AGRICULTURE DECISIONS

Volume 65

January – June 2006

UNITED STATES DEPARTMENT
OF AGRICULTURE

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Volume 65

January - June 2006
Part One (General)
Pages 1 - 380

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

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LIST OF DECISIONS REPORTED

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AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

In re: GERAWAN FARMING, INC., 01 AMA Docket No. F&V 916-1 and 917-1;
In re: GERAWAN FARMING, INC. AMAA Docket No. 02-0008.
Decision and Order.
Filed June 15, 2006.

AMA– AMMA – First amendment – Government speech – Government interests – Marketing Orders – Anti-trust, when not – Germane speech – Conduct, not speech – Commercial speech – Collectivize – Severability.

Sharlene Deskins for Complainant.
Brian C. Leighton and James A. Moody for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

Three U.S. Supreme Court Cases

[1] Three U.S. Supreme Court cases, each of which has addressed the compelled subsidy of generic advertising for agricultural commodities, direct this Decision:

(a) *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 125 S.Ct. 2055, 161 L. Ed. 2d 896 (2005) (herein frequently "*Livestock Marketing*");

(b) *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001) (herein frequently "*United Foods*"); and

(c) *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) (herein frequently "*Glickman v. Wileman*").

[2] The result in both *Glickman v. Wileman* and *Livestock Marketing* suggests that First Amendment claims such as Gerawan Farming, Inc.'s are trumped by the Secretary of Agriculture's involvement in the promotion of agricultural commodities. But *United Foods* is not overruled. And the description in *Glickman v. Wileman* and *United*

Foods of the extent of the AMAA's provisions[1] does not match the reality of marketing California-grown nectarines and California-grown peaches.

Introduction

[3] Gerawan Farming, Inc. ("Gerawan" or "Petitioner"), a handler of California-grown nectarines and California-grown peaches, is required to comply with marketing orders which are federal regulations. These federal marketing orders have required Gerawan to pay assessments of about 19-20 cents per 25 pound box shipped. Gerawan is Petitioner (in the 15(A)[2] case) and Respondent (in the "injunction and penalty" case). Gerawan both grows and handles nectarines and peaches (and other agricultural commodities) and participates in the California Tree Fruit Agreement.

[4] Gerawan initiated this case, petitioning to modify (or to be exempted from) requirements to pay that portion of the assessments used to pay for promotion including paid advertising, and for research (under the Nectarine Marketing Order[3] and the Peach Marketing Order[4]).

[5] Gerawan argues that it is being forced to speak when it does not wish to speak, that it does not agree with the message or the messenger. Gerawan claims that the promotion violates its First Amendment rights and is illegal. Gerawan asks: Why should a handler lose its First Amendment rights[5] simply by participating in a regulated industry?

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[1] The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §§ 601-627 (AMAA).

[2] 7 U.S.C. § 608c(15)(A).

[3] 7 C.F.R. § 916 *et seq*.

[4] 7 C.F.R. § 917 *et seq*.

[5] *See* Justice Breyer's dissent in *United Foods*, 533 U.S. at 419, including at 428 "the Court's unreasoned distinction between heavily regulated and less heavily regulated speakers could lead to less First Amendment protection in that it would deprive the former of protection. But see *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n. of N.Y.*, 447 U.S. 530, 534, n. 1, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (Even "heavily regulated businesses may enjoy constitutional protection") (citing, as an example, (continued...)

[6] Since May 2001 (through five marketing seasons, now into the sixth marketing season), Gerawan has been paying about one-half of each assessment and withholding payment of the other half. Gerawan states that it bases the amount it withholds on estimates obtained from the California Tree Fruit Agreement former President or CEO Jon Field, who had estimated that the "speech-related services" amounted to eight or nine cents (out of the 18 or 19 or 20 cent assessment).

[7] The half that Gerawan has withheld, roughly a quarter million dollars per year, now amounts to more than $1,391,981.97 (the amount withheld as of September 28, 2005). *See* AMS's Status Report filed October 13, 2005. Gerawan has been depositing the withheld payments in an interest-bearing account, awaiting the outcome of this litigation.

[8] The Administrator of the Agricultural Marketing Service of the United States Department of Agriculture ("AMS" or "Complainant"), argues that Gerawan has no justification for withholding payment, particularly in light of *Glickman v. Wileman*.

[9] AMS is Respondent (in the 15(A) case) and Complainant (in the "injunction and penalty" case). AMS requested not only findings regarding the unpaid portions of the assessments (more than $1,391,981.97), but also a $150,000 civil penalty, for having withheld payment. Tr. 743, 744-767; CX 68.

[10] Gerawan explains that it is forced to withhold payment, because the assessments paid are fully spent every year, so there will be nothing to recover if Gerawan prevails. Gerawan, motivated and bolstered by *United Foods*, explains that it is acting in good faith and not for delay and has good grounds for its expectation that it will prevail. Gerawan states that it offered to abide by an appropriate escrow arrangement with USDA, but USDA made no such arrangement available.

Gerawan Relies on the First Amendment

[11] To oppose paying part of its nectarine and peach marketing orders assessments (that portion used for promotion and research), Gerawan relies on its freedom of speech and freedom of association, guaranteed

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[5](...continued)
Virginia Bd. of Pharmacy, *supra*, at 763-765, 96 S.Ct. 1817)".

by the First Amendment to the United States Constitution.

U.S. Const.

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Procedural History

[12] The hearing was held in Fresno, California, on February 18-21, and Sept 8-9, 2003. Gerawan, Petitioner is represented by Brian C. Leighton, Esq. and James A. Moody, Esq. AMS, Complainant, is represented by Sharlene A. Deskins, Esq.

[13] The transcript is cited as "Tr." The proposed transcript corrections, filed September 20, 2004, and October 15, 2004, are accepted. Additional transcript corrections, on my own motion, are reflected in quotations from the transcript found in this Decision.

[14] Gerawan called three witnesses: Mr. Raymond M. ("Ray") Gerawan (Tr. 26-144); Mr. Dan Gerawan (Tr. 148-234, 240-393, 1389-1412); and Mr. Marco Luna (Tr. 395-430).

[15] AMS called seven witnesses: Dr. Melvin Peter Enns (Tr. 432-489); Mr. Douglas Andrew Phillips (Tr. 496-554); Mr. Jonathan W. ("Jon") Field (Tr. 554-712, 928-1132); Mr. Ronald Cioffi (Tr. 721-908); Mr. Kurt Kimmel (Tr. 1133-1160, 1168-1227); Ms. Jacqueline Terry ("Terry") Vawter (Tr. 1228-1273); and Mr. Blair Robin Richardson (Tr. 1275-1387).

[16] The following exhibits were admitted into evidence:

Petitioner's (Gerawan's) Exhibits: PX 1, 2, 4, 5, 8-12, 20-28.

Complainant's (AMS's) Exhibits: CX 1-3, 5-12, 14-24, 26-61, 66, 68-69, 72, 74-75, 77, 79-83, 85-86.

[17] The record includes the following transcripts:

Transcripts ***Final Set*** (Tr.) Volumes I - VI (Feb 18-21, Sept 8-9,

2003):

Volumes	2003	Pages	rec'd by Hearing Clerk
I	February 18	1-237	September 22, 2003
II	February 19	238-492	September 22, 2003
III	February 20	493-716	September 22, 2003
IV	February 21	717-916	September 22, 2003
V	September 8	917-1161	September 22, 2003
VI	September 9	1162-1418	September 30, 2003.

[18] [Also part of the record are the ***initial*** transcripts[6] (which are superceded by the ***Final Set***):

Volumes 2003	Pages	rec'd by Hearing Clerk
February 18	1-237	February 26, 2003
February 19	236-508	March 3, 2003
February 20	508-630	March 4, 2003
February 20 (revised)	509-732	August 28, 2003
February 21	631-830	March 12, 2003.]

[19] AMS's Findings of Fact, Conclusions of Law and Brief in Support Thereof was timely filed on September 20, 2004; AMS's reply was timely filed on January 25, 2005.

[20] Gerawan's Post-Hearing Findings of Fact and Conclusions of Law was filed late (but nevertheless accepted) on October 15, 2004.

[21] AMS's Status Report was filed on October 13, 2005, and Gerawan filed no objection or other response.

Analysis

[22] Gerawan Farming, Inc. ("Gerawan") is a corporation with its main offices located in Sanger, California. Gerawan is one of the largest growers (producers) of nectarines and peaches in California, if not the largest. Gerawan has developed its own varieties of nectarines and peaches that it markets under the brand name Prima. Gerawan promotes its Prima brand to the retail trade with brochures, and the Prima brand includes peaches, nectarines, plums, and table grapes. PX-2.

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[6] These superceded transcripts are retained because their page numbers may be cited in briefs or elsewhere in the record. The page numbers can be used for orientation to the Final Set of transcripts.

[23] The Nectarine Marketing Order[7] and the Peach Marketing Order[8] (the Marketing Orders) are operated through the California Tree Fruit Agreement. The Marketing Orders concern fresh California-grown nectarines and peaches, which are perishable and are marketed principally during May through October each year.

[24] The California-grown nectarine and peach marketing reality is far more competitive than cooperative. Neither producers nor handlers have been deprived of their ability to compete.
Producers and handlers make their own marketing decisions regarding sellers, buyers, price, and terms; the standardization provided by the Marketing Orders has little effect on competition but does establish minimum requirements for grade, size, and maturity, and for standard packaging. Justice Souter's dissent in *Glickman v. Wileman* accurately characterizes the use to which the Marketing Orders are put. 521 U.S. 457.

[25] Gerawan both produces and handles nectarines and peaches. As a handler, Gerawan is required to belong to the group of handlers who operate according to the Marketing Orders in order to ship nectarines and peaches. Gerawan handles nectarines and peaches in a highly competitive free market with razor-thin margins.

[26] Gerawan, in its capacity as a handler of nectarines and peaches, in May of 2001, and at subsequent times during 2001, 2002, 2003, 2004, and 2005, shipped nectarines and peaches that were subject to assessments imposed under the California Tree Fruit Agreement. CX 66; Tr. 1305-1309; AMS's Status Report filed October 13, 2005.

[27] Gerawan objects to paying the portion of the assessments imposed under the California Tree Fruit Agreement used to pay for promotion including paid advertising, and research (roughly half of the total assessment).

[28] Mr. Dan Gerawan is Gerawan's corporate President; he testified that he concentrates on the administrative aspects of running the company and mostly on the packing and shipping operations. Tr. 149.

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[7] 7 C.F.R. part 916.

[8] 7 C.F.R. part 917.

[29] Since May 2001, Gerawan has chosen to pay roughly half of each assessment imposed for nectarines and peaches that it shipped, and to withhold the other half, the amount that Gerawan estimates would be devoted to promotion including paid advertising and research. The amount withheld is roughly a quarter million dollars per year (CX 66, CX 71), and as of September 28, 2005, totaled $1,391,981.97. AMS's Status Report filed October 13, 2005.

[30] Awaiting the outcome of this litigation, Gerawan has reserved the withheld amount, depositing that amount in an interest-bearing account.

[31] On May 23, 2005, the Supreme Court of the United States issued its third decision in 8 years, *Livestock Marketing*, which considered "whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment." *Livestock Marketing* upheld the constitutionality of compelled assessments used to pay for generic advertising where the advertising is government speech. On May 31, 2005, the Supreme Court of the United States remanded to various courts of appeals for further consideration, in light of *Livestock Marketing*, cases involving the constitutionality of compelled assessments to pay for generic advertising of pork,[9] alligator products,[10] and milk.[11]

[32] In *Livestock Marketing*, the Supreme Court held that the beef promotion program is government speech; Congress had 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*, 125 S.Ct. at 2063.

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[9] *Johanns v. Campaign for Family Farms*, 125 S.Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Sixth Circuit).

[10] *Landreneau v. Pelts & Skins, LLC*, 125 S.Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Fifth Circuit).

[11] *Johanns v. Cochran*, 125 S.Ct. 2512 (2005) (remanding the case to the United States Court of Appeals for the Third Circuit); *and see Cochran v. Veneman*, 252 F.Supp.2d 126 (M.D.Pa. 2003) *aff'd upon review of Livestock Marketing*, *Cochran v. Secretary of Agriculture*, 2005 WL 2755711, *1 (3rd Cir. Sep 15, 2005) (upholding constitutionality of the Dairy Promotion and Research Program and Dairy Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq*.).

[33] In this case, I determine that under *Livestock Marketing*, the California-grown nectarine and peach promotion is not government speech. I determine that under *Glickman v. Wileman* (which previously addressed the California-grown nectarine and peach marketing orders), the "restrictions on marketing autonomy" are minimal compared with the free market characteristics of California-grown nectarine and peach marketing.

[34] *Glickman v. Wileman* describes what the AMAA authorizes, but because the Nectarine Marketing Order and the Peach Marketing Order do not employ much that the AMAA authorizes, marketing is fiercely competitive and marketing autonomy is not significantly impacted. The Nectarine Marketing Order and the Peach Marketing Order restrictions ensure baseline minimum standards for the size, maturity and grade of the fruit, and standard packaging.

[35] The California-grown nectarine and peach industry cannot be characterized as "collectivist" or "cooperative" to any significant degree, even though the AMAA reads as if it could be. Even though the AMAA seems to grant an anti-trust exemption, the Department of Justice is vigilant against anti-trust activities and has, with the USDA, made clear how limited that apparent exemption is. *See* PX 22; Tr. 1207. Further, even though volume control or market allotments or reserves or pools or price supports or price controls appear to be AMAA methodology, such tools are not employed in the California-grown nectarine and peach industry.

[36] I determine that under the three cases, *United Foods*, *Glickman v. Wileman*, and *Livestock Marketing*, read together, while the promotion here is not government speech, the speech is germane to the purpose of the AMAA, and the government has reasonable interests in the speech. Consequently, Gerawan's First Amendment rights must be balanced against the government's reasonable interests.

[37] If, on balance, Gerawan's First Amendment rights are outweighed by the government's reasonable interests, Gerawan must endure those messages that Gerawan finds to be damaging with regard to its own marketing and not truthful with regard to the nectarines and peaches that Gerawan markets, and Gerawan must pay the withheld portion of the assessments to the California Tree Fruit Agreement.

[38] If, on the other hand, on balance, the government's reasonable

interests are outweighed by Gerawan's First Amendment rights, the government must exempt Gerawan from the promotion provisions of the Marketing Orders, and Gerawan must return the withheld portions of assessments to the grower(s) from which it was collected (presumably largely from itself).

[39] If requiring Gerawan to participate in promotion including paid advertising were found to be unconstitutional, the unconstitutional provisions would be legally and practically "severable" from the remaining portions of the Marketing Orders, which would remain intact. *See* 7 U.S.C. § 614, regarding "Separability". The Committees would remain empowered to undertake their remaining activities. USDA officials expressed reservations, however, with whether the industry would choose to keep the remaining provisions in effect absent the promotion provisions.

[40] Either way, Gerawan must disgorge the interest it accumulated on the monies it withheld; when Gerawan pays the withheld portion of the assessments, the interest earned thereon shall also be paid, whether to California Tree Fruit Agreement (if Gerawan loses), or to the grower(s) (if Gerawan prevails).

[41] Regarding being required to subsidize research, even if that research were strictly for promotion, Gerawan's First Amendment defense must fail. Research is conduct, not speech. Consequently, Gerawan must pay to the California Tree Fruit Agreement the withheld assessment portion proportional to research, regardless of the outcome otherwise.

[42] I determine that the efficacy of the promotion materials and efforts is not relevant to this Decision.

APPLICABLE STATUTORY PROVISIONS

[43] 7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

SUBCHAPTER I—DECLARATION OF CONDITIONS AND POLICY

§ 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c (6)(I) of this title, such container and pack requirements provided in section 608c (6)(H) of this title [1] such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c (2) of this

title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c (2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers."

. . . .

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products

thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers

thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

. . . .

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: Provided, however, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251–256) and the Standard Containers Act of 1928 (15 U.S.C. 257–257i).

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, caneberries (including raspberries, blackberries, and loganberries), Florida grown strawberries, or cranberries, such

projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, Florida Indian River grapefruit, and cranberries may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

. . . .

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: Provided, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.
(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

7 U.S.C. §§ 601, 602(1)-(5), 608c(1), (6)(A)-(F), (6)(H)-(I), & (7) [excerpts from the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §§ 601-627].

[44] The AMAA, the statute under which the Marketing Orders were promulgated, was established primarily as a supply and volume control type program with traditional mechanisms of volume control.[12] Tr. 560. Promotion activities were brought within the federal order and terminated from the state orders in 1975. Tr. 562.

[45] Use of the AMAA is different today than at its inception during the Great Depression. The statute is amended on an ongoing basis upon a determination by Congress recommended by the Secretary of Agriculture that authorization is appropriate for new or revised marketing orders. Several rulemaking hearings are held each year to consider new marketing orders or revisions to those already in place. Likewise, marketing orders are terminated on occasion and proposed marketing orders are occasionally denied. The Fruits and Vegetables Program marketing orders website shows current events and provides background: http://www.ams.usda.gov/fv/moab.html

[46] Of approximately 35 fruit and vegetable marketing orders operating under the AMAA, about half of them (17) have active promotion programs; the other half do not, according to USDA employee (since 1968) Mr. Ronald Cioffi, then Chief (since 1986) of the Marketing Order Administration Branch (MOAB). Tr. 815.

[47] USDA employee Mr. Kurt Kimmel, regional office manager, was,

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[12] Volume control and supply control are not employed under the Marketing Orders here.

with the help of staff, overseeing and administering 11 of those marketing orders, those within California, Hawaii, and parts of Arizona, including the ones at issue here. Tr. 1135, 1201-02.

[48] Under the AMAA, marketing orders are basically self-help programs which operate under the supervision of USDA. Tr. 723. Congress has established majority rule programs that have government oversight.[13]

[49] Unlike the mushroom promotion act or the beef promotion act, though, the overarching message for the promotion including paid advertising is not specified by the AMAA or the Marketing Orders or the Secretary of Agriculture or the Committees or the Subcommittees; there has been no rulemaking regarding the overarching message.

[50] Orderly marketing is the purpose of the AMAA. Ronald Cioffi testified that the purpose of promotion including paid advertising is to promote the product to expand markets, to develop new markets (foreign and domestic), and to develop new uses for those products. Tr. 751.

[51] The purpose of the promotion program for California-grown nectarines and California- grown peaches, is to increase the consumption of tree fruit. Tr. 812. . . . . (W)e expect advertising to have a positive return to producers. Tr. 814.

[52] The purpose of promotion including paid advertising has also been expressed as follows: to increase demand for nectarines and peaches; to increase demand for California-grown nectarines and California-grown peaches; to promote sales of California-grown nectarines and California-grown peaches; and to raise the prices for producers of California-grown nectarines and California-grown peaches.

[53] The AMAA restricts marketing orders "to the smallest regional production areas . . . practicable" (7 U.S.C. § 608c(9)(B)); perhaps it is

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[13] *See* Justice Breyer's dissent in *United Foods*, 533 U.S. at 419, including at 422 "Compared with traditional 'command and control,' price or output regulation, this kind of regulation - - which relies upon self-regulation through industry trade associations and upon the dissemination of information - - is more consistent, not less consistent, with producer choice." (Justice Breyer was discussing the mushroom promotion act, but this statement would apply also to marketing orders under the AMAA.)

awkward for the U.S. government to lay claim to the promotion of California nectarines and peaches, when so many states produce fine nectarines and peaches.

[54] The California nectarine and peach handlers and growers are not exempted from the antitrust laws. "Antitrust Guidelines" prepared by the USDA and the Department of Justice designed to advise the members and employees of Federal marketing order committees with regard to the U.S. antitrust law make that clear. Price fixing is not permitted; there is no uniform price. PX 22; Tr. 1207.

[55] There are no price support subsidies available to those within the California nectarine and peach industry.

[56] Cooperatives exist within the California nectarine and peach industry but are not the norm. Tr. 840, 190-191.

[57] In contrast to *Livestock Marketing*, the AMAA does not control the overarching message of the advertising - - how could it? Under the AMAA, marketing orders addressing an array of agricultural commodities have been authorized. The AMAA has been put to different uses as marketing needs have evolved. The ***merely authorized*** promotion and advertising under the AMAA are in sharp contrast to the ***specified and controlled*** promotion and advertising that the U.S. Supreme Court characterized as government speech. When the government appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 LED.2d 700 (1995).

[58] One attribute of government speech is strict compliance with Congressional or other legislative directives, but under the AMAA, the Congressional directives are neither ***specific*** nor ***controlling***.

[59] Likewise, the Regulations promulgated under the AMAA, do not establish the overarching message. Like the statute, the marketing orders authorize but do not control the promotion including advertising. The marketing orders do not "set the overall message" (as in *Livestock Marketing*) or establish the message from beginning to end.

[60] The two marketing orders promulgated pursuant to the AMAA at issue here are 7 C.F.R. Part 916 (Nectarine Order) and Part 917 (Peach

Order). 7 C.F.R. Parts 916 and 917. Pertinent parts follow.

APPLICABLE REGULATORY PROVISIONS

[61] 7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER XI—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MISCELLANEOUS COMMODITIES), DEPARTMENT OF AGRICULTURE

. . . .

[regarding nectarines]

PART 916—NECTARINES GROWN IN CALIFORNIA

Subpart—Order Regulating Handling

. . . .

RESEARCH

§ 916.45 Marketing research and development.

The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution and consumption or efficient production of nectarines. Such projects may provide for any form of marketing promotion including paid advertising. The expense of such projects shall be paid by funds collected

pursuant to § 916.41.

[36 FR 9290, May 22, 1971]

7 C.F.R. § 916.45.

[AND, regarding peaches]

PART 917—FRESH . . . . PEACHES GROWN IN CALIFORNIA

Subpart—Order Regulating Handling

. . . .

RESEARCH

§ 917.39 Production research, market research and development.

The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid by funds collected pursuant to
§ 917.37.

7 C.F.R. § 917.39.

[62] Lack of attribution of the message to the government[14] - - is a contributing factor to the determination that the speech here is not government speech.

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[14] Justice Souter's dissent in *Livestock Marketing* explains why, for speech to be regarded as government speech, the government must put that speech forward as its own. 125 S.Ct. at 2068-69. The majority in *Livestock Marketing*, where there were so many other indicia of government speech, did not find the lack of attribution to the government to be fatal to the claim of government speech.

[63] The "funding tagline" of the nectarines and peaches promotional materials varies. Most often the funding tagline is "California Tree Fruit Agreement", "California Peaches, Plums and Nectarines", "California Summer Fruits" (CX 42-51, 54-61, 73, 76), or nothing at all. A few of the promotional materials in evidence are attributed to the author of the article (a model/actress/ author, a Ph.D., an M.D.), such as CX 39-41.

[64] A few of the promotional materials in evidence are attributed to growers or handlers as a group. Tr. 337, 355-56, PX 5 at 18. Gerawan is a member of and required to belong to that group, in order to ship nectarines and peaches. The promotional messages are not attributed to the United States government or to the government of California and do not bear a government symbol. The promotional messages are not attributed to individual producers (growers) or handlers.

[65] The Secretary of Agriculture (through AMS) selects the members of the Committees (the Control Committee and the Commodity Committee) in accordance with the Marketing Orders. The Control Committee includes shipper (handler) members and grower members; the Commodity Committee also includes one public member, if nominated. Tr. 724-25.

[66] The Committees meet two times a year, sometimes three times a year. Tr. 1232-33. A USDA representative usually attends, sometimes more than one USDA representative attends. Tr. 726, 1233.

[67] Although the Committees are not government entities, they have been identified as "agents" of the United States. *Lion Raisins, Inc. v. U.S.*, 416 F.3d 1356, 1364 (2005).

[68] When USDA employee Ms. Terry Vawter, a marketing specialist with a bachelor's degree in agricultural economics and a masters degree in agriculture with a specialization in agricultural economics, being cross-examined by Mr. Moody, was asked " . . . . do you intend your regulations to have an economic impact?" she replied, "Well, we intend, we hope that they are a positive impact on the industry at large." . . . . Mr. Moody asked, ". . . .do you intend them to benefit, economically benefit somebody?" Ms. Vawter: "That is the anticipation." Mr. Moody: "Okay. And that's the handlers or the growers?" Ms. Vawter: "We regulate handlers but we believe that that affects, those benefits affect growers as well." Tr. 1258-59.

[69] Ms. Vawter testified that the Marketing Orders' flexibility has advantages in addressing changes that are inherent in the industry as far as what retailers demand; and that the Marketing Orders are reflective of the times, somewhat like the Constitution. Tr. 1256.

[70] Regarding promotional projects and materials, each year the process was from the bottom up, not the top down. The paid staff (not government agents) developed programs to present to the Subcommittees; once the Subcommittees and the staff had details and the proposed cost for the program, the Subcommittees recommended to the full Committees (both the Nectarine Committees and the Peach Committees); once the full Committees approved, the program became part of the budget and the budget was sent to USDA for approval. Tr. 1284-86.

[71] The USDA/AMS guidelines for review of promotional activities or items were not intended to control the message, but rather to check the message for certain limited factors: the promotional material must be truthful. It must not disparage another product. It must treat all participants equitably. There ought to be a good quality product to promote. Promotional things that the Committees do are to be generic and available to everybody. Tr. 781-82, 1243-44, 1246; PX 21.

[72] The USDA's review of promotional materials was focused on compliance with the AMAA and the Marketing Orders, discrimination laws, USDA diversity policies, AMS guidelines (paragraph [70]), Federal Trade Commission advertising laws and regulations, Food and Drug Administration labeling requirements, and antitrust rules. PX 21.

[73] The Secretary of Agriculture, through AMS, approved the budgets that included the promotion and advertising; and did look for compliance with requirements specified by Ms. Terry Vawter and Mr. Kimmel; but usually did not look at individual promotion pieces.

[74] The Promotion Subcommittees and the Committees approved the promotion, including paid advertising, but did not exercise tight control. Tr. 1122.

[75] In 2003 the USDA began reviewing specific pieces of promotional material for their content, a new approach. Tr. 734-36, 779-80, 1235, 1243-44, 1246-47, 1269-71. Prior to that, no piece-by-piece evaluation of the promotional materials was undertaken by the

government or government agents. The message could not have been controlled from top to bottom.

[76] Paid staff had the authority to plan the promotional activities and then to obtain approvals at the various upper levels (the governmental levels), that is, the Subcommittees, the Committees, and the Secretary of Agriculture (through AMS). Whether the expenditures, or even proposed expenses in the budget, were reasonably necessary (Tr. 728) to accomplish the mission is difficult to know because "the mission" evolved from paid staff's starting place. Tr. 781-83.

[77] Whether an objective under the Marketing Orders was to heighten awareness on the part of retailers and consumers (a) of the diversity among California-grown nectarines and California-grown peaches; and (b) of the characteristics held in common among California-grown nectarines and California-grown peaches, is unclear.

[78] The Marketing Orders establish a minimum grade and distinguish two grades, U.S. #1 and utility grade, but the promotion and advertising do not appear to highlight either the minimum or the distinction.

[79] The Marketing Orders establish a minimum maturity standard and distinguish two maturity standards, California well-mature and U.S. mature, but the promotion and advertising do not appear to highlight either the minimum or the distinction.

[80] The Marketing Orders establish minimum size requirements, but the promotion and advertising do not appear to highlight the size requirements.

[81] The Marketing Orders establish standard packaging, but the promotion and advertising do not appear to highlight the packaging requirements.

[82] Ideally, compelled "generic" advertising would promote the agricultural commodities group's common interests and would avoid spending the grouped money in ways that are divisive. Leaving off brand names is not always adequate protection, however, against favoring one producer over another, one handler over another, or one target market area over another.

[83] "Generic" advertising can be unfair in a highly competitive

market such as that for California-grown nectarines and peaches. Established market areas differ from one competitor to the next, and the choice of what market areas to target can make a difference in the benefits that growers or handlers will derive from promotional efforts. Distinct qualities of fruit belonging to one competitor and not another can make a difference in the benefits that growers or handlers will derive from promotional efforts.

[84] The evidence did not answer the following questions: What market areas are the targets for which messages? How are marketing target areas chosen so that there is no favoritism toward some producers at the expense of others, and no favoritism toward some handlers at the expense of others?

[85] Gerawan complains that featuring the SUMMERWHITE® (trademarked) nectarines and peaches, which Gerawan does not grow or handle, helps Gerawan's competitor at Gerawan's expense. Tr. 783-85; CX 47. The government evidence showed that featuring white nectarines and peaches increases sales of both white and yellow nectarines and peaches.

[86] Gerawan complains that the message "ripen your peaches in a paper bag on the counter for a few days" is false as to Gerawan's peaches, because Gerawan's peaches are ripened on the tree and ripe enough when purchased at retail to ripen without going into a bag. Tr. 38-39, 196-97. Gerawan harvests multiple times from the same tree, as many as eight to ten times per season, each time taking only the tree-ripened fruit and leaving the rest to continue ripening. Tr. 39, 41-45, 47. Gerawan complains that advertising such as the "paper bag campaign" does not increase the demand for peaches but has the opposite effect.

[87] Even if the promotion under the Marketing Orders had a well-meaning purpose to educate retailers and consumers how to care for California-grown nectarines and California-grown peaches upon acquisition, Gerawan argues that the message is false at least to its fruit and damaging.

[88] Thus, argues Gerawan, promotion including paid advertising, if designed to deliver a pleasurable eating experience to consumers of California-grown nectarines and California-grown peaches, would send entirely different messages from the ones being sent under the Marketing Orders. Dan Gerawan believes the best way to promote

Gerawan's fruit is to stop the Marketing Orders promotion altogether. Tr. 164.

[89] Gerawan would avoid generic advertising altogether and concentrate on the distinctions of the fruit it handles. Gerawan complains that generic advertising fails to address important distinctions from one brand to the next. For example, Gerawan believes that its practices result in a higher sugar content per piece of fruit and consequently a much more enjoyable eating experience for the consumer; that the available sugar of the tree, divided among fewer pieces of fruit, makes each piece of fruit sweeter. Tr. 39-45, 49-52, 192-94.

I. Not Government Speech;
rather, Commercial Speech,
in which the Government has Reasonable Interests.

[90] The California Tree Fruit Agreement promotion including advertising for nectarines and peaches, funded through compelled assessments paid by handlers such as Gerawan, is not government speech as delineated by *Livestock Marketing* and as previously suggested in *United Foods*; rather, it is commercial speech paid for by marketing orders assessments, authorized by both statute and the marketing orders, in which the government has reasonable interests.

[91] The AMAA does not establish the overarching message. (The overarching message is not established by the statute or the regulations; the overarching message is not established by the Secretary of Agriculture, or even by the Committees that administer the Marketing Orders.) The AMAA is not comparable to the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901, *et seq.*, addressed by "*Livestock Marketing*".

[92] As U.S. District Judge Gladys Kessler wrote of *Livestock Marketing*, while considering the Hass Avocado Promotion, Research, and Information Act of 2000, 7 U.S.C. § 7801, *et seq.*, in her Memorandum Opinion issued in the United States District Court for the District of Columbia on March 15, 2006:

> Writing for a 6-3 majority, Justice Scalia concluded that the Beef Act advertising programs constituted government speech to

> which the producers had no First Amendment right to object.[15] The Court rejected respondents' argument that because the Beef Board and state beef councils play such a central role in creating and disseminating those advertisements, the government speech doctrine does not apply. "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated," the Court held, "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Id*. at 2063. In other words, when a "message . . . is from beginning to end . . . established by the federal government" it constitutes government speech even if private actors are enlisted to convey it. *Id*. at 2062. *Avocados Plus Inc. v. Johanns*, Civil Action No. 02-1798, at 11-12 (GK), 2006 U.S. Dist. LEXIS 10144, 2006 WL 637108 (D.D.C. Mar. 15, 2006).

[93] The specific and controlling language, of both the **Beef** Promotion and Research Act of 1985 (addressed in "*Livestock Marketing*"), and the **Mushroom** Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101-6112 (addressed in "*United Foods*"), is comparable to that of the following statutes that also generate "government speech": (a) the **Pork** Promotion, Research and Consumer Information Act, 7 U.S.C. § 4801 *et seq.*; *see Johanns v. Campaign for Family Farms*, 125 S.Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Sixth Circuit); (b) The **Dairy** Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq.*; *see Johanns v. Cochran*, 125 S.Ct. 2512 (2005) (remanding the case to the United States Court of Appeals for the Third Circuit); (c) the **Cotton** Research and Promotion Act of 1966, as amended, 7 U.S.C. § 2101, *et seq.*; *see Cricket Hosiery, Inc. v. United States*, 28 CIT ____ slip op. 06-56, Court of International Trade, Judge R. Kenton Misgave (April 24, 2006); (d) the Has **Avocado** Promotion, Research, and Information Act of 2000, 7 U.S.C. § 7801, *et seq.*; *see Avocados Plus Inc. v. Johanns*, 2006 WL 637108 (D.D.C. March 15, 2006); (e) the **Honey** Research, Promotion, and Consumer Information Act, as amended, 7 U.S.C. §§ 4601-4613; *see Walter L. Wilson, d/b/a Buzz 76 Apiaries*, 64 Agric. Dec. ____ slip op., USDA Judicial Officer, HRPCIA Docket No. 01-0001

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[15] The Court included a lengthy analysis of the government speech doctrine which, in general, precludes citizens from challenging expressive activities by government actors or the government itself. *See Livestock Marketing*, 125 S.Ct. at 2060-63.

(November 28, 2005); and (f) the **Watermelon** Research and Promotion Act, 7 U.S.C. § 4901, *et seq.*; *see Red Hawk Farming & Cooling*, 64 Agric. Dec.1258 (2005)., USDA Judicial Officer, AMA WRPA Docket No. 01-0001 (November 8, 2005). *Emphasis added*.

[94] Both the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901, *et seq.*, addressed by *Livestock Marketing*, and the Mushroom Promotion, Research, and Consumer Information Act of 1990, addressed by *United Foods*, are characterized by ***specific*** and ***controlling*** Congressional directives. So are the other Acts including those identified in paragraph [93] under which advertising and promotion are regarded as government speech, instead of government facilitation of private speech.[16]

[95] The AMAA, in sharp contrast, authorizes but does not control the promotion and advertising. The AMAA does not "set the overall message" (as in *Livestock Marketing*) or establish the message from beginning to end. The AMAA authorizes the Secretary of Agriculture to issue marketing orders (regulations) that, among other things, establish or provide for the establishment of "**production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order**"; and regarding numerous agricultural commodities including California peaches and nectarines, "**such projects may provide for any form of marketing promotion including paid advertising**." 7 U.S.C. § 608c(6)(I).

[96] The attributes of government speech identified in *Livestock Marketing* are missing under the California Tree Fruit Agreement. The statute (the AMAA), and the regulations (the Marketing Orders): (a) do not specifically identify the government interest in promoting nectarines and peaches; (b) do not specifically articulate the purpose of the promotion and the advertising; (c) do not specify the overarching message to be communicated; (d) do not control the message from the top down; and (e) do not control the message from beginning to end.

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[16] But contrast the **Alligator** case, *Landreneau v. Pelts & Skins, LLC*, 125 S.Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Fifth Circuit).

[97] Whether the compelled monetary contributions are necessary and proportionate to the legitimate promotional goals of the Committees and Subcommittees is difficult to determine.[17]

[98] The U.S. Supreme Court's guidance in compelled subsidy cases has perhaps impacted the business of promoting California-grown nectarines and peaches. Perhaps adequately detailed initial government control has been undertaken, by the Committees or the Subcommittees, or by the Secretary of Agriculture, with specificity that serves as a yardstick for the promotion projects initiated.

[99] Based on the evidence before me, which predated *Glickman v. Wileman* and is now 2-1/2 years old, the U.S. government had not definitively controlled the overall purpose or objective for promotion including paid advertising. Rather, the governmental components reacted in a somewhat cursory review of what paid staff had undertaken.

[100] Not a factor to be addressed in this 15(A) action is the effectiveness of the expenditures for promotion including paid advertising. *Glickman v. Wileman*. Consequently, Dan Gerawan's testimony that the forced assessments are largely wasted; that much of the money is spent on point of sale (retail store) display items that end up in the trash, will not be evaluated here. Nor will Gerawan's complaint that the promotion reduces rather than increases consumption be evaluated here, because the effectiveness of the promotion is not relevant. Also, except for determining that the materials were germane to the purposes of the AMAA, I do not evaluate or describe the promotion and advertising materials in evidence. Tr. 806.

[101] Likewise, since the effectiveness of the expenditures for promotion including paid advertising is not a factor for me to consider, I will not evaluate the Apex study or the assumptions upon which the Apex study is based. Tr. 734, 736.

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[17] The Committees and Subcommittees identified and articulated and circulated a general theme of "working on category management and how to help improve the demand and movement of California peaches and nectarines through the marketing channels." Tr. 1286. Determining the governmental connection in the promotion undertaken, and whether the assessments for promotion are reasonably necessary and proportionate to the legitimate promotional goals, is difficult without clearly delineated Committees' objectives prior to development of the promotion. The Committees' objectives for promotion, including paid advertising, are formulated year-by-year in response to input from below.

[102] The effectiveness of the expenditures is of course of concern to those who set the assessment amounts and who approve the budgets, including the Secretary of Agriculture, the Committees and Subcommittees.

[103] During 2003, the assessment rate was 20 cents per box of California nectarines and peaches. Tr. 1311. The assessment had been 19 cents per box. Tr. 1311. The President of the California Tree Agreement, Mr. Richardson, attributed the penny per box increase to Gerawan's withholding (about half) of its payment of each amount assessed. Tr. 1310-11. The assessment had previously been 18.5 cents for nectarines and 19 cents for peaches per 25 pound container. CX 6. From year-to-year there is rulemaking regarding the amount of the assessment only if a change in the amount is to be considered.

[104] The Nectarine and Peach Marketing Orders do not employ volume controls *per se* (Tr. 776, 853-54), or restrictions on supply such as "reserves" or "surplus".

[105] Under the guise of quality control, Dan Gerawan testified, the Nectarine and Peach Marketing Orders accomplished volume control, during 1985-1990. Tr. 150-153. Discussion at the California Tree Fruit Agreement meetings would frequently address reducing the volume of fruit on the market in the hopes of increasing prices back to the grower. Tr. 152. The changes since 1990 have resulted in less talk among members of the industry of volume control, and USDA does not support volume control.

[106] Dan Gerawan testified that the California Tree Fruit industry experienced "a big deregulation" since 1990 (when the record closed in "*Glickman v. Wileman*"). Tr. 149. Since 1990, Dan Gerawan testified, the relaxation of standards through the addition of utility grade has given Gerawan the freedom to market all the fruit which customers will buy.

[107] Dan Gerawan testified that when "*Glickman v. Wileman*" was filed, although there were not volume controls *per se*, fruit for which there would have been customers was kept off the market through (a) the minimum size regulations, (b) the regulations against cosmetically challenged fruit, which is blemished fruit, and (c) the maturity regulations. Tr. 149.

II. Highly Competitive, Minimally "Collectivistic" or

"Cooperative" and Not in a Manner that Displaces Competition

[108] ***Glickman v. Wileman*** **and** ***United Foods*** **describe "collectivistic" and "cooperative" marketing that displaces competition, in a way that does not apply to the marketing of nectarines and peaches at issue here, by handlers such as Gerawan, under the California Tree Fruit Agreement**.

[109] Under the AMAA, agricultural commodities are regulated to varying degrees. Milk is an example of a commodity that can be tightly regulated under the AMAA. Milk marketing orders can involve pooling, and redistributing certain sales receipts. It can be argued that certain milk marketing orders under the AMAA may establish the type of cooperative marketing that displaces competition. Most agricultural commodities addressed by the AMAA are not so highly regulated.

[110] Actions taken under the AMAA range from **highly** regulating marketing orders, to **minimally** regulating marketing orders. Examples of **highly** regulating marketing orders could include dairy (regulated in numerous but not all regions of the country). Other agricultural commodities, including the California nectarines and peaches here, and including other fruits or vegetables in various regions, are examples of **minimally** regulating marketing orders. The specifics for one marketing order addressed by the AMAA would not be appropriate for another. The AMAA is versatile and has been put to many uses over more than 70 years.[18]

[111] The objective of the AMAA, "orderly marketing", does not require the type of cooperative marketing that displaces competition. Tremendous diversity exists among the various marketing orders promulgated under the AMAA. Nectarine and peach handlers under the California Tree Fruit Agreement are fiercely competitive, among themselves, as well as among packers who are not part of the California Tree Fruit Agreement.

[112] Nectarine and peach handlers under the California Tree Fruit Agreement do provide buyers with some uniformity regarding certain

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[18] The AMAA reenacted specified provisions of the Agricultural Adjustment Act of 1933, as amended).

aspects of their nectarines and peaches. These nectarine and peach handlers (a) are not exempt from antitrust requirements; (b) do not set minimum prices; (c) do not "pool" their fruit to provide buyers with only one source (such as a cooperative); and (d) do not use volume control to keep prices up. These handlers do (a) identify according to grades; (b) identify according to two standards for maturity: a minimum standard (U.S. Mature), and a higher standard (California Well-Mature); (c) specify the level of cosmetic defects, including blemishes; (d) predictably size the fruit, and (e) provide uniform packaging.

Fierce Competition Dominates the Tree Fruit Industry

[113] On direct examination, Gerawan's counsel questioned Gerawan's President:

Mr. Moody: Well, as you -- if someone were to say to you -- ask you the question is the CTFA -- or is the tree fruit industry in California characterized by competition or is it a competitive industry, how would you answer that?
Mr. Dan Gerawan: It's extremely competitive.
Mr. Moody: Okay. And what do you mean by that?
Mr. Dan Gerawan: I mean that I'm trying to get my competitors' customers. He's trying to get mine. We're trying to get new customers. It's extremely competitive.
Tr. 165-66.

[114] On cross examination, Gerawan's President answered a question by AMS's counsel Ms. Deskins:
Mr. Dan Gerawan: This is a very highly competitive business we're in. The competition -- I don't know that you understand how competitive this business really is. But it's highly competitive. And we're -- the margins are cut razor thin. And when per capita consumption goes down, that is more indication that there's a general level of dissatisfaction of the people buying the fruit from this industry. And it's -- I'm being harmed by that.
Tr. 319.

[115] On direct examination, Gerawan's counsel questioned Gerawan's President:
Mr. Moody: But the price you get though is really subject to matter of negotiation between you and the buyer?
Mr. Dan Gerawan: Yes.

Mr. Moody: And is there anything CTFA can do that affects the prices you're able to get?
Mr. Dan Gerawan: That's a pretty broad question. Yes.
Mr. Moody: Okay. What are some examples?
Mr. Dan Gerawan: Well, you used the conditional form of the verb, which means if they were to stop all their generic advertising we might be able to get a higher price for our product.
Mr. Moody: Okay. Is there anything CTFA can do to restrict entry into the business, meaning the new growers can come in and grow peaches and nectarines?
Mr. Dan Gerawan: Another broad question but there's nothing that CTFA could do to keep someone out. No, there isn't.
Mr. Moody: Okay. Is there anything CTFA can do to keep a packer out of the business?
Mr. Dan Gerawan: Aside from bringing some kind of USDA enforcement action for breaking some law or regulation, no.
Mr. Moody: And does CTFA have any control over relative market shares between the packers? Mr. Dan Gerawan: No.
Mr. Moody: Does CTFA have any role in setting any form of producer allotment?
Mr. Dan Gerawan: No.
Mr. Moody: Does CTFA have any power to regulate the price?
Mr. Dan Gerawan: No.
Mr. Moody: Does CTFA have any power to grant anti-trust immunity in case of for example you and Fower Packing wanted to agree between the two of you on a price?
Mr. Dan Gerawan: No.
Mr. Moody: Is it your understanding the anti-trust laws are fully applicable to your activities as a packer?
Mr. Dan Gerawan: Yes.
Mr. Moody: Is there any kind of market allocation regulation that CTFA is able to implement?
Mr. Dan Gerawan: No.
Tr. 164-65.

[116] The challenged assessment (roughly one-half of the total assessment) is part of a "broader regulatory system", but the extent to which it "collectivizes" aspects of the market is minimal. The primary object of the Marketing Orders is to ensure some minimum standards including grade, maturity, blemishes, and size; and some uniformity in packaging. Under the Marketing Orders, customers will know the size, number of pieces and overall weight of fruit in each box.

[117] Is Gerawan part of a group that is "bound together and required ... to market their products according to cooperative rules?" The answer is “Yes” with respect to those items in paragraph [116]; but “No” with respect to many important aspects of marketing. The “No” answer: Under the Marketing Orders, the fruit is not jointly marketed (there is no Order-wide cooperative; a few cooperatives exist; they are the exception rather than the rule). The “No” answer continues, with the following important marketing features **not** set, variable: the market areas; the customers; the quantity of fruit that a handler may market; and the prices (and the prices best not be set, as there is no anti-trust exemption for price fixing!). Further, the “No” answer continues with the following, beyond the minimum standards, **not** set, variable in ways that make a tremendous difference in the consumer’s eating experience: growing methods; harvesting methods; degree of ripeness when picked; the sugar content; the color; the variety; the flavor; the firmness; and other factors.

[118] I questioned Gerawan’s President:
ALJ: How does Gerawan measure the maturity of a peach? What does it depend on? What are the factors?
Mr. Dan Gerawan: Measuring, what way, in order to determine harvest time?
ALJ: Well, I’m beginning to think that when you determine whether it meets the highest grade of maturity or the lesser grade of maturity, that perhaps it has to do with size and color. But I don’t know for sure.
Mr. Dan Gerawan: Color, firmness, sweetness.
ALJ: Color, firmness, and sweetness.
Mr. Dan Gerawan: A mixture of those three. And depending on variety, you would give one or more of those factors more weight.
Tr. 366-67.

[119] Is the assessment regulation related to and in furtherance of other non-speech purposes, carrying out other aspects to further other economic, societal, or governmental goals? *See United Foods*, 533 U.S. at 415. The answer is Yes, but promotion including paid advertising is severable, and the expenses for the compelled generic advertising are severable.

[120] Gerawan’s Petition attacks neither the Act nor the regulations (the Marketing Orders). Gerawan’s Petition attacks one of the Committees’ activities, that of compelling Gerawan and the other handlers to pay assessments for generic advertising.

[121] On cross examination, AMS's counsel questioned Gerawan's person in charge of marketing (*See* Tr. 34-35):
Mr. Ray Gerawan: . . . . My - - the fact of CTFA, I'm not entirely against the agreement. I'm against the advertising portion of the agreement.
Ms. Deskins: Okay. Okay.
Mr. Ray Gerawan: . . . . - - my preference would be CTFA have a two-person office, and that's all, and all they would do is consumers would call in to get some information about California fruit. That would be my preference.
Ms. Deskins: Okay.
Mr. Ray Gerawan: I wouldn't want to do away with CTFA.
Ms. Deskins: Okay. Because you . . .
Mr. Ray Gerawan: I would say a two-person office, maybe three, and that's it.
Ms. Deskins: Okay. Because you believe the CTFA could inform people about California nectarines and peaches.
Mr. Ray Gerawan: Yeah. If they want to call in to find out, but I don't want them to use my money to put out advertisements on stuff that - - a product that I'm growing that's counter to my message.

Tr. 98-99.

[122] Gerawan proved that the California nectarine and peach industry, although always competitive, is even more competitive since the *Glickman v. Wileman* decision. Gerawan was a proponent of changing the regulations to allow for a utility grade of peaches and nectarines. Gerawan finds that with a utility grade it is able to improve the quality of its premium label and provide a lower-priced label with fruit of reduced quality that was previously packed in the premium label or culled out of shipments.

[123] Douglas Andrew Phillips, a "grower, packer, shipper of fruits" since 1971, described the utility grade, and the allowing of the sale of "U.S. mature", as regulation changes that did not cause his company to pack that much extra fruit but did allow the packing of some fruit that wouldn't have been allowed 10 years earlier. Tr. 497-98, 533-34.

[124] Dr. Melvin Peter Enns is a businessman in a family of growers, packers, and shippers of fresh fruit, peaches, plums, nectarines, apricots, and persimmons. Tr. 432-33. Dr. Enns has his PhD in psychology and was a professor for 18 years. Tr. 434. He was Vice-Chair of the CTFA

Executive Committee at the time of his testimony. Tr. 434.

[125] On direct examination, AMS's counsel questioned Dr. Enns:
Ms. Deskins: Can you tell us what, if any, changes there have been in these size and maturity regulations?
Dr. Enns: I'll use an analogy from an educational background. I perceive it as a two by two matrix. And if we have maturity on one (axis), we have Cal Well Mature being one category, and U.S. Mature being a second category. And then if we have grade on the other axis, we have U.S.#1 and Utility. so that would give you four boxes that you can pack,

a U.S.#1, Cal Well Mature;
a U.S.#1, U.S. Mature;
a Utility, Cal Well Mature, and
a Utility, U.S. Mature.

And I think the main change is we - - now to use my educational example - - we've gone from a pass/fail system, to a grading system. So instead of just having one box, and that being the passing box, and the rest failing, we now have an A box, a B box, a C box, and a D box.
Tr. 436.

[126] Dr. Enns identified PX 5, p. 7, the SUMMERIPE® ad. Tr. 459. He identified his company, WesPak (Tr. 459), as one of the four "Exclusive Distributors of SUMMERIPE® Premium Ready to Eat California Tree Fruit". PX 5 at 7.

[127] Dr. Enns confirmed: "The marketing order does not allow us to engage in price fixing. No. I don't think the marketing order is related to this issue. Tr. 462.

[128] On cross examination, Gerawan's counsel questioned Dr. Enns:

Mr. Moody: Okay. Would you characterize the California Tree Fruit Industry as fairly competitive?
Dr. Enns: Yes. I would.
Mr. Moody: And what's the impact of the highest grade and maturity regulations on your ability to compete?
Dr. Enns: I look at it as allowing us to really go out, as the State of California, and bust through some really tough markets and present a product that consumers know is going to be an excellent product. And if it's not an excellent product, it is going to be graded as, and clearly stated as a second product, a third product, a fourth product. And it's

going to allow people to buy a perishable product from thousands of miles away and have confidence that this product that they're buying is going to be what it was, and that they could buy it from Producer A, fill their load from Producer B, garner some of this and some of that, and it's coming from California. This stuff is quality regulated, and it's the finest in the world. Mr. Moody: Okay.
Dr. Enns: You hit a hot spot.
Mr. Moody: Oh, good. And you believe that they help you compete more effectively in the marketplace?
Dr. Enns: I think they allow us to bust down trade into other countries. I think MAP funds allow us to have - - to double our promotion that we could never get as individuals. I think that they provide a level playing surface for all the growers, large and small, and I think California fresh fruit is the envy of everyplace in the world.
Tr. 477-79.
Mr. Moody: Dr. Enns, does the marketing order place any restrictions of which customers you can sell to?
Dr. Enns: No.
Mr. Moody: Does it place any restrictions on the price you can offer your fruit for?
Dr. Enns: No.
Mr. Moody: Does it place any restrictions on the size of your grower base? Dr. Enns: No.
Mr. Moody: Does it place any restrictions on the timing of your sales?

Dr. Enns: No.
Tr. 488.

[129] On redirect examination, AMS's counsel questioned Dr. Enns:
Ms. Deskins: Mr. Enns, I want you to clarify, you used the term MAP. What does that mean, the MAP Program?
Dr. Enns: Oh, this is where CTFA applies for matching funds for export markets.[19] And CTFA is awarded funds close to $1 million a year for developing export markets.
Ms. Deskins: Okay.
Dr. Enns: And it's matching funds with our assessments that are used in primarily Taiwan, secondarily, and Hong Kong
Tr. 482.

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[19] These are matching funds for promotion in foreign markets through USDA's Foreign Agriculture Service.

[130] Ms. Vawter confirmed that California tree fruit marketing is competitive rather than cooperative in the following aspects: the growers are free to change handlers anytime they please; the handlers are free to sell to any customer they please; the committee does not take title to any of the commodity and sell it on behalf of the growers (as does the Date Committee). Tr. 1261, 864.

III. Gerawan's Withholding Payment of a Portion of its Assessments was in Good Faith and Not for Delay

[131] **Gerawan's withholding of payment of a portion of its assessments was in good faith and not for delay and in reliance on the advice of counsel.** Tr. 389-90.

[132] On direct examination, Gerawan's counsel questioned Gerawan's President:
Mr. Moody: Okay. In addition to what you told Ms. Deskins that motivated filing the Petition in May of 2001, did the Supreme Court's Decision of *United Foods* also play a role?
Mr. Dan Gerawan: Yes.
Mr. Moody: And why was that?
Mr. Dan Gerawan: When I read in *United Foods* that the Supreme Court presumed that a comprehensive scheme of regulations had displaced competition in the industry, and that that's what they based their *Wileman* Decision on, it was clear to me at that point that whatever the Supreme Court was thinking then, certainly is not the case now, especially since the great degree of deregulation we've had since then. So that's what I got from the *United Foods* decision.
Tr. 360-61.

[133] 7 U.S.C.:

§ 608c. Orders regulating handling of commodity

(14) Violation of order; penalty

(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 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 subsection 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).

[134] Gerawan's Petition has been on file since August 13, 2001. Gerawan's unpaid portion of assessments began to accrue with the production of May 2001, for which Gerawan's payment was due sometime thereafter.

[135] As counsel for Gerawan expressed (Mr. Moody at Tr. 13), it would be a pyrrhic victory to win a case ten years later and have no remedy at the end of the line.

[136] It is proper to deny AMS's request for a civil penalty. The 1946 case cited by AMS, *Ruzicka v. U.S.*, 329 U.S. 287 (1946), was decided during a time when promotional activities such as generic advertising had not been undertaken. The holding in *United Foods* sparked Gerawan's hope that it would win this time. Witness the numerous cases besides this one that sprang up in response to *United Foods*. *See* paragraph [93].

[137] On June 25, 2001, *United Foods* had struck down on First Amendment grounds the mushroom checkoff program created under the Mushroom Promotion, Research, and Consumer Information Act (the "Mushroom Act"), 7 U.S.C. § 6101, *et seq*. Gerawan's reliance on *United Foods* was justified, particularly since Gerawan knew there is no

government "collectivist" centralization of the market for tree fruit; competition has not been displaced by the regulations.
Gerawan knew that the California nectarine and peach growers and handlers are engaged in deep-seated free enterprise that can be characterized as fiercely competitive.

[138] Before *Livestock Marketing*, the reasoning in *Pelts & Skins v. Landreneau*, 365 F.3d 423 (5th Cir. 2004) (the alligator case) was very persuasive.

[139] Gerawan's position was also reinforced by language in *Delano Farms Company v. California Table Grape Commission*, 318 F.3d 895 (9th Cir. 2003). Noting the distinction between *Glickman v. Wileman* and *United Foods*, the Court said the "grape growers do not operate under the 1937 statute that substituted 'collective action' for the 'aggregate consequences of independent competitive choices' and expressly exempted them from the antitrust laws". Gerawan knew that the California nectarine and peach handlers in fact have not substituted collective action for their independent competitive choices and that they must abide by the antitrust laws.

[140] Further, Gerawan was justified in categorizing "research" with "promotion including paid advertising", even though I have separated out research in this Decision. The phrase "promotion including paid advertising" is included in the research provisions of the Marketing Orders, as in the AMAA.

[141] Illustrative is the following provision in the Peach Marketing Order with regard to using handlers' money:
§ 917.36 Expenses.
Each commodity committee is authorized to incur such expenses as the Secretary finds are reasonable and are likely to be incurred by the said commodity committee during each fiscal period for the maintenance and functioning of such committee, including its proportionate share of the expenses of the Control Committee; and for such research and service activities relating to handling of the fruit for which the commodity committee was established as the Secretary may determine to be appropriate. The funds to cover such expenses shall be acquired by the levying of assessments as provided in §§917.37.

7 C.F.R. § 917.36.

Note the use of the term "research" - - it must be meant to encompass promotion including paid advertising; otherwise, would fundraising for paid advertising be authorized?

Findings of Fact

[142] Congress has conferred powers on the Secretary of Agriculture to establish and maintain orderly marketing conditions for certain agricultural commodities specified within the Act known as the Agricultural Marketing Agreement Act of 1937, as amended (frequently herein, "the AMAA" or "the Act"). 7 U.S.C. §§ 601-627. (The AMAA reenacted specified provisions of the Agricultural Adjustment Act of 1933, as amended.)

[143] Where majority rule conflicts with constitutional rights such as those Gerawan enjoys under the First Amendment, balancing tests are required. The question, as it was in *United Foods*, is "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." 533 U.S. at 410.

[144] In balancing Gerawan's First Amendment rights against the government's interests in promotion including paid advertising under the Marketing Orders, these factors weigh against Gerawan's claim:

a. The promotion including paid advertising under the Marketing Orders relates to and is consistent with the government's goal under the AMAA of orderly marketing, including expanding and maintaining markets, creating demand, and increasing consumption. b. The Marketing Orders' promotion including paid advertising incorporates the will of the majority of those in California-grown nectarines and peaches industry, tempered by the Secretary's oversight which includes veto power, and eliminates "free-riders".

c. The Secretary has a reasonable interest in developing promotion including paid advertising through the paid staff of "agents" of the United States (the Committees, *see* paragraph [67]), with subsequent approval by the Subcommittees, the Committees, and the Secretary. d. The Secretary has a reasonable interest in encouraging sales in foreign markets and encouraging CTFA's award of nearly $1 million a year in matching funds for developing export markets through USDA's Foreign Agriculture

Service's Market Access Program (MAP) and may have a particular interest in encouraging sales in primarily Taiwan, and secondarily, Hong Kong. (*See* paragraphs [128] and [129].)

e. Government intervention in the marketplace has traditionally included collective research and promotion such as that being done under the Marketing Orders.

f. The government has a substantial interest in communicating health and safety messages regarding the fruit, and the Marketing Orders' promotion including paid advertising could and occasionally does include communications regarding health and safety.

g. The Secretary seeks not to compel Gerawan to speak, but to compel Gerawan to pay for the speech.

h. Gerawan is free to do its own advertising (as is each of the other handlers), to the extent it can afford to after paying its Marketing Orders assessments.

[145] In balancing Gerawan's First Amendment rights against the government's interests in promotion including paid advertising under the Marketing Orders, these factors weigh in favor of Gerawan's claim:

a. Gerawan has a vital interest in independence and competition in promotion including paid advertising that relates to and is consistent with the goal under the AMAA of orderly marketing, including expanding and maintaining markets, creating demand, and increasing consumption. (*See* paragraph [139], mentioning the 'aggregate consequences of independent competitive choices'.)

b. Gerawan has a reasonable interest in encouraging sales in foreign markets and may have a particular interest in encouraging sales in primarily Canada and Mexico. Tr. 115.

c. Applying the power of the United States government to force Gerawan to pay for promotion including paid advertising for its competitors, or even for itself, absent reasonably necessary requirements to achieve governmental objectives, abridges Gerawan's freedom of speech.

d. Gerawan has a substantial interest in communicating health and safety messages regarding its fruit, and either independently or through voluntary trade associations, Gerawan's promotion including paid advertising could include communications regarding health and safety.

e. Gerawan has a reasonable interest in targeting its own marketing areas with its message.

f. Gerawan has a reasonable, Constitutionally-protected interest in speaking its own marketing message.
g. Gerawan has a reasonable, Constitutionally-protected interest in choosing its own marketing messenger.
h. Gerawan has a reasonable interest in not being required to subsidize the expense[20] of the Marketing Orders' promotion including paid advertising, all of which Gerawan considers to be generally wasted, and which Gerawan considers to be at times skewed in favor of Gerawan's competitors, at times damaging to Gerawan and its own message, and at times not truthful about Gerawan's fruit.
i. Gerawan has a substantial interest in using its roughly one-quarter million dollars per year in its own way, rather than having that money spent in the Marketing Orders' promotion including paid advertising.

Conclusions of Law

[146] Governmental control and foresight over promotion including paid advertising are not built into the AMAA or the Marketing Orders in the same way as under the Beef Promotion and Research Act Beef of 1985 (addressed in "*Livestock Marketing*"). Under the Beef Promotion Act, the message is government speech: "The message of the promotional campaigns is effectively controlled by the Federal Government itself."

[147] In contrast, under the California Tree Fruit Agreement, the compelled promotion including paid advertising is authorized but is not government speech. Congress authorized "any form of marketing promotion including paid advertising". 7 U.S.C. § 608c(6)(I). Nevertheless, the attributes of government speech are missing. *See* paragraphs [90] through [99].

[148] The speech at issue here is "the statement of one self-interested group the government is currently willing to invest with power";[21] but it is not government speech.

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[20] Subsidizing includes not only helping pay for, but also enduring that speech that Gerawan was required to help pay for.

[21] *See* Justice Souter's dissent in *Livestock Marketing*, 125 S.Ct. at 2069.

[149] While *Glickman v. Wileman* describes what the AMAA authorizes, and consequently how the Marketing Orders ***could*** be operated, it does not describe how the Marketing Orders here are operated, which is at a much more minimal level of restriction on marketing autonomy.
See paragraphs [104] - [130].

[150] I disagree with Gerawan that it has a First Amendment claim not to pay for the research activities (even if they are marketing or promotion research activities) under the Marketing Orders. *See* paragraph [41]. Gerawan can be lawfully forced to pay for the research projects and activities under the Marketing Orders.

[151] Gerawan's First Amendment interests in not subsidizing promotion including paid advertising under the Marketing Orders outweigh the Secretary's interests in forcing Gerawan to pay; consequently, it is contrary to law for the Secretary to abridge Gerawan's First Amendment rights by confiscating Gerawan's money to pay for promotion including paid advertising.

[152] Gerawan had the burden of proof pursuant to section 8c(15)(A) of the AMAA. 7 U.S.C. § 608c(15)(A). Gerawan met its burden of proof.

[153] The Secretary's administration of the promotion including paid advertising under the Marketing Orders had a rational basis, was reasonable, was neither arbitrary nor capricious, and is entitled to deference, but nevertheless abridged Gerawan's freedom of speech guaranteed under the Constitution and thus was not in accordance with law; consequently, Gerawan's Petition must be granted in part.

Order

[154] Gerawan's Petition is **denied** in part and **granted** in part, as shown below.

[155] Gerawan's Petition is **denied** as to that proportion of withheld payment of assessments corresponding to research projects and activities under the Nectarine Marketing Order and the Peach Marketing Order; Gerawan's Petition is **granted**, and Gerawan is exempted from its obligation to pay, as to that proportion of withheld payment of assessments corresponding to promotion including paid advertising

under the Nectarine Marketing Order and the Peach Marketing Order. Gerawan is exempted from any further obligation to pay assessments corresponding to promotion including paid advertising under the Nectarine Marketing Order and the Peach Marketing Order.

[156] This Order shall be effective on the 11th day after this Decision becomes final.

[157] No sooner than 30 days, and no later than 60 days, following the effective date of this Order, Gerawan shall pay to the California Tree Fruit Agreement that amount of withheld payment of assessments under the Nectarine Marketing Order and the Peach Marketing Order that is proportional to research projects and activities, plus interest actually accrued on that portion while it was held in an interest-bearing account; except that, if either party files an appeal with the Judicial Officer, Gerawan shall maintain status quo with regard to the withheld portions of the assessments on deposit, awaiting further Order from the Judicial Officer.

[158] No sooner than 30 days, and no later than 60 days, following the effective date of this Order, Gerawan shall pay the remainder of the withheld payment of assessments under the Nectarine Marketing Order and the Peach Marketing Order to the producer(s) from which it was collected (presumably Gerawan, for the most part), plus interest actually accrued on that portion while it was held in an interest-bearing account; except that, if either party files an appeal with the Judicial Officer, Gerawan shall maintain status quo with regard to the withheld portions of the assessments on deposit, awaiting further Order from the Judicial Officer.

[159] AMS's Complaint is **granted** in part and **denied** in part, as shown below.

[160] Gerawan shall cease and desist from withholding payment of assessments that is proportional to research projects and activities under the Nectarine Marketing Order and the Peach Marketing Order.

[161] Gerawan shall not be required to pay any civil penalty pursuant to 7 U.S.C. § 608(c)(14)(B). AMS's request for a $150,000 civil penalty is **denied**. AMS's request for a civil penalty is **denied** in any amount, because Gerawan in good faith and not for delay, in reliance in part on *United Foods* and the advice of counsel, reserved the challenged

assessments which would otherwise have been spent and irretrievable. *See* paragraphs [131] through [141].

Finality

[162] This Decision becomes 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, in accordance with sections 900.64 and 900.65 of the Rules of Practice (7 C.F.R. §§ 900.64-900.65), and section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

_____

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: JEWEL BOND d/b/a BONDS KENNEL.
In re: AWA Docket No. 04-0024.
Decision and Order.
Filed January 9 , 2006.

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

Brian T. Hall for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Victor M. Palmer.

DECISION AND ORDER

Jewel Bond, the respondent in this proceeding, breeds dogs and sells them in interstate commerce under the trade name of Bonds Kennel. She is licensed as a Class B Dealer and is subject to regulation under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159; "the AWA"). Jewel Bond is charged in a complaint filed on August 19, 2004, by the Administrator of the Animal and Health Inspection Service ("APHIS") with violating the AWA and the regulations and standards issued under it (9 C.F.R. §§ 1.1-3.142), by failing to provide adequate veterinary care to dogs she has owned; failing to adequately construct, maintain, clean and sanitize the facilities where she houses dogs so as to protect their health and well-being; failing to provide her dogs with safe and adequate shelter; and failing to protect them from other animals, pests, contaminants, injury and disease.

Jewel Bond has elected to represent herself, *pro se*, and has denied the allegations. An oral hearing was held in Springfield, Missouri, on May 24-25, 2005. At the hearing, APHIS was represented by Brian T. Hill, Esq., Office of the General Counsel, Washington, D.C. Jewel Bond represented herself with the assistance of her former husband and present business helper, Larry Bond, who was allowed to interrogate and cross-examine witnesses, voice objections to evidence and present arguments. The testimony was transcribed (TR__), and exhibits were received from both APHIS, the complainant (CX___), and from Jewel Bond, the respondent (RX___). Subsequent to the hearing, both APHIS and Jewel Bond filed briefs in support of their positions. APHIS seeks

a cease and desist order, a one year suspension of Jewel Bond's dealer's license and a civil penalty of $10,000.00.

For the reasons that follow, I have found and concluded that Jewel Bond committed willful violations of the AWA and applicable regulations and standards, and that a cease and desist order, the suspension of her dealer's license for one year and the imposition of a $10,000.00 civil penalty are appropriate sanctions that are needed to deter future violations.

Pertinent Statutory Provisions, Regulations and Standards

The Animal Welfare Act
(7 U.S.C. §§ 2131-2159)

§ 2131 states the purposes of 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….

§ 2132 defines the term "dealer":

> (f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include---
>
> (i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or
>
> (ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year.

§ 2143 (a) authorizes the promulgation of standards for humane care and treatment:

> (1) The Secretary shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities and exhibitors.
>
> (2) The standards described in paragraph (1) shall include

minimum requirements---

(A) for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals; and

(B) for exercise of dogs, as determined by an attending veterinarian in accordance with general standards promulgated by the Secretary….

§ 2146 (a) places administration and enforcement with the Secretary of Agriculture:

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer…has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept…of any such dealer….

§ 2149 provides for license suspension or revocation, civil penalties and cease and desist orders:

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

(b)….Any dealer…that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500[1] for each such violation, and the Secretary may also make an

[1] In accordance with the Federal Civil Penalties Act of 1990 (28 U.S.C. § 2461), and the applicable implementing regulation (7 C.F.R. § 3.91(a), (b)(2)(v)), the civil penalty for a violation of the Animal Welfare Act was increased to a maximum of $2,750; and a knowing failure to obey a cease and desist order now has a civil penalty (continued...)

order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations….

§ 2151 authorizes the issuance of miscellaneous rules and regulations:

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

The regulations and standards
(9 C.F.R. §§ 1.1 – 3.142)

§ 1.1 reiterates the Animal Welfare Act's "dealer" definition:

…Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog …for use as a pet.

§ 2.40 requires each dealer to provide its animals adequate veterinary care:

> (a) Each dealer…shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section….
>
> (b) Each dealer…shall establish and maintain programs of veterinary care that include:

. . .

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[1](...continued)
of $1,650.

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

§ 2.100 requires each dealer to comply with the regulations and standards:

Each dealer...shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

§ 3.1 specifies standards for housing facilities for dogs and cats:

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

. . .

(c) *Surfaces*—(1) *General requirements*. The surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface; and

(ii) Be free of jagged edges or sharp points that might injure the animals.

(2) *Maintenance and replacement of surfaces*. All surfaces must be maintained on a regular basis. Surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

(3) *Cleaning*. Hard surfaces with which dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with § 3.11 (b) of this subpart to prevent accumulation of excreta and reduce disease hazards. Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material must be

raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta. Contaminated material must be replaced whenever this raking and spot-cleaning is not sufficient to prevent or eliminate odors, insects, pests, or vermin infestation. All other surfaces of housing facilities must be cleaned and sanitized when necessary to satisfy generally accepted husbandry standards and practices. Sanitization may be done using any of the methods provided in §3.11(b) (3) for primary enclosures.

. . .

(f) *Drainage and water disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal are of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

§ 3.4 specifies standards for the outdoor facilities used to house dogs and cats:

. . .

(c) *Construction.* Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal

barrels, cars, refrigerators or freezers, and the like must not be used as shelter structures. The floors of outdoor housing facilities may be of compacted earth, absorbent bedding, sand, gravel, or grass, and must be replaced if there are any prevalent odors, diseases, insects, pests, or vermin. All surfaces must be maintained on a regular basis. Surfaces of outdoor housing facilities—including houses, dens, etc.—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

§ 3.6 specifies standards for primary enclosures used to house dogs and cats:

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.* (1) Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosure must be kept in good repair.

(2) Primary enclosures must be constructed and maintained so that they:

(i) Have no sharp points or edges that could injure the dogs and cats;

(ii) Protect the dogs and cats from injury;

(iii) Contain the dogs and cats securely;

(iv) Keep other animals from entering the enclosure;

(v) Enable the dogs and cats to remain dry and clean;

(vi) Provide shelter and protection from extreme temperatures and weather conditions that may be uncomfortable or hazardous to all the dogs and cats;

(vii) Provide sufficient shade to shelter all the dogs and cats housed in the primary enclosure at one time;

(viii)Provide all the dogs and cats with easy and convenient access to clean food and water;

(ix) Enable all surfaces in contact with the dogs and cats to be readily cleaned and sanitized in accordance with §3.11(b) of this subpart, or be replaceable when worn or soiled;

(x) Have floors that are constructed in a manner that protects the dogs' and cats' feet and legs from injury, and that, if of mesh or slatted construction, do not allow the dogs' and cats' feet to pass through any openings in the floor;

(xi) Provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal

position, and to walk in a normal manner; and

(xii) Primary enclosures constructed on or after February 20, 1998 and floors replaced after that date, must comply with the requirements in this paragraph (a) (2). On or after January 21, 2000, all primary enclosures must be in compliance with the requirements in this paragraph (a) (2). If the suspended floor of a primary enclosure is constructed of metal strands, the metal strands must either be greater than 1/8 of an inch in diameter (9 gauge) or coated with a material such as plastic or fiberglass. The suspended floor of any primary enclosure must be strong enough so that the floor does not sag or bend between the structural supports….

§ 3.11 (a) and (d) specify standards for the cleaning of primary enclosures and pest control:

(a) Cleaning of primary enclosures. Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill type floors and the ground areas under raised runs with mesh or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards, pests, insects and odors.

. . .

(d) Pest control. A effective program for the control of insects, external parasites affecting dogs and cats, and birds and mammals that are pests, must be established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.

Findings of Fact

1. Jewel Bond, doing business as Bonds Kennel, 12250 Hwy 43, Seneca, Missouri 64865, is a dog breeder and dealer who currently holds and has annually renewed Class B Dealer's License 43-B-170 since its issuance on March 16, 1993. Jewel Bond was previously licensed as an "A" Dealer from January 10, 1983 until January 10, 1993. (RX 1). For the past ten years, she has kept about 200 dogs at a time at her facility which her attending veterinarian who testified to seeing a lot of kennels, has characterized as "a lot of dogs". (TR 223). During the period September 4, 2002 through July 23, 2003, she sold 222 puppies in interstate commerce to Okie Pets, PO Box 21, Ketchum, Oklahoma 74349, for $39, 690.00; averaging about $4,000.00 per month in sales to this one outlet alone.(CX 1; CX 4).

2. Animal dealers are required to comply with the AWA and the implementing regulations and standards for the protection of the health and well-being of the animals in their possession. To assure their compliance, APHIS employs Animal Care Inspectors and Veterinarian Medical Officers who periodically inspect the facilities that dealers operate and prepare written inspection reports of the violations that are found. The dealer is given a copy of each inspection report; an exit interview going over the report is conducted; and the dealer is given the opportunity to correct the deficiencies. (TR 5-6; TR 11-112).

3. On the basis of such periodic inspections of her facilities, Jewel Bond was charged with violating the AWA and the implementing regulations and standards in a disciplinary proceeding that resulted in the entry of a consent decision and order on September 6, 2002. (AWA Docket No. 01-0023; CX 70). In the consent decision, Jewel Bond, the named respondent, admitted that the Secretary had jurisdiction; neither admitted nor denied the remaining allegations of the complaint; agreed to a 30 day suspension of her license; agreed to pay a civil penalty of $6,000.00 of which $4,500.00 was to be spent for repairs on her facilities on or before August 1, 2002; and agreed to the entry of the following order:

> 1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall not violate the Act and the regulations and standards issued thereunder, and in particular, shall:
>
> (a) 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) Construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated;

(c) Construct and maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary;

(d) Provide for the rapid elimination of excess water from housing facilities for animals;

(e) Provide animals with adequate shelter from the elements:

(f) Provide a suitable method for the rapid elimination of excess water and wastes from housing facilities for animals;

(g) Provide sufficient space for animals in primary enclosures;

(h) Maintain primary enclosures for animals in a clean and sanitary condition;

(i) Keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes;

(j) Establish and maintain an effective program for the control of pests;

(k) Establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine; and

(l) Maintain records of the acquisition, disposition, description, and identification of animals, as required.

4. Periodic inspections of the facilities where Jewel Bond keeps her dogs were made by APHIS officials on May, 13, 2003, July 16, 2003 and August 25, 2003.

5. The inspection conducted on May 13, 2003, revealed the following:

(a) A female pug had suffered a prolapsed vagina or prolapsed uterus requiring surgical repair to prevent dryness and necrosis. (TR 7-8; TR 113-114; CX 4, CX 42 and CX 45). Also, a shar-pei exhibited swelling and inflamed areas on its rear extremities and redness, irritation and hair loss on its trunk, face and limbs, and itching skin. (TR 7-8; CX 42). At the conclusion of this inspection, Jewel Bond was charged with violating the standard set forth at 9 C.F.R. § 2.40 (b) (2) that requires the availability of emergency veterinary care. However, the inspector gave

her until May 15, 2003 to have the dogs examined by the attending veterinarian and apparently did not believe earlier attention was required. Inasmuch as Jewel Bond and the attending veterinarian have both testified that the dogs were examined within the prescribed two days time and received appropriate treatment, I conclude that 9 C.F.R. § 2.40 (b) (2) was not violated.

(b) There were violations of 9 C.F.R. § 3.1 (a), the general standard that regulates the construction and maintenance of structures housing dogs or cats. Three of the easternmost structures housing 15 dogs, had nails sticking through roofs; deteriorated plywood decking on the roofs with large portions rotted away; decayed wooden rafters that no longer supported the roof; and a black insulation board under the decking, as well as various wooden supports, had been eaten away by mice. The southwestern structure housing 11 dogs had plywood decking on the roofs that was deteriorated with large portions rotted away; the metal roofing portion was loose in several areas allowing rain to enter. Two other structures housing 49 dogs had rusted and broken hinges that did not securely attach the doors. The ramps on a newer large dog structure housing 8 dogs, were not properly secured to the building and were warped and free moving. (TR 8-11; CX 42).

(c) There were violations of 9 C.F.R. § 3.4 (c), the standard regulating the construction of outdoor facilities. The wooden surfaces of many of the interiors of the easternmost 3 structures and a newer large dog structure had not been regularly maintained as required by the standard and showed evidence of chewing and scratching that prevented proper cleaning and sanitizing. Approximately 50 animals were affected. (TR 10; CX 42).

(d) There was a violation of 9 C.F.R. § 3.6 (a) (2) (x), the standard regulating the design and construction of the floors of primary enclosures. The structure housing puppies had openings in the wire floors of the cages of the puppy building so large that the feet of the puppies were allowed to pass through the holes. One yorkie puppy was observed to have a leg completely through the floor of its cage. Eight puppies were affected by this condition. (TR 11; CX 42).

(e) There were violations of 9 C.F.R. § 3.11 (a) and (d), the standards for the cleaning of primary enclosures and pest control. Various deficiencies in respect to the cleaning, sanitization, housekeeping and pest control at the facilities that Jewel Bond had been previously instructed to correct, were still uncorrected. There was excessive accumulation of fecal waste due to inadequate cleaning. In addition to dog feces, there was rodent waste in boxes where dogs were housed with a buildup of 1 ½ inches in one box; and mice had chewed through the walls, floors and exterior

areas of the buildings. The APHIS inspector also found a wasp nest and bird droppings on rafters of the central, metal structure, but inasmuch as it is uncertain how long either condition existed and their minor nature, I do not find these conditions violated the standard. (TR 11-13; CX 42).

6. The inspection conducted on July, 16, 2003, revealed the following:
(a) There were violations of 9 C.F.R. § 3.1(c)(1)(i) in that the northeast kennel, the whelping building, and the puppy building exterior had rusted metal wire that was excessive and prevented required cleaning and sanitization.(TR 14-15; CX 62).
(b) There was a violation of 9 C.F.R. § 3.1(a) in that the floor in one of the boxes housing a dog was not structurally sound. It sagged as the dog walked on it and had gaping wire that could allow a paw to become wedged.(TR 15; CX 62).
(c) There was a violation of 9 C.F.R. § 3.1(F) in that the drainage system for waste disposal for the northwest large dog building was not working properly. It allowed waste to wash out on the ground and the wall of the building thereby failing to minimize vermin, insects and pest infestation, odors and disease hazards. This was a repeat violation. (TR 15-16; CX 62).
(d) The violations revealed in the prior inspection of May 13, 2003, respecting chewed and scratched wooden surfaces of buildings had been corrected. However, again in violation of 9 C.F.R. § 3.4 (c), wooden surfaces of the interior of boxes of the kennels were chewed and scratched and in need of repair and proper sealing to allow for cleaning and sanitization. (TR 16; CX 62).
(e) The insect control program at the facility was ineffective, in violation of 9 C.F.R. § 3.11 (d). (TR 16; CX 62).

7. The inspection conducted on August 25, 2003 revealed the following:
(a) There was a violation of 9 C.F.R. § 3.4 (c), in that there was raw, unsealed wood on the door frames of the northeast two buildings.(TR 17; CX 67).
(b) There was a violation of 9 C.F.R. § 3.6 (a) (2), in that the edge of metal flooring installed in replacement of earlier defective flooring, had sharp points that could easily damage the dogs in those pens.(TR 17; CX 67).
(c) There was a violation of 9 C.F.R. § 3.11 (c), in that a plastic washdown had large cracks in it that allowed debris and waste to collect that prevented proper cleaning and sanitizing of the facility.(TR 17; CX 67).

Conclusions

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

2. Jewel Bond is a dealer as defined in the Animal Welfare Act and the regulations.

3. As more fully set forth in findings 5, 6 and 7, *supra,* Jewel Bond willfully violated the Animal Welfare Act, the regulations and the standards as revealed by inspections conducted by APHIS on May 13, 2003, July 16, 2003 and August 25, 2003.

4. The appropriate sanctions for deterrence of future violations, is the issuance of a cease and desist order, the imposition of a one year suspension of Jewel Bond's dealer's license, and the assessment of a $10,000.00 civil penalty. In concluding that this penalty is appropriate, due consideration has been given to the size of Jewel Bond's business, the gravity of the violations, her good faith and the history of previous violations.

Discussion

Jewel Bond has engaged in business as Bonds Kennel for over 20 years selling dogs in interstate commerce as a "dealer" licensed under the Animal Welfare Act. She keeps some 200 dogs at her facility which is considered to be large, and averages over $4,000.00 per month in sales of dogs and puppies.

On September 6, 2002, she entered into a consent decision with APHIS in which she agreed to a 30 day suspension of her license, the payment of a $6,000.00 civil penalty of which $4,500.00 was to be spent on repairs to her facility, and the entry of a cease and desist order to not violate the Animal Welfare Act and the regulations and standards issued under it. Yet I find that on May 13, 2003, July 16, 2003 and August 25, 2003, Jewel Bond violated regulations and standards that were of the very type with which she agreed to comply under the terms of the consent decision. Testimony establishing these violations was given by an APHIS Animal Care Inspector and a Veterinarian Medical Officer. Both were extremely credible witnesses who produced photographic evidence corroborating their observations. I have, however, dismissed a charge in the complaint alleging an inadequate response to needed emergency veterinary care. I dismissed this charge because the APHIS Animal Care Inspector did not at the time of the inspection treat the

matter as an emergency in that he gave Jewel Bond two days to obtain veterinary care and she complied.

Each violation found in the course of the three inspections conducted in 2003 was willful. An act is considered "willful" under the Administrative Procedure Act (5 U. S. C. § 558 (c)) if the violator "(1) intentionally does an act which is prohibited,-irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." *In re Arab Stock Yard, Inc*., 37 Agric. Dec. 293, 306 (1978), *aff'd mem*., 582 F. 2d 39 (5th Cir. 1978); and *In re James E. Stephens, et al.,* 58 Agric. Dec. 149, 180 (1999). Jewel Bond's chronic failure to comply with the Animal Welfare Act and the regulations and standards, throughout the year that followed her signing the consent decree, constitutes obvious and careless disregard of the statutory and regulatory requirements, and her violations are clearly willful. *See Stephens, supra*, at 180

Jewel Bond's testimony and actions demonstrate a lack of good faith compliance with the Animal Welfare Act, and the regulations and standards that apply to her as a licensed dog dealer. She has obstinately refused to heed specific APHIS instructions. She became so incensed when told by an APHIS investigator that a building in her facility still did not meet applicable standards, she removed some ten dogs it housed and put them outside on a cold winter night when the temperature was only 20 degrees Fahrenheit. (TR 274-278). Her obstinacy, her fierce temper that can blind her to the needs and welfare of her dogs, her history of previous violations, and the gravity of her present violations which ignored basic needs of the dogs and puppies that she sells in interstate commerce, combine to require the imposition of a substantial sanction to achieve compliance and deter future violations.

I have accepted the recommendations of APHIS officials which I have concluded fully accord with the Animal Welfare Act's sanction and civil penalty provisions. If each standard that was found to have been violated at each of the three inspections is treated as a single violation, Jewel Bond committed 12 violations. Arguably, there were multiple violations of several of the standards. Therefore, the $10,000.00 civil penalty that is being assessed is far less than may be imposed by applying the $2,750.00 per violation amount authorized by the AWA against, at a minimum, 12 violations. A one year suspension of Jewel Bond's dealer's license is also presently indicated in that the prior, lesser thirty day suspension was an ineffective deterrent. The recommended inclusion of cease and desist provisions is also appropriate and needed. Accordingly, the following Order is being entered.

ORDER

It is hereby ordered:

1. Jewel Bond, 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 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 construct and maintain housing facilities for animals so that surfaces are free of jagged edges or sharp points, and may be readily cleaned and sanitized or be replaced when necessary;

(c) Failing to provide for the rapid elimination of excess water and waste from housing facilities for animals and properly maintaining the drainage systems for waste disposal;

(d) Failing to maintain primary enclosures for animals in a clean and sanitary condition, that have no sharp points or edges that could injure animals, and have floors that are constructed in a manner that protects the animal's feet from injury and do not allow their feet to pass through any opening in the floor;

(e) Failing to establish and maintain effective programs for the cleaning of primary enclosures and for the control of pests.

2. Jewel Bond is assessed a civil penalty of $10,000.00. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent by Fed-Ex, UPS, or another overnight delivery service to:

Brian T. Hill
United States Department of Agriculture
Office of the General Counsel
Marketing Division, Room 2325 A, South Building
1400 Independence Avenue, SW
Washington, DC 20250-1417

3. Jewel Bond's dealer's license is suspended for a period of one year and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Animal Welfare Act, the regulations and standards issued under it, and this order, including payment of the civil penalty imposed herein. When

respondent demonstrates to the Animal and Plant Health Inspection Service that she has satisfied this condition, a supplemental order shall be issued in this proceeding upon the motion of the Animal and Plant Inspection Service, terminating the suspension.

This decision and order shall become effective without further proceedings 35 days after the date of service thereof upon Jewel Bond, unless there is an appeal to the Judicial Officer by a party to the proceeding within 30 days after receiving this decision and order. In the event neither party files an appeal, payment of the civil penalty shall be sent to and received by Brian T. Hill within 60 days after service of this decision and order on Jewel Bond. The certified check or money order shall state upon it that it is in reference to AWA Docket No. 04-0024. Also, in the event neither party files an appeal, the one year suspension shall commence on the 60th day after service of this decision and order on Jewel Bond.

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In re: JEROME SCHMIDT, D/B/A TOP OF THE OZARK AUCTION.
AWA Docket No. 05-0019.
Decision and Order.
Filed February 10, 2006.

AWA – Auction barn sales – Refusal of access – Inspections, risk based, when not.

Frank Martin, Jr., for Complainant.
Jerome A. Schmidt, D.V.M for Respondent.
Decision and Order filed by Administrative Law Judge, Peter M. Davenport.

DECISION AND ORDER

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant] instituted this disciplinary proceeding by filing a Complaint on June 22, 2005 under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) [hereinafter the Act] and the Regulations and Standards [hereinafter Regulations and Standards] promulgated thereunder. (9 C.F.R. §§ 1.1 *et seq.*). The Complaint alleges that Jerome Schmidt, an individual doing business as Top of the Ozark Auction [hereinafter Respondent] willfully violated the Regulations and Standards. Complaint, ¶¶ II-XI.

The Respondent answered, denying the factual allegations contained in the Complaint and indicating that the facility has been found by many repeat consignors and buyers to be "an ideal venue for finding, replacing, and dispersing breeding stock. (Answer, pp 1-6).

An oral hearing was held on December 6, 2005 in Springfield, Missouri. The Complainant was represented by Frank Martin, Jr., Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. The Respondent, not represented by counsel, participated *pro se*, assisted by his wife, Karen Schmidt. The record in this case consists of the pleadings filed by the parties, the testimony of the four witnesses called by the Complainant, the thirteen witnesses, including the Respondent called by the Respondent and the 28 exhibits which were admitted during the course of the hearing.[1] Both parties have submitted post-hearing briefs in support of their respective positions.

The Respondent, Jerome A. Schmidt, is a veterinarian who has held a USDA license as a Class B Dealer since 1997.[2] Tr. 210, 290. The violations alleged in the Complaint are based upon ten inspections, all conducted by Sandra Meek, a USDA Inspector, at the Respondent's Top of the Ozark Auction facility where he conducts dog auctions which are open to both dealers and to the general public. Auctions at the facility are conducted only six or seven times per year, exclusive of full dispersal sales. Tr. 212. The auctions are conducted in a multi-purpose structural steel building. Half of the building contains cages for holding the dogs that are being sold[3] and is used for storage of items including hay. The other half contains the auction stand and the area for sale attendees, with the auction stand adjacent to the cage area situated so that the cage area is to the auctioneer's back. Tr. 213. Although the cage area contains approximately 400 steel and wire cages, no more than 240 are used for any particular sale. Tr. 212. The number of dogs sold at the facility increased from 890 in 2000, 1219 in 2001 to a high of 1342 in 2002, with the numbers sold in 2003 and 2004 only slightly less than the

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[1] Complainant's Exhibits 1-16 and 37-48 were admitted.

[2] CX 1-CX 5 are copies of the Respondent's applications for annual renewals of his license for 2001 through 2005. CX 6 is a copy of the Respondent's current license which bears an expiration date of March 24, 2006.

[3] Dogs are received at the facility and delivered to the purchasers on the day of the sale. Sales commence around 11:00 AM and are completed before 5:00 PM the same day.

number for 2002. Similarly, the gross dollar amount generated from commissions and fees on the sales increased from $15,500 in 2000 to $44,149 in 2004.[4] Although the Answer which was filed denied all of the allegations contained in the Complaint, at the hearing, the Respondent conceded that some of the violations cited by the USDA Inspector were valid,[5] denigrated the severity of the majority of the violations written up and emphatically disputed the balance. Tr. 300-302.

Implicitly embedded in his defense to the alleged violations is a strongly held and emotionally charged belief that the Respondent, those associated with him (including his wife[6]), and those employing his services as a veterinarian are being singled out as targets of harassment and increased scrutiny and inspection by USDA Inspectors. Dr. Schmidt's involvement with another Respondent was previously noted by Administrative Law Judge Dorothea A. Baker in *In re Marilyn Shepard, d/b/a Cedarcrest Kennel*, 61 Agric. Dec 478 (2002). In that case, there was indication in the record that "a superior to these inspectors [testifying in the case] indicated that he wanted to get the Respondent and to make an example of her." *Id* at 484. In giving great weight to the testimony of Dr. Schmidt whom she described as "an extremely qualified and reliable witness" (*Id* at 487) whose testimony differed significantly from that given by the inspectors, Judge Baker concluded "The evidence seems clear that the inspectors[7] were, for whatever reason, going out of their way to find violations." *Id* at 487. The disproportionately high frequency of inspections of the Respondent's facility which is operated on a part-time or infrequent

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[4] CX 1-CX 5.

[5] The Respondent's position is explained in more detail in his brief where he explains that some of what was observed related to transport containers used by the consignors which would not be a violation attributable to his facility. Respondent's Brief, pages 21-22. Although included on the Inspection Report, the allegation concerning the transport containers was not included in the complaint.

[6] The Respondent's wife, Karen Schmidt, is the respondent in a separate proceeding. AWA Docket No. 03-0024 currently pending before Chief Administrative Law Judge Marc Hillson.

[7] Inspector Jan Feldman, one of the inspectors criticized by Judge Baker, appeared as a witness and testified against Dr. Schmidt in this action. She was present at five of the ten inspections (November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003 and June 6, 2004). CX 9, CX 10, CX 12, CX 13 and CX 15.

basis,[8] the timing of findings of non-compliance beginning after his presence at one of the inspections and later participation in the *Shephard* case; the fact that violations were written for conditions which appear to have existed since the facility opened without being raised in prior or in subsequent inspections; the clear departures from published Agency policy, inspection protocols, and procedures; the inconsequential and subjective nature of some of the violations advanced in this proceeding; and the failure to corroborate more serious charges with objective evidence when the means to do so were obviously available all lend significant credence to his belief that he has been singled out for questionable treatment.

A total of 39 violations were alleged to have been observed during the course of the ten inspections conducted by Ms. Meek. Complaint ¶¶ II-XI. Of these, the Complainant withdrew two of the violations at the hearing and did not request findings for a third. Tr. 62; Complaint ¶¶ IV A.4, VI A.3, and VIII A.2. The remaining 36 alleged violations fall into the general categories of housing standards, structural soundness, soundness and security of the enclosures, house keeping and sanitation, trash on the premises, sufficiency of the lighting, the adequacy of the Respondent's insect and rodent control program, and most seriously, interference and refusal of access to the USDA Inspector.[9]

The Act authorizes the Secretary of Agriculture to promulgate the standards and other requirements governing the humane handling,

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[8] Dr. Gibbens testified that a risk-based inspection system is used to inspect licensed facilities, with the number of inspections based upon the expectation of finding non-compliance. Tr. 82. Despite this testimony, the first of the inspections finding non-compliance followed an inspection only one month prior in which no violations were noted. Four inspections were conducted in 2001 (March 18, 2001 [no violations], April 22, 2001, October 14, 2001 and November 4, 2001), two in 2002 (March 21, 2002 and October 13, 2002), three in 2003 (March 23, 2003, June 1, 2003 [no violations], and November 2, 2003) and three in 2004 (March 21, 2004, June 6, 2004 and September 12, 2004). The inspection on June 1, 2003 was conducted by Inspectors Meek and Jerry West. Tr. 74 The facility was also visited on September 17, 2004; however, no violations were reported on that occasion. (The photographs marked CX 17-36 were taken on that date, but were not admitted.) As the facility was only operated six or seven times a year, the facility was inspected more than 50% of the time it operated in 2001 and nearly that percentage in both 2003 and 2004. While facilities with chronic violations are targeted for inspection more frequently than other facilities as part of a risk-based inspection system, it would appear unlikely that any full-time facility has been inspected with anywhere near this percentage of days that it was operated.

