogs referred to in paragraphs 34 and 37 above (¶¶ 34, 37).
40. On or about October 29, 2003, Respondent, without being licensed, sold, in commerce, one welsh corgi puppy to Select Pets.
41. Respondent sold this puppy to Select Pets for resale for use as a pet or breeding purposes.
42. On or about October 29, 2003, Respondent received a check made payable to "Judy Sarson" in the amount of $160.00 from "Select Pets, Garland or Joyce Walters" for the sale of the dog referred to in paragraphs 40 above (¶ 40).
43. On or about October 29, 2003, Respondent, without being licensed, sold, in commerce, five Pembroke west corgi puppies to H & H Pets.
44. Respondent sold these puppies to H & H Pets for resale for use as

pets or breeding purposes.

45. Thereafter, in or about 2003, Respondent received a check made payable to "Judy Sarson, 12638 Birch Dr, Diamond, MO 64840-8256" in the amount of $835.00 from "The Hunte Corporation" for the sale of the dogs referred to in paragraph 43 above (¶ 43). This check was received and endorsed by "Judy Sarson."

46. On or about December 19, 2003, Respondent, without being licensed, sold, in commerce, three Pembroke west corgi puppies to Jerry & Brenda Puckett, Pucketts Perfect Pets.

47. Jerry & Brenda Puckett, Pucketts Perfect Pets are a licensed breeder (AWA license number 43-A-2903) [hereinafter "Pucketts Perfect Pets"]. 48. Respondent sold these puppies to Pucketts Perfect Pets for breeding purposes or for resale for use as pets.

49. On or about January 13, 2004, Respondent purchased one Pembroke west corgi dog from Pucketts Perfect Pets.

50. On or about February 10, 2004, Respondent submitted an "Application for License" for an Animal Welfare Act license.

51. On or about March 3, 2004, APHIS notified Respondent that it had received Respondent's Application for License and that APHIS "will issue you a license to conduct AWA regulated activities when you have completed the licensing process by passing a pre-licensing inspection and fulfilling all other applicable requirements."

52. On or about March 22, 2004, APHIS conducted a pre-license inspection of Respondent's facility, at which time APHIS identified several noncompliant items, and informed Respondent that "NO REGULATED ACTIVITIES MAY TAKE PLACE UNTIL LICNESE [sic] IS RECEIVED."

53. On or about March 22, 2004, Respondent held on her premises 59 animals.

54. On or about April 19, 2004, Respondent, without being licensed, sold, in commerce, one bichon frise puppy to Big 8 Kennel.

55. Respondent sold this puppy to Big 8 Kennel for breeding purposes or for resale for use as a pet.

56. On or about June 14, 2004, Respondent purchased four Pembroke west corgi dogs from Pucketts Perfect Pets.

57. On or about June 25, 2004, Respondent, without being licensed, sold, in commerce, several west highland white terrier puppies to Connie Dozier, Spring Chateau Ranch Kennels.

58. Connie Dozier, Spring Chateau Ranch Kennels is a licensed breeder (AWA license number 48-A-1762) [hereinafter "Spring Chateau Ranch Kennels"].

59. Respondent sold these puppies to Spring Chateau Ranch Kennels

for breeding purposes or for resale for use as pets.
60. On or about September 1, 2004, Respondent, without being licensed, sold, in commerce, one Pembroke west corgi dog to Pucketts Perfect Pets.
61. Respondent sold this puppy to Pucketts Perfect Pets for breeding purposes or for resale for use as a pet.
62. On or about August 13, 2005, purchased two Pembroke west corgi dogs from Alan and Karen Sims.
63. Alan and Karen Sims are a licensed breeder (AWA license number 43-A-3621).
64. On or about September 2006, Respondent, without being licensed, sold, in commerce, seven welsh corgi puppies to Robert D. Cline.
65. Robert D. Cline is a licensed breeder (AWA license number 43-A-4737).
66. Respondent sold these puppies to Robert D. Cline for breeding purposes or for resale for use as pets.
67. On or about September 15, 2006, Respondent purchased three Pembroke west corgi dogs from Pucketts Perfect Pets.
68. In or about November 2006, Respondent, without being licensed, sold, in commerce, one welsh corgi puppy to Robert D. Cline.
69. Respondent sold this puppy to Robert D. Cline for breeding purposes or for resale for use as a pet.
70. On or about January 11, 2007, Respondent purchased five Pembroke west corgi dogs from Pucketts Perfect Pets.
71. On or about February 5, 2007 Respondent purchased six Pembroke west corgi dogs from Pucketts Perfect Pets.
72. Since in or about early 2003, and continuing to date, Respondent has purchased and sold dogs, including to and from licensed dealers, without holding a valid AWA license.
73. Since in or about early 2003, and continuing to date, Respondent has maintained more than three breeding female dogs.
74. Between February 10, 2003 and February 10, 2004, Respondent sold 75 animals and purchased 30 animals, and Respondent grossed at least $10,500.00 from the sales of those animals. Respondent provided this information in her annual Animal Welfare Act license application.
75. Between April 1, 2001 and April 1, 2002, Respondent sold 75 animals and purchased 35 animals, and Respondent grossed at least $9,375.00 from the sales of those animals. Respondent provided this information in her annual Animal Welfare Act license application.
76. Between April 1, 2002 and April 1, 2003, Respondent sold 62 animals and purchased 25 animals, and Respondent grossed at least $9,345.00 from the sales of those animals, according to Respondent's

annual Animal Welfare Act license renewal.

DISCUSSION

77. Respondent Sarson's violations include repeated instances in which she operated as a dealer without being licensed. The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149.
78. The Act and the Regulations authorize the Secretary of Agriculture to, among other things, impose civil penalties. 7 U.S.C. § 2149(b). In imposing a civil penalty, the Secretary is required to give due consideration to the appropriateness of the penalty with respect to: (1) the gravity of the violations; (2) the size of the business of the person involved; (3) the person's good faith; (4) and the person's history of previous violations. *Id*.

The Gravity of the Violations

79. Respondent Sarson's violations are serious: enforcement of the Act and Regulations depends upon the identification of persons operating as dealers. *See* 7 U.S.C. § 2131; *see* the opinion of the Judicial Officer of the United States Department of Agriculture ("USDA": "[T]he failure to obtain an Animal Welfare Act license before operating as a dealer is a serious violation because enforcement of the Animal Welfare Act and the Regulations and Standards depends upon the identification of persons operating as dealers." *In re: J. Wayne Shaffer*, 60 Agric. Dec. 444, 478, 2001 WL 1143410, at *23 (U.S.D.A. Sept. 26, 2001).
80. The purposes of the Act are "(1) to insure that animals intended…for pets are provided humane care and treatment; (2) to assure the humane treatment of animals during transportation in commerce; and (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen." 7 U.S.C. § 2131.
81. Respondent Sarson's violations are serious: by operating as an unlicensed dealer and buying and selling, in commerce, beginning in March 2003, at least 40 dogs and puppies, of various breeds, including to licensed dealers, Respondent Sarson undercut the Secretary's ability to carry out the purposes of the Act and ensure that animals intended for use in commerce "are provided humane care and treatment."

The Size of the Business of the Person Involved

82. Respondent Sarson maintained a small- to medium-sized business. Respondent's violations of the Animal Welfare Act described herein involve her sale of at least 40 dogs of about 6 different breeds during March 2003 – November 2006. Further, Respondent grossed at least: $10,500 from selling 75 animals between February 10, 2003 and February 10, 2004; $9,345 from selling 62 animals between April 2002 and April 2003; and $9,375 from selling 75 animals between April 2001 and April 2002.

The Person's Good Faith;
and the Person's History of Previous Violations

83. Respondent Sarson has not previously been found to have violated the Animal Welfare Act. Nevertheless, Respondent's conduct over the period described herein reveals a disregard for, or unwillingness to abide by, the requirements of the Act and the Regulations. Despite knowing that her AWA license had expired, and that she needed to obtain an AWA license prior to engaging in activities regulated under the Act and Regulations, Respondent continued to engage in regulated activity and sold numerous dogs, including to licensed dealers, without holding an AWA license. Such an ongoing pattern of violations demonstrates a lack of good faith and establishes a "history of previous violations" for the purposes of section 2149(b) of the Act, 7 U.S.C. § 2149(b). The Judicial Officer of USDA wrote: "I have consistently held under the Animal Welfare Act that an ongoing pattern of violations over a period of time establishes a violator's 'history of previous violations.'" *In re William Richardson*, 66 Agric. Dec. 69, 88-89, 2007 WL 1723728, at *13 (U.S.D.A. June 13, 2007) (footnote omitted).

84. Despite having been informed on repeated occasions that she does not hold a valid USDA license and that engaging in or conducting regulated activities without a valid USDA license would be a violation of the Act and would subject Respondent to legal action, Respondent Sarson continued to engage in regulated activity without a license and sold numerous dogs and puppies, of various breeds, including to licensed dealers.

CONCLUSIONS

85. The Secretary of Agriculture has jurisdiction.

86. Respondent Judy Sarson is an individual whose mailing address is in Diamond, Missouri 64840.

87. Respondent Judy Sarson was, at all times material herein, operating as a dealer as defined in the Animal Welfare Act and the Regulations.

88. From about March 2003 through about November 2006, Respondent Sarson operated as a dealer without having obtained an Animal Welfare Act license and sold at least 40 dogs in commerce, as specified below, in violation of 7 U.S.C. §§ 2131-2134 and the Regulations, particularly 9 C.F.R. § 2.1. The sale of each dog is a separate violation. 7 U.S.C. § 2149(b).

89. On or about March 12, 2003, Respondent, without being licensed, sold, in commerce, seven border collie puppies to H & H Pets, a licensed dealer (AWA license number 43-B-0123) ("H & H Pets"), for resale for use as pets or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

90. On or about March 12, 2003, Respondent without being licensed, sold, in commerce, two west highland white terrier puppies to H & H Pets, a licensed dealer (AWA license number 43-B-0123), for resale for use as pets or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

91. On or about March 13, 2003, Respondent without being licensed, sold, in commerce, five Australian Sheppard (also known as Australian Shepherd) puppies to H & H Pets, a licensed dealer (AWA license number 43-B-0123), for resale for use as pets or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

92. On or about April 3, 2003, Respondent without being licensed, sold, in commerce, two welsh corgi puppies to David Demery, Big 8 Kennel, a licensed dealer (AWA license number 43-A-3850) ("Big 8 Kennel"), for breeding purposes or for resale for use as pets, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

93. On or about September 12, 2003, Respondent without being licensed, sold, in commerce, one west highland white terrier puppy and one welsh corgi puppy to Joyce Walters, Select Pets, a licensed dealer (AWA license number 43-B-0178) ("Select Pets"), for resale for use as pets or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

94. On or about October 3, 2003, Respondent without being licensed, sold, in commerce, one welsh corgi puppy to Select Pets, a licensed

dealer (AWA license number 43-B-0178), for resale for use as a pet or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

95. On or about October 29, 2003, Respondent without being licensed, sold, in commerce, one welsh corgi puppy to Select Pets, a licensed dealer (AWA license number 43-B-0178), for resale for use as a pet or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

96. On or about October 29, 2003, Respondent without being licensed, sold, in commerce, five Pembroke west corgi puppies to H & H Pets, a licensed dealer (AWA license number 43-B-0123), for resale for use as pets or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

97. On or about December 19, 2003, Respondent without being licensed, sold, in commerce, three Pembroke west corgi puppies to Jerry & Brenda Puckett, Pucketts Perfect Pets, a licensed breeder (AWA license number 43-A-2903) ("Pucketts Perfect Pets"), for breeding purposes or for resale for use as pets, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

98. On or about April 19, 2004, Respondent without being licensed, sold, in commerce, one bichon frise to Big 8 Kennel, a licensed dealer (AWA license number 43-A-3850), for resale for use as a pet or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

99. On or about June 25, 2004, Respondent, without being licensed, sold, in commerce, several west highland white terrier puppies to Connie Dozier, Spring Chateau Ranch Kennels, a licensed breeder (AWA license number 48-A-1762) ("Spring Chateau Ranch Kennels") for breeding purposes or for resale for use as pets, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

100. On or about September 1, 2004, Respondent without being licensed, sold, in commerce, one Pembroke west corgi puppy to Pucketts Perfect Pets, a licensed breeder (AWA license number 43-A-2903), for breeding purposes or for resale for use as a pet, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

101. In or about September 2006, Respondent without being licensed, sold, in commerce, seven west corgi puppies to Robert D. Cline, a licensed breeder (AWA license number 43-A-4737), for breeding purposes or for resale for use as pets, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

102. In or about November 2006, Respondent without being licensed, sold, in commerce, one west corgi puppy to Robert D. Cline, a licensed breeder (AWA license number 43-A-4737), for breeding purposes or for resale for use as a pet, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1).

103. The gravity of Respondent Sarson's Animal Welfare Act violations is serious.

104. The size of Respondent Sarson's business is small to medium.

105. From March 12, 2003 continuing to date, Respondent Sarson has violated the Animal Welfare Act and the Regulations at least 40 times by being engaged in activities regulated by the Animal Welfare Act without holding a valid AWA license.

106. Since about July 2001, APHIS has repeatedly provided Respondent written and other notice of Respondent's need to hold a valid AWA license prior to engaging in activities regulated by the Animal Welfare Act, and provided Respondent the opportunity to demonstrate and achieve compliance with the Act and Regulations by obtaining and maintaining an AWA license. Respondent's failure to do so, shows a lack of good faith and a "history of previous violations" for the purposes of section 2149(b) of the Act, 7 U.S.C. § 2149(b).

107. Considering Respondent Sarson's more than 40 violations of the Animal Welfare Act, over longer than a 3-1/2 year period, $17,462.00 is a reasonable and appropriate civil penalty. 7 U.S.C. § 2149.

ORDER

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

109. Respondent Sarson is assessed a **$17,462.00** civil penalty, which she shall pay by certified check(s) or cashier's check(s) or money

order(s), made payable to the order of "**Treasurer of the United States**", and forwarded within forty-five (45) days from the effective date of this Order **by a commercial delivery service, such as FedEx or UPS**, to

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn: Babak A. Rastgoufard, Esq.
Room 2343 South Building, Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

Respondent Sarson shall include **AWA Docket No. 07-0166** on the certified check(s) or cashier's check(s) or money order(s).

FINALITY

110. This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see 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

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In re: REED HARRISON, DVM, d/b/a PARMLEY EDUCATION & RESEARCH CENTER.
AWA Docket No. 07-0158.
Default Decision.
Filed March 24, 2008.

AWA – Default.

Sharlene A. Deskins.
Respondent Pro se.
Default Decision by Administrative Law Judge Jill S.Clifton.

Decision and Order by Reason of Default

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("AWA" or "Act"), as amended (7 U.S.C. § 2131 *et seq*.), by a Complaint filed on July 13, 2007, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "Complainant" or "APHIS"), alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq*.).

The Complainant, APHIS, is represented by Sharlene Deskins, Esq., with the Office of the General Counsel (Marketing Division), United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington D.C. 20250-1417.

Reed Harrison, DVM, the Respondent, is an individual who was doing business as Parmley Education & Research Center (frequently herein "Respondent Harrison" or "Respondent"), with a mailing address of P.O. Box 17, Rose Hill, Kansas 67133.

Procedural History

A copy of the Complaint and a copy of the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130 - 1.151, were served on Respondent Harrison on July 18, 2007, together with the Hearing Clerk's letter of service. Respondent Harrison was informed in the letter of service that an answer should be filed within 20 days from receipt pursuant to the Rules of Practice and that failure to

answer any allegation in the complaint would constitute an admission of that allegation.

No answer to the Complaint has been received. The time for filing an answer expired on August 7, 2007.

The Complainant's Motion for Adoption of Proposed Decision and Order, filed February 11, 2008, is before me. A copy of the Motion and a copy of the proposed Decision and Order were delivered and signed for by Respondent Harrison on February 21, 2008; he failed to respond. The time for filing a response expired on March 12, 2008.

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 Harrison'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.

Findings of Fact and Conclusions

I

A. Reed Harrison, DVM, is an individual who was doing business as Parmley Education & Research Center with a mailing address of P.O. Box 17, Rose Hill, Kansas 67133.

B. Respondent Harrison, at all times material to the Complaint, was operating as a research facility as defined in the Act and the regulations, and was registered until March 22, 2005.

C. Respondent Harrison's registration terminated on March 22, 2005 when the respondent failed to renew his registration in a timely manner. While the Respondent was registered, he received a copy of the regulations and the standards issued pursuant to the Act and agreed in writing to comply with them.

II

A. On September 23, 2003, APHIS inspected Respondent Harrison's premises and records and found that the semiannual report of the Institutional Animal Care and Use Committee (IACUC) of the research facility did not contain a statement regarding minority views, in violation of section 2.31(c)(3) of the regulations (9 C.F.R. § 2.31(c)(3)).

B. On September 23, 2003, APHIS inspected Respondent Harrison's premises and records and found that the Respondent failed to have the IACUC of the research facility review the procedures used involving animals to ensure that the principal investigator had considered alternatives to procedures that would cause more than momentary or slight pain or distress to the animals, and to have provided a written narrative description of the methods and sources, in violation of section 2.31(d)(1)(ii) of the regulations (9 C.F.R. § 2.31(d)(1)(ii)).

III

A. On September 29, 2004, APHIS inspected Respondent Harrison's premises and records and found that the Respondent failed to have the IACUC of the research facility review the procedures used involving animals to ensure that the principal investigator had considered alternatives to procedures that would cause more than momentary or slight pain or distress to the animals, and to have provided a written narrative description of the methods and sources, in violation of section 2.31(d)(1)(ii) of the regulations (9 C.F.R. § 2.31(d)(1)(ii)).

B. On September 29, 2004, APHIS inspected Respondent Harrison's premises and records and found that the Respondent failed to have the IACUC of the research facility review the procedures used involving animals to ensure that the principal investigator provided written assurance that the activities did not unnecessarily duplicate previous experiments, in violation of section 2.31(d)(1)(iii) of the regulations (9 C.F.R. § 2.31(d)(1)(iii)).

C. On September 29, 2004, APHIS inspected Respondent Harrison's premises and records and found that the Respondent failed to have the IACUC of the research facility review the procedures used involving animals to ensure that the principal investigator provided medical care for animals as necessary by a qualified veterinarian, in violation of section 2.31(d)(1)(vii) of the regulations (9 C.F.R. § 2.31(d)(1)(vii)).

D. On September 29, 2004, APHIS inspected Respondent Harrison's premises and records and found that the Respondent failed to have the IACUC of the research facility review the procedures used involving animals to ensure that surgical procedures included instructions for pre-operative and post-operative care of the animals, in violation of section 2.31(d)(1)(ix) of the regulations (9 C.F.R. §

2.31(d)(1)(ix)).

E. On September 29, 2004, APHIS inspected Respondent Harrison's premises and records and found that the Respondent failed to have current IACUC records available for inspection, in violation of section 2.35(a)of the regulations (9 C.F.R. §2.35(a)).

IV

A. On January 13, 2005, APHIS inspected Respondent Harrison's premises and records and found that the Respondent failed to have the IACUC of the research facility review the procedures used involving animals to ensure that the principal investigator had considered alternatives to procedures that would cause more than momentary or slight pain or distress to the animals, and to have provided a written narrative description of the methods and sources, in violation of section 2.31(d)(1)(ii) of the regulations (9 C.F.R. § 2.31(d)(1)(ii)).

B. On January 13, 2005, APHIS inspected Respondent Harrison's premises and records and found that the Respondent failed to have the IACUC of the research facility review the procedures used involving animals to ensure that the principal investigator provided written assurance that the activities did not unnecessarily duplicate previous experiments, in violation of section 2.31(d)(1)(iii) of the regulations (9 C.F.R. § 2.31(d)(1)(iii)).