[9] Although interference with an inspector is generally considered sufficiently serious to warrant suspension or revocation of a dealer's license, Dr. Gibbens, the USDA sanction witness was of the opinion that a civil penalty would be sufficient.

housing, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, carriers and intermediate handlers. The Secretary has delegated the responsibility of enforcing the Act to the Administrator of the Animal and Plant Health Inspection Service (APHIS). The regulations established under the Act are contained in Title 9 of the Code of federal Regulations (9 C.F.R. Chapter 1, Subchapter A, Parts 1, 2, and 3).

The following extract from the *Federal Register* sets forth an explanation of the Agency philosophy and position on inspections:

Enforcement of the AWA [Animal Welfare Act] is based upon random, unannounced inspections to determine compliance. In addition, APHIS uses a risk-based assessment to determine minimum inspection frequency. After inspection, all licensees are given an appropriate amount of time to correct any problems and become compliant. This cooperative system has been more effective than enforcement actions for each citation. *Federal Register*, Vol. 69, No. 134, Wednesday, July 14, 2004 at page 42094.

The above extract prefaced a regulatory change to 9 C.F.R. 2.126(b) which added a provision that a responsible adult must be made available to accompany officials during the inspection process. Prior to July 14, 2004, there was no such requirement.[10] One of the comments to the proposed change suggested that APHIS inspectors should inspect the property unaccompanied if no responsible adult were present. In responding to the comments, the following Agency position was clearly and unambiguously enunciated:

We do not perform unaccompanied inspections for many reasons, including the safety of the inspector. *Id*. at 42095

Provisions contained in The Animal Care Resource Guide, Dealer Inspection Guide[11] (which predate the regulatory change) are consistent and reflect this philosophy:

Prior to conducting the actual inspection:

- contact the licensee or authorized representative
- introduce yourself in a professional manner

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[10] CX 1-CX 5 indicate in Box 3 of the Application for License-License Renewal that the Respondent was the sole individual authorized to conduct business. Beginning in September of 2004, Dr. Schmidt designated Ronnie Lee Williams, an individual employed as a security guard, to accompany any inspectors. Tr. 197-202.

[11] This publication is available on the USDA Website.

- state the purpose for the visit
- show your USDA badge and ID if requested
- if appropriate, provide a business card

The inspector must be accompanied by the licensee or the licensee's designated representative (who should be at least 18 years of age), when conducting the inspection. Animal Care Resource Guide, Dealer Inspection Guide, Section 6.1.1 (4/00).

The Guide also sets forth the procedures for the Exit Briefing:

EXIT BRIEFING The exit briefing is the time to summarize everything that occurred during the inspection.

Take as much time as necessary during this opportunity to:

- discuss the non-compliant items in detail with the licensee or the facility representative
- assess his/her understanding of the problem(s)
- discuss what he/she may do to correct the problem, if asked
- make sure that licensee/representative understands what is expected of him/her
- educate him/her about animal welfare and the AWA regulations and standards

The exit briefing includes, but is not limited to:

- presenting the licensee or facility representative with a copy of the inspection report
- reading the inspection report with the licensee/facility representative
- reviewing the details of the inspection report
- answering questions
- obtaining signatures

Animal Care Resource Guide, Dealer Inspection Guide, Section 6.2.1 (3/99).

The testimony of Ms. Meek makes it clear that she understands how inspections are supposed to be conducted:

Q Ms. Meek, would you briefly describe for us how you go about conducting an inspection?

A. Initially, when we arrive on site at the facility, we contact the licensee or a designated representative. And it's my practice

> to go through the facility first after that initial contact, identifying any or all non-compliances with the licensee, suggesting corrective measures, and then follow up with a review of the required paperwork.
>
> And at the end of this, we conclude with an exit interview ensuring that the licensee does understand that these are non compliant items. (Tr.13).

While this misleading testimony might be reflective of how her inspections are normally conducted at other facilities, no effort was made during her direct examination to indicate that her inspection technique at the Respondent's facility was different than what she had described other than to indicate that she mailed the inspection reports to the Respondent rather than presenting him with a copy prior to her departure from the premises.[12] On cross-examination however, she acknowledged that she had notified the Respondent of her presence at the facility only twice, once when she visited the facility for the very first time when she was introduced by Jim Depew, another inspector and when she conducted an inspection accompanied by Dr. Sabala:

Q Did you ever introduce yourself when you came to my sale barn, ever?

A Yes, I have.

Q When?

A During the inspection with Jim Depew, when Dr. Sabelli[13] [phonetic] was with me during the last inspection that I was at your facility.

Q And you done - - Jim Depew introduced you when he came the first time.

A Correct. (Tr. 49-50).

Far from supporting the factual allegations contained in the Complaint, the record before me more clearly establishes that the inspections of the Respondent's facility were based upon some motivation or rationale other than the risk-based inspection system described by both Dr. Gibbens (Tr. 82) and contained in the previously cited portion of the *Federal Register*. The disproportionately high number of inspections previously noted, the findings of non-compliance for structural components that had been inspected numerous times in the past as well as subsequent to the inspections in question here without

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[12] No testimony was presented that an exit briefing was conducted for the inspection on September 12, 2004. CX 16 bears the notation "refused to sign".

[13] This appears to be Dr. David Sabala according to CX 16.

violations being noted[14] and the trivial, if not frivolous nature of the alleged violations for insufficient lighting,[15] cobwebs[16] and trash, including soda bottles and discarded food containers in a facility occupied by the general public during the course of an auction sale[17] all raise significant questions as to the impartiality or fairness of the inspections conducted at the Respondent's facility. The testimony of numerous witnesses, including a veterinarian employed by the Missouri Department of Agriculture and two individuals associated with the American Kennel Club, all tend to dispute the general conditions of non-

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[14] Fourteen violations are based upon structural requirements. Of these, four are written for cages with sharp or jagged edges (October 14, 2001, November 4, 2001, June 6, 2004 and September 12, 2004). Inspection of one of the cage panels reflected that what had been alleged as wire protruding into the cage was in fact nylon twine. (Tr. 200-202, 228-242, CX 48) CX 40 which does show a cage with broken wire (without any dog in the cage) but was not alleged as a violation. Two violations related to bare wire flooring (October 14, 2001 and November 4, 2001); however the later one was dropped. Ms. Meek's conclusory testimony failed to establish by competent means that the suspended wire flooring was smaller than 9 gauge. Three violations relate to the failure to have waste drains (April 22, 2001 [which alleged failure to remove excreta], October 14, 2001 and November 4, 2001). Waste drains are not necessary if there are catch pans filled with sufficient absorbent material to catch waste. Other structural violations allege rust and pitted surfaces on the support structures holding the cages. CX 42 shows an extremely sturdy support system with angle iron over the exposed edges of the wood. Even if the angle iron surface did have some rust, it would in no way affects the soundness of the structure. Other photographs which indicate the presence of rust appear to be of galvanized metal which is mildly oxidized.

[15] Two of the alleged violations (March 21, 2004 and June 6, 2004) were for insufficient lighting to conduct the inspection. The light in the facility is adequate however to read the sales program (Tr. 105), inspect AKC microchip information and compare it with a print out (even by a woman with older and dimmer eyesight) (Tr. 144) and presumably for prospective purchasers to visually inspect the dogs in their cages. Moreover, the section cited (3.1(d)) requires only that the lighting be sufficient to carry out husbandry requirements.

[16] Three such violations are alleged (March 23, 2004, March 21, 2004 and June 6, 2004). CX 37 reflects cobwebs on a rafter in the facility and CX 38 which is alleged to show spider webs in a support structure. The material contained in the photograph also resembles the absorbent material used in the facility. Dr. Schmidt's testimony which was not disputed that spiders pose no threat to the animals is credible. CX 45 and CX 46 also reflect spider webs in the support structure as opposed to the primary enclosure. CX 47 is a photo of a mud dauber nest identified by Dr. Schmidt as being in an area not available to the general public.

[17] Four such violations are alleged (November 2, 2003, March 21, 2004, June 6, 2004 and September 12, 2004).

compliance which are alleged and convey the positive impression that the Top of the Ozark Auction is a well run operation with high standards. The Respondent's witnesses included a number of dealers, breeders and employees who uniformly and without exception attested to Dr. Schmidt's exacting standards of cleanliness and his insistence on doing things correctly.[18] Of significantly greater concern to me after hearing the evidence is the egregious and repeated failure of the inspector to follow Agency policy and well-defined APHIS inspection protocols and procedures in this case. It is abundantly clear that the inspections of the Respondent's facility were not based upon a risk-based assessment, the inspections did not conform to established Agency procedures, and the subjective nature of the inspector's findings are at best inconsistent with either prior or subsequent inspection reports or the preponderance of the evidence. Given these factors, it is difficult to place much, if any, reliance upon either of the two inspectors testifying in this case.

For the above reasons, the following Findings of Fact and Conclusions of Law will be entered.

FINDINGS OF FACT

1. As the inspection of the Respondent's facility on March 18, 2001 found no items in non-compliance, the subsequent frequent inspections of the Respondent's auction facility commencing on April 22, 2001 were inconsistent with and not based upon an objective risk based assessment.

2. The number and frequency of the inspections conducted at the Respondent's facility is grossly disproportionate to the total number of days that the facility operated.

3. None of the ten inspections upon which the Complaint in this action are based, with the possible exception of the one conducted on September 12, 2004, conform to the requirements of established and published Agency guidelines or policy.

4. The failure of the inspector to conduct an Exit Briefing as required by the published guidelines operated to significantly impede or defeat

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[18] Tr. 99-102, 104-105, 128-130, 134-143, 150-153, 163-166, 179-187, 197-202 and 243. According to Jessica Lea Ann Vandergrift, Dr. Schmidt was an exacting taskmaster. Tr. 166.

the intent of the cooperative compliance program described in the previously cited extract from the *Federal Register*.

5. The inspector's failure to follow Agency procedures was observed by the other USDA personnel on several occasions, including other inspectors as well as a Veterinary Medical Officer, without corrective action being taken by them to insure that proper procedures were followed.

6. The conduct of the inspector in this case, including the frequency of inspections, the improper, inappropriate, unsupported and/or in many cases subjective violations is questionable at best.

7. The inspector's findings in the ten inspection reports are exaggerated, biased and unsupported by sufficient credible objective evidence of such non-compliance as would warrant punitive action or imposition of a pecuniary penalty against the Respondent.

CONCLUSIONS OF LAW

1. The inspector's conduct and repeated failure to follow Agency procedures and guidance are egregious and so tainted the inspection results as to preclude their being used for the purposes of an enforcement action.

2. The factual allegations of the Complaint alleging non-compliance with the Regulations and Standards on the part of the Respondent were not supported by credible evidence.

ORDER

1. The Complaint against the Respondent is **DISMISSED.**

2. The Administrator, Animal and Plant Health Inspection Service is directed to take appropriate corrective action to insure that published Departmental policy and procedures as expressed in the *Federal Register* and the Animal Care Resource Guide, Dealer Inspection Guide are followed by APHIS personnel in future inspections.

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In re: KAREN SCHMIDT d/b/a SCR KENNELS.
AWA Docket No. 03-0024.
Decision and Order.
Filed March 7, 2006.

AWA – Allegations, unsupported.

Robert Ertman for Complainant.
Respondent, Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision

In this decision, I find that Respondent Karen Schmidt d/b/a SCR Kennels committed seven violations of the Animal Welfare Act. I also find that Complainant Animal and Plant Health Inspection Service failed to meet its burden of proof with regard to nineteen additional violations alleged in the complaint. After weighing the gravity of the violations, I am assessing a civil penalty of $2,500 against Respondent, and I am not suspending or revoking her license under the Act.

Procedural History

On April 16, 2003, the Administrator of the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture issued a complaint under the Animal Welfare Act alleging that Respondent Karen Schmidt d/b/a SCR Kennels willfully violated the Animal Welfare Act and the regulations thereunder on numerous occasions. Specifically, the complaint alleged that violations were discovered at SCR during the course of five different inspections in 2000, 2001 and 2003. Three violations were alleged as a result of the January 24, 2000 inspection; four violations were alleged as a result of the July 18, 2000 inspection; six from the May 8, 2001 inspection; nine from the October 24, 2001 inspection; and eleven from the January 9, 2003 inspection. The complaint was served on Respondent on May 6, 2003 and Respondent's answer, denying or questioning each of the allegations, was filed with the Hearing Clerk on May 12, 2003. Respondent requested a hearing on the allegations in the complaint.

A hearing was originally slated to commence on September 8, 2004, but was rescheduled and I conducted a hearing on November 3-4, 2004 in Springfield, Missouri. Complainant was represented by Robert Ertman, Esq. Respondent proceeded pro se, but was assisted by Dr. Jerome Schmidt. Complainant called five witnesses and Respondent

called seven, including Dr. Schmidt.

Both parties filed briefs with proposed findings of fact and conclusions of law. In its reply brief, Complainant withdrew its proposed findings of and conclusions relating to the two inspections conducted in 2000. Thus, only the 26 alleged violations resulting from the two inspections conducted in 2001 and the single inspection in 2003 remain for my determination.

The Facts

Respondent Karen Schmidt is an individual doing business as SCR Kennels, located at 6740 Highway F, Hartville, Missouri. CX 6. p.1.[1] She is a retired teacher, and has raised and shown champion quarter horses. Tr. II—79-80. She holds USDA Class A Dealer License #43A2135. CX 6. SCR Kennels is a breeding dog kennel, and at the time of the most recent inspection that is the subject of this proceeding, SCR had 150 breeding females, over 20 breeding males, and a number of puppies. The primary function of SCR Kennels is to sell puppies in commerce, and it sold 442 puppies in 2001. *Id*.

Allegations of inappropriate government conduct

Throughout the course of the hearing, Respondent contended that it had been unfairly singled out by Complainant for a variety of reasons. While I intend to rule only on the existence or non-existence of the violations alleged in the complaint, it is worth noting that a number of witnesses testified, under oath, that USDA inspectors "were on a mission" against Respondent. Respondent attributes this to Dr. Schmidt's testifying in favor of kennel owners and against USDA at hearings in 1997 and 2001. In the latter case, *In re Marilyn Sheppard*, 61 Agric. Dec. 478 (2002), Administrative Law Judge Dorothea Baker found "The evidence seems clear that the inspectors were, for whatever reason, going out of their way to find violations." *Id.*, at 487.

Since Dr. Schmidt testified in the 1997 hearing, SCR Kennels, owned and operated by his wife, has been inspected at least ten times. CX 44. This is in addition to annual inspections by State of Missouri officials,

[1] Complainant USDA's exhibits are cited as "CX." Respondent Karen Schmidt d/b/a SCR Kennels's exhibits are cited as "RX." The transcript for the first day of the hearing is cited as "TR. I" and the transcript of the second day of the hearing is cited as "TR. II."

who apparently have generally found no violations. Dr. Schmidt testified that other kennels have taken to surreptitiously asking him for advice, because they feared that the USDA would crack down on them if they knew they were directly dealing with him. Tr. II—73-75. He stated that another individual, who he declined to name, was told by a USDA inspector that she should use another auction service than Dr. Schmidt's. Tr. 78. Len Clayton, an inspector with the Missouri Department of Agriculture, testified that he had heard that other kennels were aware of the threat of doing business with Dr. Schmidt, and that it was "common knowledge that USDA was going to take the Schmidts down." Tr. II-7. Mr. Clayton also testified that kennel owners felt that there was a relationship between Dr. Schmidt's name appearing as the veterinarian of record and their getting written up for violations. Tr. I-12. Marilyn Shepherd, who owned the kennel for whom Dr. Schmidt testified in the above-captioned case, indicated that "some of the breeders who had been using Dr. Schmidt . . . had decided that because of pressure from the USDA, that they had decided to no longer use Dr. Schmidt as their attending veterinarian." Tr. I—136-137. Mark Landers, a commercial breeder, testified that after Dr. Schmidt indicated that he believed that James Depue, a USDA inspector, transmitted a disease to Mr. Landers' dogs by not using appropriate protective clothing, Depue advised Landers to no longer list Dr. Schmidt as his veterinarian. Tr. II—46-47. There was no testimony in refutation of these various allegations.

I have made my determinations as to whether violations were present on the dates of the three inspections currently at issue in this matter, based on the evidence presented before me. However, the allegations of Respondent concerning government misconduct, while not being material to my decision, are quite serious. I have referred a copy of the transcript of this hearing to the USDA Inspector General's office for any further action they may wish to take.

The May 8, 2001 Inspection

APHIS Animal Care inspector Sandra Meek inspected Respondent's facility on May 8, 2001. Inspector Meek was accompanied by both Respondent and Dr. Schmidt and recorded her observations in an inspection report. CX 16. Other than the very brief narrative description of the alleged violations contained in CX 16, there was no photographic documentation of the violations alleged at this inspection, nor was there any testimony at the hearing about these violations on behalf of USDA,

other than Ms. Meek verifying that she wrote CX 16.[2]

With respect to the six willful violations alleged as a result of the May 8, 2001 inspection:

1. There is no reliable evidence to support the allegation that section 3.1(b) was violated as a result of there being an accumulation of weeds. There was no testimony on this allegation, and the inspection report simply states that there was "an accumulation of weed and grass growth around/in the outdoor enclosures which interferes with inspections, cleaning and pest management." CX 16, p. 2. There is no evidence of the height and thickness of the grass or weeds, or any description of how it would interfere with the above-described activities. As Respondent points out, in CX 44, Daniel Hutchings states that Ms. Meek stated that weeds were 6 to 12 inches or more, but there is no statement in this record that supports his statement. Meek makes no reference to the height of the weeds in her report. Further, as Respondent points out in her brief, it is highly unlikely that weeds of that height would be present that early in the season. Complainant has not carried its burden of proof with respect to this allegation.

2. The evidence does not support a finding of the presence of excessive rust that prevents required cleaning and sanitation of surfaces. The inspection report stated that seven primary enclosure door frames were excessively rusted to the extent that they could not be cleaned and sanitized. Once again, there was no testimony by Complainant on this issue, but just a confirmation by Ms. Meek that she wrote the inspection report which stated the existence of the violation, without any relevant details and without any photographic confirmation. On the other hand, both Dr. Schmidt and Ronnie Lee Williams testified that SCR used Rustoleum paint, which they testified was brown colored and looks like rust in photographs. Tr. II 66-67, 143-144. Nothing was offered to refute their testimony. Without any photographs or samples, and with the only testimony at the hearing being that brown Rustoleum was used on these surfaces, the preponderance of the evidence supports a finding

[2] Complainant occasionally refers to CX 12 in its brief. The document marked as CX 12, an affidavit executed by Ms. Meek dated March 18, 2001, was never offered into evidence. Furthermore, it basically just states that the May 8, 2001 inspection results are "As noted on the inspection." Had it been offered into evidence, there presumably would have been questions raised, given that it was dated two months before the May 8, 2001 inspection occurred.

that no violation was committed here.

3. The evidence does not support a finding that outside facilities were not provided with a wind break and a rain break. Once again, there was no oral testimony on this finding on behalf of Complainant. The only evidence presented by Complainant for this inspection date was a statement in Ms. Meek's inspection report that "The wind break for two adult Border Collies has been partially detached from the shelter and needs to be repaired or replaced." CX 16, p. 2. This statement is not even consistent with the charge in the complaint, which states that a wind break and a rain break were not even provided. In the absence of any specifics about the extent of the alleged detachment of the wind break, including whether and to what extent the two border collies alleged to have been impacted were in fact impacted by these conditions, Complainant has not met its burden of proof. Since the regulations only state that a wind break and a rain break are required, and are in effect a performance standard, part of the Complainant's burden is to show how the conditions expose the dogs to wind or rain. In the absence of any statement regarding the extent of the alleged detachment of the wind break, and the degree of exposure to wind that would have resulted, and in the absence of any other documentation of this violation, including photographs, this count must be dismissed.

4. Inspector Meek reported that "sixteen pens in the west side of the red barn . . . have broken wires . . . which need to be repaired." CX 16, p. 3. While the regulation cited prohibits an enclosure from having "sharp point or edges that could injure the dogs," 7 C.F.R. 3.6(a)(2)(I), Inspector Meek's report documents no actual or potential exposure to sharp points or edges that could harm the dogs. There is no photographic evidence, and no observations that would corroborate Complainant's conclusion that this regulation was violated. There must be some nexus shown between allegedly broken wires at the bottom of the pens and the sharp points or edges that could injure the animals. The regulation does not bar broken wires, unless the wires presented potential injury to the dogs. There is no factual allegation that would lead me to conclude that sharp points or edges were present at SCR on May 8, 2001. Complainant does not even make a prima facie showing regarding this violation.

5. The fifth allegation arising out of the May 8, 2001 inspection was that feeding receptacles were excessively chewed and worn and could not be sanitized. In support of this allegation, Complainant proffered

zero testimony, zero photographs, and a conclusory statement in the inspection report that "twenty-four food receptacles that are excessively chewed, worn and no longer able to be cleaned and sanitized."

On the other hand, SCR witness Ronnie Lee Williams, holder of a Missouri Class C license in Sanitary Water Supplies, Tr. I-143, testified to his sanitizing of plastic pails with chewed areas. He stated that it took approximately four minutes to sanitize a plastic pail and that even though there were chew marks and some discoloration, the pail was sanitized. Tr. I-149, RX 36. His testimony showed that the edges of a feeding pail could be chewed without preventing it from being easily sanitized. RX 42 (bottom photo). Complainant had no challenges to this testimony either in cross-examination or in rebuttal. Complainant has failed to show by a preponderance of the evidence that these twenty-four food receptacles were made of a non-durable material, and were no longer able to be cleaned and sanitized.

6. The final allegation of violation based on the May 8, 2001 inspection was that water receptacles were not kept clean and sanitized. As with the previous charge, the only evidence proffered by Complainant was the statement in the inspection report that "There are five water receptacles that are chewed, worn and no longer able to be cleaned and sanitized." CX 16, p. 2. There was no evidence allowing me to determine whether and to what extent these five water receptacles were chewed or worn. Apparently the type of pails used for feeding and watering were the same or similar, and Mr. Williams' unrefuted testimony that these receptacles were easily cleanable is persuasive. Dr. Schmidt testified that when a pail is found that is torn up, they simply throw them away, and that the use of plastic pails, particularly in the cold weather, is more beneficial to the dogs because it takes longer for the water to freeze. Tr. II-92-99. There is no basis for me to find that there was a violation of 7 C.F.R. §3.10 on the date of the inspection.

The October 24, 2001 Inspection

APHIS Animal Care Inspector Sandra Meek again inspected SCR on October 24, 2001. She was accompanied during this inspection by Jan Feldman. The two inspectors were accompanied by both Respondent and Dr. Schmidt. Their findings were memorialized in an inspection report. CX 17. In addition to the narrative in the report, Ms. Feldman took a number of photographs to document their observations. CX 18-27.

With respect to the nine willful violations alleged as a result of the October 24, 2001 inspection:

1. The complaint charges a violation of section 3.1(b) of the regulations for an accumulation of weeds at the kennel. Inspector Meek testified that CX 18, a photograph taken that day by Inspector Feldman, showed "excess weeding and grass growth, which can harbor insects, pests, disease . . .," Tr. I-33, and stated in her inspection report, CX 17, that the grass and weeds needed to be cut to prevent rodents and pests from breeding and "to protect the health and welfare of the animals." Inspector Feldman testified that she did not know how tall the grass was or how thick it was, and she did not know the type of diseases which could be spread. Tr. I—94-95.
Dr. Schmidt testified that the grass and weeds evident in CX 18 were generally about four inches high—"that it's getting time to be cut, but it's not where it's detrimental to the dogs." Tr. II-113. Dr. Schmidt testified that the fence depicted in the picture was 28 inches high, so that it appears that with the exception of one or two shrubs, the grass/weed height was not much more than four inches. Tr. II-111-113. The area depicted in CX 18 is very small, and the grass/weed level, while being above the height of a perfectly manicured lawn, does not appear to be a violation of the regulations. In the absence of any regulatory definition or convincing testimony as to what a violative accumulation of weeds is, Complainant has not met its burden here.

2. The second charge arising out of the October 24, 2001 inspection was that "surfaces of housing facilities were not kept free of excessive rust that prevents the required cleaning and sanitization of the surfaces." The inspection report, CX 17, referred to seven primary enclosures where the metal doors were "excessively rusted," and CX 20 consisted of four photographs which showed that a number of the enclosures had doors which were indeed rust colored. Inspector Meek testified that the doors were rusted and that one of the pictures showed that the wires were rusted to the point that they were broken. Tr. I—33-34. Dr. Schmidt testified that the doors were painted with Rustoleum, which was rust colored, and which inhibits the formation of rust. Tr. II—66-67. No scraping or samples were taken from these enclosures that would aid me in determining whether the doors were in fact rusted or just painted with Rustoleum as Dr. Schmidt testified without contradiction. Since the burden of proof is on Complainant, I must find that this count has not been proven.

3. The complaint alleges that chemicals and cleaning substances were stored in an unsafe manner, in violation of 9 C.F.R. 3.1(e). The inspection report, CX 17, indicates that chemicals such as paints and paint thinners were stored in SCR's red barn in proximity to bulk food supplies, rather than being stored in a cabinet or a separate area. There was no photographic documentation of this allegation, nor was there any substantive testimony that would support a violation finding here.

4. The complaint alleges that outdoor housing was not large enough to allow each animal to sit, stand and lie in a normal manner and to turn about freely. The gist of this count was that the kennel housing in a particular pen was not considered adequate to accommodate the number of dogs that were in that pen. Inspector Meek stated that CX 21, a photograph depicting a number of dogs in the corner of a pen, demonstrated that only two shelters, plus a lean-to which did not qualify as a shelter from the elements, was insufficient shelter for the eleven dogs in the enclosure. There was no demonstration of the size of the shelters that were in this pen, and why they were inadequate for the number of dogs housed. Looking at CX 21, which only depicts what appears to be a small corner of the pen, it is impossible to discern the nature and number of shelters present. Without any documentation as to the size of the shelters in the pen, a determination as to their adequacy cannot be made.

Respondent contended that the lean-to covered three doghouses, but offered no reliable documentation of this statement. Dr. Schmidt stated that with his training as a practicing veterinarian for many years, his judgment was that the shelter was adequate for these dogs. While I note that neither party presented me with convincing evidence as to the number of dogs involved and the number and dimensions of the shelters, the fact that I cannot determine from Complainant's photograph a reliable depiction of the conditions present on the day of the inspection, coupled with the requirement that it is Complainant's burden to show that the regulations were violated, leads me to find that a preponderance of the evidence does not support a violation here.

5. Complainant's allegation that outside facilities were not provided with a wind break and rain break at the entrance is not supported by the evidence. The regulation provides no specific measurements or standards as to the size or shape of the wind or rain breaks, so the key presumably is whether the shelter is protected against wind and rain. The only testimony proffered by Complainant on this count was the

statement by Inspector Meek describing CX 22 as a photograph of a shelter "without a proper wind break," and that the opening in front of the shelter was too large so that the wind and rain would go through. Tr. I—35-36. In CX 17, Meek mentioned but did not identify or photographically document two other outdoor wooden shelters as not having a wind break at the entrance, but there was no further testimony on the allegation. Meek also confirmed that there are no specifications for wind breaks and water breaks, but that the standard is they have to "protect the animals from the wind and the rain." Tr. I-60.

Dr. Schmidt testified in great detail on the nature and quality of the wind breaks at SCR, demonstrating that SCR's pens were designed to reduce the effects of wind and rain, and pointing out that for the one shelter that had the gap in front, that there was another board inside the shelter that prevented wind or rain from reaching the dogs inside. Tr. II—88-89. Dr. Schmidt stated that his judgment as to the adequacy of these shelters was superior to that of the USDA inspectors, Tr. II-84, and that SCR's shelters were as good or better than those that he said were recommended by USDA. Dr. Schmidt's detailed testimony in this area went unchallenged, and given the dearth of testimony proffered by Complainant, no violation is established here.

6. The sixth charge arising from the October 24, 2001 inspection concerns allegations that SCR did not maintain its primary enclosures in such a manner as to protect the animals from injury. Complainant has documented a number of incidences where broken wires or sharp edges in the enclosures presented potential injury hazards to the dogs sheltered therein. Inspector Meek testified that the six photographs contained in CX 23 demonstrated that several wire enclosures had broken wires, which were protruding in a manner which could cause harm to the dogs. Tr. I—37-38. In CX 17, her inspection report, Inspector Meek stated that eighteen primary enclosures posed safety threats to the dogs as a result of broken wires or side/bottom panels, but her testimony and the photographs only appear to document two such instances. Tr. I—66-67.

From Dr. Schmidt's testimony, it appears that repair of enclosures is a constant activity at SCR, particularly with dachshunds, which have a tendency to chew or claw at the enclosures. It was evident from CX-23, and from photographs proffered by Respondent, that there were many shiny clips on the enclosures that indicated repairs were made not long before the inspection—i.e., that Respondent appeared to be fairly diligent in monitoring and repairing broken wires. On the other hand, it is uncontroverted that at least two broken wires were in a position to potentially cause injury to the dogs, and thus I hold that Complainant

has proven a violation existed at the time of the inspection.

7. The seventh count in this inspection was that feeding receptacles were excessively chewed and worn and could not be adequately cleaned and sanitized. Inspector Meek indicated in CX 17 that five excessively chewed or rusted food receptacles were not able to be cleaned and sanitized. She testified that a rusted surface could not be properly cleaned and sanitized. Tr. I—69. CX 24 appeared to show that several food receptacles had some rust on their outside surfaces, but there is absolutely no evidence of any excessive chewing on these receptacles. Likewise, there is no evidence that there was any rust on the inside of these feeders, nor is there any evidence that any food was contaminated in any way by the rust.

Dr. Schmidt testified that there was no water in the feed or any other contamination and that the feeders were in good working order. Tr. II—142. Mr. Williams testified that the feeders could be easily sanitized with chlorine. Tr. I—146-147. In the absence of any evidence that the light coating of rust on top of and on the outside surfaces of the feeders would have prevented the cleaning or sanitizing of these feeders, Complainant has not met its burden of establishing a violation here.

8. Complainant once again cited SCR for having water receptacles that were not kept clean and sanitized. While CX 25 demonstrates that at least one plastic water container was chewed around the edges, that does not in itself indicate that it cannot be cleaned or sanitized. As I have already discussed with reference to the final count based on the May 8, 2001 inspection, I have no basis to find a violation of the cited regulation.

9. The final count derived from the October 24, 2001 inspection was an alleged failure to keep the kennel clean. Inspector Meek testified to "an accumulation of dirt and debris on the floor" of the whelping room, Tr. I-40-41, CX 26, stating that the dirt and other objects on the floor reflect that there was not a routine cleaning of the room. In addition, Ms. Meek discussed CX 27, a photograph showing an accumulation of spider webs in the ceiling surface area of the red barn, which also indicated to her that ". . . the facility is not being cleaned on a regular basis. Proper practices are not being followed." Tr. I--42. Dr. Schmidt stated that the inspection occurred before the cited areas had received their daily cleaning.

Looking at the photographs in CX 26, I do not see an accumulation

of dirt or debris that is indicative of a violation. I saw nothing in these photographs that would indicate a likelihood that the area could be a breeding or living area for pests, as alleged in the complaint. At worst, it looks like an area that could use a little cleaning, but hardly to the degree that constitutes a housekeeping violation. Nor do spider webs in the rafters of a barn, high above the area where dogs would be present, appear to present a hazard to the dogs. I find no violation of 9 C.F.R. §3.11 on the date of this inspection.

The January 9, 2003 Inspection

On January 9, 2003, Inspector Meek once again inspected SCR Kennel. On this occasion, Ms. Meek was accompanied by APHIS Senior Inspector Daniel Hutchings. Inspector Meek prepared an inspection report, CX 33, and Inspector Meek took photographs, CX 34-43. The inspectors were accompanied by both Karen Schmidt and Dr. Jerome Schmidt.

With respect to the eleven willful violations alleged as a result of the January 9, 2003 inspection:

1. Inspector Meek once again determined that "surfaces of housing facilities were not kept free of excessive rust that prevents the required cleaning and sanitization of the surfaces." Other than her statement that two metal door frames needed to be repaired or replaced, there was no documentation of this allegation. No photographs were taken, and no explanation was made as to the nature of the inadequacy of these two door frames. No violation of 9 C.F.R. 3.1(c) has been demonstrated by Complainant.

2. The complaint alleges that chemicals, cleaning substances and food supplies were stored in an unsafe manner. In particular, Inspector Meek testified that she observed an open bag of chemical insecticide near where the bulk food is stored. Tr. I—42-43. Exhibit 34 consists of two photos which document this observation.

Respondent did not deny that the open bag of insecticide was located as described by Inspector Meek, but rather downplayed its significance. Dr. Schmidt identified the insecticide as Rotenone and emphasized that it was a safe insecticide for dogs and humans, and was commonly used in gardening. Tr. II—125-126. He stated that there were no open bags or food containers near the Rotenone and that it presented no danger. Tr. II—124-125.

Complainant has sustained its burden in regard to this allegation.

While an insecticide may be safe to use under certain conditions, it would be hard to argue that it is permissible to store it in the same area that food is being stored, particularly where the regulation is clear that it must be stored either in a separate area or in a cabinet.

3. The third count in the complaint arising from the 2003 inspection was that "Housing facilities were not equipped with a drainage system that minimized contamination and disease risks." CX 33 discusses two aspects to this charge. First, the report mentioned that waste from two waste removal drainage pipes was running along a fence line rather than into the lagoon. Second, the report indicated that in the "small room" of the red barn, waste materials from the upper enclosures was being washed down between the back of the lower enclosures and the wall. There were no photographs and essentially no testimony on behalf of Complainant to support the lagoon allegation. With respect to the enclosures in the red barn, Complainant proffered CX 35 which appears to show that some hair had been trapped in the upper part of the lower enclosure.

Ron Williams, who has expertise in the area of waste management, testified that the lagoon system was in good shape and was working properly. The lagoon system, as described by Respondent in RX 39, appeared to be clearly separated from the dog enclosures by a fence. Mr. Williams testified it was an aerobic lagoon and was "highly serviceable." Tr. I—155-156. He was never cross-examined on his conclusion, nor was any evidence presented that would contradict his conclusion. Thus, I conclude that there was no violation with respect to the lagoon.

I also conclude that the testimony on CX 35 is not persuasive in demonstrating a violation of the regulations. From my observation of the photograph, it appears that there is just some accumulation of dog hair at the top of the lower enclosure. Other than that, I see nothing that appears to be waste. There is no readily identifiable solid waste material, contrary to the findings in the inspection report. While the inspection report indicates that only fiber board separates the two layers of enclosures in the small room of the red barn, Respondent points out in her brief (pp. 28-29) that fiber board would dissolve once it became wet, and that CX 20, photograph 4, demonstrated that the two layers of enclosures were actually separated by polymer plastic sheets. In the absence of any evidence that the "waste" was anything more than one day's accumulation of hair, I find no violation of the drainage and waste disposal regulation.

4. I find no basis for the allegation that the indoor housing facilities did not have adequate lighting to allow routine inspection and cleaning. It appears to me that this regulation does not mean that the facilities had to have sufficient lighting to allow an enforcement inspection of every nook and cranny in the facility, but rather applies to the routine daily inspections associated with running a kennel. That the inspectors needed to use a flashlight to observe the back of the enclosure does not in itself constitute a violation. Dr. Schmidt testified that in his opinion as an experienced veterinarian that the lighting provided was beneficial for animal husbandry, particularly for enhancing the kennel's conception rate. Tr. II-145. Dr. Schmidt also pointed out that the kennel's lighting arrangement had been inspected by compliance inspectors for years, and had never been criticized as being out of compliance with regulations. Id., 144-145. I find no violation here.

5. Complainant alleges that the wind and rain breaks in two of the outdoor shelters were inadequate to protect the dogs from the wind and the rain. In particular, the inspection report, CX-33, p. 2, indicated that the small protrusions extending three inches from the top of these two shelters were inadequate. As Respondent pointed out in her brief at p. 31, Meek apparently based this violation finding solely on her judgment, citing no standards or specifications in support of her exercise of judgment. Tr. I-60. Dr. Schmidt, an experienced veterinarian, testified in great detail how the structures at SCR protected, in his judgment, against wind and rain. Tr. II—80-88. SCR suggests in its brief that in a dispute between a veterinarian and a non-veterinarian as to the adequacy of wind and rain breaks, particularly where there are no specific, measurable standards, I should defer to the experienced veterinarian. I am inclined to agree, particularly where, as here, there was no veterinarian testifying on behalf of Complainant whose judgment differed from Dr. Schmidt's and where no evidence was generated, either through cross-examination or rebuttal, to contradict Dr. Schmidt's educated judgment. Complainant has not met its burden with regard to this allegation.

6. The sixth allegation in the complaint arising out of the January 9, 2003 inspection was that outside facilities were not provided with clean, dry bedding material at temperatures less than 50 degrees, in violation

of 9 C.F.R. 3.4(b)(4).[3] The inspection report stated that fifteen shelters did not "have appropriate bedding material that allows the animals to burrow down into." CX 33, p. 2. While the regulation does require clean and dry bedding material, the requirement that this material should be such that the animals can burrow down into it is nowhere to be found in the regulation. Dr. Schmidt testified at some length why Respondent's use of rubber mats was superior to other forms of bedding, including the fact that it was resistant to being torn up and thus was better able to insulate the dogs from colder temperatures. Tr. II—101-110. Once again, there is no evidence to contradict Dr. Schmidt's testimony, and I hold that there was no violation proven here.

With respect to the cleanliness of the bedding and the enclosures, see the discussion of the counts 9 and 10, *infra*.

7. The complaint cited SCR for not maintaining building surfaces in good repair, in violation of 9 C.F.R. §3.4(c). In particular, the inspectors cited SCR for having a broken hinge on a single door in one of the outdoor enclosures, causing the door to hang at an angle. CX 33, p. 3. A photograph, CX 38, confirms that the door to a shelter is indeed hanging by its top hinge. Respondent admits that the hinge was broken, but points out that the different color of the door where the hinge is missing indicates that the hinge could not have been broken for a very long time. Resp. Br. at 33-34, Tr. I-74. In addition, Inspector Meek testified that the missing hinge did not prevent animals from entering or leaving the shelter. Nevertheless, the hinge is missing, and a violation, although an exceedingly minor one, is established.

8. Complainant once again cites SCR for allowing primary enclosures to present sharp points or edges which could injure the dogs. Complainant indicated that there were a number of enclosures with broken and/or protruding wires, that one enclosure had a sheet of tin with sharp edges, and that another enclosure had two large protruding nails. Complainant also indicated that the failure of a light bulb to have a protective covering also constituted a violation due to the possibility of it breaking and exposing the dogs to broken glass.

Testimony on the broken wires was a bit hazy, as were the photographs that purported to show the wires. I saw and heard no evidence in support of the contention that protruding nails were present.

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[3] The complaint cited 3.4(b)(5), which presumably is a typographical error.

The sheet of tin did appear to have sharp edges; even though Respondent has contended that there were no dogs in the area at the time of the inspection, there was no indication that this was not an area that could be utilized for the dogs. The fact that it was not used by dogs on the day of the inspection is not necessarily dispositive as there was no indication that the enclosure had not been used recently or would not be used again shortly. This constitutes a violation, although in the absence of any showing of exposure of any dogs to this hazard, the violation is not one of great significance.

There is no basis for a finding that the failure to cover a light bulb constituted a violation. The far-fetched interpretation of the regulations, which indicate nothing that would lead any fact-finder to conclude that the covering of a light bulb would be required in these circumstances, combined with the fact that the light bulb had been in the same position through years of previous inspections by both state and federal inspectors without ever being cited, (Resp. Br., p. 35) seem to add credence to Respondent's oft-repeated contention that the inspectors were "out to get" SCR, and were looking for any possible interpretation of the regulations to beef up their complaint.

9. Respondent was charged with failure "to clean and sanitize enclosures as often as necessary to prevent an excessive accumulation of dirt, hair and fecal and food wastes." Complaint. There was an outdoor enclosure (identified as enclosure 13) that had a substantial accumulation of waste material. No dogs were seen in the pen at the time of the inspection and SCR has indicated that that pen had not been used for nearly a year before the inspection. Nevertheless, it is clear that an animal had been using the pen, since the amount of waste in it was clearly excessive. CX 41, p. 9. Len Clayton, a Missouri Department of Agriculture official called by Respondent, admitted on cross-examination that the pen in question appeared not to be in compliance with Missouri regulations. Tr. II—15. Tom Jacques, also with the same state agency, testified similarly. Tr. II—31-32. If the pen was not in use at the kennel, it is reasonable to surmise that the excessive waste observed by at least three inspectors and documented photographically would not have accumulated. While this is not a major violation, it clearly is not a demonstration of compliance.

The other allegations under this count are not as compelling. While it is true that there appear to be waste and hair in a few of the areas photographically depicted, there is nothing like the waste accumulated in enclosure 13. Respondent contends that the daily waste cleanup had not yet been undertaken, particularly since they were dealing with a

crisis from a broken sewage pipe, and the amounts of waste and hair in the other locations were not such as to indicate more than a day's accumulation. Likewise, the presence of rocks in a few of the indoor enclosures did not appear to me to present a cleanliness/sanitation problem, as there was no showing that it was more than the amount of rocks and gravel that dogs tended to bring into the enclosure in a normal day or two. Finally, I reject the contention that the water receptacles could not be cleaned and sanitized for the reasons discussed earlier.

10. The complaint also cited Respondent for failing to maintain housing premises free of accumulations of dirt, fecal matter, hair and debris. While this count seems to overlap with much of the previous count, the photographs and testimony appear to focus on the conditions caused by the broken drainage pipe in the kennel's sewage system. There is no dispute that there was a breakage in one of the pipes of the sewage system that served the kennel, nor is there any dispute that as a result of this breakage there were accumulations of waste matter that normally would not be present in a kennel complying with the requirements of the regulations regarding sanitation and cleanliness. CX 42. Although the problem was the result of an accident, the fact remains that there were violations caused by the sewage problem. The undisputedly accidental nature of the violation and the prompt cleanup that had already begun by the time the inspectors arrived are factors that I will weigh in my discussion on appropriate sanctions, *infra*.

11. The final allegation based on the January 9, 2003 inspection was for a lack of effective pest control. The only matter of significance alleged, other than the trivial observation of approximately 20 gnats, was the presence of rodent holes on the premises near the outdoor pens. The presence of several holes was well-documented. CX 43. The allegation was that these were active rodent dens, but no rodents were actually seen entering or exiting these dens during the course of the inspection.
The presence of the holes, which clearly could only be rodent holes, is enough to sustain a violation here. The inspectors were not required to stick their hands in the holes to determine whether there was activity or other indicia of the active presence of rodents. Sound practice would require that if a rodent hole were detected, then appropriate measures should be taken not only to eradicate the rodents, but to fill in the hole.

Conclusions of Law

1. Respondent did not commit any of the violations alleged in the complaint that were based on the May 8, 2001 inspection.

2. On October 24, 2001 Respondent was in violation of 9 C.F.R. § 3.6(a)(2)(i) for not maintaining its primary enclosures in such a manner as to protect all its dogs from injury. Complainant did not sustain its burden of proof with regard to any of the other eight violations alleged as a result of that inspection.

3. On January 9, 2003, respondent was in violation of 9 C.F.R. § 3.1(e), for storing chemicals and food supplies in an unsafe manner; of 9 C.F.R. § 3.4(c) for a minor failure to keep outdoor housing facilities in good repair; of 9 C.F.R. § 3.6(a)(2) for primary enclosures having sharp points or edges which could injure dogs; of 9 C.F.R. § 3.11(a) for the excessive accumulation of waste and dirt in enclosure 13; of 9 C.F.R. § 3.11(c) for the results of the accidental breakage of a drainage pipe in the kennel's sewage system; and of 9 C.F.R. §3.11(d) for the presence of rodent holes near the outdoor pens. Complainant did not sustain its burden of proof with respect to any of the other allegations in the complaint resulting from that inspection.

Sanctions

Complainant has requested that I impose a civil penalty of $25,000 and a license suspension of at least a year against Respondent. However, Complainant failed to prove the significant majority of the violations, and many of these violations were minor or non-willful. Many of the citations give great credence to the contention of Respondent that it was being targeted by Complainant, including a number of counts, such as that involving the nature of bedding materials, the sanitization of water receptacles, the need for a protective covering over a light bulb, that involve interpretations of the regulations that are extremely questionable, at best. Even the more serious violations, such as exposing dogs to protruding wires or sharp edges, are obviated by the fact that Respondent has clearly and consistently been repairing these types of conditions as she becomes aware of them.

After closely examining the entire record in this case, I am convinced that no suspension of Respondent's license is warranted. For the violations I sustained, I am imposing a sanction of a $2,500 civil penalty. In imposing the civil penalty, I considered (1) the gravity of the violations, many of which were not very significant; (2) Respondent's

good faith, which was demonstrated by the generally good state of repair of the facility; and (3) the history of previous violations. I also find the penalty to be appropriate for the size of Respondent's business.

Order

Respondent has committed violations of the Animal Welfare Act and the regulations thereunder as detailed above. Respondent is assessed a civil penalty of $2,500, which shall be paid by a certified check, cashier's check or money order made payable to the order of "Treasurer of the United States."

Respondent shall cease and desist from violating the Animal Welfare Act and the regulations and standards thereunder. In particular, Respondent shall cease and desist from violating the seven regulations cited in my Conclusions of Law.

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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In re: JOHN F. CUNEO, JR., AN INDIVIDUAL; THE HAWTHORN CORPORATION, AN ILLINOIS CORPORATION; THOMAS M. THOMPSON, AN INDIVIDUAL; JAMES G. ZAJICEK, AN INDIVIDUAL; JOHN N. CAUDILL, III, AN INDIVIDUAL; JOHN N. CAUDILL, JR., AN INDIVIDUAL; WALKER BROTHER'S CIRCUS, INC., A FLORIDA CORPORATION; AND DAVID A. CREECH, AN INDIVIDUAL.
AWA Docket No. 03-0023.
Decision and Order as to James G. Zajicek.
Filed May 2, 2006.

AWA – Animal Welfare Act – Preponderance of the evidence – Complaint dismissed.

The Judicial Officer affirmed the decision by Chief Administrative Law Judge Marc R. Hillson dismissing the Amended Complaint. The Judicial Officer concluded

Complainant failed to prove by a preponderance of the evidence that Respondent James G. Zajicek violated the regulations issued under the Animal Welfare Act as alleged in the Amended Complaint.

Colleen A. Carroll and Bernadette R. Juarez, for Complainant.
Vincent J. Colatriano and Derek L. Shaffer, Washington, DC, for Respondent.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 11, 2003. Complainant 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 (2002)) [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]. On September 22, 2003, Complainant filed an Amended Complaint.

Complainant alleges: (1) on or about June 6, 2001, through on or about July 6, 2001, James G. Zajicek [hereinafter Respondent] willfully violated section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2002)) by operating as an exhibitor without an Animal Welfare Act license; (2) on June 26, 2001, Respondent willfully violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1) (2002)) by failing to handle Ronnie, an Asian elephant, as carefully as possible in a manner that did not cause trauma, physical harm, and unnecessary discomfort to the animal; (3) on June 26, 2001, Respondent willfully violated section 2.131(a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(2)(i) (2002)) by using physical abuse to train, work, and handle Ronnie, an Asian elephant; (4) on June 26, 2001, Respondent willfully violated section 2.131(b)(2) of the Regulations (9 C.F.R. § 2.131(b)(2) (2002)) by failing to provide Joy, an African elephant, a rest period between performances equal to the time of one performance; and (5) on June 26, 2001, Respondent willfully violated section 2.131(c)(1) of the Regulations (9 C.F.R. § 2.131(c)(1) (2002)) by exhibiting Joy, an African elephant, under conditions inconsistent with good health and well-being

(Amended Compl. Alleged Violations ¶¶ 7, 9-16).[4] On January 20, 2004, Respondent filed an answer denying the material allegations of the Amended Complaint.

On March 8 through 11, 2004, March 25, 2004, and October 28, 2004, the Chief ALJ conducted a hearing in Washington, DC. Colleen A. Carroll and Bernadette R. Juarez represented Complainant. Vincent J. Colatriano and Derek L. Shaffer, Cooper & Kirk, PLLC, Washington, DC, represented Respondent.

On August 17, 2005, after Complainant and Respondent filed post-hearing briefs, the Chief ALJ issued a Decision as to James G. Zajicek [hereinafter Initial Decision] finding Complainant failed to prove Respondent violated the Regulations as alleged in the Amended Complaint and dismissing the Amended Complaint as it relates to Respondent (Initial Decision at 1, 36).

On October 28, 2005, Complainant filed "Complainant's Appeal Petition." On December 22, 2005, Respondent filed "Response of Respondent James G. Zajicek to Complainant's Appeal Petition." On December 30, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I dismiss the Amended Complaint as it relates to Respondent.

DECISION

Complainant appeals the Chief ALJ's dismissal of the allegations that Respondent violated section 2.131(a)(1) and (a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(1), (a)(2)(i) (2002)) (Amended Compl. Alleged

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[4]Complainant also alleged that John F. Cuneo, Jr.; The Hawthorn Corporation; Thomas M. Thompson; John N. Caudill, III; John N. Caudill, Jr.; Walker Brother's Circus, Inc.; and David A. Creech violated the Regulations (Amended Compl. Alleged Violations ¶¶ 1-6, 8-61). Complainant and John F. Cuneo, Jr.; The Hawthorn Corporation; Thomas M. Thompson; John N. Caudill, III; John N. Caudill, Jr.; and Walker Brother's Circus, Inc., agreed to consent decisions. Administrative Law Judge Jill S. Clifton entered the consent decision as to Thomas M. Thompson on May 15, 2003. *In re John F. Cuneo, Jr.* (Consent Decision as to Thomas M. Thompson), 62 Agric. Dec. 194 (2003). Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] entered the consent decisions as to John F. Cuneo, Jr.; The Hawthorn Corporation; John N. Caudill, III; John N. Caudill, Jr.; and Walker Brother's Circus, Inc., in March 2004. *In re John F. Cuneo, Jr.* (Consent Decision as to John F. Cuneo, Jr., and The Hawthorn Corporation), 63 Agric. Dec. 314 (2004); *In re John F. Cuneo, Jr.* (Consent Decision as to John N. Caudill, III, John N. Caudill, Jr., and Walker Brother's Circus, Inc.), 63 Agric. Dec. 314 (2004). The record reveals the Hearing Clerk has not served David A. Creech with the Amended Complaint.

Violations ¶¶ 9-14).[5] Complainant's basis for these six alleged violations of section 2.131(a)(1) and (a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(1), (a)(2)(i) (2002)) is Respondent's purported striking an elephant during a performance on June 26, 2001, at Marne, Michigan, resulting in a "mark . . . about one half to three quarters of an inch long" on the trunk of the elephant (Complainant's Exhibit 15).

Section 2.131(a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(2)(i) (2002)) provides physical abuse shall not be used to train, work, or otherwise handle animals. Complainant alleges Respondent's striking an elephant during the June 26, 2001, performance constituted the use of physical abuse to train (Amended Compl. Alleged Violations ¶ 12), work (Amended Compl. Alleged Violations ¶ 13), and otherwise handle (Amended Compl. Alleged Violations ¶ 14) the elephant. Based solely upon Complainant's theory of the case, I find Respondent's purported striking an elephant during the June 26, 2001, performance relates only to Respondent's working the elephant and does not relate to Respondent's training or otherwise handling the elephant. Therefore, I dismiss paragraphs 12 and 14 of the Alleged Violations in the Amended Complaint as those paragraphs relate to Respondent.

As for the four other alleged violations (Amended Compl. Alleged Violations ¶¶ 9-11, 13), Complainant did introduce evidence to support his contention that Respondent committed the violations. However, after weighing all the evidence, I agree with the Chief ALJ's conclusion that Complainant failed to prove by a preponderance of the evidence[6]

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[5]Section 2.131(a)(1) and (a)(2)(i) of the Regulations provides, as follows:

> **§ 2.131 Handling of animals.**
>
> (a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.
>
> (2)(i) Physical abuse shall not be used to train, work, or otherwise handle animals.

9 C.F.R. § 2.131(a)(1), (a)(2)(i) (2002).

[6]The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re The International*

(continued...)

that Respondent violated the Regulations as alleged in paragraphs 9 through 11 and 13 of the Alleged Violations in the Amended Complaint. Since the case turns on the particular testimony and exhibits in this proceeding, no useful purpose would be served by analyzing the evidence in detail. I note, however, that of the three United States Department of Agriculture employees who observed the performance in which Respondent is alleged to have violated the Regulations, Dr. Denise M. Sofranko, Thomas P. Rippy, and Joseph Kovach, only Dr. Sofranko observed the alleged violations. Thomas Rippy testified he did not see Respondent do anything that could have possibly harmed the elephants participating in the performance or that could have been a possible violation of the Animal Welfare Act. Complainant failed to call Joseph Kovach as witness; however, Complainant did introduce a

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[6](...continued)
Siberian Tiger Foundation (Decision as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady), 61 Agric. Dec. 53, 79-80 n.3 (2002); *In re Reginald Dwight Parr*, 59 Agric. Dec. 629, 643-44 n.8 (2000) (Order Denying Respondent's Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 149, 151 (1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1107-08 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1052 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1015 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *aff'd*, 189 F.3d 473 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *aff'd*, 173 F.3d 422 (Table) (3d Cir. 1998), printed in 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

United States Department of Agriculture inspection report in which Joseph Kovach states he found no violations of the Animal Welfare Act or the Regulations during his June 26, 2001, inspection. (Transcript 76-79, 125-26, 204; Complainant's Exhibit 109 at 2.)

Complainant raises a number of issues relating to the Chief ALJ's discussion of the factors he relied upon to reach his conclusion that Complainant failed to prove Respondent violated the Regulations as alleged in the Amended Complaint (Complainant's Appeal Pet.). I do not adopt the Chief ALJ's discussion. Therefore, I find the issues raised by Complainant relating to the Chief ALJ's discussion, moot.

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

ORDER

Complainant failed to prove by a preponderance of the evidence that Respondent violated section 2.131(a)(1) and (a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(1), (a)(2)(i) (2002)), as alleged in the Amended Complaint. Accordingly, the Amended Complaint, as it relates to Respondent, is dismissed.

In re: JEWEL BOND, d/b/a BONDS KENNEL.
AWA Docket No. 04-0024.
Decision and Order.
Filed May 19, 2006.

AWA – Animal Welfare Act – Willful – Correction of violations – Repeated.

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's decision: (1) finding that Respondent violated the regulations and standards issued under the Animal Welfare Act (Regulations and Standards); (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $10,000 civil penalty; and (4) suspending Respondent's Animal Welfare Act license for 1 year. The Judicial Officer rejected Respondent's contention that the correction of Respondent's violations negated Respondent's violations. The Judicial Officer also rejected Respondent's contention that her violations were not repeated, stating *repeated* means more than once.

Brian T. Hill, for Complainant.
Respondent, Pro se.
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 Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 19, 2004. Complainant 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].

Complainant alleges, on May 13, 2003, July 16, 2003, and August 25, 2003, Jewel Bond, d/b/a Bonds Kennel [hereinafter Respondent], violated the Regulations and Standards (Compl. ¶¶ II-IV). On September 15, 2004, Respondent filed an answer denying the material allegations of the Complaint.

On May 24 and 25, 2005, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] conducted a hearing in Springfield, Missouri. Brian T. Hill represented Complainant. Respondent represented herself with the assistance of Larry Bond, Seneca, Missouri. On January 9, 2006, after Complainant and Respondent filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision]: (1) concluding Respondent violated the Animal Welfare Act and the Regulations and Standards; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $10,000 civil penalty; and (4) suspending Respondent's Animal Welfare Act license for 1 year (Initial Decision at 13, 16-17).

On February 16, 2006, Respondent filed an appeal to, and requested oral argument before, the Judicial Officer. On March 16, 2006, Complainant filed a response to Respondent's appeal petition. On April 6, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm, with minor exceptions,` the ALJ's Initial Decision.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." References to the transcript are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

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

§ 2131. Congressional statement of policy

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

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

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

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

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

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or

dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

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

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

§ 2149. Violations by licensees

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

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

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

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the

alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 2151. Rules and regulations

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

7 U.S.C. §§ 2131, 2132(f), 2149(a)-(c), 2151.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

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

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

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

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a

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

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

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

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

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

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

PART 3—STANDARDS

SUBPART A—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

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

. . . .

(c) *Surfaces*—(1) *General requirements*. The surfaces of housing facilities–including houses, dens, and other furniture-type fixtures and objects within the facility–must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface[.]

. . . .

(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation.

Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

. . . .

3.4 Outdoor housing facilities.

. . . .

(c) *Construction*. Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal barrels, cars, refrigerators or freezers, and the like must not be used as shelter structures. The floors of outdoor housing facilities may be of compacted earth, absorbent bedding, sand, gravel, or grass, and must be replaced if there are any prevalent odors, diseases, insects, pests, or vermin. All surfaces must be maintained on a regular basis. Surfaces of outdoor housing facilities—including houses, dens, etc.—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements*. . . .

(2) Primary enclosures must be constructed and maintained so that they:

(i) Have no sharp points or edges that could injure the dogs and cats; [and]

. . . .

(x) Have floors that are constructed in a manner that protects the dogs' and cats' feet and legs from injury, and that, if of mesh or slatted construction, do not allow the dogs' or cats' feet to pass through any openings in the floor[.]

. . . .

. . . .

§ 3.11 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning of primary enclosures*. Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with mesh or slatted floors must be cleaned as often as necessary to prevent accumulations of feces and food waste and to reduce disease hazards pests, insects and odors.

. . . .

(d) *Pest control*. An effective program for the control of insects, external parasites affecting dogs and cats, and birds and mammals that are pests, must be established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.

9 C.F.R. §§ 1.1; 2.40, .100(a); 3.1(a), (c)(1)(i), (f), .4(c), .6(a)(2)(i), (x), .11(a), (d) (footnote omitted).

DECISION

Findings of Fact

1. Respondent, doing business as Bonds Kennel, 12250 Highway 43, Seneca, Missouri 64865, is a dog breeder and dealer who currently holds and has annually renewed class B dealer's license number 43-B-0170 since its issuance on March 16, 1993. Respondent was previously licensed as a class "A" dealer from January 10, 1983, until January 10, 1993. (RX 1.) For the past 10 years, Respondent has kept

approximately 200 dogs at a time at her facility, which her attending veterinarian, who testified to seeing numerous kennels, has characterized as "a lot of dogs" (Tr. 223). During the period September 4, 2002, through July 23, 2003, Respondent sold 222 puppies in interstate commerce to Okie Pets, P.O. Box 21, Ketchum, Oklahoma 74349, for $39,690, averaging about $4,000 per month in sales to this one outlet alone (CX 1; CX 4).

2. Animal dealers are required to comply with the Animal Welfare Act and the Regulations and Standards for the protection of the health and well-being of the animals in their possession. To assure compliance with the Animal Welfare Act and the Regulations and Standards, the Animal and Plant Health Inspection Service employs animal care inspectors and veterinary medical officers who periodically inspect the facilities that animal dealers operate and prepare written inspection reports of any violations found. The dealer is given a copy of each inspection report; an exit interview is conducted during which the inspection report is reviewed; and the dealer is given the opportunity to correct the deficiencies. (Tr. 5-6, 11-112.)

3. On the basis of periodic inspections of Respondent's facilities, Respondent was charged with violating the Animal Welfare Act and the Regulations and Standards in a disciplinary proceeding that resulted in the entry of a consent decision on September 6, 2002 (CX 70).[1] In the consent decision, Respondent admitted the Secretary of Agriculture had jurisdiction; neither admitted nor denied the remaining allegations of the complaint; agreed to a 30-day suspension of her Animal Welfare Act license; agreed to pay a civil penalty of $6,000 of which $4,500 was to be spent for repairs on her facilities on or before August 1, 2002; and agreed to the entry of the following order:

> 1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall not violate the Act and the regulations and standards issued thereunder, and in particular, shall:
>
> (a) 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) Construct and maintain indoor and sheltered housing facilities for animals so that they are adequately

[1] *In re Jewel Bond* (Consent Decision), 61 Agric. Dec. 782 (2002).

ventilated;

(c) Construct and maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary;

(d) Provide for the rapid elimination of excess water from housing facilities for animals;

(e) Provide animals with adequate shelter from the elements;

(f) Provide a suitable method for the rapid elimination of excess water and wastes from housing facilities for animals;

(g) Provide sufficient space for animals in primary enclosures;

(h) Maintain primary enclosures for animals in a clean and sanitary condition;

(i) Keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes;

(j) Establish and maintain an effective program for the control of pests;

(k) Establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine; and

(l) Maintain records of the acquisition, disposition, description, and identification of animals, as required.

4. Animal and Plant Health Inspection Service officials inspected Respondent's facilities on May 13, 2003, July 16, 2003, and August 25, 2003.

5. On May 13, 2003, Respondent failed to keep housing facilities for dogs in good repair. Specifically, three of the easternmost structures, housing 15 dogs, had nails sticking through the roofs, deteriorated plywood decking on the roofs with large portions rotted away, decayed wooden rafters that no longer supported the roof, and a black insulation board under the decking, as well as various wooden supports, had been eaten away by mice. The southwestern structure, housing 11 dogs, had plywood decking on the roofs that was deteriorated, with large portions rotted away, and the metal roofing portion was loose in several areas allowing rain to enter. Two other structures, housing 49 dogs, had rusted and broken hinges that did not securely attach the doors. The ramps on a newer large dog structure, housing eight dogs, were not

properly secured to the building and were warped and free moving. (Tr. 8-10; CX 42 at 1-2.) (9 C.F.R. § 3.1(a).)

6. On May 13, 2003, Respondent failed to maintain surfaces in outdoor housing facilities so they could be readily cleaned and sanitized. Specifically, the wooden surfaces of many of the interiors of the easternmost three structures and a newer large dog structure had not been regularly maintained and showed evidence of chewing and scratching that prevented proper cleaning and sanitizing. Approximately 50 animals were affected. (Tr. 10; CX 42 at 2.) (9 C.F.R. § 3.4(c).)

7. On May 13, 2003, Respondent failed to provide primary enclosures that had floors constructed in a manner that protected dogs' feet and legs from injury. Specifically, the structure housing puppies had openings in the wire floors of the cages of the puppy building so large that the feet of the puppies were allowed to pass through the holes. One yorkie puppy was observed to have a leg completely through the floor of its cage. Eight puppies were affected by this condition. (Tr. 11; CX 42 at 2-3.) (9 C.F.R. § 3.6(a)(2)(x).)

8. On May 13, 2003, Respondent failed to clean primary enclosures and maintain an effective program of pest control. Specifically, there was excessive accumulation of fecal waste due to inadequate cleaning. In addition to dog feces, there was rodent waste in boxes where dogs were housed, with a buildup of 1½ inches in one box, and mice had chewed through the walls, floors, and exterior areas of the buildings. There was also a wasp nest and bird droppings on rafters of the central, metal structure. (Tr. 11-13; CX 42 at 3-4.) (9 C.F.R. § 3.11(a), (d).)

9. On July 16, 2003, Respondent failed to maintain interior surfaces of housing facilities and surfaces that came in contact with dogs, free of excessive rust, which prevented required cleaning and sanitization. Specifically, the northeast kennel, the whelping building, and the puppy building exterior had rusted metal wire that was excessive and prevented required cleaning and sanitization. (Tr. 14-15; CX 62 at 1.) (9 C.F.R. § 3.1(c)(1)(i).)

10. On July 16, 2003, Respondent failed to have a properly working drainage system in one of the housing facilities. Specifically, the drainage system for waste disposal for the northwest large dog building was not working properly. The drainage system allowed waste to wash out on the ground and the wall of the building, thereby failing to minimize vermin, insect and pest infestation, odors, and disease hazards. (Tr. 15-16; CX 62 at 1-2.) (9 C.F.R. § 3.1(f).)

11. On July 16, 2003, Respondent failed to maintain surfaces in outdoor housing facilities so they could be readily cleaned and sanitized. Specifically, wooden surfaces of the interior of boxes of the kennels

were chewed and scratched and in need of repair and proper sealing to allow for cleaning and sanitization. (Tr. 16; CX 62 at 1-2.) (9 C.F.R. § 3.4(c).)

12. On July 16, 2003, Respondent failed to maintain an effective program of pest control. Specifically, Respondent's control of flies at her facility was not sufficient. (Tr. 16; CX 62 at 2.) (9 C.F.R. § 3.11(d).)

13. On August 25, 2003, Respondent failed to maintain surfaces in outdoor housing facilities so they could be readily cleaned and sanitized. Specifically, there was raw, unsealed wood on the door frames of the northeast two buildings. (Tr. 17; CX 67.) (9 C.F.R. § 3.4(c).)

14. On August 25, 2003, Respondent failed to maintain primary enclosures so they had no sharp points or edges that could injure dogs. Specifically, the edge of the metal flooring installed in replacement of earlier defective flooring in dog pens, had sharp points that could injure the dogs in those pens. (Tr. 17; CX 67.) (9 C.F.R. § 3.6(a)(2)(i).)

Conclusions of Law

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

2. Respondent is a dealer as defined in the Animal Welfare Act and the Regulations and Standards.

3. On May 13, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to keep housing facilities for dogs in good repair as required by section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)).

4. On May 13, 2003, July 16, 2003, and August 25, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain surfaces in outdoor housing facilities so they could be readily cleaned and sanitized as required by section 3.4(c) of the Regulations and Standards (9 C.F.R. § 3.4(c)).

5. On May 13, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide primary enclosures that had floors constructed in a manner that protected dogs' feet and legs from injury as required by section 3.6(a)(2)(x) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(x)).

6. On May 13, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to clean primary enclosures and maintain an effective program of pest control as required by section 3.11(a) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(a), (d)).

7. On July 16, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain interior surfaces of housing facilities and surfaces that came in contact with dogs, free of excessive rust, which prevented cleaning and sanitization as required by section 3.1(c)(1)(i) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)(i)).

8. On July 16, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to have a properly working drainage system in one of the housing facilities as required by section 3.1(f) of the Regulations and Standards (9 C.F.R. § 3.1(f)).

9. On July 16, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain an effective program of pest control as required by section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)).

10. On August 25, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain primary enclosures so they had no sharp points or edges that could injure dogs as required by section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)).

11. The appropriate sanctions for deterrence of future violations is the issuance of a cease and desist order, the imposition of a 1-year suspension of Respondent's Animal Welfare Act license, and the assessment of a $10,000 civil penalty. In concluding that this civil penalty is appropriate, due consideration has been given to the size of Respondent's business, the gravity of Respondent's violations, Respondent's good faith, and Respondent's history of previous violations.

Discussion

Respondent has engaged in business as Bonds Kennel for over 20 years, selling dogs in interstate commerce as a "dealer" licensed under the Animal Welfare Act. Respondent keeps approximately 200 dogs at her facility, which is considered to be large, and averages over $4,000 per month in sales of dogs and puppies.

On September 6, 2002, Respondent entered into a consent decision with the Animal and Plant Health Inspection Service in which she agreed to a 30-day suspension of her Animal Welfare Act license, the payment of a $6,000 civil penalty of which $4,500 was to be spent on repairs to her facility, and the entry of a cease and desist order to not

violate the Animal Welfare Act and the Regulations and Standards.[2] Yet, I find that on May 13, 2003, July 16, 2003, and August 25, 2003, Respondent violated the Regulations and Standards that were of the very type with which she agreed to comply under the terms of the consent decision. Testimony establishing these violations was given by an Animal and Plant Health Inspection Service animal care inspector and a veterinary medical officer. Both were extremely credible witnesses who produced photographic evidence corroborating their observations. I have, however, dismissed a charge in the Complaint alleging an inadequate response to needed emergency veterinary care (Compl. ¶ II A). I dismissed this charge because the Animal and Plant Health Inspection Service animal care inspector did not, at the time of the inspection, treat the matter as an emergency, in that he gave Respondent 2 days to obtain veterinary care and Respondent complied.

Each violation found in the course of the three inspections conducted in 2003 was willful. An act is considered "willful" under the Administrative Procedure Act (5 U.S.C. § 558(c)) if the violator (1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements.[3] Respondent's chronic failure to comply with the Animal Welfare Act and the Regulations and Standards throughout the year that followed her signing the consent decision constitutes obvious and careless disregard of the statutory and regulatory requirements, and Respondent's violations are clearly willful.[4]

Respondent's testimony and actions demonstrate a lack of good faith compliance with the Animal Welfare Act and the Regulations and Standards that apply to her as a licensed dog dealer. Respondent has refused to heed specific Animal and Plant Health Inspection Service instructions. Respondent became so incensed when told by an Animal and Plant Health Inspection Service investigator that a building in her facility still did not meet applicable standards, she removed

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[2]See note 1.

[3]*In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978).

[4]*See In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999) (stating the respondents' chronic failure to comply with the Animal Welfare Act and the Regulations and Standards over a period of almost 4 months presents an obvious and careless disregard of statutory and regulatory requirements; when an Animal Welfare Act licensee disregards statutory and regulatory requirements over such a period of time, the licensee's violations are clearly willful.)

approximately 10 dogs it housed and put them outside on a cold winter night when the temperature was only 20 degrees Fahrenheit (Tr. 274-78). Respondent's obstinacy, her temper that can blind her to the needs and welfare of her dogs, and the gravity of her violations which ignored basic needs of her dogs, combine to require the imposition of a substantial sanction to achieve compliance with, and deter future violations of, the Animal Welfare Act and the Regulations and Standards.

I have accepted the recommendations of Animal and Plant Health Inspection Service officials which I conclude fully accord with the Animal Welfare Act's sanction and civil penalty provisions. If each Regulation and Standard that I find to have been violated is treated as a single violation, Respondent committed 11 violations. Arguably, there were multiple violations of several of the Regulations and Standards. Therefore, the $10,000 civil penalty I assess is far less than may be imposed by applying the $2,750 per violation amount authorized by the Animal Welfare Act and the Federal Civil Penalties Inflation Adjustment Act of 1990 against, at a minimum, 11 violations.[5] A 1-year suspension of Respondent's Animal Welfare Act license is also presently indicated in that the prior, lesser 30-day suspension of Respondent's Animal Welfare Act license was not an effective deterrent. The recommended inclusion of cease and desist provisions is also appropriate.

Respondent's Request for Oral Argument

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[6] is refused because the issues are not complex and oral argument would appear to serve no useful purpose.

Respondent's Appeal Petition

Respondent raises six issues in Respondent's "Appeal to the Department's Judicial Officer" [hereinafter Respondent's Appeal Petition]. First, Respondent contends the ALJ erroneously concluded she violated sections 3.1(a), 3.4(c), and 3.6(a)(2)(x) of the Regulations

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[5]See 7 U.S.C. § 2149(b); 28 U.S.C. § 2461 (note); 7 C.F.R. § 3.91(a), (b)(2)(v).

[6]7 C.F.R. § 1.145(d).

and Standards (9 C.F.R. §§ 3.1(a), .4(c), .6(a)(2)(x)) on May 13, 2003; sections 3.1(a), (c)(1)(i), and (f), 3.4(c), and 3.11(e) of the Regulations and Standards (9 C.F.R. §§ 3.1(a), (c)(1)(i), (f), .4(c), .11(e))[7] on July 16, 2003; and sections 3.6(a)(2) and 3.11(c) of the Regulations and Standards (9 C.F.R. §§ 3.6(a)(2), .11(c)) on August 25, 2003, because she corrected the violations (Respondent's Appeal Pet. at 1-3).

I disagree with Respondent's contention that the ALJ erroneously found she violated the Regulations and Standards because she corrected the violations. Each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations and Standards. While Respondent's corrections of her Animal Welfare Act violations are commendable and can be taken into account when determining the sanction to be imposed, Respondent's corrections of her violations do not eliminate the fact that the violations occurred.[8] Therefore, even if I were to find that, subsequent to Respondent's violations of the Regulations and Standards, Respondent corrected the violations, I would not find the ALJ's Initial Decision error.

Second, Respondent contends her violations of section 3.11(a) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(a), (d)) on May 13, 2003, were not repeated because the violations were not found

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[7]The ALJ did not conclude Respondent violated section 3.11(e) of the Regulations and Standards (9 C.F.R. § 3.11(e)) on July 16, 2003. I infer, based on the record before me, Respondent intended to refer to the ALJ's conclusion that Respondent violated section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) on July 16, 2003 (Initial Decision at 12).

[8]*In re Eric John Drogosch*, 63 Agric. Dec. 623, 643 (2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (1999); In *re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, 173 F.3d 422 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206) (Table), printed in 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

in the same location as they were found during the Animal and Plant Health Inspection Service October 23, 2001, inspection (Respondent's Appeal Pet. at 2).

Section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) provides standards for cleaning primary enclosures and section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) provides standards for pest control. *Repeated* means more than once.[9] Therefore, multiple failures to clean primary enclosures constitute repeated violations of section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) even if different primary enclosures are involved in each violation. Further, multiple failures to comply with the standards for pest control constitute repeated violations of section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) even if the manner in which a respondent fails to comply with the pest control standards differs each time the violation occurs.

Third, Respondent states the Animal and Plant Health Inspection Service inspector, David Brigance, "was a little harsh" when he wrote an inspection report (CX 67) alleging Respondent violated section 3.4(c) of the Regulations and Standards (9 C.F.R. § 3.4(c)) on August 25, 2003 (Respondent's Appeal Pet. at 3).

Respondent neither denies she violated section 3.4(c) of the Regulations and Standards (9 C.F.R. § 3.4(c)) on August 25, 2003, nor contends the ALJ erroneously concluded she violated section 3.4(c) of the Regulations and Standards (9 C.F.R. § 3.4(c)) on August 25, 2003. Therefore, I find the issue of whether Mr. Brigance "was a little harsh," irrelevant.

Fourth, Respondent contends the ALJ assured Respondent during a pre-hearing conference that the hearing would concern only the May 13, 2003, July 16, 2003, and August 25, 2003, Animal and Plant Health Inspection Service inspections of her facility. Respondent asserts that, contrary to the ALJ's assurance, the ALJ received evidence of violations that had nothing to do with the findings during the May 13, 2003, July 16, 2003, and August 25, 2003, inspections of her facility and she was not prepared to defend against the allegations of these additional violations (Respondent's Appeal Pet. at 3-4).

As an initial matter, the record does not support Respondent's contention that the ALJ assured her during a pre-hearing conference that the hearing would concern only the May 13, 2003, July 16, 2003, and August 25, 2003, Animal and Plant Health Inspection Service

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[9]Merriam-Webster's Collegiate Dictionary 991 (10th ed. 1997).

inspections of her facility. The record contains a summary of one pre-hearing conference conducted by the ALJ with Complainant's counsel, Respondent, and Larry Bond on October 21, 2004.[10] The summary of the pre-hearing conference does not indicate that the ALJ assured Respondent that the hearing would concern only the May 13, 2003, July 16, 2003, and August 25, 2003, Animal and Plant Health Inspection Service inspections of her facility.

Moreover, even if I were to find the ALJ assured Respondent that the hearing would concern only the May 13, 2003, July 16, 2003, and August 25, 2003, Animal and Plant Health Inspection Service inspections of her facility and the hearing concerned violations that occurred on other occasions, I would find, at most, harmless error because the ALJ did not conclude that Respondent violated the Animal Welfare Act or the Regulations and Standards on dates other than May 13, 2003, July 16, 2003, and August 25, 2003.

However, the ALJ did find two violations that are not alleged in the Complaint. Specifically, the ALJ found, on July 16, 2003, Respondent violated section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)) and, on August 25, 2003, Respondent violated section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) (Initial Decision at 12-13). As Complainant did not allege these violations in the Complaint, I decline to conclude Respondent violated section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)) on July 16, 2003, and section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) on August 25, 2003.

Fifth, Respondent asserts the ALJ "was running interference for the Complainant" with respect to the issue of the date the Hearing Clerk served Respondent with the Consent Decision and Order (CX 70) issued in *In re Jewel Bond* (Consent Decision), 61 Agric. Dec. 782 (2002) (Respondent's Appeal Pet. at 4).

As an initial matter, I do not find the ALJ "was running interference for the Complainant." Instead, I find the ALJ was merely attempting to discern whether Complainant had proof of the date the Hearing Clerk served Respondent with the Consent Decision and Order (CX 70). Moreover, I find the date the Hearing Clerk served Respondent with the Consent Decision and Order (CX 70) is not relevant to this proceeding, and, even if I were to find the ALJ's inquiry (Tr. 211-14) error (which I do not so find), I would find the ALJ's inquiry harmless error.

Sixth, Respondent contends the ALJ did not allow her to rerun a

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[10]Notice of Hearing and Exchange Deadline filed by the ALJ on October 28, 2004.

videotape (CX 75) during her cross examination of Dr. Jeffrey Baker (Respondent's Appeal Pet. at 5).

I disagree with Respondent's contention that the ALJ prohibited Respondent's use of the videotape during her cross-examination of Dr. Baker. The record establishes that, while the ALJ expressed a preference that Respondent cross-examine Dr. Baker without using the videotape, the ALJ did not prohibit Respondent's use of the videotape (Tr. 157-62).

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

ORDER

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

(a) Failing to keep housing facilities for dogs in good repair;

(b) Failing to maintain surfaces in outdoor housing facilities so they can be readily cleaned and sanitized;

(c) Failing to provide primary enclosures that have floors constructed in a manner that protects dogs' feet and legs from injury;

(d) Failing to clean primary enclosures;

(e) Failing to maintain an effective program of pest control;

(f) Failing to maintain interior surfaces of housing facilities and surfaces that come in contact with dogs free of excessive rust that prevents cleaning and sanitization;

(g) Failing to have a properly working drainage system in housing facilities; and

(h) Failing to maintain primary enclosures so they have no sharp points or edges that can injure dogs.

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

2. Respondent is assessed a $10,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Brian T. Hill within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0024.

3. Respondent's Animal Welfare Act license is suspended for a period of 1 year and continuing thereafter until Respondent demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Animal Welfare Act, the Regulations and Standards, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that she has satisfied this condition, a supplemental order shall be issued in this proceeding upon the motion of the Animal and Plant Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license.

Paragraph 3 of this Order shall become effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order issued in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of the Order issued in this Decision and Order. Respondent must seek judicial review within 60 days after entry of the Order issued in this Decision and Order.[11] The date of entry of the Order issued in this Decision and Order is May 19, 2006.

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In re: SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC.
AWA Docket No. D-05-0002.
Decision and Order.
Filed June 7, 2006.

AWA – Primates – License denied – Inspection, full and complete.

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[11] 7 U.S.C. § 2149(c).

Colleen Carroll for Complainant.
Thomas J. Dandar for Respondent.
Decision and Order by Chief Administrative Law Judge Marc H. Hillson.

Decision

In this decision, I sustain the determination of the United States Department of Agriculture Animal and Plant Health Inspection Service (APHIS) to deny the application of Suncoast Primate Sanctuary Foundation, Inc. for a license to exhibit animals under the Animal Welfare Act. However, I remand the case to APHIS to conduct a complete investigation as to whether Petitioner qualifies as a licensee under the Act.

Procedural History

On June 30, 2004, Petitioner Suncoast Primate Sanctuary Foundation, Inc. (Petitioner), located at 4600 Alternate 19, Palm Harbor, Florida, applied to Respondent U.S. Department of Agriculture, APHIS, for a new exhibitor's license to operate an "animal sanctuary and educational facility" and a zoo. PX 1, RX 14.[1] The application was signed by Christy Holley, the Petitioner's president. On July 12, 2004, Dr. Elizabeth Goldentyer, Regional Director of APHIS's Eastern Region, wrote Ms. Holley that "prior to processing the application" APHIS would be "evaluating the application" to determine its relationship to the earlier permanent revocation of the license of The Chimp Farm. PX 3, RX 16. Following an inspection/investigation visit to the premises of Petitioner, the application was denied by letter of August 17, 2004. PX 5, RX 20. Petitioner filed a Request for Hearing dated September 7, 2004. PX 6. The matter was docketed with the Hearing Clerk in May 2005.[2] A hearing was conducted in Tampa, Florida on November 15, 2005. Thomas J. Dandar, Esq., represented Petitioner, and Colleen A. Carroll, Esq., represented Respondent. Both parties filed briefs with proposed findings of fact and conclusions of law.

[1] PX refers to Petitioner's exhibits. RX refers to Respondent's exhibits. Tr. refers to the transcript page.

[2] The delay between the filing of the Request for Hearing and the docketing by the Hearing Clerk was due to the absence of regulations concerning the conduct of proceedings to appeal license denials under the Animal Welfare Act. The scope of the Rules of Practice was amended on May 5, 2005 to include license denial appeals, and this matter was docketed shortly thereafter.

Pertinent Facts

APHIS's denial of Petitioner's license application was principally based on APHIS's determination that Petitioner was essentially the same entity that had its license revoked by APHIS in an earlier proceeding. The licensing regulations bar issuance of a license to an applicant whose license has been previously revoked.

The prior license revocation.

In August 1998, APHIS served a complaint on Anna Mae Noell and The Chimp Farm, Inc., alleging numerous serious violations of the Animal Welfare Act and the regulations thereunder. RX 1, p. 2. Although the license was issued to Anna Mae Noell d/b/a The Chimp Farm, Inc., RX 29, the complaint named both Ms. Noell and The Chimp Farm as co-respondents. Neither Anna Mae Noell nor The Chimp Farm filed a timely answer to the complaint or a response to a motion for a default decision. RX 1. Administrative Law Judge Bernstein issued a default decision which, among other sanctions, revoked their license.[3] They appealed to the Judicial Officer, who held that the age (Ms. Noell was in her mid-80's), ill-health and hospitalization of Ms. Noell was not a basis for setting aside the default decision. RX 1, p. 22. The Judicial Officer also denied a request on behalf of The Chimp Farm to reconsider his earlier decision, since that request was filed well beyond the time such requests were required to be filed, and since it raised an issue, concerning whether proper service was effectuated on The Chimp Farm, for the first time. RX 2. Finally, the U.S. Court of Appeals dismissed a petition for review filed on behalf of both parties, ruling that it was without jurisdiction because, once again, the parties filed their petition months after the Judicial Officer's decisions. RX 31.

The June 30, 2004 application

Respondent informed Petitioner in a letter dated July 12, 2004, that its application would be evaluated to determine whether issuance of a new license would violate the Decision and Order which permanently

[3] Since The Chimp Farm, Inc. was never licensed in its own right, there is some question as to whether USDA can revoke a license that it never granted in the first place. However, the Secretary's action in this case was affirmed by the Court of Appeals and is final and non-reviewable.

revoked the USDA license of The Chimp Farm[4]. PX 3, RX 16. Respondent indicated that an APHIS investigator would "be evaluating the corporate structure of the Suncoast Primate Sanctuary Foundation Inc., the ownership of the animals, property and enclosures, the funding of the operation and the management of the facility and employees." *Id*. A letter from Christy Holley on behalf of Petitioner, dated July 16, 2004, apparently mailed before receipt of the letter from Respondent, stated that they "would like to set up an appointment for an inspection as soon as possible." PX 4.

Rather than schedule an appointment to assist in obtaining the information Respondent indicated it would need to make a determination, Respondent instead sent, unannounced, two employees to Petitioner's premises on July 29, 2004. The team consisted of Greg Gaj, a field veterinarian and supervisor with APHIS's Animal Care Branch, Tr. 199, and Michael Nottingham, an experienced investigator in APHIS's Investigative and Enforcement Services. Tr. 224. Gaj stated that he would not normally go on such an investigation, since he was a supervisor, but that the "normal" person who would have gone "would have been potentially biased one way or the other." Tr. 215. He stated that he was basically an observer, while Nottingham was the lead investigator. Tr. 220.

The facility was closed to the public when they arrived, but there were a number of people on the property. Tr. 218-219, 225. Nottingham asked to speak to the owner or the person in charge and an individual told them that would be Debbie Fletcher[5]. Tr. 205, 226. RX 17, 18. Gaj indicated they were told to wait outside while the worker went inside the office to find Fletcher, and that while waiting 15 to 30 minutes they noticed a sign in the window indicating that Fletcher was manager of the facility. RX 17, Tr. 201. When they were allowed into the office, she told them that she did not have time to answer their questions as she was busy working with a number of 16 year old volunteers, and she told them to wait outside until one of the Petitioner's board members arrived on the premises to talk with them. *Id*. Approximately 45-60 minutes later, Leslie Smout, a CPA (since retired) and Christie Holley arrived. RX 17, Tr. 202. Nottingham questioned them briefly. Smout told him that he did not think that the animals had ever been formally transferred from the Chimp Farm to the Sanctuary,

[4] The letter did not mention Anna Mae Noell, even though the revoked license was in her name.

[5] Since her marriage to Jon Cobb in 2000 she has also been known as Deborah Fletcher Cobb.

but that they should talk to the Petitioner's attorney to be certain. Tr. 209, 286, RX 17, 18. Smout and Holley told the investigators that they would not give a statement without their attorney present, that their attorney was on vacation, and that the attorney would contact them when they got back from vacation. Tr. 203, 226-227, RX 17, 18. Gaj indicated that when he went to get his camera at the close of the meeting, the sign in the window indicating Fletcher was the manager was no longer there. Tr. 204, RX 17.

There was no evidence of any further contact between the parties before Respondent made its final determination denying the application for a license. Gaj indicated that other than the statement he prepared following the July 29 visit, he did no followup and had no further contact with Petitioner. Tr. 222. Nottingham likewise indicated that he was never contacted by Petitioner's attorney or anyone else on behalf of Petitioner subsequent to July 29. Tr. 227.

On August 17, 2004, Dr. Elizabeth Goldentyer, Regional Director of APHIS's Eastern Region, issued a letter rejecting Petitioner's application for a license. PX 5, RX 20. The denial was premised on the prohibition in the licensing regulations, at 9 CFR 2.11(a)(3), which states "A license will not be issued to any applicant who . . .(3) has had a license revoked . . . as set forth in §2.10," and on the prohibition in section 2.10 against issuing a license to any person whose license has been revoked "in his or her own name or in any other manner; nor will any partnership, firm, corporation or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed." Dr. Goldentyer apparently concluded that the applicants for the 2004 license were essentially the same parties subject to the1999 revocation of the license of Anna Mae Noell and The Chimp Farm—finding that the Chimp Farm continued to house animals at the same principal address and "the precise premises" where the Chimp Farm houses its animals were where Suncoast intended to exhibit its animals. Goldentyer also noted that "at least one of the Chimp Farm's directors is the president of Suncoast, and that the counsel for Chimp Farm is the registered agent for Suncoast." She concluded that issuing the new license to Suncoast Primate Sanctuary Foundation "would be tantamount to issuing a license to" the same entity whose license had earlier been revoked, in contravention of the regulations.

Dr. Goldentyer informed Petitioner that it had a right to request a hearing within 20 days of receipt of the denial letter, and Petitioner filed its Request for Hearing by letter dated September 7, 2004. The case was docketed by the Hearing Clerk in May, 2005 after the Rules of Practice were amended to include appeals of license denials.

At the hearing, and again in the briefs, Respondent retreated on several of the grounds originally offered as the bases for denying the license application. Thus, Dr. Goldentyer agreed that the fact that Mr. Dandar was counsel for The Chimp Farm and the registered agent for Petitioner should not have been a factor in denying the application. Dr. Goldentyer also indicated that she was not relying on the regulation at 9 CFR 2.9, which bans the licensing of any person who was an officer of a licensee whose license has been revoked and who was responsible for or participated in the violation which resulted in the revocation. Tr. 162. Thus, the fact that one of the Chimp Farm's directors—Christy Holley—was the president of Suncoast, would not seem to have any materiality as a basis for denying Suncoast's application, even though it was cited as one of the reasons in the August 17, 2004 letter.

Discussion

This is the first case decided since the Rules of Procedure were amended to allow appeals of license denial decisions under the Animal Welfare Act. Accordingly, there is not a great deal in the way of Agency precedent to guide the review process. However, several matters are clear. First, the Secretary is required to issue an exhibitor's license to an applicant who meets certain standards. Secondly, the Secretary is prohibited from issuing a license to an applicant whose license has been revoked. Third, a license issued to Anna Noell d/b/a The Chimp Farm was revoked in a default action under the Animal Welfare Act. The question is whether Petitioners are in fact so closely related to the persons whose license was revoked as to be barred under the regulations from receiving a license.

It was reasonable for Dr. Goldentyer, as the deciding Agency official, to inquire as to whether Petitioner was the same entity as the entity whose license was revoked. The Chimp Farm had used the fictitious name of "Suncoast Primate Sanctuary" and "Suncoast Primate Sanctuary and Wildlife Rehabilitation Center" and in the very letterhead it had used during portions of the instant application process indicated it had been "Caring for Endangered Species and Other Animals since 1954." RX 6,13,14, 15, 30. Since Petitioner's legal name is Suncoast Primate Sanctuary Foundation Inc., and since The Chimp Farm had used the slogan about caring for endangered species and other animals since 1954 it was hardly unreasonable for Dr. Goldentyer to form a concern that the entities might be the same or at least related. The similarity in names almost seems designed to indicate that the entities are related, if not identical, and when the similarity in addresses is factored in, it is

difficult to conclude other that Dr. Goldentyer was acting properly in deciding to further investigate. Likewise, the appearance of both Christy Holley's name as a director of The Chimp Farm and president of Suncoast Primate Sanctuary Foundation, and Deborah Fletcher's name as a director and registered agent of The Chimp Farm, while her husband Jon Cobb was listed as an officer on the application for license of Suncoast Primate Sanctuary Foundation would at least give rise for Dr. Goldentyer to inquire as to whether the entities were related.

While I agree with APHIS that they were justified in inquiring into the relationship between Petitioner and Anna Mae Noell d/b/a the Chimp Farm, that does not in itself answer the question of whether APHIS was justified in concluding that the license should be denied. I have serious concerns as to whether the investigation conducted was sufficient to allow Dr. Goldentyer to adequately justify her conclusions regarding Petitioner. The information that Dr. Goldentyer indicated that she was interested in pursuing was the type of information that would require the exchange of documentation, the interview of principals, inspection of property, etc. While it might also involve the unannounced inspection of premises to assure compliance with certain aspects of animal care provisions of the regulations, Dr. Goldentyer was clearly most interested in the aspects of the investigation which would show the scope of the relationship between The Chimp Farm and Petitioner.

The investigation team did not have a great deal of experience in this particular type of investigation. Inspector Gaj testified that he was at the inspection because of a potential bias that the normal investigator had, Tr. 215, that he was there in a secondary role to the more experienced Inspector Nottingham, to whom he deferred, and that he considered himself an observer while Nottingham asked the questions. Tr. 220. Their specific assignment was "to investigate whether or not the Suncoast Primate Sanctuary was a legitimate legal entity separate from the Chimp Farm." Tr. 216. They did not intend to look at any animals that day. Tr. 218. No advance notice of the inspection was given, Gaj believing that was Nottingham's "personal preference." Tr. 221. During the time Nottingham was talking to Smout and Holley, Gaj received a phone call from one of his inspectors and, rather than continuing to participate in the inspection, temporarily left the inspection to handle the phone call. Tr. 202-203.

Michael Nottingham, the lead investigator for APHIS, had no previous experience in investigating applications for Animal Welfare Act licenses. Tr. 275. He had very little independent recollection of the events that transpired on the date of his visit to Suncoast, relying heavily on the inspection report that he prepared. Rx 18, 18a. When it became

evident that the individuals who he talked with at the inspection were not able to provide him with the information he desired, he never followed up with any of the people he met that day, or any of the people that were identified on the application, or with the attorney who he was told was going to get back to him. He never indicated exactly what information he was looking for which would allow him to make recommendations to Dr. Goldentyer as to the unresolved issues regarding the Suncoast application. It was not until the day before the hearing that he picked up deeds from the county clerk which indicated the ownership and the location of the property on which Suncoast was located, and who owned the property, and he also provided business summary reports generated from Lexis Nexis for the Chimp Farm and Suncoast Primate Sanctuary. Obviously, these documents could not have been relied on by Dr. Goldentyer in her decision making, nor were they ever interpreted by any witness.

Testimony from other witnesses did little to clarify the most pertinent matters at issue. One of the least pertinent issues discussed was who greeted the inspectors. Both Gaj and Nottingham indicated that an individual identifying himself as George McCoy let them on the property and indicated that the person in charge was Debbie Fletcher, Tr. 218, 273, RX 17, 18, but Debbie Fletcher stated that McCoy was not on the premises that day, that she knew where he was and that it could not have been him. Tr. 337-338. Since both inspectors confirmed that the individual did identify himself as McCoy and since Ms. Fletcher provided no evidence as to where McCoy was or to who it was who let them in, and since it does not matter anyway, I see no reason to doubt the word of the inspectors as to this point. Similarly, I have no basis to believe the inspectors were other than truthful regarding the sign that indicated Ms. Fletcher was the manager of the facility, even if the sign was left over from the days when the facility was operating as The Chimp Farm. Ms. Cobb, as Ms. Fletcher is now called since her marriage to Jon Cobb, was not the most forthcoming of witnesses, to say the least, and her demeanor was quite defensive throughout her testimony. She even disputed whether an office or even a building containing an office even existed on the premises, Tr. 331-335, even where one of Petitioner's witnesses, Debora Geehring, described herself as the office coordinator, and her place of work as the office. Tr. 35. She also continually indicated that she had virtually no role in managing The Chimp Farm, even where the license renewals for that entity repeatedly listed her as manager, and when she signed a number of documents at the behest of her grandmother, Ms. Noell. E.g., RX 33, 34.

Leslie Smout, a certified public accountant who had retired the July prior to the hearing, essentially confirmed the testimony of the APHIS inspectors. He indicated that he had initially been affiliated with the chimp farm as a donor through his own foundation, and that he had helped them with their taxes and in securing 501(c)(3) status. He stated that he arrived at the premises about an hour after the inspectors and that he said that to the best of his knowledge, The Chimp Farm still owned the animals but that the inspectors should talk to the attorney to be sure. Tr. 286. He testified that he would not have stated that Ms. Cobb owned the animals as they would have been owned by the not-for-profit corporation. Tr. 287.

Dr. David Scott, a trustee of the Anna Mae Noell Trust, testified that the only assets of the trust were land, and that the trust was created to serve "as a steward for animals." Tr. 290. He indicated that his involvement with the trust ceased before the formation of Petitioner, but that it was his understanding that there were two different deeds covering the land occupied by the Petitioner, one of which was owned by the entity that formerly was The Chimp Farm and the other that was owned by the Anna Mae Noell Trust. Tr. 292-293. He also testified that none of the structures on the property are owned by the Trust, but to be certain as to which entity owned what property he would have to check with James Martin, the attorney for the Trust, who was not present at the hearing. In essence, there remains a lack of certainty as to who owns or controls the land on which the Petitioner's facilities are located.

As I indicated earlier, this appeal is the first of its kind under the Animal Welfare Act. As such, it should be decided on a fully-developed record. Instead, I have before me a record that does not even include the very information that the decision-maker indicated she would be gathering to facilitate her decision. Thus, while I agree that there is not sufficient evidence to support the granting of a license to Petitioner, based on the readily apparent similarities in name, management and location between Petitioner and the entity whose license was revoked in the earlier proceeding, I find that neither party met its duty under the Act or the regulations to assure that the record in this matter was complete. Based on this inadequate record, it would have been improper for the Secretary to issue Petitioner an exhibitor's license, but at the same time, it would be improper to permanently deny such a license without the record being more fully developed. If the animals have been properly transferred from the entity which had its license revoked, and is under the care of an independent entity, and is being independently operated, it may be proper, as Dr. Goldentyer implied in her testimony, to issue Petitioner an exhibitor's license. However, no records were provided to

APHIS during the pendency of the application process which would have indicated that animals were transferred to Petitioner.[6] The best way to assure a proper final decision in this matter is to remand the matter to the Agency with instructions to both parties to assure the development of a more complete record, with a final decision based on that complete record.

Findings of Fact

1. On June 30, 2004, Suncoast Primate Sanctuary Foundation, Inc. (Petitioner) applied for an exhibitor's license pursuant to the Animal Welfare Act. The application indicated Petitioner was a corporation with an address as 4600 Alternate 19, Palm Harbor, Florida. The corporate officers identified in the license application were Christie Holley, Jon Cobb and Nancy Nagel. PX1, RX 14.

2. In January 1999, the USDA Judicial Officer issued a decision affirming a Default Decision issued by Administrative Law Judge Bernstein against Anna Mae Noell and The Chimp Farm for violations of the Animal Welfare Act. In that decision, the license of Ms. Noell and The Chimp Farm was revoked (although The Chimp Farm never had a license in its own right). The Chimp Farm's address was 4612 Alternate 19 South, Palm Harbor, Florida 34683. RX 1.

3. Both The Chimp Farm and Petitioner had the same listed telephone number.

4. On September 25, 2000, after the issuance of the Default Decision referenced in Finding 2, The Chimp Farm filed a fictitious name statement in which it listed "Suncoast Primate Sanctuary and Wildlife Rehabilitation Center" as a name under which it does business. RX 13.

5. Christy Holley was listed both as a director of The Chimp Farm and President of Petitioner.

6. Deborah Fletcher is the granddaughter of the late Anna Mae Noell. Tr. 305, 314, RX 34. Since her marriage to Jon Cobb, she is also known as Deborah Fletcher Cobb. Tr. 332. She had a significant role

[6] A document purporting to assign all The Chimp Farm's interests in animals and other matters to Petitioner was attached to Petitioner's Reply Brief. It was the first documentation submitted, to my knowledge, which would support the statements made at the hearing that there was some transfer of interest prior to the application process.

in assisting her grandmother in managing The Chimp Farm, and was listed on various documents as manager of that facility. E.g., RX 34. Her husband, Jon Cobb, is listed as a director of Petitioner. PX 1, RX 14. She lives on the premises of Petitioner, and testified that she runs community outreach and ministries programs at Petitioner's facilities. Tr. 298-299.

7. When Petitioner was formed on February 21, 2003, it listed its business and mailing address as 4612 Alt U.S. Hwy 19, Palm Harbor, Florida 34683. RX 5. This was the same address as the entity whose license was revoked. RX 1, p. 4. On April 19, 2004, after an exchange of correspondence with APHIS where APHIS had expressed its concern that Petitioner was the same entity that had its license revoked in the earlier proceeding, RX 4, Petitioner filed a change of address with the Florida Secretary of State, indicating its principal place of business and mailing address were now both 4600 Alt US Hwy 19. RX 19, p. 2.

8. After receiving Petitioner's application, Dr. Goldentyer wrote Petitioner on July 12, 2004, stating that "A USDA Animal Plant Health Inspection Service Investigator will be evaluating the corporate structure of the Suncoast Primate Sanctuary Foundation Inc., the ownership of the animals, property, and enclosures, the funding of the operation and the management of the facility and employees . . . Your cooperation in providing information and documentation will speed the process." RX 16.

9. There is no evidence that Petitioner was ever told what documentation would be needed or helpful for APHIS in its review of the application.

10. On July 29, 2004, APHIS employees Greg Gaj and Michael Nottingham made an unannounced visit to Petitioner's facilities. Neither was experienced in conducting an animal licensing investigation. Although the facility was not open to the public, they were met, and allowed into the facility, by an individual who identified himself as George McCoy. When they asked him if they could speak to the owner, he indicated that Ms. Fletcher was in charge. They noticed a sign outside of the office facility indicating Ms. Fletcher was the manager of the facility. Ms. Fletcher told them she was busy meeting with some students and that they would have to wait and meet with some board members who would be coming later.

11. After waiting outside 45 minutes to an hour, Christy Holley, the president of Petitioner, and Leslie Smout, a volunteer who served as Petitioner's CPA, arrived and briefly met with the inspectors. Mr. Smout indicated that, to the best of his knowledge, The Chimp Farm had never transferred ownership of its animals to Petitioner. Holley and Smout indicated that they would not give the investigators a statement without Petitioner's attorney present, that he was on vacation, and that they would have him contact them when he returned from vacation. Gaj and Nottingham terminated the visit. Gaj noted that the sign indicating that that Ms. Fletcher was manager was no longer in the window.

12. There is no evidence of any effort made by either Petitioner or APHIS to contact or otherwise provide evidence or request evidence on any aspect of this case prior to the hearing.

13. I am unable to make a factual finding as to whether the land that is occupied by Petitioner is under the control of Petitioner, The Anna Mae Noell Foundation, The Chimp Farm, or another entity.

14. I am not able to make a factual finding as to who owns the animals which would be exhibited if the application were granted.

15. I am not able to make a definitive finding as to what entity owns the structures in which the animals which would be exhibited are housed.

Conclusions of Law

1. APHIS is obligated to issue an exhibitor's license to an applicant if certain statutory and regulatory conditions are met.

2. APHIS is prohibited from issuing an exhibitor's license to an individual or entity whose license has previously been revoked for violating provisions of the Animal Welfare Act.

3. Anna Mae Noell d/b/a The Chimp Farm was the subject of an Animal Welfare Act proceeding resulting in the revocation of the license of Anna Mae Noell and The Chimp Farm.

4. Petitioner's location, management and operations are similar in many respects to the entity whose license was revoked. The actions of APHIS in scrutinizing Petitioner's application to determine whether they

were in essence the same entity as The Chimp Farm were a legitimate and proper exercise of authority.

5. As the sole entity charged with granting or denying licenses under the Animal Welfare Act, Respondent has the duty to perform a full and complete investigation before denying a license. They did not do so here.

6. The applicant for a license has the obligation to provide all pertinent information to support its license request. After being notified on several instances that Respondent needed information on a number of matters, Petitioner fell short of its obligation to provide pertinent information, or even follow up with Respondent on exactly what information was required.

WHEREFORE, I order the following:

This matter is remanded to APHIS. Within 30 days from the issuance of this decision and order, APHIS shall inform Petitioner exactly what information they require in order to make a full determination as to whether Petitioner is a different entity from Anna Mae Noell d/b/a The Chimp Farm. Within 60 days from the date of this decision and order, Petitioner shall supply all requested information, and the parties may agree to any site visits as necessary. Within 90 days from the date of this decision and order, APHIS shall either grant Petitioner an exhibitor's license or affirm its denial with a sufficient explanation of its criteria for determining that Petitioner is the same entity. I will retain jurisdiction over this matter, and if the license is denied on remand, I will grant expedited consideration to Petitioner's request for supplemental briefing, or hearing, as appropriate.

DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

DEPARTMENTAL DECISIONS

In re: BLUE MOON SOLUTIONS, INC. AND MARTY HALE.
DNS-RUS Docket 06-0001.
Decision and Order.
Filed June 14, 2006.
Amended June 20, 2006.

DNUS – RUS – Suspension from participation, Federal grant program – Overpayment – Inducement for advances, unsupported – Grant funds, unearned.

Silas Lamont for Complainant.
James M. Andrew for Respondent.
Decision and Order by Administrative Law Judge Victor W. Palmer.

Amended Decision and Order[1]

Preliminary Statement

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.765, in disposition of the appeal by Blue Moon Solutions, Inc. and Marty Hale, its principal, of their suspension by the Rural Utilities Service ("RUS"), an agency of the United States Department of Agriculture, from participation in Federal government programs. Blue Moon and Mr. Hale were initially suspended by RUS by letters dated November 9, 2005. The appeal of these suspensions resulted in a hearing on December 14, 2005, that was presided over by the Administrator of RUS who was assisted by a fact-finder. The Administrator upheld the suspensions. On April 7, 2006, Blue Moon and Mr. Hale filed this appeal of the Administrator's determination to the Office of Administrative Law Judges and, pursuant to 7 C.F.R. § 3017.765, it has been assigned to me for decision within 90 days after the filing of the appeal. Mr. Hale joins in the reasons advanced on behalf of Blue Moon Solutions, Inc. that go to the merits of the suspension, and has not challenged his inclusion as a subject of the suspension. Under the governing regulation, my decision must be based solely on the administrative record (7 C.F.R. § 3017.765 (b)). For that reason, the request by Blue Moon and Mr. Hale that I hold a hearing is herewith denied. Moreover, I may vacate the decision of the suspending official

[1] The original Decision and Order is amended by deleting the last sentence of the Order.

only if I determine that the decision is:
Not in accordance with law;
Not based on the applicable standard of evidence; or
Arbitrary and capricious and an abuse of discretion.
7 C.F.R. § 3017.765 (a).

For the reasons that follow, after a full and careful review of the administrative record, the suspension decision by the Administrator of RUS is upheld and shall become effective as set forth in the accompanying order.

Findings

1. The Grants

In 2003, RUS awarded Blue Moon Solutions, Inc. (Blue Moon) seven Community-Oriented Connectivity Grants for projects to deploy broadband transmission services in seven rural communities in Texas. The grants totaled approximately $2.7 million.

The availability of the grants had been announced by RUS through its publication of a Notice in the Federal Register on July 8, 2002 (67 Fed. Reg. 45079-45083). The Notice advised that the grants were to be given to applicants who would undertake feasible and sustainable projects to deploy broadband transmission services to small, rural communities via their schools, libraries, education centers, health care providers, law enforcement agencies and public safety organizations; and the services were to be made available as well to residents and businesses (67 Fed. Reg. 45079). Under the Notice, Blue Moon, a for profit, incorporated company, was as eligible to receive a grant as was a public body; an Indian tribe; a cooperative, nonprofit, limited dividend or mutual association; or a municipality (67 Fed. Reg. 45081). Under "Eligible Grant Purposes", the Notice specified that:

Grant funds may be used to finance:
(a) The construction, acquisition, or lease of facilities, including spectrum, to deploy broadband transmission services to all critical community facilities and to offer such service to all residential and business customers located within the proposed service area;
(b) The improvement, expansion, construction, or acquisition of a community center that furnishes free access to broadband Internet service, provided that the community center is open and accessible to area residents before and after normal working hours and on Saturday and Sunday. Grant funds provided for such costs shall not exceed the greater of 5 percent of the grant amount requested or $100,000;

(c) End-user equipment needed to carry out the project;
(d) Operating expenses incurred in providing broadband transmission service to critical community facilities for the first 2 years of operations and to provide training and instruction. Salary and administrative expenses will be subject to review, and may be limited, by RUS for reasonableness in relation to the scope of the project; and
(e) The purchase of land, buildings, or building construction needed to carry out the project.
Grant funds may not be used to finance the duplication of any existing broadband transmission services provided by other entities.
Facilities financed with grant funds cannot be utilized, in any way, to provide local exchange telecommunications service to any person or entity already receiving such services.
67 Fed. Reg., at 45081.

A successful applicant was also required to make a matching contribution equal to 15 percent of the grant amount requested and, as part of its application, to state the scope of the work it intended to perform that would include:
….A budget for all capital and administrative expenditures reflecting the line items costs for eligible purposes for the grant funds, the matching contributions, and other sources of funds necessary to complete the project.
67 Fed. Reg., at 45082.

The notice further required an applicant to provide evidence of compliance with other Federal statutes and regulations that included 7 CFR part 3015-Uniform Federal Assistance Regulations (67 Fed. Reg., at 45082).

Blue Moon responded to this Notice by filing applications for grants that stated the scope of work to be performed and included project budgets (NAD Agency Record, at pages 543-555). On May 16, 2003, May 19, 2003 and September 24, 2003, RUS notified Blue Moon of seven Community-Oriented awards, totaling approximately $2.7 million (NAD Agency Record, at pages 285, 378, 471, 564, 662, 800 and 922). Attached to documents to be executed by Blue Moon to obtain the grants, were instructions with a sample Form 270 (the form that must be submitted to obtain grant funds) advising Blue Moon that:
each Form 270 must be supported by paid or unpaid invoices, timesheets, lease agreements or other supporting documentation with a detailed description for eligible purposes for both grant and matching funds.

(NAD Agency Record, at pages 269, 364, 455, 537, 654, 792 and 895).

This advice was in implementation of 7 C.F.R. § 3015.61 (g) that requires:

(g) *Source documentation*. Accounting records shall be supported by source documentation. These documentations include, but are not limited to, cancelled checks, paid bills, payrolls, contract and subgrant award documents.

Grant agreements were thereafter executed by Blue Moon as "the grantee" in which it agreed:
Along with the Form 270, the grantee agrees to submit paid or unpaid invoices, employee timesheets, lease agreements or other supporting documentation that adequately supports approved expenditures for allowable grant purposes.
NAD Agency Record, at pages 247, 342, 431, 515, 636, 774, and 873.

2. Drawing on the Grant Funds

On January 22, 2004, Blue Moon started to draw on Grant funds by submitting Form 270 submissions. The submitted Form 270s were signed by Christonya Hill, COO, as authorized certifying official for Blue Moon. Her signatures were adjacent to this certification:

I certify to the best of my knowledge and belief the data on the reverse are correct and that all outlays were made in accordance with the grant conditions or other agreement and that payment is due and has not been previously requested.
NAD Agency Record, at page 200.

Upon receipt of the Form 270s, RUS advanced Grant funds to Blue Moon in accordance with its requests, and advised it:

We have enclosed a copy of the approved Form 270 and supporting documentation. Please retain this material (along with the original invoices) for audit purposes. These documents must be retained on file for at least 3 years after grant closing, except that the records must be retained beyond the 3-year period if audit findings have not been resolved. Please pay special attention to the requirement regarding the use of RUS grant funds for the approved purposes as specified in the Grant Agreement. Auditors may check, among other things, that (1) grant funds were disbursed only for approved purposes, (2) the disbursements are in the proper amounts, and (3) the disbursements are

supported by proper documentation….
NAD Agency Record, at pages 179, 288, 381, 486, 572, 688 and 830.

3. OIG Investigation Report

On October 19, 2004, the United States Department of Agriculture's Office of Inspector General (OIG) issued an investigation report of RUS Grant practices in which it stated that among other concerns, there was a risk of fraud or misuse of the broadband Grant funding to Blue Moon due to Grant funds not being utilized as intended (NAD Agency Record, at pages 4567-4571).

4. Grant Review Compliance Audit by RUS

RUS visited Blue Moon between November 15 through 19, 2004 to address the concerns expressed by OIG and to begin a Grant review compliance audit. There followed various telephone conferences and additional visits to Blue Moon. The Field Activities Report (NAD Agency Record, at pages 4193-4212) shows field visits to Blue Moon on 11/15-19/04, 11/29-12/3/04, 12/13-17/04, 1/10-14/05 and 3/14-18/05 by either an individual RUS Field Accountant, or a team of two RUS Field Accountants.

The RUS accountants found that the disbursed Grant funds to Blue Moon were based on requests that included unacceptable markups, inflated hourly labor rates, and that supplied invoices had been created by Blue Moon rather than being invoices that had actually been paid. Moreover, funds were being requested sometimes two to three years in advance of the money being required and grant monies and company funds were being commingled. They concluded that Blue Moon's accounting records were of questionable accuracy and its controls over grant disbursements were inadequate.

At the conclusion of the Compliance Audit, Blue Moon was notified to return $910,829.79 in Grant disbursements because they had been requested and advanced considerably before they were required and because a number of construction fund disbursements could not be supported with actual cost documentation (NAD Agency Record, at pages 4143-4163).

5. Independent CPA Audit

Each grantee is required to submit an independent CPA audit of the grantee's financial statements under the Grant Agreement and under 7

C.F.R. § 1773.3. Although Blue Moon filed its audit report four months later than otherwise required, its filing on August 30, 2005 was acceptable under an extension of time it received from RUS (Hearing Transcript, attachment 7, Exhibits B, at pages 77-78). Prior to this audit, Blue Moon engaged a forensic accounting firm, Beakley & Associates, to recreate its accounting records and financial statements. The actual CPA audit was performed by the firm of Bolinger, Segars, Gilbert & Moss. In its Independent Auditors' Report, dated August 19, 2005, the Bolinger firm reported that it was "… unable to obtain support for labor capitalized to plant, property and equipment in 2004 and 2003 in the amount of $190,916 and $155,073, respectively" (NAD Agency Record, at page 3992). The report also contained these comments:

…regarding Blue Moon Solutions, Inc.'s internal control over financial reporting and its operation that we consider to be a material weakness as previously defined with respect to:

* the accounting procedures and records;

There are no established procedures to identify and record vested stock option benefits, depreciation expense, federal and state income tax accrued liabilities, prepaid expenses, and other current and accrued liabilities;

* the process for accumulating and recording labor, material, and overhead costs, and the distribution of these costs to construction, retirement, and maintenance or other expense accounts;

The procedures over reporting and recording labor do not allow for recording labor costs according to the function work performed;
There are no established procedures to identify and record indirect cost associated with self constructed assets; continuing property records need to be established; and

* the materials control.

There are no material accounts maintained by the company.
NAD Agency Record, at page 4016.

6. Suspension of the Grants

By letter of September 30, 2005, the Acting Administrator of RUS suspended the Grants to Blue Moon on the basis of "serious discrepancies between the purposes for which grant funds were requisitioned and their actual expenditure by Blue Moon" (NAD Agency Record, at page 3976). Thereafter, on November 9, 2005, RUS terminated the Grants and notified Blue Moon in writing of the termination with a demand for repayment in the amount of $910,829.79.

Simultaneously, RUS notified Blue Moon and Marty Hale of their suspensions from further federal contracting under 7 C.F.R. § 3017.700 (NAD Agency Record, at pages 1-14; Hearing Transcript, attachments 1 and 2).

7. The Administrator's Determination Upholding the Suspensions

In response to a written request made on behalf of Blue Moon and Mr. Hale by their attorney, a hearing to allow them to contest their suspensions was held on December 14, 2005, in Washington D.C. (Hearing Transcript, attachment 7, Exhibit B, at pages 1-172). It was conducted by the Administrator of RUS, assisted by the Assistant Program Advisor to the Policy Analysis and Risk Management division of RUS, who the Administrator named to be his fact-finder as authorized by 7 C.F.R. § 3017.750 (b). On January 26, 2006, the fact-finder submitted a report to the Administrator ("fact-finder's report", NAD Agency Record, at pages 5318-5329; and Hearing Transcript, attachment 7, Exhibit D). On March 10, 2006, "the Administrator's Determination" was issued that upheld the suspensions (Hearing Transcript, attachment 7). This appeal is taken from that determination. The Administrator stated that his determination to sustain the suspensions of Blue Moon and Mr. Hale was based, in accordance with 7 C.F.R. § 3017.750, on all the evidence in the record, including evidence presented by Blue Moon at the Suspension Hearing, the Contest of Suspension, the fact-finder's report and the records of RUS relating to Blue Moon and the Grants (Hearing Record, attachment 7, at page 2). He further stated that the suspensions were based on 7 C.F.R. § 3017.700(b) and (c) that authorize suspension upon a determination that:
(b) There exists adequate evidence to suspect any other cause for debarment listed under § 3017.800(b) through (d); and
(c) Immediate action is necessary to protect the public interest.

In his opinion, there was adequate evidence to suspect a cause for debarment pursuant to 7 C.F.R. § 3017.800(b)(2) for:
Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

. . .

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions. . . .

The Administrator concluded that the determination to suspend Blue Moon and Mr. Hale was needed because of consistent irregularities and failures in Blue Moon's compliance with provisions in the Grant Agreements. He specified ten findings set forth at pages 2-5 of the Suspension Letters, as the basis for the suspensions. (Hearing Transcript, attachment 7, at page 3).

8. This Appeal of the Administrator's Determination

Blue Moon and Mr. Hale in their appeal of the Administrator's Determination, state that their government-wide suspension is based on erroneous conclusions that overlook, dismiss or minimize significant accounting conclusions and data submitted on Blue Moon's behalf by a forensic accounting firm and by a CPA auditing firm recommended to it by RUS. Blue Moon and Mr. Hale argue that:

Volumes and volumes of detailed accounting data, financial reports from independent accountants and numerous representations from Blue Moon have been simply overlooked as evidence in this matter.

Appeal of Suspension, at page 7.

The Appeal further argues that RUS has treated Blue Moon in a prejudicial manner in abuse of its discretion through a campaign to misinform communities about the suspension by stating that Blue Moon had been debarred, and its refusal to share the OIG report with Blue Moon prior to the hearing. Blue Moon also points out that one of the ten findings given for the suspension was the failure to file an audit report on time when in fact Blue Moon did file the report within the time given it through an extension of the deadline by a RUS official.

Earlier, in the Contest of Suspension filed at the hearing on December 14, 2005, the argument was made that all ten findings upon which the suspensions are based involve nothing more than bookkeeping errors that were rectified and fall short of an actionable or willful misdeed with no indication of fraud or willful wrongdoing (Hearing Transcript, attachment 6, at page 5).

Conclusions

1. Blue Moon was not prejudiced By Late Receipt of the OIG Report

Blue Moon's argument that it was prejudiced by not being given a copy of the OIG report prior to the hearing is baseless. The fact-finder specified that:

> The issue of the OIG report is not considered applicable to the finding of fact and was, accordingly, not further considered. Furthermore, that part of the OIG report specifically cited by Blue Moon (footnote on page 10 of the CS(Contest of Suspension), pertains to a tracking system for site visits performed by RUS General Field Representatives under the Broadband Loan and Grant Program and is not directly applicable to this suspension.

Hearing Transcript, Attachment 7, Exhibit D, at page 8.

Inasmuch as, the OIG report was not a basis for the finding that Blue Moon sought to refute, it was not prejudiced by the late receipt.

2. Review of the Record Shows Two Assertions By RUS Were Unfounded

Review of the record does show that RUS made two assertions that were unfounded.

The suspension notice and the fact-finder's report stated that Blue Moon failed to timely file the requisite annual independent auditor's report. However, RUS had extended the time for the filing of this report, and hence there was no failure of a legal duty by Blue Moon in this respect.

Secondly, RUS mistakenly advised communities dealing with Blue Moon that debarment rather than suspension proceedings were pending against it.

Neither mistaken assertion, however, rises to a level requiring the Administrator's Determination to be vacated. I find no evidence in the record to support the inference that RUS was deliberately picking on Blue Moon, or, in any other sense acting in an arbitrary and capricious manner in abuse of its discretion.

3. The Administrator's Determination and the Suspensions should be Upheld and Not Vacated

When the record as a whole is reviewed, the Administrator's Determination is shown by a preponderance of evidence to be in accordance with law and based on "adequate evidence that … (Blue Moon) committed irregularities which seriously reflect on the propriety of further Federal Government dealings with … (Blue Moon)." 7 C.F.R. § 3017.715 (3).

Though a suspension need not be based on an indictment or conviction (the two other grounds for its initiation), nonetheless, in the words of 7 C.F.R. § 3017.700, "(s)uspension is a serious action." When

reviewing a similar regulation governing suspensions by another agency, the District of Columbia Circuit stated:

There must be a real need for immediate action to protect the public interest in order to justify a suspension.

Sloan v. Dept.of Housing & Urban Development, 231 F.3d 10, 17 (D.C. Cir. 2000).

The record upon which these suspensions are based, shows such a real need.

Review of the record demonstrates the Administrator's Determination is based on adequate evidence

The suspension letters listed ten sets of reasons as findings demonstrating Blue Moon's unsatisfactory performance of the seven Grants. One finding, the failure to timely submit an annual independent auditor's report, I have previously found and concluded to be erroneous.

The other nine allege five kinds of alleged unsatisfactory performance by Blue Moon under the Grants:

1. Failing to submit invoices; or conversely, submitting invoices for advances or reimbursements that were not actual invoices but had been created with added mark-ups and inaccurate and inflated charges. Under the latter practice, an internal Blue Moon profit of $410,555.84 was added to equipment costs and $34,681.99 of profit was added to the costs of university courses made available on internet sites.

2. Failures to maintain adequate timesheets; inadequate time reporting for employees; and claiming costs far in excess of actual costs incurred.

3. Seeking the full budgeted amount of costs for "Backhaul" and "Web Design" costs causing $215,044 to be advanced for Backhaul when there was documentary support for only $78,751.67 and causing $217,350 to be advanced for Web Design when there was documentary support for only $8,974.97.

4. Having inadequate books, records and financial records that used arbitrary allocations of costs based on unsupported assumptions, and that did not support the requests for advances under the Grants.

5. Lack of support for labor capitalized to plant, property and equipment as shown by the independent CPA audit that was unable to find such support in 2004 and 2003 in the amounts of $190,916 and

$155,073, respectively.

As to the first alleged kind of unsatisfactory performance, the fact–finder agreed with Blue Moon that third-party invoices are not explicitly required and that third-party invoices had been turned over to the RUS Field Accountants though not submitted with Blue Moon's submissions of Form 270 (Hearing Transcript, Attachment 7, Exhibit D, at page 4). However, in respect to Blue Moon's argument that there could not have been "additional markups for internal profit" because the independent CPA audit showed Blue Moon had a loss, the fact-finder found that its profit or loss from operations does not relate directly to the over billing. Moreover, he noted that the independent CPA audit showed $345,989 in non-supported costs of equipment which closely compares to the $410,556 overcharge claimed by RUS (*Ibid*, at pages 4 and 5).

The fact-finder then addressed the second alleged kind of unsatisfactory performance consisting of inadequate time sheets and time reporting, and applying for labor costs that exceeded what Blue Moon actually paid for labor. He found that Blue Moon did produce its timesheets, but that its submissions to RUS for payment were based upon the labor costs set forth in its grant application and approved project budget; and that the grant monies Blue Moon received for labor did not correspond to what it actually paid for labor. In fact, Blue Moon's actual labor costs were less than what was "invoiced" to RUS. In respect to time reporting, he found that Blue Moon's accounting for allocation of labor was deficient in that it did not clearly allocate work by projects (*Ibid*, at pages 5 and 6).

The fact-finder concluded that the amounts Blue Moon improperly sought in advance for Backhaul and Web Design costs is still undetermined. Some of the advances may eventually be supported and the amount that would remain unsupported could be less than the $344,667 aggregate amount expressed by RUS in the Suspension letters, perhaps as low as the $254,310 identified in the independent CPA audit as "unearned USDA grant funds" (*Ibid*, at pages 5, 7 and 8).

The fact-finder also addressed the inadequacy of Blue Moon's books, records and financial records that used arbitrary allocations of costs based on arbitrary assumptions, and did not support the requests Blue Moon made for advances under the Grants. He first noted that although the time for filing an independent CPA audit was extended, the report was dependent on the work of the forensic accountant, Beakley, who had to first produce compiled financial records for the audit to be completed.

…Blue Moon's assertion that the issue of financial statements has

become moot ignores that part of this RUS finding asserting that Blue Moon did not have adequate records as required by the grant agreement.

As to the "arbitrary allocations" based upon unsupported assumptions recounted in this RUS finding, Blue Moon relied upon the Beakley letter. As previously noted…, this Beakley letter is dated November 28, 2005 (after the suspension letters of November 9, 2005), and sets forward in detail the basis used for the allocation of certain direct and indirect labor costs/expenses which allocations apparently formed the basis for the Bolinger audited financial statements. It is worth noting that: (i) Beakley was engaged by Blue Moon and does not represent RUS; and (ii) in its audit reports, Bolinger was"… unable to obtain support for labor capitalized to plant, property and equipment in 2004 and 2003 in the amount of $190,916 and $155,073, respectively." *Ibid*, at pages 8-9.

Finally, the fact-finder addressed the fact that the independent CPA audit was unable to find support for labor capitalized to plant, property and equipment in 2004 and 2003 in the amounts of $190,916 and $155,073, respectively. He does so in the context of whether the aggregate amount of $910,829.78 that RUS initially disallowed as unsupported advances received by Blue Moon could be lowered to perhaps $600,299 or $530,664.42, upon review of worksheets prepared by Beakley that have not as yet been furnished to RUS. The point being that without adequate documentation, Blue Moon induced a gross overpayment and the amount it is actually owed is still unclear since its failure to furnish needed documentation has not been rectified.

b. The record shows a real need for immediate action to protect the public interest

Neither the Notice announcing the availability of Grants, nor the seven Grant awards to Blue Moon contained any provision for Blue Moon to profit on the work it was to perform to deploy broadband transmission services to community facilities. Additionally, USDA's Uniform Federal Assistance Regulations (7 C.F.R. part 3015) that were expressly made part of each Grant award, sets forth principles and provisions to assure that disbursements of grant funds are limited to allowable costs. These regulations are expressly applicable to grants awarded to for profit organizations (7 C.F.R. § 3015.1) and they contain no provision for adding on markups for profit.

The fact-finder found that requests by Blue Moon for labor costs that exceeded actual costs happened to be consistent with the budgets Blue Moon had submitted. Apparently, the submitted budgets either contained

built-in markups for profit, or Blue Moon's actual costs were less than those its budgets anticipated. In any event, unlike procurement contracts for services or equipment, the RUS Grants awards are limited to reimbursing allowable costs that are not inflated to yield profits to Grantee. This is the essential interpretation that underlies the Administrator's Determination and it is an interpretation that is consistent with the Grant awards themselves and the Uniform Federal Assistance Regulations that apply to the Grant awards.

Those regulations make it clear, for example, that a grantee's "acquisition cost" of an item of purchased equipment means the net invoice price of the equipment.(Appendix A to Part 3015-Definitions, Section II). Although this definition does not preclude some charge to be included for ancillary or carrying costs, a markup for profit may not be added (*Ibid*, and Hearing Transcript, Exhibit B, at page 87).

The interpretation is also consistent with the objectives of the Notice that made the grants available to cooperatives and other nonprofits, Indian tribes, public bodies municipalities as well as to for profit corporations. Obviously, the nonprofit groups would not build in a profit on the work they would perform to carry out the purposes of the grant. Their compensation would consist of the satisfaction they would receive from making an improvement to a rural community that otherwise would be without broadband transmission services.

This does not mean that Blue Moon applied for the grants without any expectation of obtaining an eventual profit on its services. Mr. Hale understood that under the terms of the Grant awards, Blue Moon, as a for profit corporation, needed to earn its profits by:

…selling services to the residents and businesses to make enough revenue/profit to be able to provide free services (at the community centers).

Hearing Transcript, attachment 7, Exhibit B, at page 88.

In fact, he specifically denied that markups on equipment purchased for the projects were to enhance Blue Moon's profit margin, but were instead to compensate for the fact that:

…each piece of equipment has to be configured, burned in….

Hearing Transcript, attachment 7, Exhibit B, at page 90. But as the various investigators and the fact-finder have pointed out, nothing to substantiate such added costs was ever provided by Blue Moon. To the contrary, its COO told the investigators that the added markups were to obtain a profit on the projects.

Under these circumstances, Blue Moon's failure to provide needed invoices, timesheets and other documents to support its claim that the amounts it obtained for labor and equipment from RUS were for

allowable costs only, is not properly characterized as mere carelessness or negligent bookkeeping errors. Blue Moon filed false and unsubstantiated requests for grant funds to obtain more money than it was entitled to receive under the Grant awards. Not only did it regularly request funds in excess of the amounts it had actually incurred; its requests for others, such as the $532, 394 it obtained for Web Design and Backhaul, were made before Blue Moon had been invoiced anywhere near the amounts claimed. The record indicates that when all the invoices are in, the overcharges by Blue Moon for Web Design and Backhaul will be between $254,310 and $344,667.

Moreover, these practices were persistent. Field visits to Blue Moon were made by RUS investigators on November 15-19, 2004, November 29-December 3, 2004, December 13-17, 2004, January 10-14, 2005 and on March 14-18, 2005. The record shows that the need for documents to support the costs for which Blue Moon had obtained Grant funds was reiterated at the time of each visit, but was largely unsuccessful. Blue Moon's unsatisfactory performance of seven grants demonstrates, as stated in 7 C.F.R. § 3017.800(b)(2), "…(a) history of… unsatisfactory performance of one or more public agreements or transactions".

The persistence of these violations coupled with the large sums of money that Blue Moon improperly obtained through its Grant requests shows its violations to be serious. The existence of a real need to protect the public interest by taking immediate action to suspend Blue Moon and Marty Hale finds additional support in the fact that Blue Moon was attempting to enter into, or be the recipient of funds as a subcontractor on contracts for agency-financed grant projects. (RUS suspension letter of November 9, 2005, NAD Agency Record, at page 5073).

Accordingly, the following Order is hereby entered.

ORDER

It is this 7th day of June, 2006, ORDERED that the Administrator's Determination of March 10, 2006, suspending Blue Moon Solution's Inc. and Marty Hale from participating in Federal government programs, including Federal financial and non-financial assistance and benefits, is hereby upheld.

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FEDERAL CROP INSURANCE ACT

COURT DECISION

ACE PROPERTY AND CASUALTY INS. CO, ET AL. v. USDA.
C.A.8 (Iowa), 2006.
No. 05-2321.
Filed March 16, 2006.

(Cite as: 440 F.3d 992).

FCIA – SRA – Administrative remedies, failure to exhaust – Jurisdictional vs. non-jurisdictional statutes – "sweeping and direct" – futile action, when not.

Federal Crop Insurance Act (FCIA) amended the Standard Reinsurance Agreement (SRA) of the Federal Crop Insurance Act which adversely affected the Appellants and 13 other insurers similarity situated. Appellants (Insurers) brought a action directly to Federal District Court rather than exhausting all their administrative remedies. The court needed to determine whether 7 U.S.C. § 6912(e) was jurisdictional. The court cited *Weinberger v. Salfi,* 422 U.S. 749 for the principal of jurisdictional vs.non-jurisdictional exhaustion of administrative remedies. The court determined that the failure to exhaust administrative remedies for this statute – 7 U.S.C.§ 6912(e) was non-jurisdictional since the language used by congress was not "sweeping and direct." Non-jursidictional statutes follow the common law principal under which exhaustion of administrative remedies is favored, but may be excused by a limited number of exceptions to the general rule. The court then went on to determine whether the insurers have a legitimate constitutional issue to litigate, or whether the pursuit of the administrative remedy would be "futile" and concluded that the insurers did not present any exception to the general rule concerning exhaustion of administrative remedies.

United States Court of Appeals, Eighth Circuit.

Before MURPHY, HANSEN, and SMITH, Circuit Judges.
MURPHY, Circuit Judge.

This breach of contract action was brought by a group of thirteen insurance companies[1] who provide federal crop insurance, alleging that the Federal Crop Insurance Corporation (FCIC) breached two provisions of the 1998 Standard Reinsurance Agreement (SRA). The FCIC moved

[1]Ace Property and Casualty, Alliance Insurance Company, America Agricultural Insurance Company, American Growers Insurance Company, Country Mutual Insurance Company, Farm Bureau Mutual Insurance Company of Iowa, Farmers Alliance Mutual Insurance Company, Great American Insurance Company, Hartford Fire Insurance Company, Nau Country Insurance Company, Producers Lloyds Insurance Company, Rural Community Insurance Company, Farmers Mutual Hail Insurance Company of Iowa.

to dismiss for lack of jurisdiction, and the district court granted the motion on that ground, but ruled in the alternative that dismissal was also warranted because the insurers had neither exhausted their administrative remedies nor established any exception to the exhaustion requirement. The insurers appeal, and we affirm on the alternate ground.

I

The Federal Crop Insurance Act (FCIA), 7 U.S.C. §§ 1501-1524, established a federal crop insurance program in 1938 to be administered and regulated by the FCIC. 7 U.S.C. § 1503. Originally the FCIC directly provided crop insurance coverage to eligible farmers, but in 1980 Congress revised the FCIA to require the FCIC "to contract with private companies" for insurance "to the maximum extent possible." 7 U.S.C. § 1507(c). The FCIC was to "reimburse such companies...for [their] administrative and program expenses," *id.,* and provide reinsurance "to the maximum extent practicable" to cover catastrophic loss. 7 U.S.C. §§ 1508(k)(1), 1508(b)(1). The FCIC now offers most federal crop insurance through private insurers which it then reinsures.

The federal reinsurance program is governed by a contract between the FCIC and participating insurance providers entitled Standard Reinsurance Agreement (SRA). 7 C.F.R. § 400.164. The SRA is renewed annually, and a company may terminate the agreement by not submitting a Plan of Operation for the next reinsurance year by the date specified in the SRA. The FCIC may only terminate the SRA by giving notice at least 180 days prior to the date of renewal of its intent to terminate.

At issue between the FCIC and these insurers are two provisions of the 1998 SRA which provide Catastrophic Risk Protection (CAT) coverage. The Administrative Fee provision in the 1998 SRA allowed insurers to retain a portion of the administrative fee charged by the FCIA, and the Loss Adjustment Expenses (LAE) provision permitted insurers to recoup 14% of an imputed premium for each CAT policy provided to a farmer. These provisions were affected by congressional action in 1998. In that year Congress enacted the Agricultural Research Extension and Education Reform Act (AREERA), Pub.L. No. 105-185, 112 Stat. 523 (1998), which eliminated the right of private insurance companies to retain any administrative fees and capped LAE reimbursement at 11%. Then in 2000 Congress enacted the Agricultural

Risk Protection Act (ARPA), Pub.L. No. 106-224, 114 Stat. 358 (2000), further lowering the LAE cap to 8%.

The FCIC amended the SRA to implement AREERA and ARPA. Amendment No. 1 was effective at the start of the 1999 fiscal year, and it eliminated the right of private insurers to retain any administrative fees and capped LAE reimbursement at 11%. Amendment No.3 was effective at the start of fiscal year 2000, and it reduced the LAE cap to 8%. When the FCIC notified the insurers of each amendment, it informed them that their SRA would be terminated if they failed to execute either amendment within 10 days of receipt. Appellants all executed the amendments, but they reserved the right to sue the FCIC for damages.

Disputes regarding the SRA are governed by the Federal Crop Insurance Reform and Department of Agriculture Act of 1994, Pub.L. 103-354, 7 U.S.C. §§ 6901-7014 (1994) (Reorganization Act), which created a mandatory administrative appeals process for SRA matters. Under the Reorganization Act, a party who believes that its SRA rights have been violated may request a final agency determination, which can then be appealed to the Department of Agriculture Board of Contract Appeals (the Board). Although the Act grants exclusive jurisdiction to federal district courts, 7 U.S.C. § 1506(d), parties are to exhaust their administrative remedies before pursuing a claim in federal court. 7 U.S.C. § 6912(e).

II.

In February 2003 the insurers brought an action against the United States in the Court of Federal Claims for breach of contract, duress, and unjust enrichment resulting from the implementation of AREERA and ARPA. The government moved to dismiss, arguing that under § 6912(e) exhaustion of administrative remedies was a prerequisite to subject matter jurisdiction, and alternatively that § 1506(d) required complaints to be filed in federal district court. The insurers responded that neither § 1506(d) nor the exhaustion requirements contained in the SRA were binding; they did not directly address § 6912(e) because their suit was against the United States rather than the FCIC. In March 2004 the Court of Federal Claims dismissed the action for lack of jurisdiction under § 6912(e) because the insurers had not exhausted their administrative remedies, and alternatively because § 1506(d) grants federal district courts exclusive jurisdiction over suits against the FCIC. *Ace Property & Cas. Ins. Co. v. United States,* 60 Fed.Cl. 175, 184-85 (Fed.Cl.2004).

Its decision was affirmed by the Federal Circuit on June 1, 2005, on the ground that the case had been properly dismissed since § 1506(d) provides for exclusive jurisdiction in the federal district courts and that there was therefore "no reason to revisit [the court's] superfluous finding regarding exhaustion of administrative remedies." *Ace Property & Cas. Ins. Co. v. United States,* 138 Fed.Appx. 308, 309 (Fed.Cir.2005).

After the Federal Circuit's decision, the insurers sought a final administrative determination from the FCIC. The FCIC declined because their request had not been made within 45 days after notice of the disputed action. *See* 7 C.F.R. § 400.169(a). The insurers then appealed to the Board, which did not issue its decision until shortly before oral argument on the appeal in this court.

While their appeal was still pending before the Federal Circuit, the insurers filed this action against the FCIC in the Southern District of Iowa seeking damages for the breach of the 1998 SRA. The FCIC moved to dismiss, arguing that the district court lacked subject matter jurisdiction under § 6912(e) because appellants had failed to exhaust their administrative remedies. The insurers responded that the statute did not deprive the federal district court of jurisdiction and that exhaustion should not be required because it would be futile since neither the FCIC nor the Board has the authority to award the relief sought and the issues involved are legal questions better resolved by courts than agencies. The district court dismissed their complaint in February 2005, holding that it had no jurisdiction over the dispute because the insurers had not exhausted their administrative remedies as required by § 6912(e). Alternatively the court held that even if it had jurisdiction, their failure to exhaust was not excused under the traditional exceptions. The insurers now appeal, arguing that § 6912(e) is not a jurisdictional statute and that exhaustion is not required because in this case it would be futile and because the complaint raises only legal issues unsuitable for administrative resolution.

Subsequently on December 21, 2005, the Board rendered its decision on the insurers' administrative appeal. *Ace Property & Cas. Ins. Co.,* AGBCA No.2004-173-F, 2005 WL 3485623 (December 21, 2005). The Board found that it had jurisdiction over the dispute and possessed the authority to issue whatever relief might be necessary to remedy any breach of contract, including the power to award money damages. It also gave examples of instances in the past where it had awarded such relief.

Although it upheld the 45 day rule for bringing administrative claims, it decided that the rule should not have been applied retroactively. Thus it affirmed the agency determination that the insurers' claims for the 2001 and 2002 reinsurance years were time barred for failing to bring them within 45 days of notice of the disputed action, but it remanded the claims for the 1999 and 2000 reinsurance years for further administrative proceedings.

III.

On their appeal from the dismissal of their action, the insurers complain that the district court erred in concluding that exhaustion of administrative remedies was a prerequisite to subject matter jurisdiction. The FCIC responds that the language of § 6912(e) is jurisdictional when considered within the context of the statutory scheme so appellants' failure to exhaust administrative remedies means there is no subject matter jurisdiction over this action.

The Supreme Court has indicated that a statute requiring plaintiffs to exhaust administrative remedies before coming into federal court may be either jurisdictional in nature or non jurisdictional, depending on the intent of Congress as evinced by the language used. *See Weinberger v. Salfi,* 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). Under a jurisdictional statute, exhaustion of administrative remedies cannot be excused or waived and the failure by a party to exhaust is a jurisdictional bar. In contrast, a non jurisdictional statute codifies the common law exhaustion principle under which exhaustion of administrative remedies is favored, but may be excused by a limited number of exceptions to the general rule. *Id.* at 765-66, 95 S.Ct. 2457.

In *Salfi,* the Court addressed an appeal dealing with § 405(h) and § 405(g) of the Social Security Act. The Court first considered the third sentence of § 405(h), which provides that "[n]o action ... shall be brought under section 1331 ... of Title 28 to recover on any claim arising under this subchapter." 42 U.S.C. § 405(h). Since the language used by Congress was "more than a codified requirement of administrative exhaustion" and was "sweeping and direct," the district court had lacked federal question jurisdiction over the case before it. *Salfi,* 422 U.S. at 757, 95 S.Ct. 2457. The Court then discussed § 405(g), which provides in pertinent part that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party ... may obtain a review ... by a civil action ..." 42 U.S.C. § 405(g). The Court concluded

that the term "final decision" was "a statutorily specified jurisdictional prerequisite" and "something more than simply a codification of the judicially developed doctrine of exhaustion." The district court had therefore erred by concluding that futility could excuse the need to exhaust. *Salfi,* 422 U.S. at 766, 95 S.Ct. 2457.

Under *Salfi* the language of a statute must be "sweeping and direct" for it to be considered jurisdictional. *Id.* 422 U.S. at 757, 95 S.Ct. 2457. The language must indicate either that "there is no federal jurisdiction prior to exhaustion" or that exhaustion is "an element of the underlying claim." *Chelette v. Harris,* 229 F.3d 684, 687 (8th Cir.2000). Exhaustion is presumed to be non jurisdictional "unless Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision." *Avocados Plus Inc. v. Veneman,* 370 F.3d 1243, 1248 (D.C.Cir.2004) (internal citations omitted). We review de novo the district court's interpretation of § 6912(e). *Alpharma, Inc. v. Pennfield Oil Co.,* 411 F.3d 934, 937 (8th Cir.2005).

The question of whether § 6912(e) is jurisdictional in nature has never been addressed by the Supreme Court, and it presents a question of first impression for this court. Section 6912(e) provides that:

> [n]otwithstanding any other provision of law, *a person* shall exhaust all administrative appeal procedures established by the Secretary or required by law before *the person* may bring an action in a court of competent jurisdiction[2] against (1) the Secretary; (2) the Department; or (3) an agency, office, officer, or employee of the Department.

7 U.S.C. § 6912(e).

Other circuits that have addressed the issue are split. In *McBride Cotton & Cattle Corp. v. Veneman,* the Ninth Circuit held that "the exhaustion requirement of § 6912(e) is not jurisdictional" because it contains no language expressly conditioning federal question jurisdiction on exhaustion of administrative remedies. 290 F.3d 973, 976 (9th Cir.2002). In contrast, the Second Circuit in *Bastek v. Fed. Crop Ins. Corp.,* held that "the statutory provision mandating exhaustion in 7 U.S.C. § 6912(e) is explicit" and the plaintiffs' failure to exhaust

[2]A court of competent jurisdiction is any federal district court to which 7 U.S.C. § 1506(d) grants exclusive jurisdiction over suits by or against the FCIC.

administrative remedies "deprived them of the opportunity to obtain relief in the district court." 145 F.3d 90, 94-95 (2d Cir.1998). The lower courts are also split as to whether § 6912(e) is jurisdictional. *Compare Kuster v. Veneman,* 226 F.Supp.2d 1190, 1192 (D.N.D.2002) (implicitly finding § 6912(e) non jurisdictional); *Rain & Hail Ins. Service, Inc. v. Fed. Crop Ins. Corp.,* 229 F.Supp.2d 710, 714 (S.D.Tx.2002) (same); *In re Cottrell,* 213 B.R. 33, 37 (M.D.Ala.1997) (rejecting the claim that § 6912(e) is jurisdictional) [3] *with In re 2000 Sugar Beet Crop Ins. Litig.,* 228 F.Supp.2d 999, 1004 (D.Minn.2002) (explicitly finding § 6912(e) to be jurisdictional); *Am. Growers Ins. Co. v. FCIC,* 210 F.Supp.2d 1088, 1092-93 (S.D.Iowa 2002) (implies § 6912(e) is jurisdictional); *Gilmer-Glenville, Ltd. P'ship v. Farmers Home Admin.,* 102 F.Supp.2d 791, 794 (N.D.Ohio 2000) (same); *Utah Shared Access Alliance v. Wagner,* 98 F.Supp.2d 1323, 1333 (D.Utah 2000) (failure to exhaust remedies deprives court of subject matter jurisdiction).

We begin our inquiry with the language of § 6912(e). *See United States v. Mickelson,* 433 F.3d 1050, 1052 (8th Cir.2006). Although the language requires exhaustion, nothing in the text indicates that exhaustion was intended as a jurisdictional bar and the FCIC has not pointed to any legislative history evidencing such an intent. Section 6912(e) is directed at "a person" and provides that the person shall exhaust administrative remedies before bringing an action in federal district court against the FCIC. There is no language directed at courts or limiting federal district court jurisdiction.

Our court has examined similar language in the Prison Litigation Reform Act (PLRA) and held that it "does not contain the sort of 'sweeping and direct' language necessary to impose a jurisdictional requirement," but only "governs the timing of the action." *Chelette,* 229 F.3d at 686-87 (internal citations omitted). Section 1997e(a) of the PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by *a prisoner* confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). Every circuit which has considered whether § 1997e(a) is jurisdictional in nature has concluded that it is not.

[3] There are also unreported decisions which have explicitly held that § 6912(e) is non jurisdictional. *See Farmers Alliance Mut. Ins. Co. v. Fed. Crop Ins. Corp.,* 2001 WL 30443, at *2 (D.Kan.2001) ("Section 6912(e) contains no sweeping and direct language barring federal question jurisdiction absent exhaustion of administrative remedies."); *Pringle v. United States,* 1998 U.S. Dist. Lexis 19378, at * 14-15 (E.D. Mich.1998).

See Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 677 (4th Cir.2005); *Richardson v. Goord,* 347 F.3d 431, 433-34 (2d Cir.2003); *Steele v. Fed. Bureau of Prisons,* 355 F.3d 1204, 1206 (10th Cir.2003); *Ali v. Dist. of Columbia,* 278 F.3d 1, 5-6 (D.C.Cir.2002); *Casanova v. Dubois,* 289 F.3d 142, 147 (1st Cir.2002); *Wright v. Hollingsworth,* 260 F.3d 357, 358 n. 2 (5th Cir.2001); *Curry v. Scott,* 249 F.3d 493, 501 n. 2 (6th Cir.2001); *Nyhuis v. Reno,* 204 F.3d 65, 69 n. 4 (3d Cir.2000); *Rumbles v. Hill,* 182 F.3d 1064, 1067-68 (9th Cir.1999); *Massey v. Helman,* 196 F.3d 727, 732 (7th Cir.1999).

The language used by Congress in the Immigration and Nationality Act (INA) provides a useful contrast. In § 242 of the INA, Congress provided that "*a court* may review a final order of removal *only if* ... the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1) (emphasis added). Here, the exhaustion requirement explicitly limits subject matter jurisdiction, and § 1252(d)(1) has consistently been treated as a jurisdictional statute and an integral part of the statute. *See Barron v. Ashcroft,* 358 F.3d 674, 677 (9th Cir.2004); *Theodoropoulos v. I.N.S.,* 358 F.3d 162, 169-72 (2d Cir.2004); *Abdulrahman v. Ashcroft,* 330 F.3d 587, 594-95 (3d Cir.2003); *Fernandez-Bernal v. Attorney General of the United States,* 257 F.3d 1304, 1317 n. 13 (11th Cir.2001); *Singh v. Reno,* 182 F.3d 504, 511 (7th Cir.1999); *Witter v. I.N.S.,* 113 F.3d 549, 554 (5th Cir.1997).

The language in § 6912(e) of the Reorganization Act resembles that used in the PLRA. Its directive is addressed to the individual litigant rather than the court, and it pertains to the time when an action may be brought in federal district court. Like the language of the PLRA and in contrast to the language of the INA and the Social Security Act, "[n]othing in § 6912(e) mentions, defines or limits federal jurisdiction," *McBride,* 290 F.3d at 980, and its language cannot be considered "sweeping and direct" under *Salfi.*

The FCIC contends that appellants reliance on *Chelette,* and its interpretation of PLRA § 1997e(a), is misplaced due to the Supreme Court's intervening decision in *Booth v. Churner,* 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). In *Booth* the Court dismissed a prisoner's § 1983 action for failure to exhaust administrative remedies, but it did not consider whether § 1997e(a) was jurisdictional or not. Its decision turned instead on its interpretation of "available remedies" under § 1997e(a). *Id.* at 736, 121 S.Ct. 1819. Moreover, all circuits

which have ruled on the jurisdictional issue since *Booth* have continued to treat § 1997e(a) as non jurisdictional. *See Anderson,* 407 F.3d at 677; *Richardson,* 347 F.3d at 433-34; *Steele,* 355 F.3d at 1206; *Ali,* 278 F.3d at 5-6.

The FCIC's reliance on the Second Circuit's decision in *Bastek* is also not persuasive. *Bastek* concluded that exhaustion of administrative remedies was a statutory mandate under § 6912(e) precluding the normal exercise of judicial discretion in balancing the individual interest in access to a federal judicial forum against the institutional interests favoring exhaustion. *Bastek,* 145 F.3d. at 94. As the Ninth Circuit has pointed out, however, "not all statutory exhaustion requirements are created equal. Only statutory exhaustion requirements containing 'sweeping and direct' language deprive a federal court of jurisdiction." *McBride,* 290 F.3d at 980 (*citing Anderson v. Babbitt,* 230 F.3d 1158, 1162 (9th Cir.2000); *Rumbles,* 182 F.3d at 1067); *see also Cottrell,* 213 B.R. 33 (exhaustion of administrative remedies not a jurisdictional prerequisite to court consideration of Chapter 13 debtor's claim even though exhaustion required by statute). In *Bastek* the court did not address whether the language of § 6912(e) was sweeping and direct, but merely stated that § 6912(e) was "explicit." However, the language in § 6912(e) is no more explicit than that in § 1997e(a) of the PLRA which no circuit considers jurisdictional. A contrary interpretation would make virtually all statutory exhaustion provisions jurisdictional, regardless of whether they contain sweeping and direct jurisdictional language. Such a rule cannot be squared with the Supreme Court's decision in *Salfi.*

After reviewing the cases and comparing § 6912(e) to other statutes we conclude that § 6912(e) is nothing more than "a codified requirement of administrative exhaustion" and is thus not jurisdictional. *Salfi,* 422 U.S. at 757, 95 S.Ct. 2457; *see also McBride,* 290 F.3d at 980. Section 6912(e) was promulgated in 1994, almost twenty years after the Supreme Court's decision in *Salfi* distinguishing between jurisdictional and non jurisdictional exhaustion. Had Congress intended to limit subject matter jurisdiction by § 6912(e), it could have done so with explicit language as it has in other statutes. *See, e.g.,* 8 U.S.C. § 1252(d)(1). To now interpret § 6912(e) as jurisdictional "would collapse the Supreme Court's distinction between jurisdictional prerequisites and mere codifications of administrative exhaustion requirements," *Chelette,* 229 F.3d at 687, and would run counter to our prior interpretation of

similar statutes such as the PLRA.[4] Since we conclude that the district court did have subject matter jurisdiction over this case, we must consider its alternative reason for dismissing the insurers' complaint.

V.

Appellants argue that the district court also erred by its ruling on the alternative ground that the insurers had not exhausted their administrative remedies. Appellants contend that exhaustion is not required since it would be futile because administrative remedies cannot redress their injuries and because their complaint presents legal questions which are best resolved by the courts. The FCIC responds that appellants do not qualify for the limited exceptions to the exhaustion doctrine. It contends that the Deputy Administrator of the FCIC and the Board can consider their claims, the Board can award appropriate monetary relief, and that the agency should have been allowed the opportunity to create an adequate administrative record for review before any complaint was filed in the district court. Because appellants have challenged the agency action, they bear the burden of proving that exhaustion should be excused under their proffered theories. *In Home Health, Inc. v. Shalala,* 272 F.3d 554, 559-61 (8th Cir.2001). We review the district court's decision on exhaustion de novo. *Kinkead v. Southwestern Bell Corp. Sickness & Accident Disability Benefit Plan,* 111 F.3d 67, 68 (8th Cir.1997).

A party may be excused from exhausting administrative remedies if the complaint involves a legitimate constitutional claim, if exhaustion would cause irreparable harm, if further administrative procedures would be futile, *In Home Health,* 272 F.3d at 560, or if the issues to be decided are primarily legal rather than factual. *Missouri v. Bowen,* 813 F.2d 864, 871 (8th Cir.1987). The insurers claim that both the futility and legal issue exceptions apply, and we address each in turn.

An administrative remedy will be deemed futile if there is doubt about whether the agency could grant effective relief. *See McCarthy*

[4]Other statutes that require exhaustion but which have been held to be non jurisdictional include § 7806 of the Hass Avocado Promotion, Research, and Information Act, 7 U.S.C. §§ 7801-7813, *Avocados,* 370 F.3d at 1248; and §§ 405(g)-(h) of the Social Security Act, *Salfi,* 422 U.S. at 757, 766, 95 S.Ct. 2457. *See also Anderson,* 230 F.3d at 1162 (holding that 43 C.F.R. § 4.21(c), which requires exhaustion before appeals from decisions of the Interior Board of Indian Appeals is non jurisdictional).

v. Madigan, 503 U.S. 140, 147, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992). In claiming they come under the futility exception the insurers allege that neither the FCIC nor the Board have the power to award damages. The Board's jurisdiction was set out by the Contract Disputes Act (CDA), 41 U.S.C. § 607(d), which provides that [e]ach agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

Appellants argue that because the CDA only covers procurement contracts, 7 C.F.R. § 24.4 (defining contract under the CDA); *Coastal Corp. v. United States,* 713 F.2d 728, 730 (Fed.Cir.1983), the Board lacks jurisdiction because the SRA is not a procurement contract.

Appellants overlook 7 C.F.R. § 400.169, which provides that "final administrative determinations of the [FCIC] ... may be appealed to the [Board]" if "the company believes that the [FCIC] has taken an action that is not in accordance with the provisions of the Standard Reinsurance Agreement." Because the implementation of AREERA and ARPA can affect the legal rights of appellants under the SRA, complaints over implementation are properly considered by the Board under 7 C.F.R. § 400.169. *See Nat'l Crop. Ins. Services, Inc. v. Fed. Crop Ins. Corp.,* 351 F.3d 346 (8th Cir.2003); *Ace Property,* AGBCA No.2004-173-F, 2005 WL 3485623. Moreover, Section V of the 1998 SRA provided that an insurer could bring disputes before the Board under 7 C.F.R. § 400.169. While the Board could not decide the legality of the regulations in issue, interpreting the contractual language of the SRA is well within its purview.

Appellants also claim that the Board cannot award damages. Even though the FCIC was required by Congress to implement AREERA and ARPA and thus breach the SRA, it does not follow that the Board cannot award damages for the breach. *See United States v. Winstar Corp.,* 518 U.S. 839, 843, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996). "On matters involving disputes over interpreting, explaining, or restricting the terms of the [SRA], the [Board also] has [the] authority and has authorized [the] award of monetary damages." *Ace Property & Cas. Ins. Co.,*

AGBCA No.2004-173-F thru 2004-184-F, 2005 WL 3485623 (December 21, 2005). "[W]hile FCIC was required to comply with the congressional mandate, nothing in that congressional action barred FCIC from paying or being responsible for breach damages caused by that compliance." *Id.* Because the Board has jurisdiction over the dispute and the power to award monetary relief, we conclude that appellants have not demonstrated that their administrative remedies would be futile.

Appellants finally argue that their failure to exhaust should be excused because the issues involved on this appeal are legal questions which are not suitable for administrative resolution and are more properly resolved by the courts. The FCIC responds that while some of the issues to be determined involve factual questions, they are more properly considered legal questions which should be left to the expertise of the FCIC and the Board.

The legal issues exception is extremely narrow and should only be invoked if the issues involved are ones in which the agency has no expertise or which call for factual determinations. *Jewel Companies, Inc. v. Fed. Trade Comm'n,* 432 F.2d 1155, 1159 (7th Cir.1970). The district court identified several facts which may remain in dispute, such as whether the SRA was a continuous contract with unvariable terms or a renewable contract whose terms will vary from year to year; what type of consideration was given; and whether the parties were under duress when they accepted Amendments No. 1 and 3. *Ace Property,* 357 F.Supp.2d at 1151. Even though some of the issues involved are admittedly legal in nature, that does not necessarily mean they are questions that should excuse exhaustion.

The purpose of exhaustion is to prevent "premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the court the benefit of its experience, and to complete a record which is adequate for judicial review." *Salfi,* 422 U.S. at 765, 95 S.Ct. 2457; *see also West v. Bergland,* 611 F.2d 710, 715 (8th Cir.1979). Those goals would not be advanced if the administrative process was not completed here. The statutory scheme gives the FCIC and the Board special responsibility in respect to the proper application and interpretation of the SRAs. The administrative process is apparently moving forward successfully, *see Ace Property,* AGBCA No.2004-173-F thru 2004-184-F, 2005 WL 3485623, and exercising

jurisdiction at this stage would not allow the expertise of the FCIC and Board to develop a full administrative record for the benefit of any future judicial review. We conclude that appellants have not established any exception to the requirement that they exhaust their administrative remedies.

IV.

Accordingly, we affirm the judgment of the district court on the ground that none of the exceptions to the exhaustion doctrine excuse appellants' failure to exhaust their administrative remedies.

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FOOD NUTRITION SERVICE

COURT DECISION

BURCH v. USDA.
C.A.6 (Ohio), 2006.
No. 04-3640.
Filed March 31, 2006.

FNS – Trafficking – Clearly erroneous findings, when not – Electronic Benefits Transfer (EBT) – Employee, who is an – disqualification, permanent.

Government's investigators presented creditable evidence of three instances that convenience store's employees engaged in trafficking of federal food stamps. Store part-time cashier and manager (Burch) who claimed he was not a paid employee and contended (without specific evidence) that the investigators entrapped him on two other occasions or otherwise failed to disclose exculpatory evidence at the trial. Court held that the regulatory framework provides that even a single instance of trafficking is sufficient to permanently disqualify a participant in the federal food stamp program. The government also offered electronic benefits (EBT) data which they proffered "could not be legitimate transactions." The court did not rely on the EBT data, but found the investigator's testimony legally sufficient to find that trafficking did occur and was attributed to the employer.

(Cite as: 174 Fed.Appx. 328).

United States Court of Appeals,Sixth Circuit.

Before GIBBONS, GRIFFIN and BRIGHT, Circuit Judges.*

JULIA SMITH GIBBONS, Circuit Judge.

Plaintiff-appellant David Burch appeals from the district court's affirmance of the decision of the United States Department of Agriculture ("USDA"), Food and Nutrition Service ("FNS"), to permanently disqualify Burch's store, DB's Check Mart (the "store" or "Check Mart"), from participation in the federal food stamp program (the "program"). For the following reasons, we affirm the district court's decision.

The FNS permanently disqualified Check Mart from the federal food stamp program after it determined that the store's personnel unlawfully

*The Honorable Myron H. Bright, United States Court of Appeals for the Eighth Circuit, sitting by designation.

trafficked in food stamps in violation of 7 U.S.C. § 2021(b)(3)(B) and C.F.R. § 278.6(e)(1)(i). Following that administrative action, Burch filed a complaint in district court in accordance with 7 U.S.C. § 2023(a)(13), which provides for *de novo* judicial review of final administrative decisions by the FNS. After the parties consented to having the case heard by a magistrate judge, a bench trial was conducted. At trial, William Krause, an FNS program specialist, testified about the administration of the food stamp program. Krause testified that Check Mart was permanently disqualified from the program as a result of an investigation, which was carried out by the USDA Office of Inspector General and the Akron Police Department, that determined that food stamp benefits were being redeemed for cash and non-food items at Check Mart. Krause also testified that the store was disqualified based on an analysis of the store's electronic benefit transfer ("EBT") data, which tracks food stamp transactions electronically. According to Krause, the data revealed that certain transactions at the store could not be legitimate transactions and therefore likely reflected trafficking activity.

Detective Dan Hudnall of the Akron Police Department then testified that he was involved in the investigation of Check Mart that uncovered trafficking. Hudnall testified that an undercover source, Joe Mollis, with whom the investigation was working, was able to exchange food stamps for cash or ineligible items on three occasions: Mollis exchanged $100 in paper food stamps for $40 cash and a six pack of beer with Daniel Burch, the plaintiff's brother, on February 14, 2000; Mollis exchanged money on an EBT card for cash and beer with Diane Roebuck on February 24, 2000; and Mollis bought ineligible beer using food stamps on March 16, 2000. Detective Kandy Shoaf of the Akron Police Department testified that she was also involved in the investigation of Check Mart. Shoaf testified that she accompanied Joe Mollis into the Check Mart on March 16, 2000. Mollis attempted to exchange food stamps for cash but was told to come back later to sell food stamp benefits. Shoaf testified that Mollis was able to purchase beer using food stamps at that time. Joe Mollis then testified that he participated as an undercover source and sold food stamps to employees of Check Mart on each of the three different occasions in February and March 2000. Mollis testified that the first transaction was with Daniel Burch, while the second and third were with Diane Roebuck. Finally, James Owens, a USDA agent, testified that he also participated in the investigation and that Joe Mollis was able to sell food stamp benefits for cash.

Diane Roebuck testified that she volunteered at Check Mart, helping with check cashing, money orders, money grams, and cleaning. Daniel Burch testified that he assisted in going to the bank for the store and doing construction for the store. Daniel Burch also testified that Diane Roebuck worked, although without pay, 12- to 14-hour days at Check Mart, seven days a week.

On March 9, 2004, the magistrate judge affirmed the FNS's decision to permanently disqualify Check Mart from the program and dismissed Burch's complaint. In an accompanying memorandum opinion, the magistrate judge made, in part, the following findings of fact: (1) on February 14, 2000, Joe Mollis sold food stamps to Daniel Burch in exchange for cash and alcohol; (2) on February 23, 2000, Joe Mollis sold an authorization card to Diane Roebuck in exchange for cash and alcohol; and (3) on March 16, 2000, Joe Mollis, accompanied by detective Shoaf, exchanged food stamp benefits with Diane Roebuck for alcoholic beverages and other miscellaneous items. The magistrate judge found that Daniel Burch and Diane Roebuck "performed duties in various capacities at the store, including management and occasionally clerking at the cash register." The magistrate judge concluded that Daniel Burch and Diane Roebuck were personnel of the store and had engaged in trafficking on these three occasions. Therefore, the magistrate judge held that the FNS action to permanently disqualify Check Mart from the program was valid. With respect to the EBT data offered by the government, although the magistrate judge did not challenge the authenticity of the data, she concluded that the transactions reflected in the data did not constitute trafficking. Burch filed a timely notice of appeal.

On appeal, we review the district court's findings of fact for clear error. Fed.R.Civ.P. 52(a). The district court's conclusions of law are reviewed *de novo*. *Golden v. Kelsey-Hayes Co.,* 73 F.3d 648, 653 (6th Cir.1996).

Burch first argues that exculpatory evidence, the discovery of which will demonstrate that FNS intentionally framed Burch, was concealed by FNS. Specifically, Burch argues that there were two instances prior to the three trafficking violations in which various individuals tried to get Daniel Burch to violate the food stamp laws. Burch fails to state what specific evidence he seeks or whether he previously requested any evidence regarding the prior incidents. Based on our review of the bench trial record, it does not appear that he ever did request any such

evidence. Moreover, Burch does not explain how any evidence concerning the earlier incidents, assuming such evidence exists, relates to the narrow issue in this case: whether Check Mart engaged in food stamp trafficking on the three dates in question. Beyond his conclusory assertion that the other two instances provide evidence of a "frame-up" and motive to frame him by the government, Burch offers no basis on which this court could reach such a conclusion.

Burch also argues that the government's enforcement action was untimely. Any claim that the government's delay bars enforcement of the regulation fails, because the government is generally not subject to the defense of laches in enforcing its rights. *Hatchett v. United States,* 330 F.3d 875, 887 (6th Cir.2003). Moreover, at trial, Burch plainly admitted that he could not show any prejudice to him arising from the government's delay in enforcing the regulation.

Burch asserts that the government's failure to preserve exculpatory evidence violated his due process rights. In support of his due process claim, Burch cites to *United States v. Wright,* 260 F.3d 568 (6th Cir.2001), which held that a criminal defendant's due process rights were not violated when investigators negligently failed to preserve potentially useful evidence. This court's *Wright* case derives from principles, outlined in *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) and *California v. Trombetta,* 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), that involve a criminal defendant's right to present a complete defense and " 'what might loosely be called the area of constitutionally guaranteed access to evidence.' " *Trombetta,* 467 U.S. at 485, 104 S.Ct. 2528 (quoting *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982)). Burch neither argues nor cites to any authority indicating that a criminal defendant's right to certain evidence is applicable to a civil action challenging an administrative decision to disqualify a business from the federal food stamp program.

The record does not indicate that Burch requested the allegedly exculpatory evidence prior to trial. Moreover, at trial, Burch acknowledged that the absence of the allegedly missing evidence-the cash and non-cash items involved in the transactions and Check Mart's security video tapes on the transaction dates-had not prejudiced his case in any way. Nor does he suggest any prejudice now. With regard to the cash used in the transactions, it is not disputed that an FNS agent, who was not involved in the case, stole the cash from an evidence locker. The

government did not attempt to enter any of the non-cash items into evidence. The security videotapes were erased by Burch before he knew of the administrative investigation or disqualification. There is no basis for finding a due process violation under the circumstances presented here.

Burch also argues that the evidence offered at trial was insufficient to sustain the FNS's decision. Initially, it should be noted that many of Burch's assertions revolve around the alleged invalidity of the EBT data introduced by the government. We need not consider these arguments, however, because the magistrate judge did not rely on the EBT data and specifically concluded that the transactions manifested in that data were not trafficking. Thus, the validity of the EBT data is irrelevant. The remainder of Burch's assertions involve credibility determinations and the weight given to certain evidence. Our own review of the record leads us to conclude that the magistrate judge's factual findings in this case were supported by ample evidence in the form of testimony from the government's investigating officers. The magistrate judge's findings were not clearly erroneous.

Finally, Burch challenges the constitutionality of 7 C.F.R. § 278.6, arguing that the regulation is vague and overbroad. The challenged regulation provides that the FNS shall disqualify a firm permanently from the food stamp program if "personnel" of the firm have "trafficked" in food stamps. 7 C.F.R. § 278.6(e)(1)(i).[1] "Trafficking" is defined in the regulations as "the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food...." 7 C.F.R. § 271.2. Although "personnel" is not defined in the regulations, we have previously defined the word as it is used in this regulation. Giving the word its ordinary meaning, the court interpreted personnel to be " 'a body of persons employed in some service' or 'a body of employees that is a factor in business administration.' " *Bakal Bros., Inc. v. United States,* 105 F.3d 1085, 1089 (6th Cir.1997) (citing Webster's Third New International Dictionary 1687 (1971)).

A challenge to the constitutionality of a regulation is reviewed *de*

[1]The statutory basis for this regulation is found at 7 U.S.C. § 2021(b)(3)(B), which provides that a store may be permanently disqualified from the federal food stamp program based on a single instance of the trafficking in or purchasing of coupons or authorization cards. Although the statute allows for a lesser sanction if certain conditions are met, *see Bakal Bros., Inc. v. United States,* 105 F.3d 1085, 1088-89 (6th Cir.1997), those conditions are not relevant to this case.

novo.[2] *See, e.g., Jifry v. F.A.A.,* 370 F.3d 1174, 1182 (D.C.Cir.2004); *United States v. Hsu,* 364 F.3d 192, 196 (4th Cir.2004); *Gonzalez v. Metro. Transp. Auth.,* 174 F.3d 1016, 1018 (9th Cir.1999). The general standard for a vagueness challenge is whether the law gives "fair notice of the offending conduct." *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). Moreover, "regulatory statutes governing business activities, where the acts limited are in a narrow category [receive] greater leeway...." *Id.* In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, the Supreme Court reaffirmed that economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (footnotes omitted). With this framework in mind, we turn to Burch's challenge to the regulation.

The magistrate judge found that "Diane Roebuck and Daniel Burch performed duties in various capacities at the store, including management and occasionally clerking at the cash register." Indeed, Burch admits in his appellate brief that both "Diane Roebuck and Daniel Burch were volunteer employees at [ ] Check Mart." Giving personnel its ordinary meaning, as we did in *Bakal Bros.,* the regulation's prohibition on trafficking by "personnel of the firm" gave fair notice to Burch that he could be held liable for the actions of "volunteer employees" or individuals whose duties at the store included "management and occasionally clerking at the cash register."

Burch acknowledges *Bakal Bros.* but argues that our interpretation of personnel in that case actually conflicts with the position of the agency, thereby making the regulation even more vague. Krause, the FNS specialist, testified at trial that personnel could include a non-employee who is allowed by a store owner to go behind the store's counter and has access to the cash register. Relying on Krause's testimony, Burch puts forward various hypothetical individuals that

[2]Although the government briefly refers to *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), in its brief, we do not understand Burch to raise an issue with the agency's construction of the statute. Burch argues that the regulation is unconstitutionally vague, not that the regulation is either contradictory to or an unreasonable interpretation of the statute.

might test the limits of the agency's proffered definition of personnel. We need not address any theoretical inconsistency between our prior interpretation of the regulation in *Bakal Bros.* and the agency expert's testimony. It is well settled that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie,* 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). Thus, although Burch posits hypothetical individuals that might fall outside of the ordinary meaning of personnel, the actual individuals involved in trafficking in this case fit squarely within the regulation's plain meaning as this court has previously interpreted it in *Bakal Bros.*

Finally, Burch challenges the regulation as unconstitutionally "overbroad" because it does not give the store owner an opportunity, without fear of liability, to renounce and report trafficking activity after the employer has discovered it. Burch is correct that liability may attach the moment a firm's personnel engage in trafficking; however, there is no requirement that a liable store owner be provided with the opportunity to escape disqualification by renouncing the actions of his employees. Indeed, this court has previously determined that no such provision is required. *See Bakal Bros.,* 105 F.3d at 1088-89 (holding that an innocent owner could be permanently disqualified from the program); *Goldstein v. United States,* 9 F.3d 521, 524 (6th Cir.1993) (same).

For the foregoing reasons, the district court's decision is affirmed.

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FARM SERVICE ACT

COURT DECISION

STEVEN E. CLASON v.USDA.
C.A.8 (Neb.), 2006.
No. 05-1547.
Filed: Feb. 22, 2006.

(Cite as: 438 F.3d 868).

FSA – CCC – "Delivery", meaning of – Affirmative misconduct by government official, when not – Equitable estopple.

Corn farmer (Clausen) sold, but did not physically deliver a quantity of corn which was subject to a security interest by FSA. Clausen claimed the earlier recognition of the "sale" qualified him for a better loan repayment rate. Clausen used USDA form CCC-681-1 to notify FSA of the sale. FSA disagreed that the terms of the release of FSA's security interest was satisfied and assessed Clausen for the differential bushel price. Clausen contended that FSA's "delivery" terms varied over time and that he (Clausen) had reliance on the definition favorable to him. Clausen also claimed that a FSA official told him that the transacton was complete with the "sale" without delivery. The court held that the National Appeals Division (NAD) officer's determination that physical delivery is required was not arbitrary and capricious.

United States Court of Appeals, Eighth Circuit.

Before ARNOLD, BEAM, and RILEY, Circuit Judges.
ARNOLD, Circuit Judge.

Steven Clason appeals a judgment affirming a decision by the National Appeals Division (NAD) of the Department of Agriculture that he owed the federal government $9,703.62 plus interest for the unpaid balance of a marketing assistance loan. The dispute centers on whether Mr. Clason was entitled to repay the loan at an advantageous rate when he sold, but did not physically deliver, the corn securing the loan. The local office of the Farm Service Agency (FSA) (an agency of the Agriculture Department) determined that in order to repay the loan at the lower amount, Mr. Clason was required to make physical delivery of the corn to the buyer. After exhausting his administrative appeals, Mr. Clason sought review in the district court,[1] which affirmed the agency's

[1]The Honorable David L. Piester, United States Magistrate Judge for the District of Nebraska, sitting by consent of the parties. *See* 28 U.S.C. 636(c); *see also* Fed.R.Civ.P.
(continued...)

decision. Mr. Clason appealed that decision to this court, and we affirm.

In October, 1998, Mr. Clason accepted a marketing assistance loan for over $66,000 from the Commodity Credit Corporation (CCC), a federal corporation within the Department of Agriculture. As required by the loan's terms, Mr. Clason gave the CCC a security interest in 36,000 bushels of corn valued at $1.86 per bushel. He agreed not to move the corn from where it was stored on his property or to co-mingle it with other corn without the CCC's approval.

Under the terms of the loan, the interest rate was set at 5.875% and payment was due in July, 1999. The loan program, however, allowed farmers to discharge a marketing assistance loan at a reduced rate if the price of corn dropped during the term of the loan. 7 C.F.R. § 1421.25(b), (c) (1998). Several weeks before the loan was due, Mr. Clason sought approval from the local FSA office, which administers CCC loans, to sell and deliver more than 30,000 bushels of the corn to his brother. To obtain approval from the FSA, Mr. Clason executed a standardized form, CCC-681-1, titled "Authorization for Delivery of Loan Collateral For Sale." The authorization form provided a repayment rate of $1.49 per bushel "for any quantity delivered on or before" July 26, 1999. Another provision of the form stated that the CCC's security interest would be released "only if the CCC receives payment at the [Furnas County FSA Office] for the quantity of commodity delivered to the buyer."

In August, Mr. Clason notified the Furnas County FSA office that, although he had sold the bulk of his corn to his brother, only 8,573 bushels of corn had been transferred from his storage bins to his brother's operation. The rest of the corn remained in his possession. Mr. Clason nonetheless contended that because that corn now belonged to his brother, it had been "delivered" and he was entitled to the lower repayment rate. In addition, Mr. Clason maintained that he had spoken with an FSA employee prior to the July 26 deadline, and that the employee had assured him that physical delivery was not necessary.

Upon learning that Mr. Clason had not made physical delivery of all of the corn that he had sold to his brother, the FSA determined that Mr. Clason owed the full repayment amount of $1.935 per bushel for the corn that remained in his possession. After accepting as partial payment

[1](...continued)
73.

the checks that Mr. Clason tendered, the FSA calculated an outstanding balance due of $9,703.62.

Pursuant to Agriculture Department procedure, Mr. Clason appealed the deficiency notice to the FSA county committee, which determined that Mr. Clason's failure to make physical delivery of the corn disqualified him from repaying the lower rate. Mr. Clason then unsuccessfully appealed to the FSA state committee and to the NAD, the latter of which held an evidentiary hearing. The NAD hearing officer concluded that physical delivery was required to qualify for the lower rate, and the NAD National Director upheld that decision. His administrative appeals exhausted, Mr. Clason sought review in the district court. The magistrate judge determined that the administrative decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law and therefore affirmed the agency determination.

II.

Mr. Clason contends that the meaning of the term "delivery," as used on the CCC-681-1 form, is not confined to physical delivery. Neither the form nor the regulations governing marketing assistance loans provide a definition of "delivery." Our task is not to interpret the contract independently, but instead to determine whether the NAD's interpretation was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and should be set aside pursuant to the provisions of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

Because we are reviewing an agency's interpretation of a term in a document that it created, we must first determine the level of deference to give to the NAD's construction of that term. *See Rain & Hail Ins. Serv., Inc. v. Federal Crop Ins. Corp.,* 426 F.3d 976, 979 (8th Cir.2005). In this case, the interpretation at issue involves the language on the CCC-681-1 form. The regulations governing the marketing assistance loans authorized the CCC to set the terms and conditions of the CCC-681-1 form. *See* 7 C.F.R. § 1421.20(a) (1998). The terms of CCC-681-1 involve complex matters within the Department of Agriculture's area of expertise, namely, the repayment terms of subsidized agricultural commodity loans. We also note that the NAD's appeal process, which provided Mr. Clason with a face-to-face hearing, *see* 7 U.S.C. § 6991-7002, qualifies as formal adjudication. *Lane v. United States Dep't of Agriculture,* 120 F.3d 106, 108-110 (8th

Cir.1997). Because of the NAD's expertise and the extensive administrative review afforded to Mr. Clason, we will afford the NAD's interpretation the same level of deference afforded to an agency's interpretation of its own regulations. *See Rain & Hail Ins.,* 426 F.3d at 979 (citing *Martin v. Occupational Safety & Health Rev. Comm'n,* 499 U.S. 144, 151, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991)). This deferential approach requires us to accept the NAD's interpretation of the term "delivery" unless that interpretation is "plainly erroneous." *Rain & Hail Ins.,* 426 F.3d at 979 (citing *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)).

In this case, the NAD determined that the "delivery" required by CCC-681-1 was physical delivery. This was not plainly erroneous. The regulations governing these transactions during the relevant time period referred to the "removal of" and "moving" of farm-stored commodities. *See* 7 C.F.R §§ 1421.20(a), (e); 1421.23(b) (1998). By requiring producers who wish to take advantage of the favorable repayment rate to make physical delivery to the buyer, the Agriculture Department rationally may have believed that it was promoting the actual use of commodities. In any case, although the word "delivery" can be interpreted to include constructive delivery, *see, e.g.,* Black's Law Dictionary (8th ed.2004), the NAD's interpretation is reasonable and consistent with the regulations governing marketing assistance loans.

Mr. Clason contends that the agency has changed its definition of the word "delivery" and therefore the NAD's interpretation deserves no weight. Although an inconsistent agency interpretation is less authoritative than a consistent one, *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987), Mr. Clason has not identified any previous administrative or judicial decision that establishes a contrary government interpretation. Instead he points to a statement in the record from an Agriculture Department official that "the FSA currently, and for the past several years, has interpreted and defined 'delivery' as the movement to a purchaser of a commodity under loan" to the CCC. Mr. Clason contends that this language necessarily leads to the conclusion that the FSA used a different definition of the term at some previous time. We disagree. The language quoted above, by itself, is insufficient to support Mr. Clason's inference that the FSA has used more than one definition of the term "delivery."

III.

In the alternative, Mr. Clason argues that the government is estopped from requiring physical delivery because of his reliance upon assurances that he allegedly received from a county FSA officer. The FSA officer stated at the hearing that she did not recall telling Mr. Clason that constructive delivery was acceptable. Even if she had made such statements, however, they would not be sufficient to support the application of estoppel against the federal government. Any claim of equitable estoppel against the government would require proof "that the government committed affirmative misconduct." *Charleston Housing Auth. v. U.S. Dep't of Agric.,* 419 F.3d 729, 739 (8th Cir.2005). The record here does not contain any evidence of affirmative misconduct. At most, the FSA officer's comments were the product of negligence, which is insufficient to satisfy Mr. Clason's heavy burden of proof. *See Morgan v. C.I.R.,* 345 F.3d 563, 566-67 (8th Cir.2003).

IV.

For the reasons stated above, the judgment of the district court is affirmed.

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FARM SERVICE ACT

DEPARTMENTAL DECISION

In re: ANNA BRAMBLETT, FORMERLY ANNA J. EDWARDS.
FSA Docket 06-0001.
Decision and Order.
Filed January 20, 2006.

FSA – Federal salary offset – Reliance.

Petitioner - Pro Se.
For Respondent – Sharon Gipson.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Decision

This matter is before the Administrative Law Judge upon the Petition of Anna J. Bramblett who seeks review of a proposed offset of her federal salary. Telephonic hearings were held in this matter on December 20, 2005 and December 30, 2005. the Petitioner, Anna J. Bramblett, who is not represented by counsel, participated *pro Se.* The Natural Resources Conservation Service, (hereafter "NRCS") the Department of Agriculture agency that has proposed the offset was represented by Sharon Gipson, NRCS State Administrator, United States Department of Agriculture, Athens, Georgia. Following the second telephonic hearing, the Petitioner and NRCS were given time to submit additional documentation addressing the matters raised during the hearing.

The issues before me are whether the Petitioner, a federal employee, owes a debt to the Respondent, whether the debt is eligible Lobe the subject of an offset, and if so, the amount of the debt. Once the amount of the debt is determined, the Administrative Law Judge is also required to determine the percentage of disposable pay to he deducted in satisfaction of the debt. Heads of agencies are mandated by the Federal Debt Collection Act, 31 U.S.C. § 3711, to "take all appropriate steps to collect [a delinquent] debt" including "Federal Salary Offset." The statutory basis for offsetting the salary of a federal employee is found 5 U.S.C. § 5514:

> (a)(l) When the head of an agency or his designee determines that an employee... is indebted to the United States for debts to which

> the United States is entitled to be repaid at the time of the determination... the amount of indebtedness may be collected in monthly installments, or at officially established pay intervals from the current pay account of the individual....The amount deducted for any period may not exceed 15 percent of disposable pay....

Before an offset can be effectuated, the statute requires notice to the employee and an explanation of the employee's rights which include the right to inspect and copy Government records relating to the debt, the opportunity to enter into a written agreement to repay the debt according to a mutually agreed upon schedule and an opportunity for a hearing on the determination of the agency concerning the existence or amount of the debt, and in the case of an individual whose repayment schedule is established other than by a written agreement, upon the terms of the repayment schedule. 5 U.S.C. § 5514 (a)(2).

The implementing regulations are found in 7 C.F.R. Subpart C § 1951.101 *et seq.* and contain specific requirements for the petition for a hearing, direct that the hearings be conducted by an appropriately designated hearing official upon all relevant evidence and place the burden of proof upon the agency to prove the existence of the debt and upon the employee for the ultimate burden of proof once the debt is established.

The file reflects that the procedural prerequisite of notice was properly given by letter dated July 7, 2005.[1]

The indebtedness in question arose when the Petitioner transferred from the Department of the Interior ("DOI") to NRCS in October of 2002 and implementation of deductions for her health insurance coverage under the Federal Employee Health Benefits Program ("FEHBP") was not properly transferred. Under the FEHBP, the election of health insurance coverage of an employee who transfers to another federal agency is continued without the necessity of making a new election and in fact, the Petitioner's coverage remained in force despite the fact that no deductions were made by the National Finance Center ("NFC") from the Petitioner's paycheck from the date of her transfer on October 20, 2002 through February 5, 2005. The absence of a deduction for health insurance coverage on her leave and earning statements was not detected by the Petitioner until February 22, 2004 in the process of computing medical deductions for inclusion on her 2003

[1]The letter appears as Attachment 3 to the Agency Answer. The July 7, 2005 is written over the typed date of June 8, 2005.

tax returns.[2] The following day, the Petitioner contacted Shirley Bellows, a NRCS Human Resources employee in the Georgia State Office who indicated that she would check into the problem and get back with her.[3] On February 27, 2004, Ms. Bellows verified that NFC was not withholding monies for the Petitioner's health coverage and communicated that fact to the Petitioner, but thereafter made no effective contribution toward resolving the Petitioner's predicament.

Although there is some dispute as to who determined that a new Standard Form 2810 ("SF 2810") was needed,[4] the record is clear that even with the newly filed SF 2810 in November of 2004, resolution of the Petitioner's problem was far from over. Initiation of the payroll deduction from the Petitioner's paycheck met other seemingly insurmountable obstacles as is recounted in the following remarkable extract from the Agency Answer:

> HR also tried to input an action into NFC that would have had health insurance deductions start to come from Anna Edward's paycheck. The system would not allow HR to input the action, it would give errors and NFC could not explain why this was happening and they were investigating it.
>
> It took several months of calling, waiting and working with NFC and BC/BS (Blue Cross/Blue Shield) before we had a

[2]Employees are strongly encouraged to check their Leave and Earnings Statements regularly and report any discrepancies to their Human Resources Office. This is particularly important upon transfer from one agency to another; however, the Petitioner's failure to detect the error for over a year is far overshadowed by her Human Resources Office's failure, once the error had been reported to them, to follow up and to expeditiously correct the problem.

[3]The Respondent's Answer confirms that the petitioner contacted them around January)February of 2004. (Answer, first paragraph, page 1).

[4]I her Petition for Review, the Petitioner indicated that she reviewed her past personnel actions, determined that the form had been filed when she transferred before and asked Shirley Bellows if a SF 2810 had been completed and if not, maintained to Ms. Bellows that a new SF 2810 should be flied. According to the Petitioner's account, Ms. Bellows indicated that the form was not required as all insurance issues were handled automatically. The Petitioner eventually prevailed upon Renae Lankford, an individual who by then had joined the Human Resources Office to file the form for her. The Respondent's Answer indicates that NFC suggested that a SF 2810 be filed when it was contacted by the NRCS Human Resources Office. Attachment 5 to the Supplemental Material filed by the Respondent indicates only that OPM determined that Blue Cross Blue Shield had a SF 2810 transferlng the Petitioner to the Department of Agriculture with an effective date of October 20, 2002 without identification of the date the form was executed.

> breakthrough in this situation. During this time, HR-NRCS-GA was staying in contact with NFC and doing their best to get the situation settled. (Answer, page 2)

In the meantime, the Petitioner remarried and in face of the fact that no resolution was in sight, after her new husband added the Petitioner and her children to his FEHBP coverage, on February 6, 2005 she executed a SF 2809 canceling the BC/BS health insurance coverage effective February 4, 2005 (which still was not being deducted for despite her bringing it to the attention of the human Resources Office nearly a year before).