C. On January 13, 2005, APHIS inspected Respondent Harrison's premises and records and found that the Respondent failed to have the IACUC of the research facility review the procedures used involving animals to ensure that the principal investigator provided medical care for animals as necessary by a qualified veterinarian, in violation of section 2.31(d)(1)(vii) of the regulations (9 C.F.R. § 2.31(d)(1)(vii)).

D. On January 13, 2005, APHIS inspected Respondent Harrison's premises and records and found that the Respondent failed to have the IACUC of the research facility review the procedures used involving animals to ensure that surgical procedures included instructions for pre-operative and post-operative care of the animals, in violation of section 2.31(d)(1)(ix) of the regulations (9 C.F.R. § 2.31(d)(1)(ix)).

E. On January 13, 2005, APHIS inspected Respondent Harrison's premises and records and found that the Respondent failed to have current IACUC records available for inspection, in violation of section 2.35(a)of the regulations (9 C.F.R. §2.35(a)).

F. On January 13, 2005, APHIS inspected Respondent Harrison's facility and found the following willful violations of section 2.38(k) of the regulations (9 C.F.R. § 2.38(k)(1)) and the standards specified

below:

(1) Supplies of food and bedding were not stored in a manner that protects them from spoilage, contamination, and vermin infestation (9 C.F.R. § 3.1(e)); and

(2) Primary enclosures for cats did not contain adequate resting surfaces (9 C.F.R. § 3.6(b)(4).

V

APHIS inspected Respondent Harrison's premises and records and found that on or about June 28, 2005, the Respondent failed to file a registration form before conducting a regulated activity, in violation of section 2.30(a)(1)of the regulations (9 C.F.R. § 2.30(a)(1)).

VI

On or about June 29, 2005, APHIS inspected Respondent Harrison's premises and records and found that the Respondent failed to file a registration form before conducting a regulated activity, in violation of section 2.30(a)(1)of the regulations (9 C.F.R. § 2.30(a)(1)).

VII

A. The Secretary of Agriculture has jurisdiction.

B. By reason of the facts set forth above, Respondent Harrison has willfully violated the Animal Welfare Act and regulations promulgated under the Act.

C. The $26,400 civil penalty requested by APHIS is appropriate and necessary to achieve the remedial purposes of the Act. 7 U.S.C. § 2149.

Order

1. Respondent Harrison, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations issued thereunder, and, in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and Regulations without being licensed as required, and shall cease and desist from:

(a) failing to have his Institutional Animal Care and Use Committee

(IACUC) review procedures used involving animals to ensure that the principal investigator had considered alternatives to procedures that would cause more than momentary or slight pain or distress to the animals and to provide a written narrative description of the methods and sources; that the activities did not unnecessarily duplicate previous experiments; that medical care for animals was provided as necessary by a qualified veterinarian; and that procedures included parameters used to monitor animals during anesthesia, and instructions for pre-operative and post-operative care of the animals;

(b) failing to file complete annual reports;

(c) failing to make records available for inspection;

(d) failing to register before conducting any regulated activities under the Act and the regulations;

(e) failing to provide primary enclosures for cats that contain adequate resting surfaces; and

(f) failing to store supplies of food and bedding so as to adequately protect them from spoilage, contamination and vermin infestation.

2. Respondent Harrison is assessed a civil penalty of **$26,400**, which he shall pay by certified check(s) or cashier's check(s) or money order(s), made payable to the order of "**Treasurer of the United States**", and forwarded within forty-five (45) days from the effective date of this Order **by a commercial delivery service, such as FedEx or UPS**, to

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn: Sharlene Deskins, Esq.
Room 2343 South Building, Mail Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

Respondent Harrison shall include **AWA Docket No. 07-0158** on the certified check(s) or cashier's check(s) or money order(s). Respondent Harrison shall not engage in any activity covered by the AWA until the civil penalty is paid.

Finality

This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see 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

In re: ALICE MYRICK, d/b/a MYRICK TOY KENNEL.
AWA Docket No. 07-0096.
Default Decision.
Filed April 21, 2008.

AWA – Default.

Sharlene Deskins for APHIS.
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 et seq.), by an complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, alleging that the Respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 et seq.). Copies 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 on May 14, 2007. The Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

The Respondent 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)) which provides that 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)) and 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 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 constitutes a waiver of hearing. Accordingly, the material allegations in the complaint are adopted as findings of fact and conclusions of law. 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

I

A. Alice Myrick, hereinafter referred to as the respondent, is an individual whose address is Route 2, Box 79, Mapleton, Kansas 66754. The respondent operates under the business name of Myrick Toy Kennel.

B. The respondent, at all times material hereto, was operating as a dealer as defined in the Act and the regulations. The respondent's AWA license number is 48-A-1418.

II

On July 10, 2002, APHIS inspected respondent's premises and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Housing facilities for animals were not kept in good repair so as to protect the animals from injury (9 C.F.R. § 3.1(a)); and

2. The buildings and surrounding grounds were not keep clean and in good repair (9 C.F.R.§ 3.11(c)).

III

A. On August 7, 2003, APHIS inspected respondent's premises and found that respondent had failed to identify at least eight dogs on her premises, in willful violation of section 2.50(b)(1) of the regulations (9 C.F.R. § 2.50(b)(1)).

B. On August 7, 2003, APHIS inspected respondent's premises and found that respondent had failed to make and maintain records which fully and correctly disclosed information regarding dogs in her possession, in willful violation of section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)).

C. On August 7, 2003, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondent failed to provide shelter with sufficient space to allow dogs to stand, sit and lie in a comfortable, normal position (9 C.F.R. § 3.6(a)(2)(xi)).

IV

A. On June 18, 2004, APHIS inspected respondent's premises and found that respondent had failed to provide adequate veterinary care to at least one dog which had a wound that appeared to contain maggots, in willful violation of section 2.40(b)(3) of the regulations (9 C.F.R. § 2.40(b)(3)).

B. On June 18, 2004, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondent failed to spot clean daily hard surfaces in which the dogs have contact (9 C.F.R. § 3.1(c)(3));

2. Respondent failed to properly store cleaning supplies in a

manner so as to protect the dogs from injury (9 C.F.R. § 3.1(e)); and

3. Respondent failed to provide shelter with sufficient space to allow dogs to stand, sit and lie in a comfortable, normal position (9 C.F.R. § 3.4(b)).

V

A. On August 6, 2004, APHIS inspected respondent's premises and found that respondent failed to identify at least seven dogs on her premises, in willful violation of section 2.50(a)(2) of the regulations (9 C.F.R. § 2.50(a)(2)).

B. On August 6, 2004, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondent failed to provide primary enclosures free of sharp points or edges that could injure the animals (9 C.F.R. § 3.6(a)(2)(i)).

VI

A. On March 16, 2005, APHIS inspected respondent's premises and found that respondent had failed to provide adequate veterinary care, in willful violation of section 2.40(b) of the regulations (9 C.F.R. § 2.40(b)). These violations included but were not limited to :

1. At least four boxers were not treated for a skin condition.
2. The respondent did not have a veterinarian provide care to a puppy that was observed to be dying and died during the inspection.

B. On March 16, 2005, APHIS inspected respondent's premises and found that respondent had failed to identify at least twenty-five dogs on her premises, in willful violation of section 2.50(a)(1) of the regulations (9 C.F.R. § 2.50(a)(1)).

C. On March 16, 2005, APHIS inspected respondent’s premises and attempted to photograph the facilities but were denied access, in willful violation of section 2.126(a)(4) of the regulations (9 C.F.R. § 2.126(a)(4)) since the respondent stopped APHIS personnel from photographing animals during the inspection including a dog with a skin condition.

D. On March 16, 2005, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the

regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondent failed to provide sufficiently ventilated housing facilities for dogs (9 C.F.R. § 3.2(b));
2. Respondent failed to provide floor areas which were impervious to moisture (9 C.F.R. § 3.3(e)(1)(ii));
3. Respondent failed to provide outdoor housing shelter which had wind and rain breaks (9 C.F.R. § 3.4(b)(3));
4. Respondent failed to provide primary enclosures free of sharp points or edges that could injure the animals (9 C.F.R. § 3.6(a)(2)(i));
5. Respondent failed to provide dogs housed in groups 100% of the required space for each dog if maintained separately (9 C.F.R. § 3.8(b)); and
6. Respondent failed to clean often enough to prevent excessive accumulation of feces (9 C.F.R. § 3.11(a)).

VII

On March 25 and March 26, 2005, the respondent transported at least five dogs with health certificates that were executed by a veterinarian more than ten days prior to the date the dogs were delivered in willful violation of the Act (7 U.S.C. § 2143 (f)) and section 2.78 of the regulations (9 C.F.R. § 2.78).

VIII

A. On April 1, 2005, APHIS inspected respondent's premises and found that respondent had failed to establish and maintain programs of adequate veterinary care, in willful violation of section 2.40(b)(2) of the regulations (9 C.F.R. § 2.40(b)(2)). These violations included but were not limited to :

1. At least four boxers had skin conditions that had worsen since the previous inspection. One white boxer named "Cinderella" had very red, crusty skin and eyes that were matted. A boxer named "Bashful" had crusty, scabby skin and matted eyes. Two boxers, one which was named "Rainbow" and another named "Brutus" had scabby skin which made their legs appear to be swollen.
2. One female dog which was a Westie was observed to limp.
3. One male dog which was a Westie was observed to have a skin problem under his body and down his legs.

B. On April 1, 2005, APHIS inspected respondent's premises and

found that respondent had failed to provide adequate veterinary care, in willful violation of section 2.40(b)(3) of the regulations (9 C.F.R. § 2.40(b)(3)).

C. On April 1, 2005, APHIS inspected respondent's premises and found that respondent had failed to identify all dogs on her premises, in willful violation of section 2.50(a)(1) of the regulations (9 C.F.R. § 2.50(a)(1)).

D. On April 1, 2005, APHIS inspected respondent's premises and found that respondent had failed to identify all live puppies less than 16 weeks of age, in willful violation of section 2.50(a)(1) of the regulations (9 C.F.R. § 2.50(a)(2)).

E. On April 1, 2005, APHIS inspected respondent's premises and found that respondent had failed to make and maintain records which fully and correctly disclosed information regarding dogs in her possession, in willful violation of section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1))

F. On April 1, 2005, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondent failed to clean and sanitized surfaces in the facilities with which the dogs have contact (9 C.F.R. §3.1(c)(2));
2. Respondent failed to provide outdoor housing shelter which provided wind and rain breaks (9 C.F.R. § 3.4(b)(3));
3. Respondent failed to provide primary enclosures free of sharp points or edges that could injure the animals (9 C.F.R. § 3.6(a)(2)(i));
4. Respondent failed to maintain enclosures in good repair (9 C.F.R. § 3.6(a)(1));
5. Respondent failed to provide a minimum amount of floor space for housed dogs (9 C.F.R. § 3.6(c)(1)(i)); and
6. Respondent failed to clean often enough to prevent excessive accumulation of feces (9 C.F.R. § 3.11(a)).

VIII

A. On April 8, 2005, APHIS inspected respondent's premises only to determine if the six dogs observed in need of veterinarian care at the previous inspection had received veterinarian care and found that respondent had failed to provide adequate veterinary care, in willful violation of section 2.40(b)(3) of the regulations (9 C.F.R. § 2.40(b)(3)). These violations included but were not limited to :

1. The respondent’s records did not show if the four boxers

with skin conditions were being treated because the treatment plan prescribed by a veterinarian was not documented by the respondent.

2. The male Westie with the skin condition that was observed on the previous inspection was euthanized rather then being treated by a veterinarian. The respondent failed to document if the euthanasia was performed in a manner that constituted adequate veterinarian care for the dog.

3. The respondent had no documentation to show that the lame female Westie received adequate veterinarian care and the dog continued to limp.

Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the "Findings of Fact" above, the Respondent has willfully violated the Act and regulations promulgated under the Act.
3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. The Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder, and in particular, shall cease and desist from :

(a) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(b) Failing to provide sufficient space for animals in primary enclosures;

(c) Failing to maintain primary enclosures for animals that are clean and sanitary;

(d) Failing to keep the premises clean and in good repair;

(e) Failing to construct and maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary;

(f) Failing to provide animals kept outdoors with shelter from inclement weather;

(g) Failing to establish and maintain programs of disease

control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(h) Failing to individually identify animals, as required;

(i) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required; and

(j) Failing to provide veterinary care to animals.

2. The respondent is assessed a civil penalty of $20,000.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States. The notation AAWA Dkt. No. 06-0008" shall appear on the certified check or money order. The check shall be sent to Sharlene Deskins, USDA OGC Marketing Division, Mail Stop 1417, 1400 Independence Ave. S.W., Washington, D.C. 20250-1417.

3. The respondent's license is revoked. The respondent is permanently disqualified from becoming licensed under the Act and regulations. The respondent shall not engage in any activity which requires a license under the Animal Welfare Act.

The provisions of this Order shall become effective on the first day after service of this decision on the Respondent.

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

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.

In re: TIGER RESCUE, JOHN HANS WEINHART, MARLA SMITH,WENDELIN R. RINGEL.
AWA Docket No. 07-0184.
Decision and Order as to only TIGER RESCUE.
Filed May 9, 2008.

AWA – Default.

Colleen A. Carroll for APHIS.
Respondent Pro se.
Default Decision by Administrative Law Judge Jills S. Clifton.

Default Decision

This proceeding was instituted under the Animal Welfare Act

("AWA" or "Act"), as amended (7 U.S.C. § 2131 *et seq*.), by a Complaint filed on August 30, 2007, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "Complainant" or "APHIS"), alleging that the respondents willfully violated the Act and the regulations and standards promulgated thereunder ("Regulations" and "Standards"). 9 C.F.R. § 1.1 *et seq*.

The Complainant, APHIS, is represented by Colleen A. Carroll, Esq., with the Office of the General Counsel (Marketing Division), United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington D.C. 20250-1417.

Tiger Rescue, respondent, is a California corporation (frequently herein "Respondent Tiger Rescue" or "Respondent"), which had a mailing address of Tiger Rescue, Agent John H. Weinhart, 9478 Bellegrave Avenue, Riverside, California 92509.

Procedural History

On August 31, 2007, the Hearing Clerk sent to Respondent Tiger Rescue, by certified mail, return receipt requested, a copy of the Complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151), together with the Hearing Clerk's service letter, addressed to "Tiger Rescue, Agent John H. Weinhart, 9478 Bellegrave Avenue, Riverside, CA 92509." The Complaint package was returned by the United States Postal Service to the Office of the Hearing Clerk, marked "RETURNED TO SENDER" "Refused." On September 18, 2007, the Hearing Clerk re-mailed the Complaint package to Respondent Tiger Rescue by ordinary mail at the same address, pursuant to section 1.147(c) of the Rules of Practice. 7 C.F.R. § 1.147(c).

Respondent Tiger Rescue was informed in the Hearing Clerk's service letter that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Tiger Rescue did not file an answer to the Complaint. Its time for filing an answer expired on October 9, 2007.

This case was assigned to me, Jill S. Clifton, on April 9, 2008. APHIS's Motion for Adoption of Proposed Decision and Order as to Respondent Tiger Rescue, filed November 30, 2007, is before me. The Hearing Clerk, on December 3, 2007, sent to Respondent Tiger Rescue, by certified mail, return receipt requested, a copy of the Motion (for Decision), together with the Hearing Clerk's letter dated

December 3, 2007, addressed to "Tiger Rescue, Agent John H. Weinhart, 9478 Bellegrave Avenue, Riverside, CA 92509." The Motion (for Decision) package was returned by the United States Postal Service to the Office of the Hearing Clerk, marked "RETURNED TO SENDER" "UNCLAIMED." On December 20, 2007, the Hearing Clerk re-mailed the Motion package to Respondent Tiger Rescue by ordinary mail at the same address. Respondent Tiger Rescue did not respond. Its time for filing a response to the Motion expired on January 9, 2008.

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 Tiger Rescue'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.

Findings of Fact

1. Respondent Tiger Rescue is a California corporation (number C1990992) whose agent for service of process (and President) is John H. Weinhart, 9478 Bellegrave Avenue, Riverside, California 92509. Respondent Tiger Rescue was incorporated on September 30, 1996, and is currently suspended by the California Secretary of State. Respondent Tiger Rescue operated as an exhibitor, as that term is defined in the Act and the Regulations, at all times material herein.

2. APHIS conducted inspections of Respondent Tiger Rescue's facilities, animals and records on November 20, 2002, November 25, 2002, December 10, 2002, January 28, 2003, April 26, 2003, and April 30, 2003. On April 22 and 23, 2003, the Riverside County Department of Animal Services and the California Department of Fish and Game executed a search warrant at the facilities and home of respondents John Hans Weinhart and Marla Smith, at 9474 and 9478 Bellegrave Avenue, Glen Avon, California, and 1350 Agua Mansa Road, Colton, California. 3. Respondent Tiger Rescue operated a large business. On August 29, 2001, Respondent Tiger Rescue had custody and control of 65 wild and exotic felines and 20 farm animals used in exhibition. Respondent Tiger Rescue used these animals for economic gain.

4. The gravity of the violations detailed in this Decision is of the

utmost severity. Respondent Tiger Rescue neglected and abused many animals. By April 2003, approximately 90 animals (mostly tigers) died as a direct result of Respondent Tiger Rescue's lack of care and husbandry. Respondent Tiger Rescue also handled animals in a manner that was unsafe for the animals and the public, failed to provide minimally-adequate housing or veterinary care to animals in obvious distress, and failed to provide sufficient food to animals.

5. Respondent Tiger Rescue has not shown good faith, having falsely portrayed its facility, located at 1350 Agua Mansa Road, Colton, California, to the public as a "sanctuary" for abused animals.

6. Between November 16, 2002, and April 23, 2003, Respondent Tiger Rescue operated as an exhibitor at premises for which a valid license had not been issued or made applicable.

7. On or about the following dates, Respondent Tiger Rescue failed to comply with the attending veterinarian and veterinary care regulations:

a. November 20, November 22, and December 10, 2002. Respondent Tiger Rescue failed to employ a full-time veterinarian under formal arrangements, or a part-time veterinarian under formal arrangements that included a written program of veterinary care and regularly-scheduled visits to the respondents' premises.

b. November 20 and November 22, 2002. Respondent Tiger Rescue failed to provide adequate veterinary care to animals, specifically:

i. four severely underweight and undernourished black leopards.

ii. three underweight and undernourished black leopards and numerous underweight and undernourished tigers.

iii. one black leopard suffering from untreated facial wounds.

iv. one underweight and undernourished female tiger (Jaya) suffering from untreated diarrhea, and numerous untreated skin lesions on her body and legs.

v. one female lion and four tigers that were underweight and undernourished with poor coats.

vi. four female tigers that were severely underweight and undernourished, with protruding hipbones, visible ribs, and poor coats.

vii. one male white tiger (Centaur) suffering from several untreated skin lesions.

c. November 20, November 22 and December 10, 2002. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the availability of

appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and specifically, failed to maintain minimally-adequate records showing routine care and observations of animals.

d. November 25, 2002. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and failed to provide minimally-adequate veterinary care to animals that were suffering, specifically Nemo, an underweight male tiger with untreated bloody paws, whose enclosure had blood on the floor, and Jaya, an emaciated female tiger with untreated skin lesions on her back, along her right flank, and over her face, and, consequently, APHIS inspectors issued to Respondent Tiger Rescue a notice of intent to confiscate these two tigers unless they were treated within 24 hours.

e. November 25, 2002. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and daily observation of animals, and failed to provide minimally-adequate veterinary care to animals that were suffering, specifically a tiger in the second pen on the west side of the facility, that had an untreated draining abscess on its neck.

f. November 25 and December 10, 2002, and April 22 and April 23, 2003. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically, failed to take steps to determine the cause of the high mortality rate in tiger litters born at respondents' facilities, including the felid cubs whose remains were contained in respondents' freezer.

g. December 10, 2002. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically, Respondent Tiger Rescue failed to take steps to establish an adequate feeding and separation program for animals, resulting in a

large number of underweight, unthrifty animals bearing fight scars.

h. January 28, 2003. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, the availability of emergency, weekend and holiday care, and adequate guidance to personnel involved in the care and use of animals, and specifically, failed to provide veterinary care to a goat suffering from tetanus.

i. April 22, 2003. Respondent Tiger Rescue failed to obtain adequate veterinary care for animals, specifically:

i. two black domestic short-hair cats with severe skin problems.

ii. one small white female goat with overgrown front hooves (four inches), that had difficulty walking and standing, and had a swollen left knee.

iii. two donkeys with severely (7 inches) overgrown hooves that curled up and away from the feet, and one donkey that could not stand up.

j. April 22, 2003. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization and euthanasia, and specifically failed to provide minimally-adequate veterinary care to animals and to document the condition of animals, including 53 dead felid cubs.

k. April 23, 2003. Respondent Tiger Rescue failed to obtain minimally-adequate veterinary care for animals, specifically, two black domestic short-hair cats suffering from extreme mite infection (*notoedres cati*), that was so advanced as to require their euthanasia.

l. April 26, 2003. Respondent Tiger Rescue failed to have an attending veterinarian who could provide adequate veterinary care to animals, and failed to ensure that it had an attending veterinarian with appropriate authority to ensure the provision of adequate veterinary care, and specifically, Respondent Tiger Rescue failed to allow access to the facility and animals.

m. April 26, 2003. Respondent Tiger Rescue failed to establish

and maintain programs of adequate veterinary care that include daily observation and a mechanism for frequent communication with the attending veterinarian, and specifically, a tiger that had a surgical procedure on April 13, 2003, had not been seen by a veterinarian since, Respondent Tiger Rescue was not following the veterinarian's instructions, and the veterinarian was not aware of the animal's condition and had not documented the animal's progress or lack thereof.

n. April 26, 2003. Respondent Tiger Rescue failed to provide adequate veterinary care to (i) a male tiger with a swollen left forelimb; (ii) a tiger with an open wound on its back; (iii) pot-bellied pigs with reddened skin, lack of hair and itchiness; and (iv) animals with diarrhea.