Upon receipt of the July notification letter, the Petitioner requested verification that the coverage premiums had been paid and for a copy of the computation. Notwithstanding the Agency's Answer which indicated that Human Resources sent NFC an AD-343 on February 15, 2005 showing the dates and the premium amount due,[5] additional delay was encountered in responding to the Petitioner's requests.[6]

Despite the lamentably inexplicable and egregious joint failure on the part of NRCS and NFC to ever resolve the Petitioner's problem by effectuating a deduction from her paycheck, and despite the lengthy period involved, in view of the fact that the Petitioner's health benefits under the FEHBP continued after her transfer and were not interrupted, I must conclude that the Petitioner is indebted to her employing agency in the amount of Six Thousand, Four Hundred Seventy-Five Dollars and Seventy Cents ($6,475.70) for the 60 pay periods of coverage that was provided as is reflected on Attachment 2 to the Agency Answer. Under the facts as presented; however, I find that interest should be waived and that the employer may offset no more than Seven Percent of the Petitioner's disposable pay in the collection of this indebtedness.

Accordingly, the following Findings of Fact and Conclusions of Law will be entered.

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[5]This appears as Attachment 2 to the Agency Answer.

[6]This delay is documented in the exchange of e-mail correspondence found in Attachment 4 to the Agency Answer

FINDINGS OF FACT

1. The Petitioner was overpaid the amount of $6,475.70 as a result of the failure of NRCS and NEC to properly initiate a payroll deduction for her health insurance coverage under the FEHBP upon her transfer from 001 to NRCS on October 20, 2002 until cancellation of that coverage effective February 4, 2005.

2. The Petitioner is an employee of the United States Department of Agriculture and as such is an individual whose salary is subject to Federal Salary Offset.

3. The Petitioner was given notice of the proposed offset of her federal salary and the notice dated July 7, 2005 is in full compliance with the statutory requirements of 5 U.S.C. § 5514 and the implementing regulations.

4. The Petitioner is currently indebted to NRCS in the amount of $6,475.70.

CONCLUSIONS OF LAW

1. The Petitioner received health benefit coverage under FEHBP for period October 20, 2002 until the same was cancelled effective February 4, 2005 for which premiums were not collected from her federal salary.

2. Anna J. Bramblett, as an employee of NRCS, the United States Department of Agriculture, is an employee against whom an offset of her federal salary may be effected.

3. The notice of proposed offset dated July 7, 2005 complied with all statutory and regulatory requirements for offsetting her salary.

4. There are no legal restrictions to the debt within the meaning of 7 C.F.R. §1951.ll1(c)(2).

5. The amount owed to NRCS is $6,475.70 to be paid without interest.

6. NRCS is entitled to offset 7% of the Petitioner's disposable federal pay as defined in 7 C.F.R. § 1951.111 (b)(4) until the same shall be paid in full.

_____

FOOD SAFETY INSPECTION SERVICE

COURT DECISION

LEE A. BARNES, JR., v. USDA.
C.A.8 (Mo.),2006. No. 05-2329.
Filed May 30, 2006.

Cite as: 448 F.3d 1065)

FSIS – PPIA – Negligent inspection – "good Samaritan rule" – "private analogue"situs requirement – Federal tort claims act – Uniquely governmental function.

A Missouri Poultry processor (Barnes) claimed USDA poultry product inspectors negligently inspected his processing plant, issued faulty technical assistance, and subjected his plant to unnecessary shut-downs causing him to go out of business. Barnes brought suit under Federal Tort Claims Act (FTCA) for damages. Court determined that "good Samaritan" rule would be applicable, but that the "private analogue" portion of the rule was not fulfilled in that the purpose of the inspections is intended to benefit and protect the consuming public. FSIS did not owe a state-law duty to Barnes as a plant owner and consequently did not rise to provide a private citizen's right of action (the private analogue) against the federal government under FTCA.

United States Court of Appeals, Eighth Circuit.
Rehearing and Rehearing En Banc Denied Aug. 4, 2006.

Before WOLLMAN, LAY, and ARNOLD, Circuit Judges.
ARNOLD, Circuit Judge.

Lee Barnes appeals the dismissal by the district court [1] of his action filed under the Federal Tort Claims Act (FTCA), *see* 28 U.S.C. §§ 1346, 2671-2680. We affirm.

Mr. Barnes owned and operated Gammon Brothers Poultry, a business that processed and packaged chickens in Missouri. Under the Poultry Products Inspection Act, 21 U.S.C. §§ 451-471, Gammon Brothers was subject to inspections by the Food Safety and Inspection Service (FSIS), an agency of the Department of Agriculture. Mr. Barnes brought this FTCA action against the United States. He claimed that the FSIS negligently inspected Gammon Brothers, issued vague and misleading noncompliance notices, failed to provide him with technical

[1]The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

assistance, and subjected the company to unnecessary periodic shut-downs, eventually causing him to go out of business.

The government moved to dismiss Mr. Barnes's complaint for lack of subject matter jurisdiction. Federal courts generally lack jurisdiction to hear claims against the United States because of sovereign immunity. The court may hear the case, however, if the plaintiff shows that the government has unequivocally waived that immunity. *Cf. V S Ltd. P'ship v. HUD,* 235 F.3d 1109, 1112 (8th Cir.2000). The FTCA waives the government's immunity in certain tort suits by providing that the "United States shall be liable [for torts] ... in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. This provision is sometimes called the "private analogue" requirement. The district court granted the government's motion to dismiss, holding that there is no private analogue of the present action under Missouri law.

The determination of whether a private analogue exists is made in accordance with the law of the place where the relevant act or omission occurred. 28 U.S.C. § 1346(b)(1). Relying on *Scottsdale Ins. Co. v. Ratliff,* 927 S.W.2d 531 (Mo.Ct.App.1996), Mr. Barnes contends that his FTCA action may proceed because Missouri law recognizes a cause of action for negligent inspection and negligent advice. But for a defendant to be liable under those theories, it must have first owed the plaintiff a duty under Missouri law to inspect and to advise, and Missouri law imposed no such duty on the FSIS. Although the FSIS is required to follow the inspection standards established by its administrator, 9 C.F.R. § 381.4, this duty is imposed by the federal government, not by the state.

Mr. Barnes maintains that the government is nevertheless liable under Missouri's "good Samaritan" rule, a principle under which one who " 'undertakes ... to render services to another' " may sometimes be held liable for a failure to exercise reasonable care in doing so. *Stanturf v. Sipes,* 447 S.W.2d 558, 561-62 (Mo.1969) (per curiam) (quoting Restatement (Second) of Torts § 323). He relies on *Indian Towing Co. v. United States,* 350 U.S. 61, 61-62, 76 S.Ct. 122, 100 L.Ed. 48 (1955), in which the plaintiff brought an action under the FTCA, contending that its tugboat ran aground because the Coast Guard failed to maintain a lighthouse. The United States sought dismissal for lack of subject matter jurisdiction; because no private person operated lighthouses, the government argued that there was no private analogue of the government's conduct. The district court granted the motion, and the

Fifth Circuit affirmed, *Indian Towing Co. v. United States,* 211 F.2d 886, 886 (5th Cir.1954) (per curiam).

The Supreme Court reversed the dismissal in *Indian Towing,* holding that the FTCA's waiver of sovereign immunity did not turn on whether its conduct was uniquely governmental in nature. Instead, the question was whether a private person in like circumstances could be liable to Indian Towing. The Court found that such a person could be liable under the "good Samaritan" law: By erecting and operating the lighthouse, the Coast Guard had sought to protect mariners and their cargo. The tug operators, in turn, had come to rely on that protection. The Court observed that "under hornbook tort law ... one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." *Indian Towing,* 350 U.S. at 64-65, 76 S.Ct. 122; *see also Appley Brothers v. United States,* 164 F.3d 1164, 1173-74 (8th Cir.1999).

Mr. Barnes is therefore eminently correct in relying on *Indian Towing* to show that the United States is not immune from suits under the FTCA merely because it was undertaking a uniquely governmental function. But as the Court recently restated in *United States v. Olson,* --- U.S. ----, ----, 126 S.Ct. 510, 513, 163 L.Ed.2d 306 (2005), the relevant question is whether the government's conduct was such that a private individual under like circumstances would be liable under state law. Here a private individual in the position of the FSIS could not be liable to Mr. Barnes under Missouri's good Samaritan rule. That rule requires that the defendant voluntarily " 'undertake[ ] ... to render services to' " the plaintiff. *Stanturf,* 447 S.W.2d at 561 (quoting Restatement (Second) of Torts § 323). In other words, the good Samaritan rule comes into play only where the plaintiff is the intended beneficiary of the defendant's action. But the FSIS conducts inspections to ensure that the poultry sold to the public is sanitary, not to benefit chicken-processing plants or their owners. For that reason the federal government violated no state-law duty owed to Mr. Barnes that would permit a suit under the FTCA.

We therefore affirm the order of the district court.

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HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: KIM BENNETT.
HPA Docket No. 04-0001.
Decision and Order.
Filed January 13, 2006.

HPA – Horse protection – Refusal to permit inspection – Manner of inspection – Civil penalty – Disqualification.

The Judicial Officer reversed the initial decision by Administrative Law Judge Victor W. Palmer and concluded Respondent refused to permit a United States Department of Agriculture veterinary medical officer to complete an inspection of a horse named "The Duck" at the 64th Annual Tennessee Walking Horse National Celebration Show, in violation of 15 U.S.C. § 1824(9). The Judicial Officer stated the Horse Protection Act (15 U.S.C. § 1824(9)) prohibits the failure or refusal to permit inspection, as required by 15 U.S.C. § 1823(e), which authorizes the Secretary of Agriculture's representatives, upon presentation of appropriate credentials, to inspect any horse at any horse show, horse exhibition, horse sale, or horse auction. The Judicial Officer concluded Respondent's belief that the Secretary of Agriculture's representative was not conducting the inspection of The Duck in a reasonable manner was not relevant to Respondent's violation of 15 U.S.C. § 1824(9), and the failure of a representative of the Secretary of Agriculture to conduct an inspection in a reasonable manner, as required by 15 U.S.C. § 1823(e), may be used to challenge the results of the inspection, but may not be used as a basis to refuse to permit completion of the inspection. The Judicial Officer assessed Respondent a $2,200 civil penalty and disqualified Respondent for 1 year.

Frank Martin, Jr., for Complainant.
David F. Broderick, Bowling Green, Kentucky, for Respondent.
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 Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 15, 2004. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11) [hereinafter the Horse Protection 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].

Complainant alleges that on August 26, 2002, Kim Bennett [hereinafter Respondent] refused to permit Animal and Plant Health Inspection Service officials to inspect a horse known as "The Duck," entry number 784 in class number 104 in the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(a) of the Horse Protection Regulations (9 C.F.R. § 11.4(a)) (Compl. ¶ II.1). On May 17, 2004, Respondent filed an answer denying the material allegations of the Complaint.

On May 17-18, 2005, Administrative Law Judge Victor W. Palmer presided at a hearing in Nashville, Tennessee. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented Complainant. David F. Broderick, Broderick & Thornton, Bowling Green, Kentucky, represented Respondent.

On June 30, 2005, Complainant filed "Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof." On August 5, 2005, Respondent filed "Respondent's Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof." On August 12, 2005, Complainant filed "Complainant's Reply Brief."

On September 23, 2005, the ALJ issued a "Decision and Order" [hereinafter Initial Decision] concluding Complainant failed to prove by a preponderance of the evidence that Respondent violated the Horse Protection Act and the Horse Protection Regulations and dismissing the Complaint (Initial Decision at 2, 12).

On October 20, 2005, Complainant appealed to the Judicial Officer. On November 15, 2005, Respondent filed a response to Complainant's appeal petition. On November 25, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the ALJ's conclusion that Complainant failed to prove by a preponderance of the evidence that Respondent violated the Horse Protection Act. Therefore, I do not adopt the ALJ's Initial Decision as the final Decision and Order.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that–

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1822. Congressional statement of findings

The Congress finds and declares that–

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens

interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1823. Horse shows and exhibitions

. . . .

(e) Inspection by Secretary or duly appointed representative

For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction. Such an inspection may only be made upon presenting appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be

liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if unsupported by substantial evidence.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1823(e), 1824(9), 1825(b)(1)-(2), (c), 1828.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

. . . .

PART 11—HORSE PROTECTION REGULATIONS

. . . .

§ 11.4 Inspection and detention of horses.

For the purpose of effective enforcement of the Act:

(a) Each horse owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse at any horse show, horse exhibition, or horse sale or auction, shall allow any APHIS representative to reasonably inspect such horse at all reasonable times and places the APHIS representative may designate. Such inspections may be required of any horse which is stabled, loaded on a trailer, being prepared for show, exhibition, or sale or auction, being exercised or otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or auction, whether or not such horse has or has not been shown, exhibited, or sold or auctioned, or has or has not been entered for the purpose of being shown or exhibited or offered for sale or auction at any such horse show, horse exhibition, or horse sale or auction. APHIS representatives will not generally or routinely delay or interrupt actual individual classes or performances at horse shows, horse exhibitions, or

> horse sales or auctions for the purpose of examining horses, but they may do so in extraordinary situations, such as but not limited to, lack of proper facilities for inspection, refusal of management to cooperate with Department inspection efforts, reason to believe that failure to immediately perform inspection may result in the loss, removal, or masking of any evidence of a violation of the Act or the regulations, or a request by management that such inspections be performed by an APHIS representative.

9 C.F.R. § 11.4(a).

DECISION

Decision Summary

I conclude Respondent refused to permit completion of an inspection of a horse by a representative of the Secretary of Agriculture at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). I assess Respondent a $2,200 civil penalty and disqualify Respondent for a period of 1 year from showing, exhibiting, or entering any horse, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

Discussion

Complainant proved by a preponderance of the evidence[1] that on

[1]Complainant, as the proponent of an order, has the burden of proof in this proceeding (5 U.S.C. § 556(d)). The standard of proof by which this burden is met is the preponderance of the evidence standard. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1494 (2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 474 (2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Beverly Burgess* (Decision as to Winston T. Groover, Jr.), 63 Agric. Dec. 678, 712 (2004), *appeal docketed sub nom. Winston T. Groover, Jr. v. United States Dep't of Agric.*, No. 04-4519 (6th Cir. Dec. 13, 2004); *In re Robert B. McCloy*, 61 Agric. Dec. 173, 195 n.6 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re William J. Reinhart*, 60 Agric. Dec. 241, 258 n.7 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta (continued...)

August 26, 2002, Respondent refused to permit Dr. Michael Guedron, a United States Department of Agriculture veterinary medical officer, to complete an inspection of The Duck at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee (CX 3, CX 4A, CX 4B; RX 31; Tr. 102-05, 184-87, 248-53, 284, 290-91, 300-01, 313, 382, 453-60, 463-65). Complainant also proved by a preponderance of the evidence that, at all times relevant to this proceeding, Dr. Guedron displayed appropriate credentials indicating that he was a representative of the Secretary of Agriculture authorized to inspect horses at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee (CX 4A, CX 4B; Tr. 247).

Section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) prohibits the failure or refusal to permit inspection, as required by section 4 of the Horse Protection Act (15 U.S.C. § 1823). Section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)) authorizes the Secretary of Agriculture's representatives, upon presentation of appropriate credentials, to inspect any horse at any horse show, horse exhibition, horse sale, or horse auction. Respondent's belief that Dr. Guedron was not conducting the inspection of The Duck in a reasonable

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[1](...continued)
Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

manner is not relevant to Respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). The failure of a representative of the Secretary of Agriculture to conduct an inspection in a reasonable manner, as required by section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)), may be used to challenge the results of the inspection, but may not be used as a basis to refuse to permit completion of the inspection.

Findings of Fact

1. Respondent is an individual whose mailing address is 636 Mt. Lebanon Road, Alvaton, Kentucky 42122 (Answer ¶ I.1).

2. Respondent earned a degree in equine science from Middle Tennessee State University in 1976 and has been a trainer and breeder of Tennessee Walking Horses since 1980. Respondent has a horse trainer's license with the Walkers Training Association and an AAA judge's license with the National Horse Show Commission. Both licenses are in good standing. Respondent has judged horse shows throughout the United States and twice judged the Tennessee Walking Horse National Celebration Show. Respondent has served on the National Board of the Tennessee Walkers Breeders and Exhibitors Association for approximately 18 years. Respondent served on the License Enforcement Committee of the Walking Horse Owners Association until its merger with the Trainers Association and Breeders Association to form the National Horse Show Commission. Respondent is a voting member of the National Horse Show Commission and has represented the Tennessee Walking Horse Owners Association on the National Horse Show Commission for approximately 15 years. (Tr. 392-95.)

3. Respondent and his wife, Leigh Bennett, who also has a horse trainer's license and an AAA judge's license, keep more than 50 horses on their farm in Alvaton, Kentucky (Tr. 315-16).

4. In February 2002, Respondent and Leigh Bennett began training The Duck after he had been purchased, based on their advice, for $100,000 by Elizabeth and Dwight Ottman of Owensboro, Kentucky (Tr. 317, 400-02).

5. The Duck is a stallion and a past world grand champion. The Duck was used exclusively for breeding at the time of his purchase by the Ottmans. In 2002, The Duck was bred with 32 mares for which a $900 stud fee was charged for each breeding. Respondent undertook to restore The Duck's form to win another championship at the 64th Annual Tennessee Walking Horse National Celebration Show to

increase The Duck's value. The Duck is an unusually nervous and aggressive horse that is sensitive to his environment, can get excited fairly easily, and is not very fond of strangers. (Tr. 14-15, 295, 317, 319, 402-04.)

6. On August 26, 2002, Respondent entered The Duck as entry number 784 in class number 104 in the 64th Annual Tennessee Walking Horse National Celebration Show for the purpose of showing or exhibiting The Duck (CX 1, CX 2, CX 4A, CX 4B; RX 31).

7. On August 26, 2002, Respondent knew Dr. Guedron was a United States Department of Agriculture veterinary medical officer authorized by the Secretary of Agriculture to inspect horses for compliance with the Horse Protection Act. At all times relevant to this proceeding, Dr. Guedron displayed appropriate credentials indicating that he was a representative of the Secretary of Agriculture authorized to inspect horses at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee. (CX 4A, CX 4B; RX 31; Tr. 247, 457.)

8. On August 26, 2002, at approximately 11:00 p.m., Respondent led The Duck into the inspection area of the Calsonic Arena in Shelbyville, Tennessee, where the 64th Annual Tennessee Walking Horse National Celebration Show was being held, and presented The Duck for pre-show inspection (CX 3, CX 4A; Tr. 408).

9. As a stallion recently used for breeding, The Duck became very agitated and easily aroused when near other horses. Because of The Duck's unsteady temperament and the possibility that The Duck might become excited and difficult to handle and mount, Respondent had waited until the inspection area was clear of other horses that might distract The Duck before leading him to the inspection area. (Tr. 321-22, 405-08.)

10. On August 26, 2002, at approximately 11:00 p.m., Mark Thomas, a Designated Qualified Person[2] employed by the National Horse Show Commission, conducted a pre-show inspection of The Duck (Tr. 9-10, 408-09).

11. Mr. Thomas has been a licensed Designated Qualified Person for 14 years and has inspected horses at hundreds of horse shows (Tr. 7, 13).

[2]A Designated Qualified Person is defined in 9 C.F.R. § 11.1 as a person meeting the requirements specified in 9 C.F.R. § 11.7. Designated Qualified Persons are licensed by horse industry organizations or associations having a Designated Qualified Person program certified by the United States Department of Agriculture. Designated Qualified Persons may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale, or horse auction under 15 U.S.C. § 1823 to detect or diagnose horses which are sore or to otherwise inspect horses and records pertaining to horses for the purpose of enforcing the Horse Protection Act.

12. Mr. Thomas conducted a three-part inspection of The Duck, as he did other horses, consisting of observations of The Duck's (1) general appearance, (2) locomotion, and (3) reaction to palpation. Mr. Thomas gave The Duck the best score in each category. (Tr. 16-18.)

13. Mr. Thomas approved The Duck to be shown and exhibited, and Respondent, who was to be the horse's rider, then led The Duck to the warm-up area (CX 1, CX 2; Tr. 27, 410).

14. Dr. Michael Guedron and Dr. Lynn P. Bourgeois, United States Department of Agriculture veterinary medical officers assigned to the 64th Annual Tennessee Walking Horse National Celebration Show, were present in the inspection area on the evening of August 26, 2002. Dr. Bourgeois was the show veterinarian, the Animal and Plant Health Inspection Service designation for the veterinarian in charge, whose duties included inspecting horses, managing both Dr. Guedron and a team of Animal and Plant Health Inspection Service inspectors, and monitoring the Designated Qualified Persons and their performance. (Tr. 130-31, 134-36, 187, 212-13.)

15. As Respondent led The Duck into the warm-up area on the evening of August 26, 2002, he was followed by Dr. Guedron who stopped Respondent and instructed him to return The Duck to the inspection area for another inspection. Dr. Guedron did not tell Respondent why he wanted to re-inspect The Duck and did not provide a reason when asked. Respondent nonetheless agreed to the re-inspection and permitted Dr. Guedron to conduct the inspection until Respondent observed Dr. Guedron palpate The Duck's left front pastern in a way that Respondent believed to be abusive and calculated to elicit a reaction from a horse that was not sore. At that point, Respondent led The Duck away from Dr. Guedron. Dr. Guedron asked Respondent if he was refusing inspection. Respondent replied: "No, sir. I'm just asking that you inspect him properly." (Tr. 416.) Dr. Bourgeois, the show veterinarian, asked Respondent whether or not he would permit Dr. Guedron to complete his inspection and Respondent replied: "Not Dr. Guedron." (Tr. 160.) Respondent requested that Dr. Bourgeois inspect the horse instead of Dr. Guedron because Respondent believed Dr. Guedron was using the points of his thumbs rather than the balls of his thumbs to palpate The Duck's foot. Dr. Bourgeois denied Respondent's request. (CX 4A; Tr. 137, 160, 162, 199, 220-22, 328-35, 411-20.)

Conclusions of Law

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

2. On August 26, 2002, Respondent refused to permit a United States Department of Agriculture veterinary medical officer, displaying appropriate credentials, to complete inspection of The Duck, entry number 784 in class number 104, at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)).

Complainant's Appeal Petition

Complainant raises five issues in "Complainant's Appeal of the ALJ's Decision and Order, and Brief in Support Thereof" [hereinafter Complainant's Appeal Petition]. First, Complainant contends the ALJ erroneously concluded that, under the Horse Protection Act, an exhibitor may refuse to permit completion of the United States Department of Agriculture's inspection of a horse at a horse show if the exhibitor believes the inspection is not being conducted in a reasonable manner (Complainant's Appeal Pet. at 2-5).

The ALJ found Respondent's refusal to permit Dr. Guedron to continue inspection of The Duck did not constitute a refusal of United States Department of Agriculture inspection because Respondent believed Dr. Guedron was not conducting the inspection in a reasonable manner and Respondent sought inspection by another United States Department of Agriculture inspector, as follows:

> Kim Bennett allowed Dr. Guedron, an APHIS representative, to start an inspection of the horse Mr. Bennett was about to mount and ride into the show ring, but refused to allow Dr. Guedron to continue the inspection when Mr. Bennett observed that it was not being reasonably conducted. He did not refuse the APHIS inspection per se, but he sought to assure that it would be reasonably conducted by having it performed by another APHIS inspector.

Initial Decision at 8.

I disagree with the ALJ's conclusion that Respondent's refusal to permit Dr. Guedron to continue inspection of The Duck is not a violation of the Horse Protection Act. Section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) prohibits the failure or refusal to permit inspection as required by section 4 of the Horse Protection Act (15 U.S.C. § 1823). Section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)) provides that the Secretary of Agriculture, or *any*

representative of the Secretary of Agriculture, duly designated by the Secretary of Agriculture, may, upon presenting appropriate credentials, inspect any horse at any horse show. The record establishes that on August 26, 2002, Dr. Guedron was a representative of the Secretary of Agriculture, duly designated to inspect horses at the 64th Annual Tennessee Walking Horse National Celebration Show. Thus, Respondent's refusal to permit Dr. Guedron to complete his inspection of The Duck constitutes a violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). Respondent's belief that Dr. Guedron was not conducting the inspection in a reasonable manner and Respondent's request for inspection by another United States Department of Agriculture official are not relevant to Respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). The failure of a representative of the Secretary of Agriculture to conduct an inspection in a reasonable manner, as required by section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)), may be used to challenge the results of the inspection, but may not be used as a basis to refuse to permit completion of the inspection or as a basis to require inspection by another representative of the Secretary of Agriculture.

Second, Complainant contends the ALJ erroneously found Complainant failed to prove that Dr. Guedron conducted his inspection of The Duck in a reasonable manner (Complainant's Appeal Pet. at 6-9).

The ALJ found "[t]he preponderance of the evidence in this case fails to prove that Dr. Guedron conducted the horse's inspection in a reasonable manner." (Initial Decision at 10.) I make no finding regarding the manner in which Dr. Guedron inspected The Duck because I find the manner in which Dr. Guedron inspected The Duck is not relevant to the issue of Respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)).[3] Thus, I find the issue of the manner in which Dr. Guedron inspected The Duck, moot.

Third, Complainant contends the ALJ "effectively requires that there be evidence proving a USDA veterinarian's inspection of a horse was reasonable before an inspection could be initiated and completed under the HPA" (Complainant's Appeal Pet. at 9).

I disagree with Complainant's contention that the ALJ effectively requires proof that a United States Department of Agriculture veterinary medical officer's inspection of a horse is reasonable before an inspection

[3]Complainant did not appeal the ALJ's conclusion that Complainant failed to prove Respondent violated section 11.4(a) of the Horse Protection Regulations (9 C.F.R. § 11.4(a)); therefore, I reach no conclusion regarding the relevance of the manner in which Dr. Guedron inspected The Duck to Respondent's alleged violation of section 11.4(a) of the Horse Protection Regulations (9 C.F.R. § 11.4(a)).

may be initiated and completed. I cannot locate any part of the Initial Decision in which the ALJ even remotely suggests that, prior to initiating and completing an inspection of a horse, there must be evidence proving that the United States Department of Agriculture veterinary medical officer's inspection is reasonable. Requiring proof that an inspection is reasonable prior to initiating the inspection would be an absurdity that, based upon my examination of the Initial Decision, I find the ALJ did not intend to suggest.

Fourth, Complainant contends the ALJ erroneously failed to address Respondent's repeated refusals to permit Dr. Guedron to inspect The Duck (Complainant's Appeal Pet. at 11-12).

The record establishes, after Respondent's initial refusal to permit Dr. Guedron to complete inspection of The Duck, Respondent was given over 1 hour to permit Dr. Guedron to complete his inspection of The Duck and, on multiple occasions, Respondent refused to permit Dr. Guedron to complete his inspection (CX 4A, CX 4B; RX 31; Tr. 381-82, 455-63). The ALJ adequately addresses Respondent's repeated refusals to permit Dr. Guedron to complete his inspection of The Duck (Initial Decision at 6). Therefore, I reject Complainant's contention that the ALJ erroneously failed to address Respondent's repeated refusals to permit Dr. Guedron to complete his inspection of The Duck.

Fifth, Complainant contends the ALJ erroneously found Dr. Guedron's inspection unreasonable because The Duck was the last horse in the inspection area when the event in which The Duck was to participate was about to begin and because the United States Department of Agriculture typically conducts inspections at the completion of the event (Complainant's Appeal Pet. at 12-14).

I make no finding regarding the manner in which Dr. Guedron inspected The Duck because I find the manner in which Dr. Guedron inspected The Duck is not relevant to the issue of Respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). Thus, I find the issue of the ALJ's basis for finding Dr. Guedron's inspection of The Duck unreasonable, moot.

Sanction

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than $2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824). However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be

assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from $2,000 to $2,200.[4] The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation.[5]

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

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

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, in determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

Complainant recommends that I assess Respondent a $2,200 civil penalty (Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 7-10). The extent and gravity of Respondent's prohibited conduct are great. Respondent's refusal to permit a United States Department of Agriculture veterinary medical officer to complete an inspection of The Duck thwarts the Secretary of Agriculture's ability to enforce the Horse Protection Act. Weighing all the circumstances, I find Respondent culpable for the violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)).

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[4] 7 C.F.R. § 3.91(b)(2)(vii).

[5] 15 U.S.C. § 1825(c).

Respondent presented no argument that he is unable to pay a $2,200 civil penalty or that a $2,200 civil penalty would affect his ability to continue to do business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[6] Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for Respondent's violation of the Horse Protection Act. Therefore, I assess Respondent a $2,200 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)) may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Respondent's refusal to permit a United States

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[6] *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1504 (2005); *In re Mike Turner*, 64 Agric. Dec. 1456, 1475 (2005), *appeal docketed*, No. 05-4487 (6th Cir. Nov. 23, 2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 490 (2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 208 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

Department of Agriculture veterinary medical officer to complete an inspection of The Duck thwarts the Secretary of Agriculture's ability to prevent the practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.[7]

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)). While section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) requires that the Secretary of Agriculture consider certain specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[8]

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[7]*See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

[8]*In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, slip op. at 21-22 (2005); *In re Mike Turner*, 64 Agric. Dec. 1456, 1476 (2005), *appeal docketed*, No. 05-4487 (6th Cir. Nov. 23, 2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 492 (2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 209 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 591 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 982 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision

(continued...)

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates section 5 of the Horse Protection Act (15 U.S.C. § 1824).

Circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record before me does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for Respondent's violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

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

ORDER

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

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

Respondent's payment of the civil penalty shall be forwarded to, and

[8](...continued)
as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

received by, Mr. Martin within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 04-0001.

2. Respondent is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to obtain review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of the Order in this Decision and Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[9] The date of the Order in this Decision and Order is January 13, 2006.

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[9]15 U.S.C. § 1825(b)(2), (c).

INSPECTION AND GRADING

DEPARTMENTAL DECISION

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION, f/k/a LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; ALFRED LION, JR., AN INDIVIDUAL; BRUCE LION, AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL; ISABEL LION, AN INDIVIDUAL; AND JEFFREY LION, AN INDIVIDUAL; AND LARRY LION, AN INDIVIDUAL.
I & G Docket No. 04-0001.
Decision and Order.
Filed June 9, 2006.

I&G – Debarment from inspection services – Licenses – Grading, poor testing – Officially drawn – Misconduct, pattern of.

Colleen A. Carroll for Complainant.
Wesley Green and James A. Moody for Respondent.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This action was brought by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture (hereinafter "AMS"), initially against Lion Raisin, Inc., a California corporation (hereinafter "Lion"); Lion Raisin Company, a partnership or unincorporated association; Lion Packing Company, a partnership or unincorporated association; Alfred (Al) Lion, Jr., Bruce Lion, Daniel (Dan) Lion, and Jeffrey (Jeff) Lion for violations of the Agricultural Marketing Act of 1946, as amended (7 U.S.C. § 1621, *et seq*.) and the Regulations governing the inspection and certification of processed fruits and vegetables. By later amendments, Isabel Lion and Larry Lion were added as additional Respondents.[1]

[1] This action is the third such action brought against the Respondents seeking debarment, each of which is styled *In re Lion Raisins, et al.* I & G Docket No. 01-0001 is currently pending before United States Administrative Law Judge Jill S. Clifton. I & G Docket No. 03-0001 was dismissed as being barred by the statute of limitations and is presently on appeal before the Judicial Officer. Lion's differences with USDA have been litigated in a variety of forums, including: *Lion Raisins, Inc. v. United States,* 51 (continued...)

Characterized by Complainant's counsel as a case being about deception and money[2] and by Respondents' counsel as an absurdity of using a pro-market inspection program to shut down a 103 year old company for its conduct in seeking to better serve the needs of their customers[3] suggesting that the inaccuracy of the USDA inspections made their conduct necessary), both the original and amendments to the Complaint allege that the Respondents engaged in a pattern of misrepresentation or deceptive or fraudulent practices in connection with the use of official inspection certificates and or inspection results between the period May 24, 1996 and May 11, 2000. The Respondents answered, generally denying the factual allegations contained in the Complaints, specifically denying any wrong-doing and asserting a number of affirmative defenses. By Order dated December 29, 2005, the allegations contained in numerical paragraphs 11 through 89 of the Second Amended Complaint pertaining to conduct occurring more than five years prior to the date of the filing of the Complaint were dismissed as being barred by the statute of limitations contained in 28 U.S.C. §2462.

Eight days of oral hearing were held addressing the remaining allegations, commencing on February 21, 2006 and continuing through February 23, 2006 in Washington, D.C. and then reconvening in Fresno, California on February 27, 2006 and concluding on March 3, 2006. The Complainant was represented by Colleen A. Carroll, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C. The corporate Respondent was represented by Wesley T. Green, Esquire, Selma, California and James A. Moody, Esquire, Washington, D.C., who also represented each of the individual Respondents. During the course of the oral hearing, the Complainant called two witnesses and the Respondents thirteen. In addition to the pleadings contained in the record and the transcript of the oral hearing, the evidence includes the 74 exhibits introduced by the Complainant which were admitted and the

[1](...continued)
Fed. Cl. 238 (Fed. Cl. 2001); *In re Lion Raisins*, 2002 AMA Docket No. F & V 989-1; *Lion Raisins, Inc. v. USDA*, 354 F 3d 1072 (9th Cir. 2004); *Lion Raisins, Inc., et al v. USDA,* No. CV-F-04-5844 REC DLB, (E.D. Ca. 2005); *Lion Raisin, Inc. v. United States,* 416 F 3d 1356 (Fed Cir. 2005); and *Lion Raisins, Inc. v. United States*, 64 Fed Cl. 536 (Fed Cl. 2005).

[2] See the opening statement of Ms. Carroll. Tr. 7

[3] Respondent's brief, pages 6-8.

22 exhibits introduced by the Respondents that were admitted.[4] Both parties have submitted post hearing briefs in support of their respective positions.

In addition to filing a post hearing brief, the Respondents moved to dismiss the Complaint for lack of subject matter jurisdiction and for summary judgment limiting the scope of relief and for failure to afford pre-litigation warning and opportunity to demonstrate or achieve compliance.[5] The subject matter jurisdiction argument was addressed by the Department's Judicial Officer as a certified question in another case brought against Lion. In that decision, the Judicial Officer wrote:

The Secretary of Agriculture's authority to prescribe regulations for the inspection, certification, and identification of the class, quality, quantity, and condition of agricultural products and to issue regulations and orders to carry out the purposes of the Agricultural Marketing Act of 1946 includes authority to issue debarment regulations and to debar persons from benefits under the Agricultural Market Act of 1946. (footnote omitted) Moreover, the Secretary of Agriculture has long exercised debarment authority under the Agricultural Marketing Act of 1946. (footnote omitted) *In re Lion Raisins, Inc., et al.*, 63 Agric. Dec. 836 at 840 (2004)

In answering the certified question, the Judicial Officer referenced his earlier decision debarring an entity from receiving raisin inspection services under the Agricultural Marketing Act of 1946 in the case of *In re American Raisin Packers, Inc.,* 60 Agric. Dec. 165 (2001) *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 Fed Appx. 706, 2003 WL 21259771 (9th Cir. 2003), as well as citing the well established line of cases relating to the withdrawal of meat grading and inspection services under the Agricultural Marketing Act of 1946.[6]

Respondents also argue that Summary Judgment should be granted

[4] The record also includes all 131 exhibits of the Complainant and 1291 exhibits of the Respondent; however, only the number indicated were in fact admitted.

[5] These matters were previously raised prior to the hearing in a Motion for Partial Summary Judgment filed on September 14, 2005.

[6] Respondents assert that the Judicial Officer's decision should not be regarded as authoritative, in part because his ruling was "simply stated in conclusory terms and without rigorous analysis." Respondent's Motion to Dismiss (May 11, 2006) at page 26. The Judicial Officer's economy of language, a trait not shared by Respondent's counsel, does not detract from the ruling's precedential value. The *Merchant of Venice* argument that only voluntary inspections are at issue in this action also appears to have been addressed by the Ninth Circuit in *American Raisin.*

because Lion was not warned that use of their certificates was potentially unlawful and Lion was not provided a pre-litigation opportunity to demonstrate or achieve compliance, relying upon 5 U.S.C. § 558(c), a part of the Administrative Procedures Act.

5 U.S.C. § 558(c) does provide for notice by the agency and an opportunity to achieve compliance where licenses are involved:

> (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefore, the licensee has been given
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.
>
> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Both the terms “license” and “licensing” are defined in 5 U.S.C. § 551:

> (8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;
>
> (9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

Although the above definitions are significantly broad, as neither definition appears to cover inspection services, extension of the “second chance” doctrine to the Respondents does not appear warranted in this case.

BACKGROUND OF THE CASE

The Complainant's first witness, David W. Trykowski, Chief of Investigations, Agricultural Marketing Service Compliance Office, United States Department of Agriculture, Washington, D.C., testified that the investigation of Lion was initiated after the Fresno Office of the Agricultural Marketing Service Inspection Office received an anonymous phone call indicating that USDA inspection certificates were being falsified by Lion. Tr. 37. The information from the anonymous caller was subjected to a "credibility check" which was accomplished by sending letters to 109 known overseas customers of Lion requesting that they provide information concerning the USDA certificates that they had received in connection with shipments of raisins that they had purchased from Lion. Tr. 38. The information provided in the responses received was then compared to the USDA inspection records maintained in the Fresno inspection office, a preliminary report was drafted confirming that irregularities had been found and the matter was referred to the Office of the Inspector General for criminal investigation. Tr. 38-49. Incident to the criminal investigation, a search warrant was obtained and executed on October 19, 2000 and a significant number of Lion's records were seized, primarily consisting of those records pertaining to export customers covering the period from approximately 1995 through October of 2000. Tr. 49.

As the investigation progressed, Mr. Trykowski's involvement increased and he personally worked through both the USDA records and the "shipping files" seized from Lion, compared the parallel sets of records for each transaction, and noted the non-conforming results which appeared.[7] Three types of fraudulent conduct or misrepresentation were identified. First, existing USDA certificates were found that had been altered; second, USDA certificates which were reported by Lion as lost or unusable were instead completed by Lion reflecting results inconsistent with USDA inspections; and last, Lion certificates resembling those issued by USDA were prepared purporting to report USDA inspection results, but contained results different than those

[7] The results of the analysis of the two sets of records are summarized in tabular form in Exhibit CX 126A. The exhibit identifies the type of conduct complained of, the alteration involved, the USDA Certificate (if applicable), the date of inspection, the customer, the product, Lion's order number, the sales amount, the cash incentive received, the applicable paragraphs of the Second Amended Complaint and the applicable Complainant's exhibit numbers.

found by USDA.[8] The comparison of Lion's shipping files with USDA's inspection files reflects that between November 11, 1998 and May 11, 2000 different results were reported in the respective files with respect to 33 invoices in three general areas, moisture, USDA grade and size. Moisture differences were the most prevalent, with twenty such variances. Grade differences, with changes from USDA Grade C to USDA Grade B[9], accounted for thirteen variances, and there was a single instance where a mixed size determination was changed to midget size.[10]

Aside from the single instance in which a USDA Certificate was altered to lower the moisture results from 16.0% to 15.4% (CX 72 and 73), the allegations are primarily based upon Lion's use of facsimile certificates prepared on Lion letterhead, but prepared in the same general format and containing the same information as that used by USDA and in which the source of the sample is identified as being "Officially Drawn," a term defined in the Regulations[11]. 7 C.F.R. § 52.2.

The Respondents argue forcefully and with some justification that because the moisture content of raisins tends to drop rapidly after processing and even after packing, the USDA moisture testing does not accurately reflect results that are in any way representative of the moisture content of the raisins when they are received by an overseas customer. They also suggest that their customers were neither misled nor dissatisfied with the raisins that they received,[12] that USDA's testing results often are so negligently performed as to be inherently unreliable due to the apparent practice of up or down rounding which resulted in

[8] The second type of conduct noted above apparently was involved in other cases or counts which were dismissed, but was not present in the remaining counts involved in this case. Although Mr. Moody's opening statement suggested that the hearing would not involve any misuse of USDA Certificates, his statement apparently overlooked the allegations concerning USDA Certificate No. B-034343 (Lion Order No. 48397) contained in paragraphs 177 to 180 of the Second Amended Complaint.

[9] USDA Grade B requires a higher quality of raisin than USDA Grade C.

[10] There are two instances in which both moisture and grade changes were present. CX 56, 57 and 59.

[11] Respondents note the use of a certificate, similar to the Lion certificate, used by SunMaid. RX 3-0187 LR 0745. On Sun Maid's certificate; however, the source of samples is "SunMaid" rather than "Officially Drawn."

[12] The testimony indicates that only one of the customers (Western Commodities) involved in this case is no longer purchasing raisins from Lion, but that the entity is no longer purchasing California raisins. Tr. 1462.

serially repeated identical moisture values[13] which the uncontroverted testimony indicates is statistically improbable and argue that their own independent quality control moisture testing, the specifics of which differ from those used by USDA is a far more accurate indication of the actual raisin moisture content.[14] The Complainant concedes that mistakes are made by USDA's inspectors and while one might generate some empathy for the Respondents' frustration with their repeated efforts in attempting to effect changes in the way USDA inspections are performed and reported in order to meet the needs of their customers (a service for which Lion must pay), the record amply demonstrates a pattern of repeated conduct by Lion to either deliberately alter or impermissibly misrepresented USDA inspection results to meet Lion's needs.

As a remedy,[15] the Complainant seeks debarment of each of the named Respondents for a period of 15 years. Tr. 374. Although the "remedy" witness, G. Neil Blevins, the Associate Deputy Administrator for Compliance Safety and Security in the Agricultural Marketing Service testified that it was not the intent of the Department to end the use of the Lion name on raisins sold from California,[16] he did indicated that in almost 20 years on this job, he had never seen a company as unethical in its dealing with the Agency and suggested that "it is clearly the aim of the Agency that we never wish to provide service to this

[13] See Tr. 651, 1435. CX 46 at 12, one of the USDA line check sheets reflects seven consecutive identical readings of 18.0% moisture. CX 98 at 8 contains five identical consecutive readings. A detailed examination of every USDA line check sheets would reflect many other such serial readings which according to the testimony would be "highly unlikely...extremely unlikely." Tr. 651.

[14] The differences between USDA and Lion's testing included the stage of processing at which the raisins were tested for moisture, with Lion testing before the application of oil in the processing, with USDA testing after application of the oil. Other differences include the timing of the testing as well as the size of the sample. Lion would also retain samples and would test the retained sample on occasion. While the question of whether the moisture testing done by USDA is appropriate for international trade possibly should be revisited by the Department in light of market preferences, this action is not the appropriate forum to obtain such relief.

[15] The Complainant took great pains to avoid characterizing the relief sought as a sanction, stressing that the action is remedial in nature. By way of contrast, in *American Raisin*, the Judicial Officer characterized debarment as a sanction. *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165 at 189 (2001).

[16] Tr. 516. Mr. Blevins was also asked if it was the intent of the Department to put the Lion family out of the raisin growing, handling and marketing business and he answered "absolutely not and I don't see how it would do that." Tr. 522.

corporation or this family ever again..." Tr. 375, 377. In arriving at the 15 year period, he suggested that normally two to four years for each willful violation would be appropriate in cases such as this.

On the basis of the evidence before me, I find that Lion and the individual Respondents did engage in a pattern of misrepresentation or deceptive or fraudulent practices in connection with the use of official inspection certificates and or inspection results as alleged but that the requested relief of debarment for fifteen years sought by the Complainant against all Respondents is excessive.[17] After considering all of the evidence, the following Findings of Fact and Conclusions of Law are made.

FINDINGS OF FACT

1. The corporate Respondent, Lion Raisins, Inc., is a California corporation, formerly known as Lion Raisins and Lion Enterprises, Inc. (CX 1 at 6-14), with offices currently in Selma, California[18] that processes, packs and sells processed raisins both domestically and internationally,[19] being the second largest such company in the raisin industry. Lion is a closely held Subchapter S family corporation, with the corporation's 1000 shares of stock being held by only three individuals: Alfred Lion, Jr. (500 shares), Isabel Lion (499 shares) and

[17] It is initially noted that 7 U.S.C. § 1622 provides a maximum criminal penalty of a fine of not more than $1,000.00 and one year's imprisonment for each offense. Given the Congressional objective of promoting the marketing of agricultural products in the enactment of the Agricultural Marketing Act of 1946, the severity of remedy requested in this case might very well adversely impact and act at cross purposes to the objectives of other agencies within the Department as well as the raisin industry's ability to retain its share of the international market, at least during the near term. No agency witness addressed this issue; however, Kalem Baserian briefly touched upon the subject in his testimony. Tr. 1318-20. Bruce Lion also testified as to the impact of a 15 year debarment upon Lion and his family and noted the impact upon the international market share when Dole exited the market in 1997 or 1998. Tr. 1449-1450.

[18] The corporation moved its operation from 3310 East California Avenue, Fresno, California to 9500 South Dewolf, Selma, California in 1999. CX 3; Tr. 1373.

[19] Lion Raisin Company and Lion Packing Company, both of which were named as Respondents, are alleged to be partnerships or unincorporated associations that were either a subsidiary of or affiliated with the corporate Respondent. Although not listed on the Fictitious Name Statement filed with the Fresno County Clerk's Office, documents in Lion's shipping files identify Lion Raisin Company and Lion Raisin Packing as affiliated entities or business names. CX 47-10, 23. Lion Packing was a name used both before and after incorporation. See CX 1.

Larry Lion (1 share).[20] Tr. 1085-86; 1113-17. Lion was incorporated in 1967;[21] however, members of the Lion family have been in the raisin business for over 100 years. Tr. 1117-18.

2. Prior to incorporation, Lion was known as Lion Packing Co. on filings with the Raisin Advisory Committee CX 3 at 12-46. On documents contained in Lion shipping files, the names Lion Raisin Company and Lion Packing Company are indicated as affiliated entities or businesses. CX 47 at 10, 23.

3. Alfred (Al) Lion, Jr. holds the largest number of shares of Lion, is one of its directors, and is named as Lion's President on filings with the Raisin Advisory Committee. CX 3 at 1-17. On other filings with the California Secretary of State's Office, he is listed as the Chief Executive Officer and Chief Financial Officer and Registered Agent of Lion. Tr. 1186-88. CX 1 at 4, 5. Bruce Lion, Daniel Lion and Jeffrey Lion are his sons. The Lion family involvement in the raisin industry began with Alfred Lion Jr.'s grandfather; prior to Lion's incorporation, he and his brother Herbert Lion owned the partnership known as Lion Packing Company. CX 1 at 40-46, Tr. 1082.

4. Bruce Lion is listed as one of Lion's directors on the 1997 and 2000 filings with the California Secretary of State, as a Vice President of Lion on the filings with the Raisin Advisory Committee for the crop years 1996 through 2004, and exercised responsibility and control over the sales and shipping operations of Lion. CX 1 at 4,5, CX 3 at 1-11, Tr. 1129-1121. Bruce Lion testified that he was an officer and director of the corporation (Tr. 1350[22]) and that he exercised exclusive authority over whether raisins were to be "released." Tr. 1467.

5. During 1998, 1999 and 2000, Daniel (Dan) Lion exercised responsibility and control over Lion's production or processing department and was listed as one of Lion's Vice Presidents in the filing with the Raisin Advisory Committee only in 1997. CX 3 at 9, CX 4, Tr.

[20] Isabel Lion is Herbert Lion's widow; Larry Lion is their son. Tr. 1086.

[21] Lion was initially incorporated as Lion Enterprises, Inc.; however, its failure to file an annual report with the California Secretary of State's Office allowed another to take that name and the corporation was renamed Lion Raisin, Inc. Tr. 1084.

[22] The question of whether he was a director of Lion was answered "A. I'm a vice president." Tr. 1350 at line 17.

1119-21.

6. During 1998, 1999 and 2000, Jeffrey (Jeff) Lion exercised responsibility and control over Lion's ranch and grower's operations and was named as one of Lion's Vice Presidents in filings with the Raisin Advisory Committee, beginning in 1992. CX 3 at 1-15, Tr. 119-21.

7. During 1998, 1999 and 2000, Isabel Lion, the widow of Herbert Lion (Alfred Lion, Jr.'s brother and former partner), was Lion's second largest shareholder and according to one set of minutes, a director of Lion. Tr. 1085-86, CX 1 at CX 127.

8. During 1998, 1999 and 2000, Larry Lion was a shareholder and director of Lion, and according to documents filed with the California Secretary of State's Office and one set of minutes, was Lion's Secretary. CX 1 at 3, 4, 10-14, CX 127, Tr. 1085-86.

9. Lion failed to observe corporate formalities in numerous ways, including the filing of inconsistent documents with the California Secretary of State's Office and the Raisin Advisory Committee, naming different individuals as officers and directors of Lion with the two entities, failing to file required annual reports (which resulted in Lion losing its original corporate name of Lion Enterprises, Inc.), naming of officers of the corporation with a variety of different titles, using titles other than those contained on filings with the Secretary of State's Office, designating individuals as Vice Presidents of the corporation without apparent approval or action by the Board of Directors,[23] failing to either hold annual meetings of either the shareholders or Board of Directors or to maintain accurate and appropriate minutes of those meetings.[24] CX 1

[23] This was explained as "being management titles" rather than a corporate officer. Tr. 1044, 1046.

[24] One must initially wonder why more than one set of minutes might exist. Alfred Lion testified that Susan Keller, one of Lion's employees prepared the minutes, but did not attend the meetings, if in fact there were such meetings. Tr. 1109-10. In one set of minutes appearing in the record, Larry Lion was indicated as being present for the meeting of the Board of Directors for 1999, 2000 and 2001; however, the testimony indicated that he did not attend corporate meetings or otherwise perform the duties of corporate secretary. Tr. 1102-05, 1109-10. None of the minutes appearing of record contain mention of the any litigation Lion in which was involved, the retention of outside counsel, or mention personnel appointments, such as that of Kalem Baserian as General Manager. Given the informal fashion in which decisions were made, the alter ego standard discussed in *In re Anthony Thomas*, 59 Agric. Dec. 367 at 391 (2000) (continued...)

at 3,4, CX 127, Tr. 1100-06, 1113-17, 1121-22.

10. During the period between November 11, 1998, and May 11, 2000, as is indicated in the AMS Inspection and Grading Manual (RX 3-0189, LR 0748-1025), AMS inspectors recorded the results of their inspection sampling on line check sheets. Id. at LR 0955. AMS provided copies of their line check sheets to Lion Raisins, Inc. Id at LR 0957. AMS retained the original line check sheets, along with the pack-out report provided by the packer. Id at LR 0957.

11. During the period between November 11, 1998, and May 11, 2000, AMS's Processed Products Branch used Form FV-146 Certificate of Quality and Condition (Processed Foods), a packet form that comprised multiple pages, with the top page on white paper, identified as "original" in red in the lower right hand corner, followed by seven blue tissue pages (separated by carbon paper) each identified by the word "copy" (also in red) in the lower right hand corner. Tr. 39-40, CX 47 at 15, 16. Each FV-146 form was identifiable by a singular serial number at the top right side. Id. On the top page only, the number was printed in red. For example, see CX 47 at 15RX (LR 0972-77).

12. During the period between November 11, 1998, and May 11, 2000, if requested by the packer, AMS inspectors prepared a certificate worksheet, using the inspection information from their line check sheets, and product labeling and buyer information supplied by the packer. RX 3- 0189 (LR 0998). The worksheet was essentially a "draft" of the inspection certificate. Tr. 40-41.

13. Packers could and did request USDA Certificates of Quality and Condition (FV-146) after the product had been shipped. In that event, the inspector would prepare the form using the inspection documents and the order information. RX 3-0189 (LR 0980).

14. Once the FV-146 was prepared and signed, the original and up to four of the blue tissue copies were provided to the packer (or designee). RX 3-0189 (LR 0981). USDA retained a blue tissue copy in its files, along with any order information that had been provided by the packer when the certificate was requested, and the certificate worksheet, if it had been returned to the inspector. Tr. 40-42; RX 3-0189 (LR 0981). The certificates were recorded in a ledger maintained by the

[24](...continued)
appears to be met.

Inspection Service, with voided certificates being so noted. CX 14; Tr. 41-2, 52-3, RX 3-0189 (LR 0976-77. The voided original certificate was retained in the USDA files, and all blue tissue copies were destroyed. Id. If the inspector could not recover the original and all of the blue tissue copies, he or she would issue a superseded certificate, according to the procedures set forth in the inspection manual. Tr. 43; RX 3-0189 (LR 0977)

15. AMS filed the blue tissue copies, in the case of valid certificates, and the original, in the case of void certificates, together in numerical order. Tr. 40-42; RX 3-0189 (LR 0977, 0981).

16. During the period between November 11, 1998, and May 11, 2000, AMS inspectors performed on-line in-plant inspections of product at Lion Raisins, Inc. Although AMS personnel were provided with office space, the inspectors lacked the capability of print official inspection certificates and instead provided Lion Raisins, Inc.'s shipping clerks with blank FV-146 forms. CX 4. When Lion requested a certificate, it would generally give the inspector a copy of Lion's "outside" order form, which contained information regarding the buyer, codes, labels, and product specifications. Tr. 84.

17. Lion's shipping files in evidence typically contain a customer order form, prepared by the sales department, and an "inside" invoice and "invoice trial," prepared by the shipping department. The customer order form prepared by the sale department, contains the customer's order specifications. The "inside" invoice is an internal shipping department document that precedes the "invoice trial." The "invoice trial" is the last document prepared, and denotes the customer's specifications, the contract price, the manner and date of shipment, and, usually, the date when the order documentation was mailed to the customer, generally by United Parcel Service.

18. Under a program operated by the Raisin Administrative Committee (hereinafter the "RAC"), packers who sold raisins for export could apply for, and receive, "cash back" for such sales, by filing an RAC Form 100C. See e.g., CX 47 at 12. The amount of "cash back" was based on the weight of the raisins. Id. Lion applied for "cash back" from virtually all of the sales that are the subject of this case.[25]

[25] See generally Findings of Fact 21 through 52; CX 126A does not reflect "cash back" from all transactions.

19. Once Lion developed a "Lion" certificate, Lion implemented the practice of charging its customers for USDA certificates, thereby creating a disincentive to request the official certificate FV-146. CX 7. Customers were advised a "Lion" certificate would be provided without charge and that Lion certificates contained the same information as a USDA certificate. See CX 73 at 44 ("Please note that the Lion certificate and the USDA certificate for each order is the same.").

20. Lion certificates were prepared not by Lion's quality control personnel, but rather by those in the shipping department. CX 7. Lion certificates were prepared on Lion letterhead but follow the same format used on the FV-146 in the body of the document, providing the same information categories found on the USDA's worksheet and/or certificate.

21. Order Number 43387. On October 26, 1998, Western Commodities, Ltd., in Devon, England, contracted for 1,660 cases of oil-dressed, 12.5 kilo, select raisins that were certified U.S. Grade B, and requested a USDA certificate.[26] CX 47 at 1-2. On November 11, 1998, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 46 at 8.[27] Lion requested an inspection certificate,[28] USDA inspectors prepared a worksheet, provided it to Lion's shipping department, Certificate Y-869392 was prepared, and the inspector signed it. CX 46 at 1. Lion retained the original inspection certificate Y-869392 and one copy in its shipping file. CX 47 at 15-6. Lion's shipping file contains a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information concerning the raisins as the USDA certificate — except that "U.S. Grade B" was substituted for the Grade C that was found by USDA inspectors. CX 47 at 14. Lion mailed the order documents to the

[26] The salesman was Steven Vlaminck, who was identified as a witness on respondents' witness list, but was not called by respondents to testify. CX 47 at 7.

[27] According to the line check sheet, one pallet (which inspectors had found failed because of mold) was set aside, and Lion Raisins, Inc., elected to dump it back into the processing line. On a subsequent sampling the raisins were certified as meeting U.S. Grade C, which was accepted by Lion Raisins, Inc.'s processing personnel. CX 46 at 8 (see entries for mold and remark "C grade OK by Graham").

[28] CX 46 at 3(document given to USDA inspectors shows raisins for Lion order 43387 loaded by "Joe" in container MAEU 6734307, with seal No. 0016729); CX 47 at 2 (same container and seal identified on inside invoice).

buyer on December 2, 1998 and requested and received $13,661.76 "cash back" from the RAC. CX 47 at 1, 12.

22. Order Number 43588. On November 5, 1998, Central Import, Emsdetter, Germany, contracted for 2,880 cases of oil-dressed, 12.5 kilo, midget raisins, not more than 18% moisture, and requested a USDA certificate. CX 99 at 1. On November 28, 1998, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, obtaining moisture results of 17.8 to 18.0% from the officially drawn samples. CX 98 at 1. Lion requested an inspection certificate,[29] USDA inspectors prepared a worksheet, provided it to Lion's shipping department, Certificate B-033610 was prepared, and the inspector signed it. CX 98 at 1-2. Lion retained the original certificate B-033610 and one copy in its shipping file. CX 99 at 18-19. Lion's shipping file contains a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was stated to be "17.8 Percent" rather than 17.8 to 18.0% as was found by the USDA inspectors. CX 99 at 17. Lion mailed the order documents to the buyer on December 10, 1998 and requested and received $23,702.00 "cash back" from the RAC. CX 99 at 1, 13.

23. Order Number 43598. On November 5, 1998, Central Import placed an order for 1,440 cases of 12.5 kilo, oil-treated midget raisins, U.S. Grade B, and requested a USDA certificate. CX 49 at 1. On January 6, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 114 at 7. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 49 at 11. Lion failed to return the worksheet or a typed certificate; however, the worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information as the USDA worksheet — except that "U.S. Grade B" was substituted for the Grade C found by the USDA inspectors." CX 49 at 6, 11. Lion mailed the order documents to the buyer on January 20, 1999 and requested and received $10,572.50 "cash back" from the RAC. CX 49 at 2, 9.

[29] CX 98 at 3 (document given to USDA inspectors shows raisins for Lion order 43588 in containers GSTU 3464037 and MAEU 7857055 with seals 0016817 and 0016818).

24. Order Number 43601. On November 5, 1998, Central Import placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B and requested a USDA certificate. CX 51 at 1. On February 3, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, graded the officially drawn samples as mixed raisins, and as U.S. Grade C. CX 50 at 6, CX 51 at 14.[30] The raisins were shipped that day. CX 51 at 1. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 50 at 6. Lion failed to return the worksheet or a typed certificate; however, the worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate worksheet — except that the "U.S. Grade B" was substituted for the Grade C found by the USDA inspectors. CX 51 at 13, 14.[31] Lion mailed the order documents to the buyer on February 11, 1999 and requested and received $12,187.75 "cash back" from the RAC. CX 51 at 1, 11.

25. Order Number 43603. On November 5, 1998, Central Import placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B and requested a USDA certificate. CX 101 at 1. On February 3, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant and graded the officially drawn samples as mixed size, U.S. Grade C. CX 50 at 6.[32] Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 50 at 6, CX 101 at 12, 21. Lion failed to return the worksheet or a typed certificate; however, the worksheet was found in respondents' shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE

[30]According to the line check sheet, the samples exceeded the maximum allowable number of substandard and underdeveloped raisins. CX 50 at 6. The raisins were certified as meeting U.S. Grade C, which was accepted by Lion Raisins, Inc.'s processing personnel. CX 50 at 6 (see remark "C grade sub OK'd by Robert").

[31]The USDA certificate worksheet contains both the range and average berry count; the "Lion" certificate gives only the average. This difference is present in a number of transactions.

[32] The line check sheet reflects that the samples exceeded the maximum allowable number of substandard and underdeveloped raisins and were graded as U.S. Grade C. CX 50 at 6. This grade was accepted by Lion (see remark: "C grade sub OK'd by Robert") Id.

OF SAMPLES: Officially Drawn," and contained the identical information as the USDA certificate worksheet — except that the "U.S. Grade B" was substituted for the Grade C found by the USDA inspectors." CX 101 at 12, 21-22. Lion mailed the order documents to the buyer on March 3, 2000 and requested and received $12,187.75 "cash back" from the RAC. CX 101 at 1, 9.

26. Order Number 43612. On November 5, 1998, Shoei Foods, Marysville, California, placed an order for 1,250 cases of 12.5 kilo, oil-treated midget raisins, U.S. Grade B and requested a USDA certificate. CX 103 at 1. On November 21, 1998, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant and graded the officially drawn samples as U.S. Grade C. CX 102 at 1. Lion requested an inspection certificate after the raisins were loaded in a container and sealed.[33] USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 102 at 2. Lion returned the worksheet and a typed Certificate Y-869393 which the inspector signed. CX 102 at 1, CX 103 at 12. The original certificate Y-869393 and a blue tissue copy were found in Lion's shipping file for this order. CX 103 at 12, 13. The blue tissue copy was annotated with the words "don't send" written on its face in pencil. CX 103 at 13. Lion's shipping file also contained a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "GRADE" is typed as "U.S. Grade B" instead of the Grade C found by the USDA inspectors. CX 103 at 11, 12. Lion mailed the order documents to the buyer on November 23, 1998 and requested and received $8,199.39 "cash back" from the RAC. CX 103 at 1, 10. On the "inside" order sheet located in Lion's shipping file, there was a Post-it note from "Yvonne" to "Bruce," stating:

> Bruce–
> USDA shows Grade C -
> Do you want to send Lion
> Cert of Quality instead
> of USDA for both orders.
> Tx, Yvonne

In pencil, the word "yes" was written in response. CX 103 at 2.

[33] CX 102 at 3 (document given to USDA inspectors shows raisins for Lion order 43612 loaded by "A/sert"[?] in container POCU 0125740 with seal No. 0016796).

27. Order Number 43694. On November 12, 1998, Central Import placed an order for 1,440 cases of 12.5 kilo, oil-treated midget raisins, U.S. Grade B, and requested a USDA certificate. CX 105 at 1. On November 24, 1998, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 104 at 6. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 104 at 2-3. Lion returned the worksheet and a typed Certificate Y-869397. CX 104 at 1, CX 105 at 24, 25. The original certificate Y-869397 (and one official copy) were found in Lion's shipping file for this order. CX 105 at 24, 25. Lion's shipping file also contained a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" is substituted for the Grade C found by the USDA inspectors. CX 105 at 23. Lion mailed the order documents to the buyer on December 8, 1998 and requested and received $15,025.38 "cash back" from the RAC. CX 105 at 1, 13.

28. Order Number 43922. On December 1, 1998, Farm Gold placed an order for 3,200 cases of 12.5 kilo, oil-treated midget raisins, U.S. Grade B, and requested a USDA certificate. CX 107 at 1. On November 29, and December 6, 1998, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 105 at 5, 8. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 106 at 2. Lion returned the worksheet and a typed Certificate B-033629. CX 106 at 1, CX 107 at 33, 34. The original certificate B-033629 (and one of the official copies) were found in Lion's shipping file for this order. CX 107 at 33, 34. In addition, the shipping file contained a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" is substituted for the Grade C found by the USDA inspectors. CX 107 at 32. Lion mailed the order documents to the buyer on December 24, 1998 and requested and received $33, 361.84 "cash back" from the RAC. CX 107 at 3, 22.

29. Order Number 43956. On December 3, 1998, Farm Gold placed an order for 1,660 cases of 12.5 kilo, oil-treated midget raisins, U.S. Grade B, and requested a USDA certificate. CX 109 at 1. On January

20, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 108 at 5, CX 109 at 21. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 109 at 21. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" was substituted for the Grade C found by the USDA inspectors. CX 109 at 20, 21. Lion mailed the order documents to the buyer and requested and received $15,844.08 "cash back" from the RAC. CX 109 at 1, 12.

30. Order Number 43957. On December 3, 1998, Farm Gold placed an order for 1,660 cases of 12.5 kilo, oil-treated midget raisins, U.S. Grade B, and requested a USDA certificate. CX 111 at 1. On January 20, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 108 at 5, CX 111 at 25. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 111 at 25. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" was substituted for the Grade C found by the USDA inspectors." CX 111 at 21, 25. Lion mailed the order documents to the buyer and requested and received $15,844.08 "cash back" from the RAC. CX 111 at 1, 13.

31. Order Number 43975. On December 4, 1998, Central Import Muenster placed an order for 2,880 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B and requested a USDA certificate. CX 53 at 2. On December 16, 1998, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 52 at 17, CX 53 at 13-14. Lion requested an inspection certificate after the raisins were loaded in a container and sealed.[34] USDA inspectors prepared a worksheet and provided it to Lion's

[34] CX 52 at 3 The document provided to the USDA inspectors reflects this order was loaded by "BH" in containers APMU 2751550 and TRIU 3706610 with seals Nos. 0017053 and 0017054.

shipping department. CX 52 at 2. Lion returned the worksheet and a typed Certificate B-033631. CX 53 at 13-14. Lion's shipping file contained the original certificate and a photocopy as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" was substituted for the Grade C found by the USDA inspectors. CX 53 at 12-14. Lion mailed the order documents to the buyer on January 20, 1999 and requested and received $23,682.12 "cash back" from the RAC. CX 53 at 1, 10.

32. Order Number 44120. On December 14, 1998, Navimpex, S.A., Charenton, France placed an order for 1,660 cases of oil-treated, 12.5 kilo select raisins, U.S. Grade B, with no more than 15% moisture and requested a USDA certificate and copies of the USDA's line check sheets. CX 55 at 1. On January 21, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, obtaining moisture levels of 16.4 to 16.5% from the officially drawn samples. CX 54 at 5, CX 55 at 7. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 55 at 7. Lion failed to return the worksheet or a typed certificate; however, Lion's shipping file for this order contained the certificate worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn,". CX 55 at 6-7. The Lion certificate contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "15.0 Percent" instead of the 16.4 to 16.5% found by the USDA inspectors. CX 55 at 6-7. On the Invoice, next to "LINE CHECK SHEETS," there appeared a handwritten notation "Do not send (per Bruce)." CX 55 at 1. Lion's shipping file also contained a copy (redacted) of the USDA's line check sheet for the inspection of these raisins. The copy bore a Post-it note, in red ink:

> Bruce–
> Please note USDA
> Line check sheets
> show higher moisture
> than spec.
> Tx, Yvonne

The response, in pencil, said: "don't send or reduce them" The "don't send" was circled. CX 55 at 5. Lion mailed the order documents to the buyer on February 3, 1999 and requested and received $12,187.75 "cash

back" from the RAC. CX 55 at 1, 15.

33. Order Number 44122. On December 14, 1998, Navimpex placed an order for 1,660 cases of oil-treated, 12.5 kilo select raisins, U.S. Grade B, with no more than 15% moisture, and requested a USDA certificate. CX 113 at 1. On March 1, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, obtaining moisture levels of 15.0 to 17.0% from the officially drawn samples. CX 112 at 4.[35] Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. Lion failed to return the worksheet or a typed certificate; however. Lion's shipping file for this order contained the certificate worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "15.0 Percent" rather than the 15.0 to 17.0% found by USDA inspectors. CX 113 at 14. Lion mailed the order documents to the buyer on January 20, 1999 and requested and received $15,844.08 "cash back" from the RAC. CX 57 at 1, 12.

34. Order Number 44184. On December 16, 1998, Heinrich Bruning, Hamburg, Germany, placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B, with no more than 17% moisture and requested a USDA certificate. CX 57 at 1. On January 12, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, obtaining moisture levels of 16.7 to 17.0% from the officially drawn samples and grading the raisins as U.S. Grade C. CX 56 at 4. Lion requested an inspection certificate, USDA inspectors prepared a certificate worksheet, and provided it to Lion's shipping department. CX 57 at 22. Lion failed to return the worksheet or a typed certificate; however, Lion's shipping file for this order contained the certificate worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "16.0 Percent" and the "GRADE" is typed as "U.S. Grade B" rather than the moisture of 16.7 to 17.0% and Grade C found by the USDA inspectors. CX 57 at 17, 22. Lion mailed the order documents to the buyer on March 11, 1999 and requested and received $12,187.75 "cash back" from the RAC. CX 113 at 1, 7.

[35] The inspector noted that she "notified Joe on moisture." CX 112 at 4.

35. Order Number 44185. On December 16, 1998, Heinrich Bruning, Hamburg, Germany, placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B, with no more than 17% moisture and requested a USDA certificate. CX 59 at 1. On January 12, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant, obtaining moisture levels of 16.7 to 17.0% and grading the raisins as U.S. Grade C. CX 56 at 4. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 59 at 19. Lion failed to return the worksheet or a typed certificate; however, Lion's shipping file for this order contained the certificate worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "16.0 Percent" and the "GRADE" is typed as "U.S. Grade B" instead of the moisture level of 16.7 to 17.0% and Grade C found by the USDA inspectors. CX 59 at 18-19. Lion mailed the order documents to the buyer on January 20, 1999 and requested and received $15,844.08 "cash back" from the RAC. CX 59 at 1, 11.

36. Order Number 44351. On January 4, 1999, Central Import placed an order for 290 cases of 12.5 kilo, oil-treated midget raisins, with no more than 15.5% moisture, and requested a USDA certificate. CX 115 at 1. On January 6, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, obtaining moisture levels of 17% from the officially drawn samples. CX 114 at 7. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 115 at 21. Lion returned a typed Certificate B-033650 which stated that the raisins sampled were "officially drawn," and certified at 17% moisture. CX 114 at 1. Lion's shipping files contained the original certificate B-033650 and the certificate worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "15.5%" rather than the 17% found by the USDA inspectors. CX 115 at 18, 19, 21. Lion's shipping file also contains a Post-it note from "RW" to "Bruce, as follows:

> 3/9
>
> Bruce,
> (See order attached)
> The Berry count met the specs,

however the moisture did not.
According to USDA moisture
was 17%.
Tx,
RW

CX 115 at 15. Lion mailed the order documents to the buyer on January 20, 1999 and requested and received $2,768.03 "cash back" from the RAC. CX 115 at 1, 13.

37. Order Number 44488. On January 11, 1999, Heinrich Bruning placed an order for 4,980 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B, with no more than 17% moisture and requested a USDA certificate. CX 61 at 1. On January 22, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, obtaining moisture levels of 16.6 to 17.0% from the officially drawn samples. CX 60 at 5. Lion requested an inspection certificate,. USDA inspectors prepared a worksheet, and provided it to the shipping clerks. CX 61 at 16. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in respondents' shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "16.0 Percent" instead of the 16.6 to 17.0% found by the USDA inspectors. CX 61 at 15-16. Lion mailed the order documents to the buyer on February 3, 1999 and requested $47,531.90 "cash back" from the RAC. CX 61 at 1, 24.

38. Order Number 44865. On February 4, 1999, Primex International placed an order for 440 cases of oil-treated, 30 pound select raisins, with no more than 15% moisture, and requested a USDA certificate. CX 117 at 1. On February 8, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, and obtained moisture levels of 17.2% from the officially drawn samples. CX 116 at 2. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 117 at 14. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate —

except that the "Moisture" was typed as "15.0 Percent" instead of the 17.2% found by the USDA inspectors. CX 117 at 13. There was a Post-it note on the "Lion" certificate from "RW" to "Bruce":

> Bruce,
> Moisture did not
> meet spec of 15%
> Actual moisture
> is 17.2%.
> RW

CX 117 at 13. Lion mailed the order documents to the buyer on February 12, 1999 and requested and received $3, 235.41 "cash back" from the RAC. CX 117 at 1, 11.

39. Order Number 45199. On March 5, 1999, Sunbeam Australian Dried Fruits Sales, Victoria, Australia, placed an order for 3,320 cases of oil-treated, 12.5 kilo zante currant raisins, U.S. Grade B, with no more than 17.5% moisture and requested a USDA certificate. CX 63 at 1. On April 15, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, and obtained moisture levels of 17.6 to 18.9% from the officially drawn samples. CX 62 at 8.[36] Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping clerks. CX 63 at 25. Lion failed to return the worksheet or a typed certificate to USDA; however, the certificate worksheet was located in Lion's shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "17.5 Percent" instead of the 17.6 to 18.9% found by the USDA inspectors. CX 63 at 25, 46. Lion requested and received "cash back" from the RAC. CX 63 at 42 (the amount is obscured).

40. Order Number 46171. On May 21, 1999, Sunbeam Australian Dried Fruits Sales, Victoria, Australia, placed an order for 3,320 cases of oil-treated, 12.5 kilo zante currant raisins, U.S. Grade B, with no more than 16.5% moisture and requested a USDA certificate. CX 65 at 1. On April 15, 1999, USDA inspectors sampled processed raisins on-

[36] The inspector notified the processing staff that the moisture was high. CX 62 at 8 ("notified Robert on moist"). The maximum allowable moisture percentage for zante currant raisins is 20%. 7 C.F.R. § 52.1857.

line at Lion's Fresno plant, obtaining moisture levels of 17.6 to 18.9% from the officially drawn samples. CX 64 at 5. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 65 at 41. Lion failed to return the worksheet or a typed certificate to USDA; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "16.9 to 17.0 Percent" rather than the 17.6 to 18.9% found by the USDA inspectors. CX 65 at 31, 41.[37] Lion's shipping file also contained a letter, dated July 21, 1999, sent to Sunbeam, which stated:

"Your P O 8863 has already been processed. Enclosed please find a copy of the signed USDA certificate showing the moisture content of 17 percent which is below the maximum requirement of 18 percent. Per your PO 9003 we have adjusted the maximum moisture specification to 17 percent to ensure the moisture level is reduced as per your request. We will try testing under 17 percent but our production thinks it might be difficult to obtain the moisture any lower than the 17 percent."[38]

Lion mailed the order documents to the buyer on August 9, 1999 and requested and received $36,032.50 "cash back" from the RAC. CX 65 at 45.

41. Order Number 46371. On May 14, 1999, Farm Gold, in Neudorf, Austria, placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B, with no more than 16% moisture and requested a USDA certificate. CX 67 at 1. On September 1, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 15.5 to 17.0% from the officially drawn samples.[39] CX 66 at 5. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 67 at 23. Lion failed to return the worksheet

[37] USDA stated that the certificate covered 91,489.24 pounds of product, while the "Lion" certificate referred to 91,489 pounds.

[38] CX 65 at 12-13; see also CX 65 at 14 (noting "USDA readout 17.0%"). "PO" appears to refer to Sunbeam's purchase orders. See CX 65 at 6 (reference to PO9003); 10, 14.

[39] According to the line check sheets, the maximum moisture for the order was 17%. CX 66 at 5.

or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as two "Lion" certificates, signed by Barbara Baldwin, both of which used the legend "SOURCE OF SAMPLES: Officially Drawn." CX 67 at 21, 22. One of the "Lion" certificates contained – in typewriting – the identical information about the raisins as the USDA certificate — including the non-conforming "15.5 to 17.0" percent moisture. CX 67 at 22. The entire page, however, was struck through with a red line, and, in pencil, the "17.0 Percent" was obliterated, and corrected with a handwritten "16." Id. On the other "Lion" certificate, presumably the final version, the "Moisture" was typed as "15.5 to 16.0 Percent" instead of the 15.5 to 17.0% found by the USDA inspectors. CX 67 at 21, 23. Lion mailed the order documents to the buyer on September 19, 1999 and requested and received $10,725.22 "cash back" from the RAC. CX 67 at 1, 16.

42. Order Number 46811. On July 19, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B and requested a USDA certificate. CX 69 at 1. On September 19, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, grading the officially drawn samples as U.S. Grade C.[40] CX 68 at 3. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 69 at 18. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as two "Lion" certificates, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that on one, the "GRADE" was typed as it is on the USDA worksheet, as "U.S. Grade C." CX 69 at 17-18. The "C" was circled in pencil, and a "B" placed next to it, also in pencil. Id. The other "Lion" certificate was corrected to read "GRADE: U.S. GRADE: B." CX 69 at 16. Lion mailed the order documents to the buyer on October 5, 1999 and requested and received $10,725.22 "cash back" from the RAC. CX 69 at 1, 25.

43. Order Number 47456. On September 8, 1999, Farm Gold placed an order for 3,320 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B, and requested a USDA certificate. CX 119 at 1. On September 23, 1999, USDA inspectors sampled processed raisins on-

[40] The samples were graded U.S. Grade C as the maximum allowable number of substandard and underdeveloped raisins was exceeded for U.S. Grade B. The remarks reflect "C grade sub OK. Robert" CX 68 at 3.

line at Lion's Selma plant, grading the officially drawn samples as U.S. Grade C. CX 118 at 4. Lion requested an inspection certificate, USDA inspectors prepared a worksheet and provided it to Lion's shipping clerks. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well a "Lion" certificate, signed by Barbara Baldwin, which used the legend "SOURCE OF SAMPLES: Officially Drawn," and stated that the "GRADE" was "U.S. GRADE: B" rather than the Grade C found by the USDA inspectors. CX 119 at 26. The "Lion" certificate also included an additional case code that does not appear on the USDA worksheet. CX 119 at 26.Lion mailed the order documents to the buyer on October 14, 1999 and requested and received $28,762.80 "cash back" from the RAC. CX 119 at 1, 12.

44. Order Number 48052. On October 20, 1999, Demos Ciclitira, London, England, placed an order for 1,660 cases of oil-treated, 12.5 kilo Medos zante currant raisins, U.S. Grade B, with no more than 17% moisture and requested a USDA certificate. CX 71 at 1, 6, 26. On October 27, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 17.0 to 18.0% from the officially drawn samples. CX 70 at 8. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 71 at 25. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the same information about the raisins as the USDA certificate — except the that the moisture read "[blank] To 17.0 Percent" and the principal label marks contained additional information not found on the certificate worksheet. CX 71 at 24, 25.[41] Lion mailed the order documents to the buyer on November 18, 1999 and requested "cash back" from the RAC. CX 71 at 1, 14.

45. Order Number 48137.

a. On October 25, 1999[42], Borges, S.A., Reus, Spain, contracted to buy 665 cases of 30-pound oil-treated Lion Select raisins, at no more

[41] The Lion shipping file contains an outside order form with the same label information that appears on the "Lion" certificate, but not on the USDA certificate worksheet. CX 71 at 22

[42] This order date appears to be incorrect as it predates the inspection of the raisins, but is what is reflected by the exhibits.

than 16% moisture, and requested a USDA certificate. CX 121 at 1. On November 4, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 16.8 to 17.0% from the officially drawn samples[43]. CX 120 at 14. After the raisins were loaded in a container, Lion requested an inspection certificate, the inspector gave a worksheet to Lion's shipping department, and received the worksheet and typed Certificate B-034321 back. CX 120 at 3-5. Lion's shipping file contained the original certificate as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and represented the moisture as 16.0% instead of the 16.86 to 17.0% found by the USDA inspectors. CX 121 at 36, 38.

b. On October 25, 1999, Borges contracted to buy 735 cases of 30-pound oil-treated golden raisins, at no more than 18% moisture, and requested a USDA certificate. CX 121 at 1. On October 15, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 16.5 to 17.3% from the officially drawn samples[44]. CX 120 at 12. After the raisins were loaded in a container, Lion requested an inspection certificate, the inspector gave a worksheet to Lion's shipping department, and received the worksheet and typed Certificate B-034317 back. CX 120 at 1, 2. Lion's shipping files contained the original certificate as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and represented the moisture as 16.0% rather than the 16.0 to 17.9% found by the USDA inspectors. CX 121 at 35, 37.

c. Lion mailed the documents for order 48137 (both parts) to the buyer on January 6, 1999 and requested and received $6,109.95 "cash back" from the RAC. CX 121 at 1, 10.

46. Order Number 48397. On November 10, 1999, N.A.F. International, Copenhagen, Denmark, placed an order for 650 cases of bagged, oil-treated, raisins, U.S. Grade B, with no more than 15% moisture, and 800 cases of 12.5 kilo, oil-treated select raisins, U.S. Grade B, with no more than 16% moisture and requested a USDA certificate. CX 73 at 1. On December 6, 1999, USDA inspectors

[43] The USDA line check sheet reflects only 16.8 to 17.0% moisture levels; however, the FV 146 reflects the 16.86 to 17.0% figures. CX 120 at 1, 14; CX 121 at 42.

[44] The USDA line check sheet reflects moisture of 16.5 to 17.3; however, the worksheet and the certificate reflected moisture levels of 16.0 to 17.9%. CX 120 at 1,2, 12.

sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 15.1 to 15.3% from the officially drawn samples. CX 72 at 12. Lion requested an inspection certificate after the raisins were loaded in a container and sealed, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 72 at 8. Lion returned the worksheet and a typed Certificate B-034343. CX 72 at 4[45]. Lion's shipping file contained the original certificate B-034343 (and several photocopies thereof) for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "15.3 TO 16.0 Percent" rather than the 15.3 to 15.4% recorded on the USDA Certificate found in the USDA file. CX 72 at 4, CX 73 at 34 (original), 39, 40-43. The original USDA certificate was altered to read "Moisture - 15.3 TO 16.0 Percent," and a copy of the altered original was in the shipping file as well. CX 73 at 34, 39. Lion mailed the order documents to the buyer on January 5, 2000 and requested and received $6,751.94 "cash back" from the RAC. CX 73 at 1, 16.

47. Order Number 48416. November 11, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, no more than 17% moisture, and requested a USDA certificate. CX 123 at 1. On December 13, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 17.9 to 18.0% from the officially drawn samples. CX 122 at 3. Lion requested an inspection certificate, USDA inspectors prepared a worksheet and provided it to Lion's shipping department. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and stated that the "Moisture" was "17.0% rather than the 17.9 to 18.0% found by the USDA inspectors." CX 123 at 30, 31. Lion mailed the order documents to the buyer on January 12, 2000 and requested and received $17,664.63 "cash back" from the RAC. CX 123 at 1, 10.

48. Order Number 48487. On November 16, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, 12.5 kilo select raisins, no

[45] Although the certificate worksheet records the moisture as being 15.1 to 15.3% consistent with the line check sheet, Certificate 03343 contains a moisture level of 15.3 to 15.4%.

more than 16% moisture, and requested a USDA certificate. CX 125 at 1. On November 30, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant, and obtained moisture levels of 15.1 to 15.8% from the officially drawn samples. CX 124 at 4. Lion requested an inspection certificate, USDA inspectors prepared a worksheet and provided it to Lion's shipping department. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and stated that the "Moisture" was "15.1 to 15.5% rather than the 15.1 to 15.8% found by the USDA inspectors." CX 125 at 29, 30. Lion mailed the order documents to the buyer on December 23, 1999 and requested and received $17,664.63 "cash back" from the RAC. CX 125 at 3, 14.

49. Order Number 48523. On November 18, 1999, Heinrich Bruning placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B, with no more than 17% moisture and requested a USDA certificate. CX 75 at 1. On December 2, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 16.6 to 17.0% moisture. CX 74 at 3. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 75 at 22. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "16.0 Percent rather than the 16.6 to 17.0% found by the USDA inspectors." CX 75 at 18, 22. The "Lion" certificate bore a Post-it note, in pen:

"USDA certificate shows a moisture of 16.6-17.0."

Lion mailed the order documents to the buyer on December 30, 1999 and requested and received $17,664.63 "cash back" from the RAC. CX 75 at 1, 9.

50. Order Number 49334. On January 20, 2000, EKO Produktor AB, Gothenburg, Sweden, placed an order for 1,660 cases of oil-treated, 12.5 kilo select raisins, U.S. Grade B, with no more than 17% moisture and requested a USDA certificate. CX 77 at 1. On December 21 and 22, 1999, USDA inspectors had sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 16.6 to 17.8% from the

officially drawn samples. CX 76 at 4, 13. Lion requested an inspection certificate, USDA inspectors prepared a worksheet which bore Order Number 49334, and provided it to Lion's shipping department[46]. CX 77 at 22. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as a well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and which stated that the pack dates were January 21 and 22, 2000, and bore the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "16.6 To 17.0 Percent" rather than the 16.6 to 17.8% found by the USDA inspectors. CX 77 at 21. The "Lion" certificate bore a Post-it note, in pen:

"USDA shows no packing on the 21 & 22 of January.
The moisture for the Dec. Pack date shows 16.6 - 17.8%."

Lion mailed the order documents to the buyer on February 7, 2000 and requested and received $11,573.38 "cash back" from the RAC. CX 77 at 1, 12.

51. Order Number 50431. On April 14, 2000, N.A.F. International placed an order for 1,440 cases of 12.5 kilo, oil-treated select raisins, U.S. Grade B, with 16 to 18% moisture and requested a USDA certificate. CX 79 at 1. On April 17, 2000, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 17.2 to 17.5% from the officially drawn samples. CX 78 at 3. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping clerks. CX 79 at 25. Lion failed to return the worksheet or a typed certificate; however, Lion's shipping file contains two "Lion" certificates signed by Barbara Baldwin that used the legend "SOURCE OF SAMPLES: Officially Drawn." CX 79 at 23, 24. One certificate contained the USDA's moisture results, and bore a handwritten (in pencil) notation "16-17 adjacent to the moisture entry." CX 79 at 23. The second "Lion" certificate contained the typewritten "corrected" moisture of 16 to 17%. CX 79 at 24. Lion mailed the order documents to the buyer on April 20, 2000 and requested and received $13,421.36 "cash back" from the RAC. CX 79 at 1, 4.

52. Order Number 50750. On May 8, 2000, J.L. Priestly, Lincolnshire, England, placed an order for 1,660 cases of 12.5 kilo, oil-

[46] It is not entirely clear what occurred here as the Order date is well after the inspection date.

treated midget raisins. CX 81 at 1. On April 14 and May 11, 2000, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant, and graded the officially drawn samples as mixed size raisins. CX 80 at 6, 11. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping clerks. CX 81 at 21. Lion failed to return the worksheet or a typed certificate; however, Lion's shipping file for the order contained the worksheet as well as two "Lion" certificates (one signed by Barbara Baldwin), that used the legend "SOURCE OF SAMPLES: Officially Drawn." CX 81 at 23, 24, 26. One certificate contained USDA's size result and the other recorded the size as "midget." Id. There is also a Post-it which stated:

> "Bruce,
> The USDA certificate
> shows a size of Mixed."

The handwritten response, in pencil indicated:

> "Change to Midget," circled. CX 81 at 25.

Lion mailed the order documents to the buyer on May 25, 2000 and requested and received $15,471.78 "cash back" from the RAC. CX 81 at 1, 3.

CONCLUSIONS OF LAW

1. The Secretary of Agriculture has the authority under the Agricultural Marketing Act of 1946 to: (a) prescribe regulations for the inspection, certification, and identification of the class, quality, and condition of agricultural products, and (b) to issue regulations and orders to carry out the purposes of the Act, including the right to issue debarment regulations and to debar persons and entities from benefits under the Act.

2. The term "officially drawn sample" as defined in 7 C.F.R. § 52.2 is limited to those samples selected by USDA inspectors, other licensed samplers or by other persons authorized by the Administrator. The use of such language on Lion certificates indicating that the source of samples was "officially drawn" impermissibly attempts to extend that term to sampling results performed by an entity's quality control personnel if such sampling was in fact performed. While no regulation prohibits the use of a non-USDA certificate or guarantee by a processor, packer or seller of raisins, the use of the term "officially drawn" allows no leeway or deviation from the sampling results found by USDA inspectors.

3. U.S. Grades, as applied to raisins, are based upon a variety of components, only one of which is the maturity of the raisin. Lion's false representation that certain orders (which had been graded by USDA inspectors as U.S. Grade C) were in fact U.S. Grade B based only upon maturity was an impermissible use of the U.S. Grade designation given to the raisins in question.

4. Lion impermissibly attempted to use its own standards to define the term "midget" when that term is defined and used by USDA as part of the identification of the size of a raisin.

5. By reason of Lion's failure to observe corporate formalities, as enumerated above, Lion is not an entity separate and apart from the individual respondents named in the Second Amended Complaint.

6. On 33 occasions between November 11, 1998 and May 11, 2000, in connection with 32 orders, respondents Lion Raisins, Inc., Lion Raisin Company, Lion Packing Company, Alfred Lion, Jr., Daniel Lion, Jeffrey Lion, Bruce Lion, Larry Lion, and Isabel Lion, willfully violated section 203(h) of the Act (7 U.S.C. § 1622(h)), and section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)), by engaging in misrepresentation or deceptive or fraudulent practices or acts, as follows:

a. Order Number 43387 (November 11, 1998). Respondents used an official inspection certificate (Y-869392), as a basis to misrepresent the U.S. Grade of 45,744.62 pounds of raisins sold by respondents to Western Commodities, Ltd., as U.S. Grade B, when in fact, the official U.S. Grade of those raisins was U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iii). Respondents also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as U.S. Grade B, when USDA had in fact certified them as U.S. Grade C, as shown on the official certificate. 7 C.F.R. § 52.54(a)(1)(iv). Finally, respondents used a facsimile form that simulated in part the official inspection certificate issued for these raisins (Y-869392) for the purpose of purporting to evidence the U.S. grade of the raisins. 7 C.F.R. § 52.54(a)(1)(v).

b. Order Number 43588 (January 6, 1999). Respondents used an official inspection certificate (B-033610), as a basis to misrepresent the moisture content of 79,364 pounds of raisins sold by respondents to Central Import Meunster. 7 C.F.R. § 52.54(a)(1)(iii). Respondents also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins to be 17.8% moisture, when the USDA's officially drawn sample of those raisins was certified

as 17.8 to 18.0% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Finally, respondents used a facsimile form that simulated in part the official inspection certificate issued for these raisins, for the purpose of purporting to evidence the officially drawn moisture level of the raisins. 7 C.F.R. § 52.54(a)(1)(v).

c. Order Number 43598 (January 6, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 39,682.08 pounds of raisins sold by respondents to Central Import Meunster as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate, for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

d. Order Number 43601 (February 3, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn"), falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Central Import Meunster as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

e. Order Number 43603 (February 3, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Central Import Meunster as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

f. Order Number 43612 (November 21, 1998). Respondents used an official inspection certificate (Y-869393), as a basis to misrepresent the U.S. Grade of 37,500 pounds of raisins sold by respondents to Shoei Foods (U.S.A.) Inc., as U.S. Grade B, when in fact, the official U.S. Grade of those raisins was U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iii). Respondents also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as U.S. Grade B when the official inspection certificate (Y-869393) for the raisins certified them as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Finally, respondents also used a facsimile form that simulated in part an

official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

g. Order Number 43694 (November 24, 1998). Respondents used an official inspection certificate (Y-869397), as a basis to misrepresent the U.S. Grade of 39,682.08 pounds of raisins sold by respondents to Central Import Meunster, as U.S. Grade B, when in fact, the official U.S. Grade of those raisins was U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iii). Respondents also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as U.S. Grade B when the official inspection certificate (Y-869397) for the raisins certified them as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Finally, respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

h. Order Number 43922 (December 6, 1998). Respondents used an official inspection certificate (B-033629) to misrepresent the U.S. Grade of 88,182.40 pounds of raisins sold by respondents to Farm Gold as U.S. Grade B, when in fact, the official U.S. Grade of those raisins was U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iii). Respondents also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as U.S. Grade B when the official inspection certificate certified them as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Finally, respondents used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

i. Order Number 43956 (January 20, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Farm Gold as U.S. Grade B when the officially drawn sample for that product was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

j. Order Number 43957 (January 20, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Farm Gold as U.S. Grade B when the officially drawn sample for those raisins was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

k. Order Number 43975 (December 6, 1998). Respondents used an official inspection certificate (B-033631), as a basis to misrepresent the U.S. Grade of 79,364.16 pounds of raisins sold by respondents to Central Import Meunster as U.S. Grade B, when in fact, the official U.S. Grade of those raisins was U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iii). Respondents also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as U.S. Grade B when the official inspection certificate certified them as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Finally, respondents used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

l. Order Number 44120 (January 21, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Navimpex, at 15.0% moisture, when the officially drawn sample for that product was certified at 16.4 to 16.5% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

m. Order Number 44122 (March 1, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Navimpex at 15.0% moisture, when the officially drawn sample for that product was not certified at such moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

n. Order Number 44184 (January 12, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Heinrich Bruning, at 16.0% moisture and U.S. Grade B when the officially drawn sample for those raisins was certified at 16.7 to 17.0% moisture, and as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

o. Order Number 44185 (January 12, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely

signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Heinrich Bruning at 16.0% moisture and U.S. Grade B, when the officially drawn sample for that product was certified at 16.7 to 17.0% moisture, and as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

p. Order Number 44351 (January 6, 1999). Respondents used an official inspection certificate (B-033650), as a basis to misrepresent the moisture of 7,991.53 pounds of raisins sold by respondents to Central Import Meunster as 15.5%. 7 C.F.R. § 52.54(a)(1)(iii). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as having 15.5% moisture when the officially drawn sample was certified at 17% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

q. Order Number 44488 (January 22, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 137,233.86 pounds of raisins sold by respondents to Heinrich Bruning at 16.0% moisture, when the officially drawn sample for that product was not certified at such moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

r. Order Number 44865 (February 8, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 13,200 pounds of raisins sold by respondents to Primex International, with final destination of Manila, Philippines, at 15.0% moisture, when the officially drawn sample for those raisins was certified as 17.2% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

s. Order Number 45199 (April 15, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 91,489.24 pounds of raisins sold by respondents to Sunbeam Australian Dried Fruits Sales, at 17.5%

moisture, when the officially drawn sample for those raisins was certified at 17.6 to 18.9% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v)..

t. Order Number 46171 (July 26, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 91,489 pounds of raisins sold by respondents to Sunbeam Australian Dried Fruits Sales, at 16.9 to 17.0% moisture, when the officially drawn sample for that product was certified at 16.9 to 17.5% moisture, and the officially drawn sample for that product also had identified 91,489.24 pounds of product. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

u. Order Number 46371 (September 1, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Farm Gold at 15.5 to 16.0% moisture, when the officially drawn sample for those raisins was certified at 15.5 to 17.0% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

v. Order Number 46811 (September 19, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Farm Gold to be U.S. Grade B, when the officially drawn sample for that product was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

w. Order Number 47456 (September 19, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified that 92,489.24 pounds of raisins sold by respondents to Farm Gold were inspected on September 19, 1999, code marked "PKD 19 SEP99L," and determined to be to be U.S. Grade B. The officially drawn sample for that product was drawn and inspected on September 23, 1999, was code marked "PKD 23SEP99L," and the sample was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv).

Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

x. Order Number 48052 (October 27, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified, 45,744.62 pounds of raisins sold by respondents to Demos Ciclitira, Ltd., at 17.0% moisture. The officially drawn sample for that product was certified at 17.0 to 18.0% moisture and the product was to have been packed under a different label. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

y. Order Number 48137 (November 4, 1999). Respondents used an official inspection certificate (B-034321) as a basis to misrepresent the moisture and size of 19,950 pounds of raisins sold by respondents to Borges, S.A. 7 C.F.R. § 52.54(a)(1)(iii). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified these raisins as "midget" raisins containing 16% moisture, when the officially drawn sample for that product was not certified at such moisture, and the raisins were not certified as midget raisins. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade and officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

z. Order Number 48137 (October 15, 1999). Respondents used an official inspection certificate (B-034317) as a basis to misrepresent the moisture of 22,050 pounds of raisins sold by respondents to Borges, S.A.. 7 C.F.R. § 52.54(a)(1)(iii). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified these raisins at 16% moisture, when the officially drawn sample for that product was not certified at such moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

aa. Order Number 48397 (December 9, 1999). Respondents altered an official inspection certificate (Y-034343) to misrepresent the moisture of 22,045.6 pounds of raisins sold by respondents to N.A.F. International, by falsifying the moisture of the officially drawn sample (and obliterating a portion of the remarks section of the certificate). 7 C.F.R. § 52.54(a)(1)(iii). Respondents used a legend ("SOURCE OF

SAMPLES: Officially Drawn") falsely signifying that USDA had certified these raisins at 15.3 to 16.0% moisture, when the officially drawn sample for that product was not certified at such moisture, and the product from which the official sample was drawn was to be packed under a different label. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

bb. Order Number 48416 (December 13, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Farm Gold at 17% moisture, when the officially drawn sample for that product was not certified at such moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

cc. Order Number 48487 (November 30, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Farm Gold at 15.1 to 15.5% moisture, when the officially drawn sample for that product was not certified at such moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

dd. Order Number 48523 (December 2, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Heinrich Bruning at 16.0% moisture, when the officially drawn sample for that product was certified at 16.6 to 17.0% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

ee. Order Number 49334 (December 22, 1999). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to EKO Produktor AB, at 16.6 to 17.0% moisture, when the officially drawn sample for that product was certified at 16.6 to 17.8% moisture, and the product from which the official sample was drawn was to be packed in containers bearing different code marks. 7 C.F.R. §

52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

ff. Order Number 50431 (April 17, 2000). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 39,682.08 pounds of raisins sold by respondents to N.A.F. International at 16.0 to 17.0% moisture, when the officially drawn sample for that product was certified at 17.2 to 17.5% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

gg. Order Number 50750 (May 11, 2000). Respondents used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to J.L. Priestly & Company, Ltd., as "midget" size raisins, when the officially drawn sample for that product certified it as "mixed" size raisins and the product was to have been packed under a different label. Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

7. Each of the acts and practices outlined above was willful, in violation of section 203(h) of the Act (7 U.S.C. § 1622(h)), and section 52.54(a)(2) of the Regulations (7 C.F.R. § 52.54(a)(2)).

8. The acts and practices set forth herein in connection with inspection documents for respondents' raisins and raisin products, constitute sufficient cause for the debarment of each of the named Respondents.

ORDER

On the basis of the foregoing, it is **ORDERED** as follows:

1. The Respondents, Lion Raisin, Inc., a California corporation; Lion Raisin Company, a partnership or unincorporated association; Lion Packing Company, a partnership or unincorporated association; and their agents, employees, successors and assigns are debarred for a period of five years from receiving inspection services under the Agricultural Marketing Act and the Regulations and Standards.

2. The Respondents Alfred Lion, Jr., Bruce Lion, Daniel Lion, Isabel Lion, Jeffrey Lion, and Larry Lion are each debarred for a period of five years from receiving inspection services under the Agricultural Marketing Act and the Regulations and Standards.

3. After a period of one year, upon a showing of good faith and adequate assurances of future compliance, the Respondents, or any of them, may petition the Secretary or his designee to suspend the balance of the period of debarment; however, with such suspension conditioned upon no violations being found during the remaining period of suspension. In the event additional violations were to be found, the full suspended balance of the period of debarment would then be reinstated.

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

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PLANT PROTECTION ACT

COURT DECISION

CACTUS CORNER, LLC, ET AL. v. U.S.D.A.
C.A.9 (Cal.),2006 No. 04-16003.
Filed June 8, 2006.

(Cite as: 450 F.3d 428).

PPA – Medfly – Clementines – Imported from Spain – Prohib 9 – Arbitrary and capricious, when not – Threshold of risk.

Domestic fruit growers objected to the proposed new APHIS clementine importation rules. The growers viewed the importation of Spanish Clementines as posing an unacceptable risk of accidental importation and release of the Mediterranean fruit fly (Medfly). The prior pre-shipment protocol had failed to eliminate live larvae in the imported fruit and was halted on an emergency basis since 2001 under protest by the foreign producers[*]. The USDA proposed a revised protocol they contended will meet the Prohib 9 standard (99.99% Medfly larvae mortality) under which clementine importations may resume. While the domestic growers contend that USDA merely "declared" that the new rules will work, the Court found that USDA conducted extensive scientific studies and conducted careful risk analysis and took reasonable actions in reasoned reliance on that scientific evidence. The court ruled that an agency must have discretion to rely on the reasoned opinions of its own qualified experts and an agency has the authority to make a discretionary judgement call to which the court will defer. The court found that the APHIS had articulated a rational connection between the facts found and the choices made.

United States Court of Appeals, Ninth Circuit.

Before: RYMER, FLETCHER, and CLIFTON, Circuit Judges.
CLIFTON, Circuit Judge:

The Mediterranean fruit fly, widely known as the medfly, may be tiny-slightly smaller than a common housefly-but it carries enormous weight. It is widely regarded as one of the world's most destructive fruit pests. The medfly damages citrus and other fruits by planting eggs that hatch inside the fruit, and it reproduces rapidly: a female medfly can lay as many as 800 eggs during a lifetime of less than a month. The species originated in sub-Saharan Africa and is not established in the United States, except in Hawaii, which has been infested for nearly a century. The first U.S. mainland infestation was reported in Florida in 1929. Several infestations have been reported since then, especially in recent

[*] *See InterCitrus, Ibertrade Commercial Corp and LG Specialty Sales v. USDA*, 61 Agric. Dec. 695 (2002) – Editor.

years, but intensive detection and eradication programs, notably in California, are believed to have prevented the pest from becoming permanently established.

The medfly is viewed as a serious threat to California's agricultural sector and general economy. California, the world's fifth largest agricultural economy, produces more than $13 billion worth of fruits and vegetables annually. Medfly infestation threatens that production, and an infestation would particularly hinder exports because other countries often restrict imports from medfly-infested areas. Because many believe that California's recent medfly outbreaks have been caused by the importation of infested fruit, it is unsurprising that California growers are wary of fruit brought from other parts of the world. At the same time, there are those who believe that the growers' position is motivated as much or more by their desire to protect themselves against foreign competition in the multi-billion dollar domestic produce market.

It is within that context that this case arises. In 2001, medfly larvae were discovered in fruit imported from Spain, specifically in clementines, a variety of mandarin orange. The U.S. Department of Agriculture promptly halted further imports of clementines from Spain. Several months later, the USDA issued a rule that permitted the importation of Spanish clementines to resume, subject to certain conditions intended to prevent
the introduction of medflies into this country. Domestic fruit growers challenged that rule by bringing this action. Spanish fruit growers intervened in support of the rule, and both sides filed motions for summary judgment. The district court granted summary judgment to the USDA, thus sustaining the rule against the domestic growers' challenge. *See Cactus Corner, LLC v. USDA,* 346 F.Supp.2d 1075 (E.D.Cal.2004).

This appeal requires us to consider which requirements administrative agencies must satisfy in decisionmaking. The domestic fruit grower plaintiffs urge us to require agencies to articulate explicit standards, quantitative or otherwise, that would then be used to guide the agency's decisionmaking process. Specifically, plaintiffs argue that the USDA must identify the level of risk it will accept in performing its duty "to prevent the introduction into the United States ... of a plant pest," 7 U.S.C. § 7712(a), and that the department's failure to do so violated the Administrative Procedure Act ("APA"). We are not persuaded. Although a governmental agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the

choice made," it need not define an explicit standard to guide its decisionmaking. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (quotation marks and citation omitted). Because the government has "cogently explain[ed] why it has exercised its discretion in a given manner," *id.* at 48, 103 S.Ct. 2856, we cannot conclude that the USDA's action in adopting the new rule was arbitrary and capricious. We also reject plaintiffs' argument that the USDA's factual determinations are not supported by the administrative record.

I. BACKGROUND

The facts of this case are fully set forth in the district court's opinion, 346 F.Supp.2d at 1081-92, and we summarize them briefly here. Until 2001, clementines were imported from Spain under a permit authorized by 7 C.F.R. § 319.56-2(e). The permit required that Spanish clementines be subjected to a cold treatment-storage at a specified cold temperature for a specified minimum period of time. The cold treatment was designed to kill any medfly larvae before they reached the United States. Importation continued without incident until November 2001, when consumers and agricultural officials discovered live medfly larvae in Spanish clementines at scattered locations around the country. *Id.* at 1081-82.

On December 5, 2001, the USDA's Animal and Plant Health Inspection Service ("APHIS") temporarily suspended the importation of Spanish clementines. The agency did so under the authority of the Plant Protection Act, which permits the Secretary of Agriculture to "prohibit or restrict the importation ... of any plant ... if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States ... of a plant pest." 7 U.S.C. § 7712(a). APHIS quickly assembled a team that visited Spain in mid-December. After identifying several possible causes for the appearance of medfly larvae, the team recommended that a "systems approach" be adopted. 346 F.Supp.2d at 1085. Under this approach, medflies would be subjected to multiple pest control measures, "at least two of which have an independent effect in mitigating" the risk of infestation. 7 U.S.C. § 7702(18) (defining "systems approach"); *see also id.* § 7712(e) (requiring the Secretary of Agriculture to conduct a study of "systems approaches designed to guard against the introduction of plant pathogens").

Because of concerns about the effectiveness of the cold treatment protocol, APHIS also convened a panel of experts to review the existing literature on the subject. The panel issued its findings on May 2, 2002. The panel concluded that the existing cold treatment protocol "does not provide 100% mortality, and even falls short of probit 9 security."[1] The panel therefore recommended revising the protocol by increasing "the required treatment time at each temperature by two days." For example, while the existing protocol only required 12 days of treatment at 34oF, the revised protocol called for 14 days at that temperature. In addition to recommending this immediate revision, the panel stressed the need for "long-term research plans ... to verify the efficacy of the proposed new cold treatment parameters."

APHIS further analyzed the cold treatment protocols in a study prepared by its Office of Risk Assessment and Cost-Benefit Analysis ("ORACBA"). The ORACBA study provided a quantitative analysis of the effectiveness of cold treatment. The report agreed with the May 2002 study that the existing cold treatment protocol was inadequate, but concluded that the revised treatment protocol "should achieve the probit 9 level of security."

In addition to the cold treatment studies, APHIS prepared a risk management analysis, which provided a more comprehensive evaluation of medfly control measures. The agency released the final version on October 4, 2002. This analysis assisted the agency's decisionmaking process by estimating the likelihood that a mated pair of medflies could enter a region of the United States with a climate suitable for medfly populations. The agency focused on mated pairs because a single medfly cannot cause much damage. Unless a mated pair comes together in a suitable climate, there is little risk of infestation.

The risk management analysis evaluated the efficacy of the "systems approach," under which two independent pest control measures would be implemented. One was "the application of quarantine cold treatments such that probit 9 mortality is approximated," as described above. The other was a management program designed to limit medfly populations within Spanish orchards, prior to any cold treatment or shipment of

[1]Probit 9 "refers to a level or percentage of mortality of target pests (i.e., 99.9968 percent mortality or 32 survivors out of a million) caused by a control measure. APHIS has historically used the term 'probit 9' in association with the mortality rate caused by commodity treatments (including ... cold treatments) for fruit flies." 67 Fed.Reg. 64702, 64704 (Oct. 21, 2002).

clementines to the United States.

To determine the risk of medfly introduction, the risk management analysis used a five-variable model. These variables estimated (1) the number of clementines shipped from Spain; (2) the proportion of fruit infested with larvae; (3) the number of larvae per fruit that will develop into adults; (4) the mortality rate resulting from the revised cold treatment protocol; and (5) the proportion of fruit discarded in areas of the United States with medfly-suitable climates. After examining these variables, APHIS concluded that the proposed control measures would reduce the likelihood of medfly introduction to less than 0.0001, or "less than one in more than ten thousand years." Even at the 95% confidence level, the likelihood was only 0.0004, or "less than one in two thousand years."

Meanwhile, in July APHIS published a rule proposing that the importation of clementines be resumed. *See* 67 Fed.Reg. 45922 (July 11, 2002). APHIS solicited comments on the proposal and held two public hearings. After evaluating these comments, and making revisions to the risk management analysis and the proposed treatment methods, APHIS issued the Final Rule. 67 Fed.Reg. 64702 (Oct. 21, 2002); *see also* 7 C.F.R. § 319.56-2jj. In promulgating the Final Rule, the agency expressly relied on the risk management analysis, the May 2002 panel review, the ORACBA study, and "the determinations of USDA technical experts." 67 Fed.Reg. at 64703.

The Final Rule follows the recommendations of the risk management analysis by implementing two major changes to the Spanish clementine program. First, the Final Rule mandates the use of the revised cold treatment protocol. 7 C.F.R. § 319.56-2jj(g). Second, the Final Rule requires that the Spanish government take aggressive steps, including an APHIS-approved management program, to reduce the medfly population in that country's orchards. *Id.* § 319.56-2jj(b)-(d). The Final Rule tests the efficacy of those efforts by requiring that 200 fruit from each shipment be sampled before the shipment undergoes cold treatment. *Id.* § 319.56-2jj(f). If, during this pre-treatment sampling, "inspectors find a single live Mediterranean fruit fly in any stage of development ..., the entire shipment of clementines will be rejected." *Id.* In addition, if a single live medfly "is found in any two lots of fruit from the same orchard during the same shipping season, that orchard will be removed from the export program for the remainder of the shipping season." *Id.* The Rule also provides for the inspection of clementines at U.S. ports of

entry. If any live medfly or medfly larvae are found during such an inspection, "the shipment will be held until an investigation is completed and appropriate remedial actions have been implemented." *Id.* § 319.56-2jj(h).

Plaintiffs filed suit in the Eastern District of California, arguing that the Final Rule violates the APA and other laws. After a group of Spanish clementine exporters intervened in support of APHIS and the Final Rule, both sides moved for summary judgment. On March 11, 2004, the district court granted the agency's motion for summary judgment, 346 F.Supp.2d at 1123, and plaintiffs timely appealed.

II. DISCUSSION

Plaintiffs challenge the Final Rule on two grounds. First, they contend that APHIS improperly issued the Final Rule without defining what level of risk it would accept in "prevent[ing] the introduction" of medflies under the Plant Protection Act. Second, they argue that the agency's factual determinations are not supported by the record.

We review the district court's grant of summary judgment *de novo. Baccarat Fremont Developers, LLC v. U.S. Army Corps of Engineers,* 425 F.3d 1150, 1153 (9th Cir.2005). We may set aside the agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). In our review under the APA, "we ask whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Baccarat Fremont,* 425 F.3d at 1153 (citing *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)).

A. *Articulation of an Acceptable Level of Risk*

Plaintiffs argue that the Final Rule violates the APA because the agency "simply declar[ed] that the measures it has adopted will 'prevent the introduction' of Medfly without explaining what criterion it applied to make that determination or why." According to plaintiffs, APHIS was obligated to identify the level of risk it considers to be unacceptable, and the agency's failure to do so requires that the Final Rule be set aside. In support of their argument, plaintiffs cite *Harlan Land Company v. USDA,* 186 F.Supp.2d 1076 (E.D.Cal.2001), as well as decisions relied

on in *Harlan Land,* including *Ober v. Whitman,* 243 F.3d 1190, 1195 (9th Cir.2001).

The court in *Harlan Land* overturned a similar rule because APHIS "did not establish a level above which the risk [of pest introduction] would no longer be negligible." *Id.* at 1080. *Harlan Land* thus suggests that APHIS was required to "provide a negligible risk threshold" before issuing the Final Rule. *Id.* at 1087.

Plaintiffs' argument is foreclosed by our recent decision in *Ranchers Cattleman Action Legal Fund v. USDA,* 415 F.3d 1078 (9th Cir.2005). In *Ranchers Cattleman,* we considered this issue in the context of the Animal Health Protection Act, which is substantively identical to the Plant Protection Act.[2] The district court in that case had relied on *Harlan Land* to enjoin a USDA rule permitting the importation of Canadian beef and cattle. The district court specifically held "that USDA failed adequately to quantify the risk of Canadian cattle to humans." *Id.* at 1091. The agency appealed, and we reversed.

On appeal, we squarely rejected the premise of plaintiffs' argument, holding that the Animal Health Protection Act "does not require the Secretary to quantify a permissible level of risk or to conduct a risk assessment." *Id.* at 1097. We also emphasized the USDA's "wide discretion in dealing with the importation of plant and animal products," and we noted that "the statute's use of the word 'may' suggests that [USDA] is given discretion over such decisions as whether to close the borders." *Id.* at 1094. In this case, where APHIS has issued a rule under a substantively identical statute, we follow our holding in *Ranchers Cattleman* and reject this point of appeal.

B. *APHIS's Factual Determinations*

Plaintiffs further argue that the administrative record does not support the factual determinations underlying the Final Rule. They have identified four problems with the agency's analysis which, plaintiffs

[2]The relevant language in the two statutes is nearly identical. Under the Animal Health Protection Act, the Secretary of Agriculture may prohibit or restrict ... the importation ... of any animal ... if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into ... the United States of any pest. 7 U.S.C. § 8303(a)(1). Under the Plant Protection Act, the Secretary may prohibit or restrict the importation ... of any plant ... if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States ... of a plant pest. 7 U.S.C. § 7712(a).

contend, demonstrate that the Final Rule is arbitrary and capricious. We conclude that these objections are without merit.

Plaintiffs first point out that the risk management analysis improperly presented four different estimates, varying by a large margin, for the probability that a mated pair of medflies will be introduced in a medfly-suitable region. These inconsistencies are not fatal to the Final Rule. The underlying data *are* consistent with the figures cited in the analysis's executive summary and with the agency's ultimate conclusions about the likelihood of medfly introduction. Because these discrepancies within the risk management analysis do not appear to have affected APHIS's final decision, we decline to overturn the regulation on this basis. *See Alaska Dep't of Environmental Conservation v. EPA,* 540 U.S. 461, 497, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004) ("Even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned.") (quotation marks and citation omitted).

Plaintiffs' second objection concerns the risk management analysis's estimate of eight as the maximum number of larvae per fruit that will lead to viable adults. Plaintiffs assert that this estimate is baseless because the agency's direct sampling in 2001 indicated that the average larvae per fruit varied between four and twelve. We are unpersuaded by this argument for two reasons. First, the estimate used in the risk management analysis is not equivalent to the figure cited by plaintiffs. The risk management analysis estimated the number of *viable larvae* (i.e., those that will reach adulthood), while the 2001 sampling data merely represents the number of *larvae observed,* without adjusting for larvae mortality. Although APHIS discovered clementines that contained as many as twelve larvae, only about 10% of those larvae would be expected to reach adulthood. Plaintiffs argue that this 90% mortality rate is offset by the fact that only 10% of larvae are detected, but the detection rate cited by plaintiffs is based on grapefruit data. Although the agency discussed this grapefruit data in the risk management analysis, APHIS never assumed that the detection rate for grapefruit is identical to the clementine's, a decision supported by the agency's observation that the characteristics of these fruits differ.[3] Indeed, elsewhere APHIS assumed that medflies are more easily detected in clementines than in grapefruit. *Compare* A.R. 1401 (citing

[3] "We note ... that clementines are smaller fruit than grapefruit and have therefore a much larger surface area to inspect. Clementines are also easier to dissect than grapefruit." A.R. 1401.

a study in which only 35% of infested grapefruit were detected) *with* 67 Fed.Reg. at 64736 (assuming that 75% of infested clementines will be detected). In short, the 2001 sampling data does not support plaintiffs' claim that the maximum number of viable larvae is greater than eight.

The second reason we reject plaintiffs' argument is that, even if the 2001 sampling data would support a different estimate than the one chosen, APHIS was within its discretion in using an alternative method to calculate this value. The agency relied on a 1999 study of clementines which suggested that the maximum survival rate for medfly larvae is less than 8%. Conservatively assuming that an infested clementine could contain up to 100 eggs, the risk management analysis estimated that the maximum number of viable larvae was eight. *See* A.R. 1402-03 ((100 eggs per fruit) x (maximum survival rate of .0765) = 8 viable larvae per fruit). Because we "defer to the evaluations of agencies when the evidence presents conflicting views," *Pacific Coast Federation of Fishermen's Associations v. Bureau of Reclamation,* 426 F.3d 1082, 1090 (9th Cir.2005), we reject this challenge to the Final Rule.

Third, plaintiffs maintain that the Final Rule's control measures cannot logically fix the medfly problem, because the infestation rate observed in 2001 was 0.16% while the Final Rule only protects against infestation rates greater than 1.5%. Plaintiffs thus question how "[l]imiting the maximum infestation rate under the Rule to a value almost ten times higher than the infestation rate in 2001 would [ ] be expected to make a difference." But APHIS addressed this issue in the Final Rule, explaining that it was "unconvinced that the level of infestation observed in samples taken later in the shipping season are representative of" the infestation rates that existed earlier in the season. 67 Fed.Reg. at 64713. APHIS believed that the medfly infestation rates in Spain varied ove[4]r the course of the 2001-2002 shipping season. The agency concluded that these rates were greater than 0.16% early in the season, when the first shipments reached American shores. It was within these early-season clementines, which were on the market by November 2001, that live medfly larvae were found. According to APHIS, by the time it began collecting data later that season, the infestation rates had fallen. Because "the infestations associated with early season shipments"

[4]APHIS can detect infestation levels as low as 1.5% because the Final Rule requires that "APHIS inspectors [ ] cut and inspect 200 fruit that are randomly selected" from each shipment of clementines. 7 C.F.R. § 319.56-2jj(f). By sampling 200 fruit, there is a 95% probability that the agency will detect medfly larvae in shipments in which only 1.5% of the clementines are infested. 67 Fed.Reg. at 64712.

were greater than 0.16%, APHIS chose not to rely on its sampling data in the risk management analysis. *Id.* at 64714. The agency's assumption, that the early-season infestation rates exceeded 0.16%, is supported by empirical evidence, including the "higher than average trap captures" and "higher than average temperatures" that existed early in the season. *Id.* Because APHIS addressed plaintiffs' specific concern, and its selection of the target rate is otherwise defensible, we will not disturb the agency's judgment. *See Pacific Coast,* 426 F.3d at 1090 ("an agency must have discretion to rely on the reasonable opinions of its own qualified experts") (citation omitted).

Fourth, Plaintiffs challenge the revised cold treatment protocol, arguing that APHIS was wrong to implement this protocol because the agency's experts could not validate the protocol's effectiveness. Although a panel of experts recommended further research in May 2002, APHIS subsequently conducted the ORACBA study, whose results demonstrated "a high degree of confidence" that the revised treatment protocol "should achieve the probit 9 level of security." Given the ORACBA results, APHIS's decision to implement the revised protocol did not "run[ ] counter to the evidence before the agency." *Pacific Coast*, 426 F.3d at 1090 (citation omitted).

In their reply brief, plaintiffs argue for the first time that the ORACBA report does not support the risk management analysis's assumption that the revised protocol will result in probit 9 mortality. They contend that the ORACBA report only supports the use of an 18-day treatment, and that the report's conclusions regarding the 14-day treatment (which is permitted under the Final Rule) are inapplicable because ORACBA relied on a study of lemons, not clementines. This argument is without merit. Even assuming that plaintiffs could properly raise this issue in the reply brief, we decline plaintiffs' invitation to second-guess the agency. In promulgating the Final Rule, APHIS considered and addressed numerous comments pertaining to the revised cold treatment protocol, including concerns about the efficacy of treatments shorter than 18 days. *See, e.g.,* 67 Fed.Reg. at 64730-64733. The agency's reliance on a study of lemons in devising the 14-day protocol was a discretionary judgment call to which we defer. *See Pacific Coast,* 426 F.3d at 1090.

III. CONCLUSION

Because APHIS was not required to define a negligible risk standard

under the Plant Protection Act, and because the agency has "articulated a rational connection between the facts found and the choices made," *Ranchers Cattleman,* 415 F.3d at 1093 (citation omitted), we conclude that the Final Rule is neither arbitrary nor capricious. The district court's grant of summary judgment in favor of the government was appropriate.

AFFIRMED.

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SUGAR MARKETING ALLOTMENT

COURT DECISION

HOLLY SUGAR CORP. v. USDA.
C.A.D.C.,2006. No. 05-5067.
Decided Feb. 7, 2006.

(Cite as: 437 F.3d 1210).

SMA – CCC – FAIR act – Commodity loans – Non-recourse loans– Treasury rate interest – Chevron two prong test.

Pre-1996, the Commodity Credit Corporation (CCC) charged the treasury rate for commodity loans to the cane sugar processors. The FAIR (1996) act mandated that the commodity loan rate charged by CCC be treasury rate plus 1%. In 2002, Congress exempted cane (and beet) sugar from the agricultural commodities subject to the mandated interest loan rate requirements of the F.A.I.R. act, but did not specify a new interest rate or strip CCC of its interest rate-setting authority. The processors contended that Congress intended that CCC reduce the loan rate to the pre-1996 rate-setting level. The court analyzed the facts using *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (467 U.S. 837) two prong test and determined that CCC's rate setting authority remained intact and rendered the commodity loan rate for sugar to be the same as other agricultural commodities.

United States Court of Appeals, District of Columbia Circuit.

Before: TATEL, GARLAND, and GRIFFITH, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.TATEL, Circuit Judge.

Appellees, a group of sugar processors, receive sugar loans from the federal government. Until 1996, interest rates for all agricultural commodity loans, including sugar, were set by regulations promulgated by the agency charged with administering the loans, the Commodity Credit Corporation (CCC). In that year, however, Congress set the rate by statute, increasing it by one percentage point over the regulatory rate. Six years later, in 2002, Congress exempted sugar from the statutory rate, but the CCC kept the rate the same. Believing that the 2002 statute required a lower interest rate, the sugar processors filed suit, and the district court ordered the CCC to reduce the rate. We reverse. Nothing in the 2002 statute sets an interest rate. Instead, it merely restores the CCC's rate-setting authority.

I.

The Commodity Credit Corporation runs the nation's "sugar program." 7 U.S.C. § 7272 (creating sugar program); *id.* § 7991(a) (assigning it to the CCC). Federal loans to sugar processors form the core of this program. For example, the statute provides that "[t]he Secretary shall make loans available to processors of domestically grown sugarcane at a rate equal to 18 cents per pound for raw cane sugar." *Id.* § 7272(a); *see also id.* § 7272(b) (analogous language for refined beet sugar with rate at "22.9 cents per pound"). Secured by sugar produced by the processors, these loans are nonrecourse, *id.* § 7272(e)(1), meaning that if the processors default, the government's only remedy is to foreclose on the sugar. *See* 7 C.F.R. § 1435.105(b). Thus, if the price of raw cane sugar falls below 18 cents per pound, the processors simply default on the loan, in essence selling their sugar to the government.

For many years, the statute remained silent on the interest rate for these loans, and the CCC set the interest rate for each loan individually. In 1988, a CCC regulation set a uniform rate for all agricultural loans at "the rate of interest charged by the U.S. Treasury for funds borrowed by CCC." Price Support Loans and Purchases, Production Adjustment Programs, and Other Operations, 53 Fed.Reg. 47,658, 47,659 (Nov. 25, 1988) (codified as amended at 7 C.F.R. § 1405.1). The CCC issued this regulation under its statutory authority to "make such loans ... as are necessary in the conduct of its business," 15 U.S.C. § 714b(*l*), and to "[s]upport the prices of agricultural commodities through loans, purchases, payments, and other operations," *id.* § 714c(a).

So things remained until the Federal Agriculture Improvement and Reform Act of 1996 (FAIR), which, for the first time, set the interest rate by statute:

> Notwithstanding any other provision of law, the monthly Commodity Credit Corporation interest rate applicable to loans provided for agricultural commodities by the Corporation shall be 100 basis points greater than the rate determined under the applicable interest rate formula in effect on October 1, 1995.

Federal Agriculture Improvement and Reform Act of 1996, Pub.L. No. 104-127, § 163, 110 Stat. 888, 935 (codified as amended at 7 U.S.C. § 7283(a)). Because the "applicable interest rate formula" was the

Treasury rate, the 1996 legislation effectively set the interest rate at one percentage point above the Treasury rate. The CCC amended its regulations to reflect this change. Implementation of the Farm Program Provisions of the 1996 Farm Bill, 61 Fed.Reg. 37,544, 37,575 (July 18, 1996) (codified at 7 C.F.R. § 1405.1).

Up to this point, sugar loans carried the same interest rate as all other agricultural loans. But Congress changed that in 2002 by appending the following language to section 7283, the section that set the interest rate: For purposes of this section [i.e., section 7283], raw cane sugar, refined beet sugar, and in-process sugar eligible for a loan ... shall not be considered an agricultural commodity.

Farm Security and Rural Investment Act of 2002, Pub.L. No. 107-171, § 1401(c)(2), 116 Stat. 134, 187 (codified at 7 U.S.C. § 7283(b)). The 2002 Act also required the CCC to promulgate implementing regulations, which it exempted from the Administrative Procedure Act's notice and comment provisions. *Id.* § 1601(c), 116 Stat. at 211-12 (codified at 7 U.S.C. § 7991(c)).

The sugar processors expected the interest rate, once freed of the statutory requirement to exceed the Treasury rate, to return to its pre-1996 level. The CCC's response to the 2002 Act therefore must have come as quite a surprise. "The 2002 Act," the CCC explained, "eliminates the requirement that CCC add 1 percentage point to the interest rate as calculated by the procedure in place in 1996 but does not establish a sugar loan interest rate. CCC has decided to use the rates required for other commodity loans." 2002 Farm Security and Rural Investment Act of 2002 Sugar Programs and Farm Facility Storage Loan Program, 67 Fed.Reg. 54,926, 54,927 (Aug. 26, 2002). Having decided the interest rate for sugar should remain at one percentage point above the Treasury rate, the CCC made no change to its interest rate regulation.

Seventeen sugar processors then filed suit in U.S. District Court, arguing that the 2002 Act required the CCC to lower the sugar interest rate. They sought declaratory relief and an injunction prohibiting the CCC from imposing an interest rate other than the Treasury rate as well as restitution for interest they had already paid in excess of the Treasury rate. The district court granted their motion for summary judgment, explaining that the CCC's interpretation would render the 2002 Act "meaningless" or "superfluous," and ordered declaratory and injunctive relief. *Holly Sugar Corp. v. Veneman,* 335 F.Supp.2d 100, 107

(D.D.C.2004), *modified,* 355 F.Supp.2d 181 (D.D.C.2005). Although the district court initially denied restitution, 335 F.Supp.2d at 108-10, it later changed its mind, 355 F.Supp.2d at 190-96. The CCC now appeals, challenging both the district court's interpretation of the CCC's statutory mandate and its restitution award. We review the district court's grant of summary judgment de novo. *Dunaway v. Int'l Bhd. of Teamsters,* 310 F.3d 758, 761 (D.C.Cir.2002).

II.

As all parties agree, we consider the CCC's interpretation of a statute it administers under the two-part test of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We ask first "whether Congress has directly spoken to the precise question at issue." *Id.* at 842, 104 S.Ct. 2778. If it has, we end our inquiry, giving "effect to the unambiguously expressed intent of Congress." *Id.* at 843, 104 S.Ct. 2778. In determining whether a statutory provision speaks directly to the question before us, we consider it in context. *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132-33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). In addition, we must "exhaust the 'traditional tools of statutory construction.' " *Natural Res. Def. Council, Inc. v. Browner,* 57 F.3d 1122, 1125 (D.C.Cir.1995) (quoting *Chevron,* 467 U.S. at 843 n. 9, 104 S.Ct. 2778). If, having conducted this analysis, we still find the statute silent or ambiguous on the issue before us, we move on to *Chevron* 's second step, asking "whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778.

Here, the parties dispute the meaning of the 2002 Act's provision exempting sugar from the statutory interest rate. According to the CCC, this provision restored the rate-setting authority it held before the 1996 Act first imposed a statutory rate. The sugar processors contend that the provision restored the interest rate in effect before the 1996 Act, and that the CCC therefore has no authority to deviate from the Treasury rate.

Our analysis, of course, begins with the statute's language. Subsection (a), the portion of the statute enacted in 1996, sets an interest rate for all agricultural commodities. Subsection (b), the portion of the statute added in 2002, exempts sugar from that generic interest rate. On their face, then, the two sections together have no effect on sugar loans-subsection (b) exempts sugar from subsection (a), the only provision that sets an interest rate. It thus appears that the rate-setting

authority for sugar has reverted to the CCC under its authority to "make ... loans."

The processors insist that notwithstanding the statute's language, the CCC must impose the Treasury rate. Like the district court, the processors find significance in the fact that Congress enacted subsections (a) and (b) sequentially rather than simultaneously. They label subsection (a)'s enactment the "Interest Surcharge Act," *see* Appellees' Br. 3, and then conclude that through subsection (b) Congress exempted sugar from the "interest surcharge," thereby expressing its intent to restore the interest rate to its pre-1996 level. But "Interest Surcharge Act" is the processors' label, not Congress's, and the 1996 Act could just as easily be called the "Statutory Interest Rate Act" or even the "Strip the CCC of Authority Act." Exempting sugar from a provision described either of these two ways would restore the CCC's discretion, not the pre-1996 interest rate.

We also disagree with the district court's conclusion that the CCC's interpretation renders the 2002 Act "meaningless," *Holly Sugar,* 355 F.Supp.2d at 188, or "superfluous," *id.* at 189. Under the CCC's interpretation, the agency has now regained its authority to set the sugar interest rate-authority it was given only when Congress passed the 2002 Act and which it lacks for all other agricultural commodities.

The processors also rely on the provision's legislative history. They emphasize most heavily a Senate report's statement that the 2002 Act "reduces the CCC interest rate on sugar loans by 100 basis points." S.Rep. No. 107-117, at 100 (2001). The House report, however, is far more equivocal. It explains that the provision "reduces the CCC interest rate on price support loans" without specifying how much. H.R.Rep. No. 107-191, pt. 1, at 89 (2001). The conference report gives the processors even less support. Mirroring the statute's language, that report states that the Act " makes section 163 of the FAIR Act inapplicable to sugar." H.R.Rep. No. 107-424, at 447 (2002), U.S.Code Cong. & Admin.News 2002, pp. 141, 172 (Conf.Rep.). Taken together, these reports fall far short of the "extraordinary circumstances" in which a statute's unambiguous language might not control. *United States v. Braxtonbrown-Smith,* 278 F.3d 1348, 1352 (D.C.Cir.2002) (quoting *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 474, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992)). Indeed, of the three reports, only the Senate's gives any inkling that Congress may have had a particular interest rate in mind, and the conference report-to which we ordinarily

ascribe the most weight, *see Moore v. District of Columbia,* 907 F.2d 165, 175 (D.C.Cir.1990) (en banc) ("[the] conference committee report is the most persuasive evidence of congressional intent after [the] statutory text itself" (internal quotation marks omitted))-gives no indication whatsoever that Congress intended to restore the pre-1996 rate.

In short, contrary to the processors' argument, the statute sets no interest rate for sugar. Instead, it sets an interest rate for all other commodities and specifically exempts sugar. By removing sugar from the statutory rate, "Congress has directly spoken to the precise question" of how the rate should be set, namely, by the CCC. *Chevron,* 467 U.S. at 842, 104 S.Ct. 2778. Thus agreeing with the CCC that Congress unambiguously gave it discretion over the sugar interest rate, we end our *Chevron* analysis at step one.

III.

Because we disagree with the district court's reasoning, we must consider the processors' claim that even if the CCC has authority to set the rate, such authority does not extend to imposing an interest rate above the Treasury rate. *See EEOC v. Aramark Corp., Inc.,* 208 F.3d 266, 268 (D.C.Cir.2000) ("[B]ecause we review the district court's judgment, not its reasoning, we may affirm on any ground properly raised."). The processors advance three arguments in support of this claim, none persuasive.

The processors first argue that the CCC has never before charged more than its estimated cost of borrowing, i.e., the Treasury rate. True enough, but that doesn't mean the CCC lacks authority to do so. Whether it has such authority turns on the meaning of the statutes we have been discussing, not the agency's past practices.

Next, the processors argue that the CCC has no explicit power to charge interest, and that its implied power to do so must be limited to furtherance of congressional policy. Accordingly, the processors assert, the rate decision falls outside the CCC's authority because charging an interest rate higher than the cost of borrowing creates a windfall for the CCC, a result that is inconsistent with the policies associated with running a subsidy program. As the CCC points out, however, Congress mandated such an interest rate for six years and continues to mandate it for all other agricultural commodities, so it is hard to see how the CCC's

rate conflicts with the program's goals.

Finally, the processors contend that the rate cannot be defended as a form of user fee. But because the rate is an interest rate, not a fee, this argument is irrelevant.

One last point. The processors nowhere argue that the CCC, in lumping sugar in with other agricultural commodities, acted arbitrarily and capriciously. Instead, they challenge only the agency's *authority* to set such a rate, not its *decision* to do so. To be sure, they describe the agency's explanation as "deficient, to say the least," Appellees' Br. 19, but they make this point only in support of their argument that the resulting interest rate "is plainly not an *outcome* that Congress would have sanctioned," *id.* at 20 (emphasis added). As the processors make no claim that the agency's selection of a particular interest rate was arbitrary and capricious, we need not address that possibility. *See Gen. Instrument Corp. v. FCC,* 213 F.3d 724, 732 (D.C.Cir.2000) (distinguishing between *Chevron* argument and argument that "even assuming the statute did not foreclose the [agency's] policy, it was nevertheless unreasonable").

Because the 2002 Act granted the CCC authority to set the interest rate for sugar, we reverse the district court's judgment. Our conclusion that the CCC acted within its discretion eliminates any need to consider the district court's restitution order.

So ordered.

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SUGAR MARKETING ALLOTMENT

DEPARTMENTAL DECISIONS

In re: AMALGAMATED SUGAR COMPANY, L.L.C.
SMA Docket No. 04-0003.
Decision and Order.
Filed March 3, 2006.

SMA – Sugar beets – Transfer of allocation to buyer of assets – Distribution of allocation upon termination of operations.

The Judicial Officer reversed Administrative Law Judge Victor W. Palmer's order requiring the Commodity Credit Corporation to distribute the amount of the beet sugar marketing allocation that the CCC transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company on September 16, 2003, to all beet sugar processors in accordance with 7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003). The Judicial Officer concluded that the Commodity Credit Corporation's September 16, 2003, transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with 7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003).

Jeffrey Kahn, for the Executive Vice President.
Kevin J. Brosch and John Lemke, Washington, DC, for Petitioner.
David A. Bieging, Gina Allery, and Steven A. Adduci, Washington, DC, for Southern Minnesota Beet Sugar Cooperative.
Steven Z. Kaplan, David P. Bunde, and Daniel C. Mott, Minneapolis, MN, for American Crystal Sugar Company.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
Decision issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On September 16, 2003, the Commodity Credit Corporation, United States Department of Agriculture [hereinafter the CCC], transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company. On October 2, 2003, Amalgamated Sugar Company, L.L.C. [hereinafter Petitioner], requested that the Executive Vice President, CCC [hereinafter the Executive Vice President], reconsider the September 16, 2003, decision. On November 14, 2003, the Executive Vice President determined on reconsideration that transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 [hereinafter the Agricultural Adjustment Act of 1938].

On December 4, 2003, Petitioner filed a Petition for Review pursuant

to the Agricultural Adjustment Act of 1938, the Sugar Program regulations (7 C.F.R. pt. 1435) [hereinafter the Sugar Program Regulations], and the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Executive Vice President, Commodity Credit Corporation, Under 7 U.S.C. §§ 1359dd and 1359ff [hereinafter the Rules of Practice]. In January 2004, Wyoming Sugar Company, LLC, and Southern Minnesota Beet Sugar Cooperative intervened in support of Petitioner.

On December 23, 2003, the Executive Vice President filed: (1) an "Answer and Motion to Dismiss" in response to Petitioner's Petition for Review; (2) a certified copy of documents relating to Petitioner's October 2, 2003, request for reconsideration; and (3) a list of "affected persons."[1] On January 14, 2004, American Crystal Sugar Company intervened in support of the Executive Vice President. On March 25, 2004, American Crystal Sugar Company filed "American Crystal Sugar Company's Memorandum in Support of Its Motion to Dismiss the Appeal Petition or, in the Alternative, for Summary Judgment." During the period January 20, 2004, through May 21, 2004, Petitioner, Southern Minnesota Beet Sugar Cooperative, and American Crystal Sugar Company made numerous filings related to the Executive Vice President's motion to dismiss, American Crystal Sugar Company's motion to dismiss, and American Crystal Sugar Company's motion for summary judgment.

On June 23, 2004, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an "Order Denying Motions to Dismiss and Motion For Summary Judgment": (1) denying the Executive Vice President's motion to dismiss; (2) denying American Crystal Sugar Company's motion to dismiss; (3) denying American Crystal Sugar Company's motion for summary judgment; (4) ruling, pursuant to section 359i of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359ii), he had subject matter jurisdiction to hear and decide Petitioner's claim; (5) ruling Petitioner had a legally cognizable claim under the Agricultural Adjustment Act of 1938; and (6) ruling Petitioner is not barred under the doctrine of judicial estoppel from pursing its claim.

On September 20-21, 2004, Petitioner, Southern Minnesota Beet Sugar Cooperative, the Executive Vice President, and American Crystal Sugar Company, filed pre-hearing briefs. On September 21-23, 2004,

[1]Rule 2(c) of the Rules of Practice defines an "affected person" as a sugar beet processor, other than the petitioner, affected by the Executive Vice President's determination and identified by the Executive Vice President as an affected person. Rule 5(a) of the Rules of Practice requires that any answer filed by the Executive Vice President shall be accompanied by the names and addresses of affected persons.

and October 4-5, 2004, the ALJ conducted a hearing in Washington, DC. Kevin J. Brosch and John Lemke, DTB Associates, LLP, Washington, DC, represented Petitioner. Jeffrey Kahn, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Executive Vice President. Steven A. Adduci, Venable, LLP, Washington, DC, and David A. Bieging, Olsson, Frank and Weeda, P.C., Washington, DC, represented Southern Minnesota Beet Sugar Cooperative. Steven Z. Kaplan, David P. Bunde, and Daniel C. Mott, Fredrikson & Byron, P.A., Minneapolis, Minnesota, represented American Crystal Sugar Company.

In November 2004, Petitioner, Southern Minnesota Beet Sugar Cooperative, the Executive Vice President, and American Crystal Sugar Company filed post-hearing briefs. On February 7, 2005, the ALJ issued a "Decision" [hereinafter Initial Decision]: (1) reversing the Executive Vice President's November 14, 2003, determination on reconsideration; and (2) ordering the CCC to distribute the amount of the beet sugar marketing allocation transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors in accordance with section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E)).

On February 28, 2005, Petitioner, Southern Minnesota Beet Sugar Cooperative, and the Executive Vice President appealed to the Judicial Officer. On March 7, 2005, American Crystal Sugar Company appealed to the Judicial Officer. On April 14, 2005, after Petitioner, Southern Minnesota Beet Sugar Cooperative, and American Crystal Sugar Company filed responses to the appeal petitions, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I reverse the ALJ's February 7, 2005, Initial Decision, and affirm the Executive Vice President's November 14, 2003, determination on reconsideration that the transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938.

Petitioner's and Southern Minnesota Beet Sugar Cooperative's exhibits are designated by "AMAL-SM." American Crystal Sugar Company's exhibits are designated by "ACS." Exhibits from the certified copy of the record submitted by the Executive Vice President are designated as "AR." Exhibits from the addendum to the certified copy of the record submitted by the Executive Vice President are designated by "AR Addendum." The transcript is divided into five volumes, one volume for each day of the 5-day hearing. References to

"Tr. I" are to the volume of the transcript that relates to the September 21, 2004, segment of the hearing; references to "Tr. II" are to the volume of the transcript that relates to the September 22, 2004, segment of the hearing; references to "Tr. III" are to the volume of the transcript that relates to the September 23, 2004, segment of the hearing; references to "Tr. IV" are to the volume of the transcript that relates to the October 4, 2004, segment of the hearing; and references to "Tr. V" are to the volume of the transcript that relates to the October 5, 2004, segment of the hearing.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 35—AGRICULTURAL ADJUSTMENT ACT OF 1938

. . . .

SUBPART VII—FLEXIBLE MARKETING ALLOTMENTS FOR SUGAR

. . . .

§ 1359dd. Allocation of marketing allotments

(a) Allocation to processors

Whenever marketing allotments are established for a crop year under section 1359cc of this title, in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.

(b) Hearing and notice

. . . .

(2) Beet sugar

. . . .

(E) Permanent termination of operations of a processor

If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall—

(i) eliminate the allocation of the processor provided under this section; and

(ii) distribute the allocation to other beet sugar processors on a pro rata basis.

(F) Sale of all assets of a processor to another processor

If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other beet processors under subparagraph (E).

7 U.S.C. § 1359dd(a), (b)(2)(E)-(F) (Supp. III 2003).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER XIV—COMMODITY CREDIT CORPORATION, DEPARTMENT OF AGRICULTURE

. . . .

PART 1435—SUGAR PROGRAM

. . . .

Subpart D—Flexible Marketing Allotments For Sugar

. . . .

§ 1435.319 Appeals and arbitration.

(a) A person adversely affected by any determination made under this subpart may request reconsideration by filing a written request with the Executive Vice President, CCC, detailing the basis of the request within 10 days of such determination. Such a request must be submitted at: Executive Vice President, CCC, Stop 0501, 1400 Independence Ave., SW, Washington, DC 20250-0501.

(b) For issues arising under §§ 359d, 359f(b) and (c), and 359(i) of the Agricultural Adjustment Act of 1938, as amended, after completion of the process in paragraph (a) of this section, a person adversely affected by a reconsidered determination may appeal such determination by filing a written notice of appeal within 20 days of the issuance of the reconsidered determination with the Hearing Clerk, USDA. The notice of appeal must be submitted at: Hearing Clerk, USDA, Room 1081, South Building, 1400 Independence Ave., SW., Washington, DC, 20250-9200. Any hearing conducted under this paragraph shall be by the Judicial Officer.

7 C.F.R. § 1435.319(a)-(b) (2003).

DECISION

Discussion

The Agricultural Adjustment Act of 1938 establishes flexible marketing allotments for sugar. The Secretary of Agriculture is required to establish flexible marketing allotments for sugar for any crop year in which allotments are required by the Agricultural Adjustment Act of 1938. If allotments are required, the Secretary of Agriculture establishes the overall allotment quantity in accordance with a statutory formula.

The overall allotment quantity is then allocated between sugar derived from sugar beets and sugar derived from sugar cane.[2]

The Secretary of Agriculture is required to make allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect on the basis of the adjusted weighted average quantity of beet sugar produced by beet sugar processors for each of the 1998 through 2000 crop years.[3] The Secretary of Agriculture is required to adjust the weighted average quantity of beet sugar produced by a beet sugar processor during the 1998 through 2000 crop years if the Secretary of Agriculture determines that the processor opened a sugar beet processing factory, closed a sugar beet processing factory, constructed a molasses desugarization facility, or suffered substantial quality losses on stored sugar beets during any crop year from 1998 through 2000.[4]

The CCC determined the percentage of the overall beet sugar allotment to which each beet sugar processor was entitled based on the processor's weighted average quantity of beet sugar produced during the 1998 through 2000 crop years, as adjusted in accordance with the Agricultural Adjustment Act of 1938. Effective October 1, 2002, the CCC assigned to each beet sugar processor, including Pacific Northwest Sugar Company, a percentage of the weighted average quantity of beet sugar produced during the 1998 through 2000 crop years commensurate with the statutory formula. Pacific Northwest Sugar Company's share of the beet sugar allotment was 2.692 percent (AMAL-SM 78). Each beet sugar processor's share of the beet sugar allotment remains fixed for the life of the flexible marketing allotment provisions of the Agricultural Adjustment Act of 1938, unless the Secretary of Agriculture takes some action pursuant to the Agricultural Adjustment Act of 1938. Thus, if the CCC had taken no action, Pacific Northwest Sugar Company would have retained the right to market beet sugar under its allocation through crop year 2007.

The Agricultural Adjustment Act of 1938 provides for the elimination, distribution, assignment, reassignment, and transfer of a beet sugar processor's beet sugar marketing allocation under various circumstances.[5] Section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)) provides, if

[2]7 U.S.C. § 1359cc (Supp. III 2003).

[3]7 U.S.C. § 1359dd(b)(2)(A) (Supp. III 2003).

[4]7 U.S.C. § 1359dd(b)(2)(D) (Supp. III 2003).

[5]7 U.S.C. § 1359dd(b)(2)(E)-(I) (Supp. III 2003).

the assets of a beet sugar processor are sold to another beet sugar processor, the Secretary of Agriculture is required to transfer the beet sugar marketing allocation of the seller to the buyer, unless the beet sugar marketing allocation has been previously distributed to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)).

On September 8, 2003, Pacific Northwest Sugar Company sold its assets, including its beet sugar marketing allocation, to American Crystal Sugar Company (AR Addendum 236-49). On September 16, 2003, the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company pursuant to section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)) (AR Addendum 250-51).

The only issues in this proceeding are: (1) whether Pacific Northwest Sugar Company and American Crystal Sugar Company were beet sugar processors on September 8, 2003; (2) whether Pacific Northwest Sugar Company sold its assets to American Crystal Sugar Company on September 8, 2003; and (3) whether the CCC had, prior to September 16, 2003, distributed Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)). I find Pacific Northwest Sugar Company and American Crystal Sugar Company were beet sugar processors on September 8, 2003, when Pacific Northwest Sugar Company sold its assets, including its beet sugar marketing allocation, to American Crystal Sugar Company. I also find, when the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company on September 16, 2003, Pacific Northwest Sugar Company's beet sugar marketing allocation had not been previously distributed to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)). Therefore, I conclude the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company in accordance with the Agricultural Adjustment Act of 1938, and I affirm the Executive Vice President's November 14, 2003, determination on reconsideration that the transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938.

Findings of Fact

1. The Columbia River Sugar Company was formed as a cooperative in 1991 to build and operate a sugar beet processing factory in Moses Lake, Washington. Sugar beets had been previously grown in the Columbia River Basin but the sugar beet processing factory located there had gone out of business and was inoperable. (ACS 1 at 3.)

2. Columbia River Sugar Company formed Pacific Northwest Sugar Company in partnership with Holly Sugar Company to construct the sugar beet processing factory, which took place in 1996 through the summer of 1998 (ACS 1 at 3; AMAL-SM 58 at 8).

3. In 1998, sugar beet processing was started at the Moses Lake factory under the direction of Holly Sugar Company whose personnel had experience gained from operating other sugar beet processing factories. The Moses Lake operations did not go well. Equipment and system breakdowns caused frequent factory shutdowns for repairs and changes to the system. Approximately half of the sugar that went into its silos was unmarketable. The factory had a rate of recovery of sugar from the sugar beets it processed of only 25 percent and two-thirds of the sugar beets delivered to the factory were not processed, but instead rotted. (Tr. II at 51-52, 67; AMAL-SM 58 at 8.)

4. In 1999, Holly Sugar Company left the partnership conveying its interest in Pacific Northwest Sugar Company to Columbia River Sugar Company. That year, Pacific Northwest Sugar Company, operating the sugar beet processing factory without assistance from Holly Sugar Company, hired a number of experienced employees to operate the factory. Plant equipment was improved through the investment of several million dollars. The sugar recovery rate for the 1999-2000 processing season increased from 25 percent to 65 percent. However, to be profitable, a sugar beet processing factory requires a recovery rate in excess of 80 percent with 90 percent being the optimum target. (Tr. II at 52- 67; Tr. V at 6-10, 23-24.)

5. In the 2000-2001 processing season Pacific Northwest Sugar Company made additional improvements to its operations at the factory and increased its sugar recovery rate to 82 percent (Tr. II at 66-67; Tr. V at 10-11, 25).

6. Pacific Northwest Sugar Company encountered numerous problems in connection with the operation of the Moses Lake, Washington, sugar beet processing factory, including financing issues, the California energy crisis of 2000-2001, and a drought (AMAL-SM 58; Tr. II at 46-48, 61-66, 72-79, 85-109).

7. Sugar beet processing operations at the Moses Lake factory ceased in February 2001 and never resumed. No sugar beet crop was planted by Columbia River Sugar Company growers in 2002 or 2003.

(Tr. I at 188; Tr. V at 11.)

8. On May 13, 2002, the Farm Security and Rural Investment Act of 2002 was approved. On October 1, 2002, the CCC announced the initial beet sugar marketing allocation for crop year 2002. The CCC provided Pacific Northwest Sugar Company a beet sugar marketing allocation of 2.692 percent of the future beet sugar allotment under the Agricultural Adjustment Act of 1938, on the basis of its beet sugar production during each of the 1998, 1999, and 2000 crop years. (AMAL-SM 78.)

9. Although the CCC provided Pacific Northwest Sugar Company with an initial beet sugar marketing allocation for crop year 2002, the CCC was legally empowered to redistribute any allocation that was not being used. On October 1, 2002, when the CCC announced initial allocations under the provisions of the Farm Security and Rural Investment Act of 2002, it simultaneously redistributed 87 percent (97,639 of 112,639 short tons) of Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors. During the remainder of that same crop year, the CCC subsequently redistributed an additional 24,023 short tons – nearly all the rest of Pacific Northwest Sugar Company's initial beet sugar marketing allocation, as well as any additional allocation that Pacific Northwest Sugar Company might have received because of increases in the total beet sugar allotment – to other beet sugar processors. (Tr. IV at 149-54; AMAL-SM 78 at 1.)

10. Pacific Northwest Sugar Company sought to have its beet sugar marketing allocation increased for crop year 2003. On June 16, 2003, the Executive Vice President presided at a hearing on Pacific Northwest Sugar Company's application to increase its beet sugar marketing allocation. Subsequently, the Executive Vice President denied Pacific Northwest Sugar Company's request to increase its beet sugar marketing allocation. (ACS 23; AR Addendum at 7-88.)

11. American Crystal Sugar Company negotiated to purchase Pacific Northwest Sugar Company's assets. American Crystal Sugar Company's proposal to purchase Pacific Northwest Sugar Company's assets was described in a July 3, 2003, fax by Joseph Talley of American Crystal Sugar Company to Barbara Fesco, a CCC sugar program official (AR Addendum at 89-91), as follows:

> First, our understanding is that Pacific Northwest Sugar Company Sugar Company (PNSC) currently holds an allocation to sell sugar. The allocation was initially established as a result of the adoption of the Farm Security and Rural Investment Act of 2002

(Farm Bill). Since that time Pacific Northwest Sugar Company's allocation has not been permanently transferred from them nor terminated, but it has been reassigned (with such reassignment being valid only for the current fiscal year).

American Crystal Sugar Company (ACSC) is currently contemplating a transaction which would effectively result in the allocation, currently owned by PNSC, being transferred to ACSC. As currently contemplated, substantially all of the assets of PNSC would be transferred to an intermediary company (Washington Sugar Company (WSC)). Since PNSC has already transferred ownership of its former processing facility to another party (Central Leasing LLC), substantially all of the assets of PNSC consist mainly of the marketing allocation and some other generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of WSC to ACSC (or perhaps a 100% owned subsidiary of ACSC). The effect of the transaction would be to move the sugar marketing allocation from PNSC, through WSC, to ACSC.

ACSC does not intend to process sugar beets in Moses Lake, WA after the completion of the transaction.

This transaction structure is clearly our preferred option. Although we did discuss other potential structures, which are outlined below, the alternative structures appear to be less favorable in terms of their complexity, cost and the risks that they would create for ACSC.

Our view of the potential transaction outlined here is that it fits within the area of Sec. 359d(b)(2)(F) of the sugar section of the Farm Bill. The allocation has not been eliminated under Sec. 359d(b)(2)(E), and therefore since ACSC would be acquiring substantially all of the assets of a processor the transfer we are contemplating should be within the guidelines established by the Farm Bill. Our primary question for you is – do you agree that a transaction like this would be approved by the USDA?

We are also considering a couple of other alternative structures for this transaction. One would transfer the assets (primarily the marketing allocation) directly from PNSC to ACSC (or perhaps a 100% owned subsidiary of ACSC). From your perspective,

would this additional aspect have any impact on whether or not the USDA would approve the transfer of the sugar marketing allocation?

Another would include the above aspects, plus ACSC acquiring control of the processing facility (that is now owned by Central Leasing LLC). From your perspective, would this additional factor have any impact on whether or not the USDA would approve the transfer of the sugar marketing allocation?

We also discussed the current appeal to the USDA by PNSC to increase their marketing allocation. Our view relative to that appeal has not changed from the position presented to you earlier by Jim Horvath, and we do not anticipate that the result of that appeal would have any impact on this potential transaction.

Since the USDA typically establishes marketing allocations for the upcoming year before October 1, time is of the essence in this process.

12. On July 30, 2003, American Crystal Sugar Company's president, James J. Horvath, and Scott Lybbert for Washington Sugar Company, sent the CCC a fax that formally notified the CCC of American Crystal Sugar Company's intent to acquire ownership of the assets, including the rights to the production history and the beet sugar marketing allocation, associated with the Moses Lake, Washington, sugar beet processing factory (AR Addendum at 92-93), as follows:

Mr. Dan Colacicco
United States Department of Agriculture
Farm Service Agency
1400 Independence Ave., SW
Room 3752-S, Stop 0516
Washington, DC 20250-0516

Re: Marketing Allocation Transfer

Dear Mr. Colacicco:

We are writing to make you aware of a series of pending transactions by which American Crystal Sugar Company ("ACSC") will acquire ownership or control of the assets

(including the rights to the production history and the marketing allocations), associated with the Moses Lake, Washington sugarbeet processing factory (the "Factory"). The purpose of this letter is to request the USDA's preliminary approval of these transactions as they relate to the transfer of the marketing allocation currently held by the Pacific Northwest Sugar Company, LLC, ("PNSC") to ACSC.

As you know, PNSC currently holds a marketing allocation representing approximately 2.7% of the beet sugar allotment (the "Allocation"). The Allocation was based on PNSC's historical operation of the Factory. PNSC has reached an agreement with the Washington Sugar Company, LLC ("WSC") by which WSC has acquired substantially all of the assets of PNSC, including PNSC's rights to the Allocation. Our understanding is that documentation of this agreement has previously been provided to the USDA, Central Leasing, LLC, ("Central Leasing") an unrelated third party, is the current owner of the Factory.

Through a series of transactions with WSC and Central Leasing, ACSC (or its wholly owned subsidiary) will gain control of both the Factory's ability to produce sugar and the rights to claim the production history and the related Allocation. The Agreement with WSC will provide that the assets it acquired from PNSC, including the Allocation, will be transferred to ACSC. ACSC will simultaneously gain control of the sugar production capabilities of the Factory through a series of contracts with Central Leasing. ACSC will also be obtaining non-competition agreements from WSC. Central Leasing and the principal owners of these entities. ACSC is confident that this combination of agreements will provide ACSC with control of the sugar production capabilities of the Factory and will prevent a "new entrant" from operating the Factory, for the foreseeable future.

Given the fact that the Factory is not currently operating (and there are no growers currently raising sugarbeets in the vicinity of the Factory), it is ACSC's intention that the Factory will not operate in the future as a sugar beet processing facility. In fact, much of the sugar production equipment at the Factory may be used at other ACSC facilities or sold to third parties for use elsewhere. We currently plan to have restrictions in the various agreements that would limit sales of certain key pieces of sugar

production equipment to third parties operating outside of North or South America.

The parties are hereby requesting the USDA's preliminary approval of the transfer of the Allocation from PNSC to ACSC based upon the transactions outlined above. The provisions of Section 359d(b)(2)(F) of the 2002 Farm Bill address the transfer of marketing allocations in connection with the sale of assets of one processor to another. Subparagraph (F) provides as follows:

> (F) Sale of all assets of a processor to another processor.–If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E).

In this case, the series of transactions described above will result in ACSC acquiring the assets currently owned by WSC/PNSC, including the production history and all rights to the Allocation. As of the date of this letter, the USDA has not distributed the Allocation to other sugarbeet processors under subparagraph (E). Given these facts, the provisions of subparagraph (F) provide that the Secretary is to transfer the entire Allocation from PNSC to ACSC. Furthermore, the transfer of the Allocation will not be subject to any pro ration or future operating requirements.

The parties are currently in the process of finalizing the terms of the various documents and agreements necessary to implement the transactions described above. It is anticipated that these transactions will close on or about August 15, 2003. The parties would appreciate your preliminary approval of the Allocation transfer in advance of the closing. We anticipate that final USDA action to transfer the Allocation will not occur until after the closing.

Should you have any questions regarding the proposed transactions or if you require any additional details concerning the contractual arrangements, please feel free to contact either Joe Talley at American Crystal Sugar Company or Scott Lybbert at Washington Sugar Company, LLC. We would also be happy to meet with representatives of the USDA to discuss this matter in

greater detail.

Thank you for your consideration, and we look forward to your response.

Very truly yours,

AMERICAN CRYSTAL SUGAR COMPANY

WASHINGTON SUGAR COMPANY, LLC

13. On August 28, 2003, the CCC replied to American Crystal Sugar Company's and Scott Lybbert's letter of July 30, 2003, advising that the CCC would transfer Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company if provided with documentation showing that all the assets of Pacific Northwest Sugar Company have been purchased by American Crystal Sugar Company (AR Addendum at 234-35), as follows:

Mr. Scott Lybbert
Pacific Northwest Sugar Company
3501 West 42nd Avenue
Kennewick, WA 99337

Dear Mr. Lybbert:

Thank you for your letter of July 30, 2003, advising us of the pending transactions between the American Crystal Sugar Company (American Crystal) and the Pacific Northwest Sugar Company (Pacific Northwest). We understand that American Crystal is purchasing all of the assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing some of the sugar making equipment used by Pacific Northwest.

Section 359d(b)(2)(F) of the Agriculture [sic] Adjustment Act of 1938, as amended, requires the Department of Agriculture (USDA) to transfer a processor's sugar marketing allocation when all of the assets of a processor are sold to another processor. Therefore, the Commodity Credit Corporation (CCC) will transfer Pacific Northwest's allocation to American Crystal, upon receipt of the documents listed below. We will accomplish the

transfer of allocation by transferring all of Pacific Northwest's production history during the base period to American Crystal, in the same manner that we transferred the production history of the Holly Sugar's factories to American Crystal when American Crystal purchased the Holly factories.

We will require the following documentation before we will transfer the allocation:

- Settlement documents showing that all of the assets of Pacific Northwest have been purchased by American Crystal, that American Crystal has secured the rights to make sugar at the Pacific Northwest/Central Leasing facility, and that American Crystal has purchased some equipment (including the diffuser and the molasses desugaring equipment from Central Leasing that Pacific Northwest used to make sugar.

- Certification from Pacific Northwest that its [sic] has not marketed any sugar under its 2002–crop sugar marketing allocation, if American Crystal wishes CCC to transfer the Pacific Northwest's 2002–crop allocation to American Crystal.

- American Crystal and Pacific Northwest must each agree in writing to waive their respective rights, if any, to bring an action against the Secretary of Agriculture, USDA and any agency thereof including CCC, and any official of the Department, in the event USDA is required by a Court to reverse the transfer of the allocation to American Crystal as a result of legal action by a third party challenging the original transfer from Pacific Northwest to American Crystal.

- American Crystal must agree in writing to drop Pacific Northwest's appeal of CCC's adverse decision regarding its request for an increased allocation because Pacific Northwest suffered a quality loss on stored beets and built a desugaring facility.

Notwithstanding the foregoing, the USDA agrees that it will vigorously defend any third party challenge to the transfer of the

allocation and will seek to provide the opportunity for American Crystal to participate in the defense of the USDA decision to transfer the allocation.

An identical letter is being sent to Mr. Horvath.

14. On September 8, 2003, American Crystal Sugar Company advised the CCC that, through its wholly-owned subsidiary, Crab Creek Sugar Company, it acquired, that day, ownership or control of all of the assets (including the rights to the production history and the beet sugar marketing allocation) associated with the production of sugar at the Moses Lake, Washington, sugarbeet processing factory. American Crystal Sugar Company's September 8, 2003, letter went on to positively address the requirements for the transfer the CCC specified in its August 28, 2003, letter. A bill of sale was attached. (AMAL-SM 70 at 1; AR Addendum at 243-49.)

15. On September 16, 2003, the CCC wrote to Scott Lybbert informing him that, effective immediately, the CCC was transferring Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company (AR Addendum at 250), as follows:

Mr. Scott Lybbert
Vice-President Finance and Marketing
Pacific Northwest Sugar Company
3501 West 42nd Avenue
Kennewick, Washington 99337

Dear Mr. Lybbert:

This letter is to inform you that the Department of Agriculture (USDA) will transfer, effective immediately, the marketing allocation of the Pacific Northwest Sugar Company (Pacific Northwest) to American Crystal Sugar Company (American Crystal). On the basis the documents you sent to us by facsimile on September 9, 2003, and the withdrawal of Petition for Review, SMA Docket No. 03-0003, USDA has determined that all assets of Pacific Northwest have been sold to American Crystal and that all documentation USDA required in an August 28, 2003 letter to you for proceeding with the transfer of allocation, has been received.

The transfer of allocation will be accomplished by transferring all

of Pacific Northwest's production history during the base period to American Crystal (enclosure).

Thank you for your diligence in meeting all our requirements.

16. American Crystal Sugar Company paid $6.8 million to acquire Pacific Northwest Sugar Company's beet sugar marketing allocation. The following payments were made from an escrow account (ACS 67 at 30-36; Tr. I at 137-39):

Central Leasing	$2,125,000
Scott Lybbert	$ 300,000
Pacific Northwest Sugar Company	$3,025,000

The $300,000 paid from the escrow account to Scott Lybbert was designed to be an initial payment on a "non-complete" agreement with the balance to be paid him over a so-called "earn out" period of time, for $1.65 million total going to him (Tr. I at 138-39).

17. After acquiring the beet sugar marketing allocation, American Crystal Sugar Company realized it could not fully use all of it. American Crystal Sugar Company contacted other beet sugar processors and leased them portions of American Crystal Sugar Company's allocation for undisclosed sums. The other beet sugar processors who leased portions of American Crystal Sugar Company's beet sugar marketing allocation were Michigan Sugar Company and Minn-Dak Farmers Cooperative and because of confidentiality agreements American Crystal Sugar Company has with each of them, American Crystal Sugar Company was not required to reveal the amounts it has received under the lease arrangements. (ACS 85-91, 93; Tr. I at 155-56, 159-66; Tr. V at 121-24.)

18. At all times material to this proceeding, American Crystal Sugar Company was a beet sugar processor. During the period 1998 through September 16, 2003, Pacific Northwest Sugar Company was a beet sugar processor.

19. At no time material to this proceeding did the CCC distribute Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)).

Conclusion of Law

The CCC's September 16, 2003, transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938.

The Executive Vice President's Appeal Petition and American Crystal Sugar Company's Appeal Petition

The Executive Vice President and American Crystal Sugar Company each request that I reverse the ALJ's February 7, 2005, Initial Decision and affirm the Executive Vice President's November 14, 2003, determination on reconsideration or remand the matter to the Executive Vice President to make a determination based on the evidence presented to the ALJ.

This proceeding involves the CCC's September 16, 2003, decision to allow the sale of a beet sugar marketing allocation from Pacific Northwest Sugar Company to American Crystal Sugar Company under section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)). The Agricultural Adjustment Act of 1938 provides, if a beet sugar processor has a beet sugar marketing allocation, that allocation can be sold in connection with the sale of the assets of the beet sugar processor. The record clearly reflects that on September 8, 2003, Pacific Northwest Sugar Company still had its beet sugar marketing allocation, which it sold that day to American Crystal Sugar Company. Section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)) provides that the Secretary of Agriculture shall eliminate and distribute the allocation of a processor which has permanently terminated operations other than in conjunction with the sale or other disposition of the processor or the assets of the processor. Section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)) provides that a processor's allocation can be sold if the allocation has not previously been eliminated and distributed. On September 16, 2003, when the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company, no previous distribution of Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors had been made, as is fully reflected in the ALJ's February 7, 2005, Initial Decision.

The ALJ finds this reading of section 359d(b)(2)(E)-(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E)-(F) (Supp. III 2003)) too simplistic (Initial Decision at 30-31). I disagree.

The plain language of section 359d(b)(2)(E)-(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E)-(F) (Supp. III 2003)) provides, if a processor still has an allocation, the processor may sell that allocation along with the processor's assets to another processor, and, under those circumstances, the Secretary of Agriculture is required to transfer the allocation of the selling processor to the buying processor.

I find no purpose would be served by remanding this proceeding to the Executive Vice President to make a determination based on the evidence presented to the ALJ. The facts presented to the ALJ and found by the ALJ support the Executive Vice President's November 14, 2003, determination on reconsideration. Therefore, I reverse the ALJ's February 7, 2005, Initial Decision and affirm the Executive Vice President's November 14, 2003, determination on reconsideration.

Petitioner's and Southern Minnesota Beet Sugar Cooperative's Appeal Petition

Petitioner and Southern Minnesota Beet Sugar Cooperative raise one issue in the "Notice of Appeal to the Judicial Officer by Amalgamated Sugar Company, L.L.C. and Southern Minnesota Beet Sugar Cooperative." Petitioner and Southern Minnesota Beet Sugar Cooperative contend the ALJ erroneously limited his order to "future crop years."

The ALJ ordered the distribution, in future crop-years, of the beet sugar marketing allocation transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors, as follows:

> [T]he Reconsidered Determination by the Executive Vice President of the CCC that is the subject of the appeal is hereby reversed. Upon this decision becoming final and effective, CCC shall distribute, in future crop years, the amount of marketing allocation that was transferred to American Crystal from Pacific Northwest to all beet sugar processors on a pro rata basis in accordance with 7 U.S.C. § 1359dd(b)(2)(E) of the Act.

Initial Decision at 37.

I reverse the ALJ's February 7, 2005, Initial Decision ordering the CCC to distribute the amount of the beet sugar marketing allocation that was transferred to American Crystal Sugar Company from Pacific

Northwest Sugar Company to all beet sugar processors in accordance with section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)). Therefore, I reject Petitioner's and Southern Minnesota Beet Sugar Cooperative's request that I immediately distribute the amount of the beet sugar marketing allocation that was transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors in accordance with section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)).

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

ORDER

1. The ALJ's February 7, 2005, Initial Decision is reversed.

2. The Executive Vice President's November 14, 2003, determination on reconsideration that the transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938, is affirmed.

RIGHT TO JUDICIAL REVIEW

Petitioner 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, 2343-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order.[6] The date of entry of the Order in this Decision and Order is March 3, 2006.

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[6]See 28 U.S.C. § 2344.

MISCELLANEOUS ORDERS

In re: IDAHO POWER COMPANY - HELLS CANYON COMPLEX.
FERC Project No. 1971.
EPAct Docket No. 06-0001.
Ruling.
Filed April 24, 2006.

EPAct – Legal issues are beyond subject matter jurisdiction – Material facts, duty to determine.

James Tucker for Complainant.
Jeffrey Vail for Respondent.
Ruling by Chief Administrative Law Judge Marc R. Hillson.

Ruling Denying Motions to Dismiss Issues

With the filing on May 11, 2006 of the Voluntary Withdrawal by Idaho Power Company of its challenge to nine conditions as a result of stipulations entered into with the United States Forest Service, the only condition imposed by the Forest Service on Idaho Power that remains challenged in this proceeding is condition 4.[*]

Condition 4 concerns sandbar maintenance and restoration. With respect to that condition, Idaho Power has submitted six disputed issues of material fact for a hearing under the new Energy Policy Act. The Forest Service, along with intervenors the National Marine Fisheries Service and Idaho Rivers United and American Rivers, have moved to dismiss with respect to each alleged disputed material fact, and intervenor States of Idaho and Oregon have also moved to dismiss with respect to condition 4.

After carefully reviewing the motions and responses, I am denying all motions to dismiss.

While there is not a great deal of legislative history surrounding the relevant changes to the Federal Power Act, the purpose of the 2005 amendments, as they apply to the role of USDA's administrative judiciary in the hydroelectric power licensing process, is quite clear. Congress wanted to provide the parties an opportunity to develop facts that might prove material to the decision making of the Federal Energy Regulatory Commission, and enhance the review of the federal courts.

[*] A "condition" is a duty to be imposed on the licensee as a condition for the renewal of the hydroelectric power licensee.- Editor.

If I allow the development of facts, and find that a fact is material, and make a fact finding, and the FERC or the court decides that the fact is not material, the effect on the expedited schedule would be de minimus since all matters within my jurisdiction must be decided by July 19, 2006. However, if I erroneously dismiss a matter as immaterial, the regulatory process could be significantly delayed, as there is the possibility of the FERC or the federal courts remanding the case for a subsequent factual finding.

Additionally, while Judge Heffernan's rationale in the parallel Department of Interior proceeding is not binding on me, I find, too, that the arguments of the government in this matter would render the very purpose of the amended Federal Power Act as it applies to these proceedings virtually meaningless. These proceedings were designed to allow the development of facts, to allow the FERC to make decisions with a solid factual basis, and based upon more than the opinions and recommendations and opinions of government officials. Couching every factual issue as potentially involving a legal or policy decision, as the Forest Service and intervenors consistently appear to do, serves to do little but avoid the very task that Congress sought to impose on the administrative judiciary by the 2005 amendments. Each of the factual issues alleged to be disputed by Idaho Power appears to involve, at least arguably, underlying competing factual issues which I believe it is within my jurisdiction to resolve.

Thus, for example, it is possible that the FERC may find it immaterial the degree to which the Hells Canyon Complex contributes to sandbar degradation vis-à-vis motorboat usage and other causes. However, if the FERC does decide that the degree of the contribution of the Hells Canyon Complex is a material factor, than this administrative forum appears to be the arena that Congress has chosen for findings relating to that factor to be made. Similarly, it is clearly not within my authority to make a determination at to whether certain lands lying in the Hells Canyon area belong to the federal government, or to Idaho or Oregon. But it does not seem outside of the authority that Congress has placed in this forum for me to have the authority to make a factual finding based upon credible evidence as to the location of the Ordinary High Water Mark. And, if it turns out that I make a finding outside of my jurisdiction, the FERC, and the reviewing court, are both free to ignore the finding.

In sum, the overarching intent of Congress in passing the Energy Policy Act of 2005 amendments to the Federal Power Act is to allow licensees such as the Idaho Power Company an opportunity to seek expedited administrative resolution, before a United States Department

of Agriculture Administrative Law Judge, of disputed material facts regarding conditions imposed by the United States Forest Service. Denial of the Forest Service and Intervenors' Motions to Dismiss is the path most consistent with congressional intent.

Accordingly, the Motions to Dismiss Idaho Power Company's Request for Hearing on issues 4.1 through 4.6 are denied.

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In re: IDAHO POWER COMPANY - HELLS CANYON COMPLEX.
FERC Project No. 1971
EPAct Docket No. 06-0001.
Ruling.
Filed May 26, 2006.

EPAct – Unduly burdensome discovery, when not – "Trial type" hearing – Duty to find material facts.

James Tucker for Complainant.
Jeffrey Vail for Respondent.
Ruling by Chief Administrative Law Judge Marc R. Hillson.

Order Granting in Part and Denying in Part Motions Objecting to Discovery Requests

At the May 10, 2006, prehearing conference, after being informed that the parties were entering into a joint stipulation leaving only one condition remaining challenged in this proceeding, I directed that the parties file amended discovery requests by May 16, 2006, and any objections to the requests by May 19, 2006. Both the Forest Service and the National Marine Fisheries Service filed revised motions for discovery on Idaho Power Company, and Idaho Power Company served revised motions for discovery on both the Forest Service and the National Marine Fisheries Service. Each entity on whom a revised motion for discovery was served has objected to some or all of the requested discovery, except that Idaho Power did not appear to object to the revised discovery request of the National Marine Fisheries Service.

Idaho Power Company Objections to Forest Service Discovery Requests

Several of Idaho Power's objections were based on the contention that they should not have to respond to interrogatories that would otherwise be covered in their written direct testimony. I do not find this to be a valid basis for objection. Interrogatories are designed to clarify the evidence and narrow issues likely to be presented in a case, and the fact that a question asked would be part of the testimony presented in the direct case of the questioned party is not a basis for not answering the question. Additionally, if the question will be answered a week later in written direct testimony I do not see much chance for prejudicial harm against Idaho Power. Thus, I overrule the objections to interrogatories 1, 3, 4 and 5, and to the portions of interrogatories 19, 21, 22, 23, 24, 25, 26, 27 and 28 covered by that objection.

Idaho Power also objected to a number of interrogatories that would require them, they contend, to conduct new research and perform new analysis (6, 7, 8, 9, 10, and 11), and would be unduly burdensome in that it would require the compilation of extremely large amounts of data (14, 15). Given the limited time period for the completion of discovery, and the general requirement that a party can only discover what is already in existence, I sustain these objections, but I am willing to hear further argument on these objections at the scheduled June 1 follow-up prehearing conference. However, to the extent that these interrogatories can be answered without the conduct of new research and analysis, Idaho Power is directed to do so.

The objection to interrogatory 29 is sustained.

The objection to the Request for Production No. 2 is denied, unless Idaho Power can identify with greater specificity exactly which documents fall into this "unduly burdensome" category.

Forest Service Objections to Idaho Power Discovery Requests

The Forest Service has objected to interrogatories 1-8 and 12 through 25 and requests for production 1, 6 and 10.

I sustain the objection to interrogatories 1 through 5. First, I have considerable difficulty in detecting a connection between the material facts alleged as issues for me to determine in this proceeding, and the information that will be generated by the response to these interrogatories. The information on parcels of land under Forest Service administration is also, according to the Forest Service, not discoverable as it is already either in the license proceeding record or otherwise obtainable by Idaho Power. 7 C.F.R. § 1.641(b)(2)(ii). I sustain the objection to request for production 1 as it covers this same information.

I sustain the objections to interrogatories 6 through 8. The purpose

of this proceeding is for me, as the administrative law judge, to make material fact findings on issues pertaining to conditions raised by Idaho Power. Asking the Forest Service to provide its version of material facts in a proceeding where Idaho Power is being asked to raise disputed issues of material fact for my resolution is not consistent with the purpose of these proceedings. As I will discuss in my ruling on the burden of proof, Idaho Power, as the party raising alleged facts in dispute that are material to conditions imposed by the Forest Service, has the burden of going forward on these facts.

Interrogatories 12 through 25 appear to seek material which may be relevant to issue 4.6, but which also appears to be overreaching in terms of the information which it is seeking. The time period Congress implicitly allowed for discovery in this proceeding is incredibly brief, and the amount of information sought in these interrogatories, and in the accompanying requests for product, appears to be quite broad, particularly in light of the relatively narrow framing of issue 4.6. I will consider, if Idaho Power is able to craft a more finely honed discovery request prior to the June 1 follow-up prehearing conference, attempts to gather pertinent information as to this issue, but as crafted it appears to be far too detailed and burdensome to be compliant with the expedited circumstances associated with this hearing process. I encourage Idaho Power and the Forest Service to confer and try to ascertain whether they can agree on a more suitable exchange of information in this particular area. As currently drafted, however, I sustain the Forest Service's objections to interrogatories 12-15, 17-19, and 22-25. I conclude that interrogatories 16, 16a, 20, 20a and 21 can be answered consistent with this hearing's purpose. I sustain the objection to request for production 6 to the extent it covers the interrogatories for which I sustain the objections, and overrule the objection to request for production 6 as it applies to the remaining interrogatories.

There appears to be no basis for sustaining the Forest Service objection to request for production 10 as the request described does not match up to the objection in the Forest Service's document.

National Marine Fisheries Service Objections to Idaho Power Discovery Requests

Idaho Power served four interrogatories on National Marine Fisheries Service, all relating to issue 6. NMFS objected on two criteria—that the information was already in the FERC record or otherwise readily available to Idaho Power, or that it would be too burdensome to conduct

the studies or otherwise produce the materials requested in the extremely brief period available before the hearing. Under 7 C.F.R. § 1.641(b)(2)(ii), I may not authorize the discovery of information that is "already in the license proceeding record or otherwise obtainable by the party" or is "unduly burdensome." Thus, unless I hear to the contrary at before or during the follow-up prehearing conference on June 1, I am constrained to sustain the objections of the National Marine Fisheries Service.

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In re: IDAHO POWER COMPANY HELLS CANYON COMPLEX.
FERC Project No. 1971.
EPAct Docket No. 06-0001.
Ruling.
Filed May 31, 2006.

EPAct – Burden of proof – Default rule – Congressional expression, absence of – Trial type hearing.

James Tucker for Complainant.
Jeffrey Vail for Respondent.
Ruling by Chief Administrative Law Judge Marc R. Hillson.

Ruling on Motion to Establish Burden of Proof

On May 4, 2006 the Forest Service filed a motion seeking a ruling that the burden of proof in this proceeding lies with Idaho Power Company. On May 15, 2006, Idaho Power filed a response, contending that the burden of proof lies with the Forest Service. In this ruling, I hold that Idaho Power has the burden of proving its case, by a preponderance of the evidence, with respect to the six disputed issues of alleged material facts relating to mandatory condition 4.

This is the first case referred to the United States Department of Agriculture's Office of Administrative Law Judges under the Energy Policy Act of 2005 (EPAct).[1] The EPAct amended the Federal Power Act[2] to add a "trial type" administrative hearing process regarding disputed issues of material fact with respect to mandatory conditions that

[1] A parallel case, referred to the Department of Interior, was resolved by stipulation of the parties.

[2] EPAct P.L. 109-58, 119 Stat. 594 *et seq*., at Sec. 241

the Forest Service developed for inclusion in hydropower licenses. Neither the EPAct, nor the regulations promulgated under the Act at 7 C.F.R.§ 1 *et seq*., subpart O, make mention of which party has the burden of going forward at the hearing nor which party has the burden of proof, or what the standard of proof is. I find that in this proceeding the burden of going forward, and the burden of proving its case by the preponderance of the evidence, is on Idaho Power.

There appears to be no dispute that this issue is governed by Section 7(c) of the Administrative Procedure Act, which pertinently provides that "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." In essence, Idaho Power contends that as the proponent of the condition that is being imposed on its license, the Forest Service should be viewed as the proponent for the purpose of burden of proof, while the Forest Service contends that Idaho Power is the entity challenging an Agency decision and, as such has the burden of proof at the upcoming hearing. Given the purpose of this type of hearing, which is to adjudicate factual issues alleged to be "material" by Idaho Power, as opposed to the issues that will be adjudicated before the Federal Energy Regulatory Commission or in the federal courts, I find that the position advocated by the Forest Service is the most appropriate for this proceeding.

Although Idaho Power contends otherwise, the Supreme Court's decision is *Schaffer v. Weast,* 126 S. Ct. 528 (2005) does appear to me to be dispositive on the issue of burden of proof ("the default rule") where a statute or regulation is silent. The Court succinctly held that ". . . the burden lies, as it typically does, on the party seeking relief." In the instant proceeding, the hearing is being requested by Idaho Power. Idaho Power is seeking [relief] to establish certain facts that it alleges are material, as a basis to challenge, in the subsequent proceeding before the FERC, a mandatory condition imposed by the Forest Service. In *that* proceeding, but not in this one, the Forest Service may well be in a different position than in this one, as it may be required to present to the FERC modified conditions and prescriptions which are a reflection of my findings on disputed issues of material facts, among other things. Likewise, under Escondido[3], the FERC's decision must be upheld if supported by substantial evidence. Each of these three proceedings, although part of the same ultimate process, is significantly different in many aspects, not the least of which is which party has the burden of proof. The fact that the conditions are imposed by the Forest Service does not provide a basis for putting the burden of proof on that Agency

[3] *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians,* 466 U.S. 765

for this proceeding as suggested by Idaho Power in its Response Brief. The purpose of the instant proceeding is to make findings in an administrative hearing setting on the disputed issues of material facts contained in Idaho Power's request for hearing, not for ruling on the validity of the conditions themselves.

As both parties must recognize, in a matter where the standard of proof is the preponderance of the evidence, the burden of proof only becomes significant when the weight of the evidence is equally balanced. In the unlikely event that this exact balance of evidence is achieved with respect to any of the six disputed issues of alleged material fact, I will hold that Idaho Power has failed to meet its burden of proof.

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In re: ROBERT HARRIS.
FCIA Docket No. 05-0008.
Order Dismissing Case.
Filed April 20, 2006.

Donald A. Brittenham, Jr. for Complainant.
Respondent Pro se.
Order by Administrative Law Judge Victor W. Palmer.

The parties Mutual Request for Dismissal as a result of settlement, filed on April 20, 2006, **GRANTED**.

This case is **DISMISSED** with prejudice**.**

_____

In re: HAROLD CHUHLANTSEFF.
FCIA Docket No. 06-0001.
Ruling.
Filed April 21, 2006.

Donald L. Brittenham, Jr. for Complainant.
Respondent, Pro se.
Ruling by Chief Administrative Law Judge Marc R. Hillson.

Order Dismissing Case

The parties Mutual Request for Dismissal as a result of settlement, filed on April 20, 2006, is **GRANTED**.
This case is **DISMISSED** with prejudice.

_____

In re: RONALD BELTZ, AN INDIVIDUAL; AND CHRISTOPHER JEROME ZAHND, AN INDIVIDUAL.
HPA Docket No. 02-0001.
Order Denying Motion for Reconsideration as to Christopher Jerome Zahnd.
Filed February 6, 2006.

HPA – Horse protection – Petition to reconsider – Findings, conclusions, and order supported by the record.

The Judicial Officer denied Respondent's Motion for Reconsideration. The Judicial Officer rejected Respondent's contention that the findings of fact, conclusions of law, and order in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), were not supported by the record.

Brian T. Hill, for Complainant.
Kenneth Shelton, Decatur, Alabama, for Respondent.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

William R. DeHaven, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on October 25, 2001. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on May 25, 2000, Christopher Jerome Zahnd [hereinafter Respondent] entered a horse known as "Lady Ebony's Ace" as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace, while Lady Ebony's Ace was sore, in violation of section 5(2)(B) of the

Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ II.1).[1] On December 4, 2001, Respondent filed an answer denying the material allegations of the Complaint, and on May 6, 2004, Respondent filed an amended answer denying the material allegations of the Complaint.

On December 1, 2004, the Chief ALJ presided at a hearing in Huntsville, Alabama. Brian T. Hill, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Greg L. Shelton, Shelton & Shelton, Decatur, Alabama, represented Respondent. After the hearing, the parties filed post-hearing briefs.

On September 6, 2005, the Chief ALJ issued a "Decision as to Christopher J. Zahnd" [hereinafter Initial Decision as to Christopher J. Zahnd]: (1) concluding Complainant failed to prove by a preponderance of the evidence that Lady Ebony's Ace was sore on May 25, 2000, when Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace; and (2) dismissing the Complaint (Initial Decision as to Christopher J. Zahnd at 11).

On October 24, 2005, Complainant appealed to the Judicial Officer. On November 16, 2005, Respondent filed a response to Complainant's appeal petition. On November 23, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On December 28, 2005, I issued a Decision and Order as to Christopher Jerome Zahnd reversing the Chief ALJ and concluding Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace, while Lady Ebony's Ace was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).[2]

On January 12, 2006, Respondent filed a "Motion for Reconsideration" of *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005). On February 2, 2006, Complainant filed "Opposition to Motion for Reconsideration." On February 3, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for

[1]Complainant also alleged that Ronald Beltz violated the Horse Protection Act (Compl. ¶¶ II.1, II.2). Complainant and Ronald Beltz agreed to a consent decision which Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] entered on January 18, 2005. *In re Ronald Beltz*, 64 Agric. Dec 853 (2005) (Consent Decision as to Ronald Beltz).

[2]*In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec 1487 (2005).

Reconsideration.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises three issues in the Motion for Reconsideration. First, Respondent contends the findings of fact in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), are not supported by the record.

I have reviewed each of the 15 findings of fact in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005). I find each of the findings of fact are supported by the record. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec.1487 (2005), contains numerous citations to the portions of the record that support the findings of fact.

Second, Respondent contends the conclusions of law in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), are not supported by the record, the Horse Protection Regulations, or the Rules of Practice.

I have reviewed the conclusions of law in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005). I find the conclusions of law are supported by the record. Moreover, *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), does not contain a conclusion that Respondent violated the Horse Protection Regulations (9 C.F.R. pt. 11) and does not cite the Rules of Practice as support for the conclusion that Respondent violated the Horse Protection Act.

Third, Respondent contends the Order in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), is not supported by the record.

I have reviewed the Order in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec.1487 (2005). I find the Order is supported by the record. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), contains a detailed discussion of the evidentiary basis for, and purpose of, the Order. A repetition of that discussion here would serve no useful purpose.

For the foregoing reasons and the reasons set forth in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec.1487 (2005), Respondent's Motion for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be

stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent's Motion for Reconsideration was timely filed and automatically stayed *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005). Therefore, since Respondent's Motion for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Motion for Reconsideration as to Christopher Jerome Zahnd.

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

ORDER

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

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

Respondent's payment of the civil penalty shall be forwarded to, and received by, Mr. Hill within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 02-0001.

2. Respondent is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse

exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to obtain review of the Order in this Order Denying Motion for Reconsideration as to Christopher Jerome Zahnd in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of the Order in this Order Denying Motion for Reconsideration as to Christopher Jerome Zahnd and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[3] The date of the Order in this Order Denying Motion for Reconsideration as to Christopher Jerome Zahnd is February 6, 2006.

In re: KIM BENNETT.
HPA Docket No. 04-0001.
Order Denying Petition for Reconsideration.
Filed February 8, 2006.

HPA – Horse protection – Refusal to permit inspection – Manner of inspection – Inspector's prior conduct and reputation – Inspector's failure to testify and to prepare written statement – Civil penalty – Disqualification.

The Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer rejected Respondent's contention that a respondent cannot be proven to have refused inspection in violation of 15 U.S.C. § 1824(9) unless the inspection is conducted reasonably in accordance with 15 U.S.C. § 1823(e). The Judicial Officer also rejected Respondent's contention that the Judicial Officer erroneously failed to make findings regarding the United States Department of Agriculture inspector's prior conduct and reputation stating the inspector's conduct prior to the date of Respondent's violation and the inspector's reputation on the date of Respondent's violation are not relevant to the issue of whether Respondent refused to permit completion of inspection of a horse. Finally, the Judicial Officer rejected Respondent's contention that the Judicial Officer erroneously failed to address the United States Department of Agriculture inspector's failure to testify or to prepare a written statement regarding Respondent's alleged violation. The Judicial Officer stated Complainant proved by a preponderance of the evidence that Respondent refused to permit the inspector to complete an inspection of a horse in violation of 15 U.S.C. § 1824(9), and the inspector's testimony and written

[3] 15 U.S.C. § 1825(b)(2), (c).

statement were not necessary to Complainant's case.

Frank Martin, Jr., for Complainant.
David F. Broderick, Bowling Green, Kentucky, for Respondent.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
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 Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 15, 2004. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11) [hereinafter the Horse Protection 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].

Complainant alleges that on August 26, 2002, Kim Bennett [hereinafter Respondent] refused to permit Animal and Plant Health Inspection Service officials to inspect a horse known as "The Duck," entry number 784 in class number 104 in the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(a) of the Horse Protection Regulations (9 C.F.R. § 11.4(a)) (Compl. ¶ II.1). On May 17, 2004, Respondent filed an answer denying the material allegations of the Complaint.

On May 17-18, 2005, Administrative Law Judge Victor W. Palmer presided at a hearing in Nashville, Tennessee. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented Complainant. David F. Broderick, Broderick & Thornton, Bowling Green, Kentucky, represented Respondent. After the hearing, the parties filed post-hearing briefs.

On September 23, 2005, the ALJ issued a "Decision and Order" [hereinafter Initial Decision] concluding Complainant failed to prove by a preponderance of the evidence that Respondent violated the Horse Protection Act and the Horse Protection Regulations and dismissing the Complaint (Initial Decision at 2, 12).

On October 20, 2005, Complainant appealed to the Judicial Officer. On November 15, 2005, Respondent filed a response to Complainant's appeal petition. On November 25, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On

January 13, 2006, I issued a Decision and Order reversing the ALJ and concluding Respondent refused to permit a United States Department of Agriculture veterinary medical officer, displaying appropriate credentials, to complete inspection of The Duck, entry number 784 in class number 104, at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)).[1]

On January 31, 2006, Respondent filed a "Petition for Reconsideration of Decision and Order of January 13, 2006" [hereinafter Petition for Reconsideration]. On February 6, 2006, Complainant filed "Complainant's Opposition to Respondent's Petition for Reconsideration of the Judicial Officer's Decision and Order." On February 6, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition for Reconsideration.

APPLICABLE STATUTORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

. . . .

§ 1823. Horse shows and exhibitions

. . . .

(e) Inspection by Secretary or duly appointed representative

For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction. Such an inspection may only be made upon presenting

[1] *In re Kim Bennett*, 65 Agric. Dec. ___ (Jan. 13, 2006).

> appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.
>
> **§ 1824. Unlawful acts**
>
> The following conduct is prohibited:
>
> . . . .
>
> (9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

15 U.S.C. §§ 1823(e), 1824(9).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises two issues in his Petition for Reconsideration. First, Respondent contends a respondent cannot be proven to have refused inspection in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) unless the inspection is conducted reasonably in accordance with section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)) (Respondent's Pet. for Recons. at 2).

I disagree with Respondent's contention that a respondent cannot be proven to have refused inspection in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) unless the inspection is conducted reasonably in accordance with section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)). Section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) prohibits the failure or refusal to permit inspection as required by section 4 of the Horse Protection Act (15 U.S.C. § 1823). Section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)) provides that any representative of the Secretary of Agriculture may, upon presenting appropriate credentials, inspect any horse at any horse show. A respondent's belief that a representative of the Secretary of Agriculture is not conducting an inspection in a reasonable manner is not relevant to the respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). The failure of a representative of the Secretary of Agriculture to conduct an inspection in a reasonable manner, as required by section 4(e) of the

Horse Protection Act (15 U.S.C. § 1823(e)), may be used to challenge the results of the inspection, but may not be used as a basis to refuse to permit completion of the inspection.

Second, Respondent contends I erroneously failed to make findings regarding Dr. Michael Guedron's prior conduct and reputation and I erroneously failed to address Dr. Guedron's failure to testify or to prepare a written statement regarding Respondent's alleged violation (Respondent's Pet. for Recons. at 3).

Complainant proved by a preponderance of the evidence[2] that on

[2]Complainant, as the proponent of an order, has the burden of proof in this proceeding (5 U.S.C. § 556(d)). The standard of proof by which this burden is met is the preponderance of the evidence standard. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1494 (2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 474 (2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Beverly Burgess* (Decision as to Winston T. Groover, Jr.), 63 Agric. Dec. 678, 712 (2004), *aff'd sub nom. Groover v. United States Dep't of Agric.*, No. 04-4519 (6th Cir. Oct. 31, 2005); *In re Robert B. McCloy*, 61 Agric. Dec. 173, 195 n.6 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *In re William J. Reinhart*, 60 Agric. Dec. 241, 258 n.7 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, (continued...)

August 26, 2002, Respondent refused to permit Dr. Guedron to complete an inspection of The Duck at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). While Dr. Guedron's testimony and written statement regarding the issue of Respondent's refusal to permit completion of inspection of The Duck may have been helpful, Dr. Guedron's testimony and written statement are not necessary to Complainant's case. Moreover, Dr. Guedron's conduct prior to August 26, 2002, and Dr. Guedron's reputation on August 26, 2002, are not relevant to the issue of whether Respondent refused to permit completion of inspection of The Duck on August 26, 2002. Therefore, I do not find my failure to make findings regarding Dr. Guedron's prior conduct and reputation or my failure to address Dr. Guedron's failure to testify or to prepare a written statement, is error.

For the foregoing reasons and the reasons set forth in *In re Kim Bennett*, 65 Agric. Dec. ___ (Jan. 13, 2006), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent's Petition for Reconsideration was timely filed and automatically stayed *In re Kim Bennett*, 65 Agric. Dec. ___ (Jan. 13, 2006). Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Kim Bennett*, 65 Agric. Dec. ___ (Jan. 13, 2006), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration.

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

ORDER

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

Frank Martin, Jr.
United States Department of Agriculture
Office of the General Counsel
Marketing Division

[2](...continued)
40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

1400 Independence Avenue, SW
Room 2343-South Building, Stop 1417
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Mr. Martin within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 04-0001.

2. Respondent is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to obtain review of the Order in this Order Denying Petition for Reconsideration in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of the Order in this Order Denying Petition for Reconsideration and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[3] The date of the Order in this Order Denying Petition for Reconsideration is February 8, 2006.

_____

In re: RONALD BELTZ, AN INDIVIDUAL; AND CHRISTOPHER JEROME ZAHND, AN INDIVIDUAL.
HPA Docket No. 02-0001.
Stay Order as to Christopher Jerome Zahnd.

[3] 15 U.S.C. § 1825(b)(2), (c).

Filed June 15, 2006.

HPA – Stay Order.

Stephen M. Reilly, for the United States Department of Agriculture.
Greg Shelton, Decatur, Alabama, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On December 28, 2005, I issued a Decision and Order as to Christopher Jerome Zahnd: (1) concluding Christopher Jerome Zahnd [hereinafter Respondent] violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); (2) assessing Respondent a $2,200 civil penalty; and (3) disqualifying Respondent for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.[1] On January 12, 2006, Respondent filed a motion for reconsideration, which I denied.[2]

On March 8, 2006, Respondent filed a petition for review of *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), and *In re Ronald Beltz*, 65 Agric. Dec. ___ (Feb. 6, 2006) (Order Denying Mot. for Recons. as to Christopher Jerome Zahnd), with the United States Court of Appeals for the Eleventh Circuit. On June 14, 2006, Respondent filed a "Motion for Stay by Consent" requesting stay of the Orders in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec.1487 (2005), and *In re Ronald Beltz*, 65 Agric. Dec. ___ (Feb. 6, 2006) (Order Denying Mot. for Recons. as to Christopher Jerome Zahnd), pending the outcome of proceedings for judicial review. Stephen M. Reilly, attorney of record with the Office of the General Counsel, United States Department of Agriculture, concurs in the granting of Respondent's Motion for Stay by Consent.

In accordance with 5 U.S.C. § 705, Respondent's Motion for Stay by Consent is granted.

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

ORDER

[1] *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec.1487 (2005).

[2] *In re Ronald Beltz*, 65 Agric. Dec.___ (Feb. 6, 2006) (Order Denying Mot. for Recons. as to Christopher Jerome Zahnd).

The Orders in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec.1487 (2005), and *In re Ronald Beltz*, 65 Agric. Dec. ___ (Feb. 6, 2006) (Order Denying Mot. for Recons. as to Christopher Jerome Zahnd), are stayed pending the outcome of proceedings for judicial review. This Stay Order as to Christopher Jerome Zahnd shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

_____

In re: HEREFORD, TEXAS FACTORY (SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE).
SMA Docket No. 04-0005.
Order Denying Petitioner's Appeal Petition.
Filed February 2, 2006.

SMA – Sugar beets – Adjustment to allocation – Timeliness of request for reconsideration – Jurisdiction to consider late-filed petition for review.

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's (ALJ) order dismissing Petitioner's Petition for Review as time-barred. The Judicial Officer found the Executive Vice President, Commodity Credit Corporation (Executive Vice President), issued a reconsidered determination on January 28, 2003, and Petitioner failed to file a petition for review within 20 days after the issuance as required by 7 C.F.R. § 1435.319(b) (2004) and Rule 3 of the applicable rules of practice. The Judicial Officer stated the ALJ did not have jurisdiction to consider a petition for review filed after the time for filing the petition for review expired.

Jeffrey Kahn, for the Executive Vice President.
David A. Bieging and Steven A. Adduci, Washington, DC, for Petitioner.
Steven Z. Kaplan and Jeffrey W. Post, Minneapolis, MN, for American Crystal Sugar Company.
Initial order issued by Victor W. Palmer, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On October 1, 2002, the Commodity Credit Corporation, United States Department of Agriculture [hereinafter the CCC], announced beet sugar marketing allotment allocations for the 2002 crop. In early October 2002, American Crystal Sugar Company purchased a factory located in Hereford, Texas, from Imperial Sugar Company. On November 18, 2002, the CCC issued Release No. 1693.02 announcing revisions to the beet sugar marketing allotment allocations for the 2002 crop. These revisions included a transfer of the beet sugar marketing allotment allocation commensurate with the Hereford, Texas, factory

production history from Holly Sugar Corporation, a subsidiary of Imperial Sugar Company, to American Crystal Sugar Company to reflect American Crystal Sugar Company's October 2002 purchase of the Hereford, Texas, factory.

On November 27, 2002, Southern Minnesota Beet Sugar Cooperative [hereinafter Petitioner[1]] requested that the Executive Vice President, CCC [hereinafter the Executive Vice President], assign the beet sugar marketing allotment allocation commensurate with the Hereford, Texas, factory production history to all beet sugar processors on a pro rata basis. On January 28, 2003, the Executive Vice President issued a reconsidered determination denying Petitioner's November 27, 2002, request. Petitioner did not file a petition for review within 20 days after the Executive Vice President issued the reconsidered determination as required by Sugar Program regulations (7 C.F.R. pt. 1435) [hereinafter the Sugar Program Regulations] and the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Executive Vice President, Commodity Credit Corporation, Under 7 U.S.C. §§ 1359dd and 1359ff [hereinafter the Rules of Practice].

On September 30, 2003, the CCC issued Release No. 0340 announcing the 2003 crop sugar marketing allotments and allocations. On October 10, 2003, Petitioner requested that the Executive Vice President issue a reconsidered determination reassigning that portion of American Crystal Sugar Company's beet sugar marketing allotment allocation, which was based upon American Crystal Sugar Company's October 2002 purchase of the Hereford, Texas, factory, to all beet sugar processors on a pro rata basis. On March 1, 2004, Larry Walker, Director, Economic and Policy Analysis Staff, Farm Service Agency, United States Department of Agriculture, informed Petitioner that the CCC announcement transferring a portion of Holly Sugar Corporation's beet sugar marketing allotment allocation to American Crystal Sugar Company, had been issued on November 18, 2002, and Petitioner's October 10, 2003, request for a reconsidered determination was late-filed and could not be accepted.

On March 22, 2004, Petitioner filed a Petition for Review seeking reassignment of the beet sugar marketing allotment allocation that the CCC allocated to American Crystal Sugar Company based upon American Crystal Sugar Company's purchase of the Hereford, Texas,

[1]The caption of this proceeding indicates that Hereford, Texas, Factory is the Petitioner; however, I conclude, based on a review of the filings in this proceeding, that the Petitioner is Southern Minnesota Beet Sugar Cooperative. Nonetheless, since most of the filings in this proceeding are captioned "In re: Hereford, Texas, Factory, Petitioner," I have retained that caption.

factory. Petitioner filed the Petition for Review pursuant to the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 [hereinafter the Agricultural Adjustment Act of 1938]; the Sugar Program Regulations; and the Rules of Practice.

On April 12, 2004, the Executive Vice President filed: (1) an "Answer and Motion to Dismiss" in response to Petitioner's Petition for Review; (2) a certified copy of documents relating to Petitioner's requests for reconsideration; and (3) a list of "affected persons."[2]

On April 22, 2004, American Crystal Sugar Company filed a "Notice of Intervention and Answer of Intervenor American Crystal Sugar Company." On May 5, 2004, Petitioner filed a motion for summary judgment and a response to the Executive Vice President's motion to dismiss. On December 23, 2004, the Executive Vice President filed a brief in support of the Executive Vice President's Answer and Motion to Dismiss. On December 27, 2004, American Crystal Sugar Company filed a brief in support of the Executive Vice President's Answer and Motion to Dismiss. On January 18, 2005, Petitioner filed a brief in response to the Executive Vice President's December 23, 2004, brief and American Crystal Sugar Company's December 27, 2004, brief.

On February 7, 2005, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an Order of Dismissal [hereinafter Initial Order] dismissing Petitioner's Petition for Review as time-barred. On March 4, 2005, Petitioner appealed to the Judicial Officer. On March 14, 2005, the Executive Vice President filed a response in opposition to Petitioner's appeal petition, and on April 4, 2005, American Crystal Sugar Company filed a response in opposition to Petitioner's appeal petition. On April 13, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's February 7, 2005, Initial Order. Therefore, except for minor modifications, I adopt the ALJ's Initial Order as the Order Denying Petitioner's Appeal Petition. Additional conclusions by the Judicial Officer follow the ALJ's discussion, as restated. Exhibits from the certified copy of the documents relating to Petitioner's requests for reconsideration, which the Executive Vice President filed on April 12,

[2]Rule 2(c) of the Rules of Practice defines an "affected person" as a sugar beet processor, other than the petitioner, affected by the Executive Vice President's determination and identified by the Executive Vice President as an affected person. Rule 5(a) of the Rules of Practice requires that any answer filed by the Executive Vice President shall be accompanied by the names and addresses of affected persons.

2004, are designated by "AR."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 35—AGRICULTURAL ADJUSTMENT ACT OF 1938

. . . .

SUBPART VII—FLEXIBLE MARKETING ALLOTMENTS FOR SUGAR

. . . .

§ 1359dd. Allocation of marketing allotments

(a) Allocation to processors

Whenever marketing allotments are established for a crop year under section 1359cc of this title, in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.

(b) Hearing and notice

. . . .

(2) Beet sugar

. . . .

(G) Sale of factories of a processor to another processor

(i) In general

Subject to subparagraphs (E) and (F), if 1 or more factories of a processor of beet sugar (but not all of the assets of the processor) are sold to another processor of beet sugar during a crop year, the Secretary shall assign a pro rata portion of the allocation of the seller to the allocation of the buyer to reflect the historical contribution of the production of the sold factory or factories to the total allocation of the seller.

(ii) Application of allocation

The assignment of the allocation under clause (i) shall apply–

(I) during the remainder of the crop year during which the sale described in clause (i) occurs (referred to in this subparagraph as the "initial crop year"); and

(II) each subsequent crop year (referred in this subparagraph as a "subsequent crop year"), subject to clause (iii).

(iii) Subsequent crop years

(I) In general

The assignment of the allocation under clause (i) shall apply during each subsequent crop year unless the acquired factory or factories continue in operation for less than the initial crop year and the first subsequent crop year.

(II) Reassignment

If the acquired factory or factories do not continue in operation for the complete initial crop year and the first subsequent crop year, the Secretary shall reassign the temporary allocation to other processors of beet sugar on a pro rata basis.

7 U.S.C. § 1359dd(a), (b)(2)(G)(i)-(iii) (Supp. III 2003).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER XIV—COMMODITY CREDIT CORPORATION, DEPARTMENT OF AGRICULTURE

. . . .

PART 1435—SUGAR PROGRAM

. . . .

Subpart D—Flexible Marketing Allotments For Sugar

. . . .

§ 1435.319 Appeals and arbitration.

(a) A person adversely affected by any determination made under this subpart may request reconsideration by filing a written request with the Executive Vice President, CCC, detailing the basis of the request within 10 days of such determination. Such a request must be submitted at: Executive Vice President, CCC, Stop 0501, 1400 Independence Ave., SW, Washington, DC 20250-0501.

(b) For issues arising under §§ 359d, 359f(b) and (c), and 359(i) of the Agricultural Adjustment Act of 1938, as amended, after completion of the process in paragraph (a) of this section, a person adversely affected by a reconsidered determination may appeal such determination by filing a written notice of appeal within 20 days of the issuance of the reconsidered determination with the Hearing Clerk, USDA. The notice of appeal must be submitted at: Hearing Clerk, USDA, Room 1081, South Building, 1400 Independence Ave., SW., Washington, DC, 20250-9200. Any hearing conducted under this paragraph shall be by the Judicial Officer.

7 C.F.R. § 1435.319(a)-(b) (2004).

ADMINISTRATIVE LAW JUDGE'S INITIAL ORDER (AS RESTATED)

Section 1435.319(b) of the Sugar Program Regulations (7 C.F.R. § 1435.319(b) (2004)) and Rule 3 of the Rules of Practice provide that any person adversely affected by a reconsidered determination of the Executive Vice President may appeal the reconsidered determination to an administrative law judge by filing a petition for review with the Hearing Clerk within 20 days after the issuance of the reconsidered determination. Petitioner had requested reconsideration of the determination it seeks to overturn in a letter dated November 27, 2002 (AR 10-12). On January 28, 2003, the Executive Vice President issued a reconsidered determination denying Petitioner's request and informing Petitioner of its right to appeal the reconsidered determination, as follows:

> I reconsidered CCC's transfer of allocation commensurate with the Hereford factory's sugar production to the new owners but, unfortunately, cannot provide SMBSC any relief.
>
> . . . .
>
> You may appeal my reconsidered determination within 20 days from the date of this letter, with the Hearing Clerk, USDA, Room 1081-South Building, 1400 Independence Ave., SW, Washington, DC, 20250-9200.

AR 13-14. Petitioner failed to file a petition for review within 20 days after issuance of the Executive Vice President's January 28, 2003, reconsidered determination.

Petitioner contends it did not appeal the January 28, 2003, reconsidered determination because the Executive Vice President's determination "can only be considered a preliminary order . . ." and CCC was, at the time, "statutorily prohibited from granting any 'permanent' transfer of the Hereford related marketing allocation . . ." (Brief of Southern Minnesota Beet Sugar Cooperative in Response to the Briefs of the Commodity Credit Corporation and American Crystal Sugar Company Opposing Motion for Summary Judgment at 17). Petitioner's argument that its appeal of the Executive Vice President's January 28, 2003, reconsidered determination would have been premature since a 2-year operating requirement could still be met, ignores the fact that the CCC transferred the Hereford related beet sugar

marketing allocation to American Crystal Sugar Company knowing that American Crystal Sugar Company never intended to operate the Hereford, Texas, factory. Petitioner's November 27, 2002, request for reconsideration establishes Petitioner had no illusion that the Hereford, Texas, factory would ever again operate stating: "The Hereford facility is not a factory. It is a former factory." (AR 11.) More importantly, the Executive Vice President agreed, responding in his January 28, 2003, reconsidered determination, as follows:

> You note, as did CCC, that the Hereford factory cannot "continue" in operation because it was closed prior to the establishment of sugar marketing allotments. CCC determined, in the Hereford factory case, the acquired factory did not have to meet the 2-year operation requirement because it was closed and could not "continue" for any length of time.

AR 13. Therefore, the Executive Vice President made clear in the January 28, 2003, reconsidered determination, that the reconsidered determination was the Executive Vice President's final word on the subject, and, if Petitioner wanted to continue to press its argument, it was required by the Sugar Program Regulations and the Rules of Practice to file a petition for review within 20 days after issuance of the reconsidered determination. Petitioner states:

> SMBSC did not seek an appeal of CCC's January 28, 2003 Letter Order determination. Rather, SMBSC recognized that, in light of the governing statutory provision (*i.e.*, Section 1359dd(b)(2)(G)), an appeal of the CCC's Letter Order determination at that time would be procedurally premature and subject to summary dismissal because it technically was still possible for ACS to comply with the two-year operating requirement in Section 1359dd(b)(2)(G) at the time an appeal was due. SMBSC therefore was required to wait for the CCC's establishment of the 2003 crop year beet sugar allotment allocations to determine (i) whether ACS could satisfy the two-year operating requirement for the acquired Hereford factory under Section 1359dd(b)(2)(G), and (ii) whether the CCC would allow ACS to retain the Hereford beet sugar marketing allocation despite the fact that the Hereford factory was closed during the crop year of acquisition and did not operate.

Response of Southern Minnesota Beet Sugar Cooperative to the

Commodity Credit Corporation's Motion to Dismiss and Cross Motion of Southern Minnesota Beet Sugar Cooperative for Summary Judgment at 4.

But the CCC, the Executive Vice President, and Petitioner knew American Crystal Sugar Company was unable to comply with the 2-year operating requirement when, on January 28, 2003, the Executive Vice President issued his reconsidered determination. If section 359d(b)(2)(G)(iii)(II) of the Agricultural Adjustment of Act of 1938 (7 U.S.C. § 1359dd(b)(2)(G)(iii)(II)) could be said to apply, the Hereford, Texas, factory would have been required to continue in operation "for the complete initial crop year and the first subsequent crop year[.]" Inasmuch as the Hereford, Texas, factory was acquired in October 2002 and never operated in the 2002 crop year, it was impossible for the factory to have operated during the complete initial crop year. Therefore, American Crystal Sugar Company could not later meet the 2-year operation requirement. The very point of the reconsidered determination was that the acquired factory did not have to meet the 2-year operation requirement "because it was closed and could not 'continue' for any length of time" (AR 13).

In response to Petitioner's second request for reconsideration of the transfer of the beet sugar marketing allotment allocation from Holly Sugar Corporation to American Crystal Sugar Company based upon American Crystal Sugar Company's purchase of the Hereford, Texas, factory, the Director, Economic and Policy Analysis Staff, Farm Service Agency, United States Department of Agriculture, advised that Petitioner's request could not be accepted stating:

> Since your request for reconsideration is dated over 10 months from the announcement of the transfer, we must determine that the 10-day appeal period under the regulation has expired and USDA cannot accept your request for reconsideration on this issue.

AR 24. Purportedly, Petitioner was seeking reconsideration of American Crystal Sugar Company's allocation of the 2003 crop beet sugar marketing allotment to the extent it included the transfer of the allocation share associated with the Hereford, Texas, factory. But the September 30, 2003, announcement in Release No. 0340 (AR 15-18), set forth the overall allotments for beet sugar and cane sugar and the individual allocations for processors for the 2003 crop. The September 30, 2003, announcement did not establish allocation shares or change the allocation shares of American Crystal Sugar Company,

Holly Sugar Corporation, or any other beet sugar processor. The allocation shares remained the same as they were under Release No. 1693.02 issued on November 18, 2002 (AR 8-9). For that reason, the Director, Economic and Policy Analysis Staff, Farm Service Agency, United States Department of Agriculture, advised Petitioner that the 10-day period within which to request reconsideration of the determination Petitioner sought to challenge had long expired and the United States Department of Agriculture could not accept Petitioner's October 10, 2003, request for reconsideration.

This interpretation is consistent with section 1435.319(a) of the Sugar Program Regulations (7 C.F.R. § 1435.319(a) (2004)). Unquestionably, a request made on October 10, 2003, concerning a determination made on November 18, 2002, was untimely coming not within 10 days, as required, but more than 10 months following the determination.

In any event, Petitioner had obtained a reconsidered determination regarding the transfer of the beet sugar marketing allotment allocation from Holly Sugar Corporation to American Crystal Sugar Company based upon American Crystal Sugar Company's purchase of the Hereford, Texas, factory on January 28, 2003, and Petitioner failed to file a petition for review within 20 days as required by section 1435.319(b) of the Sugar Program Regulations (7 C.F.R. § 1435.319(b) (2004)) and Rule 3 of the Rules of Practice.

An administrative law judge has no jurisdiction under the Sugar Program Regulations or the Rules of Practice to consider a petition for review that is filed after the 20-day filing period. The Executive Vice President's January 28, 2003, reconsidered determination became final on February 17, 2003. Petitioner filed a Petition for Review with the Hearing Clerk on March 22, 2004, 1 year 1 month 5 days after the Executive Vice President's reconsidered determination became final. Therefore, the ALJ has no jurisdiction to consider Petitioner's Petition for Review.

This construction of the Rules of Practice is consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides, as follows:

> **Rule 4. Appeal as of Right—When Taken**
>
> **(a) Appeal in a Civil Case.**
>
> (1) **Time for Filing a Notice of Appeal.**

> (A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.[3]

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a petition for review after the time for filing the petition for review has expired. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of

[3] *Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (stating under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (stating the filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (stating Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989) (stating the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding pro se does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (stating the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

the time otherwise provided in the rules for the filing of a notice of appeal.[4] The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the administrative law judge to extend the time for filing a petition for review after the time for filing the petition for review has expired.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes an administrative law judge from considering a petition for review that is filed after the time for filing the petition for review has expired, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[5]

Accordingly, Petitioner's Petition for Review must be dismissed, since it is too late for the matter to be further considered.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner requests in its Petition of Appeal to the Judicial Officer by Southern Minnesota Beet Sugar Cooperative [hereinafter Petitioner's Appeal Petition] that I "reinstate as not time-barred the appeal that [Petitioner] filed on March 22, 2004, challenging the announcement by

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[4]Fed. R. App. P. 4(a)(5).

[5]*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

the . . . CCC of beet sugar marketing allotment allocations to processors for crop year 2003" and issue a decision on the merits in Petitioner's favor (Petitioner's Appeal Pet. at 1).

I agree with the ALJ's Initial Order; therefore, I reject Petitioner's requests that I reinstate Petitioner's March 22, 2004, Petition for Review as not time-barred and issue a decision on the merits in Petitioner's favor.

On October 1, 2002, the CCC assigned to each beet sugar processor, including Holly Sugar Corporation, an allocation share of the beet sugar marketing allotment. Holly Sugar Corporation's allocation was based, in part, on the production history of the Hereford, Texas, factory. In early October 2002, Imperial Sugar Company sold the Hereford, Texas, factory to American Crystal Sugar Company. Based on this sale, the CCC announced, in Release No. 1693.02, dated November 18, 2002 (AR 8-9), the permanent reassignment to American Crystal Sugar Company of the portion of the Holly Sugar Corporation allocation that was based upon the production history of the Hereford, Texas, factory. Petitioner timely requested reconsideration of this November 18, 2002, reassignment of a share of the allocation from Holly Sugar Corporation to American Crystal Sugar Company. The Executive Vice President issued a reconsidered determination denying Petitioner's request on January 28, 2003. Petitioner did not file a timely petition for review of the Executive Vice President's January 28, 2003, reconsidered determination.

In Release 0340, dated September 30, 2003, the CCC announced the 2003 crop sugar marketing allotments and allocations (AR 15-18). Release No. 0340 set forth overall quantity allotments for beet sugar and cane sugar and the individual allocations for beet sugar processors and cane sugar processors for the 2003 crop. Release No. 0340 did not establish allocation shares or change the allocation shares of the beet sugar allotment for American Crystal Sugar Company, Holly Sugar Corporation, or any other beet sugar processor. American Crystal Sugar Company's and Holly Sugar Corporation's allocation shares, as well as those of all other beet sugar processors, remained as they had been announced in Release No. 1693.02. Release No. 0340 only set forth the tonnage allocations calculated by multiplying each beet sugar processor's percentage allocation share times the overall beet sugar marketing allotment. Petitioner's October 10, 2003, request for a reconsidered determination of the reassignment of a share of the allocation from Holly Sugar Corporation to American Crystal Sugar Company can only relate to the CCC's November 18, 2002, announcement. Petitioner's October 10, 2003, request for a

reconsidered determination of the November 18, 2002, announcement came far too late to be considered by the Executive Vice President. Moreover, Petitioner's Petition for Review was filed far too late to be considered by the ALJ; therefore, I must deny Petitioner's Appeal Petition seeking that I reinstate Petitioner's Petition for Review as not time-barred.

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

ORDER

1. The ALJ's February 7, 2005, order dismissing Petitioner's March 22, 2004, Petition for Review as time-barred, is affirmed.

2. Petitioner's Appeal Petition, filed March 4, 2005, is denied.

3. The Executive Vice President's January 28, 2003, reconsidered determination is the final decision in this proceeding.

_____

DEFAULT DECISIONS

ANIMAL QUARANTINE ACT

In re: TRENT WAYNE WARD AND MICHAEL LEE MCBARRON d/b/a T&M HORSE COMPANY.
A.Q. Docket No. 06-0003.
Default Decision.
Filed May 4, 2006.

A.Q. – Default.

Thomas Neal Bollick for Complainant.
Respondent, Pro se
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order by Reason of Default as to Trent Wayne Ward, d/b/a T&M Horse Company

This administrative proceeding was instituted by a complaint filed on December 5, 2005, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "Complainant"). The complaint alleged that the respondents 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*.).

The complaint seeks civil penalties authorized by section 903(c)(3) of the Act (7 U.S.C. § 1901 note) and 9 C.F.R. § 88.6.[1] 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*.

The Hearing Clerk sent to respondent Trent Wayne Ward d/b/a T&M Horse Company (frequently herein "respondent Ward") a copy of the complaint, by certified mail, return receipt requested, on December 5, 2005. Respondent Ward was informed in the complaint and in the Hearing Clerk's accompanying letter of service, that an answer to the complaint should be filed with the Hearing Clerk within 20 days of receipt, pursuant to the Rules of Practice, and that failure to answer any

[1] 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.

allegation in the complaint would constitute an admission of that allegation and waiver of a hearing. 7 C.F.R. § 1.136.

The complaint that was mailed to respondent Ward on December 5, 2005 was returned to the Hearing Clerk on January 10, 2006, marked "Unclaimed" by the U.S. Postal Service. Accordingly, the Hearing Clerk's office re-mailed the complaint to respondent Trent Wayne Ward d/b/a T&M Horse Company at the same address via regular mail on January 10, 2006. Therefore, respondent Ward is deemed to have been served with the complaint on January 10, 2006.[2] Respondent Ward's answer was thus due by January 30, 2006, twenty days after service of the complaint. 7 C.F.R. § 1.136(a).

Respondent Trent Wayne Ward d/b/a T&M Horse Company never filed an answer to the complaint. The Hearing Clerk sent to respondent Trent Wayne Ward d/b/a T&M Horse Company a "no answer" letter by regular mail on February 1, 2006. Further, the Hearing Clerk sent to respondent Trent Wayne Ward d/b/a T&M Horse Company a copy of the "Proposed Default Decision and Order", a copy of the "Motion for Adoption of Proposed Default Decision and Order", and the Hearing Clerk service letter dated March 13, 2006, by certified mail, return receipt requested, on March 13, 2006, which were signed for and delivered on behalf of, and thereby served upon, respondent Trent Wayne Ward d/b/a T&M Horse Company on March 16, 2006.

Accordingly, the material allegations in the complaint, which are admitted by the respondent's failure to file an answer (7 C.F.R. §1.136(c)), are adopted and set forth in this Decision and Order as the Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139.[3]

Findings of Fact

1. Respondent Trent Wayne Ward d/b/a T&M Horse Company,

[2] Section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) states that any document that is initially sent to a person by certified mail to make that person a party respondent in a proceeding but is returned marked by the postal service as unclaimed shall be deemed to have been received by said person on the date it is re-mailed by ordinary mail to the same address.

[3] 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.

frequently hereinafter referred to as respondent Ward, owned and operated T&M Horse Company in the State of Texas and has a mailing address of 1037 Lakeview Circle, Kaufman, Texas 75142. Respondent Ward is a commercial slaughter horse buyer who has been in the business of buying and selling horses, as well as other livestock, most of his adult life.

2. (a) On or about June 10, 2003, respondent Ward shipped 43 horses in commercial transportation from Southwest Livestock to Dallas Crown for slaughter without applying a USDA back tag to each horse in the shipment, in violation of 9 C.F.R. § 88.4(a)(2).

(b) On or about June 10, 2003, respondent Ward shipped 43 horses in commercial transportation from Southwest Livestock to Dallas Crown for slaughter without the required owner-shipper certificate, VS Form 10-13, in violation of 9 C.F.R. § 88.4(a)(3)(i-x).

(c) On or about June 10, 2003, respondent Ward shipped 43 horses in commercial transportation from Southwest Livestock to Dallas Crown for slaughter. The shipment included at least seven (7) stallions but respondent Ward did not load the horses on the conveyance so that each stallion 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).

3. (a) On or about August 25, 2003, respondent Ward shipped 30 horses from Southwest Livestock to Dallas Crown 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 owner/shipper's address and telephone number were not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(i); (2) the license plate number of the conveyance was not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (3) the time the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix). Also, one of the horses, a palomino gelding with USDA back tag # USAZ 0691, had an old injury to its left hind foot such that it could not bear weight on all four limbs, yet respondent did not describe this pre-existing injury on the VS 10-13, in violation of 9 C.F.R. § 88.4(a)(3)(viii).

(b) On or about August 25, 2003, respondent Ward shipped 30 horses from Southwest Livestock to Dallas Crown for slaughter. One of the horses, a palomino gelding with USDA back tag # USAZ 0691, had an old injury to its left hind foot such that it could not bear weight on all four limbs, yet respondent Ward shipped the horse in commercial

transportation to the slaughtering facility in spite of its injuries. By reason of the above, the injured horse was in obvious physical distress, yet respondent Ward failed to obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(c) On or about August 25, 2003, respondent Ward shipped 30 horses from Southwest Livestock to Dallas Crown for slaughter. One of the horses, a palomino gelding with USDA back tag # USAZ 0691, had an old injury to its left hind foot such that it could not bear weight on all four limbs, yet respondent Ward shipped the horse in commercial transportation to the slaughtering facility in spite of its injuries. By transporting it in this manner, respondent Ward failed to handle the injured horse 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).

4. On or about March 14, 2004, respondent Ward shipped 15 horses from Southwest Livestock to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the prefix for each horse's USDA back tag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

5. On or about March 21, 2004, respondent Ward shipped 40 horses from Southwest Livestock to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: it did not indicate the breed or 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).

6. On or about August 23, 2004, respondent Ward shipped 10 horses from Southwest Livestock to Dallas Crown 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 prefix for each horse's USDA back tag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi); and (2) the time the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

Conclusions

1. The Secretary of Agriculture has jurisdiction.

2. At all times material herein, the conduct of respondent Trent Wayne Ward d/b/a T&M Horse Company while in possession of horses for the purpose of transporting them to slaughter was regulated under 9 C.F.R. § 88 *et seq*.

3. Violations of the regulations constitute violations of the Act. By reason of the Findings of Fact set forth above, respondent Trent Wayne Ward d/b/a T&M Horse Company repeatedly violated the Commercial Transportation of Equine for Slaughter Act. 7 U.S.C. § 1901 note.

Order

1. The provisions of this Order shall be effective on the first day after this decision becomes final.

2. Respondent Trent Wayne Ward d/b/a T&M Horse Company is hereby assessed a civil penalty of **$21,450.00** (twenty-one thousand four hundred fifty dollars). Respondent Trent Wayne Ward d/b/a T&M Horse Company shall pay this penalty by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**" and shall indicate that payment is in reference to **A.Q. Docket No. 06-0003.** Respondent Ward's certified check(s), cashier's check(s), or money order(s) shall be forwarded within **60** (sixty) 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

3. So long as Respondent Ward pays his civil penalty in full as required, Respondent Ward's civil penalty shall be reduced by the amount of civil penalty paid in this case by the end of calendar year 2007 by the remaining respondent in this case, Respondent Michael Lee McBarron d/b/a T&M Horse Company.

Finality

This Decision and Order shall have the same force and effect as if entered after a full hearing and 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.

* * *

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: MITCHELL STANLEY D/B/A STANLEY BROTHERS.
A.Q. Docket No. 06-0007.
Default Decision and Order.
Filed June 14 2006.

AQ – Default.

Thomas Bolick for Petitioner.
Respondent Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Decision

This is an administrative proceeding for the assessment of a civil penalty for violations of the Animal Health Protection Act (7 U.S.C. §§ 8301 et seq.), 7 U.S.C. § 1901 note, 9 C.F.R. part 75, and 9 C.F.R. part 88 in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 et seq.

and 380.1 et seq.

On January 18, 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 respondent Mitchell Stanley d/b/a Stanley Brothers. The complaint was served on respondent on January 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 February 13, 2006, twenty days after service of the complaint (7 C.F.R. § 136(a)). Respondent never filed an answer to the complaint and the Hearing Clerk's Office mailed him a No Answer Letter on February 23, 2006.

Respondent Mitchell Stanley d/b/a Stanley Brothers failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and failed to deny or otherwise respond to an allegation of the complaint. Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) or to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. Furthermore, since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and respondent's failure to file an answer is deemed such an admission pursuant to the Rules of Practice, respondent's failure to answer is likewise deemed a waiver of hearing. Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Mitchell Stanley is an individual who engages in the commercial transportation of equines to slaughter under the name of Stanley Brothers. He handles more than 20 horses per year in interstate commerce and resides at 747 Highway 8 West, Hamburg, Arkansas 71646.

2. (a) On or about October 20, 2003, respondent shipped horses in commercial transportation from Louisiana to Dallas Crown in Kaufman,

Texas (hereinafter referred to as Dallas Crown), for slaughter. Two horses in the shipment, USDA backtag numbers USAU 3602 and USAU 3616, bore a brand on the left side of their necks, 72A, which identified them as positive reactors for Equine Infectious Anemia, but they were not accompanied by the required Permit for Movement of Restricted Animals, VS Form1-27, in violation of 9 C.F.R. § 75.4(b).

(b) On or about October 20, 2003, respondent shipped horses in commercial transportation from Louisiana to Dallas Crown 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 and the name of the driver of the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (2) the form did not list 72A brands on the two positive reactors for Equine Infectious Anemia and thereby failed to list all of the physical characteristics, including permanent brands, that could be used to identify those horses, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (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).

Conclusion

By reason of the Findings of Fact set forth above, respondent Mitchell Stanley d/b/a Stanley Brothers violated the Animal Health Protection Act (7 U.S.C. §§ 8301 et seq.) and 7 U.S.C. § 1901 note. Therefore, the following Order is issued.

Order

Respondent Mitchell Stanley d/b/a Stanley Brothers is hereby assessed a civil penalty of twelve thousand eight hundred dollars ($12,800.00). 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 Mitchell Stanley d/b/a Stanley Brothers shall indicate that payment is in reference to A.Q. Docket No. 06-0007.

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 Mitchell Stanley d/b/a Stanley Brothers 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).

DEFAULT DECISIONS

ANIMAL WELFARE ACT

In re: MILTON WAYNE SHAMBO, d/b/a WAYNE'S WORLD SAFARI AND ARBUCKLE WILDERNESS; ANIMALS, INC., d/b/a WAYNE'S WORLD SAFARI; AND ANIMALS, INC., d/b/a ARBUCKLE WILDERNESS.
AWA Docket No. 05-0024.
Default Decision.
Filed February 22, 2006.

AWA – Default.

Bernadette R. Juarez for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order by Reason of Default

Preliminary Statement

This is a Decision and Order by Reason of Default as to all the respondents, that is, Milton Wayne Shambo; Animals, Inc., a Texas corporation; and Animals, Inc., an Oklahoma corporation. This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq*.), by a complaint filed on July 8, 2005, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS"), alleging that the respondents willfully violated the Act and the regulations and standards ("Regulations" and "Standards") issued thereunder (9 C.F.R. § 1.1 *et seq*.).

The Hearing Clerk sent copies of the complaint, by certified mail, return receipt requested, to respondents on July 12, 2005. Respondents were informed in the accompanying letter of service that an answer to the complaint should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondents Milton Wayne Shambo and Animals, Inc., (Oklahoma) received the complaint on July 16, 2005.[1]

[1] *See* Domestic Return Receipt for Article Numbers 7003 1670 0011 8982 5766; 7003 1670 0011 8982 5773.

Respondent Animals, Inc., (Texas) received the complaint on October 4, 2005.[2]

Respondents have failed to file an answer, and the material facts alleged in the complaint, which are admitted by the respondents' failure to file an answer (7 C.F.R. §1.136(c)), are adopted and set forth herein as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice.[3]

FINDINGS OF FACT

1. Respondent Animals, Inc., is an Oklahoma domestic stock corporation doing business as Arbuckle Wilderness ("AI–OK") and whose agent for service of process is Wayne Shambo, Route 1, Box 63, Davis, Oklahoma 73030. At all material times mentioned herein, said respondent was operating as exhibitor, as that term is defined in the Act and the Regulations, under the direction, control and management of its president, secretary, and sole shareholder: respondent Shambo.

2. Between November 2, 1998 and on or about November 25, 2002, Respondent Animals, Inc., was a Texas domestic stock corporation doing business as Wayne's World Safari ("AI–TX") and whose agent for service of process was Wayne Shambo, 400 Mann Street, Suite 901, Corpus Christi, Texas 78401. At all material times mentioned herein, said respondent was operating as exhibitor, as that term is defined in the Act and the Regulations, under the direction, control and management of its president, secretary, and director: respondent Shambo.

3. Respondent Milton Wayne Shambo is an individual doing business as Wayne's World Safari and Arbuckle Wilderness, whose mailing address is Route 1, Box 63, Davis, Oklahoma 73030. At all times mentioned herein, said respondent was licensed and operating as an exhibitor as that term is defined in the Act and the Regulations.

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[2] The U.S. Postal Service marked the Hearing Clerk's certified mailing to Animals, Inc. (Texas) "undeliverable as addressed" and returned it on July 25, 2005. On August 12, 2005, the Hearing Clerk sent said respondent, by certified mail addressed to its agent's address of record, copies of the complaint and Rules of Practice. *See* Memorandum to File, dated August 12, 2005. The U.S. Postal Service marked this mailing "refused" and returned it on August 29, 2005. *See* Memorandum to File, dated October 4, 2005. On October 4, 2005, in accordance with section 1.147(c)(1) of the Rules of Practice, the Hearing Clerk served respondent, by regular mail, with copies of the complaint and the Rules of Practice. *See id.*

[3] 7 C.F.R. § 1.139.

Between August 26, 1999 and August 26, 2002, respondent Shambo held Animal Welfare Act license number 74-C-0467 issued to "WAYNE SHAMBO DBA: WAYNE'S WORLD SAFARI."

Between April 8, 2002, and April 8, 2004, Respondent Shambo held Animal Welfare Act license number 73-C-0146 issued to "WAYNE SHAMBO DBA: ARBUCKLE WILDERNESS."

During all material times respondent Shambo exhibited animals at respondent AI–TX's facility known as Wayne's World Safari in Mathis, Texas and respondent AI–OK's facility known as Arbuckle Wilderness in Davis, Oklahoma.

4. The acts, omissions, and failures to act by respondent Shambo identified herein were within the scope of said respondent's offices, and are deemed the acts, omissions and failures of respondents AI–TX and AI–OK, as well as respondent Shambo, for the purpose of construing or enforcing the provisions of the Act and Regulations. Respondents Shambo, AI–TX, and AI–OK, are herein frequently referred to collectively as "respondents."

5. APHIS personnel conducted inspections of respondents' facilities, records and animals for the purpose of determining respondents' compliance with the Act and the Regulations and Standards on:

Date	Site Location	Regulated Animals
August 21, 2000	Davis, OK	77
September 19, 2000	Mathis, TX	155
January 19, 2001	Mathis, TX	approximately 158
January 23, 2001	Mathis, TX	158
April 19, 2001	Mathis, TX	unavailable
February 12, 2001	Davis, OK	749
May 10, 2001	Mathis, TX	unavailable
September 5, 2001	Davis, OK	609
November 7, 2001	Davis, OK	725
November 29, 2001	Davis, OK	662
February 26, 2002	Davis, OK	466
August 12, 2003	Davis, OK	553

NONCOMPLIANCE WITH REGULATIONS

6. On November 29, 2001, respondents violated section 2.4 of the Regulations by failing to not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties, and specifically, respondents verbally abused

APHIS officials in the course of carrying out their duties.

7. Respondents violated the attending veterinarian and veterinary care regulations, as follows:

a. January 19, 2001 (TX). Respondents failed to maintain a written program of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, and specifically, failed to obtain veterinary care for a spider monkey that had an injured finger and sores on his hand.

b. Respondents failed to establish and maintain programs of adequate veterinary care, that included 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:

(i) October 19, 2000 (TX). Respondents failed to provide veterinary treatment, as directed by their attending veterinarian, to a bobcat that exhibited signs of behavioral stress.

(ii) May 10, 2001 (TX). Respondents failed to provide veterinary treatment, as directed by their attending veterinarian, to a caracal, coatimundi and kinkajou.

(iii) May 10, 2001 (TX). Respondents allowed the goat's hoofs to become overgrown, thereby risking disease and injury.

(iv) February 12, 2001 (OK). Respondents failed to obtain treatment for a female goat in the petting zoo that appeared thin and lame.

c. On or about December 26, 2000 through on or about January 5, 2001 (OK). Respondents failed to establish and maintain programs of adequate veterinary care that included the availability of appropriate facilities, personnel, equipment, and services to provide care to three lemurs, one spider monkey, two giraffes, one female addax, one female gemsbok, four blackbucks (two adults, two juvenile), two adult elk, one male nilgai antelope, one adult fallow deer, one juvenile eland, during an eight-day ice storm, which failure resulted the animals' deaths.

8. On September 5, 2001 (OK). Respondents willfully violated the Regulations by failing to make, keep, and maintain records that fully and correctly disclose required information concerning animals in their possession, and specifically, failed to maintain accurate records concerning cavies that arrived at the facility in April 2001 and had no records concerning a fennec fox.

9. On or about December 26, 2000 through on or about January 5, 2001, respondents violated the Regulations by failing to take appropriate measures to alleviate the impact of climatic conditions that present a threat to an animal's health or well-being, and specifically, failed to provide appropriate heat, shelter, and care to hundreds of animals during an eight-day ice storm, which failure resulted in the deaths of no fewer than eighteen animals.

10. Respondents violated the Regulations by failing to meet the minimum facilities and operating standards for nonhuman primates, as follows:

a. Respondents failed to spot-clean hard surfaces of primary enclosures for nonhuman primates daily to prevent accumulation of excreta or disease hazards, and specifically:

(i) October 19, 2000 (TX). Respondents failed to remove old food, old bedding and fecal matter from the nonhuman primates' enclosures (Monkey Barn), thereby depriving the animals of the freedom to avoid contact with excreta.

(ii) January 19, 2001 (TX). Respondents failed to remove old food, old bedding, excessive feces, and algae from the nonhuman primates' enclosures, thereby exposing the animals to disease hazards.

b. Respondents failed to equip housing facilities with disposal facilities and drainage systems that are constructed, installed, maintained, and operated so that animal wastes and water are rapidly eliminated and the animals stay dry and as to minimize vermin and pest infestation, insects, odors, and disease hazards, and specifically:

(i) January 19, 2001 (TX). The drainage system in the nonhuman primate housing facility allowed water, liquid wastes, feces, and algae to accumulate in the drain, thereby exposing the animals to disease hazards.

(ii) January 23, 2001 (TX). The drainage system in the nonhuman primate housing facility allowed water, liquid wastes, feces, and algae to accumulate in and around the animals' enclosures (including two spider and two vervet monkeys), thereby depriving the animals of the ability to stay clean, dry and free from disease.

(iii) April 19, 2001 (TX). The drainage system in the nonhuman primate housing facility allowed water, liquid wastes, feces and algae to accumulate in and around the animals' enclosures, thereby depriving the animals of the ability to stay clean, dry and free from disease.

(iv) May 10, 2001 (TX). The drainage system in the nonhuman primate housing facility allowed water, liquid wastes, feces and black algae to accumulate in and around the animals' enclosures and in the drains, thereby depriving the animals of the ability to stay clean, dry and free from disease.

c. Respondents failed to maintain all surfaces of nonhuman primate facilities on a regular basis, and specifically:

(i) August 21, 2000 (OK). Respondents failed to repair or replace the peeling paint in the nonhuman primates' enclosures.

(ii) September 5, 2001 (OK). Respondents failed to repair and remove the chipped concrete flooring from spider monkeys' enclosure, and the peeling paint and rusted posts in the chimpanzees' enclosure.

d. Respondents failed to light indoor housing facilities well enough to permit routine inspection and cleaning of the facility, and observation of the nonhuman primates, and specifically:

(i) August 21, 2000 (OK). There were no functioning lights in and around the enclosure housing six spider monkeys.

(ii) November 29, 2001 (OK). Respondents housed nonhuman primates (lemurs and vervets) in an enclosure that contained one small light bulb that failed to provide adequate lighting to permit inspection and cleaning.

(iii) February 12, 2001 (OK). The two functioning light bulbs in the chimpanzees' enclosure failed to provide adequate lighting to permit inspection and cleaning.

e. Respondents failed to construct and maintain facilities so that they are structurally sound for the species of nonhuman primates housed therein, maintained in good repair and that protect the animals from injury, contain the animals, and restrict other animals from entering, and specifically:

(i) February 12, 2001 (OK). Respondents failed to repair the sharp, chewed edges of the macaques' enclosure.

(ii) September 5, 2001 (OK). Respondents failed to repair or remove sharp, protruding nails that pointed into the lemurs' enclosure and the sagging roof that leaked in the chimpanzees' enclosure.

(iii) September 5, 2001 (OK). The interior area of shelters provided to four lemurs could not be readily cleaned and sanitized.

f. On or about December 26, 2000 through on or about January 5, 2001 (OK). Respondents failed to sufficiently heat sheltered housing

when necessary to protect the nonhuman primates from extreme temperatures to provide for their health and well-being, and so the ambient temperature does not fall below 45 F for more than 4 consecutive hours when nonhuman primates are present, and specifically, failed to provide sufficient heat to nonhuman primates during an eight-day ice storm, which failure caused the deaths of three lemurs and one spider monkey.

g. Respondents failed to provide nonhuman primates with adequate shelter from the elements at all times that provides protection from the sun, rain, snow, wind, and cold, and from any weather conditions that my occur, and specifically:

(i) October 19, 2000 (TX). The nonhuman primates' shelters contained gaps between the walls, roofs, and floors and, therefore, failed to adequately protect the animals from wind, rain, and cold temperatures.

(ii) January 19, 2001 (TX). The nonhuman primates' shelters contained gaps between the walls, roofs, and floors and, therefore, failed to adequately protect the animals from wind, rain, and cold temperatures.

h. Respondents failed to have barriers between fixed public exhibits housing nonhuman primates and the public any time the public is present, in order to restrict physical contact between the public and the nonhuman primate, and specifically:

(i) November 7, 2001 (OK). Respondents housed one lemur in an enclosure that lacked an adequate barrier between the enclosure and members of the public, thereby allowing the public to have direct contact with the animal.

(ii) August 12, 2003 (OK). Respondents housed two lemurs and two vervets in enclosures that lacked adequate barriers between the enclosures and members of the public, thereby allowing the public to have direct contact with the animals.

i. August 12, 2003 (OK). Respondents failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian, and specifically, respondents' plan for environmental enrichment failed to describe the methods of enrichment and how often each animal (including two vervets, two lemurs, and one spider monkey) would receive enrichment.

j. September 5, 2001 (OK). Respondents failed to provide nonhuman primates with diets that are appropriate for the species,

size, age, and condition of the animals, and for the conditions in which the animals are maintained and with food that is clean, wholesome, and palatable to the animals that is of sufficient quantity and nutritive value to main a healthful condition, weight range, and to meet the animals' normal daily nutritional requirements, and specifically, respondents fed nonhuman primates expired food that failed to meet the animals' vitamin needs.

k. October 19, 2000 (TX). Respondents failed to provide nonhuman primates with a sufficient quantity of potable water, in water receptacles that are clean and sanitized, and specifically, the squirrel monkeys' water and water receptacle were contaminated with green, dirty water. l. Respondents failed to keep premises where housing facilities are located, including buildings and surrounding grounds, clean and in good repair to protect the nonhuman primates from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents, pests and vermin, and specifically:

(i) August 21, 2000 (OK). Respondents failed to remove rotten produce from the refrigerator (including a fruit box infested with maggots) and the food-prep room was infested with flies and had unsanitary counters and floors.

(ii) February 12, 2001 (OK). The food-prep room had unsanitary floors and counters.

m. August 21, 2000 (OK). Respondents failed to have enough employees to carry out the requisite level of husbandry practices and care, that are trained and supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of nonhuman primates, and specifically, failed to have enough adequately trained and supervised employees to provide the minimally-adequate husbandry and care to their nonhuman primates as evidenced by the unsanitary conditions of respondents' facility, including the animals' enclosures and food-prep area.

11. Respondents violated section the Regulations and Standards by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, as follows:

a. Respondents failed to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain them in good repair to protect the animals from injury and to contain the animals, and specifically:

(i) October 19, 2000 (TX). Respondents failed to repair the roofs

and sides of four shelters used by hoof stock (drive through area).

(ii) January 19, 2001 (TX). Respondents failed to repair the roofs and the sides of four shelters used by hoof stock in the drive through area.

(iii) May 10, 2001 (TX). Respondents failed to repair, replace or remove the rotting roof and sharp, protruding nails in the cavy's shelter; the chewed shelter in the prairie dogs' enclosure; and housed lions in enclosures that could not adequately contain them.

(iv) February 12, 2001 (OK). Respondents failed to repair the roofs in the tigers' and cavy's enclosures, the broken door in the porcupines' enclosure, and the coatimundis' shelter lacked a back side.

(v) September 5, 2001 (OK). Respondents housed a coatimundi, a fennec fox, three cavies, three camels, two rhinoceroses, a serval and a white tiger in enclosures that were chewed, splintered and rotting wood; housed deer in enclosures that allowed three animals to escape; housed a tiger in an enclosure that lacked adequate structural integrity to contain him; and, the porcupine's and bears' shelters were structurally unsound and risked injury to the animals.

b. Respondents failed to store supplies of food and bedding in facilities that adequately protect such supplies against deterioration, molding, or contamination by vermin, and to provide refrigeration for perishable food, and specifically:

(i) August 21, 2000 (OK). Respondents failed to protect food supplies against deterioration and contamination by vermin, including food stored in three containers that had cracked lids, one open feed bag, and uncovered meat stored in the freezer.

(ii) February 12, 2001 (OK). Respondents failed to protect food supplies against deterioration and contamination by vermin, including food stored in two containers with holed and cracked lids.

(iii) November 7, 2001 (OK). Respondents failed to protect food supplies against deterioration and molding by storing fresh produce next to spoiled and moldy produce.

c. Respondents failed to make provisions for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris and to provide and operate disposal facilities as to minimize vermin infestation, odors, and disease hazards, and specifically:

(i) April 19, 2001 (OK). Respondents failed to remove excreta and manure from in and around the rhinoceroses' enclosure.

(ii) September 5, 2001 (OK). Respondents failed to remove trash, insulation, and feces from the entrance of the coatimundi's enclosure.

d. Respondents failed to provide all animals kept outdoors with sufficient shade by natural or artificial means, when sunlight is likely to cause overheating or discomfort of animals, and specifically:

(i) April 19, 2001 (OK). Respondents failed to provide lions and giraffes with sufficient shade from sunlight.

(ii) May 10, 2001 (TX). Respondents failed to provide one juvenile deer and two juvenile calves with sufficient shade from sunlight.

e. Respondents failed to provide animals kept outdoors with natural or artificial shelter to afford them protection and to prevent their discomfort, and specifically:

(i) October 19, 2000 (OK). Respondents failed to provide any bedding to the prairie dogs and adequate shelter to four porcupines that shared one small wood box and two adult wolves that shared one dog house.

(ii) On or about December 26, 2000 through on or about January 5, 2001 (OK). Respondents failed to provide adequate shelter to giraffes, rhinoceroses, gemsbok, blackbucks, elk, antelope, eland and deer, which failure caused the deaths of no fewer than 12 animals.

(iii) January 19, 2001 (TX). Respondents failed to provide adequate shelter, including bedding, to no fewer than thirty animals (small felids, caracal, serval, bobcat, civits, kudu, cavies, cappybara, wolves, rhinoceroses, hyena, bears, lions, cougars, leopards, and tigers).

(iv) January 23, 2001 (TX). Respondents failed to provide adequate shelter to two wolves that shared one small dog house.

(v) May 10, 2001 (TX). Respondents failed to provide adequate shelter to one juvenile deer and two calves.

f. Respondents failed to provide a suitable method to rapidly eliminate excess water from animal enclosures, and specifically:

(i) October 19, 2000 (TX). The bison, camels, pigs and hoofstock had to walk through and stand in water and mud to access their water receptacles.

(ii) September 5, 2001 (OK). Respondents housed animals (petting area, four cavies and a fennec fox) in enclosures with standing water, thereby depriving the animals of the ability to stay clean and dry.

(iii) November 7, 2001 (OK). Respondents failed to rapidly

eliminate standing water from the giraffe's enclosure; the giraffe had to walk through standing water and mud to access their outdoor paddock.

(iv) November 29, 2001 (OK). The rhinoceros and deer (near petting area) had to walk through and stand in water and mud to access their shelters, food and water receptacles.

g. Respondents failed to construct a perimeter fence that restricts animals and persons from going through or under it, and specifically:

(i) On or about October 19, 2000 through on or about January 19, 2001 (OK). Respondents' perimeter fence lacked sufficient height to keep animals in and unauthorized persons out.

(ii) August 21, 2000 (OK). Respondents failed to construct a perimeter fence around dangerous animals, including large felids, bears, wolves, rhinoceros and nonhuman primates.

(iii) September 5, 2001 (OK). Respondents' perimeter fence failed to contain their animals; APHIS officials observed three deer outside the perimeter fence.

(iv) November 7, 2001 (OK). Respondents' perimeter fence failed to contain their animals; APHIS officials observed two deer in the public parking area.

h. Respondents failed to provide animals with food that is wholesome, palatable, free from contamination and of sufficient quantity and nutritive value to maintain good animal health, that is prepared with consideration for the age, species, condition, size, and type of animal, and that is located so as to be accessible to all animals in the enclosure and placed so as to minimize contamination, and specifically:

(i) October 19, 2000 (TX). The food trough in the petting zoo contained old, wet, and spoiled food and the red deer appeared thin and had no food.

(ii) January 19, 2001 (TX). The hoofstocks' food supply was contaminated with dirt and mud.

i. October 19, 2000 (TX). Respondents failed to keep food receptacles clean and sanitary at all times, and specifically, provided animals (petting area) with a food receptacle that was contaminated with old, wet, and spoiled food.

j. Respondents failed to make potable water accessible to the animals at all times, or as often as necessary for the animals' health and comfort, and to keep water receptacles clean and sanitary, and specifically:

(i) October 19, 2000 (TX). The serval's water receptacle was rusted and could not be sanitized; the water provided to three

racoons, two wolves, one capybara, three kudu, four lechews and petting zoo animals was contaminated with algae and dirt; the racoons' water receptacle was contaminated with green algae; and two civets had no water at all.

(ii) January 19, 2001 (TX). The two wolves' water and water receptacle were contaminated with dirty, green water.

(iii) August 21, 2000 (OK). The only source of water available to animals in the petting zoo was a dirty wading pool and the water receptacles used by the cougars and tigers were dirty.

k. Respondents failed to remove excreta from primary enclosures as often as necessary to prevent contamination of animals, minimize disease hazards, and reduce odors, and specifically:

(i) August 21, 2000 (OK). Respondents housed three rhinoceroses in an enclosure that contained excessive feces, urine, and mud.

(ii) January 19, 2001 (TX). Respondents housed two hyenas and racoons in enclosures that contained excessive feces and waste.

(iii) February 12, 2001 (OK). Respondents housed a goat in an enclosure (food-prep room) that contained 1½ inches of packed excreta and a coatimundi in an enclosure that had, at least, a two-day accumulation of feces.

(iv) April 19, 2001 (TX). Respondents housed rhinoceroses in an enclosure that contained excessive excreta.

l. Respondents failed to keep premises (buildings and grounds) clean and in good repair to protect the animals from injury and to facilitate the prescribed husbandry practices, and to place accumulations of trash in designated areas that are cleared as necessary to protect the health of the animals, and specifically:

(i) August 21, 2000 (OK). Respondents failed to remove rotten produce from the refrigerator (including a fruit box infested with maggots), failed to repair or replace the leaking water tap and deteriorating plywood the rhinoceros barn, the food-prep room was infested with flies and had unsanitary counters and floors, veterinary instruments were stored in a brown liquid and were rusty, and the giraffes' barn was contaminated with bird feces.

(ii) February 12, 2001(OK). Respondents failed to clean the unsanitary floors and counters in the food-prep room and to remove or clean the unoccupied, dirty enclosures outside the food-prep room.

(iii) September 5, 2001 (OK). Respondents failed to remove flies, feces and trash from in and around the coatimundi's enclosure, the refrigerator's interior surfaces were rusted and

could not be sanitized.

(iv) November 7, 2001 (OK). Respondents failed to remove rotten produce from the refrigerator and failed to repair or remove damaged fencing throughout the facility.

m. September 5, 2001 (OK). Respondents failed to establish and maintain a safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests, and specifically, failed to establish an maintain a minimally-adequate program to control fly infestation in and around the food-prep room and the coatimundi's enclosure.

n. Respondents failed to utilize a sufficient number of adequately trained employees to maintain the professionally acceptable level of husbandry practices, under a supervisor who has a background in animal care, and specifically:

(i) January 19, 2001 (TX). Respondents failed to have a supervisor with an adequate background in animal care provide training and supervision to employees who handled or provided husbandry and care to animals.

(ii) January 23, 2001 (TX). Respondents failed to utilize a sufficient number of adequately-trained employees to maintain an acceptable level of husbandry.

(iii) August 21, 2001 (OK). Respondents failed to utilize a sufficient number of adequately-trained employees to provide husbandry and care to their animals.

(iv) September 5, 2001 (OK). Respondents' four week-day employees and three week-end maintenance employees, were not sufficient to provide minimally-adequate care to respondents' 800 regulated animals (including nonhuman primates, large and small felids, large canids, bears, rhinoceroses, giraffes, camels, and hoofstock), as evidenced by the facility's disrepair and deterioration and the condition of the animals and their enclosures.

o. Respondents failed to house animals in compatible groups so as not to interfere with their health or cause them discomfort, and specifically:

(i) October 19, 2000 (TX). Respondents jointly housed incompatible animals, including red deer that appeared thin and overcrowded.

(ii) January 23, 2001 (TX). Respondents jointly housed incompatible animals in the drive through area; the animals competed for food and APHIS officials observed a juvenile Nilgai antelope that appeared to have been trampled to death by

other animals in the enclosure.

CONCLUSIONS

1. The Secretary of Agriculture has jurisdiction.

2. On November 29, 2001, respondents willfully violated section 2.4 of the Regulations by verbally abusing an APHIS official in the course of carrying out his or her duties. 9 C.F.R. § 2.4.

3. Respondents willfully violated the attending veterinarian and veterinary care regulations (9 C.F.R. § 2.40), as follows:

a. January 19, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with section 2.40(a)(1) of the Regulations. 9 C.F.R. § 2.40(a)(1).

b. Respondents failed to establish and maintain programs of adequate veterinary care, that included 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:

(i) October 19, 2000 and May 10, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.40(a) and 2.40(b)(2) of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(2).

(ii) February 12, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.40(a) and 2.40(b)(2) of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(2).

c. On or about December 26, 2000 through on or about January 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

4. September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) willfully violated section 2.75 of the Regulations (9 C.F.R. § 2.75), by failing to make, keep, and maintain records that fully and correctly disclose required information concerning animals in their possession. 9 C.F.R. § 2.75(b)(1).

5. On or about December 26, 2000 through on or about January 5, 2001. Respondents willfully violated the Regulations (9 C.F.R. § 2.131(e)), by failing to take appropriate measures to alleviate the impact

of climatic conditions that present a threat to an animal's health or well-being.
9 C.F.R. § 2.131(e), formerly cited as 9 C.F.R. § 2.131(d), *see* 69 Fed. Reg. 42089, 42102 (July 14, 2004).

6. Respondents willfully violated sections 3.75-3.77 of the Regulations by failing to meet the minimum facilities and operating standards for nonhuman primates (9 C.F.R. §§ 3.75-3.77), as follows:

a. October 19, 2000 and January 19, 2001(TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.75(c)(3) of the Regulations and Standards by failing to spot-clean hard surfaces of primary enclosures for nonhuman primates daily to prevent accumulation of excreta or disease hazards. 9 C.F.R. §§ 2.100(a), 3.75(c)(3).

b. January 19, 2001, January 23, 2001, April 19, 2001, and May 10, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a), 3.75(f), and 3.80(a)(2)(v) of the Regulations and Standards by failing to equip housing facilities with disposal facilities and drainage systems that are constructed, installed, maintained, and operated so that animal wastes and water are rapidly eliminated and the animals stay dry and as to minimize vermin and pest infestation, insects, odors, and disease hazards. 9 C.F.R. §§ 2.100(a), 3.75(f), 3.80(a)(2)(v).

c. August 21, 2000 and September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.75(c)(1), (2) of the Regulations and Standards by failing to maintain all surfaces of nonhuman primate facilities on a regular basis. 9 C.F.R. §§ 2.100(a), 3.75(c)(1), (2).

d. August 21, 2000, November 29, 2001 and February 12, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.76(c) by failing to light indoor housing facilities well enough to permit routine inspection and cleaning of the facility, and observation of the nonhuman primates. 9 C.F.R. §§ 2.100(a), 3.76(c).

e. Respondents failed to construct and maintain facilities so that they are structurally sound for the species of nonhuman primates housed therein, maintained in good repair and that protect the animals from injury, contain the animals, and restrict other animals from entering, and specifically:

(i) February 12, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a), 3.75(a) and 3.80(a)(2)(i),(ii) of the Regulations and

Standards. 9 C.F.R. §§ 2.100(a), 3.75(a), 3.80(a)(2)(i),(ii).

(ii) September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a), 3.75(a) and 3.80(a)(2)(i),(ii) & (v) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.75(a), 3.80(a)(2)(i),(ii) & (v).

(iii) September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 3.75(a) and 3.80(ix) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.75(a), 3.80(ix).

f. On or about December 26, 2000 through on or about January 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a), 3.77(a) and 3.80(a)(2)(vi) of the Regulations and Standards by failing to sufficiently heat sheltered housing when necessary to protect the nonhuman primates from extreme temperatures to provide for their health and well-being, and so the ambient temperature does not fall below 45 F for more than 4 consecutive hours when nonhuman primates are present. 9 C.F.R. §§ 2.100(a), 3.77(a), 3.80(a)(2)(vi).

g. October 19, 2000 and January 19, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a), 3.75(a), 3.78(b) and 3.80(a)(2)(v),(vi) by failing to provide nonhuman primates with adequate shelter from the elements at all times that provides protection from the sun, rain, snow, wind, and cold, and from any weather conditions that may occur. 9 C.F.R. §§ 2.100(a), 3.75(a), 3.78(b), 3.80(a)(2)(v),(vi).

h. November 7, 2001 and August 12, 2003 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.78(e) of the Regulations and Standards by failing to have barriers between fixed public exhibits housing nonhuman primates and the public any time the public is present, in order to restrict physical contact between the public and the nonhuman primate. 9 C.F.R. §§ 2.100(a), 3.78(e).

i August 12, 2003 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.81 of the Regulations and Standards by failing to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian. 9 C.F.R. §§ 2.100(a), 3.81.

j. September 5, 2001 (OK). Respondents Milton Wayne Shambo

and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.82(a) of the Regulations and Standards by failing to provide nonhuman primates with diets that are appropriate for the species, size, age, and condition of the animals, and for the conditions in which the animals are maintained and with food that is clean, wholesome, and palatable to the animals that is of sufficient quantity and nutritive value to main a healthful condition, weight range, and to meet the animals' normal daily nutritional requirements. (9 C.F.R. §§ 2.100(a), 3.82(a)).

k. October 19, 2000 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.83 of the Regulations and Standards by failing to provide nonhuman primates with a sufficient quantity of potable water to nonhuman primates, in water receptacles that are clean and sanitized. 9 C.F.R. §§ 2.100(a), 3.83.

l. August 21, 2000 and February 12, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.131(c) of the Regulations and Standards by failing to keep premises where housing facilities are located, including buildings and surrounding grounds, clean and in good repair to protect the nonhuman primates from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents, pests and vermin. 9 C.F.R. §§ 2.100(a), 3.131(c).

m. August 21, 2000 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a), and 3.85 of the Regulations and Standards by failing to have enough employees to carry out the requisite level of husbandry practices and care, that are trained and supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of nonhuman primates. 9 C.F.R. §§ 2.100(a), 3.85.

7. Respondents willfully violated section 2.100(a) of the Regulations and Standards by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.142), as follows:

a. Respondents failed to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain them in good repair to protect the animals from injury and to contain the animals, and specifically:

(i) October 19, 2000, January 19, 2001 and May 10, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX)

failed to comply with sections 2.100(a) and 3.125(a) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.125(a).

(ii) February 12, 2001 and September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.125(a) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.125(a).

b. August 21, 2000, February 12, 2001 and November 7, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.125(c) of the Regulations and Standards by failing to store supplies of food and bedding in facilities that adequately protect such supplies against deterioration, molding, or contamination by vermin, and to provide refrigeration for perishable food. 9 C.F.R.
§§ 2.100(a), 3.125(c).

c. April 19, 2001 and September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.125(d) of the Regulations and Standards by failing to make provisions for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris and to provide and operate disposal facilities as to minimize vermin infestation, odors, and disease hazards. 9 C.F.R.
§§ 2.100(a), 3.125(d).

d. Respondents failed to provide all animals kept outdoors with sufficient shade by natural or artificial means, when sunlight is likely to cause overheating or discomfort of animals, and specifically:

(i) April 19, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.127(a) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.127(a).

(ii) May 10, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.127(a) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.127(a).

e. Respondents failed to provide animals kept outdoors with natural or artificial shelter to afford them protection and to prevent their discomfort, and specifically:

(i) October 19, 2000, and on or about December 26, 2000 through on or about January 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.127(b) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.127(b).

(ii) January 19, 2001, January 23, 2001 and May 10, 2001 (TX).

Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.127(b) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.127(b).

f. Respondents failed to provide a suitable method to rapidly eliminate excess water from animal enclosures, and specifically:

(i) October 19, 2000 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.127(c) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.127(c).

(ii) September 5, 2001, November 7, 2001 and November 29, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.127(c) of the Regulations and Standards. 9 C.F.R.
§§ 2.100(a), 3.127(c).

g. On our about October 19, 2000 through on or about January 19, 2001, August 21, 2000, September 5, 2001 and November 7, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.127(d) of the Regulations and Standards by failing to construct a perimeter fence that restricts animals and persons from going through or under it. 9 C.F.R. §§ 2.100(a), 3.127(d).

h. October 19, 2000 and January 19, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.129(a), (b) of the Regulations and Standards by failing to provide animals with food that is wholesome, palatable, free from contamination and of sufficient quantity and nutritive value to maintain good animal health, that is prepared with consideration for the age, species, condition, size, and type of animal, and that is located so as to be accessible to all animals in the enclosure and placed so as to minimize contamination. 9 C.F.R. §§ 2.100(a), 3.129(a),(b).

i. October 19, 2000 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.129(b) of the Regulations and Standards by failing to keep food receptacles clean and sanitary at all times. 9 C.F.R. §§ 2.100(a), 3.129(b). j. Respondents failed to make potable water accessible to the animals at all times, or as often as necessary for the animals' health and comfort, and to keep water receptacles clean and sanitary, and specifically:

(i) October 19, 2000 and January 19, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.130 of the Regulations and Standards.

9 C.F.R. §§ 2.100(a), 3.130.

(ii) August 21, 2000 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.130 of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.130.

k. Respondents failed to remove excreta from primary enclosures as often as necessary to prevent contamination of animals, minimize disease hazards, and reduce odors, and specifically:

(i) August 21, 2000 and February 12, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.131(a) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.131(a).

(ii) January 19, 2001 and April 19, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.131(a) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.131(a).

l. August 21, 2000, February 12, 2001, September 5, 2001 and November 7, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.131(c) of the Regulations and Standards by failing to keep premises (buildings and grounds) clean and in good repair to protect the animals from injury and to facilitate the prescribed husbandry practices, and to place accumulations of trash in designated areas that are cleared as necessary to protect the health of the animals. 9 C.F.R. §§ 2.100(a), 3.131(c).

m. September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.131(d) of the Regulations and Standards by failing to establish and maintain a safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests. 9 C.F.R. §§ 2.100(a), 3.131(d).

n. Respondents failed to utilize a sufficient number of adequately-trained employees to maintain the professionally acceptable level of husbandry practices, under a supervisor who has a background in animal care, and specifically:

(i) January 19, 2001 and January 23, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.132 of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.132.

(ii) August 21, 2001 and September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.132 of the Regulations and

Standards. 9 C.F.R. §§ 2.100(a), 3.132.

o. October 19, 2000 and January 23, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.133 of the Regulations and Standards by failing to house animals in compatible groups so as not to interfere with their health or cause them discomfort. 9 C.F.R. §§ 2.100(a), 3.133.

FINDINGS OF FACT AND CONCLUSIONS REGARDING RESPONDENTS' COMPLIANCE HISTORY, SIZE OF RESPONDENTS' BUSINESS, GRAVITY OF THE VIOLATIONS, AND RESPONDENTS' LACK OF GOOD FAITH

8. Respondents have a large business. At all material times mentioned herein respondents held, on average, 461 animals (including wild and exotic animals such as camels, rhinoceroses, zebras, tigers, servals, chimpanzees, lemurs, and spider monkeys) for exhibition purposes.

9. The gravity of the violations identified herein is great. They include repeated instances in which respondents failed to provide minimally adequate husbandry and care to their animals despite having been repeatedly advised of animal care deficiencies.

10.Respondents do not have a previous history of violations. However, respondents' conduct over the material times in the complaint shows consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and lack of good faith.

ORDER

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

2. Respondents Milton Wayne Shambo, Animals Inc. (AI-OK), and Animals Inc. (AI-TX), and 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.

3. Animal Welfare Act licenses numbered **74-C-0467 and 73-C-0146 are hereby revoked**.

4. Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) are jointly and severally assessed a **civil penalty of $23,265**, which they shall pay within 60 days after service of this Order upon them, as follows.

The civil penalty shall be paid by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**". Respondents shall reference **AWA Docket No. 05-0024** on their certified check(s), cashier's check(s), or money order(s).
Payments of the civil penalty shall be sent by a commercial delivery service, such as FedEx or UPS, to, and received by, Bernadette R. Juarez, at the following address:

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Bernadette R. Juarez, Esq.
Room 2343 South Building, Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

FINALITY

This Decision and Order shall have the same force and effect as if entered after a full hearing and 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.

* * *

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: CHERYL MORGAN d/b/a EXOTIC PET CO.
AWA Docket No. 05-0032.
Default Decision.
Filed March 29, 2006.

AWA – Default.

Bernadette Juarez for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the Motion of the Complainant for adoption of a Proposed Decision and Order and other pending Motions. Consistent with the Rules of Practice, a copy of the Motion for Adoption of the Proposed Decision and Order was served upon the Respondent. The Respondent replied by letter, indicating that she traveled a lot, had difficulty receiving certified mail, that due to the holidays, she had not had time to talk to an attorney and requested an extension of time in which to "solve this misunderstanding." By Order dated December 29, 2005 (entered on December 30, 2005), United States Administrative Law Judge Jill S. Clifton granted the Respondent an extension of time until January 31, 2006 to file her response to the Motion for Adoption of the Proposed Decision and Order, but found the Respondent failed to have filed a timely response to the Complaint, found her to be in default and strongly encouraged the Respondent to contact counsel for the Complainant to try to settle the case.

By letter dated January 11, 2006 entered into the record on January 31, 2006, the Respondent again indicated that she traveled a lot, that she did not get certified mail on a timely basis and then generally denied the factual allegations contained in the Complaint. The Complainant then sought and received leave to file a Response to the Respondent's Objections and moved to strike certain pages from the Respondent's letter. The Respondent has filed a Reply to the Complainant's Response and the matter has been referred to the undersigned for disposition.

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended
(7 U.S.C. § 2131 *et seq*.), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations and standards ("Regulations" and "Standards") issued thereunder (9 C.F.R. § 1.1 *et seq*.).

The Hearing Clerk sent copies of the complaint, by certified mail, return receipt requested, to respondent on September 9, 2005.[4] The United States Postal Service marked said mailing "unclaimed" and returned it to the Hearing Clerk on November 3, 2005. On November 9, 2005, in accordance with section 1.147(c)(1) of the Rules of Practice, the Hearing Clerk served respondent, by regular mail, with copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151).[5] Respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. As previously noted in Judge Clifton's Order, the Respondent failed to file an answer within the time prescribed in the Rules of Practice and was found to be in default. Accordingly, the material facts alleged in the complaint are admitted by the respondent's failure to file an answer, are adopted and will be set forth herein as Findings of Fact.[6] This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

FINDINGS OF FACT

[4]*See* Domestic Return Receipt for Article Number 7000 1670 0003 5453 3925.

[5]*See* Memorandum to File, dated November 9, 2005.

[6]In light of Judge Clifton's finding that the Respondent was in default and granted her additional time in which to "solve this misunderstanding," good cause will not be found to have existed to excuse her failure to have answered the Complaint in a timely manner.

1. Respondent Cheryl Morgan is an individual doing business as Exotic Pet Co and whose mailing address is 2006 Smith Lane, Beeville, Texas 78102. At all times mentioned herein, and between December 16, 2001, and December 16, 2004, said respondent was licensed and operating as an exhibitor, as that term is defined in the Act and the Regulations and held Animal Welfare Act license number 74-C-0406. On December 16, 2004, license number 74-C-0406 expired because it was renewed.

On or about March 16, 2005, respondent applied for a new Animal Welfare Act license and, as of June 21, 2005, respondent has operated as a dealer, as that term is defined in the Act and the Regulations and holds Animal Welfare Act license number 74-B-0530.

2. APHIS personnel conducted inspections of respondent's facilities, records and animals for the purpose of determining respondent's compliance with the Act, Regulations, and Standards on May 23, 2002 (10 animals inspected), February 25, 2003 (28 animals inspected), February 26, 2003 (43 animals inspected), August 28, 2003 (40 animals inspected), September 29, 2003 (20 animals inspected), May 26, 2004 (40 animals inspected), and August 12, 2004 (30 animals inspected).

3 Respondent has a medium-size business. At all material times mentioned herein respondent held, on average, 30 animals for exhibition or resale use (including spider monkeys, capuchin monkeys, baboons, rhesus monkeys, vervet monkeys, kinkajous, cavies, kangaroos, porcupines, a blackbuck antelope and a camel).

4. The gravity of the violations alleged in this complaint is great. They include numerous instances in which respondent failed to provide minimally-adequate veterinary care, husbandry and shelter to her animals.

5. Respondent has a previous history of violations. On July 4, 1999, complainant assessed, and respondent paid, a $ 2,250 penalty for violations of the Act and Regulations documented in Animal Welfare Act investigation TX 99-086AC. Moreover, throughout the material time herein, respondent has continually failed to provide minimally-adequate veterinary care and husbandry to her animals despite having been repeatedly advised of such deficiencies. An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and lack of good faith.

6. Respondent violated the attending veterinarian and veterinary care regulations, as follows:

a. May 23, 2002, August 28, 2003, and September 29, 2003. Respondent failed to establish and maintain programs of adequate veterinary care that included a written program of veterinary care and regularly scheduled visits to the premises, and specifically, failed to make her written program of veterinary care available to APHIS officials during their inspection of her facility.

b. Respondent failed to establish and maintain an adequate program of veterinary care that included the availability of appropriate facilities, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically:

(i) May 23, 2002. Respondent failed to obtain veterinary treatment for a female Capuchin monkey with a severely injured tail.

(ii) May 23, 2002. Respondent housed nonhuman primates in enclosures that failed to protect them from injuries and disease.

(iii) On or about February 6, 2003. Respondent failed to have appropriate facilities, services and methods available to provide minimally-adequate care to no fewer than eight animals, including: four hypothermic sugar gliders; one sugar glider that suffered from a prolapsed rectum; one neonatal capuchin monkey that suffered from diarrhea; one neonatal capuchin monkey that had nasal discharge and appeared dehydrated and lethargic; and, one neonatal macaque that had nasal discharge and suffered from diarrhea.

(iv) February 25, 2003. Respondent failed to obtain veterinary treatment for a spider monkey that had discharge exuding from both eyes and appeared hypothermic.

(v) February 26, 2003. Respondent failed to obtain veterinary treatment for a spider monkey that had discharge exuding from both eyes and appeared hypothermic and a juvenile blackbuck antelope that appeared bloated, hypothermic and had a rough hair coat.

(vi) August 28, 2003. Respondent failed to obtain veterinary treatment for a juvenile blackbuck antelope that appeared bloated.

(vii) September 29, 2003. Respondent failed to obtain veterinary treatment for a juvenile blackbuck antelope that appeared bloated.

c. On or about May 23, 2002. Respondent failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being with a mechanism of direct and frequent communication so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinary, and specifically, failed to observe, and convey timely and accurate information to her attending

veterinarian concerning, a female capuchin monkey that had a severely injured tail, which injury became infected, necrotic and resulted in the animal's tail being amputated.

7. On the dates as follows, respondent violated the record-keeping regulations by failing to make, keep, and maintain records which fully and correctly disclose information concerning animals in her possession, and specifically:
a. May 23, 2002, August 28, 2003, and September 29, 2003. Respondent failed to maintain, and make available for inspection, records concerning her acquisition and disposition of animals and animals she had on hand.
b. May 26, 2004. Respondent failed to maintain, and make available for inspection, complete and accurate records concerning animals on hand, records concerning the disposition of animals (including a female spider monkey, two juvenile tigers, a vervet monkey and capuchin monkey), and records concerning the acquisition of four infant rhesus monkeys.

8. Respondent violated the handling regulations by failing to take appropriate measures to alleviate the impact of climatic conditions that present a threat to an animal's health or well-being, and specifically:
a. February 25, 2003. Respondent failed to provide appropriate heat, shelter, and care to two lemurs, one baboon, seven capuchin monkeys, two macaques, and four vervet monkeys that were exposed to cold, wet weather.
b. February 26, 2003. Respondent failed to provide appropriate heat, shelter, and care to four spider monkeys, seven capuchin monkeys, three vervet monkeys, a baboon, and rhesus monkeys that were exposed to temperatures below 45 degrees Fahrenheit.

9. On or about February 6, 2003. Respondent violated the handling regulations by failing to handle three kinkajous, three nonhuman primates, and twenty-eight sugar gliders as expeditiously and careful as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort.

10. Respondent violated the Regulations and Standards by failing to meet the minimum facilities and operating standards for nonhuman primates, as follows:
a. Respondent failed to construct and maintain housing facilities for nonhuman primates that are structurally sound for the species of

nonhuman primates housed therein, maintained in good repair, and that protect the animals from injury and contain them, and specifically:
(i) May 23, 2002. The wire wall that separated the adjacently housed pig-tailed macaque and five capuchin monkeys lacked adequate structural integrity to contain the animals in their respective enclosures, thereby risking cross-contact injury.
(ii) February 26, 2003. Respondent failed to repair or replace loose wire in an enclosure housing two capuchin monkeys, a collapsed resting shelf in the enclosure housing two rhesus monkeys, and failed to remove an electrical cord in the enclosure housing a vervet monkey and broken glass in the enclosure housing two vervet monkeys.
(iii) May 26, 2004. Respondent housed two capuchin monkeys in an enclosure that lacked adequate structural integrity and safety mechanisms to contain the animals, which failure allowed the animals to escape.
(iv) August 12, 2004. Respondent failed to repair or replace chewed, holed, and splintered shelter structures in enclosures housing macaques, capuchin monkeys, baboons.
b. Respondent failed to keep housing facilities and areas used for storing animal food or bedding free of any accumulation of trash, waste material, junk, weeds, and other discarded materials, and specifically:
(i) August 28, 2003. Respondent failed to remove boxes, tools, and trash from the room used to store animal food and bedding.
(ii) May 26, 2004. Respondent failed to remove caulk, insecticides, bags, a jug, fertilizer and other discarded items from the room used to store animal food and failed to clean and sanitize the refrigerator used to store animal food.
c. May 26, 2004. Respondent failed to construct and maintain all surfaces of nonhuman primate facilities in a manner and of materials that protect the animals from injury, and that allow them to be readily cleaned and sanitized, and specifically, failed to repair or replace chewed shelter boxes with exposed, splintered wood and chipped linoleum from the resting platforms in primate enclosures.
d. Respondent failed to spot-clean hard surfaces of primary enclosures for nonhuman primates daily to prevent accumulation of excreta or disease hazards, and specifically:

(i) February 25, 2003. Respondent deprived animals of the freedom to avoid contact with excreta by failing to remove excessive feces and old food from the floors, shelters, walls and perches of enclosures that housed a baboon, seven capuchin monkeys, and three vervet monkeys.

(ii) February 26, 2003. Respondent deprived animals of the freedom to avoid contact with excreta by failing to remove excessive feces and

old food from the floors, shelters, and walls and perches of enclosures that housed a female baboon, seven capuchin monkeys, and two vervet monkeys.

(iii) August 28, 2003. Respondent failed to remove old food, feces, and urine from the floors, shelters, walls, resting boards and perches of enclosures that housed four capuchin monkeys, three vervet monkeys, and two white-faced capuchin monkeys. (iv) September 29, 2003. Respondent failed to remove dirt, body oils and feces from the walls in the enclosures that housed five capuchin monkeys.

(v) May 26, 2004. Respondent failed to remove accumulated body oils and old food from the resting shelves and shelter boxes in enclosures housing nonhuman primates.

e. Respondent failed to store supplies of food and bedding in a manner that protected the supplies from spoilage, contamination, and vermin infestation, and specifically:

(i) February 25, 2003. Respondent failed to store three open bags of feed in leakproof containers with tightly fitting lids.

(ii) February 26, 2003. Respondent stored sacks of food on a wet floor and near insecticides, paints, old plastic bags, rags, and other discarded items. (iii) May 26, 2004. Respondent stored food supplies in a dirty refrigerator that contained spoiled food.

f. Respondent failed to only house nonhuman primates that are acclimated, as determined by the attending veterinarian, to the prevailing temperature and humidity at the outdoor housing facility during the time of year they are at the facility, and that can tolerate the range of temperatures and climatic conditions known to occur at the facility without stress our discomfort, and specifically:

(i) February 25, 2003. Two spider monkeys, two lemurs, one baboon, seven capuchin monkeys, two macaques, and four vervet monkeys housed in outdoor enclosures, without the attending veterinarian having determined that the animals were acclimated to the prevailing weather conditions, exhibited symptoms of discomfort and stress (shivered and appeared hypothermic) related to the prevailing climatic conditions.

(ii) February 26, 2003. Four spider monkeys and seven capuchin monkeys housed in outdoor enclosures, without the attending veterinarian having determined that the animals were acclimated to the prevailing weather conditions, exhibited symptoms of discomfort and stress (shivered and appeared hypothermic) related to the prevailing climatic conditions.

g. Respondent failed to provide nonhuman primates housed outdoors with adequate shelter from the elements at all times, and specifically:

(i) February 25, 2003. Respondent failed to provide any heat to two

spider monkeys, two lemurs, one baboon, seven capuchin monkeys, two macaques, and four vervet monkeys when the ambient temperature was below 45 degrees Fahrenheit.

(ii) February 26, 2003. Respondent failed to provide minimally-adequate shelter (including bedding and wind and rain breaks) and heat to four spider monkeys, seven capuchin monkeys, three vervet monkeys, a baboon, and rhesus monkeys when the ambient temperature was below 40 degrees Fahrenheit.

(iii) August 12, 2004. Respondent failed to provide minimally-adequate shelter for four spider monkeys; the animals' sole means of shelter (a plastic barrel and wood box) were too small to accommodate all four animals and lacked wind and rain breaks.

h. Respondent failed to house nonhuman primates in enclosures that provide the minimum space requirements, and specifically:

(i) On or about February 6, 2003. Respondent housed three infant monkeys (two capuchin monkeys and one macaque) in an enclosure that lacked minimally-adequate space, thereby depriving the animals of the ability to make normal postural adjustments with adequate freedom of movement.

(ii) May 26, 2004. Respondent housed four infant macaques in enclosures that lacked minimally-adequate space, thereby depriving the animals of the ability to make normal postural adjustments with adequate freedom of movement.

j. Respondent failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian, and that is available to APHIS upon request, and specifically:

(i) May 23, 2002. Respondent failed to make her written plan for environment enhancement available to APHIS officials during their inspection of her facility and failed to provide five capuchin monkeys with species-typical enrichment activities, including elevated perches and cage complexities.

(ii) On or about February 6, 2003. Respondent failed to provide any environment enhancement to three infant monkeys (two capuchin monkeys and one macaque).

(iii) August 28, 2003. Respondent failed to make her written plan for environment enhancement available to APHIS officials during their inspection of her facility.

(iv) May 26, 2004. Respondent failed to make her written plan for environment enhancement available to APHIS officials during their

inspection of her facility and failed to provide spider monkeys with species-typical enrichment activities, including ropes or brachiating structure.

11. Respondent violated the Regulations and Standards by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, as follows:

a. Respondent failed to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain them in good repair to protect the animals from injury and to contain the animals, and specifically:

(i) February 26, 2003. Respondent risked injury to her animals by failing to provide any housing for a camel that roamed throughout the facility and was exposed to, among other things, numerous electrical cords and by housing a juvenile blackbuck antelope in an enclosure that contained sharp, protruding chain link fencing.

(ii) August 12, 2004. Respondent failed to house animals in enclosures that protect them from injury by housing a juvenile cougar and juvenile tiger in enclosure that contained holes and gaps in the floor and Patagonian cavies and crested porcupines in enclosures that had floors with exposed, sharp, protruding wires.

b. On or about February 6, 2003. Respondent failed to make provisions for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris and to provide and operate disposal facilities as to minimize vermin infestation, odors, and disease hazards, and specifically, failed to remove animal and food waste, old bedding, and a dead animal from enclosures housing three kinkajous and twenty-eight sugar gliders.

c. Respondent failed to construct a perimeter fence that restricts animals and unauthorized persons from going through or under it and having contact with the animals in the facility, and that acts as a secondary containment system for animals in the facility, and specifically:

(i) February 25, 2003. Respondent failed to construct and maintain a perimeter fence around three kangaroos, a juvenile blackbuck antelope and a camel.