8. On or about November 20, 2002, Respondent Tiger Rescue failed to identify fourteen leopards.

9. On or about November 20, November 22, November 25, and December 2, 2002, and April 22, 2003, Respondent Tiger Rescue:

a. failed to make, keep and maintain any records of animals.

b. failed to make, keep and maintain records of the name of and address of the person from whom Respondent Tiger Rescue acquired animals.

c. failed to make, keep and maintain records of the USDA license or registration number or vehicle license number and driver's license number of the person from whom Respondent Tiger Rescue acquired animals.

d. failed to make, keep and maintain records of the date of purchase, acquisition, sale and disposition of animals.

10. On November 25, 2002, Respondent Tiger Rescue refused to provide to the APHIS inspectors, information concerning the person from whom he acquired the female tiger Jaya.

11. On or about the following dates, Respondent Tiger Rescue failed to comply with the handling regulations, as follows:

a. November 16, November 20, and November 22, 2002. Respondent Tiger Rescue, during public exhibition, allowed members of the public to handle animals (including large felines) directly without any distance or any barriers.

12. On or about the following dates, Respondent Tiger Rescue:

a. April 22, 2003. Failed to feed dogs wholesome, uncontaminated food, in sufficient quantities.

b. April 22, 2003. Failed to provide adequate potable water, in clean receptacles, to dogs.

c. April 30, 2003. Housed three 20-pound dogs in a

"VariKennel" that was adequate for only one such dog.

d. April 30, 2003. Failed to remove built-up excreta from the "VariKennel" that housed three dogs.

e. April 30, 2003. Failed to establish an effective program of pest control for eight dogs housed at Respondent Tiger Rescue's facility.

f. April 30, 2003. Failed to have sufficient employees to attain the level of animal care and husbandry required by the Regulations and Standards.

13. On or about the following dates, Respondent Tiger Rescue:

a. November 16, 2002. Failed to remove excreta from lion and tiger enclosures.

b. November 20, 2002. Failed to construct its facility of such material and such strength as appropriate for the animals involved, and to maintain its facility in good repair to protect the animals from injury, and specifically:

i. the camel enclosures had large 24-inch gaps, the chain link fencing was warped, bent and buckled, and the bottom was turned into the animals' enclosure, exposing the animals to pointed wire ends;

ii. the enclosure housing a male leopard, was missing part of the roof, exposing nails;

iii. the shift cage for a male lion was broken, exposing nails;

iv. the tops of the two enclosures housing a female lion and a male lion (Nemo) were broken, exposing nails;

v. the enclosures housing leopards had torn chicken wire, exposing the animals to sharp wire ends;

vi. the main enclosures housing felids had boards that had been torn from the rear wall that were lying inside the enclosures;

vii. the roof of the east side enclosures housing female tigers was separating from the rest of the structure;

viii. the enclosures housing goats had chain link turned up at its base, exposing sharp wire ends;

ix. the torn water container in the enclosure housing three tiger cubs exposed the animals to sharp metal edges;

x. Respondent Tiger Rescue housed camels in enclosures constructed of chain link fencing, which material is not appropriate for such animals; and

xi. Respondent Tiger Rescue housed three pot-bellied pigs in Rubbermaid tool sheds, which trapped the animals inside with inadequate ventilation, and which enclosures were not

appropriate for such animals.

c. November 20, 2002. Failed to provide sufficient shade for white tiger housed outdoors in end cage on north side of facility.

d. November 20, 2002. Failed to provide sufficient shelter from inclement weather for large felids, goats, and a camel.

e. November 20, 2002, January 28 and April 22, April 23, April 26 and April 30, 2003. Failed to remove excreta and food waste from nearly all animal enclosures.

f. November 20, 2002, and January 28, and April 26 and April 30, 2003. Failed to provide a suitable method to rapidly eliminate excess water from animal enclosures.

g. December 10, 2002. Failed to construct its facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically the camel enclosures had large 24-inch gaps, the chain link fencing was warped, bent and buckled, and the bottom was turned into the animals' enclosure, exposing the animals to pointed wire ends.

h. January 28, 2003. Failed to provide sufficient shelter from inclement weather for large felids, goats, and pigs.

i. January 28, 2003. Failed to provide sufficient shade for large felids, goats, and pigs.

j. April 22, 2003. Failed to construct its facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically, housed ten live lion cubs and two live leopard cubs in an attic area of respondent Weinhart's home, in filthy conditions.

k. April 26 and April 30, 2003. Failed to store supplies of food and bedding in facilities that adequately protected them from deterioration and contamination, and specifically, there was no adequate means of storing food supplies at Respondent Tiger Rescue's facilities.

l. April 26 and April 30, 2003. Failed to provide sufficient shade for animals, and specifically, most of the shelters have been blown off of the chain link rooftops of animal enclosures.

m. April 30, 2003. Failed to provide sufficient shade for animals, and specifically, housed a tiger (Trevor) in a transport enclosure that offered the animal no shelter from the sun.

n. April 30, 2003. Failed to construct its facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals

from injury, and specifically, (i) the camel enclosure had a non-functioning gate; (ii) the old camel enclosure had a 12-inch gap, the chain link fencing was warped, bent and buckled, and the poles were leaning outward; and (iii) shelter boxes for large felids were in a state of disrepair.

o. April 30, 2003. Failed to provide sufficient shelter from inclement weather for all animals.

p. April 30, 2003. Failed to provide adequate space to a deer housed in a "VariKennel."

14. On or about the following dates, Respondent Tiger Rescue:

a. November 16, November 20, 2002, and January 28, April 22, April 23, April 26 and April 30, 2003. Failed to feed large felids wholesome, uncontaminated food in sufficient quantities.

b. November 20, November 22, November 25, and December 10, 2002, and January 28, April 22, April 23, April 26 and April 30, 2003. Failed to provide potable water to animals, in clean receptacles.

c. November 20 and November 22, 2002. Failed to remove excreta from primary enclosures as often as necessary, and in particular, the gap between two adjacent tiger enclosures (housing Jaya and Nemo), and around the den boxes, were filled with feces.

d. November 20 and November 22, 2002, and April 26 and April 30, 2003. Failed to establish and maintain a safe and effective program for the control of insects, and other pests.

e. November 20, November 22, and December 10, 2002, and January 28, April 22 and April 23, 2003. Failed to keep premises clean and good repair in order to protect animals from injury and to facilitate prescribed husbandry practices, and specifically, inspectors observed accumulations of junk, discarded materials, buildup of filth, food debris, manure, and excreta throughout the facility.

f. November 20, November 22, and December 10, 2002, and April 26 and April 30, 2003. Failed to employ a sufficient number of adequately trained employees to maintain the professionally-acceptable level of husbandry practices.

g. November 16, November 20, November 25 and December 10, 2002. Housed incompatible animals in the same primary enclosures, and housed animals near animals that interfere with their health or well-being, and specifically large felids exhibited scars and open wounds indicative of fighting activity.

h. December 10, 2002, and January 28, April 22, April 23, and April 26, 2003. Failed to remove excreta from primary enclosures

as often as necessary.

i. April 30, 2003. Housed seven goats, two pot-bellied pigs, and a llama in the bed of a pick-up truck, with inadequate space, extraneous materials that could harm the animals, and no shade or shelter.

Conclusions

1. Between November 16, 2002, and April 23, 2003, Respondent Tiger Rescue operated as an exhibitor at premises for which a valid license had not been issued or made applicable, in willful violation of section 2.1 of the Regulations. 9 C.F.R. § 2.1.

2. On or about the following dates, Respondent Tiger Rescue willfully violated the attending veterinarian and veterinary care regulations (9 C.F.R. § 2.40) as follows:

a. November 20, November 22, and December 10, 2002. Respondent Tiger Rescue failed to employ a full-time veterinarian under formal arrangements, or a part-time veterinarian under formal arrangements that included a written program of veterinary care and regularly-scheduled visits to the respondents' premises. 9 C.F.R. § 2.40(a)(1).

b. November 20 and November 22, 2002. Respondent Tiger Rescue failed to provide adequate veterinary care to animals, in violation of 9 C.F.R. § 2.40(a), specifically:

i. four severely underweight and undernourished black leopards.

ii. three underweight and undernourished black leopards and numerous underweight and undernourished tigers.

iii. one black leopard suffering from untreated facial wounds.

iv. one underweight and undernourished female tiger (Jaya) suffering from untreated diarrhea, and numerous untreated skin lesions on her body and legs.

v. one female lion and four tigers that were underweight and undernourished with poor coats.

vi. four female tigers that were severely underweight and undernourished, with protruding hipbones, visible ribs, and poor coats.

vii. one male white tiger (Centaur) suffering from several untreated skin lesions.

c. November 20, November 22 and December 10, 2002. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the

use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and specifically, failed to maintain minimally-adequate records showing routine care and observations of animals. 9 C.F.R. §§ 2.40(b)(1), 2.40(b)(2), 2.40(b)(4).

d. November 25, 2002. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and failed to provide minimally-adequate veterinary care to animals that were suffering, specifically Nemo, an underweight male tiger with untreated bloody paws, whose enclosure had blood on the floor, and Jaya, an emaciated female tiger with untreated skin lesions on her back, along her right flank, and over her face, and, consequently, APHIS inspectors issued to Respondent Tiger Rescue a notice of intent to confiscate these two tigers unless they were treated within 24 hours. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

e. November 25, 2002. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and daily observation of animals, and failed to provide minimally-adequate veterinary care to animals that were suffering, specifically a tiger in the second pen on the west side of the facility, that had an untreated draining abscess on its neck. 9 C.F.R. §§ 2.40(a), 2.40(b)(2), 2.40(b)(3).

f. November 25 and December 10, 2002, and April 22 and April 23, 2003. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically, failed to take steps to determine the cause of the high mortality rate in tiger litters born at respondents' facilities, including the felid cubs whose remains were contained in respondents' freezer. 9 C.F.R. §§ 2.40(b)(1), 2.40(b)(2).

g. December 10, 2002. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the use of appropriate methods to prevent, control,

diagnose, and treat diseases and injuries, and specifically, Respondent Tiger Rescue failed to take steps to establish an adequate feeding and separation program for animals, resulting in a large number of underweight, unthrifty animals bearing fight scars. 9 C.F.R. § 2.40(b)(2).

h. January 28, 2003. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization and euthanasia, and specifically, failed to provide veterinary care to a goat suffering from tetanus. 9 C.F.R. §§ 2.40(a), 2.40(b)(1, 2.40(b)(2), 2.40(b)(4).

i. April 22, 2003. Respondent Tiger Rescue failed to obtain adequate veterinary care for animals, in violation of 9 C.F.R. § 2.40(a), specifically:

i. two black domestic short-hair cats with severe skin problems.

ii. one small white female goat with overgrown front hooves (four inches), that had difficulty walking and standing, and had a swollen left knee.

iii. two donkeys with severely (7 inches) overgrown hooves that curled up and away from the feet, and one donkey that could not stand up.

j. April 22, 2003. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization and euthanasia, and specifically failed to provide minimally-adequate veterinary care to animals and to document the condition of animals, including 53 dead felid cubs. 9 C.F.R. §§ 2.40(b)(1), 2.40(b)(2), 2.40(b)(4).

k. April 23, 2003. Respondent Tiger Rescue failed to obtain minimally-adequate veterinary care for animals, specifically, two black domestic short-hair cats suffering from extreme mite

infection (*notoedres cati*), that was so advanced as to require their euthanasia. 9 C.F.R. § 2.40(a).

l. April 26, 2003. Respondent Tiger Rescue failed to have an attending veterinarian who could provide adequate veterinary care to animals, and failed to ensure that he had an attending veterinarian with appropriate authority to ensure the provision of adequate veterinary care, and specifically, Respondent Tiger Rescue failed to allow access to the facility and animals. 9 C.F.R. §§ 2.40(a), 2.40(a)(2).

m. April 26, 2003. Respondent Tiger Rescue failed to establish and maintain programs of adequate veterinary care that include daily observation and a mechanism for frequent communication with the attending veterinarian, and specifically, a tiger that had a surgical procedure on April 13, 2003, had not been seen by a veterinarian since, Respondent Tiger Rescue was not following the veterinarian's instructions, and the veterinarian was not aware of the animal's condition and had not documented the animal's progress or lack thereof. 9 C.F.R. § 2.40(b)(3).

n. April 26, 2003. Respondent Tiger Rescue failed to provide adequate veterinary care to (i) a male tiger with a swollen left forelimb; (ii) a tiger with an open wound on its back; (iii) pot-bellied pigs with reddened skin, lack of hair and itchiness; and (iv) animals with diarrhea. 9 C.F.R. § 2.40(a).

3. On or about November 20, 2002, Respondent Tiger Rescue willfully violated the identification regulations (9 C.F.R. § 2.50), by failing to identify one or more animals other than dogs and cats confined in a primary enclosure, and specifically, failed to identify fourteen leopards. 9 C.F.R. §§ 2.50(e)(2), 2.50(e)(3).

4. On or about November 20, November 22, November 25, and December 2, 2002, and April 22, 2003, Respondent Tiger Rescue willfully violated the record-keeping regulations (9 C.F.R. § 2.75(b)(1)), by failing to make, keep and maintain records or forms that fully and correctly disclose required information concerning animals other than dogs and cats purchased or otherwise acquired, owned, held, leased, or otherwise in respondents' possession or under respondents' control, or transported, sold, euthanized, or otherwise disposed of, and specifically:

a. failed to make, keep and maintain any records of animals.

b. failed to make, keep and maintain records of the name of and address of the person from whom Respondent Tiger Rescue acquired animals.

c. failed to make, keep and maintain records of the USDA

license or registration number or vehicle license number and driver's license number of the person from whom Respondent Tiger Rescue acquired animals.

d. failed to make, keep and maintain records of the date of purchase, acquisition, sale and disposition of animals.

5. On November 25, 2002, Respondent Tiger Rescue refused to provide to the APHIS inspectors, information concerning the person from whom it acquired the female tiger Jaya, in willful violation of section 2.125 of the Regulations. 9 C.F.R. § 2.125.

6. On or about the following dates, Respondent Tiger Rescue willfully violated the handling regulations (9 C.F.R. § 2.131), as follows:

November 16, November 20, and November 22, 2002. Respondent Tiger Rescue failed to handle animals during public exhibition so that there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the public so as to assure the safety of the animals and the public, and specifically, allowed members of the public to handle animals (including large felines) directly without any distance or any barriers. 9 C.F.R. § 2.131(b)(1).

7. On or about the following dates, Respondent Tiger Rescue willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the general facilities and operating standards for dogs, as follows:

a. April 22, 2003. Respondent Tiger Rescue failed to feed dogs wholesome uncontaminated food in sufficient quantities. 9 C.F.R. § 3.9.

b. April 22, 2003. Respondent Tiger Rescue failed to provide dogs with adequate potable water in clean receptacles. 9 C.F.R. § 3.10.

c. April 30, 2003. Respondent Tiger Rescue failed to house dogs in primary enclosures that offered them an adequate amount of space, and specifically, housed three 20-pound dogs in a "VariKennel" that was adequate for only one such dog. 9 C.F.R. § 3.6.

d. April 30, 2003. Respondent Tiger Rescue failed to remove excreta from primary enclosures for dogs as often as necessary, and specifically, there was a buildup of excreta in the "VariKennel" that housed three dogs. 9 C.F.R. § 3.11(a).

e. April 30, 2003. Respondent Tiger Rescue failed to establish an effective program of pest control for eight dogs housed at Respondent Tiger Rescue's facility. 9 C.F.R. § 3.11(d).

f. April 30, 2003. Respondent Tiger Rescue failed to have sufficient employees to attain the level of animal care and husbandry required by the Regulations and Standards. 9 C.F.R. § 3.12.