(ii) February 26, 2003. Respondent failed to construct and maintain a perimeter fence around three kangaroos and three porcupines.

d. Respondents failed to provide animals with food that is wholesome, palatable, free from contamination and of sufficient quantity and nutritive value to maintain good animal health, that is prepared with consideration for the age, species, condition, size, and type of animal,

and that is located so as to be accessible to all animals in the enclosure and placed so as to minimize contamination, and specifically:
(i) On or about February 6, 2003. Respondent failed to provide twenty-eight sugar gliders with food of sufficient quantity and nutritive value to maintain good animal health; all of the animals ate voraciously when offered food and many appeared malnourished and underweight.
(ii) May 26, 2004. Respondent fed cavies, African porcupines, and capybaras decaying cabbage.
e. On or about February 6, 2003. Respondent failed to make potable water accessible to the animals at all times, or as often as necessary for the animals' health and comfort, and to keep water receptacles clean and sanitary, and specifically, provided a small amount (if any) of dirty water to twenty-eight sugar gliders; when offered water the animals drank thirstily.
f. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of animals, minimize disease hazards, and reduce odors, and specifically:
(i) On or about February 6, 2003. Respondent housed three kinkajous in an enclosure that contained excessive feces.
(ii) February 25, 2003. Respondent housed two kinkajous in an enclosure that contained excessive feces.
(iii) February 26, 2003. Respondent housed two kinkajous in an enclosure that contained excessive feces.
g. Respondent failed to utilize a sufficient number of adequately-trained employees to maintain the professionally acceptable level of husbandry practices, under the supervisor who has a background in animal care, and specifically:
(i) On or about February 6, 2003. Respondent's one unsupervised employee was unable to provide minimally-adequate care and husbandry to her animals as evidenced by the condition of the animals and their enclosures.
(ii) February 25, 2003. Respondent's one unsupervised, part-time employee was unable to provide minimally-adequate care and husbandry to her animals as evidenced by the excessive feces and food in the animals' enclosures and lack of basic shelter.
(iii) February 26, 2003. Respondent's one unsupervised, part-time employee was unable to provide minimally-adequate care and husbandry to her animals as evidenced
by the excessive feces and food in the animals' enclosures and lack of basic shelter.

CONCLUSIONS OF LAW

1. The Secretary had jurisdiction over this matter.

2. Respondent willfully violated the attending veterinarian and veterinary care regulations (9 C.F.R. § 2.40), as follows:
a. On May 23, 2002, August 28, 2003, and September 29, 2003, respondent failed to comply with sections 2.40(a)(1) and 2.126(a)(2) of the Regulations. (9 C.F.R. §§ 2.40(a)(1), 2.126(a)(2)).
b. On May 23, 2002, on or about February 6, 2003, February 25, 2003, February 26, 2003, August 28, 2003, and September 29, 2003, respondent failed to comply with sections 2.40(a) and 2.40(b)(1), (2) of the Regulations. (9 C.F.R. §§ 2.40(a), 2.40(b)(1), (2)).
c. On or about May 23, 2002, respondent failed to comply with sections 2.40(a) and 2.40(b)(3) of the Regulations. (9 C.F.R. §§ 2.40(a), 2.40(b)(3)).

3. On May 23, 2002, August 28, 2003, September 29, 2003, and May 26, 2004, respondent willfully violated sections 2.75(b)(1) and 2.126(a)(2) of the Regulations by failing to make, keep, and maintain records which fully and correctly disclose information concerning animals in her possession. (9 C.F.R. §§ 2.75(b)(1), 2.126(a)(2)).

4. On February 25, 2003, and February 26, 2003, respondent willfully violated section 2.131(e) of the handling regulations by failing to take appropriate measures to alleviate the impact of climatic conditions that present a threat to an animal's health or well-being. (9 C.F.R. § 2.131(e)).

5. On or about February 6, 2003, respondent willfully violated section 2.131(b) of the handling regulations by failing to handle animals as expeditiously and carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort. (9 C.F.R. § 2.131(b)).

6. Respondent willfully violated section 2.100(a) of the Regulations and Standards by failing to meet the minimum facilities and operating standards for nonhuman primates (9 C.F.R. § 3.75-3.92), as follows:
a. Respondent failed to construct and maintain housing facilities for nonhuman primates that are structurally sound for the species of nonhuman primates housed therein, maintained in good repair, and that protect the animals from injury and contain them, and specifically:
(i) On May 23, 2002, respondent failed to comply with sections 2.100(a), 3.75(a) and 3.80(a)(2)(ii) of the Regulations and Standards.

(9 C.F.R. §§ 2.100(a), 3.75(a), 3.80(a)(2)(ii)).
(ii) On February 26, 2003, respondent failed to comply with sections 2.100(a), 3.75(a) and 3.80(a)(2)(i),(ii) of the Regulations and Standards. (9 C.F.R. §§ 2.100(a), 3.75(a), 3.80(a)(2)(i),(ii)).
(iii) On May 26, 2004, respondent failed to comply with sections 2.100(a), 3.75(a) and 3.80(a)(2)(iii) of the Regulations and Standards. (9 C.F.R. §§ 2.100(a), 3.75(a), 3.80(a)(2)(iii)).
(iv) On August 12, 2004, respondent failed to comply with sections 2.100(a), 3.75(a), 3.75(c) and 3.80(a)(2)(iii) of the Regulations and Standards. (9 C.F.R. §§ 2.100(a), 3.75(a), 3.75(c), 3.80(a)(2)(iii)).
b. On August 28, 2003, and May 26, 2004, respondent failed to comply with sections 2.100(a) and 3.75(b) of the Regulations and Standards by failing to keep housing facilities and areas used for storing animal food or bedding free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. (9 C.F.R. §§ 2.100(a), 3.75(b)).
c. On May 26, 2004, respondent failed to comply with sections 2.100(a), 3.75(c) and 3.80(a)(2)(i),(ii) & (ix) of the Regulations and Standards by failing to construct and maintain all surfaces of nonhuman primate facilities in a manner and of materials that protect the animals from injury, and that allow them to be readily cleaned and sanitized. (9 C.F.R. §§ 2.100(a), 3.75(c), 3.80(a)(2)(i),(ii) & (ix)).
d. On February 25, 2003, February 26, 2003, August 28, 2003, September 29, 2003, and May 26, 2004, respondent failed to comply with sections 2.100(a), 3.75(c)(3), 3.80(a)(2)(v) and 3.84(a) of the Regulations and Standards by failing to spot-clean hard surfaces of primary enclosures for nonhuman primates daily to prevent accumulation of excreta or disease hazards. (9 C.F.R. §§ 2.100(a), 3.75(c)(3), 3.80(a)(2)(v), 3.84(a)).
e. On February 25, 2003, February 26, 2003, and May 26, 2004, respondent failed to comply with sections 2.100(a) and 3.75(e) of the Regulations and Standards by failing to store supplies of food and bedding in manner that protected the supplies from spoilage, contamination, and vermin infestation. (9 C.F.R. §§ 2.100(a), 3.75(e)).
f. On February 25, 2003, and February 26, 2003, respondent failed to comply with sections 2.100(a) and 3.78(a) of the Regulations and Standards by failing to only house nonhuman primates that are acclimated, as determined by the attending veterinarian, to the prevailing temperature and humidity at the outdoor housing facility during the time of year they are at the facility, and that can tolerate the range of temperatures and climatic conditions known to occur at the facility without stress or discomfort. (9 C.F.R. §§ 2.100(a), 3.78(a)).
g. On February 25, 2003, February 26, 2003, and August 12, 2004,

respondent failed to comply with sections 2.100(a), 3.78(b) and 3.80(a)(2)(vi) of the Regulations and Standards by failing to provide nonhuman primates housed outdoors with adequate shelter from the elements at all times. (9 C.F.R. §§ 2.100(a), 3.78(b), 3.80(a)(2)(vi)).
h. On or about February 6, 2003, and May 26, 2004, respondent failed comply with sections 2.100(a), 3.80(a)(xi), 3.80(b)(2)(i) and 3.87(e) of the Regulations and Standards by failing to house nonhuman primates in enclosures that provide the minimum space requirements. (9 C.F.R. §§ 2.100(a), 3.80(a)(xi), 3.80(b)(2)(i), 3.87(e)).
j. Respondent failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian, and that is available to APHIS upon request, and specifically:
(i) On May 23, 2002, and May 26, 2004, respondent failed to comply with sections 2.126(a)(2), 2.100(a), 3.81 and 3.81(b) of the Regulations and Standards. (9 C.F.R. §§ 2.126(a)(2), 2.100(a), 3.81, 3.81(b)).
(ii) On or about February 6, 2003, respondent failed to comply with sections 2.126(a)(2), 2.100(a), 3.81 and 3.81(c)(1) of the Regulations and Standards. (9 C.F.R. §§ 2.126(a)(2), 2.100(a), 3.81, 3.81(c)(1)).
(iii) On August 28, 2003, respondent failed to comply with sections 2.126(a)(2), 2.100(a) and 3.81 of the Regulations and Standards. (9 C.F.R. §§ 2.126(a)(2), 2.100(a), 3.81).

7. Respondent willfully violated section 2.100(a) of the Regulations and Standards by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.142), as follows:
a. On February 26, 2003, and August 12, 2004, respondent failed to comply with sections 2.100(a) and 3.125(a) of the Regulations and Standards by failing to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain them in good repair to protect the animals from injury and to contain the animals. (9 C.F.R. §§ 2.100(a), 3.125(a)).
b. On or about February 6, 2003, respondent failed to comply with sections 2.100(a) and 3.125(d) of the Regulations and Standards by failing to make provisions for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris and to provide and operate disposal facilities as to minimize vermin infestation, odors, and disease hazards. (9 C.F.R. §§ 2.100(a), 3.125(d)).

c. On February 25, 2003 and February 26, 2003, respondent failed comply with sections 2.100(a) and 3.127(d) of the Regulations and Standards by failing to construct a perimeter fence that restricts animals and unauthorized persons from going through or under it and having contact with the animals in the facility, and that acts as a secondary containment system for animals in the facility. (9 C.F.R. §§ 2.100(a), 3.127(d)).

d. On or about February 6, 2003 and May 26, 2004, respondent failed to comply with sections 2.100(a) and 3.129(a) of the Regulations and Standards by failing to provide animals with food that is wholesome, palatable, free from contamination and of sufficient quantity and nutritive value to maintain good animal health, that is prepared with consideration for the age, species, condition, size, and type of animal, and that is located so as to be accessible to all animals in the enclosure and placed so as to minimize contamination. (9 C.F.R. §§ 2.100(a), 3.129(a)).

e. On or about February 6, 2003, respondent failed to comply with sections 2.100(a) and 3.130 of the Regulations and Standards by failing to make potable water accessible to the animals at all times, or as often as necessary for the animals' health and comfort, and to keep water receptacles clean and sanitary. (9 C.F.R. §§ 2.100(a), 3.130).

f. On or about February 6, 2003, February 25, 2003, and February 26, 2003, respondent failed to comply with sections 2.100(a) and 3.131(a) of the Regulations and Standards by failing to remove excreta from primary enclosures as often as necessary to prevent contamination of animals, minimize disease hazards, and reduce odors. (9 C.F.R. §§ 2.100(a), 3.131(a)).

g. On or about February 6, 2003, February 25, 2003, and February 26, 2003, respondent failed to comply with sections 2.100(a), 3.85 and 3.132 of the Regulations and Standards by failing to utilize a sufficient number of adequately-trained employees to maintain the professionally acceptable level of husbandry practices, under the supervisor who as a background in animal care. (9 C.F.R. §§ 2.100(a), 3.85, 3.132).

ORDER

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

2. Respondent is assessed a civil penalty of $16,280. The civil penalty shall be paid by certified check or money order made payable to

the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this order on Respondent. Respondent shall state on her certified check or money order that the payment is in reference to AWA Docket No. 05-0032.

3. Animal Welfare Act license numbers 74-C-0406 and 74-B-0530 are hereby revoked.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

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In re: MARJORIE AND HAROLD WALKER, d/b/a LINN CREEK KENNEL.
AWA Docket No. 04-0021.
Default Decision and Order.
Filed May 25, 2006.

AWA – Default.
Sharlene Deskins for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

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 a Complaint filed by

the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondents willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq*.).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon Respondents by certified mail on July 26, 2004. Respondents were informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondents failed to file an answer to the Complaint within the time prescribed in Section 1.136(a) of the Rules of Practice, 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice, 7 C.F.R. § 1.136(c) provides 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. Marjorie Walker and Harold Walker, hereinafter referred to as Respondents, are individuals doing business as Linn Creek Kennel whose address is P. O. Box 107, Gentry, Missouri 64453.

B. The Respondents, at all times material hereto, were licensed and operating as a dealer as defined in the Act and the regulations.

II

A. On or about March 5, 2001, the Respondents transported puppies in interstate commerce without valid health certificates, in willful violation of section 2.78(a) and (c) of the regulations (9 C.F.R. § 2.78(a) and (c)).

III

A. On July 9, 2001, APHIS inspected Respondents' premises and records and found that Respondents transported puppies in interstate commerce without valid health certificates, in willful violation of section 2.78(a) of the regulations (9 C.F.R. § 2.78(a)).

IV

A. On November 5, 2001, the Respondents transported puppies in interstate commerce that were not eight weeks of age, in willful violation of section 2.130 of the regulations (9 C.F.R. § 2.130).

V

A. On November 15, 2001, APHIS inspected Respondents' premises and records and found that the Respondents failed to identify dogs, in willful violation of section 2.50(a)(1) of the regulations (9 C.F.R. § 2.50(a)(1)).

B. On November 15, 2001, APHIS inspected Respondents' premises and records and found that the Respondents failed to make and maintain records which correctly disclosed required information for dogs held at the facility, in willful violation of section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

C. On November 15, 2001, APHIS inspected the Respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondents failed to provide housing facilities for dogs that were in good repair and which protected the dogs from injury (9 C.F.R. § 3.1(a)); and

2. Respondents failed to adequately clean and sanitize water receptacles (9 C.F.R. § 3.10).

VI

A. On November 27, 2001, APHIS inspected the Respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondents failed to position primary enclosures for puppies and kittens in a manner that allowed the puppies and kittens to be easily

and quickly removed in the case of an emergency (9 C.F.R. § 3.15(f)).

VII

A. On January 16, 2002, APHIS inspected Respondents' premises and records and found that Respondents had failed to identify dogs, in willful violation of section 2.50(a)(1) of the regulations (9 C.F.R. § 2.50(a)(1)).

B. On January 16, 2002, APHIS inspected the Respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondents failed to provide clean, dry bedding for dogs that were wet when the temperature was in the upper 20 Fahrenheit range (9 C.F.R. § 3.4(b)(4)); and

2. Respondents failed to remove excreta from primary enclosures on a daily basis (9 C.F.R. § 3.11(a)).

VIII

A. On March 18, 2002, the Respondents transported puppies in interstate commerce that were not eight weeks of age, in willful violation of section 2.130 of the regulations (9 C.F.R. § 2.130).

IX

A. On April 1, 2002, the Respondents transported puppies in interstate commerce that were not eight weeks of age, in willful violation of section 2.130 of the regulations (9 C.F.R. § 2.130).

B. On April 1, 2002, APHIS inspected Respondents' premises and records and found that Respondents transported seventy-seven puppies in interstate commerce without valid health certificates, since the health certificates were not dated in willful violation of section 2.78(a) of the regulations (9 C.F.R. § 2.78(a)).

X

A. On July 18, 2002, APHIS inspected Respondents' premises and records and found that Respondents 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)).

B. On July 18, 2002, APHIS inspected Respondents' premises and records and found that Respondents had failed to identify dogs, in willful violation of section 2.50(a)(3) and (b)(1) of the regulations (9 C.F.R. § 2.50(a)(3) and (b)(1)).

C. On July 18, 2002, APHIS inspected Respondents' premises and records and found that Respondents had failed to make and maintain records which correctly disclosed required information for dogs held at the facility, in willful violation of section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

D. On July 18, 2002, APHIS inspected the Respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondents failed to provide housing facilities that were structurally sound and maintained to secure the dogs and protect them from injury (9 C.F.R. § 3.1(a));

2. Respondents failed to provide outdoor housing that provided shelter from the elements for all dogs located outside (9 C.F.R. § 3.4(b));

3. Respondents failed to provide dog enclosures that had coated wire floors or were more than 1/8 of an inch in diameter (9 C.F.R. § 3.6(a)(2)(xii));

4. Respondents failed to remove excreta and food waste from primary enclosures on a daily basis (9 C.F.R. § 3.11(a)); and

5. Respondents failed to properly clean and sanitize water and food receptacles and primary enclosures (9 C.F.R. § 3.11(b)(2)).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the Respondents have 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. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder, and in

particular, shall cease and desist from:

(a) 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 for the regular and frequent collection, removal, and disposal of animal and food wastes, in a manner that minimizes contamination and disease risks;

(c) Failing to construct and maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary;

(d) Failing to provide animals with adequate shelter from the elements;

(e) Failing keep food and water receptacles clean and sanitized;

(f) 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;

Failing to individually identify animals, as required;

(h) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required;

(i) Transporting animals in interstate commerce without valid health certificates;

(j) Transporting animals in interstate commerce that are not eight weeks of age;

(k) Failing to transport animals in primary enclosures that allowed the animals to be quickly removed in an emergency;

(l) Failing to provide clean, dry bedding for animals; and

(m) Failing to provide dog enclosures that have coated wire floors or that are more than an 1/8 inch in diameter.

2. The Respondents are jointly and severally assessed a civil penalty of $13,500, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. The Respondents' license is suspended for 30 days and continuing thereafter until the Respondents demonstrate to the Animal and Plant Health Inspection Service that they are in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein. When the Respondents demonstrate to the Animal and Plant Health Inspection Service that they

have satisfied this condition and paid the civil penalty in full, a supplemental order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension.

The provisions of this Order shall become effective on the first day after service of this decision on the Respondents.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in 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.

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DEFAULT DECISIONS

PLANT QUARANTINE ACT

In re: JOHN M. BRUCE, d/b/a ST. JOHN GROUP
P.Q. Docket No. 04-0015.
Decision and Order.
Filed April 17, 2006.

P.Q. – Default.

James Booth for Complainant.
Respondent, Pro se.
Decision and Order by Administration Law Judge Peter M. Davenport.

DECISION and ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the prohibition of the importation of fresh limes into the United States (7 C.F.R. § 319.56 *et seq*. and § 330.105 *et seq*.) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701-7772)(Act), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service on September 17, 2004, alleging that the respondent violated the Act and regulations promulgated under the Acts (7 C.F.R. § 319.56 *et seq*. and § 330.105 *et seq*.).
The complaint sought civil penalties as authorized by section 424 of the Plant Protection Act (7 U.S.C. § 7734). This complaint specifically alleged that the respondent imported a truck load (approximately 37,000 lbs) of fresh limes from Mexico into the United States at Laredo, Texas, and upon arrival at the port of first arrival failed to notify USDA of the permit for the shipment of fresh limes and other required information regarding the shipment; failed to offer the shipment of fresh limes for entry into the United States; failed to have the shipment of fresh limes inspected at the port of first arrival; failed to have the shipment properly release by a USDA inspector; and removed the shipment of fresh limes from the port of first arrival before the shipment had been inspected and released for movement by a USDA inspector.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). In fact, the respondent has not filed any answer whatsoever. Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. John M. Bruce, d.b.a St. John Group, hereinafter referred to as the respondent, is an individual whose mailing address is 711 Timber Lane, Laredo, Texas, 78045.

2. On or about June 30, 2000, the respondent imported a truck load (approximately 37,000 lbs) of fresh limes from Mexico into the United States at Laredo, Texas, and upon arrival at the port of first arrival (Laredo, TX) failed to notify USDA of the permit for the shipment of fresh limes (U.S. Customs entry # AY1-0001746-8) and other required information regarding the shipment in violation of 7 C.F.R. § 319.56-5(a); and failed to offer the shipment of fresh limes for entry into the United States in violation of 7 C.F.R. § 319.56-6(b).

3. On or about June 30, 2000, the respondent imported a truck load (approximately 37,000 lbs) of fresh limes from Mexico into the United States at Laredo, Texas, without having the shipment of fresh limes inspected at the port of first arrival in violation of 7 C.F.R. § 319.56-6(a); and failed to have the shipment properly release by a USDA inspector at the port of first arrival in violation of 7 C.F.R. § 330.105(a).

4. On or about June 30, 2000, the respondent imported a truck load (approximately 37,000 lbs) of fresh limes from Mexico into the United States at Laredo, Texas, and removed the shipment of fresh limes from the port of first arrival before the shipment had been inspected and released for movement by a USDA inspector in violation of 7 C.F.R. § 319.56-6(d).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. § 319.56 *et seq*.). Therefore, the following Order is issued.

Order

The respondent, John M. Bruce, d.b.a St. John Group, is assessed a civil penalty of three thousand dollars ($3,000.00). The respondent shall pay three thousand dollars ($3,000.00) as a civil penalty. This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 04-0015

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 7 C.F.R. § 1.145 of the Rules of Practice.

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In re: FONONGA LELENOA.
P.Q. Docket No. 06-0003.
Decision and Order.
Filed April 20, 2006.

P.Q. – Default.

Krishna G. Ramaraju for Complainant
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of flowers from Hawaii into the Continental United States (7 C.F.R. §§ 318.13 *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 7 C.F.R. §§ 380.1 *et seq*.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701 *et seq*)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on October 19, 2005, alleging that respondent Fononga Lelenoa violated the Act and regulations promulgated under the Acts (7 C.F.R. §§ 318.13 *et seq*.).

The complaint sought civil penalties as authorized by 7 U.S.C. § 7734. This complaint specifically alleged that on or about May 1, 2003, at Honolulu, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service, approximately 0.40 pounds of fresh tuberose flowers (*polianthes tuberosa*) (1 jade-colored *lei*) for shipment from Hawaii into the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Fononga Lelenoa, hereinafter referred to as respondent, is an individual with a mailing address of 1527 Pohaku Street, Honolulu, Hawaii 96817.

2. On or about May 1, 2003, at Honolulu, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service,

approximately 0.40 pounds of fresh tuberose flowers (*polianthes tuberosa*) (1 jade-colored *lei*) for shipment from Hawaii into the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. §§ 318.13 *et seq*). Therefore, the following Order is issued.

Order

Respondent Fononga Lelenoa is assessed a civil penalty of five hundred dollars ($500). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 06-0003.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

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In re: EMILYN QUIMOYOG.
P.Q. Docket No. 06-0002.
Decision and Order.
Filed April 21, 2006.

P.Q. – Default.

Krishna G. Ramaraju for Complainant.

Respondent, Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

DECISION and ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of vegetables from Hawaii into the Continental United States (7 C.F.R. §§ 318.13 *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 7 C.F.R. §§ 380.1 *et seq*..

This proceeding was instituted under the Plant Protection Act (7 U.S.C. § 7701 *et seq*)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on October 19, 2005, alleging that respondent Emilyn Quimoyog violated the Act and regulations promulgated under the Acts (7 C.F.R. § 318.13 *et seq*.).

The complaint sought civil penalties as authorized by 7 U.S.C. § 7734. This complaint specifically alleged that on or about August 21, 2003, at Waianae, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service, approximately 1.8 pounds of fresh moringa pods (*Moringa sp.*) for shipment from Hawaii into the continental United States, in violation of 7 C.F.R. 318.13(b) and 318.13-2(a).

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Emilyn Quimoyog, hereinafter referred to as respondent, is an individual with a mailing address of 84-1005 Kaulaili Road, Waianae, Hawaii 96792.

2. On or about August 21, 2003, at Waianae, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service, approximately 1.8 pounds of fresh moringa pods (*Moringa sp.*) for shipment from Hawaii into the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. §§ 318.13 *et seq*). Therefore, the following Order is issued.

Order

Respondent Emilyn Quimoyog is assessed a civil penalty of five hundred dollars ($500). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 06-0002.

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 7 C.F.R. § 1.145 of the Rules of Practice.

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In re: LOUIS A. BARRERA.
P.Q. Docket No. 06-0010.
Decision and Order.
Filed April 21, 2006.

P.Q. – Default.

Carylnne S. Cockrum for Complainant.
Respondent, Pro se.
Decision and Order 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 Plant Protection Act of June 20, 2000, as amended (7 U.S.C. §§ 7701 *et seq*.)(the Act), in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*.

This proceeding was instituted under the Act by a complaint filed on December 12, 2005, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture and served by certified mail on respondent Luis A. Barrera on December 20, 2005. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), respondent Luis A. Barrera was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Respondent's answer thus was due no later than January 9, 2006, twenty days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent Luis A. Barrera never filed an answer to the complaint and the Hearing Clerk's Office mailed him a No Answer Letter on February 14, 2006.

Therefore, respondent Luis A. Barrera failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and failed to deny or otherwise respond to the allegations of the complaint. Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) or to deny or otherwise respond to the allegations of the complaint shall be deemed an admission of the allegations in the complaint. Furthermore, since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and respondent's failure to file an answer is deemed such an admission pursuant to the Rules of Practice, respondent's failure to answer is likewise deemed a waiver of hearing. Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Luis A. Barrera, herein referred to as respondent, is an individual with an address of 1784 5th Avenue, BXC 46, Bayshore, NY 11706.

2. On or about March 2, 2004, the respondent, in violation of Section 412 (a) of the Act (7 U.S.C. § 7712 (a)) and Section 319.56 of the Code of Federal Regulations (7 C.F.R. § 319.56), imported one kilogram of mangoes from El Salvador.

Conclusion

By reason of the Findings of Fact set forth above, Luis A. Barrera has violated the Act. Therefore, the following Order is issued.

Order

Respondent Luis A. Barrera 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 Luis A. Barrera shall indicate that payment is in reference to P.Q. Docket No. 06-0010.

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 Luis A. Barrera 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).

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In re: CYNTHIA E. LAIDLEY
P.Q. Docket No. 06-0011.
Default Decision.
Filed May 11, 2006.

P.Q. – Default.

Carlynne S. Cockrum for Complainant.
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson

DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Protection Act of June 20, 2000, as amended (7 U.S.C. §§ 7701 *et seq*.)(the Act), in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*.

This proceeding was instituted under the Act by a complaint filed on December 12, 2005, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture and served by certified mail on respondent Cynthia E. Laidley on December 15, 2005. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), respondent Cynthia E. Laidley was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Respondent's answer thus was due no later than January 4, 2006, twenty days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent Cynthia E. Laidley never filed an answer to the complaint and the Hearing Clerk's Office mailed her a No Answer Letter on January 11, 2006.

Thereafter, on January 26, 2006, Complainant filed a Motion for Adoption of Proposed Default Decision and Order together with the Proposed Default Decision and Order. Subsequently, on February 6, 2006, Ms. Laidley filed with the Hearing Clerk's Office a letter along with a check for one hundred dollars ($100.00). The letter did not clearly admit, deny, or explain the specific allegations of the complaint, as required section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).

Therefore, respondent Cynthia E. Laidley failed to file an answer as 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

denying or otherwise responding to the allegations of the complaint shall be deemed an admission of the allegations in the complaint. Furthermore, since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and respondent's failure to file an answer is deemed such an admission pursuant to the Rules of Practice, respondent's failure to answer is likewise deemed a waiver of hearing. Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Cynthia E. Laidley, herein referred to as respondent, is an individual with an address of 4025 Murdock Avenue, Bronx, NY 10466.

2. On or about August 1, 2002, the respondent, in violation of Section 412 (a) of the Act (7 U.S.C. § 7712 (a)) and Section 319.56 of the Code of Federal Regulations (7 C.F.R. § 319.56), imported twelve (12) mangoes, ten (10) sweet sop, and two (2) bags of fresh thyme from Jamaica.

Conclusion

By reason of the Findings of Fact set forth above, Cynthia E. Laidley has violated the Act. Therefore, the following Order is issued.

Order

Respondent Cynthia E. Laidley is hereby assessed a civil penalty of one hundred dollars ($100.00). 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 Cynthia E. Laidley 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).

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In re: WENDY MILLER.
P.Q. Docket No. 05-0024
Decision and Order.
Filed May 15, 2006.

P.Q. – Default.

James Booth for Complainant.
Respondent Pro se.
Decision and Order by Chief Administrative Judge Marc R. Hillson.

DECISION and ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the prohibition of the importation of avocados and fresh fruit from Hawaii into the continental United States (7 C.F.R. § 318.13 *et seq*.) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701-7772)(Act), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service on May 27, 2005, alleging that the respondent violated the Act and regulations promulgated under the Acts (7 C.F.R. § 319.56 *et seq*.). The complaint sought civil penalties as authorized by section 424 of the Plant Protection Act (7 U.S.C. § 7734).

The complaint alleged that the respondent illegally shipped approximately one pound of fresh avocados and one half of a pound of fresh passion fruit for shipment from Hawaii to the continental United States.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). In fact, the respondent has not filed any answer. Section 1.136(c) of the Rules of Practice
(7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Wendy Miller, hereinafter referred to as the respondent, is an individual whose mailing address is 5111 Hanawai Street, Apt. F, Lahaina, Hawaii 96761B9144.

2. On or about January 11, 2001, at Haiku, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service, approximately one pound of fresh avocados and one half of a pound of fresh passion fruit for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a)(1), because movement of these items into or through the continental United States is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. § 318.13 *et seq*). Therefore, the following Order is issued.

Order

The respondent, Wendy Miller, is assessed a civil penalty of five hundred dollars ($500.00). The respondent shall pay five hundred dollars ($500.00) as a civil penalty. This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 05-0024

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 7 C.F.R. § 1.145 of the Rules of Practice.

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CONSENT DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

Jose Luis Torres and Fernando Torres. AMAA Docket No. 04-0003. 4/7/06.

Navarette Produce Co., LLC. AMAA Docket No 06-0002. 6/07/06.

ANIMAL QUARANTINE ACT

My Van Nguyen. AQ Docket 06-0005. 2/10/06.

John R. Malouff d/b/a M & M Livestock. A.Q. Docket No 06-0001. 5/15/06.

ANIMAL WELFARE ACT

Jeannine L. Peter d/b/a LoBraDira Lovin Pups. AWA Docket No. 04-0025. 1/24/06.

Joe Schreibvogel and G.W. Exotic Animal Memorial Foundation. AWA Docket 05-0014. 1/26/06

Ronald Armitage, Arbuckle & Ozarks Development Company d/b/a Animal
Paradise. AWA Docket No. 05-0033. 1/30/06.

Sandra L. Smith, Kenneth R. Smith and Wesa-A-Geh-Ya Zoo. AWA Docket No. 05- 0004. 3/1/06.

Diana R. McCourt, a/k/a Diana R. Cziraky, Siberian Tiger Conservation. AWA
Docket No. 05-0003. 3/21/06.

Cynthia Palm, Michael Evers, and M & C Exotics. AWA Docket No. 04-0030.
4/17/06.

Craig A. Perry, et al, Consent as to American Furniture Warehouse, Inc. AWA
Docket No. 05-0026. 4/21/06.

Carolyn D. Atchison. AWA Docket No. 05-0015. 5/22/06.

Ben Korn. AWA Docket No 04-0033. 5/25/06.

Mary Amborn d/b/a Greenspace Kennel. AWA Docket No 05-0031. 6/02/06.

Lightening Ranch and Wildlife Preserve, Inc, Lance Williams, Staci Williams. AWA Docket No. 05-0022. 6/12/06.

Richard and Donna Wilcox d/b/a R & D Kennels. AWA Docket No. 05-0010. 6/27/06.

Larry Paris d/b/a Circle P. Kennels. AWA Docket No. 05-0012. 6/30/06.

FEDERAL CROP INSURANCE ACT

Jackson, Cris A.d/b/a Double J Farms. FCIA Docket No. 04-0004. 1/4/06.

William D. Smith, et al. FCIA Docket No. 05-0009. 4/20/06.

Steve Maurer. FCIA Docket No 06-0005. 5/19/06.

Arthur Dagemjian. FCIA Docket No 05-0010. 5/24/06.

Robert Plueger. FCIA Docket No 06-0004. 5/26/06.

FEDERAL MEAT INSPECTION ACT

Billings Meats and Processing Plant and Terry R. Billings. FMIA Docket No. 06-0004. 4/12/06.

Champlain Beef Company, Inc. FMIA Docket No 06-0003. 5/09/06.

Chehade Sabbouh, Washington Lamb, Inc. FMIA Docket No. 06-0005/ PPIA Docket No. 06-0003. 6/09/06.

HORSE PROTECTION ACT

Grandy Tuck, Burl J. Dale, Charles Dale, Barbara Dale, and Spring Dale Farms, Inc. HPA Docket No. 03-0003. 1/27/06.

Grandy Tuck. HPA Docket No 03-0003. 1/27/06.

Edward Rains and Janie Rains. HPA 05-0005. 2/1/06.

Mark Arnold Williams . HPA Docket No. 06-0005. 3/23/06.

Mark Arnold Williams. HPA Docket No. 06-0005. 4/06/06.

Sand Creek Farm, Inc. & Billy A. Gray. HPA Docket No. 01-0030. 4/25/06.

Sand Creek Farm, Inc. HPA Docket No. 01-C022. 4/25/06.

Mae Nettleship, Anderson Nettleship, Floyd Posenke. HPA Docket No. 06-0006. 6/05/06.

Chad Way, Chad Way Stables, Inc. HPA Docket No. 03-0005. 6/30/06.

PLANT QUARANTINE ACT

"R" Best Products, Inc. PQ Docket No 05-0002. 2/1/06.

Chazz Cox d/b/a Gateway Gardens. PQ Docket No. 06-0004. 2/15/06.

United Air Lines, Inc. PQ Docket No 04-0010. 4/24/06.

Inman A. Dahhan. PQ Docket No 05-0027. 6/12/06.

Maersk Sealand. PQ Docket No. 05-0001. 6/12/06.

POULTRY PRODUCTS INSPECTION ACT

House of Raeford Farms of Louisiana, LLC. PPIA Docket No. 05-0002. 2/17/06.

VETERINARIAN ACCREDITATION

Michael J. Chovanes. D.V.M. V.A. Docket No. 05-0001. 4/11/06.

AGRICULTURE DECISIONS

Volume 65

January - June 2006
Part Two (P & S)
Pages 381 - 393

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*.

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

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket 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*.

Consent decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions*. However, a list of consent decisions is included in the printed edition. Since Volume 62, the full text of consent decisions is posted on the USDA/OALJ website (See url below). Consent decisions are on file in portable document format (pdf) format and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (ALJ).

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

Beginning in Volume 60, each part of *Agriculture Decisions* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The Alphabetical List of Decisions Reported and the Subject Matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Volumes 57 (circa 1998) through the current volume of *Agriculture Decisions* are also available online at http://www.usda.gov/da/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 56 (circa 1997) have been scanned and will appear in pdf on the same OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order.

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Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1057 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

LIST OF DECISIONS REPORTED

JANUARY - JUNE 2006

PACKERS AND STOCKYARDS ACT

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PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

In re: LITTLE JOE LIVESTOCK MEATS, INC., AND JOSEPH PAGLIUSO, JR.
P & S Docket No. D-04-0005.
Decision and Order.
Filed January 3, 2006.

P&S – Insufficient funds – Failure to pay when due – Dishonored checks.

Ruben D. Rudolph for Complainant.
Paul M. Aloi for Respondent.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This is the third action was brought by the Grain Inspection Packers and Stockyards Administration (GIPSA) against the Respondents for violations of the provisions of the Packers and Stockyards Act of 1921, as amended and supplemented (7 U.S.C. § 181, *et seq*.) hereinafter referred to as the "Act" and the Regulations issued pursuant to the Act.[1] The Respondents have generally denied the allegations of the Complaint and a hearing was held in New York City, New York on November 8, 2005. The Complainant was represented by Ruben Rudolph, Esquire, Office of the General Counsel, United States department of Agriculture, Washington, D.C.

The Complaint alleges that between May 24, 2000 and January 8, 2001, the corporate Respondent, Little Joe Livestock Meats, Inc. and Respondent Joseph Pagliuso, Jr., its President and sole shareholder willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §213(a) and 7 U.S.C. § 228b) by issuing checks in payment for livestock without having sufficient funds on deposit and available in the account upon which to pay such checks when presented, and by failing to pay, when due, the full purchase price of the purchased livestock. The Respondents are also alleged to have violated section 401 of the Act (7 U.S.C. § 221) by failing to maintain adequate records that fully and correctly disclose all transactions involved in its business.

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[1] CX 4 and CX 5.

7 U.S.C. § 213(a) provides:

It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock.

7 U.S.C. § 228b requires payment of the full purchase price of livestock before the close of the next business day:

Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price.....

The record keeping requirements for licensees involved in the business of purchase and sale of livestock are contained in 7 U.S.C. § 221:

Every packer, any live poultry dealer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business....

The Respondents failed to appear at the hearing, either in person or by counsel,[2] and although a default decision could have been entered,

[2] The Respondents' Answer was submitted by Paul Aloi, an attorney who entered his appearance as counsel for the Respondents. After filing the Answer, he raised the possibility of settlement with government counsel. Thereafter, he failed to return telephone calls from the Administrative Law Judge's Secretary concerning his availability for participation in a Pre Hearing Conference or from government counsel concerning either settlement or dates for a hearing, he failed to comply with the Order concerning the filing of witness and exhibit lists with the Hearing Clerk and available dates with the Administrative Law Judge and Hearing Clerk, (Docket Entry No. 10, Notice of Exchange Dates entered July 18, 2005, modified by Docket Entry No. 13, Order entered on August 17, 2005), he failed to provide a witness or exhibit list or copies of any exhibits to government counsel and only in the late afternoon on the day before the hearing (after the Administrative Law Judge had departed for New York) without filing a Motion for a Continuance or Postponement of the hearing advised the Administrative Law Judge's office of his inability to appear based upon oral surgery which apparently had been performed on November 3, 2005. Under these circumstances, the hearing was conducted as scheduled without postponement. Even though no Order (continued...)

the Complainant elected to introduce the testimony of witnesses and produced documentary evidence which amply support the general allegations of both issuing checks which were returned unpaid by the bank upon which they were drawn as a result of insufficient funds being on deposit and failing to pay for cattle in a timely manner as alleged in the Complaint.[3] The transcript of the November 8, 2005 hearing (hereafter "Tr.") was filed on November 23, 2005. The Respondents were advised of their opportunity to inspect the transcript or to secure a copy from the Hearing Reporter, as well as being given an opportunity to respond to a Proposed Decision submitted by the Complainant; however no response has been received. A brief summary of the evidence introduced at the hearing follows.

The Complainant called Cindy J. Bertoli, a Resident Agent with the Packers and Stockyards Program, (hereinafter "P & SP") who testified concerning her investigation of the Respondents. Agent Bertoli testified that the investigation was initiated after her office received information that the Respondents had issued a number of checks which had been returned for insufficient funds. (Tr. at 12). She identified Exhibits CX 1-6 as information obtained from the records maintained by P & SP and the Respondents pertaining to Little Joe's Livestock Meats, Inc. (hereinafter "Little Joe") and Joseph Pagliuso, Jr. (hereinafter "Pagliuso").[4] As part of her investigation, she went to Pagliuso's

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[2](...continued)
was entered granting a continuance or postponement of the hearing, neither of the Respondents nor anyone else appeared on their behalf.

[3] As will be discussed, the documentary evidence does not fully support all of the allegations of the Complaint as there is some disparity in the proof as to the dates that NSF checks were issued; however, the general nature of the violations was clearly established. The evidence actually demonstrates that there were more instances of NSF checks being issued than were alleged.

[4] Included in those records were CX 1 which was described as the PS & P Business Report which was downloaded from the P & SP records database and a copy of the original Application for Registration for Little Joe's Livestock Meats, Inc. dated June 17, 1972 which reflected that Joseph Pagliuso, Jr. owned 100% of the stock of the corporation. CX 2 consists of copies of annual reports filed by the Respondent corporation for the year ended December 31, 1996, 2001, 2002 and 2004. (Tr. at 20). CX 3 included a copy of information downloaded from the New York State Department of State, identifying the entity information on file with the New York Department of State and copies of the stock certificates reflecting ownership of the corporation by (continued...)

business office and requested information concerning his cattle transactions. Pagliuso was able to provide the Cattle Transactions Logbook mandated by the State of New York and some of the requested information, but was unable to produce all of the records requested. Agent Bertoli was referred to Pagliuso's accountant who provided additional records but again not all of the information which had been requested. She then proceeded to contact the livestock exchanges where the Respondents had transacted business, Finger Lakes Livestock Exchange, Inc. (hereinafter "Finger Lakes") and the two locations of Empire Livestock Marketing, LLC. (Bath, New York and Pavilion, New York) (hereinafter "Empire"). (Tr. at 12-17).

At Finger Lakes, Agent Bertoli interviewed the office manager, Barbara Parker. (Tr. at 15). Ms. Parker produced additional records which were pertinent to the Respondents' transactions and explained the handwritten notations which had been made on the records. (Tr. at 15-16). Agent Bertoli also went to the locations of Empire and interviewed Robin Cross, the senior accountant and the two office managers at the two locations who provided records concerning their transactions with the Respondents and explained the notations on their records. (Tr. at 16-17). After obtaining the additional records from Finger Lakes and Empire, Agent Bertoli prepared two summaries, Exhibit CX 7, which summarized the instances of issuing Not Sufficient Funds ("NSF") checks for the purchases of cattle and Exhibit CX 14 which summarizes the instances of failure to pay for the purchases of cattle in a timely manner. (Tr. at 28, 69-70). Exhibits CX 8-13 contain copies of the documents supporting the summary in Exhibit CX 7, including copies of the deposit slips reflecting a deposit of check(s) from the Respondents, copies of the bank statements reflecting charge backs of the amounts of the checks with the handwritten notations referencing that the charge backs were those written by the Respondents as well as copies of the NSF checks themselves bearing the bank stamps reflecting that the checks had been returned for insufficient funds.

In Paragraph II (a) of the Complaint, the Complainant identified purchases made on five dates for which the Respondents issued checks

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[4](...continued)
Joseph Pagliuso, Jr. obtained from Mr. Pagliuso and his accountant. (Tr. at 23-24). CX 4 and 5 are copies of the prior Consent Decisions entered on May 15, 1987 and November 14, 1996. (Tr. at 22). CX 6 is a copy of the certified letter dated October 6, 1997 sent to the Respondents following a visit to them on September 10, 1997 to determine compliance with the Consent Decision and to determine whether the Respondents were eligible to request the modification of the suspension imposed by the Consent Decision dated November 14, 1996. (Tr. at 27).

in payment for livestock purchases which were returned unpaid by the Respondents' bank. At the hearing, the Complainant entered into evidence copies of five checks issued by Respondents (CX 11, pgs 5, 8; CX 12 pgs 2, 7: CX 13 pg 2) and the corresponding bank statements from the parties that deposited those checks (CX 11; CX 12; CX 13) demonstrating that Respondents' checks were dishonored by the bank upon which they were drawn. During her investigation, Agent Bertoli was able to locate physical copies of five dishonored checks issued by the Respondents in payment for cattle; however, the bank records of the Finger Lakes indicate that Respondents' payments for livestock were dishonored for insufficient funds many additional times. (Tr. at 32-43, 50-62, 64-67; CX 11; CX 12; CX 13).

The proof adduced at the hearing differs slightly from the allegations contained in the complaint to the extent that the evidence reflects a single aggregate check in the amount of $3,612.99 written for the transactions for the purchase of livestock on May 24, 2000, May 31, 2000 and June 7, 2000. (CX 8, 9, 10). There is no evidence as to the date when the first check purporting to pay for these purchases might have been written or whether other checks were written for these three transactions; however, the evidence does reflect $3,612.99 being deposited by Finger Lakes as early as June 15, 2000 and Finger Lakes being advised by their bank that $3,612.99 was charged back against their account as being returned unpaid on June 23, 2000 due to insufficient funds in the Respondents' account.[5] Agent Bertoli testified that based upon information provided by Finger Lakes, the payment in the amount of $3,612.99 was for the three transactions dated May 24, 2000, May 31, 2000 and June 7, 2000, (Tr. at 33-34), and that amount is the sum of the three invoices.

Similarly, the evidence reflects Check Number 4696 dated July 5, 2000 in the amount of $3,014.16 for a purchase of livestock made by the

[5] The evidence reflects that Finger Lakes attempted to deposit $3,612.99 eleven times by the notation on Exhibits CX 11-2 and 11A-2 before being satisfied on November 29, 2000. Of the eleven deposits, the documentary evidence reflects ten charge backs of $3,612.99. (Exhibits CX 11-3, 11-4, 11-6, 11-7, 11-9, 11-10, 11-11, 11-12 and 12-17, 11-13 and 11-14). Although the check deposited on June 15, 2000 was not introduced into evidence, two later checks in that amount dated July 5, 2000 and July 26, 2000 (Check Numbers 4695 and 4812) bearing the stamps denoting being returned for NSF were admitted. (Exhibits CX 11-5 and 11-8).

Respondents on June 28, 2000. (CX 12-2).[6] Last, Check Number 4911 dated October 24, 2000 in the amount of $2,295.88 was issued by the Respondents in payment of a purchase of livestock made on October 18, 2000. It was deposited on October 24, 2000 by Finger Lakes (Exhibit CX 13-2) and Finger Lakes was advised of its charge back on November 8, 2000. (Exhibits CX 13-3 and 13-4).[7] The evidence additionally reflected multiple other instances of NSF checks being issued by the Respondents for purchases of livestock; however, as they are not alleged in the Complaint, Complainant has requested no findings as to those transactions.

Agent Bertoli then turned to the documents supporting the allegations concerning the failure of the Respondents to pay, when due, the full purchase price of the livestock they purchased. As previously noted, Exhibit CX 14 is a summary of those ten transactions where livestock were not paid for in a timely manner. For each such transaction, she identified the sales invoice(s) and the corresponding documents demonstrating how and when the purchase price was ultimately paid. (Exhibits CX 15-24).

The foregoing evidence, with the pattern of NSF checks and untimely settlement of the obligations for the purchase of livestock amply demonstrate that the Respondents abjectly failed to maintain anything even remotely resembling minimally adequate records that fully and correctly disclose all transactions involved in its business.

The following Findings of Fact and Conclusions of Law are made:

FINDINGS OF FACT

1. The Respondent, Little Joe Livestock Meats, Inc., is a corporation organized and existing under the laws of the state of New York and has a mailing address of 6808 Slocum Road, Ontario, New York 14519. (CX 1).

2, Little Joe Livestock Meats, Inc. has been registered with the Secretary of Agriculture since December 15, 1972 to buy and sell livestock for its own account as a dealer of livestock in commerce and

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[6] The documentary evidence reflects that Finger Lakes deposited $3,014.16 on July 6, 2000 (Exhibit CX 12-3) and again on July 17, 2000 (Exhibit CX 12-5) and was advised of charge backs being made by their bank on their account for the checks being returned on July 12, 2000 (Exhibit CX 11-6) and again on July 20, 2000. (Exhibit CX 11-7). The check (Exhibit CX 12-2 and 18-2) bears the NSF stamp.

[7] The check bearing the NSF stamp was admitted as Exhibit 13-2.

at all times material to the Complaint that has been filed was engaged in the business of buying and selling for its own account as a dealer of livestock in commerce. (CX 1).

3. The Respondent, Joseph Pagliuso, Jr., is an individual whose business mailing address is identical to that of Little Joe Livestock Meat, Inc. at 6808 Slocum Road, Ontario, New York 14519. (CX 1; CX 2).

4. Joseph Pagliuso, Jr. is the President, Manager and the sole shareholder of Little Joe Livestock Meat, Inc. and is solely responsible for the day to day management, direction and control of the corporation. (Tr. at 20; CX 1; CX 2; CX 3; CX 5).

5. Little Joe and Pagliuso have been disciplined for violations of the Act on two prior occasions and on each such prior occasion entered into a Consent Decision, the first being entered on May 15, 1987 and the second on November 14, 1996.[8]

6. On or about the dates indicated below, Little Joe issued checks to Finger Lakes in the amounts set forth below in payment of livestock purchased on the dates indicated, which checks were returned to Finger Lakes unpaid due to insufficient funds in the Respondents' account:

a. A check in the amount of $3,612.99 dated on or about June 15, 2000 for the payment of livestock purchased on May 24, 2000, May 31, 2000 and June 7, 2000 with replacement checks dated July 5, 2000 and July 26, 2000 in the same amount, all of which were returned unpaid to Finger Lakes (a total of at least 10 times) due to insufficient funds in the Respondents' account. (CX 7; CX 8; CX 9; CX 10; CX 11).

b. A check in the amount of $3,014.16 dated July 5, 2000 for the payment of livestock purchased on June 28, 2000 which was returned unpaid to Finger Lakes on July 6, 2000 and July 17, 2000 due to insufficient funds in the Respondents' account. (CX 12).

c. A check in the amount of $2,295.88 dated October 24, 2000 for the payment of livestock purchased on October 18, 2000 which was returned unpaid to Finger Lakes on November 8, 2000 due to insufficient funds in the Respondents' account. (CX 13).

7. On or about the dates and in the transactions listed below, the Respondents failed to pay when due the full purchase price of such livestock:

Purchase Date	Seller	No. Head	Invoice Amount	Date Due	Date Paid	Days Late

[8] On the first occasion, the Respondents were suspended for a twenty-one day period. On the second, they were suspended for a period of five years. (CX 4 and CX 5).

05-24-00	Finger Lakes	5	$1,384.49	05-25-00	11-29-00	189
05-11-00	Finger Lakes	1	306.80	06-01-00	11-29-00	182
06-07-00	Finger Lakes	6	1,921.70	06-08-00	11-29-00	174
06-28-00	Finger Lakes	8	3,014.16	06-29-00	09-27-00	91
10-18-00	Finger Lakes	9	2,295.88	10-19-00	01-10-01	83
11-09-00	Empire	5	2,072.12	11-10-00	11-16-00	6
11-27-00	Empire	7	2,469.80	11-28-00	12-11-00	13
11-30-00	Empire	11	2,986.68	12-01-00	12-07-00	6
12-07-00	Empire	2	595.60	12-08-00	12-21-00	13
01-08-01	Empire	13	2,724.58	01-09-01	01-15-01	6

(CX 11A; CX 14; CX 15; CX 17; CX 18; CX 19; CX 20; CX 21; CX 22; CX 23; CX 24).

8. From May 24, 2000 through January 8, 2001, Respondents failed to maintain adequate records that fully and correctly disclosed all transactions in its business, specifically, failed create invoices for all of its purchases, failed to maintain records of cash transactions and failed to maintain records of returned checks and subsequent payment of such checks. (Tr. at 12-14, 19).

CONCLUSIONS OF LAW

1. Respondent Joseph Pagliuso, Jr. is the *alter ego* of the Respondent Little Joe Livestock Meats, Inc.

2. Respondents willfully violated sections 312 (a) and 409 of the Act (7 U.S.C. § 213(a) and 228(b) by issuing checks in payment for livestock without sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented, and by failing to pay, when due, the full price of such livestock.

3. Respondents willfully violated section 312 (a) of the Act (7 U.S.C. § 213(a)) by failing to maintain adequate records that fully and correctly disclose all transactions involved in its business, as required by section 401 of the Act. (7 U.S.C. § 221).

ORDER

1. Respondent Little Joe and Respondent Joseph Pagliuso, Jr., their agents and employees, directly or indirectly through any corporate or other device, in connection with their operations subject to the Act, shall cease and desist from:

a. Issuing checks in payment for livestock without sufficient funds on deposit and available in the account upon which such checks are

drawn to pay such checks when presented;

b. Failing to pay, when due, the full purchase price of livestock.

2. Respondents shall maintain adequate records of account as fully and correctly disclose all transactions involved in its business. Specifically, the Respondents shall create invoices for all transactions; shall maintain records of all cash transactions; shall maintain records of its checking and other bank account information to determine when funds for outstanding checks have been presented and disbursed and the debts paid such that Respondents fully and correctly disclose all transactions involved in its business.

3. In accordance with section 312 (b) of the Act (7 U.S.C. § 213(b)), Respondents are jointly and severally assessed a civil penalty of Six Thousand Six Hundred Dollars ($6,600.00).

The provisions of this **ORDER** shall become effective on the sixth (6^{th}) day after service of the same upon the Respondents.

Copies of this Decision and Order shall be served upon the Parties by the Hearing Clerk's Office.

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In Re: HARRINGTON CATTLE CO. L.L.C.
P&S Docket No D-03-0013.
Default Decision.
Filed April 12, 2006.

P&S – Default.

Jonathon Gordy, for Complainant.
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Marc J. Hillson.

DECISION WITHOUT HEARING BY REASON OF DEFAULT

Preliminary Statement

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 et seq.) ("Act"), by a Complaint filed on May 25,2005, by the Deputy Administrator, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, alleging that the Respondent willfully violated the Act and regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq*.). The complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq*.) ("Rules of Practice") were mailed by certified mail to Respondent's business mailing address. On June 14,2005, the Complaint came back as other than "unclaimed" or "refused." On January 5,2006, an employee of the Department of Agriculture, Lowell E. Phelps, served the Complainant on the Nebraska Secretary of State's Agent of Record for Respondent, Robert William Chapin, Jr., by personal service as is permitted by the Rules of Practice section 1.147)(3)(i) (7 C.F.R. § 1.147(c)(3)(I)) at 421 South 9th Street, Suite 245, Lincoln, Nebraska 68508.

Accompanying the Complaint was a cover letter informing Respondent that an answer must be filed within twenty (20) days of service and that failure to file an answer would constitute an admission of all the material allegations in the complaint and a waiver of the right to an oral hearing.

Respondent failed to file an answer within the time period required by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth in this decision as findings of fact.

This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Harrington Cattle Company, L.L.C. (hereinafter "Respondent") is a limited liability company organized and existing under the laws of the State of Nebraska. Respondent's business mailing address is Post Office Box 108, Hickman, Nebraska 68372.

2. The Respondent is, and at all times material herein was:
   (1) Engaged in the business of a market agency, buying on commission; and
   (2) Registered with the Secretary of Agriculture as a market agency buying on commission, and as a dealer to buy and sell livestock in commerce for its own account.

3. The Respondent was notified by letter dated May 25, 2001 that its trust fund agreement would terminate on June 15, 2001. That same letter stated that Respondent was required to obtain a new bond or bond equivalent in the amount of $20,000 on or before June 15, 2001 to secure the performance of its livestock obligations under the Act. Notwithstanding that notice, the Respondent continued to engage in the business of a market agency buying on commission without maintaining an adequate bond or its equivalent

Conclusions

By reason of the facts alleged in Finding of Fact 3, Respondent has willfully violated section 312(a) of the Act (7 U.S.C. §213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29 and 201.30). Respondent did not file an answer within the time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission of all the material allegations in the Complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision is

entered without hearing or further procedure.

Order

Respondent Harrington Cattle Co., L.L.C., its agents and employees, directly or indirectly through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until it complies fully with the bonding requirements under the Act and the regulations. Provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order will be issued in this proceeding terminating the suspension upon Respondent's demonstration that it is in full compliance with the bonding requirements of the Act.

In accordance with section 312(b) of the Act (7 U.S.C. § 213 (b)), Respondent is assessed a civil penalty in the amount of one thousand dollars ($1 000).

This decision and order shall become final and effective without further proceedings thirty-five days (35) after service on Respondent, if it is not appealed to the Judicial Officer by a party to the proceeding within thnty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this order shall be served on the parties.

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CONSENT DECISIONS

PACKERS AND STOCKYARDS ACT

Glover, Richard. P&S Docket No. D-06-0005. 1/10/06.

Midwest National Farmers - Sig Ellingson, Inc., and James Gibbons. P&S Docket No. D-04-0006. 1/13/06.

Valley Pride Pack, Inc. and Frederick R. Stewart. P&S Docket No.. D-03-0009. 1/30/06.

John M. Gibbs d/b/a John M. Gibbs Livestock. P&S Docket No. D-05-0017. 2/16/06.

Poor Boy Auction, Inc. P&S Docket No. D-06-0004. 2/17/06.

David Vander Kooi. P&S Docket No. D-06-0003. 3/6/06.

Beken Livestock Inc., and Bradley Becken. P&S Docket No. D-06-0008. 3/31/06.

Weikert's Livestock, Inc. et al. P&S Docket No. D-06-0007. 4/21/06.

Frey Cattle Company, Inc. and Alan Halfmann. P&S Docket No. D 06-0006. 5/23/06.

R. Robert Lamb. P&S Docket No. D-04-0014. 6/12/06.

Thomas Schaefer and Schaefer Cattle Company, LLC. P&S Docket No. D-06-0014. 6/21/06.

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AGRICULTURE DECISIONS

Volume 65

January - June 2006
Part Three (PACA)
Pages 394 - 766

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 arranged by the controlling statute and will be published chronologically along with appeals (if any) of those ALJ decisions issued by the Judicial Officer.

Beginning in Volume 60, each part of *Agriculture Decisions* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The Alphabetical List of Decisions Reported and the Subject Matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

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LIST OF DECISIONS REPORTED

JANUARY - JUNE 2006

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

PERISHABLE AGRICULTURAL COMMODITIES ACT

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PERISHABLE AGRICULTURE COMMODITIES ACT

COURT DECISIONS

FLEMING COMPANIES, INC. V. USDA
C.A.5 (Tex.),2006. No. 04-40802.
Decided Feb. 1, 2006.[*]

(Cite as: 164 Fed. Appx. 528).

PACA – Batter rule – Arbitrary and capricious, when not.

United States Court of Appeals, Fifth Circuit.

Before SMITH, DENNIS, and PRADO, Circuit Judges.
EDWARD C. PRADO, Circuit Judge[**]

In this appeal, Plaintiff-Appellant Fleming Companies, Inc. challenges the "Batter-Coating Rule,"[1] a regulation promulgated by the U.S. Department of Agriculture ("USDA") pursuant to the Perishable Agricultural Commodities Act ("PACA"),[2] on two grounds: first, that the rule is invalid pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*;[3] second, that the USDA's decision-making with regard to the Batter-Coating Rule was "arbitrary and capricious" in violation of the Administrative Procedures Act ("APA").[4] Essentially for the reasons articulated by the district court in its comprehensive opinion on motions for summary judgment, *Fleming Companies, Inc. v. U.S. Department of Agriculture,* 322 F.Supp.2d 744 (E.D.Tex.2004), we AFFIRM.

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[*]See also *Fleming Companies, Inc. et al.*, 63 Agric. Dec 958.- Editor.

[**]Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

[1]7 C.F.R. § 46.2(u) (2005)

[2]7 U.S.C. § 499a-s (1996).

[3] 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[4] 5 U.S.C. § 706(2)(A) (1996).

POST AND TABACK, INC. v. USDA[1]
No. 04-1128.
Filed February 11, 2005.

(Cite as: 123 Fed. Appx. 406).

PACA– Prompt payment, when not – Res judicata, when not – Bribery of government inspector – Respondent Superior doctrine, scope of employment elements not applicable – Slow pay vs. No pay.

Court held that PACA licensee who entered into a final settlement agreement with most of their creditors for less the full payment will be held to be in a "no-pay" status (resulting in revoking of license) rather than "slow-pay" status. Court held that unlike criminal statutes – as regards to PACA, the usual elements of being "within the scope of employment" does not apply to the Respondent Superior element of bribery of a government official even for criminal acts of the employee.

United States Court of Appeals,
District of Columbia Circuit.

Before: GINSBURG, Chief Judge, and HENDERSON and RANDOLPH, Circuit Judges.

JUDGMENT

This cause was considered on the record compiled before the Secretary of Agriculture and on the briefs of the parties. It is

ORDERED AND ADJUDGED that the petition for review be DENIED for the reasons stated in the accompanying memorandum.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R.App. P. 41(b); D.C.Cir. Rule 41.

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[1]Please use FIND to look at the applicable circuit court rule before citing this opinion. District of Columbia Circuit Rule 28(c). (FIND CTADC Rule 28.)

MEMORANDUM

Post & Taback petitions for review of the Secretary of Agriculture's decision and order concluding that Post & Taback "engaged in willful, flagrant, and repeated violations" of § 2(4) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499b(4), by "failing to make full payment promptly to its produce sellers" and by "the payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector." JA 242.

As to the first ground for the Secretary's decision, Post & Taback argues "this case should have been considered a slow pay rather than a no-pay case" because, after being sued by numerous suppliers, it paid the judgments entered by the district court prior to the hearing date on the USDA complaint. Brief of Petitioner at 8. As the Secretary makes clear, however, the judgment of the district court awarded Post & Taback's creditors only "75 cents on the dollar for their claims in exchange for waiving any further proceedings by them against Post & Taback." Brief of Respondent at 11. Such a compromise hardly satisfies the requirement of "full payment promptly." 7 U.S.C. § 499b(4). Further, "[o]nly 37 of the 58 creditors listed in the Agency's complaint filed claims" against Post & Taback in the district court, and "Post & Taback failed to provide a scintilla of evidence at the administrative hearing that it paid the creditors who were not parties to the trust action a single cent." Brief of Respondent at 20-21.

Post & Taback also contends all of its "PACA debt .... was extinguished as a matter of law when each creditors' claim was merged into a judgment," and that the Secretary is barred by the doctrine of res judicata from concluding otherwise. Brief of Petitioner at 11. The Secretary, however, was neither a party nor privy to the civil actions against Post & Taback in the district court, and is therefore not precluded by those adjudications. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

As to the second ground, Post & Taback contends the Secretary erred in holding it responsible for the conduct of its employee, who bribed a USDA inspector in exchange for favorable inspections of fruits and vegetables. The PACA provides that "the act, omission, or failure of any agent, officer, or other person acting for or employed by any [regulated entity] within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such [regulated

entity]." 7 U.S.C. § 499p. As the Secretary points out, "the plain language of the statute provides no escape hatch for merchants ... who allege ignorance of their employees' misconduct." Brief of Respondent at 30; *see also H.C. MacClaren, Inc. v. USDA,* 342 F.3d 584, 591 (6th Cir.2003).

Post & Taback's argument that the Secretary should have looked to New York Penal Law § 20.20 to determine "when ... a criminal act [is] within the scope of employment such that the corporate entity may be held vicariously liable" is contrary to precedent. Brief of Petitioner at 13. When the Congress uses a common law concept, such as "the scope of employment," the Supreme Court has directed that we rely "on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms." *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 740, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). Moreover, even were it proper to incorporate New York law, it would not be the provision Post & Taback advances, as the proceedings before the Secretary were part of a regulatory licensing scheme rather than a criminal prosecution.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: KOAM PRODUCE, INC.
PACA Docket No. D-01-0032.
Decision and Order Following Reargument.
Filed January 6, 2006.

PACA – Bribery – Acts of employees and agents – Scope of employment – Willful, flagrant, and repeated violations – Publication of facts and circumstances.

Christopher Young-Morales and Ann Parnes for Complainant.
Paul Gentile for Respondent.
Decision by Administrative Law Judge Jill S. Clifton.

Decision Summary

[1] Respondent KOAM Produce, Inc. (frequently herein "KOAM"), during April through July 1999, committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), at the Hunts Point Terminal Market in the Bronx, New York, New York. Under the Perishable Agricultural Commodities Act (frequently herein "the PACA"), the acts of the employee acting within the scope of his employment are deemed to be the acts of the employer. KOAM's violations of the PACA were committed when its employee Marvin Friedman made 42 illegal cash payments to United States Department of Agriculture (frequently herein "USDA") produce inspector William J. Cashin, in connection with federal inspections of perishable agricultural commodities received or accepted in interstate or foreign commerce from 11 sellers. KOAM is responsible under the PACA for the conduct of its employee Marvin Friedman, who, in the scope of his employment, paid the unlawful bribes or gratuities to the USDA produce inspector, even if everyone at KOAM except Marvin Friedman was ignorant of Marvin Friedman's actions. Making illegal payments to a USDA produce inspector was an egregious failure by KOAM to perform its duty under the PACA to maintain fair trade practices. The remedy of revocation of KOAM's license is commensurate with the seriousness of KOAM's violations of the PACA.

Procedural History

[2] The Complainant is the Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (frequently herein "AMS"). On May 3, 2002, AMS filed its Motion to Amend Complaint, together with the proposed Amended Complaint.

[3] KOAM opposed the Motion to Amend Complaint, in its Opposition filed June 18, 2002. By Order dated June 21, 2002, I granted the Motion to Amend Complaint. On July 29, 2002, KOAM filed its Answer to Amended Complaint.

[4] The hearing was held before me in New York, New York, on March 25, 2003, and on November 17 and 18, 2003. AMS was represented by Andrew Y. Stanton, Esq., Ann K. Parnes, Esq., and Christopher Young-Morales, Esq., each with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture. KOAM was represented by Paul T. Gentile, Esq., of the law firm of Gentile & Dickler, New York, New York.

[5] AMS called three witnesses and submitted 19 exhibits, marked CX 1 through CX 19. KOAM called one witness and submitted 4 exhibits, marked RX 1 through RX 4. All the exhibits were admitted into evidence. The transcript is referred to as Tr.

[6] This "Decision and Order Following Reargument" REPLACES my "Decision and Order" issued initially on April 18, 2005. KOAM timely filed its Petition to Rehear and Reargue (frequently herein "KOAM's Reargument"), in accordance with Rule 1.146 of the Rules of Practice (7 C.F.R. § 1.146), on May 27, 2005. AMS timely filed its Response on July 1, 2005.

[7] KOAM did not actually seek rehearing; what KOAM filed is reargument. Prompted by KOAM's Reargument and AMS's Response, I have made changes, which are included herein. KOAM's Reargument refers in part to evidence that was not presented in this case (*See* Tr. 181-83), and to the Baiardi case (which is not before me). Nevertheless, KOAM's Reargument did call attention to issues that I have now addressed more fully, including my finding that the testimony of

William J. Cashin was credible.

Findings Of Fact

[8] After careful consideration of all the evidence before me, I accept as credible the testimony of William J. Cashin, Sherry Thackeray, Basil W. Coale, Jr., and Jung Yong "C.J." Park. *See* paragraphs [30] through [34] regarding my acceptance of William Cashin's testimony as credible.

[9] KOAM Produce, Inc. is a New York corporation, incorporated on or about June 18, 1996, holding PACA license no. 961890, with an address of 238-241 Hunts Point Terminal Market, Bronx, New York, New York 10474. CX 1.

[10] KOAM began doing business in the Hunts Point Terminal Market, in the Bronx, New York, New York, in about January 1997. Tr. 270.

[11] KOAM Produce, Inc. was owned in equal shares (50% each) by Jung Yong "C.J." Park (frequently herein "Mr. Park") and his wife, Kimberly S. Park (frequently herein "Mrs. Park") at all times material herein and particularly in 1999. CX 1, Tr. 269, 283-84.

[12] KOAM's Vice-President and Secretary were Mr. Park; KOAM's President and Treasurer were Mrs. Park; and KOAM's only two Directors were Mr. and Mrs. Park, at all times material herein and particularly in 1999. CX1, Tr. 269, 283-84.

[13] KOAM hired Marvin Friedman, also known as Marvin Steven Friedman, in about May 1998 to work as night produce salesman. Tr. 270. Marvin Friedman became a produce buyer in October 1998. Tr. 270-71, 274. Marvin Friedman continued to work for KOAM at all times material herein, and particularly in 1999.

[14] Marvin Friedman was arrested on or about October 27, 1999. Tr. 271.

[15] On February 25, 2000, Marvin Friedman pled guilty to and was convicted of each count of the 10-count indictment in Case No. 99 Crim. 1095, in the United States District Court for the Southern District of

New York. CX 3, CX 18.

[16] On September 20, 2000, Marvin Steven Friedman was found to have paid $29,550[2] in bribes to USDA produce inspectors at the Hunts Point Terminal Market and was sentenced to the custody of the Bureau of Prisons for 12 months plus one day on each of the 10 counts, to run concurrently; followed by supervised release of 2 years on each count, to run concurrently; plus a $300 fine on each counts, for a total of $3,000; plus a $100 special assessment on each count, for a total of $1,000. CX 19, CX 4.

[17] The 10 counts of "Bribery of a Public Official" from April 6, 1999 through July 1, 1999, of which Marvin Friedman was convicted (CX 4), were based on the undercover work of William J. Cashin. Tr. 115-197.

[18] William J. Cashin was a USDA agricultural commodities grader, also called produce inspector, at the Hunts Point Terminal Market from July 1979 until August 1999. Tr. 192.

[19] For about 19 years of those 20 years (from 1980 through August 1999), William J. Cashin, in the course of his USDA work, accepted unlawful bribes or gratuities from many produce workers. Tr. 177-78, 192.

[20] William J. Cashin had agreed, immediately after having been arrested himself on March 23, 1999, to cooperate with the Federal Bureau of Investigation (FBI) in its investigation, by continuing to operate as he had in the past and reporting daily the payments he collected. Tr. 133-34, CX 16.

[21] Beginning on March 23, 1999, William Cashin no longer kept the unlawful bribes or gratuities that were given to him, but instead turned them over to the law enforcement authorities over at the end of each work day. Tr. 194.

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[2] The $29,550 in bribes paid by Marvin Steven Friedman was determined through the sentencing process (CX 19 p. 20; CX 4 p. 9); the bribes specified in the Indictment totaled $2,100. CX 3.

[22] More than half (approximately seven to eight) of the approximately 12 to 13 USDA agricultural commodities graders who were working at the Hunt's Point Terminal Market in March or April 1999, were convicted of taking bribes (including William Cashin). Tr. 161-62.

[23] In response to William J. Cashin's daily reports to the FBI, the FBI prepared FD-302s as a summary. See CX 17. The portions of the FD-302s which correlate to the unlawful bribes or gratuities that Mr. Cashin received from Marvin Friedman are organized for each count of the Indictment, together with applicable inspection certificates, which show KOAM as having applied for the inspections. Tr. 136-97, CX 6 through CX 16.

[24] Marvin Friedman was acting within the scope of his employment as a produce buyer for KOAM each time he paid an unlawful bribe or gratuity to William Cashin as reported in CX 6 through CX 16, and as reflected in each of the 10 counts of which he was convicted, regardless of whether anyone at KOAM directed him to make the unlawful payments, provided him the money to make the unlawful payments, or was even aware that he was making the unlawful payments. Tr. 120-24, 128-29, 131-132, 146-47, 152-53, 155-56, 163-64, 167, 178-80, 184-86, 193.

[25] Factors which show that Marvin Friedman was acting within the scope of his employment as a produce buyer for KOAM, when he paid the unlawful bribes and gratuities, include the following: (a) Marvin Friedman paid the unlawful bribes and gratuities while performing, or in connection with, his job responsibilities; (b) the unlawful payments were incorporated into Marvin Friedman's regular work routine for KOAM; (c) Marvin Friedman was at his regular work place at KOAM when he paid the unlawful bribes and gratuities; (d) Marvin Friedman made the unlawful payments during his regular work hours for KOAM; (e) Marvin Friedman made the unlawful payments on a regular basis; (f) Marvin Friedman appeared to be acting on behalf of his employer KOAM; and the unlawful payments could have benefitted KOAM. Tr. 120-24, 128-29, 131-132, 146-47, 152-53, 155-56, 163-64, 167, 307; CX 19 pp. 15-17.

[26] There is no evidence that Marvin Friedman or anyone else at

KOAM was intimidated or coerced into making the unlawful payments. The only evidence on that issue came from William Cashin, who testified that he never specified a payment amount and never pressured anyone at Koam to pay. William Cashin testified that he kept Marvin Friedman apprised of the number of inspections he had performed, and that Marvin Friedman gave him $50 for each inspection. Tr. 164, 178-80, 184-86, 193.

Discussion

[27] Here, there is no question whether KOAM's employee Marvin Friedman paid unlawful bribes or gratuities to USDA produce inspector William Cashin during April 6, 1999 through July 1, 1999, in connection with produce inspections requested by KOAM. He did. Unquestionably. The only question is whether what Marvin Friedman did, causes his employer KOAM to suffer the consequences under the Perishable Agricultural Commodities Act, the PACA.

[28] The PACA, section 16, incorporates principal-agent common law, making no exception for criminal activity of the agent:

> In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. § 499p.

[29] Both the D.C. Circuit[3] and the 6th Circuit[4] have affirmed the PACA's use of its principal-agency provision under circumstances like those here. William J. Cashin, the USDA produce inspector (agricultural commodities grader), testified about the circumstances. Tr. 123-26, 128-29, 131-32.

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[3] *Post & Taback, Inc. v. USDA*, 65 Agric. Dec. 396 (2005). The citation was updated from the original text- Editor

[4] *H.C. MacClaren, Inc. v. USDA*, 342 F.3d 584, 591 (6th Cir. 2003).

Mr. Young-Morales: While he was at KOAM, as an employee, did Marvin Friedman ever give you any money in connection with any of your inspections?
Mr. Cashin: Yes, he did.
Mr. Young-Morales: Was the money that he gave you in payment of your normal inspection fee?
Mr. Cashin: No.
Mr. Young-Morales: that you have described?
Mr. Cashin: Not at all. By the time Marvin came along, KOAM had already established an account, and their billing - - they were on the billing system.
Mr. Young-Morales: Were the payments made by Marvin Friedman, that you've described, done in connection with each inspection?
Mr. Cashin: Yes, they were.
Mr. Young-Morales: How much were those payments per each inspection? Mr. Cashin: Fifty dollars per inspection.
Mr. Young-Morales: And approximately what year was it that Marvin Friedman started making payments to you?
Mr. Cashin: Marvin came along, to the best of my recollection, about 1996 or '97.
Mr. Young-Morales: Just to back up very quickly, do you know, do you remember when Ralph died?
Mr. Cashin: It wasn't long after the Company opened. It was some time in late '96 or early '97, as I recall.
Mr. Young-Morales: To your knowledge, were Ralph and Marvin Friedman at Koam at the same time ever?
Mr. Cashin: No. Not that I was aware of.
Mr. Young-Morales: How would - - were payments give(n) (to) you in connection with every inspection that you made?
Mr. Cashin: Yes.
Mr. Young-Morales: Okay. How would Marvin Friedman go about making the payments to you?
Mr. Cashin: After I was finished examining all the products, I used to write the inspections in the office upstairs. Marvin sat in the office all the way in the back. You go through the door, there's a few other offices, and he was in the back. And there was an extra desk there, and it was warm and it was dry, and I would sit there at the desk and I would write -- and he would ask me how many and I would tell him, and he would count the money and hand it to me.
Mr. Young-Morales: Was anyone else ever present during that

transaction that you've described?
Mr. Cashin: No.
Mr. Young-Morales: What was your understanding as to why you were receiving payments in connection with your inspections at Koam?
Mr. Cashin: I was helping Marvin.
Mr. Young-Morales: When you say help, what was your understanding of the meaning of help? What do you mean by help? In connection with an inspection.
Mr. Cashin: Helping in connection with an inspection came in any one of three ways. Altering the percentage of defects, especially the condition defects, in such a way that it was over the good delivery marks. Frequently, someone like Marvin and Ralph, too, would examine product, see a few decayed specimens in a box or a couple of boxes, and then call an inspection, and want that particular load of product - - produce, written so that the percentage of defects, especially decay, was over the good delivery mark.

Another way of help was the number of containers. Frequently, the amount that was inside -- the amount present at the time when I would arrive to do the inspection was less than what it originally was unloaded or came in as, and they would want the number of containers increased so it more closely matched the manifest.

The other way was to alter the temperatures. They would want the temperatures recorded on, or written on the certificate to be of a more acceptable level so it would lend legitimacy to the certificate.
Tr. 123-26.
* * * *
Mr. Young-Morales: Okay. How would Marvin Friedman have let you know that he wanted help, any kind of help, on a particular load?
Mr. Cashin: It was our, it was my policy with Marvin that when I arrived at Koam, I would find him, talk to him. Sometimes he was downstairs. Sometimes he was upstairs. And then we would discuss the various loads. And he would tell me I need a little help with this one. This one shows problems; you'll see it. This one - - and he and I would discuss the different things and he would tell me he needed help on things and what he needed help on.
Mr. Young-Morales: Were the figures that you had put down on an inspection, on an inspection certificate, when you gave help, an accurate reflection of the produce you were actually inspecting?
Mr. Cashin: No.
Tr. 128-29.

* * * *
Mr. Young-Morales: If you -- and on what percentage of the loads that you inspected at Koam would you actually give help?
Mr. Cashin: I would estimate 75 to 80 percent.
* * * *
Mr. Young-Morales: If you did state the results inaccurately on any particular inspection back then, can you state today why you would have done so?
Mr. Cashin: Yes, I can.
Mr. Young-Morales: Why?
Mr. Cashin: It goes back to the original deal of help in any one of the three ways, help meaning the number of containers, help meaning to raise the percentage of defects, or to put down the temperatures at the correct level.
Mr. Young-Morales: In the event that - - well, even if the inspection certificates that you prepared were accurate, did you still get paid by Marvin Friedman?
Mr. Cashin: Yes, I did.
Mr. Young-Morales: What was your understanding as to why that would occur?
Mr. Cashin: I - - my understanding in that sense was either he was just saying thank you for helping in general, and also, it was my understanding that he was possibly paying for future help, just in general.
Tr. 131-32.

[30] I find the testimony of William J. Cashin (Tr. 115-197), to be credible. KOAM's Reargument challenges me to make more specific findings regarding William Cashin's credibility. There are factors that could impeach William Cashin's credibility: (a) William Cashin is a convicted felon (convicted of taking bribes such as those at issue here). (b) William Cashin admits to a 19-year history of taking unlawful bribes and gratuities (the last 5 months was for the benefit of the investigation). Tr. 177-78, 192. (c) William Cashin was given a light sentence; he was not required to serve jail time (beyond "time served", the day he was arrested, and he was not taken to jail); and he was not required to pay restitution or a fine. Tr. 160-161. (d) William Cashin was allowed to retire and was not asked to waive his Civil Service Retirement System pension. Tr. 161, 192, 195.

[31] William Cashin's taking of unlawful bribes and gratuities ("extra money", as Mr. Cashin thought of it, Tr. 194) demonstrates a disregard for honesty and truthfulness in the past.[5] Nevertheless, William Cashin appeared to me to be telling the truth when he testified before me.

[32] The incentives that motivated William Cashin to cooperate in the investigation, and then to testify in numerous cases, may well have included the hope of a lenient sentence (which he got) and favorable treatment from his employer USDA (which he got). William Cashin did not need to report or testify untruthfully to receive the benefits of cooperating; he could receive the benefits of cooperating by reporting truthfully and testifying truthfully. There would have been no greater gain and thus, there was no incentive, to report or testify untruthfully.

[33] In observing Mr. Cashin, I found his testimony, on both direct- and cross-examination, to be intelligent, with good recall, and responsive, attentive, and thoughtful. Mr. Cashin's demeanor was otherwise unremarkable and sent no signal that I should be cautious in accepting his statements as true.

[34] Most persuasively to me, Mr. Cashin's testimony was essentially consistent with the all of the other evidence,[6] including the in-Court assertions of Marvin Friedman and his lawyer and the other documentary evidence, and the testimony of Mr. Park and the other witnesses.

[35] Marvin Friedman paid the unlawful bribes and gratuities within

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[5] William Cashin failed initially to report and pay income tax on the unlawful bribes and gratuities he received. This is an additional illustration of disregard for honesty and truthfulness in the past, which is known to me not from this case, but from a similar case. *See* M. Trombetta & Sons, Inc., 64 Agric. Dec.1869 (2005). Still, I find the testimony of William Cashin to be credible.

[6] There is one discrepancy between William Cashin's testimony and other evidence. Mr. Cashin testified that, when Marvin Friedman paid him, there was never anyone else from KOAM present. Tr. 166-67. Mr. Cashin's testimony appears to conflict with notes from June 28, 1999 in one of the FBI form FD-302s, CX 14, p. 2, which suggests that C.J. last name unknown, was present (or at least nearby) when Marvin (Friedman) paid William Cashin $300 (six $50 bills). I find William Cashin's testimony to be reliable, despite the apparent conflict.

the scope of his employment as KOAM's produce buyer. As Judicial Officer William G. Jenson recently commented in a similar case:

> Rarely will an employee's or agent's egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee's or agent's egregious act was committed while performing, or in connection with, his or her job responsibilities.

In re: M. Trombetta & Sons, Inc., 64 Agric. Dec. 1869 (2005).

[36] Marvin Friedman paid the unlawful bribes and gratuities while performing, or in connection with, his job responsibilities; the unlawful payments were incorporated into his regular work routine for KOAM; he was at his regular work place at KOAM when he paid the unlawful bribes and gratuities; he made the unlawful payments during his regular work hours for KOAM; he made the unlawful payments on a regular basis; he appeared to be acting on behalf of his employer KOAM; and the unlawful payments could have benefitted KOAM. These factors show that Marvin Friedman was acting within the scope of his employment as a produce buyer for KOAM, when he paid the unlawful bribes and gratuities. Tr. 120-24, 128-29, 131-132, 146-47, 152-53, 155-56, 163-64, 167, 307; CX 19 pp. 15-17.

[37] Marvin Friedman was acting within the scope of his employment when he paid the unlawful bribes and gratuities, even if KOAM did not authorize or direct him to do so, and even if KOAM was unaware of his doing so. *H.C. MacClaren, Inc. v. USDA*, 342 F.3d 584, 591 (6th Cir. 2003).

[38] KOAM argues that such criminal activity of an employee should not be imputed to his employer; that Marvin Friedman's criminal activity here cannot have been within the scope of his employment and cannot become KOAM's violation of the PACA. KOAM's argument has already been addressed by the United States Court of Appeals, the District of Columbia Circuit, in *Post & Taback, Inc. v. USDA*:

> Post & Taback's argument that the Secretary should have looked to New York Penal Law § 20.20 to determine "when ... a criminal act [is] within the scope of employment such that the corporate entity may be held vicariously liable" is contrary to precedent. Brief of Petitioner at 13. When the Congress uses a common law

> concept, such as "the scope of employment," the Supreme Court has directed that we rely "on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). Moreover, even were it proper to incorporate New York law, it would not be the provision Post & Taback advances, as the proceedings before the Secretary were part of a regulatory licensing scheme rather than a criminal prosecution.

Post & Taback, Inc. v. USDA, 65 Agric. Dec. 395 (2005), 123 Fed. Appx. 406 (D.C. Cir. 2005) (copy enclosed to counsel).

[39] KOAM is responsible under the PACA for the unlawful bribes and gratuities Marvin Friedman paid in connection with the produce inspections ordered by KOAM. 7 U.S.C. § 499p.
After careful review of the evidence as a whole, I am unable to determine whether anyone at KOAM besides Marvin Friedman was involved in making the unlawful payments. Yet the evidence on that subject, together with the more than six years of experience AMS has had with KOAM since the unlawful payments were made in 1999, may impact the future course of AMS's interaction with KOAM and KOAM's principals.

[40] It is difficult to believe that Marvin Friedman paid the unlawful bribes and gratuities out of his own pocket, even if he was the most highly compensated employee at KOAM, at about $50,000 per year. CX 5. He apparently received no bonuses in addition. Tr. 274-75. The evidence fails to prove whether the money Marvin Friedman gave unlawfully to USDA inspectors was his own money, KOAM's money, Mr. or Mrs. Park's money, or money from some other source.

[41] Mr. Park testified that neither he, nor Mrs. Park to his knowledge, at any time, authorized, directed, or had knowledge that Marvin Friedman was paying money to inspectors. Tr. 286. Mr. Park testified that he had not known that Marvin Friedman was giving money to the USDA produce inspectors until after Mr. Friedman was arrested; that he was not present on June 28, 1999 when Marvin Friedman paid William Cashin, despite a notation to the contrary in the FBI form FD-302 (*see* footnote 5; CX 14, p. 2); and that he was unaware that Marvin

Friedman's attorney represented to the Court during sentencing, that Marvin Friedman's letter to the Court said that his employer directed him to pay bribes. Tr. 271-72, 278-79, 283. The letter is not in evidence, as access to it is apparently restricted. Tr. 339. Perhaps, as KOAM argues, Marvin Friedman implicated his employer in an attempt to be sentenced more leniently. The prosecutor in the criminal case asserted to the Court that there was no factual support in the record that the employer directed this scheme. Tr. 329. CX 19 pp. 15-17.

[42] Marvin Friedman was not a witness before me. Neither KOAM nor AMS nor I had the opportunity to see Marvin Friedman confronted or cross-examined. The hearsay evidence suggesting that someone at KOAM besides Marvin Friedman may have involved in paying the unlawful bribes and gratuities is not sufficiently reliable. The evidence fails to prove that Mr. or Mrs. Park or anyone else at KOAM knew Marvin Friedman was illegally giving money to USDA inspectors. The most valuable information on this topic, in my opinion, was the prosecutor's statement at Marvin Friedman's sentencing on September 20, 2000, which includes, in part, the following:

THE COURT: I will listen to you for anything the government would like to tell me in connection with sentence.

MR. BARR: Thank you, your Honor, and I will be brief because most of my arguments have been set forth in some detail already in our memorandum.

With respect to the minor role issue, your Honor, essentially Mr. Krantz's argument hinges on the way that he is framing the issue and the people involved. The government views it differently. This is really a two-person crime. There is a briber, mainly (sic) the businessman wholesaler, and a bribee, namely the produce inspector.

The inclusion of Mr. Friedman's employer in the context here I think is inappropriate based on the record before your Honor. While Mr. Krantz has asserted it to the court there is no factual support in the record that the employer directed this scheme. Mr. Friedman did not provide the government or probation with any details on that allegation. So I think that is not really properly before the court. There is no factual foundation for it.

It may be true but it is not something that has ever been set forth. And so we find ourselves at a loss to be able to reply to something like that.

With respect to the relative culpability of the remaining players,

namely, the inspector and the wholesaler, while it is certainly true that the public official has abused his or her trust when he or she commits bribery, that is an inherent component of the offense and under Mr. Krantz's logic essentially every bribe payer would be entitled to the inference of being less culpable than every bribe recipient. And I don't think that is the law and I don't think that it's even a fair inference.

In this case the inspectors got $50 per inspection. The wholesaler got, we believe based on our efforts, something more than $50. Putting our finger on the exact amount, as we told probation and the court, is difficult, but it is surely in a magnitude far greater than $50.

While it is true, as Mr. Krantz points out, that the primary beneficiary is the company that Mr. Friedman works for, it is quite clear to us that the individual salesman who helps the company make money looks better in the company's eyes and in a competitive atmosphere such as the Hunt Point Market that is a significant advantage for any salesman.

CX 19, pp. 15-17.

[43] Whether Marvin Friedman's unlawful payments were, or were not, being made with Mr. or Mrs. Park's involvement or awareness, would make no difference in the sanction recommended by AMS. Mr. Basil W. Coale, Jr. was AMS's sanction witness. Following is an excerpt of Mr. Coale's testimony on cross-examination. Tr. 319-22.

Mr. Gentile: Now the - - you've recommended on behalf of the Agency that the license for Koam, that it should be revoked; is that correct?
Basil W. Coale, Jr.: Correct.
Mr. Gentile: In doing so, have you taken into consideration the employment sanctions that follow such a sanction?
Basil W. Coale, Jr.: Yes.
Mr. Gentile: So it's your understanding that should the sanction be granted as you requested, that those responsibly connected with Koam Produce would not be permitted to be employed within the industry for at least a year; is that correct?
Basil W. Coale, Jr.: Correct.
Mr. Gentile: And that would include, by obvious definition, the active owners such as C.J. Park; is that correct?
Basil W. Coale, Jr.: Correct.
Mr. Gentile: And does that seem appropriate to you if Mr. Park was not aware, did not have knowledge of what Mr. Friedman was doing?
Basil W. Coale, Jr.: Under the Act, that's how it's written.

Mr. Gentile: But you've said you've taken into consideration that there is a sanction. Is it part of your consideration that he should, based upon your recommendation, not be permitted to work in this industry, even though he didn't know what was going on? Is that part of your recommendation?
Basil W. Coale, Jr.: The recommendation is that, based on the violations, that the license should be revoked, and now the sanctions are defined by the statute and flow from that finding.
Mr. Gentile: And if the sanction was a civil penalty, a fine, some sort of suspension, that would have a different effect on Mr. Park and anyone else responsibly connected; is that correct?
Basil W. Coale, Jr.: Correct.
Mr. Gentile: As part of your recommendation, have you taken into consideration whether or not Koam should lose its license or not based upon the actual knowledge of the owners of the Company?
Basil W. Coale, Jr.: The, that issue, we believe, was -- is dealt with in Section 16, is that the actions of the employees and the scope of their employment are the actions of the licensee.
Mr. Gentile: I understand what the section says. I've asked you whether or not you've taken into consideration whether or not the actual knowledge by the owner is a factor to be considered?
Basil W. Coale, Jr.: I guess you could say it's what we would recognize could be the position of someone, but it's not a driving factor that's considered, whether or not the principals knew or whether it's necessary to prove that the principals knew. It's that the actions of the employee and the scope of the employment are the actions of the licensee.
Mr. Gentile: Would you say, based upon what you just said, that it's the Agency's position that it's irrelevant as to whether or not there was actual knowledge by the owners?
Basil W. Coale, Jr.: I can't argue with that word.
Mr. Gentile: Does that mean yes or no? Does that mean you agree that it's the Agency's position that it's irrelevant --
Basil W. Coale, Jr.: Yes.
Mr. Gentile: -- as to whether or not the owners actually knew?
Basil W. Coale, Jr.: Yes.
Tr. 319-22.

[44] Mr. Coale had previously testified to explain AMS's basis for recommending revocation as the only appropriate sanction. Tr. 309-15.

Mr. Young-Morales: Are you aware of the sanction recommendation that Complainant recommends in this case?
Basil W. Coale, Jr.: Yes, I am.
Mr. Young-Morales: How are you aware of the sanctions?
Basil W. Coale, Jr.: I participated in the development of the recommendation.
Mr. Young-Morales: And what is the recommendation in this case?
Basil W. Coale, Jr.: The revocation of PACA license.
Mr. Young-Morales: What's the basis for your sanction recommendation?
Basil W. Coale, Jr.: There are several factors that were considered. One is the evidence of paying as part of the criminal investigation conducted by the FBI in the 42 different inspection certificates involved with the bribery.

As an aggravating factor, there is Mr. Cashin's testimony that the bribes were paid for a period much longer than that that is documented by the criminal investigation.

There is the factor to consider of the impact to the industry of bribes. The potential impact is very great. The fresh products branch of the Agricultural Marketing Services issues approximately 150,000 inspection certificates in a year. This come out to average out to hundreds a day. Shippers, growers, brokers, carriers, all use the results of those certificates to resolve their disputes, to evidence that they met their contract terms or to document the condition of product or products.

Paying bribes to an inspector undermines the credibility of the entire inspection process, and can impact how these traders resolve their disputes.

In addition, there's the fact of in a competitive market, especially like Hunt's Point, if one firm would know, would be paying bribes and another firm finds out, a competitive firm, they may feel to (sic) need to pay bribes just to compete.

And then, in addition, there's the deterrent effect. The Agency wants to not only deter with sanctions, this individual from repeating, this respondent from repeating its violations, but, in addition, deter any other firms who may be considering similar violations.
Mr. Young-Morales: Now in this case, Complainant's intention is that the payment of bribes to William Cashin were a violation. Does the fact that Mr. Cashin would -- excuse me. Does the fact that Mr. Cashin was a USDA employee have any effect on Complainant's sanction recommendations?