8. On or about the following dates, Respondent Tiger Rescue willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the general facilities and operating standards for warm-blooded animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.128), as follows:

a. November 16, 2002. Respondent Tiger Rescue failed to provide for the removal of animal waste, and specifically, failed to remove excreta from lion and tiger enclosures. 9 C.F.R. § 3.125(d).

b. November 20, 2002. Respondent Tiger Rescue failed to construct its facility of such material and such strength as appropriate for the animals involved, and to maintain its facility in good repair to protect the animals from injury (9 C.F.R. § 3.125(a)), and specifically:

i. the camel enclosures had large 24-inch gaps, the chain link fencing was warped, bent and buckled, and the bottom was turned into the animals' enclosure, exposing the animals to pointed wire ends;

ii. the enclosure housing a male leopard, was missing part of the roof, exposing nails;

iii. the shift cage for a male lion was broken, exposing nails;

iv. the tops of the two enclosures housing a female lion and a male lion (Nemo) were broken, exposing nails;

v. the enclosures housing leopards had torn chicken wire, exposing the animals to sharp wire ends;

vi. the main enclosures housing felids had boards that had been torn from the rear wall that were lying inside the enclosures;

vii. the roof of the east side enclosures housing female tigers was separating from the rest of the structure;

viii. the enclosures housing goats had chain link turned up at its base, exposing sharp wire ends;

ix. the torn water container in the enclosure housing three tiger cubs exposed the animals to sharp metal edges;

x. Respondent Tiger Rescue housed camels in enclosures constructed of chain link fencing, which material is not appropriate for such animals; and

xi. Respondent Tiger Rescue housed three pot-bellied pigs in

Rubbermaid tool sheds, which trapped the animals inside with inadequate ventilation, and which enclosures were not appropriate for such animals.

c. November 20, 2002. Respondent Tiger Rescue failed to provide sufficient shade for white tiger housed outdoors in end cage on north side of facility. 9 C.F.R. § 3.127(a).

d. November 20, 2002. Respondent Tiger Rescue failed to provide sufficient shelter from inclement weather for large felids, goats, and a camel. 9 C.F.R. § 3.127(c).

e. November 20, 2002, January 28 and April 22, April 23, April 26 and April 30, 2003. Respondent Tiger Rescue failed to provide for the removal of animal waste, and specifically failed to remove excreta and food waste from nearly all animal enclosures. 9 C.F.R. § 3.125(d).

f. November 20, 2002, and January 28, and April 26 and April 30, 2003. Respondent Tiger Rescue failed to provide a suitable method to rapidly eliminate excess water from animal enclosures. 9 C.F.R. § 3.127(c).

g. December 10, 2002. Respondent Tiger Rescue failed to construct its facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically the camel enclosures had large 24-inch gaps, the chain link fencing was warped, bent and buckled, and the bottom was turned into the animals' enclosure, exposing the animals to pointed wire ends. 9 C.F.R. § 3.125(a).

h. January 28, 2003. Respondent Tiger Rescue failed to provide sufficient shelter from inclement weather for large felids, goats, and pigs. 9 C.F.R. § 3.127(b).

i. January 28, 2003. Respondent Tiger Rescue failed to provide sufficient shade for large felids, goats, and pigs. 9 C.F.R. § 3.127(a).

j. April 22, 2003. Respondent Tiger Rescue failed to construct its facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically, housed ten live lion cubs and two live leopard cubs in an attic area of respondent Weinhart's home, in filthy conditions. 9 C.F.R. § 3.125(a).

k. April 26 and April 30, 2003. Respondent Tiger Rescue failed to store supplies of food and bedding in facilities that adequately protected them from deterioration and contamination, and specifically, there was no adequate means of storing food

supplies at Respondent Tiger Rescue's facilities. 9 C.F.R. § 3.125(c).

l. April 26 and April 30, 2003. Respondent Tiger Rescue failed to provide sufficient shade for animals, and specifically, most of the shelters have been blown off of the chain link rooftops of animal enclosures. 9 C.F.R. § 3.127(a).

m. April 30, 2003. Respondent Tiger Rescue failed to provide sufficient shade for animals, and specifically, housed a tiger (Trevor) in a transport enclosure that offered the animal no shelter from the sun. 9 C.F.R. § 3.127(a).

n. April 30, 2003. Respondent Tiger Rescue failed to construct its facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically, (i) the camel enclosure had a non-functioning gate; (ii) the old camel enclosure had a 12-inch gap, the chain link fencing was warped, bent and buckled, and the poles were leaning outward; and (iii) shelter boxes for large felids were in a state of disrepair. 9 C.F.R. § 3.125(a).

o. April 30, 2003. Respondent Tiger Rescue failed to provide sufficient shelter from inclement weather for all animals. 9 C.F.R. § 3.127(b).

p. April 30, 2003. Respondent Tiger Rescue failed to provide adequate space to a deer housed in a "VariKennel." 9 C.F.R. § 3.128.

9. On or about the following dates, Respondent Tiger Rescue willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the animal health and husbandry and transportation standards for warm-blooded animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.129-3.142), as follows:

a. November 16, November 20, 2002, and January 28, April 22, April 23, April 26 and April 30, 2003. Respondent Tiger Rescue failed to feed large felids wholesome, uncontaminated food in sufficient quantities. 9 C.F.R. § 3.129.

b. November 20, November 22, November 25, and December 10, 2002, and January 28, April 22, April 23, April 26 and April 30, 2003. Respondent Tiger Rescue failed to provide potable water to animals, in clean receptacles. 9 C.F.R. § 3.130.

c. November 20 and November 22, 2002. Respondent Tiger Rescue failed to remove excreta from primary enclosures as often as necessary, and in particular, the gap between two adjacent tiger enclosures (housing Jaya and Nemo), and around the den boxes,

were filled with feces. 9 C.F.R. § 3.131(a).

d. November 20 and November 22, 2002, and April 26 and April 30, 2003. Respondent Tiger Rescue failed to establish and maintain a safe and effective program for the control of insects, and other pests. 9 C.F.R. § 3.131(d).

e. November 20, November 22, and December 10, 2002, and January 28, April 22 and April 23, 2003. Respondent Tiger Rescue failed to keep premises clean and in good repair in order to protect animals from injury and to facilitate prescribed husbandry practices, and specifically, inspectors observed accumulations of junk, discarded materials, buildup of filth, food debris, manure, and excreta throughout the facility. 9 C.F.R. § 3.131(c).

f. November 20, November 22, and December 10, 2002, and April 26 and April 30, 2003. Respondent Tiger Rescue failed to employ a sufficient number of adequately trained employees to maintain the professionally-acceptable level of husbandry practices. 9 C.F.R. § 3.132.

g. November 16, November 20, November 25 and December 10, 2002. Respondent Tiger Rescue housed incompatible animals in the same primary enclosures, and housed animals near animals that interfere with their health or well-being, and specifically large felids exhibited scars and open wounds indicative of fighting activity. 9 C.F.R. § 3.133.

h. December 10, 2002, and January 28, April 22, April 23, and April 26, 2003. Respondent Tiger Rescue failed to remove excreta from primary enclosures as often as necessary. 9 C.F.R. § 3.131(a).

i. April 30, 2003. Respondent Tiger Rescue housed seven goats, two pot-bellied pigs, and a llama in the bed of a pick-up truck, with inadequate space, extraneous materials that could harm the animals, and no shade or shelter. 9 C.F.R. §§ 3.125(a), 3.127(a), 3.127(b), 3.128, 3.138.

Order

1. Respondent Tiger Rescue, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

2. Respondent Tiger Rescue is assessed a civil penalty of **$99,550**

for its 362 violations of the Act and the Regulations and Standards.[1] 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(b)(2)(v) (since renumbered).

3. Respondent Tiger Rescue shall pay the **$99,550** by cashier's check(s) or certified check(s) or money order(s), made payable to the order of the **Treasurer of the United States** and delivered within sixty (60) days from the effective date of this Order to:

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

Respondent Tiger Rescue shall include on the cashier's check(s) or certified check(s) or money order(s) the docket number of this proceeding, **AWA Docket No. 07-0184**.

Finality

This Decision and Order shall be final and effective thirty five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to 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.

In re: TIGER RESCUE, JOHN HANS WEINHART, MARLA SMITH, WENDELIN R. RINGEL.
AWA Docket No. 07-0184.
Decision and Order as to only JOHN HANS WEINHART by Reason of Default.

[1] The 362 violations comprise 159 violations of the licensing regulations, 67 violations of the veterinary care regulations, 20 violations of the identification regulations, 3 violations of the handling regulations, and 113 instances of noncompliance with the standards. Civil penalties of up to $2,750 were provided for each violation during the time of these violations. 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(b)(2)(v). For these 362 violations, the civil penalty amount can be $995,500.

Filed May 9, 2008.

AWA – Default.

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

This proceeding was instituted under the Animal Welfare Act ("AWA" or "Act"), as amended (7 U.S.C. § 2131 *et seq*.), by a Complaint filed on August 30, 2007, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "Complainant" or "APHIS"), alleging that the respondents willfully violated the Act and the regulations and standards promulgated thereunder ("Regulations" and "Standards"). 9 C.F.R. § 1.1 *et seq*.

The Complainant, APHIS, is represented by Colleen A. Carroll, Esq., with the Office of the General Counsel (Marketing Division), United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington D.C. 20250-1417.

John Hans Weinhart, respondent, is an individual (frequently herein "Respondent Weinhart" or "Respondent"), whose address was 9478 Bellegrave Avenue, Riverside, California 92509.

Procedural History

On August 31, 2007, the Hearing Clerk sent to Respondent John Hans Weinhart, by certified mail, return receipt requested, a copy of the Complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151), together with the Hearing Clerk's service letter, addressed to "John Hans Weinhart, d/b/a Tiger Rescue, 9478 Bellegrave Avenue, Riverside, CA 92509." The Complaint package was returned by the United States Postal Service to the Office of the Hearing Clerk, marked "RETURNED TO SENDER" "Refused." On September 14, 2007, the Hearing Clerk re-mailed the Complaint package to Respondent Weinhart by ordinary mail at the same address, pursuant to section 1.147(c) of the Rules of Practice. 7 C.F.R. § 1.147(c).

Respondent John Hans Weinhart was informed in the Hearing Clerk's service letter that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Weinhart did not file an answer to the Complaint. His

time for filing an answer expired on October 4, 2007.

This case was assigned to me, Jill S. Clifton, on April 9, 2008. APHIS's Motion for Adoption of Proposed Decision and Order as to Respondent John Hans Weinhart, filed October 23, 2007, is before me. The Hearing Clerk, on October 24, 2007, sent to Respondent John Hans Weinhart, by certified mail, return receipt requested, a copy of the Motion (for Decision), together with the Hearing Clerk's letter dated October 24, 2007, addressed to "John Hans Weinhart, d/b/a Tiger Rescue, 9478 Bellegrave Avenue, Riverside, CA 92509." The Motion (for Decision) package was returned by the United States Postal Service to the Office of the Hearing Clerk, marked "RETURNED TO SENDER" "UNCLAIMED." On December 20, 2007, the Hearing Clerk re-mailed the Motion package to Respondent Weinhart by ordinary mail at the same address. Respondent Weinhart did not respond. His time for filing a response to the Motion expired on January 9, 2008.

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 Weinhart'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.

Findings of Fact

1. Respondent John Hans Weinhart is an individual whose address was 9478 Bellegrave Avenue, Riverside, California 92509. Respondent Weinhart was an exhibitor, as that term is defined in the Act and the Regulations, at all times material herein. Between October 6, 2000, and October 17, 2003, Respondent Weinhart held Animal Welfare Act license number 93-C-0825, issued to "JOHN WEINHART DBA: TIGER RESCUE," and was President of respondent Tiger Rescue. Respondent Weinhart previously held Animal Welfare Act licenses 21-A-005 and 21-C-021, as well as 93-C-0199, which license has been terminated.

2. APHIS conducted inspections of Respondent Weinhart's facilities, animals and records on November 20, 2002, November 25, 2002, December 10, 2002, January 28, 2003, April 26, 2003, and April 30, 2003. On April 22 and 23, 2003, the Riverside County Department

of Animal Services and the California Department of Fish and Game executed a search warrant at the facilities and home of Respondent Weinhart, at 9474 and 9478 Bellegrave Avenue, Glen Avon, California, and 1350 Agua Mansa Road, Colton, California.

3. Respondent Weinhart operated a large business. On August 29, 2001, Respondent Weinhart represented to APHIS that he and respondent Tiger Rescue had custody and control of 65 wild and exotic felines and 20 farm animals used in exhibition. Respondent Weinhart used these animals for economic gain.

4. The gravity of the violations detailed in this Decision is of the utmost severity. Respondent Weinhart neglected and abused many animals. By April 2003, approximately 90 animals (mostly tigers) died as a direct result of Respondent Weinhart's lack of care and husbandry. Respondent Weinhart also handled animals in a manner that was unsafe for the animals and the public, failed to provide minimally-adequate housing or veterinary care to animals in obvious distress, and failed to provide sufficient food to animals. On April 22, 2005, Respondent Weinhart was convicted by the State of California of 13 counts of felony animal cruelty, and was sentenced to two years in jail and five years probation.

5. Respondent Weinhart has not shown good faith. Respondent Weinhart provided false information to APHIS in his 2000 application for an exhibitor's license, namely, a representation that "direct public contact is not allowed," falsely portrayed his facility, located at 1350 Agua Mansa Road, Colton, California, to the public as a "sanctuary" for abused animals, and maintained a separate, undisclosed, animal facility at his home in Glen Avon, California. Respondent Weinhart has failed to obey the cease and desist order issued in *In re John Weinhart,* AWA Docket No. 162, 40 Agric. Dec. 1924 (1981).

6. Respondent Weinhart has a history of noncompliance, *In re John Weinhart,* 40 Agric. Dec. 1924 (1981), and received written warnings in April 1998 and January 1990. In 1981, Respondent Weinhart was ordered to cease and desist from violating the Act and the Regulations and Standards, as follows:

> "Respondent John Weinhart shall comply with each and every provision of the Animal Welfare Act...and the standards and regulations issued thereunder...and shall cease and desist from any violation thereof." *In re John Weinhart,* 40 Agric. Dec. 1924 (1981).

7. Between November 16, 2002, and November 28, 2003, Respondent John Weinhart knowingly failed to obey the cease and desist order made by the Secretary in *In re John Weinhart,* AWA

Docket No.162, 40 Agric. Dec. 1924 (1981), pursuant to section 2149(b) of the Act. 7 U.S.C. § 2149(b).

8. Between November 16, 2002, and April 23, 2003, Respondent Weinhart operated as an exhibitor at premises for which a valid license had not been issued or made applicable.

9. On or about April 22, 2003, Respondent Weinhart failed to notify APHIS of an additional site that Respondent operated at his home.

10. On or about the following dates, Respondent Weinhart failed to comply with the attending veterinarian and veterinary care regulations:

a. November 20, November 22, and December 10, 2002. Respondent Weinhart failed to employ a full-time veterinarian under formal arrangements, or a part-time veterinarian under formal arrangements that included a written program of veterinary care and regularly-scheduled visits to the respondents' premises.

b. November 20 and November 22, 2002. Respondent Weinhart failed to provide adequate veterinary care to animals, specifically:

i. four severely underweight and undernourished black leopards.

ii. three underweight and undernourished black leopards and numerous underweight and undernourished tigers.

iii. one black leopard suffering from untreated facial wounds.

iv. one underweight and undernourished female tiger (Jaya) suffering from untreated diarrhea, and numerous untreated skin lesions on her body and legs.

v. one female lion and four tigers that were underweight and undernourished with poor coats.

vi. four female tigers that were severely underweight and undernourished, with protruding hipbones, visible ribs, and poor coats.

vii. one male white tiger (Centaur) suffering from several untreated skin lesions.

c. November 20, November 22 and December 10, 2002. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and specifically, failed to maintain minimally-adequate records showing routine care and observations of animals.

d. November 25, 2002. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that

include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and failed to provide minimally-adequate veterinary care to animals that were suffering, specifically Nemo, an underweight male tiger with untreated bloody paws, whose enclosure had blood on the floor, and Jaya, an emaciated female tiger with untreated skin lesions on her back, along her right flank, and over her face, and, consequently, APHIS inspectors issued to Respondent Weinhart a notice of intent to confiscate these two tigers unless they were treated within 24 hours.

e. November 25, 2002. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and daily observation of animals, and failed to provide minimally-adequate veterinary care to animals that were suffering, specifically a tiger in the second pen on the west side of the facility, that had an untreated draining abscess on its neck.

f. November 25 and December 10, 2002, and April 22 and April 23, 2003. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically, failed to take steps to determine the cause of the high mortality rate in tiger litters born at respondents' facilities, including the felid cubs whose remains were contained in respondents' freezer.

g. December 10, 2002. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically, Respondent Weinhart failed to take steps to establish an adequate feeding and separation program for animals, resulting in a large number of underweight, unthrifty animals bearing fight scars.

h. January 28, 2003. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, the availability of emergency, weekend and holiday care, and adequate guidance to

personnel involved in the care and use of animals, and specifically, failed to provide veterinary care to a goat suffering from tetanus.

e. April 22, 2003. Respondent Weinhart failed to obtain adequate veterinary care for animals, specifically:

i. two black domestic short-hair cats with severe skin problems.

ii. one small white female goat with overgrown front hooves (four inches), that had difficulty walking and standing, and had a swollen left knee.

iii. two donkeys with severely (7 inches) overgrown hooves that curled up and away from the feet, and one donkey that could not stand up.

f. April 22, 2003. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization and euthanasia, and specifically failed to provide minimally-adequate veterinary care to animals and to document the condition of animals, including 53 dead felid cubs.

g. April 23, 2003. Respondent Weinhart failed to obtain minimally-adequate veterinary care for animals, specifically, two black domestic short-hair cats suffering from extreme mite infection (*notoedres cati*), that was so advanced as to require their euthanasia.

h. April 26, 2003. Respondent Weinhart failed to have an attending veterinarian who could provide adequate veterinary care to animals, and failed to ensure that he had an attending veterinarian with appropriate authority to ensure the provision of adequate veterinary care, and specifically, Respondent Weinhart failed to allow access to the facility and animals.

i. April 26, 2003. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include daily observation and a mechanism for frequent communication with the attending veterinarian, and specifically, a tiger that had a surgical procedure on April 13, 2003, had not been seen by a veterinarian since, Respondent Weinhart was not following the veterinarian's instructions, and the veterinarian was not aware of the animal's condition and had not documented the animal's progress or lack

thereof.

j. April 26, 2003. Respondent Weinhart failed to provide adequate veterinary care to (i) a male tiger with a swollen left forelimb; (ii) a tiger with an open wound on its back; (iii) pot-bellied pigs with reddened skin, lack of hair and itchiness; and (iv) animals with diarrhea.

11. On or about November 20, 2002, Respondent Weinhart failed to identify fourteen leopards.

12. On or about November 20, November 22, November 25, and December 2, 2002, and April 22, 2003, Respondent Weinhart:

a. failed to make, keep and maintain any records of animals.

b. failed to make, keep and maintain records of the name of and address of the person from whom Respondent Weinhart acquired animals.

c. failed to make, keep and maintain records of the USDA license or registration number or vehicle license number and driver's license number of the person from whom Respondent Weinhart acquired animals.

d. failed to make, keep and maintain records of the date of purchase, acquisition, sale and disposition of animals.

13. On November 25, 2002, Respondent Weinhart refused to provide to the APHIS inspectors, information concerning the person from whom he acquired the female tiger Jaya.

14. On or about the following dates, Respondent Weinhart failed to comply with the handling regulations, as follows:

a. November 16, November 20, and November 22, 2002. Respondent Weinhart, during public exhibition, allowed members of the public to handle animals (including large felines) directly without any distance or any barriers.

15. On or about the following dates, Respondent Weinhart:

a. April 22, 2003. Failed to feed dogs wholesome, uncontaminated food, in sufficient quantities.

b. April 22, 2003. Failed to provide adequate potable water, in clean receptacles, to dogs.

c. April 30, 2003. Housed three 20-pound dogs in a "VariKennel" that was adequate for only one such dog.

d. April 30, 2003. Failed to remove built-up excreta from the "VariKennel" that housed three dogs.

e. April 30, 2003. Failed to establish an effective program of pest control for eight dogs housed at Respondent Weinhart's facility.

f. April 30, 2003. Failed to have sufficient employees to attain

the level of animal care and husbandry required by the Regulations and Standards.

16. On or about the following dates, Respondent Weinhart:

a. November 16, 2002. Failed to remove excreta from lion and tiger enclosures.

b. November 20, 2002. Failed to construct his facility of such material and such strength as appropriate for the animals involved, and to maintain his facility in good repair to protect the animals from injury, and specifically:

i. the camel enclosures had large 24-inch gaps, the chain link fencing was warped, bent and buckled, and the bottom was turned into the animals' enclosure, exposing the animals to pointed wire ends;

ii. the enclosure housing a male leopard, was missing part of the roof, exposing nails;

iii. the shift cage for a male lion was broken, exposing nails;

iv. the tops of the two enclosures housing a female lion and a male lion (Nemo) were broken, exposing nails;

v. the enclosures housing leopards had torn chicken wire, exposing the animals to sharp wire ends;

vi. the main enclosures housing felids had boards that had been torn from the rear wall that were lying inside the enclosures;

vii. the roof of the east side enclosures housing female tigers was separating from the rest of the structure;

viii. the enclosures housing goats had chain link turned up at its base, exposing sharp wire ends;

ix. the torn water container in the enclosure housing three tiger cubs exposed the animals to sharp metal edges;

x. Respondent Weinhart housed camels in enclosures constructed of chain link fencing, which material is not appropriate for such animals; and

xi. Respondent Weinhart housed three pot-bellied pigs in Rubbermaid tool sheds, which trapped the animals inside with inadequate ventilation, and which enclosures were not appropriate for such animals.

c. November 20, 2002. Failed to provide sufficient shade for white tiger housed outdoors in end cage on north side of facility.

d. November 20, 2002. Failed to provide sufficient shelter from inclement weather for large felids, goats, and a camel.

e. November 20, 2002, January 28 and April 22, April 23, April 26 and April 30, 2003. Failed to remove excreta and food

waste from nearly all animal enclosures.

f. November 20, 2002, and January 28, and April 26 and April 30, 2003. Failed to provide a suitable method to rapidly eliminate excess water from animal enclosures.

g. December 10, 2002. Failed to construct his facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically the camel enclosures had large 24-inch gaps, the chain link fencing was warped, bent and buckled, and the bottom was turned into the animals' enclosure, exposing the animals to pointed wire ends.

h. January 28, 2003. Failed to provide sufficient shelter from inclement weather for large felids, goats, and pigs.

i. January 28, 2003. Failed to provide sufficient shade for large felids, goats, and pigs.

j. April 22, 2003. Failed to construct his facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically, housed ten live lion cubs and two live leopard cubs in an attic area of his home, in filthy conditions.

k. April 26 and April 30, 2003. Failed to store supplies of food and bedding in facilities that adequately protected them from deterioration and contamination, and specifically, there was no adequate means of storing food supplies at Respondent Weinhart's facilities.

l. April 26 and April 30, 2003. Failed to provide sufficient shade for animals, and specifically, most of the shelters have been blown off of the chain link rooftops of animal enclosures.

m. April 30, 2003. Failed to provide sufficient shade for animals, and specifically, housed a tiger (Trevor) in a transport enclosure that offered the animal no shelter from the sun.

n. April 30, 2003. Failed to construct his facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically, (i) the camel enclosure had a non-functioning gate; (ii) the old camel enclosure had a 12-inch gap, the chain link fencing was warped, bent and buckled, and the poles were leaning outward; and (iii) shelter boxes for large felids were in a state of disrepair.

o. April 30, 2003. Failed to provide sufficient shelter from inclement weather for all animals.

p. April 30, 2003. Failed to provide adequate space to a deer

housed in a "VariKennel."

17. On or about the following dates, Respondent Weinhart:

a. November 16, November 20, 2002, and January 28, April 22, April 23, April 26 and April 30, 2003. Failed to feed large felids wholesome, uncontaminated food in sufficient quantities.

b. November 20, November 22, November 25, and December 10, 2002, and January 28, April 22, April 23, April 26 and April 30, 2003. Failed to provide potable water to animals, in clean receptacles.

c. November 20 and November 22, 2002. Failed to remove excreta from primary enclosures as often as necessary, and in particular, the gap between two adjacent tiger enclosures (housing Jaya and Nemo), and around the den boxes, were filled with feces.

d. November 20 and November 22, 2002, and April 26 and April 30, 2003. Failed to establish and maintain a safe and effective program for the control of insects, and other pests.

e. November 20, November 22, and December 10, 2002, and January 28, April 22 and April 23, 2003. Failed to keep premises clean and good repair in order to protect animals from injury and to facilitate prescribed husbandry practices, and specifically, inspectors observed accumulations of junk, discarded materials, buildup of filth, food debris, manure, and excreta throughout the facility.

f. November 20, November 22, and December 10, 2002, and April 26 and April 30, 2003. Failed to employ a sufficient number of adequately trained employees to maintain the professionally-acceptable level of husbandry practices.

g. November 16, November 20, November 25 and December 10, 2002. Housed incompatible animals in the same primary enclosures, and housed animals near animals that interfere with their health or well-being, and specifically large felids exhibited scars and open wounds indicative of fighting activity.

h. December 10, 2002, and January 28, April 22, April 23, and April 26, 2003. Failed to remove excreta from primary enclosures as often as necessary.

i. April 30, 2003. Housed seven goats, two pot-bellied pigs, and a llama in the bed of a pick-up truck, with inadequate space, extraneous materials that could harm the animals, and no shade or shelter.

Conclusions

1. Between November 16, 2002, and November 28, 2003,

Respondent Weinhart knowingly failed to obey the cease and desist order made by the Secretary in *In re John Weinhart,* AWA Docket No. 162, 40 Agric. Dec. 1924 (1981), pursuant to section 2149(b) of the Act. Any person who knowingly fails to obey such a cease and desist order shall be subject to a civil penalty of $1,650 for each offense, and each day during which such failure continues shall be deemed a separate offense. 7 U.S.C. § 2149(b). 7 C.F.R. § 3.91(b)(2)(v).

2. Between November 16, 2002, and April 23, 2003, Respondent Weinhart operated as an exhibitor at premises for which a valid license had not been issued or made applicable, in willful violation of section 2.1 of the Regulations. 9 C.F.R. § 2.1.

3. On or about April 22, 2003, Respondent Weinhart failed to notify APHIS of an additional site that Respondent Weinhart operated at his home, in willful violation of section 2.8 of the Regulations. 9 C.F.R. § 2.8.

4. On or about the following dates, Respondent Weinhart willfully violated the attending veterinarian and veterinary care regulations (9 C.F.R. § 2.40) as follows:

a. November 20, November 22, and December 10, 2002. Respondent Weinhart failed to employ a full-time veterinarian under formal arrangements, or a part-time veterinarian under formal arrangements that included a written program of veterinary care and regularly-scheduled visits to the respondents' premises. 9 C.F.R. § 2.40(a)(1).

b. November 20 and November 22, 2002. Respondent Weinhart failed to provide adequate veterinary care to animals, in violation of 9 C.F.R. § 2.40(a), specifically:

i. four severely underweight and undernourished black leopards.

ii. three underweight and undernourished black leopards and numerous underweight and undernourished tigers.

iii. one black leopard suffering from untreated facial wounds.

iv. one underweight and undernourished female tiger (Jaya) suffering from untreated diarrhea, and numerous untreated skin lesions on her body and legs.

v. one female lion and four tigers that were underweight and undernourished with poor coats.

vi. four female tigers that were severely underweight and undernourished, with protruding hipbones, visible ribs, and poor coats.

vii. one male white tiger (Centaur) suffering from several untreated skin lesions.

c. November 20, November 22 and December 10, 2002. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and specifically, failed to maintain minimally-adequate records showing routine care and observations of animals. 9 C.F.R. §§ 2.40(b)(1), 2.40(b)(2), 2.40(b)(4).

d. November 25, 2002. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and failed to provide minimally-adequate veterinary care to animals that were suffering, specifically Nemo, an underweight male tiger with untreated bloody paws, whose enclosure had blood on the floor, and Jaya, an emaciated female tiger with untreated skin lesions on her back, along her right flank, and over her face, and, consequently, APHIS inspectors issued to Respondent Weinhart a notice of intent to confiscate these two tigers unless they were treated within 24 hours. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

e. November 25, 2002. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and daily observation of animals, and failed to provide minimally-adequate veterinary care to animals that were suffering, specifically a tiger in the second pen on the west side of the facility, that had an untreated draining abscess on its neck. 9 C.F.R. §§ 2.40(a), 2.40(b)(2), 2.40(b)(3).

f. November 25 and December 10, 2002, and April 22 and April 23, 2003. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically, failed to take steps to determine the cause of the high mortality rate in tiger litters born at respondents' facilities, including the felid cubs whose remains were contained in respondents' freezer. 9 C.F.R. §§

2.40(b)(1), 2.40(b)(2).

g. December 10, 2002. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically, Respondent Weinhart failed to take steps to establish an adequate feeding and separation program for animals, resulting in a large number of underweight, unthrifty animals bearing fight scars. 9 C.F.R. § 2.40(b)(2).

h. January 28, 2003. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization and euthanasia, and specifically, failed to provide veterinary care to a goat suffering from tetanus. 9 C.F.R. §§ 2.40(a), 2.40(b)(1, 2.40(b)(2), 2.40(b)(4).

i. April 22, 2003. Respondent Weinhart failed to obtain adequate veterinary care for animals, in violation of 9 C.F.R. § 2.40(a), specifically:

i. two black domestic short-hair cats with severe skin problems.

ii. one small white female goat with overgrown front hooves (four inches), that had difficulty walking and standing, and had a swollen left knee.

iii. two donkeys with severely (7 inches) overgrown hooves that curled up and away from the feet, and one donkey that could not stand up.

j. April 22, 2003. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization and euthanasia, and specifically failed to provide minimally-adequate veterinary care to animals and to document the condition of animals, including 53 dead felid cubs. 9 C.F.R. §§ 2.40(b)(1), 2.40(b)(2), 2.40(b)(4).

k. April 23, 2003. Respondent Weinhart failed to obtain minimally-adequate veterinary care for animals, specifically, two black domestic short-hair cats suffering from extreme mite infection (*notoedres cati*), that was so advanced as to require their euthanasia. 9 C.F.R. § 2.40(a).

l. April 26, 2003. Respondent Weinhart failed to have an attending veterinarian who could provide adequate veterinary care to animals, and failed to ensure that he had an attending veterinarian with appropriate authority to ensure the provision of adequate veterinary care, and specifically, Respondent Weinhart failed to allow access to the facility and animals. 9 C.F.R. §§ 2.40(a), 2.40(a)(2).

m. April 26, 2003. Respondent Weinhart failed to establish and maintain programs of adequate veterinary care that include daily observation and a mechanism for frequent communication with the attending veterinarian, and specifically, a tiger that had a surgical procedure on April 13, 2003, had not been seen by a veterinarian since, Respondent Weinhart was not following the veterinarian's instructions, and the veterinarian was not aware of the animal's condition and had not documented the animal's progress or lack thereof. 9 C.F.R. § 2.40(b)(3).

n. April 26, 2003. Respondent Weinhart failed to provide adequate veterinary care to (i) a male tiger with a swollen left forelimb; (ii) a tiger with an open wound on its back; (iii) pot-bellied pigs with reddened skin, lack of hair and itchiness; and (iv) animals with diarrhea. 9 C.F.R. § 2.40(a).

5. On or about November 20, 2002, Respondent Weinhart willfully violated the identification regulations (9 C.F.R. § 2.50), by failing to identify one or more animals other than dogs and cats confined in a primary enclosure, and specifically, failed to identify fourteen leopards. 9 C.F.R. §§ 2.50(e)(2), 2.50(e)(3).

6. On or about November 20, November 22, November 25, and December 2, 2002, and April 22, 2003, Respondent Weinhart willfully violated the record-keeping regulations (9 C.F.R. § 2.75(b)(1)), by failing to make, keep and maintain records or forms that fully and correctly disclose required information concerning animals other than dogs and cats purchased or otherwise acquired, owned, held, leased, or otherwise in respondents' possession or under respondents' control, or transported, sold, euthanized, or otherwise disposed of, and specifically:

a. failed to make, keep and maintain any records of animals.

b. failed to make, keep and maintain records of the name of and

address of the person from whom Respondent Weinhart acquired animals.

c. failed to make, keep and maintain records of the USDA license or registration number or vehicle license number and driver's license number of the person from whom Respondent Weinhart acquired animals.

d. failed to make, keep and maintain records of the date of purchase, acquisition, sale and disposition of animals.

7. On November 25, 2002, Respondent Weinhart refused to provide to the APHIS inspectors, information concerning the person from whom he acquired the female tiger Jaya, in willful violation of section 2.125 of the Regulations. 9 C.F.R. § 2.125.

8. On or about the following dates, Respondent Weinhart willfully violated the handling regulations (9 C.F.R. § 2.131), as follows:

November 16, November 20, and November 22, 2002. Respondent Weinhart failed to handle animals during public exhibition so that there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the public so as to assure the safety of the animals and the public, and specifically, allowed members of the public to handle animals (including large felines) directly without any distance or any barriers. 9 C.F.R. § 2.131(b)(1).

9. On or about the following dates, Respondent Weinhart willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the general facilities and operating standards for dogs, as follows:

a. April 22, 2003. Respondent Weinhart failed to feed dogs wholesome uncontaminated food in sufficient quantities. 9 C.F.R. § 3.9.

b. April 22, 2003. Respondent Weinhart failed to provide dogs with adequate potable water in clean receptacles. 9 C.F.R. § 3.10.

c. April 30, 2003. Respondent Weinhart failed to house dogs in primary enclosures that offered them an adequate amount of space, and specifically, housed three 20-pound dogs in a "VariKennel" that was adequate for only one such dog. 9 C.F.R. § 3.6.

d. April 30, 2003. Respondent Weinhart failed to remove excreta from primary enclosures for dogs as often as necessary, and specifically, there was a buildup of excreta in the "VariKennel" that housed three dogs. 9 C.F.R. § 3.11(a).

e. April 30, 2003. Respondent Weinhart failed to establish an effective program of pest control for eight dogs housed at

Respondent Weinhart's facility. 9 C.F.R. § 3.11(d).

f. April 30, 2003. Respondent Weinhart failed to have sufficient employees to attain the level of animal care and husbandry required by the Regulations and Standards. 9 C.F.R. § 3.12.

10. On or about the following dates, Respondent Weinhart willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the general facilities and operating standards for warm-blooded animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.128), as follows:

a. November 16, 2002. Respondent Weinhart failed to provide for the removal of animal waste, and specifically, failed to remove excreta from lion and tiger enclosures. 9 C.F.R. § 3.125(d).

b. November 20, 2002. Respondent Weinhart failed to construct his facility of such material and such strength as appropriate for the animals involved, and to maintain his facility in good repair to protect the animals from injury (9 C.F.R. § 3.125(a)), and specifically:

i. the camel enclosures had large 24-inch gaps, the chain link fencing was warped, bent and buckled, and the bottom was turned into the animals' enclosure, exposing the animals to pointed wire ends;

ii. the enclosure housing a male leopard, was missing part of the roof, exposing nails;

iii. the shift cage for a male lion was broken, exposing nails;

iv. the tops of the two enclosures housing a female lion and a male lion (Nemo) were broken, exposing nails;

v. the enclosures housing leopards had torn chicken wire, exposing the animals to sharp wire ends;

vi. the main enclosures housing felids had boards that had been torn from the rear wall that were lying inside the enclosures;

vii. the roof of the east side enclosures housing female tigers was separating from the rest of the structure;

viii. the enclosures housing goats had chain link turned up at its base, exposing sharp wire ends;

ix. the torn water container in the enclosure housing three tiger cubs exposed the animals to sharp metal edges;

x. Respondent Weinhart housed camels in enclosures constructed of chain link fencing, which material is not appropriate for such animals; and

xi. Respondent Weinhart housed three pot-bellied pigs in Rubbermaid tool sheds, which trapped the animals inside with inadequate ventilation, and which enclosures were not appropriate for such animals.

c. November 20, 2002. Respondent Weinhart failed to provide sufficient shade for white tiger housed outdoors in end cage on north side of facility. 9 C.F.R. § 3.127(a).

d. November 20, 2002. Respondent Weinhart failed to provide sufficient shelter from inclement weather for large felids, goats, and a camel. 9 C.F.R. § 3.127(c).

e. November 20, 2002, January 28 and April 22, April 23, April 26 and April 30, 2003. Respondent Weinhart failed to provide for the removal of animal waste, and specifically failed to remove excreta and food waste from nearly all animal enclosures. 9 C.F.R. § 3.125(d).

f. November 20, 2002, and January 28, and April 26 and April 30, 2003. Respondent Weinhart failed to provide a suitable method to rapidly eliminate excess water from animal enclosures. 9 C.F.R. § 3.127(c).

g. December 10, 2002. Respondent Weinhart failed to construct his facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically the camel enclosures had large 24-inch gaps, the chain link fencing was warped, bent and buckled, and the bottom was turned into the animals' enclosure, exposing the animals to pointed wire ends. 9 C.F.R. § 3.125(a).

h. January 28, 2003. Respondent Weinhart failed to provide sufficient shelter from inclement weather for large felids, goats, and pigs. 9 C.F.R. § 3.127(b).

i. January 28, 2003. Respondent Weinhart failed to provide sufficient shade for large felids, goats, and pigs. 9 C.F.R. § 3.127(a).

j. April 22, 2003. Respondent Weinhart failed to construct his facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically, housed ten live lion cubs and two live leopard cubs in an attic area of his home, in filthy conditions. 9 C.F.R. § 3.125(a).

k. April 26 and April 30, 2003. Respondent Weinhart failed to store supplies of food and bedding in facilities that adequately protected them from deterioration and contamination, and

specifically, there was no adequate means of storing food supplies at Respondent Weinhart's facilities. 9 C.F.R. § 3.125(c).

l. April 26 and April 30, 2003. Respondent Weinhart failed to provide sufficient shade for animals, and specifically, most of the shelters have been blown off of the chain link rooftops of animal enclosures. 9 C.F.R. § 3.127(a).

m. April 30, 2003. Respondent Weinhart failed to provide sufficient shade for animals, and specifically, housed a tiger (Trevor) in a transport enclosure that offered the animal no shelter from the sun. 9 C.F.R. § 3.127(a).

n. April 30, 2003. Respondent Weinhart failed to construct his facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically, (i) the camel enclosure had a non-functioning gate; (ii) the old camel enclosure had a 12-inch gap, the chain link fencing was warped, bent and buckled, and the poles were leaning outward; and (iii) shelter boxes for large felids were in a state of disrepair. 9 C.F.R. § 3.125(a).

o. April 30, 2003. Respondent Weinhart failed to provide sufficient shelter from inclement weather for all animals. 9 C.F.R. § 3.127(b).

p. April 30, 2003. Respondent Weinhart failed to provide adequate space to a deer housed in a "VariKennel." 9 C.F.R. § 3.128.

11. On or about the following dates, Respondent Weinhart willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the animal health and husbandry and transportation standards for warm-blooded animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.129-3.142), as follows:

a. November 16, November 20, 2002, and January 28, April 22, April 23, April 26 and April 30, 2003. Respondent Weinhart failed to feed large felids wholesome, uncontaminated food in sufficient quantities. 9 C.F.R. § 3.129.

b. November 20, November 22, November 25, and December 10, 2002, and January 28, April 22, April 23, April 26 and April 30, 2003. Respondent Weinhart failed to provide potable water to animals, in clean receptacles. 9 C.F.R. § 3.130.

c. November 20 and November 22, 2002. Respondent Weinhart failed to remove excreta from primary enclosures as often as necessary, and in particular, the gap between two adjacent tiger enclosures (housing Jaya and Nemo), and around the den boxes,

were filled with feces. 9 C.F.R. § 3.131(a).

d. November 20 and November 22, 2002, and April 26 and April 30, 2003. Respondent Weinhart failed to establish and maintain a safe and effective program for the control of insects, and other pests. 9 C.F.R. § 3.131(d).

e. November 20, November 22, and December 10, 2002, and January 28, April 22 and April 23, 2003. Respondent Weinhart failed to keep premises clean and in good repair in order to protect animals from injury and to facilitate prescribed husbandry practices, and specifically, inspectors observed accumulations of junk, discarded materials, buildup of filth, food debris, manure, and excreta throughout the facility. 9 C.F.R. § 3.131(c).

f. November 20, November 22, and December 10, 2002, and April 26 and April 30, 2003. Respondent Weinhart failed to employ a sufficient number of adequately trained employees to maintain the professionally-acceptable level of husbandry practices. 9 C.F.R. § 3.132.

g. November 16, November 20, November 25 and December 10, 2002. Respondent Weinhart housed incompatible animals in the same primary enclosures, and housed animals near animals that interfere with their health or well-being, and specifically large felids exhibited scars and open wounds indicative of fighting activity. 9 C.F.R. § 3.133.

h. December 10, 2002, and January 28, April 22, April 23, and April 26, 2003. Respondent Weinhart failed to remove excreta from primary enclosures as often as necessary. 9 C.F.R. § 3.131(a).

i. April 30, 2003. Respondent Weinhart housed seven goats, two pot-bellied pigs, and a llama in the bed of a pick-up truck, with inadequate space, extraneous materials that could harm the animals, and no shade or shelter. 9 C.F.R. §§ 3.125(a), 3.127(a), 3.127(b), 3.128, 3.138.

Order

1. Respondent John Hans Weinhart, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

2. All Animal Welfare Act licenses held by Respondent John Hans Weinhart (specifically, numbers 93-C-0825, 21-A-005, 21-C-021, and 93-C-0199) are hereby revoked.

3. Respondent John Hans Weinhart is assessed a civil penalty of

$99,825 for his 363 violations of the Act and the Regulations and Standards.[2] 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(b)(2)(v) (since renumbered).

4. Respondent John Hans Weinhart is assessed a civil penalty of **$59,895** for his repeated knowing failure to obey the cease and desist order[3] issued by the Secretary of Agriculture in *In re John Weinhart*, 40 Agric. Dec. 1924 (1981). 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(b)(2)(v) (since renumbered).

5. Respondent John Hans Weinhart shall pay the **$159,720** ($99,825 plus $59,895) by cashier's check(s) or certified check(s) or money order(s), made payable to the order of the **Treasurer of the United States** and delivered within sixty (60) days from the effective date of this Order to:

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

Respondent Weinhart shall include on the cashier's check(s) or certified check(s) or money order(s) the docket number of this proceeding, **AWA Docket No. 07-0184**.

Finality

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

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[2] The 363 violations comprise 160 violations of the licensing regulations, 67 violations of the veterinary care regulations, 20 violations of the identification regulations, 3 violations of the handling regulations, and 113 instances of noncompliance with the standards. Civil penalties of up to $2,750 were provided for each violation during the time of these violations. 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(b)(2)(v). For these 363 violations, the civil penalty amount can be $998,250.

[3] Civil penalties of $1,650 were provided for each knowing failure to obey the Secretary's cease and desist order. 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(b)(2)(v). For 363 knowing failures to obey the Secretary's cease and desist order, the civil penalty amount can be $598,950.

Clerk upon each of the parties.
Done at Washington, D.C.

In re: TIGER RESCUE, JOHN HANS WEINHART, MARLA SMITH, and WENDELIN R. RINGEL.
AWA Docket No. 07-0184.
Decision and Order as to only MARLA SMITH by Reason of Default.
Filed May 9, 2008.

AWA – Default.

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

This proceeding was instituted under the Animal Welfare Act ("AWA" or "Act"), as amended (7 U.S.C. § 2131 *et seq*.), by a Complaint filed on August 30, 2007, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "Complainant" or "APHIS"), alleging that the respondents willfully violated the Act and the regulations and standards promulgated thereunder ("Regulations" and "Standards"). 9 C.F.R. § 1.1 *et seq*.

The Complainant, APHIS, is represented by Colleen A. Carroll, Esq., with the Office of the General Counsel (Marketing Division), United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington D.C. 20250-1417.

Marla Smith, respondent, is an individual (frequently herein "Respondent Smith" or "Respondent"), whose mailing address was Marla Smith, 9478 Bellegrave Avenue, Riverside, California 92509.

Procedural History

On August 31, 2007, the Hearing Clerk sent to Respondent Marla Smith, by certified mail, return receipt requested, a copy of the Complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151), together with the Hearing Clerk's service letter, addressed to "Marla Smith, Director: Tiger Rescue, 9478 Bellegrave Avenue, Riverside, CA 92509." The Complaint package was returned by the United States Postal Service to the Office of the

Hearing Clerk, marked "RETURNED TO SENDER" "Refused." On September 25, 2007, the Hearing Clerk re-mailed the Complaint package to Respondent Smith by ordinary mail at the same address, pursuant to section 1.147(c) of the Rules of Practice. 7 C.F.R. § 1.147(c).

Respondent Smith was informed in the Hearing Clerk's service letter that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Smith did not file an answer to the Complaint. Her time for filing an answer expired on October 15, 2007.

This case was assigned to me, Jill S. Clifton, on April 9, 2008. APHIS's Motion for Adoption of Proposed Decision and Order as to Respondent Smith, filed November 30, 2007, is before me. The Hearing Clerk, on December 3, 2007, sent to Respondent Smith, by certified mail, return receipt requested, a copy of the Motion (for Decision), together with the Hearing Clerk's letter dated December 3, 2007, addressed to "Marla Smith, Director: Tiger Rescue, 9478 Bellegrave Avenue, Riverside, CA 92509." The Motion (for Decision) package was returned by the United States Postal Service to the Office of the Hearing Clerk, marked "RETURNED TO SENDER" "UNCLAIMED." On December 20, 2007, the Hearing Clerk re-mailed the Motion package to Respondent Smith by ordinary mail at the same address. Respondent Smith did not respond. Her time for filing a response to the Motion expired on January 9, 2008.

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 Smith'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.

Findings of Fact

1. Respondent Marla Smith is an individual whose address was 9478 Bellegrave Avenue, Riverside, California 92509. Respondent Marla Smith was a Director of respondent Tiger Rescue and acting as an agent of respondents Tiger Rescue and John Hans Weinhart at all times material herein. Respondent Smith's acts, omissions, and

failures to act, detailed herein, were within the scope of her office; they are deemed to be her own acts, omissions and failures, as well as the acts, omissions and failures of respondents Tiger Rescue and John Hans Weinhart, for the purpose of construing and enforcing the provisions of the Animal Welfare Act. 7 U.S.C. § 2139.

2. APHIS conducted inspections of the respondents' facilities, animals and records on November 20, 2002, November 25, 2002, December 10, 2002, January 28, 2003, April 26, 2003, and April 30, 2003. On April 22 and 23, 2003, the Riverside County Department of Animal Services and the California Department of Fish and Game executed a search warrant at the facilities and home of respondent John Hans Weinhart and Respondent Marla Smith, at 9474 and 9478 Bellegrave Avenue, Glen Avon, California, and 1350 Agua Mansa Road, Colton, California.

3. Respondent Smith operated a large business. On August 29, 2001, Respondent Smith had custody and control of 65 wild and exotic felines and 20 farm animals used in exhibition. Respondent Smith used these animals for economic gain.

4. The gravity of the violations detailed in this Decision is of the utmost severity. Respondent Smith neglected and abused many animals. By April 2003, approximately 90 animals (mostly tigers) died as a direct result of Respondent Smith's lack of care and husbandry. Respondent Smith also handled animals in a manner that was unsafe for the animals and the public, failed to provide minimally-adequate housing or veterinary care to animals in obvious distress, and failed to provide sufficient food to animals. Respondent Smith was convicted by the State of California of 16 counts of felony animal cruelty and 46 misdemeanor violations, and on January 25, 2005, was sentenced to 180 days in jail, and four years' probation.

5. Respondent Smith has not shown good faith, having falsely portrayed the respondents' facility, located at 1350 Agua Mansa Road, Colton, California, to the public as a "sanctuary" for abused animals, and having maintained a separate, undisclosed animal facility at her home in Glen Avon, California.

6. Between November 16, 2002, and April 23, 2003, Respondent Smith operated as an exhibitor at premises for which a valid license had not been issued or made applicable.

7. On or about the following dates, Respondent Smith failed to comply with the attending veterinarian and veterinary care regulations:

a. <u>November 20, November 22, and December 10, 2002</u>. Respondent Smith failed to employ a full-time veterinarian under formal arrangements, or a part-time veterinarian under formal

arrangements that included a written program of veterinary care and regularly-scheduled visits to the respondents' premises.

b. November 20 and November 22, 2002. Respondent Smith failed to provide adequate veterinary care to animals, specifically:

i. four severely underweight and undernourished black leopards.

ii. three underweight and undernourished black leopards and numerous underweight and undernourished tigers.

iii. one black leopard suffering from untreated facial wounds.

iv. one underweight and undernourished female tiger (Jaya) suffering from untreated diarrhea, and numerous untreated skin lesions on her body and legs.

v. one female lion and four tigers that were underweight and undernourished with poor coats.

vi. four female tigers that were severely underweight and undernourished, with protruding hipbones, visible ribs, and poor coats.

vii. one male white tiger (Centaur) suffering from several untreated skin lesions.

c. November 20, November 22 and December 10, 2002. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and specifically, failed to maintain minimally-adequate records showing routine care and observations of animals.

d. November 25, 2002. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and failed to provide minimally-adequate veterinary care to animals that were suffering, specifically Nemo, an underweight male tiger with untreated bloody paws, whose enclosure had blood on the floor, and Jaya, an emaciated female tiger with untreated skin lesions on her back, along her right flank, and over her face, and, consequently, APHIS inspectors issued a notice of intent to confiscate these two tigers unless they were treated within 24 hours.

e. November 25, 2002. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and

services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and daily observation of animals, and failed to provide minimally-adequate veterinary care to animals that were suffering, specifically a tiger in the second pen on the west side of the facility, that had an untreated draining abscess on its neck.

f. November 25 and December 10, 2002, and April 22 and April 23, 2003. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically, failed to take steps to determine the cause of the high mortality rate in tiger litters born at respondents' facilities, including the felid cubs whose remains were contained in respondents' freezer.

g. December 10, 2002. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically, Respondent Smith failed to take steps to establish an adequate feeding and separation program for animals, resulting in a large number of underweight, unthrifty animals bearing fight scars.

h. January 28, 2003. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, the availability of emergency, weekend and holiday care, and adequate guidance to personnel involved in the care and use of animals, and specifically, failed to provide veterinary care to a goat suffering from tetanus.

i. April 22, 2003. Respondent Smith failed to obtain adequate veterinary care for animals, specifically:

i. two black domestic short-hair cats with severe skin problems.

ii. one small white female goat with overgrown front hooves (four inches), that had difficulty walking and standing, and had a swollen left knee.

iii. two donkeys with severely (7 inches) overgrown hooves that curled up and away from the feet, and one donkey that could not stand up.

j. April 22, 2003. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the

availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization and euthanasia, and specifically failed to provide minimally-adequate veterinary care to animals and to document the condition of animals, including 53 dead felid cubs.

k. April 23, 2003. Respondent Smith failed to obtain minimally-adequate veterinary care for animals, specifically, two black domestic short-hair cats suffering from extreme mite infection (*notoedres cati*), that was so advanced as to require their euthanasia.

l. April 26, 2003. Respondent Smith failed to have an attending veterinarian who could provide adequate veterinary care to animals, and failed to ensure that it had an attending veterinarian with appropriate authority to ensure the provision of adequate veterinary care, and specifically, Respondent Smith failed to allow access to the facility and animals.

m. April 26, 2003. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include daily observation and a mechanism for frequent communication with the attending veterinarian, and specifically, a tiger that had a surgical procedure on April 13, 2003, had not been seen by a veterinarian since, Respondent Smith was not following the veterinarian's instructions, and the veterinarian was not aware of the animal's condition and had not documented the animal's progress or lack thereof.

n. April 26, 2003. Respondent Smith failed to provide adequate veterinary care to (i) a male tiger with a swollen left forelimb; (ii) a tiger with an open wound on its back; (iii) pot-bellied pigs with reddened skin, lack of hair and itchiness; and (iv) animals with diarrhea.

8. On or about November 20, 2002, Respondent Smith failed to identify fourteen leopards.

9. On or about November 20, November 22, November 25, and December 2, 2002, and April 22, 2003, Respondent Smith:

a. failed to make, keep and maintain any records of animals.

b. failed to make, keep and maintain records of the name of and address of the person from whom Respondent Smith acquired animals.

c. failed to make, keep and maintain records of the USDA license or registration number or vehicle license number and driver's license number of the person from whom Respondent Smith acquired animals.

d. failed to make, keep and maintain records of the date of purchase, acquisition, sale and disposition of animals.

10. On November 25, 2002, Respondent Smith refused to provide to the APHIS inspectors, information concerning the person from whom he acquired the female tiger Jaya.

11. On or about the following dates, Respondent Smith failed to comply with the handling regulations, as follows:

a. November 16, November 20, and November 22, 2002. Respondent Smith, during public exhibition, allowed members of the public to handle animals (including large felines) directly without any distance or any barriers.

12. On or about the following dates, Respondent Smith:

a. April 22, 2003. Failed to feed dogs wholesome, uncontaminated food, in sufficient quantities.

b. April 22, 2003. Failed to provide adequate potable water, in clean receptacles, to dogs.

c. April 30, 2003. Housed three 20-pound dogs in a "VariKennel" that was adequate for only one such dog.

d. April 30, 2003. Failed to remove built-up excreta from the "VariKennel" that housed three dogs.

e. April 30, 2003. Failed to establish an effective program of pest control for eight dogs housed at the respondents' facility.

f. April 30, 2003. Failed to have sufficient employees to attain the level of animal care and husbandry required by the Regulations and Standards.

13. On or about the following dates, Respondent Smith:

a. November 16, 2002. Failed to remove excreta from lion and tiger enclosures.

b. November 20, 2002. Failed to construct the respondents' facility of such material and such strength as appropriate for the animals involved, and to maintain the respondents' facility in good repair to protect the animals from injury, and specifically:

i. the camel enclosures had large 24-inch gaps, the chain link fencing was warped, bent and buckled, and the bottom was turned into the animals' enclosure, exposing the animals to pointed wire ends;

ii. the enclosure housing a male leopard, was missing part of the roof, exposing nails;

iii. the shift cage for a male lion was broken, exposing nails;

iv. the tops of the two enclosures housing a female lion and a male lion (Nemo) were broken, exposing nails;

v. the enclosures housing leopards had torn chicken wire, exposing the animals to sharp wire ends;

vi. the main enclosures housing felids had boards that had been torn from the rear wall that were lying inside the enclosures;

vii. the roof of the east side enclosures housing female tigers was separating from the rest of the structure;

viii. the enclosures housing goats had chain link turned up at its base, exposing sharp wire ends;

ix. the torn water container in the enclosure housing three tiger cubs exposed the animals to sharp metal edges;

x. Respondent Smith housed camels in enclosures constructed of chain link fencing, which material is not appropriate for such animals; and

xi. Respondent Smith housed three pot-bellied pigs in Rubbermaid tool sheds, which trapped the animals inside with inadequate ventilation, and which enclosures were not appropriate for such animals.

c. November 20, 2002. Failed to provide sufficient shade for white tiger housed outdoors in end cage on north side of facility.

d. November 20, 2002. Failed to provide sufficient shelter from inclement weather for large felids, goats, and a camel.

e. November 20, 2002, January 28 and April 22, April 23, April 26 and April 30, 2003. Failed to remove excreta and food waste from nearly all animal enclosures.

f. November 20, 2002, and January 28, and April 26 and April 30, 2003. Failed to provide a suitable method to rapidly eliminate excess water from animal enclosures.

g. December 10, 2002. Failed to construct the respondents' facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically the camel enclosures had large 24-inch gaps, the chain link fencing was warped, bent and buckled, and the bottom was turned into the animals' enclosure, exposing the animals to pointed wire ends.

h. January 28, 2003. Failed to provide sufficient shelter from inclement weather for large felids, goats, and pigs.

i. January 28, 2003. Failed to provide sufficient shade for large felids, goats, and pigs.

j. April 22, 2003. Failed to construct the respondents' facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically, housed ten live lion cubs and two live leopard cubs in an attic area of her and respondent Weinhart's home, in filthy conditions.

k. April 26 and April 30, 2003. Failed to store supplies of food and bedding in facilities that adequately protected them from deterioration and contamination, and specifically, there was no adequate means of storing food supplies at the respondents' facilities.

l. April 26 and April 30, 2003. Failed to provide sufficient shade for animals, and specifically, most of the shelters have been blown off of the chain link rooftops of animal enclosures.

m. April 30, 2003. Failed to provide sufficient shade for animals, and specifically, housed a tiger (Trevor) in a transport enclosure that offered the animal no shelter from the sun.

n. April 30, 2003. Failed to construct the respondents' facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically, (i) the camel enclosure had a non-functioning gate; (ii) the old camel enclosure had a 12-inch gap, the chain link fencing was warped, bent and buckled, and the poles were leaning outward; and (iii) shelter boxes for large felids were in a state of disrepair.

o. April 30, 2003. Failed to provide sufficient shelter from inclement weather for all animals.

p. April 30, 2003. Failed to provide adequate space to a deer housed in a "VariKennel."

14. On or about the following dates, Respondent Smith:

a. November 16, November 20, 2002, and January 28, April 22, April 23, April 26 and April 30, 2003. Failed to feed large felids wholesome, uncontaminated food in sufficient quantities.

b. November 20, November 22, November 25, and December 10, 2002, and January 28, April 22, April 23, April 26 and April 30, 2003. Failed to provide potable water to animals, in clean receptacles.

c. November 20 and November 22, 2002. Failed to remove excreta from primary enclosures as often as necessary, and in particular, the gap between two adjacent tiger enclosures (housing Jaya and Nemo), and around the den boxes, were filled with feces.

d. November 20 and November 22, 2002, and April 26 and

April 30, 2003. Failed to establish and maintain a safe and effective program for the control of insects, and other pests.

e. November 20, November 22, and December 10, 2002, and January 28, April 22 and April 23, 2003. Failed to keep premises clean and good repair in order to protect animals from injury and to facilitate prescribed husbandry practices, and specifically, inspectors observed accumulations of junk, discarded materials, buildup of filth, food debris, manure, and excreta throughout the facility.

f. November 20, November 22, and December 10, 2002, and April 26 and April 30, 2003. Failed to employ a sufficient number of adequately trained employees to maintain the professionally-acceptable level of husbandry practices.

g. November 16, November 20, November 25 and December 10, 2002. Housed incompatible animals in the same primary enclosures, and housed animals near animals that interfere with their health or well-being, and specifically large felids exhibited scars and open wounds indicative of fighting activity.

h. December 10, 2002, and January 28, April 22, April 23, and April 26, 2003. Failed to remove excreta from primary enclosures as often as necessary.

i. April 30, 2003. Housed seven goats, two pot-bellied pigs, and a llama in the bed of a pick-up truck, with inadequate space, extraneous materials that could harm the animals, and no shade or shelter.

Conclusions

1. Respondent Marla Smith is an individual whose address was 9478 Bellegrave Avenue, Riverside, California 92509. Respondent Marla Smith was a Director of respondent Tiger Rescue and acting as an agent of respondents Tiger Rescue and John Hans Weinhart at all times material herein. Respondent Smith's acts, omissions, and failures to act, detailed herein, were within the scope of her office; they are deemed to be her own acts, omissions and failures, as well as the acts, omissions and failures of respondents Tiger Rescue and John Hans Weinhart, for the purpose of construing and enforcing the provisions of the Animal Welfare Act. 7 U.S.C. § 2139.

2. Between November 16, 2002, and April 23, 2003, Respondent Smith operated as an exhibitor at premises for which a valid license had not been issued or made applicable, in willful violation of section 2.1 of the Regulations. 9 C.F.R. § 2.1.

3. On or about the following dates, Respondent Smith willfully

violated the attending veterinarian and veterinary care regulations (9 C.F.R. § 2.40) as follows:

a. November 20, November 22, and December 10, 2002. Respondent Smith failed to employ a full-time veterinarian under formal arrangements, or a part-time veterinarian under formal arrangements that included a written program of veterinary care and regularly-scheduled visits to the respondents' premises. 9 C.F.R. § 2.40(a)(1).

b. November 20 and November 22, 2002. Respondent Smith failed to provide adequate veterinary care to animals, in violation of 9 C.F.R. § 2.40(a), specifically:

i. four severely underweight and undernourished black leopards.

ii. three underweight and undernourished black leopards and numerous underweight and undernourished tigers.

iii. one black leopard suffering from untreated facial wounds.

iv. one underweight and undernourished female tiger (Jaya) suffering from untreated diarrhea, and numerous untreated skin lesions on her body and legs.

v. one female lion and four tigers that were underweight and undernourished with poor coats.

vi. four female tigers that were severely underweight and undernourished, with protruding hipbones, visible ribs, and poor coats.

vii. one male white tiger (Centaur) suffering from several untreated skin lesions.

c. November 20, November 22 and December 10, 2002. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and specifically, failed to maintain minimally-adequate records showing routine care and observations of animals. 9 C.F.R. §§ 2.40(b)(1), 2.40(b)(2), 2.40(b)(4).

d. November 25, 2002. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and failed to provide minimally-adequate veterinary care to animals that were suffering, specifically Nemo, an underweight male tiger with untreated

bloody paws, whose enclosure had blood on the floor, and Jaya, an emaciated female tiger with untreated skin lesions on her back, along her right flank, and over her face, and, consequently, APHIS inspectors issued to Respondent Smith a notice of intent to confiscate these two tigers unless they were treated within 24 hours. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

e. November 25, 2002. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and daily observation of animals, and failed to provide minimally-adequate veterinary care to animals that were suffering, specifically a tiger in the second pen on the west side of the facility, that had an untreated draining abscess on its neck. 9 C.F.R. §§ 2.40(a), 2.40(b)(2), 2.40(b)(3).

f. November 25 and December 10, 2002, and April 22 and April 23, 2003. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically, failed to take steps to determine the cause of the high mortality rate in tiger litters born at the respondents' facilities, including the felid cubs whose remains were contained in the respondents' freezer. 9 C.F.R. §§ 2.40(b)(1), 2.40(b)(2).

g. December 10, 2002. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically, Respondent Smith failed to take steps to establish an adequate feeding and separation program for animals, resulting in a large number of underweight, unthrifty animals bearing fight scars. 9 C.F.R. § 2.40(b)(2).

h. January 28, 2003. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization and euthanasia, and specifically, failed to provide veterinary care to a goat suffering from tetanus. 9 C.F.R. §§ 2.40(a), 2.40(b)(1,

2.40(b)(2), 2.40(b)(4).

i. April 22, 2003. Respondent Smith failed to obtain adequate veterinary care for animals, in violation of 9 C.F.R. § 2.40(a), specifically:

i. two black domestic short-hair cats with severe skin problems.

ii. one small white female goat with overgrown front hooves (four inches), that had difficulty walking and standing, and had a swollen left knee.

iii. two donkeys with severely (7 inches) overgrown hooves that curled up and away from the feet, and one donkey that could not stand up.

j. April 22, 2003. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include the availability of appropriate facilities, personnel, equipment, and services, the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend and holiday care, and adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization and euthanasia, and specifically failed to provide minimally-adequate veterinary care to animals and to document the condition of animals, including 53 dead felid cubs. 9 C.F.R. §§ 2.40(b)(1), 2.40(b)(2), 2.40(b)(4).

k. April 23, 2003. Respondent Smith failed to obtain minimally-adequate veterinary care for animals, specifically, two black domestic short-hair cats suffering from extreme mite infection (*notoedres cati*), that was so advanced as to require their euthanasia. 9 C.F.R. § 2.40(a).

l. April 26, 2003. Respondent Smith failed to have an attending veterinarian who could provide adequate veterinary care to animals, and failed to ensure that she had an attending veterinarian with appropriate authority to ensure the provision of adequate veterinary care, and specifically, Respondent Smith failed to allow access to the facility and animals. 9 C.F.R. §§ 2.40(a), 2.40(a)(2).

m. April 26, 2003. Respondent Smith failed to establish and maintain programs of adequate veterinary care that include daily observation and a mechanism for frequent communication with the attending veterinarian, and specifically, a tiger that had a surgical procedure on April 13, 2003, had not been seen by a veterinarian since, Respondent Smith was not following the veterinarian's

instructions, and the veterinarian was not aware of the animal's condition and had not documented the animal's progress or lack thereof. 9 C.F.R. § 2.40(b)(3).

n. April 26, 2003. Respondent Smith failed to provide adequate veterinary care to (i) a male tiger with a swollen left forelimb; (ii) a tiger with an open wound on its back; (iii) pot-bellied pigs with reddened skin, lack of hair and itchiness; and (iv) animals with diarrhea. 9 C.F.R. § 2.40(a).

4. On or about November 20, 2002, Respondent Smith willfully violated the identification regulations (9 C.F.R. § 2.50), by failing to identify one or more animals other than dogs and cats confined in a primary enclosure, and specifically, failed to identify fourteen leopards. 9 C.F.R. §§ 2.50(e)(2), 2.50(e)(3).

5. On or about November 20, November 22, November 25, and December 2, 2002, and April 22, 2003, Respondent Smith willfully violated the record-keeping regulations (9 C.F.R. § 2.75(b)(1)), by failing to make, keep and maintain records or forms that fully and correctly disclose required information concerning animals other than dogs and cats purchased or otherwise acquired, owned, held, leased, or otherwise in respondents' possession or under respondents' control, or transported, sold, euthanized, or otherwise disposed of, and specifically:

a. failed to make, keep and maintain any records of animals.

b. failed to make, keep and maintain records of the name of and address of the person from whom Respondent Smith acquired animals.

c. failed to make, keep and maintain records of the USDA license or registration number or vehicle license number and driver's license number of the person from whom Respondent Smith acquired animals.

d. failed to make, keep and maintain records of the date of purchase, acquisition, sale and disposition of animals.

6. On November 25, 2002, Respondent Smith refused to provide to the APHIS inspectors, information concerning the person from whom the respondents acquired the female tiger Jaya, in willful violation of section 2.125 of the Regulations. 9 C.F.R. § 2.125.

7. On or about the following dates, Respondent Smith willfully violated the handling regulations (9 C.F.R. § 2.131), as follows:

November 16, November 20, and November 22, 2002. Respondent Smith failed to handle animals during public exhibition so that there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the

public so as to assure the safety of the animals and the public, and specifically, allowed members of the public to handle animals (including large felines) directly without any distance or any barriers. 9 C.F.R. § 2.131(b)(1).

8. On or about the following dates, Respondent Smith willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the general facilities and operating standards for dogs, as follows:

a. April 22, 2003. Respondent Smith failed to feed dogs wholesome uncontaminated food in sufficient quantities. 9 C.F.R. § 3.9.

b. April 22, 2003. Respondent Smith failed to provide dogs with adequate potable water in clean receptacles. 9 C.F.R. § 3.10.

c. April 30, 2003. Respondent Smith failed to house dogs in primary enclosures that offered them an adequate amount of space, and specifically, housed three 20-pound dogs in a "VariKennel" that was adequate for only one such dog. 9 C.F.R. § 3.6.

d. April 30, 2003. Respondent Smith failed to remove excreta from primary enclosures for dogs as often as necessary, and specifically, there was a buildup of excreta in the "VariKennel" that housed three dogs. 9 C.F.R. § 3.11(a).

e. April 30, 2003. Respondent Smith failed to establish an effective program of pest control for eight dogs housed at the respondents' facility. 9 C.F.R. § 3.11(d).

f. April 30, 2003. Respondent Smith failed to have sufficient employees to attain the level of animal care and husbandry required by the Regulations and Standards. 9 C.F.R. § 3.12.

9. On or about the following dates, Respondent Smith willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the general facilities and operating standards for warm-blooded animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.128), as follows:

a. November 16, 2002. Respondent Smith failed to provide for the removal of animal waste, and specifically, failed to remove excreta from lion and tiger enclosures. 9 C.F.R. § 3.125(d).

b. November 20, 2002. Respondent Smith failed to construct the respondents' facility of such material and such strength as appropriate for the animals involved, and to maintain the respondents' facility in good repair to protect the animals from injury (9 C.F.R. § 3.125(a)), and specifically:

i. the camel enclosures had large 24-inch gaps, the chain

link fencing was warped, bent and buckled, and the bottom was turned into the animals' enclosure, exposing the animals to pointed wire ends;

ii. the enclosure housing a male leopard, was missing part of the roof, exposing nails;

iii. the shift cage for a male lion was broken, exposing nails;

iv. the tops of the two enclosures housing a female lion and a male lion (Nemo) were broken, exposing nails;

v. the enclosures housing leopards had torn chicken wire, exposing the animals to sharp wire ends;

vi. the main enclosures housing felids had boards that had been torn from the rear wall that were lying inside the enclosures;

vii. the roof of the east side enclosures housing female tigers was separating from the rest of the structure;

viii. the enclosures housing goats had chain link turned up at its base, exposing sharp wire ends;

ix. the torn water container in the enclosure housing three tiger cubs exposed the animals to sharp metal edges;

x. Respondent Smith housed camels in enclosures constructed of chain link fencing, which material is not appropriate for such animals; and

xi. Respondent Smith housed three pot-bellied pigs in Rubbermaid tool sheds, which trapped the animals inside with inadequate ventilation, and which enclosures were not appropriate for such animals.

c. November 20, 2002. Respondent Smith failed to provide sufficient shade for white tiger housed outdoors in end cage on north side of facility. 9 C.F.R. § 3.127(a).

d. November 20, 2002. Respondent Smith failed to provide sufficient shelter from inclement weather for large felids, goats, and a camel. 9 C.F.R. § 3.127(c).

e. November 20, 2002, January 28 and April 22, April 23, April 26 and April 30, 2003. Respondent Smith failed to provide for the removal of animal waste, and specifically failed to remove excreta and food waste from nearly all animal enclosures. 9 C.F.R. § 3.125(d).

f. November 20, 2002, and January 28, and April 26 and April 30, 2003. Respondent Smith failed to provide a suitable method to rapidly eliminate excess water from animal enclosures. 9 C.F.R. § 3.127(c).

g. December 10, 2002. Respondent Smith failed to construct

the respondents' facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically the camel enclosures had large 24-inch gaps, the chain link fencing was warped, bent and buckled, and the bottom was turned into the animals' enclosure, exposing the animals to pointed wire ends. 9 C.F.R. § 3.125(a).

h. January 28, 2003. Respondent Smith failed to provide sufficient shelter from inclement weather for large felids, goats, and pigs. 9 C.F.R. § 3.127(b).

i. January 28, 2003. Respondent Smith failed to provide sufficient shade for large felids, goats, and pigs. 9 C.F.R. § 3.127(a).

j. April 22, 2003. Respondent Smith failed to construct the respondents' facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically, housed ten live lion cubs and two live leopard cubs in an attic area of her and respondent Weinhart's home, in filthy conditions. 9 C.F.R. § 3.125(a).

k. April 26 and April 30, 2003. Respondent Smith failed to store supplies of food and bedding in facilities that adequately protected them from deterioration and contamination, and specifically, there was no adequate means of storing food supplies at Respondent Smith's facilities. 9 C.F.R. § 3.125(c).

l. April 26 and April 30, 2003. Respondent Smith failed to provide sufficient shade for animals, and specifically, most of the shelters have been blown off of the chain link rooftops of animal enclosures. 9 C.F.R. § 3.127(a).

m. April 30, 2003. Respondent Smith failed to provide sufficient shade for animals, and specifically, housed a tiger (Trevor) in a transport enclosure that offered the animal no shelter from the sun. 9 C.F.R. § 3.127(a).

n. April 30, 2003. Respondent Smith failed to construct the respondents' facility of such material and such strength as appropriate for the animals involved, and to maintain the facility in good repair to protect the animals from injury, and specifically, (i) the camel enclosure had a non-functioning gate; (ii) the old camel enclosure had a 12-inch gap, the chain link fencing was warped, bent and buckled, and the poles were leaning outward; and (iii) shelter boxes for large felids were in a state of disrepair. 9 C.F.R. § 3.125(a).

o. April 30, 2003. Respondent Smith failed to provide sufficient shelter from inclement weather for all animals. 9 C.F.R. § 3.127(b).

p. April 30, 2003. Respondent Smith failed to provide adequate space to a deer housed in a "VariKennel." 9 C.F.R. § 3.128.

10. On or about the following dates, Respondent Smith willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the animal health and husbandry and transportation standards for warm-blooded animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.129-3.142), as follows:

a. November 16, November 20, 2002, and January 28, April 22, April 23, April 26 and April 30, 2003. Respondent Smith failed to feed large felids wholesome, uncontaminated food in sufficient quantities. 9 C.F.R. § 3.129.

b. November 20, November 22, November 25, and December 10, 2002, and January 28, April 22, April 23, April 26 and April 30, 2003. Respondent Smith failed to provide potable water to animals, in clean receptacles. 9 C.F.R. § 3.130.

c. November 20 and November 22, 2002. Respondent Smith failed to remove excreta from primary enclosures as often as necessary, and in particular, the gap between two adjacent tiger enclosures (housing Jaya and Nemo), and around the den boxes, were filled with feces. 9 C.F.R. § 3.131(a).

d. November 20 and November 22, 2002, and April 26 and April 30, 2003. Respondent Smith failed to establish and maintain a safe and effective program for the control of insects, and other pests. 9 C.F.R. § 3.131(d).

e. November 20, November 22, and December 10, 2002, and January 28, April 22 and April 23, 2003. Respondent Smith failed to keep premises clean and in good repair in order to protect animals from injury and to facilitate prescribed husbandry practices, and specifically, inspectors observed accumulations of junk, discarded materials, buildup of filth, food debris, manure, and excreta throughout the facility. 9 C.F.R. § 3.131(c).

f. November 20, November 22, and December 10, 2002, and April 26 and April 30, 2003. Respondent Smith failed to employ a sufficient number of adequately trained employees to maintain the professionally-acceptable level of husbandry practices. 9 C.F.R. § 3.132.

g. November 16, November 20, November 25 and December

10, 2002. Respondent Smith housed incompatible animals in the same primary enclosures, and housed animals near animals that interfere with their health or well-being, and specifically large felids exhibited scars and open wounds indicative of fighting activity. 9 C.F.R. § 3.133.

h. December 10, 2002, and January 28, April 22, April 23, and April 26, 2003. Respondent Smith failed to remove excreta from primary enclosures as often as necessary. 9 C.F.R. § 3.131(a).

i. April 30, 2003. Respondent Smith housed seven goats, two pot-bellied pigs, and a llama in the bed of a pick-up truck, with inadequate space, extraneous materials that could harm the animals, and no shade or shelter. 9 C.F.R. §§ 3.125(a), 3.127(a), 3.127(b), 3.128, 3.138.

Order

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

2. Respondent Smith is assessed a civil penalty of **$99,550** for her 362 violations of the Act and the Regulations and Standards.[4] 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(b)(2)(v) (since renumbered).

3. Respondent Smith shall pay the **$99,550** by cashier's check(s) or certified check(s) or money order(s), made payable to the order of the **Treasurer of the United States** and delivered within sixty (60) days from the effective date of this Order to:

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

Respondent Smith shall include on the cashier's check(s) or certified check(s) or money order(s) the docket number of this proceeding, **AWA Docket No. 07-0184**.

[4] The 362 violations comprise 159 violations of the licensing regulations, 67 violations of the veterinary care regulations, 20 violations of the identification regulations, 3 violations of the handling regulations, and 113 instances of noncompliance with the standards. Civil penalties of up to $2,750 were provided for each violation during the time of these violations. 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(b)(2)(v). For these 362 violations, the civil penalty amount can be $995,500.

Finality

This Decision and Order shall be final and effective thirty five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to 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.

In re: JAMES AND ANGIE GODWIN, d/b/a CANE CREEK KENNELS.
AWA Docket No. 08-0003.
Default Decision.
Filed May 12, 2008.

AWA – Default.

Robert Ertman for APHIS.
Respondent Pro se.
Default Decision by Administrative Law Judge Jill S. Clifton.

Decision and Order By Reason of Default

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act, as amended ("AWA" or "Act") (7 U.S.C. § 2131 *et seq*.), by a Complaint filed on October 4, 2007, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture ("Complainant" or "APHIS"), alleging that the Respondents willfully violated the Act and the regulations and standards issued pursuant to the Act ("Regulations" and "Standards") (9 C.F.R. § 1.1 *et seq*.).

Parties and Counsel

APHIS is represented by Robert A. Ertman, Esq., Office of the General Counsel (Marketing Division), United States Department of Agriculture, 1400 Independence Ave. S.W., Washington, D.C. 20250-

1417.

James Godwin, Respondent, represents himself (appears *pro se*). Angie Godwin, Respondent, represents herself (appears *pro se*). Collectively, they are referred to as Respondents.

Procedural History

A copy of the Complaint and a copy of the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served on the Respondents by certified mail, return receipt requested (article Number 7004 2510 0003 7022 9736). United States Postal Service records show that the Complaint packet was delivered at 11:01 a.m. on October 9, 2007. However, a signed receipt card ("green card") was not received by the Office of the Hearing Clerk. Accordingly, the local Postmaster was asked to obtain the addressee's signature on a duplicate card; this was accomplished on November 15, 2007, used here as the date of service.

The Respondents failed to file an answer. The time for filing an answer expired on December 5, 2007. On December 12, 2007, the Office of the Hearing Clerk sent a "no answer" letter to the Respondents. The material facts alleged in the Complaint, which are admitted by the Respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions.

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

1. James Godwin and Angie Godwin, Respondents, are individuals doing business as Cane Creek Kennels whose mailing address is HC 66, Box 465, Marble Hill, Missouri 63764.
The Respondents at all times material hereto were licensed and operating as a dealer as defined in the Animal Welfare Act and the Regulations.

2. The Secretary has jurisdiction over the Respondents and the subject matter herein.

3. On March 4, 2003, the Respondents purchased four puppies and sold them on March 4 and March 5, 2003, without having held them for the required period, in willful violation of section 2.101(a)(2) of the Regulations (9 C.F.R. § 2.101(a)(2)).

4. On April 15, 2003, the Respondents purchased three puppies and sold them on the same date, without having held them for the

required period, in willful violation of section 2.101(a)(2) of the Regulations (9 C.F.R. § 2.101(a)(2)).

5. On August 20, 2003, APHIS inspected the Respondents' premises and records, and the Respondents failed to make records of the acquisition of dogs available for inspection, in willful violation of section 2.126(a)(2) of the Regulations (9 C.F.R. § 2.126(a)(2)).

6. On August 20, 2003, APHIS inspected the Respondents' facility and found that a puppy was housed in an enclosure with un-coated, thin wire mesh flooring, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(2)(xii) of the Standards (9 C.F.R. § 3.6(a)(2)(xii)).

7. On or about September 11, 2003, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (three Australian Terrier puppies), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

8. On or about September 16, 2003, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (15 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

9. On or about September 26, 2003, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (four dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)). 10. On or about September 30, 2003, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (20 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

11. On or about October 13, 2003, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (2 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

12. On or about October 15, 2003, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (26 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

13. On October 23, 2003, APHIS inspected the Respondents' premises and records and found that the Respondents had failed to maintain required records relating to the acquisition of animals (50 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140)

and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

14. On October 23, 2003, APHIS inspected the Respondents' premises and records, and the Respondents failed to make records of the acquisition of dogs (those dogs acquired since August 2003) available for inspection, in willful violation of section 2.126(a)(2) of the Regulations (9 C.F.R. § 2.126(a)(2)).

15. On or about October 27, 2003, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (11 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

16. On or about October 27, 2003, the Respondents transported in commerce two dogs which were not at least eight weeks of age, in willful violation of section 2.130 of the Regulations (9 C.F.R. § 2.130). 17. On or about October 28, 2003, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (16 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

18. On or about November 11, 2003, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (five dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

19. On or about November 11, 2003, the Respondents transported in commerce one dog which was not at least eight weeks of age, in willful violation of section 2.130 of the Regulations (9 C.F.R. § 2.130). 20. On or about November 16, 2003, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (5 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

21. On or about December 11, 2003, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (12 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

22. On or about December 13, 2003, the Respondents failed to make and maintain accurate records relating to the acquisition of an animal (1 dog), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

23. On or about February 14, 2004, the Respondents failed to make

and maintain accurate records relating to the acquisition of animals (8 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

24. On or February 23, 2004, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (6 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

25. On or about February 29, 2004, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (12 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

26. On or about February 29, 2004, the Respondents transported in commerce 12 dogs which were not at least eight weeks of age, in willful violation of section 2.130 of the Regulations (9 C.F.R. § 2.130).

27. On or about March 2, 2004, the Respondents failed to make and maintain accurate records relating to the acquisition of animals (4 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

28. On March 9, 2004, APHIS discovered that the Respondents had utilized an additional site as a holding facility for about 12 months without having notified APHIS of the site, in willful violation of section 2.8 of the Regulations (9 C.F.R. § 2.8).

29. On March 9, 2004, APHIS inspected the Respondents' facility and found that the Respondents had failed to provide veterinary care to dogs in need of care for extensive hair matting containing fecal waste and debris, in willful violation of section 2.40(b) of the Regulations (9 C.F.R. § 2.40(b)).

30. On March 9, 2004, APHIS inspected the Respondents' facility and found that the Respondents had failed to maintain complete and accurate records of the acquisition and disposition of animals (96 dogs), in willful violation of section 10 of the Act (21 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

31. On March 9, 2004, APHIS inspected the Respondents' premises and records, and the Respondents failed to make records of the breeding dogs on the premises available for inspection, in willful violation of section 2.126(a)(2) of the Regulations (9 C.F.R. § 2.126(a)(2)).

32. On March 9, 2004, APHIS inspected the Respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)) and the specified standards:

A. Animal wastes were not regularly and frequently collected in

a manner that minimizes contamination and disease risks (9 C.F.R. § 3.1(f)).

B. Shelter structures for dogs were not large enough to allow each animal in the shelter to sit, stand, and lie in a normal manner and to turn about freely (four structures for 19 dogs) (9 C.F.R. § 3.4(b)).

C. Shelters in the outdoor housing area did not contain bedding material although the ambient temperature was below fifty degrees Fahrenheit (9 C.F.R. § 3.4(b)(4)).

33. On October 9, 2004, the Respondents obtained 14 puppies from a person who was not licensed, knowing that the person was required to be licensed, in willful violation of section 2.132(d) of the Regulations (9 C.F.R. § 2.132(d)).

34. On June 20, 2005 APHIS inspected the Respondents' transport vehicle and found the following willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the specified Standards:

A. Primary enclosures used to transport live dogs were not large enough to ensure that each animal contained in the primary enclosure has enough space to turn about normally while standing, to stand and sit erect, and to lie in a natural position (five enclosures holding ten dogs) (9 C.F.R. § 3.13(e)).

B. One primary enclosure in the transport vehicle contained five puppies (9 C.F.R. § 3.13(g)).

35. On June 20, 2005, the Respondents purchased seven puppies and sold them on June 21, 2005, without having held them for the required period, in willful violation of section 2.101(a)(2) of the Regulations (9 C.F.R. § 2.101(a)(2)).

36. On June 21, 2005, APHIS inspected the Respondents' premises and records, and the Respondents failed to make records of the acquisition and disposition of dogs available for inspection, in willful violation of section 2.126(a)(2) of the Regulations (9 C.F.R. § 2.126(a)(2)).

37. On June 21, 2005, APHIS inspected the Respondents' facility and found that animal wastes were not regularly and frequently collected in a manner that minimizes contamination and disease risks, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)).

38. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. James Godwin and Angie Godwin, Respondents, their agents

and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder, and in particular, shall cease and desist from:

(a) obtaining dogs from persons who are required to be licensed but do not hold a current, valid license under the Act;

(b) failing to hold animals for the required period before disposition;

(c) failing to make and maintain complete and accurate records, as required, and to make these records available for inspection;

(d) transporting in commerce dogs which are not at least eight weeks of age;

(e) failing to give notice of any additional site where dogs are held, as required;

(f) failing to maintain an adequate program of veterinary care and to provide veterinary care to dogs when needed;

(g) failing to maintain housing facilities for dogs as required;

(h) failing to regularly and frequently collect and remove animal waste in a manner that minimizes contamination and disease risks;

(i) failing to provide adequate shelter for dogs, as required; and

(j) failing to provide adequate space for dogs in transport enclosures, as required.

2. James Godwin and Angie Godwin, Respondents, are jointly and severally assessed a civil penalty of **$10,000**, which they shall pay by certified check(s) or cashier's check(s) or money order(s), made payable to the order of **Treasurer of the United States**, and forwarded within sixty (60) days from the effective date of this Order **by a commercial delivery service, such as FedEx or UPS**, to

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

Respondents shall include **AWA Docket No. 08-0003** on the certified check(s) or cashier's check(s) or money order(s).

3. The Respondents' license under the Animal Welfare Act is **suspended** for a period of 30 days and continuing thereafter until the civil penalty and any interest and late payment charges have been paid and a supplemental order has been issued terminating the suspension.

This Order shall be effective on the first day after this Decision and

Order becomes final. [See next paragraph regarding when the Decision and Order becomes final.]

Finality

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.

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DEFAULT DECISIONS

FEDERAL CROP INSURANCE ACT

In re: KEVIN THOMAS.
FCIA Docket No. 07-0137.
Default Decision.
Filed January 3, 2008.

FCIA – Default.

Don Brittenham, Jr. For APHIS.
Respondent, Pro se.
Default Decision by Chief Administrative Law Judge Marc R. Hillson.

ORDER

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of Respondent, Kevin Thomas, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraphs I and II of the Complaint are deemed admitted, it is found that the Respondent has willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (Act) (7 U.S.C. 1515(h)).

It is further found that, pursuant to section 515(h)(3)(B) of the Act (7 U.S.C. 1515(h)(3)(B)), Respondent is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of two years:

(i) The Federal Crop Insurance Act (7 U.S.C. 1501 *et seq*.).

(ii) The Agricultural Market Transition Act (7 U.S.C. 7201 *et seq*.), including the noninsured crop disaster assistance program under section 196 of that Act (7 U.S.C. 7333).

(iii) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq*.).

(iv) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq*.).

(v) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq*.).

(vi) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq*.).

(vii) The Consolidated Farm and Rural Development Act (7

U.S.C. 1921 *et seq.*).

(viii) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities;

Therefore, unless this decision is appealed as set out below, the period of ineligibility for all programs offered under the above listed Acts shall commence 35 days after this decision is served. As a disqualified individual, you will be reported to the U.S. General Services Administration (GSA) pursuant to 7 C.F.R. 3017.505. GSA publishes a list of all persons who are determined ineligible in its Excluded Parties List System (EPLS).

It is further found that, pursuant to section 515(h)(3)(A) of the Act (7 U.S.C. 1515(h)(3)(A)), a civil fine of $3,000 will be imposed upon the Respondent. This civil fine shall be made payable to the Federal Crop Insurance Corporation, Attn: Kathy Santora, Collection Examiner, Fiscal Operations Branch, 6501 Beacon Road, Kansas City, Missouri 64133. This order shall be effective 35 days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

Done at Washington, D.C.

In re: HILTON L. PARKER, JR.
FCIA Docket No. 08-0021.
Default Decision.
Filed February 15, 2008.

FCIA – Default.

Don Brittenham for AMS.
Respondent Pro se.
Default Decision by Administrative Law Judge Jill S. Clifton.

Decision and Order by Reason of Default

1. This proceeding was initiated by a Complaint filed on November 20, 2007, by the Manager of the Federal Crop Insurance Corporation, Complainant (frequently herein "the FCIC"). The Complainant is represented by Donald A. Brittenham, Jr., Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington DC 20250.

2. The Complaint alleges that Hilton L. Parker, Jr., the Respondent (frequently herein "Respondent Parker") violated the Federal Crop Insurance Act (7 U.S.C. § 1501 *et seq*.) (frequently herein "the FCIA" or "the Act") and the regulations promulgated thereunder governing the administration of the Federal crop insurance program (7 C.F.R. part 400).

3. The FCIC requests that Respondent Parker be required to pay a $10,000 civil fine, and that Respondent Parker be disqualified for a period of three years from receiving any benefit from any program listed in section 515(h)(3)(B) of the Act. 7 U.S.C. § 1515(h)(3)(B).

4. On November 21, 2007, the Hearing Clerk sent to Respondent Parker, by certified mail, return receipt requested, a copy of the Complaint and a copy of the Rules of Practice, together with a cover letter (service letter). Respondent Parker was informed in the Complaint and in the service letter that an answer to the complaint should be filed in accordance with the Rules of Practice within 20 days, and that failure to answer any allegation in the complaint would constitute an admission of that allegation. 7 C.F.R. § 1.136.

5. The envelope containing the Complaint, Rules of Practice, and service letter was served on Respondent Parker on November 24, 2007 (see Return Receipt in the record file). Consequently, Respondent Parker had until December 14, 2007, to file an answer to the Complaint. 7 C.F.R. § 1.136(a). Respondent Parker failed to file an answer to the Complaint by December 14, 2007, as required. [Now, two months later, he still has not filed an answer.]

6. The FCIC filed a Motion to Enter a Default Decision on December 28, 2007. The Hearing Clerk sent to Respondent Parker, by certified mail, return receipt requested, a copy of the Motion with the Hearing Clerk's cover letter on December 28, 2007. The envelope containing the Motion and cover letter was served on Respondent Parker on January 11, 2008 (see Return Receipt in the record file). Consequently, Respondent Parker had until January 31, 2008, to file a response to the Motion. Respondent Parker failed to respond to the Motion by January 31, 2008, as required. [Now, two weeks later, he still not has not filed a response.]

7. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an

admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

8. Accordingly, the material allegations in the Complaint, which are admitted by Respondent Parker's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq*.

Findings Of Fact

9. Respondent Hilton L. Parker, Jr. has a mailing address in Kinston, North Carolina 28504.

10. Respondent Parker was a participant in the Federal crop insurance program under the Act and the regulations for the 2003 and 2004 crop years.

11. The allegations of the Complaint found under Roman Numeral II on pages 2-6, are hereby incorporated herein as Findings of Fact by this reference, including the findings that Respondent Parker received, as a result of his intentional misrepresentations, an indemnity overpayment of $16,462 for his 2003 soybean crops and an indemnity overpayment of $27,841for his 2004 soybean crops.

Conclusions

12. Respondent Parker intentionally misrepresented his harvested soybean production for the 2003 and 2004 crop years.

13. Respondent Parker knew or should have known that the information was false at the time that he provided it.

14. As a result of his intentional misrepresentations, Respondent Parker received an indemnity overpayment of $16,462 in 2003 and an indemnity overpayment of $27,841in 2004.

15. Respondent Parker willfully and intentionally provided false information to the insurer and to the Federal Crop Insurance Corporation with respect to an insurance plan or policy under the Federal Crop Insurance Act. 7 U.S.C. 1515(h).

16. Pursuant to section 515(h) of the Act (7 U.S.C. § 1515(h)) and subpart R of FCIC's Regulations (7 C.F.R. § 400.451-400.500), willfully and intentionally providing false or inaccurate information as detailed above in the Findings of Fact is grounds for civil fines of up to $10,000 for each violation, or the amount of the pecuniary gain obtained as a result of the false or incorrect information, and disqualification from receiving any monetary or non-monetary benefit that may be provided under each of the following for a period of up to five years:

(a) The Federal Crop Insurance Act (7 U.S.C. § 1501 *et seq*.);

(b) The Agricultural Market Transition Act (7 U.S.C. § 7201 *et seq*.), including the non-insured crop disaster assistance program under section 196 of that Act (7 U.S.C. § 7333);

(c) The Agricultural Act of 1949 (7 U.S.C. § 1421 *et seq*.);

(d) The Commodity Credit Corporation Charter Act (15 U.S.C. § 714 *et seq*.);

(e) The Agricultural Adjustment Act of 1938 (7 U.S.C. § 1281 *et seq*.);

(f) Title XII of the Food Security Act of 1985 (16 U.S.C. § 3801 *et seq*.);

(g) The Consolidated Farm and Rural Development Act (7 U.S.C. § 1921 *et seq*.); and

(h) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities. This includes, but is not limited to, Title I of the Farm Security and Rural Investment Act of 2002.

17. Disqualification under section 515(h) of the Act will affect a person's eligibility to participate in any programs or transactions offered under any of the statutes specified above. All persons who are disqualified will be reported to the U.S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505. GSA maintains and publishes a list of all persons who are determined ineligible from non-procurement or procurement programs in its Excluded Parties List System.

18. It is appropriate that Respondent Parker (a) be assessed a civil fine of $10,000; and (b) be disqualified from receiving any monetary or non-monetary benefit provided under each of the programs listed above for a period of three years. Consequently, the following Order is issued.

Order

19. Respondent Hilton L. Parker, Jr., is hereby assessed a civil fine of **$10,000**, as authorized by section 515(h)(3)(A) of the Act. 7 U.S.C. 1515(h)(3)(A). Respondent Parker shall pay the $10,000 civil fine by cashier's check or money order or certified check, made payable to the order of the "**Federal Crop Insurance Corporation**" and sent to

Federal Crop Insurance Corporation
Attn: Kathy Santora, Collection Examiner
Fiscal Operations Branch
6501 Beacon Road
Kansas City, Missouri 64133.

20. Respondent Hilton L. Parker, Jr., is disqualified from receiving any monetary or non-monetary benefit provided under each of the laws identified above in paragraph 16. for a period of **three years**, pursuant to section 515(h)(3)(B) of the Act. 7 U.S.C. 1515(h)(3)(B).

21. Unless this decision is appealed as set out below, Respondent Parker shall be ineligible for all of the programs listed above beginning on the first day after this Decision and Order becomes final. (*See* next paragraph.) As a disqualified individual, Respondent Parker will be reported to the U.S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505. GSA publishes a list of all persons who are determined ineligible in its Excluded Parties List System (EPLS).

22. 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.
* * *

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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DEFAULT DECISIONS

PLANT QUARANTINE ACT

In re: TODD ERICKSON d/b/a MEADOW LAKE NURSERY
P.Q. Docket No. 07-0048.
Default Decision.
Filed April 10, 2008.

P.Q. – 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 Plant Protection Act (7 U.S.C. § 7701 *et seq*.)(the Act) and regulations promulgated thereunder (7 C.F.R. section 319.37-10(b)(4)), in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*.

On December 19, 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 Todd Erickson, doing business as Meadow Lake Nursery (hereinafter, Respondent). The complaint was served on Respondent on August 23, 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 September 13, 2007, twenty days after service of the complaint (7 C.F.R. § 136(a)). Respondent never filed an answer to the complaint.

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).

Complainant initially sought a penalty of $10,000 in its Motion for Adoption of Proposed Default Decision and Order. After I issued an Order to Show Cause how the proposed penalty was comported with the statutory requirements for civil penalty assessment, Complainant submitted a response detailing how the factors were applied, and lowered the proposed penalty to $5,000 after factoring in Respondent's cooperation.

Findings of Fact

1. Todd Erickson d/b/a Meadow Lake Nursery, is a business with a mailing address of 3500 NE Hawn Creek Road, McMinnville, OR 97128.

2. On or about August 15, 2002 the Respondent violated 7 C.F.R. section 319.37-10(b)(4) of the regulations by importing 30 Malus Bud Sticks from Dresden, Germany, by mail without plainly and correctly bearing the permit number authorizing the importation on the package.

Conclusion

By reason of the Findings of Fact set forth above, Respondent Todd Erickson violated the Plant Protection Act (7 U.S.C. § 7701 *et seq*.). Therefore, the following Order is issued.

Order

Respondent, Todd Erickson, is hereby assessed a civil penalty of five thousand dollars ($5,000.00). 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 shall indicate that payment is in reference to P.Q. Docket No. 07-0048.

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, Todd Erickson, 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.

Consent Decisions

(Date Syntax YY/MM/DD)

Animal Quarantine Act

Anton Wald and John Wald d/b/a Wald Livestock, AQ-07-0045, 08/01/11.

Klime Srbinoski d/b/a Balkan Company, AQ-08-0056, 08/03/28.

Animal Welfare Act

Mac's Land Exotics, Inc., Steven A. Macaluso, Metrolina Wildlife Park, Charlotte Metro Zoo, AWA 07-0121, 08/01/11.

Robert L. Pitt, Sr., Kellynn S. Pitt d/b/a A Zoo For You and H.O.P.E. For All Animals, Inc., AWA 07-0106, 08/01/18.

Mitchel Kalmanson and Worldwide Exotic Animal Talent Agency, LLC, AWA-07-0080, 08/02/01.

Six Flags Over Texas, Inc. and Marian Buehler, AWA-03-0035, 08/02/05.

Clem Disterhaupt, Jr. d/b/a Ponca Creek Kennels, AWA 06-0023, 08/02/25.

Stephen T. Clark d/b/a Crossed Paws Ranch, AWA 07-0129, 08/02/26.

Horseshoe Creek Wildlife Foundation, Inc. and Darryl Atkinson, AWA-07-0159, 08/03/24.

Andy and Dot Jamerson d/b/a Jamerson Rabbit Farm, AWA 07-0102, 08/03/31.

Wolf Haven International, AWA 07-0119, 08/04/07.

Michael Peters, AWA 07-0119, 08/04/10.

Gerald and Angeline Wensmann d/b/a Highdarling Cattery a/k/a Highland Hills Kennel, AWA 07-0091, 08/04/10.

Octogon Sequence of Eight, Inc., AWA 05-0016, 08/04/16.

US Airways, Inc., AWA 08-0049, 08/04/18.

Wanda Reed d/b/a Wanda's Little Pets, AWA-07-0097, 08/04/21.

James Kerr d/b/a Parker Flat Lands Kennel, AWA-07-0186, 08/04/29.

Sherry Hayes d/b/a Hayes Kennel, AWA-07-0013, 08/04/29.

George Creson, Jr., Lois Creson d/b/a Six Little Angels Kennels, AWA-08-0011, 08/05/02.

Paula Stahl and Jeff Stahl d/b/a High Hopes Kennel, AWA-08-0097, 08/05/08.

Daniel and Debra Clark, AWA-07-0011, 08/05/19.

Stephanie Taunton d/b/a Bow Wow Productions and Hesperia Zoo f/k/a Cinema Safari Zoo, AWA-D-07-0084 and AWA-08-0110, 08/05/29.

Devon Suddarth and Lorann Suddath d/b/a Sonora Desert Primate Conservancy, AWA-07-0095, 08/06/05.

Federal Meat Inspection Act

Scala Packing Company, Inc., FMIA-08-0002, 08/03/12.

Little Fork Proteins, Inc. d/b/a Millers Custom Meats and Charles Robinette, FMIA-08-0088, 08/03/27.

Atlantis Foods, Inc and Timothy P. DeLong, FMIA-08-0112, 08/05/02.

Berry Packing, Inc. and James B. Davis, FMIA-08-0105, 08/05/06 and PPIA-08-0105, 08/05/06.

Horse Protection Act

Roger Ivins, HPA-06-0007, 08/03/31.

Elesia Hylton and Crystal Young, HPA-D-08-0043, 08/05/06.

PRPA

Parkinson Seed Farm, Inc., PRPA-08-0068, 08/04/18.

Randy Lloyd, Rory Lloyd, Ryan Lloyd d/b/a R. Lloyd Brothers, PRPA-07-0189, 08/03/04.

Plant Quarantine Act

Esteban Tapia, d/b/a Central Chilera De Puebla, PQ-07-0140, 08/01/11.

Mac's Land Exotics, Inc., Steven A. Macaluso, Metrolina Wildlife Park, Thomas J. Belter, PQ-07-0150, 08/01/11.

Wall Street Systems, Inc., PQ 08-0019, 08/02/12.

Dale L. Siemens d/b/a Daylen, Inc., PQ-07-0142, 08/02/25.

DFDS Transport, Inc., PQ-08-0045, 08/03/13.

Prime Airport Services, Inc., PQ-08-0055, 08/03/25.

CMA CGM (America), Inc., PQ-08-0045, 08/03/26.

Terry Charles Boss, PQ 08-0077, 08/04/08.

Xiaohua Huo a/k/a Hope Huo, PQ-08-0085, 08/04/30.

Reinoso Vintimilla Travel del Ecuador d/b/a Reinoso y Gallegos Travel, and Reinoso Travel, Inc., PQ-08-0083, 08/05/06.

Dole Fresh Fruit Company, PQ-08-0101, 08/06/06.

Veterinary Accreditation

Steven Warrington and Ostrich.com, Inc. VS-08-0121, 08/06/06.