Basil W. Coale, Jr.: No, it does not.
Mr. Young-Morales: Why doesn't it?
Basil W. Coale, Jr.: Paying a bribe is a very serious violation of the PACA. Whether the bribe is paid to another industry member, another trader, or to a USDA employee such as an inspector, the fact that the bribes in this case were paid to - - excuse me, to a USDA produce inspector, does not excuse the fact that the bribes were paid.
Mr. Young-Morales: Does Complainant recommend any kind of civil penalty in this case as an alternative, possible alternative, to license revocation? And this is based on your sanction recommendation and on what you've heard in the court case so far.
Basil W. Coale, Jr.: No, it does not believe that a monetary penalty would be appropriate in this situation.
Mr. Young-Morales: Why not?
Basil W. Coale, Jr.: Paying bribes is a very serious violation of PACA, and in this specific instance, it went on for a long period of time. There's a great potential for damage to the industry in the way it does business, and this calls for the, only the most severe sanction, and that sanction is revocation of PACA license.
Mr. Young-Morales: In the course of the proceedings as a whole, have you heard anything with respect to Marvin Friedman paying bribes for expedited access to inspectors?
Basil W. Coale, Jr.: Not that I recall.
Mr. Young-Morales: Are you aware that it's a potential defense of the Respondent in this case?
Basil W. Coale, Jr.: Yes, I am.
Mr. Young-Morales: And, Mr. Coale, with that potential defense in mind, have you reviewed CX-18? And do you have a copy in front of you?
Basil W. Coale, Jr.: I have the official copy right here.
Mr. Young-Morales: Have you read it in its entirety?
Basil W. Coale, Jr.: Yes, I have.
Mr. Young-Morales: Could I direct you to page 17 of that document? Well, first of all, what is this document?
Basil W. Coale, Jr.: This is a copy of the February -- a transcript of the February 25th proceeding involving United States of America v. Marvin Steven Friedman.
Mr. Young-Morales: Would this be the plea agreement transcript, so to speak?
Basil W. Coale, Jr.: Where Mr. Friedman entered his pleas to the

criminal proceeding?
Mr. Young-Morales: Uh-huh.
Basil W. Coale, Jr.: Yes.
Mr. Young-Morales: If I could direct you to page 17. Well, excuse me. Let me direct you to page 16. Could I ask you -- and you may have to familiarize yourself with it again, but could I ask you who Mr. Krantz is in this transcript?
Basil W. Coale, Jr.: It is my understanding that he is Mr. Friedman's counsel.
Mr. Young-Morales: All right. And on line 19 -- excuse me, line 17, could you read the question by the Court?
Basil W. Coale, Jr.: The Court says, "Mr. Krantz, do you know of any valid defense that would prevail at a trial of Mr. Friedman?"
Mr. Young-Morales: And what is Mr. Krantz's response?
Basil W. Coale, Jr.: "No, Your Honor."
Mr. Young-Morales: And the Court's question?
Basil W. Coale, Jr.: The next question is, "Do you know any reason why Mr. Friedman should not be permitted to plead guilty?"
Mr. Young-Morales: And the answer?
Basil W. Coale, Jr.: "No."
Mr. Young-Morales: And the next question, and I'll stop there.
Basil W. Coale, Jr.: It appears that the Court says, "Mr. Friedman, tell me in your own words what you did in connection with the crime to which you are entering a plea of guilty?"
Mr. Young-Morales: Could you please read his answer on the next page?
Basil W. Coale, Jr.: "The defendant: On approximately the dates stated in the indictment, I paid cash to an inspector of the United States Department of Agriculture. The purpose of the payments was to influence the outcome of the inspection of fresh fruit and produce conducted at Koam Produce, Inc., located in the Bronx. I was an employee of Koam at the time. I acted knowingly and intentionally, and I knew the payments were unlawful."
Mr. Young-Morales: And do you remember, ultimately, what Mr. Friedman pled guilty to when this transcript was all said and done? If not, I --
Basil W. Coale, Jr.: I believe it was 10 counts of bribery.
Mr. Young-Morales: Thank you, Your Honor. I have no further questions. Well, I may have -- well, yes.
Mr. Young-Morales: Even absent this, the evidence in this transcript,

or the information contained in this transcript, and absent the evidence that we have heard, much of the evidence that we've heard so far, if Respondent were to have shown that Marvin Friedman paid bribes to William Cashin for expedited inspections, would that change, do you think, your recommended sanction today?
Basil W. Coale, Jr.: No.
Mr. Young-Morales: Why?
Basil W. Coale, Jr.: Illegal payments made to a produce inspector undermine the credibility of the inspection process and therefore that could lead to industry-wide impact. And, in addition, even if the inspections themselves are not fraudulent factually, times, dates, temperatures, count, all that is still correct, it's still not a fair trading practice because other competitors on the market, then someone is moved getting moved to the back of the line and somebody else is moving to the front to get expedited treatment. So that's an unfair advantage as well.
Tr. 309-15.

Conclusions

[45] Marvin Friedman, an employee of Respondent KOAM Produce, Inc., paid unlawful bribes and gratuities to a United States Department of Agriculture (USDA) inspector, during April through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities from 11 sellers received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[46] Marvin Friedman was acting as KOAM Produce, Inc.'s agent, when he did what is described in paragraph [45]. 7 U.S.C. § 499p.

[47] Marvin Friedman was acting within the scope of his employment, when he did what is described in paragraph [45]. 7 U.S.C. § 499p.

[48] Marvin Friedman's willful violations of the PACA are deemed to be KOAM's willful violations of the PACA. *In re: H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 756-57 (2001), *aff'd* 342 F.3d 584 (6th Cir. 2003).

[49] KOAM Produce, Inc., through its employee and agent Marvin Friedman, paid unlawful bribes and gratuities to a USDA inspector,

during April through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities from 11 sellers received or accepted in interstate or foreign commerce, in violation of section 2(4) of the PACA. 7 U.S.C. § 499b(4).

[50] KOAM is responsible under the PACA, even if ignorant of the misconduct of its employee Marvin Friedman, who paid the unlawful bribes or gratuities to the USDA produce inspector in connection with the federal inspections. *Post & Taback, Inc. v. USDA*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

[51] KOAM willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act during April 1999 through July 1999, by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[52] Respondent KOAM Produce, Inc. committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)).

[53] KOAM's violations of the PACA were egregious, requiring a remedy of suspension or revocation. *In re Geo. A. Heimos Produce Company, Inc.*, 62 Agric. Dec. 763, 780-781 (2003).

[54] Revocation of KOAM's license is commensurate with the seriousness of KOAM's violations of the PACA. Tr. 309-15. KOAM's violations were so egregious as to warrant revocation whether Marvin Friedman's unlawful cash payments (a) were a bribe or were a gratuity; (b) were associated with certificates that were falsified or with certificates that were truthful; (c) were or were not paid in response to intimidation or coercion (and the evidence in this case fails to prove intimidation or coercion; see paragraph [26]); and (d) were or were not known to Mr. or Mrs. Park or anyone else or KOAM (and the evidence in this case fails to prove that Mr. or Mrs. Park or anyone else at KOAM knew Marvin Friedman was illegally giving money to USDA inspectors; see paragraph [42]).

[55] Any lesser remedy than revocation would not be commensurate with the seriousness of KOAM's violations, even though many of KOAM's competitors were committing like violations, and even though USDA inspectors who took the unlawful bribes and gratuities were arguably more culpable than those that paid them. Tr. 309-15.

Order

[56] Respondent KOAM Produce, Inc.'s PACA license is revoked.
[57] The revocation of Respondent KOAM Produce, Inc.'s PACA license shall become effective on the 11th day after this Decision becomes final.

Finality

[58] This Decision becomes final without further proceedings 35 days after service unless appealed to the Judicial Officer within 30 days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

A copy of this Decision and Order Following Reargument shall be served by the Hearing Clerk upon each of the parties, **together with** a copy of *Post & Taback, Inc. v. USDA*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

_____

In re: DONALD R. BEUCKE.
Docket No. PACA-APP D-04-0009.
Decision and Order.
Filed January 6, 2006.

PACA – PACA-APP – Responsibly connected – Stock ownership greater than 10% – Resignation from Board of Directors, belated.

Charles L. Kendall for Complainant.
Jane E. Bednar for Respondent.
Effie F. Anastassiou for Respondent.
Decision and Order by Chief Administrative Law Marc R. Hillson.

Decision

In this decision, I find that Petitioner Donald R. Beucke was responsibly connected to Garden Fresh Produce, Inc., a company that has committed disciplinary violations under the Perishable Agricultural Commodities Act (PACA). I find that Petitioner was actively involved in the activities resulting in the violations by Garden Fresh, and that he was more than a nominal partner, officer, director, or shareholder of Garden Fresh.

Procedural History

On February 18, 2004, a letter from Karla Whalen, Head, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, notified Petitioner that an initial determination had been made that he was "responsibly connected" to Garden Fresh Produce, Inc., as that term is defined in 7 U.S.C. § 499a(b)(9). The determination was based on Petitioner's 20 percent ownership of Garden Fresh, as well as his being vice-president and a director of that company from July 2000 through April 2003. That interval encompassed the period January 2002 through February 2003, during which time Garden Fresh was alleged to have committed numerous violations of the prompt payment provisions of the PACA.

On February 24, 2004 Petitioner challenged the initial determination and requested that the PACA Branch Chief "review and reverse" the finding that he was responsibly connected to Garden Fresh. On April 28, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, issued a final determination that Mr. Beucke was responsibly connected to Garden Fresh at the time violations of the PACA were committed, and informed Mr. Beucke of his right to file a petition for review of his final determination. A petition for review was filed on June 1, 2004.

In a related proceeding, on January 27, 2004, a PACA complaint was filed against Garden Fresh Produce, Inc. for PACA violations committed between January 2002 and February 2003. Following service of the complaint, no answer having been filed by Garden Fresh, the Agency filed a Motion for Decision Without Hearing by Reason of Default on June 4, 2004. No response to that Motion was filed by Garden Fresh and I issued a Decision Without Hearing on August 25, 2004, finding that Garden Fresh had committed the alleged violations involving non-payment of nearly $380,000 for 109 lots of commodities purchased between January 2002 and February 2003. PX 6.

In another related proceeding, a responsibly connected determination

was also issued against Shane Martindale[1] for his role at Garden Fresh. While Mr. Martindale's petition was not formally consolidated with Mr. Beucke's, the two cases were grouped throughout the pre-trial process. Since there was no active case involving Garden Fresh, and thus no mandatory consolidation as required by Rule of Procedure 1.137(b), two separate hearings were scheduled, with Mr. Beucke's hearing taking place on March 1, 2005 and Mr. Martindale's hearing taking place the next day.

A hearing was conducted in this case on March 1, 2005 in San Jose, California. Petitioner was represented by Effie F. Anastassiou and Respondent was represented by Charles L. Kendall. Petitioner testified in his own behalf, and called six additional witnesses, while two witnesses testified on behalf of Respondent.

Facts

Petitioner Donald R. Beucke has been involved in the produce business for over 25 years, originally working for his stepfather at Martindale Distributing Company, first as an inspector and later as a buyer. Tr. 59, 61.[2] At one point he was president of Martindale. Tr. 84. During this period, Petitioner worked with other family members, including his step-brothers Wayne and Shane Martindale.

Around the beginning of the year 2000, Wayne Martindale asked Petitioner to invest in Garden Fresh Produce, Inc., a produce company he intended to operate in Las Vegas, Nevada. Tr. 61. Petitioner invested $20,000 in Garden Fresh, and was listed as a 20% stockholder of the company. Tr. 61. Wayne and Shane Martindale were also listed on the PACA license certificate as 20% stockholders. RX 1. Nevada corporate records list Petitioner as a director and vice president of marketing. RX 3. Petitioner was authorized to sign checks on behalf of Garden Fresh, but there is no evidence that he did so after the first few

[1] Mr. Martindale's given name is Edward Shane Martindale, but he has generally been referred to as Shane Martindale.

[2] "Tr." refers to the transcript from the March 1, 2005 hearing. Even though the Beucke and Martindale matters were heard separately, although they were scheduled on consecutive days as a matter of administrative convenience, Respondent filed a single brief combining its discussion of the two cases, and liberally used testimony and other evidence from the Martindale hearing in those portions of its brief regarding the responsibly connected liability of Beucke. I am deciding this case solely based on the testimony and evidence received at the Beucke hearing on March 1, 2005.

months the company was operating. RX 13. Petitioner was one of the signatories on the application for a PACA license, RX 12, Tr. 87-89, and was listed on the application as a director, vice-president and 20% shareholder. Petitioner was issued a stock certificate in Garden Fresh Produce indicating that he owned 1000 shares in the company. RX 8, p. 3.

Petitioner maintained his positions with Garden Fresh during the time period that Garden Fresh committed its willful, flagrant and repeated violations of the PACA. Petitioner testified that Wayne Martindale ran the company and that he had virtually no role in the company's operations other than making his initial $20,000 investment. Tr. 60-66. He indicated that while Garden Fresh was operating out of Vegas, he maintained his position working full-time at Martindale Distributing in Salinas, California. He remembered attending a single meeting of the board in Las Vegas, but had no recollection of receiving a stock certificate, or signing the PACA license application (until his recollection was refreshed on viewing a copy of the application at the hearing). Tr. 62-64. He stated he wrote a single check on the company's behalf in the start-up phase of operations but otherwise wrote no checks for Garden Fresh, never saw any tax or financial books or records, and had virtually no duties. Tr. 62-64. He stated he was never involved in any business decisions for Garden Fresh. Tr. 65-66. He ordered some produce for Garden Fresh in the months shortly after it was founded, but not during the time period of the violations committed by Garden Fresh. Tr. 65. He also received some compensation—approximately $1500—during the first year of operation of Garden Fresh. Tr. 65.

While working at Martindale Distributing, Petitioner began to hear that there were problems at Garden Fresh. Tr. 69. Beginning in December, 2002, he began receiving calls from Garden Fresh customers, who were also customers of Martindale Distributing, indicating that they were not getting paid in a timely basis. *Id*. He told them to call Wayne Martindale, and also told them that they should stop doing business with Garden Fresh if payment was becoming a problem. Tr. 70-71. He frequently placed calls to the Garden Fresh office in Las Vegas to try to determine the status of payments, but had great difficulty in reaching Wayne Martindale, and when he did talk to him was told that checks were in the mail, or that business would be picking up, new accounts had been landed, etc.—information which was not true. Tr. 71-73.

There is no evidence that Petitioner had any direct involvement in the

transactions that were the subject of the disciplinary case. Several witnesses testified that they viewed Wayne Martindale as the person running Garden Fresh, and they only called Petitioner to get advice on how to get hold of Wayne Martindale, and to inform him of the situation. Tr. 17, 29-30, 41-42. During the violation period, Petitioner never saw the company's books, and had no role in deciding which creditors to pay. Before he resigned from Garden Fresh via letter of April 4, 2003, Petitioner signed off on the resignations of directors David N. Wiles (RX 7) and Bruce Martindale (RX 1).

Petitioner's witnesses generally corroborated Petitioner's testimony that Wayne Martindale ran Garden Fresh as far as they were concerned, and that Petitioner enjoyed a good reputation in the produce industry and had a reputation for paying the bills of Martindale Distributing on a timely basis.

Respondent's first witness was Evert Gonzalez, a senior marketing specialist for the PACA Branch. The investigation was initiated after the PACA Branch received reparation complaints. He described his investigation, which primarily involved visiting Garden Fresh's Las Vegas office. No one was at the premises when he first arrived, but he eventually received access and requested a variety of records. Wayne Martindale indicated to him that all the principals in the firms, including the Petitioner, had equal authority and could sign checks and pay payables. Mr. Gonzalez did not follow up with any of the stockholders identified by Wayne Martindale.

Phyllis Hall, a senior marketing specialist for the PACA Branch, reviewed the file, and identified the documents contained in the responsibly connected file maintained by the PACA Branch. RX 1-9.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b provides:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in

> connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

7 U.S.C. § 499a(b)(4).

In addition to penalizing the violating merchant, which in this case would be Garden Fresh Produce, Inc., the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended or has been found to have committed flagrant or repeated violations of Section 2 of the Act.. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then only upon approval of the Secretary. *Id*.

> 9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or

> shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

Findings of Fact

1. Petitioner Donald R. Beucke was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000. Petitioner invested $20,000 in the new company and was a 20% shareholder, a director and vice president of marketing.

2. Petitioner signed Garden Fresh's application for a PACA license, and was authorized to sign checks on behalf of Garden Fresh, although there is no evidence that he signed any checks other than in the period shortly after the company started up.

3. On October 8, 2002, Petitioner signed the Board of Directors resolution accepting the resignation letter of director David N. Wiles.

4. On March 3, 2003, Petitioner signed the Board of Directors resolution accepting the resignation letter of director Bruce W. Martindale.

5. Petitioner resigned as a director of Garden Fresh on April 4, 2003. He also assigned his stock in the company back to the company on that date.

6. Between January 14, 2002 and February 26, 2003 Garden Fresh failed to make full payment promptly for 109 lots of perishable agricultural commodities in the amount of nearly $380,000 to five sellers of perishable commodities.

7. During the period described in the previous paragraph, Petitioner was a director, vice president and 20% stockholder of Garden Fresh. There is no evidence in this record that Petitioner was directly involved in any of the transactions described in Finding 6.

8. Petitioner notified the PACA Branch by letter of April 28, 2003 that he was no longer connected to Garden Fresh. RX 1. In that letter, he requested that his name be removed from the PACA license.

9. Petitioner has extensive experience in the produce industry. At the time of the hearing he had worked in the produce industry for over 25 years, had held a number of positions, including president at Martindale Distributing, had co-founded Garden Fresh and Bayside Produce, and was thoroughly knowledgeable in produce industry operations.

10. With respect to his employment at Martindale, Petitioner enjoys a good reputation in the produce business, including timely payment in produce transactions.

11. Petitioner received approximately $1500 compensation for his services in the first year of Garden Fresh's operations.

12. Petitioner did not sufficiently exercise his authority as 20% shareholder, vice president and director to prevent or correct the violations committed by Garden Fresh.

Petitioner was Responsibly Connected To Garden Fresh Produce, Inc. During the Time Period in Which Garden Fresh Committed Violations of the PACA

By virtue of his long-standing experience in the produce business, his significant investment in Garden Fresh, and his management positions as 20% shareholder, director and vice president, I find that Donald Beucke was responsibly connected to Garden Fresh at the time it committed violations of the prompt payment provisions of the PACA.

Responsibly connected liability is triggered when a company has its license revoked or suspended for violations of Section 2 of the Act, or when it has been found to have committed flagrant and repeated violations of the Act. On August 29, 2004 I signed a Decision Without Hearing by Reason of Default in which I found that Garden Fresh committed willful, repeated and flagrant violations of section 2(4) of the PACA by failing to make full payment promptly for 109 lots of perishable agricultural commodities from five sellers, in the amount of just under $380,000. Thus, an individual who is responsibly connected

with Garden Fresh during the time these violations were committed is subject to the employment bar imposed by the Act.

I find that Petitioner has not met his burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of this chapter, and (2) was only nominally a director of a violating licensee or entity subject to license.

Petitioner was actively involved in the activities resulting in the violations committed by Garden Fresh. Although he did not directly enter into or even participate in the specific transactions that gave rise to the violations, his failure to take action, given his role as a co-founder, co-owner, director and officer in the corporation with a lifetime of experience in the industry, to prevent or correct the violations, is equivalent to active involvement. The responsibly connected provisions of the Act are a strong indicator that Congress believed that an individual owning a significant portion of a company engaged in perishable produce transactions cannot stand by where violations are being committed, and must undertake corrective actions when he becomes aware that there are violations. Petitioner knew that Wayne Martindale intended to operate Garden Fresh out of Las Vegas, and apparently decided to give him a free rein in doing so, without taking measures, as he surely could have, to periodically review the company's books, more actively participate in the company's management, or to take steps to inform all the company's customers that Garden Fresh was unable to pay its bills.[3] Indeed, once he knew that Garden Fresh was not paying its bills, he had a duty, either alone or in conjunction with the other directors, to implement corrective actions. Instead, he apparently chose to believe a series of untruthful statements from Wayne Martindale as to the company's fiscal health, and spent months trying to call Wayne Martindale without being put through to him, or even having Wayne Martindale hang up on him. Likewise, he could have disassociated himself from Garden Fresh by resigning, but instead

[3] I emphatically reject the attempts of Respondent to insert evidence developed at the Martindale hearing into this proceeding. It was abundantly clear that the hearings were severed, a fact Respondent was aware of since the same attorney represented Respondent at both hearings. Much of Martindale's testimony was obviously intended to point the finger of blame at others, and Petitioner's attorney was not entitled to appear or examine witnesses in the Martindale hearing. Thus, allegations that there is evidence that Petitioner made purchases for Garden Fresh during the violation period, or that he chose which debts to pay, Resp. Br. at 16-18, are not being considered by me in making this decision.

signed off on the resignations of two other directors without taking similar action himself until after the violation period.

Petitioner's inaction is particularly striking given that he knew as early as December 2002 that Garden Fresh was not paying its bills on time, if at all. He indicated that numerous customers of Garden Fresh called him at the office of Martindale Distributing, primarily to see if he could help them locate Wayne Martindale so that they could get paid. Tr. 69-71, 90-91. As a result of this, he advised some of these callers not to engage in further transactions with Garden Fresh, and began making his frequent phone calls to Wayne Martindale. He did not seek out all of Garden Fresh's customers to warn them of the company's problems. He did not, either on his own or with the participation of other directors or officers, demand to see the books of the company he co-owned, nor did he travel to Garden Fresh's Las Vegas office to attempt to alleviate the situation, or at least get a better handle on the company's condition. His failure to attempt to take any corrective actions other than trying to call Wayne Martindale, and his remaining with the company while it was committing violations, constitutes active participation in the activities resulting in a violation of this chapter. The failure of such a knowledgeable person as Petitioner, experienced in the produce business and a co-owner, officer and director of apparently at least two additional produce companies, to take action in a situation where he knows or should know that the company he owns 20% of is violating the PACA does not allow Petitioner to meet his burden here. The failure to exercise powers inherent in his various positions with Garden Fresh, "because he chose not to use the powers he had" has previously been found a basis for finding active participation. In re. Anthony Thomas, 59 Agric. Dec. 367, 392 (2000). Likewise, the need to take action to "counteract or obviate the fault of others" has been recognized as a necessary prerequisite to refute active involvement when the actual violations were not actually committed by the officer, director or shareholder. Bell v. Dept. of Agriculture, 39 F. 3d 1199, 1201 (DC Cir.1994), citing *Minotta v. U. S. Dept. of Agriculture,* 711 F. 2d 406, 408-409 (DC Cir. 1983).

Even if he was not actively involved in the violations, Petitioner likewise did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20% shareholder, director and vice president. For starters, he was a co-founder of Garden Fresh and put up $20,000 as part of the initial capitalization of Garden Fresh.
This is a far cry from someone who is listed as an owner because their

spouse or parent put them on corporate records, and had no involvement in the corporation nor experience in the produce business. *Minotto v. USDA,* 711 F. 2d 406, 409 (D.C. Cir. 1983). Rather Petitioner is an experienced, savvy individual who had worked in the produce business for a quarter of a century, has worked for years with some or all of his partners, and who is fully aware of the significance of having a valid PACA license, and the importance of complying with the prompt payment provisions of the Act. The fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof. The Judicial Officer and the courts have indicated that ownership of approximately 20% of the stock of a company is strong evidence that a person was not serving in a nominal capacity. *In re Joseph T. Kocot,* 57 Agric. Dec. 1544, 1545 and cases cited thereunder (1998).

There is no evidence that Petitioner was other than a voluntary investor, who took on the responsibilities associated with being a director, vice president and co-owner in an attempt to establish a profitable business. He apparently shared in the company's profits when there were some, and participated in a number of corporate matters, including signing the PACA license application, signing documents accepting the resignations of at least two other directors, and allowing himself to be an authorized signatory on company checks. While for practical purposes it is evident that Wayne Martindale ran Garden Fresh, the fact is that the record does not indicate any attempts, other than telephone calls, of Petitioner to exercise authority consistent with his positions as 20% owner, director and vice president. That he chose not to act does not establish that his role was nominal.

Conclusions of Law

1. Petitioner Donald R. Beucke was a 20% shareholder, director and vice president of Garden Fresh Produce, Inc. from its inception in April 2000 until he resigned from Garden Fresh on April 4, 2003.

2. Between January 14, 2002 and February 26, 2003, Garden Fresh Produce, Inc. committed willful, flagrant and repeated violations of the PACA by failing to make full payment promptly for 109 lots of perishable agricultural commodities in the amount of nearly $380,000 to five sellers of perishable commodities.

3. During the period January 14, 2002 through February 26, 2003, Petitioner was responsibly connected with Garden Fresh.

4. During the period January 14, 2002 through February 26, 2003, Petitioner was actively involved in the activities resulting in a violation of the PACA.

5. During the period January 14, 2002 through February 26, 2003, Petitioner did not serve as a 20% stockholder, director and officer of Garden Fresh in a nominal capacity.

Conclusion and Order

Petitioner has failed to show, by a preponderance of the evidence, that he was not responsibly connected to Garden Fresh Produce, Inc. at a time when Garden Fresh committed willful, flagrant and repeated violations of section 2 (4) of PACA for failing to make full payment promptly for produce purchases. Petitioner was actively involved in the activities resulting in the violations, and was more than a nominal 20% owner, vice president and director. Wherefore, I affirm the finding of the Chief of the PACA Branch that Donald R. Beucke was responsibly connected with Garden Fresh at the time the violations were committed.

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.

In re: JAMES E. THAMES, JR.
PACA-APP Docket No. 04-0003.
IN RE: GEORGE E. FULLER, JR.
PACA-APP Docket No. 03-0021.
IN RE: JON R. FULLER.
PACA-APP Docket No. 03-0020.
Decision and Order as to James E. Thames, Jr.
Filed January 24, 2006.

PACA-APP – Perishable Agricultural Commodities Act – Failure to make full payment promptly – Responsibly connected – Nominal officer, director, and shareholder.

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's decision concluding James E. Thames, Jr. (Petitioner), was responsibly connected with John Manning Co., Inc., when John Manning Co., Inc., violated the PACA. The Judicial Officer found John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4). During the violation period, Petitioner was an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc. The Judicial Officer stated the burden was on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with John Manning Co., Inc., despite his being an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc. The PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The Judicial Officer concluded Petitioner failed to prove by a preponderance of the evidence that he met the second prong of the two-pronged test. The Judicial Officer stated, since Petitioner failed to carry his burden of proof that he met the second prong of the two-pronged test, a discussion of the issue of Petitioner's active involvement in the activities resulting in a violation of the PACA (the first prong of the two-pronged test), was unnecessary.

Ann Parnes, for Respondent.
Kenneth D. Federman, Bensalem, Pennsylvania, for Petitioner.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On November 21, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that James E. Thames, Jr. [hereinafter Petitioner], was responsibly connected with John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., violated the Perishable Agricultural Commodities Act, 1930, as

amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].[1] On December 16, 2003, Petitioner filed a Petition For Review pursuant to the PACA 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] seeking reversal of Respondent's November 21, 2003, determination that Petitioner was responsibly connected with John Manning Co., Inc.

Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] conducted a hearing on March 29, 2005, in Atlanta, Georgia. Kenneth D. Federman, Rothberg & Federman, P.C., Bensalem, Pennsylvania, represented Petitioner. Ann Parnes, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On June 22, 2005, Petitioner filed "Brief in Support of the Appeal of James E. Thames, Jr. to the Chief's Determination He Was Responsibly Connected to John Manning Co., Inc." On June 24, 2005, Respondent filed "Respondent's Proposed Findings of Fact, Conclusions and Order." On August 17, 2005, Petitioner filed "Reply Brief in Support of the Appeal of James E. Thames, Jr. to the Chief's Determination He Was Responsibly Connected to John Manning Co., Inc." On August 19, 2005, Respondent filed "Respondent's Reply to Petitioners' Proposed Findings of Fact, Conclusions of Law, and Order."

On October 17, 2005, the ALJ issued a Decision and Order [hereinafter Initial Decision] concluding Petitioner was responsibly connected with John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., willfully, flagrantly, and repeatedly violated the PACA (Initial Decision at 13).

On November 15, 2005, Petitioner appealed to the Judicial Officer, and on December 16, 2005, Respondent filed a response to Petitioner's appeal petition. On December 23, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision. Therefore, I adopt the substance of the Initial Decision as the final Decision and Order as to James E. Thames, Jr.

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[1]During the period October 13, 2001, through August 28, 2002, John Manning Co., Inc., failed to make full payment promptly to 58 sellers of the agreed purchase prices in the total amount of $1,953,098.39 for 1,102 lots of perishable agricultural commodities which John Manning Co., Inc., purchased, received, and accepted in interstate and foreign commerce, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re John Manning Co.* (Decision Without Hearing by Reason of Default), 64 Agric. Dec. 1187 (2004).

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

References to the transcript are designated by "Tr." The agency records upon which Respondent based his determinations that Petitioner, George E. Fuller, Jr., and Jon R. Fuller were responsibly connected with John Manning Co., Inc., are part of the record of this proceeding.[2] Exhibits in the agency record relating to Petitioner are designated by "JTRX"; exhibits in the agency record relating to George E. Fuller, Jr., are designated by "GFRX"; and exhibits in the agency record relating to Jon R. Fuller are designated by "JFRX."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the

[2]See 7 C.F.R. § 1.136(a).

evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee

to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required). . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this

chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

. . . .

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(b).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10

days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Preliminary Statement

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or an officer, a director, or a holder of more than 10 per centum of the outstanding stock of a corporation or association.[3] The record establishes Petitioner was an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with John Manning Co., Inc., despite being an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an

[3] 7 U.S.C. § 499a(b)(9).

officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Petitioner failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc. Moreover, as Petitioner was an owner of John Manning Co., Inc., the defense that he was not an owner of John Manning Co., Inc., which was the alter ego of its owners, is not available to Petitioner.[4] As Petitioner has failed to carry his burden of proof regarding the second prong of the two-pronged test, I conclude Petitioner was responsibly connected with John Manning Co., Inc., at the time John Manning Co., Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Findings of Fact

1. John Manning Co., Inc., was formed in 1937 by John Manning and George E. Fuller, Sr. John Manning Co., Inc., was a specialty tomato re-packing house until 2000. (JFRX 7Q at 1.)

2. George E. Fuller, Sr., became sole owner of John Manning Co., Inc., when John Manning died in 1969 (JFRX 7Q at 1).

3. In 1981, Jon R. Fuller and George E. Fuller, Jr., the sons of George E. Fuller, Sr., entered the business and became stockholders of

[4] *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (1984) (holding petitioners, who were owners of the violating PACA licensee could not raise the defense that they were not owners of the licensee, which was the alter ego of its owners), *aff'd per curiam*, 131 Fed. Appx. 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who held 49 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who held 33.3 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

John Manning Co., Inc. (JFRX 7Q at 1).

4. Petitioner is an individual who resides at 12230 Edgewater Drive, Hampton, Georgia (JTRX 6 at 1).

5. Petitioner has been working in the produce industry since 1963 (Tr. 32).

6. From 1967 to 1990, Petitioner worked as a manager at Dixon Tom-A-Toe, a tomato re-packing business located in Forest Park, Georgia (JTRX 19 at 3; Tr. 31).

7. In 1990, Petitioner joined John Manning Co., Inc., and bought stock from George E. Fuller, Sr. After Petitioner's purchase of stock, George E. Fuller, Sr., had 7 percent of the outstanding stock and the remaining 93 percent was divided equally between Petitioner, George E. Fuller, Jr., and Jon R. Fuller. (JFRX 7Q at 1; JTRX 11 at 1.)

8. Petitioner became the vice president and a director of John Manning Co., Inc., in June 1991, and remained the vice president and director of John Manning Co., Inc., at least through the period that John Manning Co., Inc., violated the PACA (JTRX 1).

9. In 1999, competition in the tomato re-packing business became fierce resulting in a lower customer base for John Manning Co., Inc., and a new direction for the company was sought. Petitioner introduced Stephen McCue to the Fullers in late 1999. Thereupon, Stephen McCue became president of John Manning Co., Inc., and he, Petitioner, George E. Fuller, Jr., and Jon R. Fuller held an equal number of shares. John Manning Co., Inc., greatly expanded with diversification into the handling of mixed fruits and vegetables. (JFRX 7Q at 1; JTRX 11 at 1; Tr. 32, 80.)

10. In September 1999, Petitioner signed a $100,000 line of credit for John Manning Co., Inc., and in December 2000, Petitioner signed a $250,000 line of credit for John Manning Co., Inc. Petitioner also signed a lease for John Manning Co., Inc.'s new headquarters. (Tr. 59, 88.)

11. In May of 2001, Stephen McCue informed Petitioner, George E. Fuller, Jr., and Jon R. Fuller that he was being courted by a produce

conglomerate and would only stay with John Manning Co., Inc., if allowed to purchase additional shares to increase the number of his shares to 51 percent of the total outstanding stock. Petitioner, George E. Fuller, Jr., and Jon R. Fuller agreed. (JFRX 7Q at 1; JTRX 11 at 1.)

12. On August 27, 2001, at a joint meeting of the board of directors and the shareholders of John Manning Co., Inc., the shares held by Petitioner and the Fullers were re-assigned so that Stephen McCue became a holder of 51 percent of the outstanding stock. Stephen McCue purchased for $1 a share, 13,500 shares from George E. Fuller, Jr.; 13,500 shares from Jon R. Fuller; and 10,000 shares from Petitioner. Stephen McCue gave promissory notes in payment for the shares. As a result of the re-assignment of the shares, totaling 131,000 shares, Stephen McCue held 68,000 shares or slightly over 51 percent; Petitioner held 21,000 shares or slightly over 16 percent; George E. Fuller, Jr., held 17,500 shares or slightly over 13 percent; Jon R. Fuller held 17,500 shares or slightly over 13 percent; and George E. Fuller, Sr., held 7,000 shares or slightly over 5 percent. (JTRX 13 at 1; Tr. 51-52.)

13. When Stephen McCue initially joined John Manning Co., Inc., profits increased and so did the salaries of Petitioner, George E. Fuller, Jr., and Jon R. Fuller. At the end of June 2001, John Manning Co., Inc., had profits of $130,000, and George E. Fuller, Jr., and Jon R. Fuller were entitled to $65,000 of retained earnings on which they paid taxes. The weekly salaries of Petitioner, George E. Fuller, Jr., and Jon R. Fuller were increased from $800 to $1,000. When George E. Fuller, Jr., and Jon R. Fuller later sought their portions of the retained earnings, they were told the retained earnings were needed to pay expenses and instead George E. Fuller, Jr.'s and Jon R. Fuller's salaries were increased to $1,200 per week. Petitioner did obtain some of the retained earnings and his salary remained $1,000 per week. (GFRX 7Q at 1; Tr. 27, 81, 83, 86-89.)

14. The by-laws of John Manning Co., Inc., provide that the property and business of the corporation shall be managed by its board of directors that shall consist of no fewer than three and not more than five members. Each director shall hold office until the annual meeting of shareholders held next after the director's election and until a qualified successor shall be elected, or until the director's earlier death,

resignation, incapacity to serve, or removal. Any director may be removed, with or without cause, by the affirmative vote of the majority of the issued and outstanding shares at any regular or special meeting. The board of directors shall have the power to determine which accounts and books of the corporation shall be open to the inspection of shareholders. The by-laws further provide for the following officers:

> The president, who shall be the chief executive officer of the corporation, shall preside at all meetings of the stockholders and directors, shall ensure that all orders and resolutions of the board of directors are made effective, and, in addition to other specified duties, shall perform all other such duties as the board of directors may assign.
>
> The vice president, who, in the absence of the president or in case of the president's failure to act, shall have all the powers of the president and shall perform such duties as shall be imposed upon the vice president by the board of directors.
>
> The secretary, who shall attend and keep the minutes of all meetings of the board of directors and stockholders, shall have charge of the records and seal of the corporation, and shall perform all the duties incident to the office of the secretary of a corporation, subject at all times to the direction and control of the board of directors.
>
> The treasurer, who shall keep full and accurate account of receipts and disbursements on the books belonging to the corporation, shall deposit all monies and other properties belonging to the corporation, shall disburse the funds of the corporation as may be ordered by the board of directors, shall render to the board of directors, whenever the board may require, an account of all transactions and of the financial condition of the corporation, and shall perform such other duties as shall be assigned to the treasurer by the board of directors. (JTRX 4.)

15. During the period October 13, 2001, through May 17, 2002, the officers of John Manning Co., Inc., were Stephen McCue, president; Petitioner, vice president; George E. Fuller, Jr., treasurer; and Jon R. Fuller, secretary. Stephen McCue, Petitioner, George E. Fuller, Jr., and Jon R. Fuller constituted John Manning Co., Inc.'s board of directors. Stephen McCue attended to most of the buying and selling of produce for John Manning Co., Inc., and he had charge of all other aspects of the

business except for those handled by Petitioner, George E. Fuller, Jr., and Jon R. Fuller. Petitioner supervised the tomato lines and the packing crew. Petitioner also sold tomatoes to a few customers. George E. Fuller, Jr., assisted with tomato operations when Petitioner was absent; coordinated maintenance service on the company's trucks, forklifts, electrical jacks, and refrigeration; prepared inventory reports; and sometimes signed payroll checks. Jon R. Fuller was in charge of the company payroll; signed payroll checks; assisted with tomato operations when Petitioner was absent; purchased tomato supplies; and coordinated insurance for the company. On May 17, 2002, Stephen McCue terminated the employment of George E. Fuller, Jr., and Jon R. Fuller because they refused to put more money into the business, and they did not act as officers or directors after that date. Stephen McCue and Petitioner continued as president and vice president and members of the board of directors until the corporation stopped doing business in August 2002. (JFRX 7Q at 2; JTRX 11 at 2-3; Tr. 20, 33, 35, 67, 76, 89.)

16. Though John Manning Co., Inc., was profitable in June 2001, the company had problems paying bills. Petitioner asked Stephen McCue for financial information. Stephen McCue stated, as chief executive officer and president, he was not required to provide financial information to Petitioner. Financial information was not furnished by Stephen McCue until early May 2002. (JFRX 7Q at 2; JTRX 11 at 2.)

17. Though Petitioner knew in 2001, that John Manning Co., Inc., was having trouble paying its bills, John Manning Co., Inc.'s problems paying produce suppliers were first acknowledged and discussed at the April 24, 2002, meeting of the board of directors. Stephen McCue informed the board of directors that produce shippers were demanding money and that if the checking account was frozen pursuant to the PACA Trust Agreement, John Manning Co., Inc., could not pay. Stephen McCue asked George E. Fuller, Jr., and Jon R. Fuller for permission request money from George E. Fuller, Sr., to keep John Manning Co., Inc., from bankruptcy. They gave their permission, but emphasized George E. Fuller, Sr., would insist upon seeing some financials and that Zachary Thacker, the comptroller/chief financial officer who Stephen McCue had hired, had not yet provided the 2001 year-ending report for John Manning Co., Inc. (JTRX 14.)

18. On April 29, 2002, the board of directors held a meeting that Zachary Thacker attended. Financial difficulties were again discussed including $200,000 owed to Weis-Buy which John Manning Co., Inc., could satisfy through weekly payments secured by an 8¾ percent note and a signed guarantee by the directors. Jon R. Fuller said he was not signing anything else unless some financials were forthcoming. Stephen McCue promised financial information would be delivered by May 1, 2002. (JTRX 15.)

19. On May 3, 2002, the board of directors held another meeting that was also attended by George E. Fuller, Sr., Zachary Thacker, and Don Foster, attorney for John Manning Co., Inc. The December 31, 2001, year-ending report was distributed. The report showed a $140,805 loss in 2001 as well as a $32,598 loss in the first quarter of 2002. Stephen McCue asked the stockholders for their personal cash infusion to help John Manning Co., Inc., during the financial hardship. He also expressed concern because of the Fullers' refusal to sign additional lines of credit with Weis-Buy. He stated John Manning Co., Inc., could save $5,000 a week without George E. Fuller, Jr., Jon R. Fuller, and Petitioner on the payroll, and others could perform their jobs. Stephen McCue stated the company had a "50/50 shot of making or failing." Stephen McCue stated he was going to do his best to save John Manning Co., Inc. George E. Fuller, Sr., stated John Manning Co., Inc., should reorganize under bankruptcy laws, but Stephen McCue said reorganization was not an option. George E. Fuller, Sr., then said, under the circumstances, he could not put any more money into John Manning Co., Inc. (JTRX 16.)

20. John Manning Co., Inc., shut down in August 2002, and its PACA license terminated on June 5, 2003, for failure to pay the annual PACA license renewal fee (JTRX 1 at 1, JTRX 11 at 3).

21. On April 22, 2003, a disciplinary complaint was filed under the PACA against John Manning Co., Inc., for violating section 2(4) of the PACA (7 U.S.C. § 499b(4)) from October 13, 2001, through August 28, 2002, by failing to pay $1,953,098.39 to 58 sellers for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce. The disciplinary complaint resulted in a default decision being entered against John Manning Co., Inc., that published the finding that it had committed willful, flagrant, and repeated

violations of the PACA.[5] (JTRX 5-6.)

22. Petitioner attended numerous board of director meetings during the time he was a director of John Manning Co., Inc., including board meetings held on February 23, 2000, March 22, 2000, April 19, 2000, May 15, 2001, August 27, 2001, April 24, 2002, April 29, 2002, and May 3, 2002 (JFRX 7I-7P; JTRX 13-16).

Conclusion

Petitioner was responsibly connected with John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner failed to prove by a preponderance of the evidence that he was a nominal officer, director, and shareholder of John Manning Co., Inc. Petitioner had an actual significant nexus with John Manning Co., Inc., during the violation period. John Manning Co., Inc.'s by-laws vested all oversight and governance powers in the board of directors, and together, Petitioner, George E. Fuller, Jr., and Jon R. Fuller constituted the majority of the board of directors. Though Stephen McCue, as majority stockholder, could have removed Petitioner as an officer and a director, he did not. Petitioner therefore had powers that he failed to use in an effort to prevent John Manning Co., Inc.'s violations of the prompt payment provision of the PACA. Under these circumstances, Petitioner was so positioned that he should have known of the misdeeds and taken steps to "counteract or obviate the fault of others."[6] Petitioner therefore cannot be found to be a nominal officer, director, or shareholder under controlling legal precedents that have interpreted and applied the term "nominal" within the meaning of the PACA.

The PACA allows a person who otherwise comes under its "responsibly connected" definition to show he or she should not be so considered by satisfying both parts of an evidentiary test that he or she was not actively involved in the activities resulting in a violation and

[5] *In re John Manning Co.* (Decision Without Hearing by Reason of Default), 64 Agric. Dec. 1187 (2004).

[6] *Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Cir. 1994). *See also Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D. C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 386 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001).

was only nominally a partner, an officer, a director, and a shareholder of a violating PACA licensee. Inasmuch as Petitioner cannot be found to have only "nominally" been an officer, a director, and a shareholder of John Manning Co., Inc., I find it unnecessary to address whether under the applicable precedents Petitioner met his burden of proof that he was not actively involved in the activities resulting in a violation.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises two issues in Petitioner's Appeal Petition. First, Petitioner asserts the ALJ found a discussion of the issue of Petitioner's active involvement in the activities resulting in a violation of the PACA unnecessary because the ALJ concluded Petitioner failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of John Manning Co., Inc. Petitioner requests, if I find necessary a discussion of the issue of Petitioner's active involvement in the activities resulting in John Manning Co. Inc.'s violations of the PACA, that I refer to Petitioner's discussion of active involvement in Petitioner's Brief in Support of the Appeal of James E. Thames, Jr. to the Chief's Determination He Was Responsibly Connected to John Manning Co., Inc. (Petitioner's Appeal Pet. at ¶ 1.A.)

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 per centum of the outstanding stock of a corporation or association.[7] The record establishes Petitioner was an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with John Manning Co., Inc., despite his being an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must

[7]7 U.S.C. § 499a(b)(9).

demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

I agree with the ALJ's conclusion that Petitioner failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc. Moreover, as Petitioner was an owner of John Manning Co., Inc., the defense that he was not an owner of John Manning Co., Inc., which was the alter ego of its owners, is not available to Petitioner.[8] As Petitioner has failed to carry his burden of proof regarding the second prong of the two-pronged test, I agree with the ALJ that a discussion of the issue of Petitioner's active involvement in the activities resulting in a violation of the PACA (the first prong of the two-pronged test), is unnecessary.

Second, Petitioner states the ALJ's conclusion that Petitioner was not a nominal officer, director, and stockholder of John Manning Co., Inc., is error (Petitioner's Appeal Pet. at ¶ 1.B).

I agree with the ALJ's conclusion that Petitioner failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a stockholder of John Manning Co., Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.[9]

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[8]See note 4.

[9]*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, (continued...)

The record establishes Petitioner had an actual, significant nexus with John Manning Co., Inc., during the violation period.

Petitioner had 39 years of experience in the produce business. Prior to his employment by John Manning Co., Inc., in 1990, Petitioner had considerable experience in the tomato re-packing business, where he worked as a manager for Dixon Tom-A-Toe, in Forest Park, Georgia, from 1967 to 1990. At John Manning Co., Inc., Petitioner supervised nearly all of the tomato re-pack operations and packing crew on a daily basis, hired and fired employees, and took orders for produce. (JTRX 19 at 3; Tr. 30-33, 35, 39.)

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.[10] Petitioner held the positions of vice president and director at John Manning Co., Inc., from June 1991 until John Manning Co., Inc., stopped doing business in 2002. During the time he held these positions, Petitioner was active in corporate decision-making. Petitioner co-signed lines of credit for John Manning Co., Inc., signed the lease for John Manning Co., Inc.'s new headquarters, and nominated and voted for Stephen McCue to be president of John Manning Co., Inc. (JFRX 7I at 1; Tr. 29, 37-38, 59, 87-88). During his tenure as a director on the board of directors, Petitioner attended and participated in numerous board meetings (JTRX 13-16; JFRX 7I-7P). Petitioner knew by the April 24, 2002, board of directors meeting that John Manning Co., Inc., was not paying its produce sellers in accordance with the PACA.

Substantial compensation as a result of a person's association with the violating PACA licensee is another factor in determining whether that person was or was not a nominal officer or director.[11] Petitioner earned $1,000 a week during the period when John Manning Co., Inc., violated the PACA (Tr. 27). A salary of $52,000 per year suggests that Petitioner's roles as vice president and director were not nominal. Moreover, payment of dividends to Petitioner out of the retained earnings (Tr. 27, 88-89) indicates Petitioner was not merely a nominal stockholder.

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[9](...continued)
510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

[10]*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

[11]*In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1543 (1998); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1495-96 (1998).

In short, I find Petitioner had an actual, significant nexus with John Manning Co., Inc. Petitioner had the appropriate business experience to be a corporate officer and director, participated in corporate decision-making, received substantial compensation for his services, and attended and participated in board meetings.

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

ORDER

I affirm Respondent's November 21, 2003, determination that Petitioner was responsibly connected with John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

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

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of the Order in this Decision and Order as to James E. Thames, Jr., in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order as to James E. Thames, Jr.[12] The date of entry of the Order in this Decision and Order as to James E. Thames, Jr., is January 24, 2006.

In re: EDWARD S. MARTINDALE.
PACA-APP Docket No. 04-0010.
Decision and Order.
Filed January 27, 2006.

PACA-APP – Responsibly connected – Nominal officer, when not – Resignation, belated.

[12]See 28 U.S.C. § 2344.

P. Sterling Kerr for Petitioner.
Charles L. Kendall for Respondent.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision

In this decision, I find that Petitioner Edward S. Martindale was responsibly connected to Garden Fresh Produce, Inc., a company that has committed disciplinary violations under the Perishable Agricultural Commodities Act (PACA). I find that Petitioner was actively involved in the activities resulting in the violations by Garden Fresh, and that he was more than a nominal partner, officer, director, or shareholder of Garden Fresh.

Procedural History

On February 18, 2004, a letter from Karla Whalen, Head, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, notified Petitioner that an initial determination had been made that he was "responsibly connected" to Garden Fresh Produce, Inc., as that term is defined in 7 U.S.C. § 499a(b)(9). RX 2. The determination was based on Petitioner's 20 percent ownership of Garden Fresh, as well as his being secretary and a director of that company from July 2000 through April 2003. That interval encompassed the period January 2002 through February 2003, during which time Garden Fresh was alleged to have committed numerous violations of the prompt payment provisions of the PACA.

On March 23, 2004 [Petitioner] challenged the initial determination, contending that he had tendered his resignation from the company before the violative acts took place and that he was "in no way 'actively involved' with Garden Fresh" during the violation period. RX 3. On May 10, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, issued a final determination that Mr. Martindale was responsibly connected to Garden Fresh at the time violations of the PACA were committed, and informed Mr. Martindale of his right to file a petition for review of his final determination. A petition for review was filed on June 10, 2004.

In a related proceeding, on January 27, 2004, a PACA complaint was filed against Garden Fresh Produce, Inc. for PACA violations committed between January 2002 and February 2003. Following service of the complaint, no answer having been filed by Garden Fresh, the Agency

filed a Motion for Decision Without Hearing by Reason of Default on June 4, 2004. No response to that Motion was filed by Garden Fresh and I issued a Decision Without Hearing on August 25, 2004, finding that Garden Fresh had committed the alleged violations involving non-payment of nearly $380,000 for 109 lots of commodities purchased between January 2002 and February 2003. RX 12.

A hearing was conducted in this case on March 2, 2005 in San Jose, California. Petitioner was represented by P. Sterling Kerr, and Respondent was represented by Charles L. Kendall. Petitioner testified in his own behalf, and called one additional witness, while Respondent called three witnesses, including two PACA Branch employees.

Facts

Petitioner Edward Shane Martindale[1] has worked in the produce business for approximately fifteen years. He began working at Martindale Distributing, a business run by his father in Salinas, California. When he began working there, his stepbrother Donald R. Beucke and his older brother Wayne Martindale were already involved in the business. He started out in the company as a produce inspector and "on grounds" buyer. When his father retired from the company in 1999, Petitioner, along with his stepbrother and brother, purchased the company with each of them owning one-third of the company. Since approximately May 2003, when his brother and stepbrother resigned from Martindale Distributing, he has been the 100% owner of Martindale Distributing. Tr. 36, 41-42.

In late 1999 or early 2000, Wayne Martindale, who with his stepbrother Donald Beucke had already started Bayside Produce, a produce company with a warehouse in San Diego, "started talking about wanting to open another company in Las Vegas." Tr. 42. Petitioner joined his brother and stepbrother, along with several others, and formed Garden Fresh. Petitioner was a 20% shareholder of the new company, and was listed as a director and secretary. He was issued a stock certificate indicating that he owned 1,000 shares of stock in Garden Fresh (RX 10, p. 4) although he stated he had never seen it before the institution of this proceeding. He signed the original PACA license application and the check in payment of the PACA licensing fee. He submitted his resignation and reassigned his stock on April 4, 2003. By

[1] Petitioner's legal name is Edward Shane Martindale but he is generally known as Shane Martindale. Tr. 34.

letter dated April 28, 2003, he notified the PACA Branch that he was no longer connected with Garden Fresh, and asked that his name be removed from Garden Fresh's PACA license. RX 1, p. 16.

Petitioner stated that he originally decided to join the company because he was good with bills and money management. Tr. 85. During the early days of the company's operations, Petitioner, working out of Martindale Distributing's Salinas office, handled much of Garden Fresh's paperwork, even receiving a salary for taking care of payables that were sent to his office in Salinas. He classified his principal duties with Garden Fresh as that of an accounts payable manager, but at the end of 2001 he basically stopped writing checks for the company, when his brother Wayne moved that part of Garden Fresh's operations to Las Vegas. He stated that he relinquished his role because of differences of opinion with his brothers, and that problems arising from the use of non-matching computer systems, and problems with coordination of purchase orders and bills, caused him to "disassociate" himself from Garden Fresh. Tr. 49. He told the other shareholders that he would no longer be involved with handling the payables for Garden Fresh. Tr. 49-50. All the Garden Fresh invoices that he had in his possession and had not been paid were taken by Wayne Martindale to Las Vegas in December, 2001. Tr. 50.

Petitioner purchased some produce on behalf of Garden Fresh in the first year it did business, but recalled making no such purchases after his brother took the company's payables to Las Vegas at the end of 2001. He did issue some checks after 2001 when he was directed by his brother and stepbrother "to make payment to certain vendors that were in Salinas." Tr. 52, 95. He was not directly involved in any of the transactions that were the subject of the Default Decision I entered against Garden Fresh. After December 2001, he indicated that he did not actively monitor Garden Fresh on a regular basis, even though he was still a shareholder, officer and director. Tr. 52. He fielded calls for Garden Fresh from his Salinas office, and became aware in 2002 that there were complaints about Garden Fresh concerning the way the company was handling accounts payable. He tried to see that the caller was put in touch with Wayne Martindale to attempt to resolve the issue. Tr. 52-53. Other than referring callers to his brother, he only could recall warning one company, Sun America Produce, that he had concerns about the way Garden Fresh was paying its bills. Tr. 81. Even though he knew there were financial problems, he did not ask to see a financial statement or bank statements, basically relying on statements

from Wayne Martindale and Donald Beucke "that things were getting better." Tr. 99.

Before he resigned from Garden Fresh by letter dated April 4, 2003, Petitioner had signed off on documents accepting the resignation of David Wiles (RX 11) and Bruce Martindale (RX 1, p. 13).

Joe Quijada and Steven Wood (the latter called by Respondent) each testified that Wayne Martindale was the primary person they dealt with when dealing with Garden Fresh. Mr. Quijada testified that he never had any slow pay problems with Martindale Distributing and characterized Petitioner as "an upstanding individual." Tr. 22.

Evert Gonzalez, a senior marketing specialist for the PACA Branch, testified that his investigation was initiated after the PACA Branch received reparation complaints. Tr. 108-109. He described his investigation, which primarily involved visiting Garden Fresh's Las Vegas office. No one was at the premises when he first arrived, but he eventually received access and requested a variety of records. Tr. 110-111. Wayne Martindale indicated to him that all the principals in the firms, including the Petitioner, had equal authority and could sign checks and pay payables. Tr. 112. Mr. Gonzalez did not follow up with any of the stockholders identified by Wayne Martindale.

Phyllis Hall, a senior marketing specialist for the PACA Branch, reviewed the file, and identified the documents contained in the responsibly connected file maintained by the PACA Branch. RX 1-1

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by

> such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

7 U.S.C. § 499a(b)(4).

In addition to penalizing the violating merchant, which in this case would be Garden Fresh Produce, Inc., the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended or has been found to have committed flagrant or repeated violations of Section 2 of the Act. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then only upon approval of the Secretary. *Id*.

> 9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

Findings of Fact

1. Petitioner Edward Shane Martindale was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000. Petitioner was a 20% shareholder, a director and secretary of Garden Fresh.

2. Petitioner signed Garden Fresh's application for a PACA license, and was authorized to sign checks on behalf of Garden Fresh. As the money manager of Garden Fresh, he handled a significant portion of the payables in 2001. Even after the payables were transferred to Las Vegas in late 2001, he handled occasional payments as directed by Wayne Martindale.

3. On October 8, 2002, Petitioner signed the Board of Directors resolution accepting the resignation letter of director David N. Wiles.

4. On March 3, 2003, Petitioner signed the Board of Directors resolution accepting the resignation letter of director Bruce W. Martindale.

5. Petitioner resigned as a director of Garden Fresh on April 4, 2003. He also assigned his stock in the company back to the company on that date.

6. Between January 14, 2002 and February 26, 2003 Garden Fresh failed to make full payment promptly for 109 lots of perishable agricultural commodities in the amount of nearly $380,000 to five sellers of perishable commodities.

7. During the period described in the previous paragraph, Petitioner was a director, secretary and 20% stockholder of Garden Fresh. There is no evidence in this record that Petitioner was directly involved in any of the transactions described in Finding 6.

8. Petitioner notified the PACA Branch by letter of April 28, 2003 that he was no longer connected to Garden Fresh. RX 1, p. 16. In that letter, he requested that his name be removed from the PACA license.

9. Petitioner has extensive experience in the produce industry. At

the time of the hearing he had worked in the produce industry for over 15 years; had held a number of positions, including sole ownership of Martindale Distributing; was particularly knowledgeable in the areas of money management and bill paying in the produce industry; and was thoroughly knowledgeable in produce industry operations.

10. With respect to his employment at Martindale, Petitioner enjoys a good reputation in the produce business, including timely payment in produce transactions.

11. Petitioner received compensation for his services in the first year of Garden Fresh's operations.

12. Petitioner did not sufficiently exercise his authority as 20% shareholder, secretary and director to prevent or correct the violations committed by Garden Fresh.

Petitioner was Responsibly Connected To Garden Fresh Produce, Inc. During the Time Period in Which Garden Fresh Committed Violations of the PACA

By virtue of his long-standing experience in the produce business, his significant investment in Garden Fresh, and his management positions as 20% shareholder, director and vice president, I find that Edward S. (Shane) Martindale was responsibly connected to Garden Fresh at the time it committed violations of the prompt payment provisions of the PACA.

Responsibly connected liability is triggered when a company has its license revoked or suspended for violations of Section 2 of the Act, or when it has been found to have committed flagrant and repeated violations of the Act. On August 29, 2004 I signed a Decision Without Hearing by Reason of Default in which I found that Garden Fresh committed willful, repeated and flagrant violations of section 2(4) of the PACA by failing to make full payment promptly for 109 lots of perishable agricultural commodities from five sellers, in the amount of just under $380,000. Thus, an individual who is responsibly connected with Garden Fresh during the time these violations were committed is subject to the employment bar imposed by the Act.

I find that Petitioner has not met his burden of showing by a preponderance of the evidence that he (1) was not actively involved in

the activities resulting in a violation of this chapter, and (2) was only nominally a director of a violating licensee or entity subject to license.

Petitioner was actively involved in the activities resulting in the violations committed by Garden Fresh. Although he did not directly enter into or even participate in the specific transactions that gave rise to the violations, his failure to take action, given his role as a co-founder, co-owner, director and officer in the corporation with fifteen years experience in the industry, to prevent or correct the violations, is equivalent to active involvement. The responsibly connected provisions of the Act are a strong indicator that Congress believed that an individual owning a significant portion of a company engaged in perishable produce transactions cannot stand by where violations are being committed, and must undertake corrective actions when he becomes aware that there are violations. Petitioner knew that Wayne Martindale intended to operate Garden Fresh out of Las Vegas, and apparently decided to give him a free rein in doing so, without taking measures, as he surely could have, to periodically review the company's books, more actively participate in the company's management, or to take steps to inform all the company's customers that Garden Fresh was unable to pay its bills. This is particularly glaring in the case of Petitioner, whose strongest field of expertise was apparently in money management and handling payables, and who knew to a certainty in 2001 that there were major problems with Garden Fresh's accounts in 2001, before the violations that were the subject of the disciplinary action even took place. Indeed, once he knew that Garden Fresh was not paying its bills, he had a duty, either alone or in conjunction with the other directors, to implement corrective actions. Instead, he figuratively washed his hands of the matter, handing off the books to his brother Wayne, and taking no actions consistent with his positions as 20% owner, officer and director to correct the situation. He could have disassociated himself from Garden Fresh by resigning, but instead signed off on the resignations of two other directors without taking similar action himself until after the violation period.

Further, Petitioner issued some checks in 2002, usually at the direction of Wayne Martindale, at a time when he knew that the Garden Fresh was having trouble making its payments. Tr. 52, 55. He may have even made some purchases for Garden Fresh during this time period. Tr. 17-18. By making payments at a time when he knew the company was not making payments to some of its creditors, Petitioner

was in effect choosing which debts to pay, even though it was ostensibly under the "direction" of Wayne Martindale or Donald Beucke. As a co-owner, officer and director, he cannot duck his responsibilities under the PACA by characterizing himself as an individual powerless to disobey these directives. His executing these checks at a time when he knew Garden Fresh was having financial problems is just the kind of conduct referred to by the Judicial Officer in *In re. Lawrence D. Salins,* 57 Agric. Dec. 1474 (1998), when he held that check writing and choosing which debts to pay "can cause an individual to actively involved in failure to pay promptly for produce. *Id*., at 1488-1489.

Petitioner's inaction is particularly striking given that he knew as early as December 2001 that Garden Fresh's purchase order and invoice process was in such disarray that he passed it over to Wayne Martindale in Las Vegas. Even though he received many calls from Garden Fresh sellers looking for Wayne Martindale because they were not getting paid, he did not seek out all of Garden Fresh's customers to warn them of the company's problems. He did not, either on his own or with the participation of other directors or officers, demand to see the books of the company he co-owned, nor did he travel to Garden Fresh's Las Vegas office to attempt to alleviate the situation, or at least get a better handle on the company's condition. His failure to attempt to take any corrective actions, his "washing his hands" of the payables situation by handing the books to his brother, and his remaining with the company while it was committing violations, constitutes active participation in the activities resulting in a violation of this chapter. The failure of such a knowledgeable person as Petitioner, experienced in the produce business, to take action in a situation where he knows or should know that the company he owns 20% of is violating the PACA does not allow Petitioner to meet his burden here. The failure to exercise powers inherent in his various positions with Garden Fresh, "because he chose not to use the powers he had" has previously been found a basis for finding active participation. *In re. Anthony Thomas,* 59 Agric. Dec. 367, 388 (2000). Likewise, the need to take action to "counteract or obviate the fault of others" has been recognized as a necessary prerequisite to refute active involvement when the actual violations were not actually committed by the officer, director or shareholder. *Bell v. Dept. of Agriculture,* 39 F. 3d 1199, 1201 (DC Cir.1994), citing *Minotta v. U. S. Dept. of Agriculture,* 711 F. 2d 406, 408-409 (DC Cir. 1983).

Even if he was not actively involved in the violations, Petitioner likewise did not meet his burden of showing, by a preponderance of the

evidence, that he was only a nominal 20% shareholder, director and secretary. For starters, he was a co-founder of Garden Fresh, and was actively involved in managing the money and paying the bills of the company at its outset. This is a far cry from someone who is listed as an owner because their spouse or parent put them on corporate records, and had no involvement in the corporation or experience in the produce business. Minotto v. USDA, supra, 711 F. 2d at 409. Rather Petitioner is an experienced, savvy individual who had worked in the produce business for at least fifteen years, has worked for years with some or all of his partners, and who is fully aware of the significance of having a valid PACA license, and the importance of complying with the prompt payment provisions of the Act. The fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof. The Judicial Officer and the courts have indicated that ownership of approximately 20% of the stock of a company is strong evidence that a person was not serving in a nominal capacity. *In re Joseph T. Kocot,* 57 Agric. Dec. 1544, 1545 and cases cited thereunder (1998).

There is no evidence that Petitioner was other than a voluntary investor, who took on the responsibilities associated with being a director, secretary and co-owner in an attempt to establish a profitable business. He presumably would have shared in the company's profits when there were some, and participated in a number of corporate matters, including signing the PACA license application, signing documents accepting the resignations of at least two other directors, and allowing himself to be an authorized signatory on company checks. While for practical purposes it is evident that Wayne Martindale ran Garden Fresh, the fact is that the record does not indicate any attempts of Petitioner to exercise authority consistent with his positions as 20% owner, director and vice president. That he chose not to act does not establish that his role was nominal.

Conclusions of Law

1. Petitioner Edward Shane Martindale was a 20% shareholder, director and secretary of Garden Fresh Produce, Inc. from its inception in April 2000 until he resigned from Garden Fresh on April 4, 2003.

2. Between January 14, 2002 and February 26, 2003, Garden Fresh

Produce, Inc. committed willful, flagrant and repeated violations of the PACA by failing to make full payment promptly for 109 lots of perishable agricultural commodities in the amount of nearly $380,000 to five sellers of perishable commodities.

3. During the period January 14, 2002 through February 26, 2003, Petitioner was responsibly connected with Garden Fresh.

4. During the period January 14, 2002 through February 26, 2003, Petitioner was actively involved in the activities resulting in a violation of the PACA.

5. During the period January 14, 2002 through February 26, 2003, Petitioner did not serve as a 20% stockholder, director and officer of Garden Fresh in a nominal capacity.

Conclusion and Order

Petitioner has failed to show, by a preponderance of the evidence, that he was not responsibly connected to Garden Fresh Produce, Inc. at a time when Garden Fresh committed willful, flagrant and repeated violations of section 2 (4) of PACA (7 U.S.C. § 499b(4)) for failing to make full payment promptly for produce purchases. Petitioner was actively involved in the activities resulting in the violations, and was more than a nominal 20% owner, vice president and director. Wherefore, I affirm the finding of the Chief of the PACA Branch that Edward Shane Martindale was responsibly connected with Garden Fresh at the time the violations were committed.

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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In re: PHILIP J. MARGIOTTA.
PACA APP Docket No. 03-0007.
Decision and Order.
Filed January 31, 2006.

PACA-APP – Responsibly connected – Active participation – Bribes – Actual knowledge of bribe not required.

Mark C.H. Mandell for Petitioner.
Mary Hobbie for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

[1] I decide that Petitioner Philip J. Margiotta was responsibly connected with M. Trombetta & Sons, Inc., as defined by 7 U.S.C. § 499a(b)(9), during April through July 1999. As the manager of Trombetta's Hunts Point Terminal Market facility, while he was an officer of Trombetta (the Secretary), Philip J. Margiotta was "actively involved" in Trombetta's activities, especially Trombetta's Hunts Point Terminal Market activities. There is no evidence of wrongdoing by Philip J. Margiotta; yet by running the Hunts Point Terminal Market portion of the company, he was overwhelmingly "actively involved", within the meaning of 7 U.S.C. § 499a(b)(9), in the activities which led to Trombetta's PACA violations.[1] To be found to be "responsibly connected" or to be found to be "actively involved", wrongdoing is not required.

Procedural History

[2] Petitioner Philip J. Margiotta (herein frequently Philip J. Margiotta), filed his petition for review on March 21, 2003. The agency record was filed on April 9, 2003.

[3] Philip J. Margiotta is represented by Mark C.H. Mandell, Esq., of Annandale, New Jersey.

[4] Respondent, Chief, PACA Branch, Fruit and Vegetable Programs,

[1] Trombetta, through employee Joseph (Joe Joe) Auricchio, violated section 2(4) of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b(4), by failing to perform its duty to maintain fair trade practices required by the PACA.

Agricultural Marketing Service, United States Department of Agriculture (herein frequently PACA), was represented first by David A. Richman, Esq., and then by Andrew Y. Stanton, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.

[5] This case was consolidated with the disciplinary action[2] for the hearing, and all the evidence was available for each case. The nine-day hearing was held before me, Jill S. Clifton, in New York, New York, on July 14-18, July 21-23, and August 21, 2003. Witnesses testified and exhibits were admitted into evidence. The transcript is referred to as "Tr." Philip J. Margiotta's exhibits are designated by "RX" (based on the disciplinary action). PACA's exhibits are designated by "CX" and "AX" (based on the disciplinary action); and the Certified Agency Record exhibits are designated by "CARX".

[6] Philip J. Margiotta (and Trombetta) submitted 22 exhibits, RX A through RX V, and a DVD submitted post-hearing.

[7] Philip J. Margiotta (and Trombetta) called 11 witnesses (Philip James ("Phil") Margiotta, also known as Philip J. Margiotta (born in 1949), Tr. 498-551; 574-851, 996-1163, 1338-1381, 1390-1408, 1535-1545; Peter Silverstein, Tr. 872-924; Max Montalvo Tr. 932-974; Frank J. Falletta, Tr. 1199-1221; Matthew John ("Matt") Andras, Tr. 1221-1265; Harlow E. ("H.E.") Woodward III, Tr. 1266-1300; Stephen Trombetta, Tr. 1311-1336, Martin A. ("Marty") Shankman, Tr. 1412-1423; Patricia Baptiste, Tr. 1424-1433; Philip Harry Lucks, Tr. 1616-1638; and Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta (born in 1924), Tr. 575, 1651-1681).

[8] PACA (and AMS) submitted the Certified Agency Record exhibits which are known as CARX, and 13 additional exhibits, CX 1 through CX 10; AX 1, AX 2, and AX 3.

[9] PACA (and AMS) called three witnesses (Joan Marie Colson, Tr. 25-127; William J. Cashin, Tr. 127-160, 172-358; and John Aloysius Koller, Tr. 359-371, 378-495, 1441-1532, 1546-1596, 1683-1725).

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[2] *In re M. Trombetta and Sons, Inc.*, 64 Agric. Dec. 1869 (2005) .

[10] All of the parties' exhibits, and also ALJX 1 and ALJX 2 (*see* Tr. 1544-45), were admitted into evidence.

[11] The proposed transcript corrections, filed April 5, 2004, and April 12, 2004, were accepted.

[12] Philip J. Margiotta's Proposed Findings of Fact, Conclusions of Law, and Order, with opening brief was timely filed on October 21, 2005; his reply was timely filed on November 30, 2005.

[13] PACA's Proposed Findings of Fact, Conclusions, and Order with response brief was timely filed on November 14, 2005.

Findings of Fact

[14] The testimony of each witness was credible.

[15] Philip J. Margiotta, full name Philip James ("Phil") Margiotta, is an individual who was born on August 13, 1949, and whose mailing address was 41 Bellain Avenue, Harrison, New York 10528. Tr. 498-500, 1607-08, 1684; CARX 3; AX 1.

[16] Philip J. Margiotta is fifth generation in the business known as M. Trombetta and Sons, Inc. (herein frequently referred to as Trombetta), tracing its roots to the 1890s. Tr. 500.

[17] Trombetta was owned 60% by Philip J. Margiotta's father, Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta; and 40% by Stephen ("Steve") Trombetta, at all times material herein and particularly in 1999. Tr. 1676-77.

[18] Trombetta's PACA license records covering 1998 through 2003 show Philip J. Margiotta as secretary; P.J. Margiotta (the father of Philip J. Margiotta (Tr. at 5)), as president, treasurer and 60 percent shareholder; and Stephen Trombetta as vice president and 40 percent shareholder. CARX 1. [19] Philip J. Margiotta was not an owner of Trombetta, but he was an employee of Trombetta and an officer, the Secretary, of Trombetta. Tr. 499, 1338, 1341-1342.

[20] Philip J. Margiotta, during April through July 1999, was the

manager of Trombetta's Hunts Point Terminal Market facility, while he was the Secretary of Trombetta. Tr. 499.

[21] Philip J. Margiotta ran Trombetta's business at the Hunts Point Terminal Market[3] in the Bronx, New York, New York, and he had worked in the business for more than 30 years. Tr. 499, 1340, 1342, 1344.

[22] Trombetta's managers at all times material herein and particularly in 1999 were Philip J. Margiotta at the Hunts Point Terminal Market, and Stephen ("Steve") Trombetta at the Bronx Terminal Market. Tr. 502, 1677.

[23] P.J. Margiotta retired from active participation in Trombetta in 1993. He had not drawn a salary for more than ten years, at the time of the hearing. Tr. 1653, 1672, 1680.

[24] Stephen Trombetta had visited Trombetta's Hunts Point Terminal Market facility only about once during the 10 years prior to the hearing. Tr. 1312.

[25] Trombetta's Hunts Point Terminal Market facility is where Trombetta, through its employee Joseph (Joe Joe) Auricchio, paid unlawful bribes and gratuities to William Cashin, a United States Department of Agriculture produce inspector, during April 1999 through July 1999. *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005).

[26] Joseph (Joe Joe) Auricchio was acting in the scope of his employment as Trombetta's produce salesperson when he paid the unlawful bribes and gratuities, and Auricchio's willful violations of the PACA are deemed to be Trombetta's willful violations of the PACA. *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 756-57 (2001), *aff'd* 342 F.3d 584 (6th Cir. 2003).

[27] Trombetta was responsible under the PACA, notwithstanding any ignorance of the employee's actions, for the conduct of its employee

[3] Trombetta also owns a facility at the Bronx Terminal Market, which is approximately 10 miles from Trombetta's facility at the Hunts Point Terminal Market. Tr. 1312.

who paid the unlawful bribes and gratuities to the United States Department of Agriculture produce inspector in connection with the federal inspections. *Post & Taback, Inc. v. Department of Agric.*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

[28] Philip J. Margiotta oversaw Trombetta; he generally ran the firm. Tr. 499, 1340, 1342.

[29] Philip J. Margiotta bought produce on behalf of Trombetta, negotiated with the shippers, managed the transactions with the shippers, settled with the shippers, and sometimes arranged transportation. Tr. 1340, 1342, 1369.

[30] In carrying out his oversight responsibilities at Trombetta's Hunts Point Terminal Market facility, Philip J. Margiotta observed the merchandise as it was received from shippers and sold to customers. Tr. at 1342-43.

[31] Philip J. Margiotta ensured that the store was clean and neat and that produce was not lost due to negligence. Tr. 1342-43.

[32] Philip J. Margiotta observed the work of the foreman (who watches the porters) and the other employees. Philip J. Margiotta was responsible for addressing any union problems. Philip J. Margiotta supervised the office help, to ensure that Trombetta's purchases and sales were properly recorded. Tr. 1343-45.

[33] Philip J. Margiotta supervised the sales staff, advised them what product was coming into Trombetta, and what Philip J. Margiotta thought the market would be for the various commodities handled by Trombetta. Tr. 1344.

[34] Philip J. Margiotta decided which shippers to pay and, after consultation with the shippers, how much to pay them. Tr. 1369-70.
[35] Philip J. Margiotta hired all the sales help (Tr. 1346), including Joseph (Joe Joe) Auricchio. Tr. 505.

[36] Joseph (Joe Joe) Auricchio was one of Trombetta's employees monitored by Philip J. Margiotta. Tr. 508, 529-30, 550.

[37] Philip J. Margiotta failed to prevent Trombetta's employee Joseph (Joe Joe) Auricchio from paying unlawful bribes and gratuities. Tr. 525-27, 1358.

[38] Philip J. Margiotta worked through the union to terminate two employees of Trombetta who had engaged in theft. Tr. 1344-45. Joseph (Joe Joe) Auricchio was also terminated. Tr. 1152.

[39] Philip J. Margiotta signed, as corporate secretary, Trombetta's PACA license renewal applications for 2001-2002 (CARX 1, p. 7), 2000-2001 (CARX 1, p. 11), 1999-2000 (CARX 1, p. 15), 1998-1999 (CARX 1, p. 19), and 1997-1998 (CARX 1, p. 23). See also Tr. 1362-1363.

[40] Philip J. Margiotta was authorized by Trombetta to sign checks and was on the signature card of Trombetta's bank. Tr. 1338-39; CARX 5, p. 3. Philip J. Margiotta signed most of the checks generated by Trombetta's Hunts Point Terminal Market facility. Tr. 1369; CARX 8.

[41] Among Trombetta's checks signed by Philip J. Margiotta were checks in payment for Trombetta's annual PACA license renewals, covering the years 1997-1998 through 2001-2002. CARX 1, pp. 8, 12, 16, 20, 24.

[42] Philip J. Margiotta signed two renewal applications for Trombetta's New York State Farm Products Dealer License, identifying himself as secretary of Trombetta, on April 8, 1998 and March 22, 1999, covering the periods May 1, 1998 through April 30, 1999, and May 1, 1999 through April 30, 2000, respectively. CARX 6 at pp. 1-2 and 3-4.

[43] The April 1999 issue of The Blue Book identified Philip J. Margiotta as supervisor of sales for Trombetta. CARX 9.

Discussion

[44] This Discussion, paragraphs [44] through [57], focuses on why I determine that Philip J. Margiotta was "actively involved" in the activities that led to Trombetta's failure to perform its duty to maintain fair trade practices required by the PACA. 7 U.S.C. § 499b(4).

[45] The standard for determining whether a person is actively involved in the activities resulting in a violation of the PACA is set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), as follows:

> A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test. 58 *Agric. Dec.* at 610-11.

[46] Philip J. Margiotta wrote to PACA on September 25, 2002:

> Please note in your file that I respectfully deny that I was responsibly connected with M. Trombetta & Sons, Inc., in connection with the alleged violations alleged in the Complaint served with your letter to me regarding the above matter. Any acts forming the basis of that complaint were done or not done by a former employee of my company who had no authority to do so and of which I had neither knowledge nor the opportunity to control or stop.
>
> I therefore dispute your Branch's initial determination and ask for a formal hearing as provided by law.

CARX 3.

[47] Trombetta's former employee, Joseph (Joe Joe) Auricchio, apparently acted alone in paying the unlawful bribes and gratuities.[4] In 1999, he was earning between $800 and $900 per week as a salesperson for Trombetta; he did not earn any commissions as part of his salary; and he would receive bonuses equivalent to one or two weeks pay at

[4] On June 21, 2000, Joseph Auricchio was found to have paid approximately $29,100 in cash bribes to USDA produce inspectors at the Hunts Point Terminal Market between 1996 and September 1999 (the only time period for which data was available), in connection with inspections of fresh fruit and vegetables at M. Trombetta & Sons, Inc. ALJX 1, p. 2; see A. Offense Level, including footnote.

Christmas. Tr. 532, 1131. On an income of $40,000 to $50,000 per year (Tr. 1138), did Joseph (Joe Joe) Auricchio pay, out of his own pocket, the unlawful bribes and gratuities amounting to $7,000 to $10,000 per year (ALJX 1, p. 2)? He could have. As Philip J. Margiotta explained, keeping his salesperson job may have been worth "paying off for," to Joseph (Joe Joe) Auricchio. Tr. 1136-1138. The salesperson job was a union job, with retirement benefits, and medical benefits, including dental. Joseph (Joe Joe) Auricchio was nearing retirement, and probably did not want to go back to trucking. The status of the salesperson job was a step upward from being a trucker or porter. Tr. 1137-1138.

[48] Joseph (Joe Joe) Auricchio worked in a partially glass sales booth (a portable room made out of metal and glass), located in the downstairs section of Trombetta's Hunts Point Terminal Market facility. Tr. 509, 515, 1126, 1150, 1345, 1348. Mr. Auricchio was able to pay unlawful bribes and gratuities to USDA produce inspectors without being observed. Tr. 137-138, 538-39, 543, 549-50, 1114-1119, 1120-1131.

[49] A determination from the disciplinary case follows.

> Considering all of the evidence, Respondent (Trombetta), but for the actions of Joseph Auricchio, appears to have been trustworthy, honest, and fair-dealing. For the purpose of this Decision and Order, I find no culpability on the part of anyone within Respondent other than Joseph Auricchio. Of particular significance is that United States Department of Agriculture produce inspector William J. Cashin, who had been collecting bribes at Hunts Point Terminal Market for about 20 years and had been inspecting at Respondent's place of business for about 20 years, collected no bribes from Respondent until Joseph Auricchio started to work as a salesperson for Respondent in 1997. Also significant is that Mr. Cashin had already begun a bribe-taking relationship with Joseph Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working for Respondent. Nevertheless, I hold Respondent responsible for the actions of Joseph Auricchio, just as if Respondent itself had performed each of Mr. Auricchio's acts.

In re M. Trombetta & Sons, Inc., 64 Agric. Dec. 1869 (2005).

[50] There is no evidence that Philip J. Margiotta knew of or contributed to the payment of unlawful bribes and gratuities by Trombetta's employee Joseph (Joe Joe) Auricchio. Tr. 1152-1153, 1358, 1360. Philip J. Margiotta did fail to prevent Trombetta's employee Joseph (Joe Joe) Auricchio from paying unlawful bribes and gratuities. Tr. 525-27, 1358.

[51] The "activities that resulted in a violation of the PACA" are not limited to Joseph (Joe Joe) Auricchio's activities of wrongdoing. Being actively involved in innocent activities for Trombetta suffices. I find Philip J. Margiotta to have been actively involved during April through July 1999 in the "activities that resulted in a violation of the PACA", based upon his being Trombetta's Secretary and his having full management responsibility for Trombetta's Hunts Point Terminal Market facility.

[52] Philip J. Margiotta argues that "there was nothing that Mr. Margiotta could do to discover Auricchio's actions and thus be chargeable with preventing or stopping them." Reply Brief, p. 6. I disagree. I find that Philip J. Margiotta's testimony establishes that he was not proactive in preventing illegal activities of the type engaged in by Mr. Auricchio, until after Mr. Auricchio's unlawful bribes and gratuities came to light. Tr. 520-27, 1161, 1346-58. Philip J. Margiotta did instruct Mr. Auricchio, once, probably in about 1995, after Mr. Auricchio told him he could probably get the guy (USDA) over here (to inspect a shipment): "Let me explain something to you very certainly; we've been here since it opened and we've been in business for a very long time; we do not, do not break the rules so just forget about it." Tr. 521. Explaining that Mr. Auricchio was "making an inference that he could pay them" . . . "to get them to come sooner," Philip J. Margiotta testified that he told Mr. Auricchio: "We never did that kind of stuff nor would we allow anyone that worked for us to do that sort of thing. And that's not only that. That if a truck comes in and there's 99 packages on it and you take off 102 and I find out that manifest better be changed to 102. I don't want more. I don't want less. And I don't pay anybody, period. and if you don't like it you can't work here. And that was the end of the conversation. Tr. 524-25.

[53] My determination does not, however, depend on whether Philip J. Margiotta should have done something more. It is sufficient under the

PACA that Philip J. Margiotta was actively involved in Trombetta's activities that resulted in a violation of the PACA. Managing Trombetta's Hunts Point Terminal Market facility certainly entailed active involvement.

[54] Philip J. Margiotta was unable to establish the first of two prongs required to avoid being found responsibly connected. He failed to prove by a preponderance of the evidence that he was not actively involved in Trombetta and Sons, Inc.'s failures, during April through July 1999, to perform its duty to maintain fair trade practices required by the PACA.

[55] During April through July 1999, Philip J. Margiotta was Trombetta's Secretary. An officer need not control a company to be found responsibly connected. Here, however, Philip J. Margiotta ran the company. Every officer of a corporation is held to be responsibly connected, unless he can prove that he should be excepted (by proving both prongs of the two prong test).

[56] Philip J. Margiotta cannot prove the first prong of the *Norinsberg* exception. Thus, Philip J. Margiotta must be determined to be responsibly connected to Trombetta during its PACA violations. Philip J. Margiotta's judgment, discretion, and control were exercised in the activities he undertook for Trombetta, including the running of the business, buying fruits and vegetables, supervising other Trombetta employees, paying the bills, and the like. Tr. 499.

[57] Philip J. Margiotta was responsibly connected with M. Trombetta & Sons, Inc. as defined by 7 U.S.C. § 499a(b)(9), during April through July 1999.

Conclusions

[58] Philip J. Margiotta, the manager of Trombetta's Hunts Point Terminal Market facility while he was an officer of Trombetta (the Secretary), was "actively involved" in Trombetta's activities, especially Trombetta's Hunts Point Terminal Market activities.

[59] Trombetta's Hunts Point Terminal Market activities led to its violations of the PACA, when, through its employee, Joseph (Joe Joe) Auricchio, Trombetta failed to perform its duty to maintain fair trade

practices.

[60] Wrongdoing is not required to be found to be "actively involved" within the meaning of 7 U.S.C. § 499a(b)(9).
[61] Wrongdoing is not required to be found to be responsibly connected as defined by 7 U.S.C. § 499a(b)(9).

[62] There is no evidence of wrongdoing by Philip J. Margiotta, yet by running Trombetta's Hunts Point Terminal Market facility, while he was an officer of Trombetta, he was overwhelmingly "actively involved", within the meaning of 7 U.S.C. § 499a(b)(9), in the activities which led to Trombetta's PACA violations.

[63] Philip J. Margiotta, by being the Secretary of M. Trombetta & Sons, Inc. who was "actively involved" within the meaning of 7 U.S.C. § 499a(b)(9) in the activities which led to Trombetta's PACA violations, was responsibly connected to Trombetta as defined by 7 U.S.C. § 499a(b)(9), during April through July 1999, when Trombetta violated section 2(4) of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b(4), by failing to perform its duty to maintain fair trade practices required by the PACA.

Order

[64] This Decision affirms the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, contained in his letter dated February 11, 2003 (AX 1, Tr. 1684), that Philip J. Margiotta was responsibly connected with Trombetta and Sons, Inc., Bronx, New York, during Trombetta's PACA[5] violations.

[65] Accordingly, Philip J. Margiotta is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

[66] This Decision and Order shall become final and effective thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed 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).

[5] Section 2(4) of the PACA, 7 U.S.C. 499b(4), during April through July 1999.

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

* * *

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: CORONET FOODS, INC.
PACA Docket No. D-05-0018.
Proposed Decision Without Hearing Based on Admissions.
Filed March 21, 2006.

PACA – Default – Admission in Answer admitting bankruptcy.

Jonathon Gordy for Complainant.
Robert A. Marino for Respondent.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION

This is a disciplinary proceeding under the Perishable Agricultural

Commodities Act, 1930, as amended (7 U.S.C. §499a - §499f)("PACA"), instituted by a complaint filed on August 12, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("Complainant") alleging that Respondents Coronet Foods, Inc. of Wheeling West Virginia ("Coronet East"), and Coronet Foods, Inc., of Salinas, California ("Coronet West"), (collectively "Respondents") have willfully violated the PACA.

The Complaint alleged that during the period July 2003 through October 2004, Coronet West failed to make full payment promptly to twenty-one sellers of the agreed purchase prices in the total amount of $2,235,283.80 for 565 lots of perishable agricultural commodities, which Coronet West purchased, received and accepted in interstate or foreign commerce or in contemplation of interstate or foreign commerce. In addition, the Complaint alleged that during the period September 2003 through October 2004, Coronet East failed to make full payment promptly to twenty-one sellers of the agreed purchase prices in the total amount of $3,028,297.76 for 557 lots of perishable agricultural commodities, which Coronet East purchased, received and accepted in interstate or foreign commerce. Complainant has now filed a motion for a decision based on admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes ("Rules of Practice") *See* 7 C.F.R. § 1.139.

The Complaint was served upon Respondents on Aug. 17, 2005. Respondents requested an extension of the time to answer the Complaint on September 1, 2005, and Respondents were granted the extension on September 2, 2005. On September 26, 2005, through their attorneys, Respondents filed an Answer and Affirmative Defenses to the Complaint ("Answer").

Respondent's Answer denied violations of the PACA while admitting that they owed on October 10 and October 11 2004 the amounts set forth in the Complaint (*see* Answer ¶¶ III-V) and that only some of the produce sellers had been paid as part of the Respondent's pending bankruptcy cases. (*See* Answer ¶¶ III-IV., pg. 3 ¶ 8, pg. 4 ¶ 6.) Respondent attributes any untimely payments and unpaid balances owed to remaining sellers to the fact that many of the suppliers had extended payment terms. (*See* Answer ¶¶ III-IV, First Affirmative Defense pg. 2)

On December 18, 2005, Complainant filed a "Motion for Decision

Without Hearing in Based on Admissions." Based on careful consideration of the pleadings and the precedent cited by the parties, Complainant's motion is hereby granted and the following decision is issued in the disciplinary case against Respondents Coronet East and Coronet West without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice.

In this case, Respondent has failed to deny or otherwise respond to the jurisdictional allegations in the complaint, including an allegation that it was operating subject to a PACA license at the time of alleged violations. Pursuant to the Rules of Practice, if an answer fails to deny or otherwise respond to specific complaint allegations, they are deemed admitted. *See* 7 C.F.R. § 1.136(c).

Respondents, in the Answer at paragraphs III and IV, admitted that some of the produce suppliers had been paid in connection with their respective bankruptcy cases. Coronet West additionally asserts that the produce sellers listed in the Complaint were paid in connection with California Bulk Sales Law. (Answer at ¶ IV.) The Respondents, in their individual Bankruptcy proceedings, have reached settlements with the PACA produce sellers that were approved by the bankruptcy court. Section 2(4) of the PACA requires produce dealers to make full, prompt payment for fruit and vegetable purchases at the agreed contract prices to all of their sellers, usually within ten days of acceptance unless the parties agreed in writing to different terms prior to the purchase. *See* 7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa). In both cases, Respondents' bankruptcy settlements have not resulted in full payment to the all of the produce sellers listed in the Complaint.

In Coronet East's Bankruptcy proceeding in the Northern District of West Virginia Bankruptcy Court, case no. 04-03822, Coronet East admitted through its June 16 account report that for eleven produce sellers Coronet East admitted that it owed $984,027.46 in the Answer, only $712,014.61 was paid in settlement, leaving a remaining $272,012.85 in unpaid produce to those eleven produce sellers. (*See* Answer ¶ III; PACA Account Report, *In re: Coronet Foods, Inc.*, Case No. 5:04-bk-03822 (June 16, 2005) (ECF Docket No. 402).) In addition, for the following produce sellers Coronet East admitted that it owed the amounts listed in the Complaint, but has failed to make any payment:

Seller Name	*Produce Acceptance Dates*	*No. of Lots*	*Amount Unpaid*
The Sanson Co.	03/31/04	1	$ 2,812.50

The Herbal Garden	05/06/04	1	$ 120.00
Weis Buy Farms	07/22/04 – 08/20/04	6	$ 80,245.80
Murakami Produce	09/07/04 – 09/18/04	6	$ 32,376.75
Total		14	$115,555.05

In Coronet West's Bankruptcy proceeding in the Northern District of West Virginia Bankruptcy Court, case no. 05-00151, Coronet West admitted in its Monthly Operating Report dated August 9, 2004 that for fourteen produce sellers Coronet West admitted it owed $1,915,587.54 in the Answer, only $1,613,512.54 was paid in settlement, leaving a remaining $302,075.00 in unpaid produce. (*See* Answer ¶ IV; Monthly Operating Report for the Period July 1, 2005 through July 31, 2005 *In re: Coronet Foods, Inc. – Western Division*, Case No. 5:05–bk-00151 (August 9, 2004)(ECF Docket No. 188).) In addition, for the following produce sellers Coronet West admitted that it owed the amounts listed in the Complaint, but Coronet West has failed to make any payment:

Seller Name	*Produce Acceptance Dates*	*No. of Lots*	*Amount Unpaid*
Los Angeles Salad	10/23/04 – 06/04/04	9	$ 1,890.00
Andrew Smith	05/01/04 – 07/08/04	27	$ 125,663.59
Taylor Farms	05/18/04 – 09/11/04	3	$ 2,895.40
Total		103	$ 130,448.99

It has long been held that bankruptcy discharge does not prevent disciplinary enforcement on debts that were the subject of the bankruptcy. *See, e.g., In re The Caito Produce Co.*, 48 Agric. Dec. 602, 623 (1988) ("Bankruptcy law expressly preserves the right of the Secretary [of Agriculture] to revoke a bankrupt's license under the Perishable Agricultural Commodities Act because of debts dischargeable in bankruptcy") In this case, the admissions in the Answer and the bankruptcy filings demonstrate that Respondents have failed to make full payment as required by the PACA.

In summary, Coronet East failed to pay $387,567.90 to fifteen of its produce creditors and Coronet West failed to pay $432,523.99 to seventeen of its produce creditors. In total, the bankruptcy documents show that Respondents failed to pay $820,091.89 to thirty-two of their produce creditors.

The Department's policy with respect to admissions in PACA disciplinary cases in which a respondent is alleged to have failed to make full payment promptly for produce purchases is as follows:

> In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.
>
> *See In re Furr's Supermarkets Inc.*, 62 Agric. Dec. 385, 386 (2003) (citing *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998)).

Here, Respondents admit that they have failed to pay fully thirty-two of the sellers listed in paragraphs III and IV of the Complaint in the amount of $790,091.89 for 751 lots of perishable agricultural commodities that Respondents purchased, received and accepted in interstate commerce during the period of July 2003 to September 2004. Respondents have each failed to pay more than a *de minimis* amount for produce in violation of section 2(4) of the PACA and do not assert that they will achieve full compliance with the PACA by making full payment within 120 of the service of the complaint. Nor do Respondents assert that they will pay these sellers by the date of the hearing. This is a "no-pay" case.

The only appropriate sanction in a "no-pay" case is license revocation, or where there is no longer any license to revoke, as is the case here, the appropriate sanction in lieu of revocation is a finding of repeated and flagrant violation of the PACA and publication of the facts and circumstances of the violations. *See In re Furr's Supermarkets Inc.*, 62 Agric. Dec. at 386 - 387. A civil penalty is not appropriate in this case because "limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA" and it would not be consistent with the Congressional intent to require a PACA violator to pay the government while produce sellers remain unpaid. *See In re Scamcorp, Inc.*, 57 Agric. Dec. at 570 - 571. Because there can be no debate over the appropriate sanction, a decision can be entered in this case without hearing or further procedure based on the admitted facts. *See* 7 C.F.R.

§ 1.139.[1]

Respondents have defended on several grounds that are without merit.

First, Respondents have defended that "Through custom and practice, Coronet East and Coronet West historically and routinely paid PACA payables in accordance with terms agreed to by Coronet East's produce vendors. There was a well-established course of dealings between the Respondents and their suppliers that supported payment on terms other than normally required by PACA." (Answer at pg. 2.) This defense is without legal merit because the regulations require that payment agreements for terms other than those specified in the regulations must be in writing before the transaction. 7 C.F.R. § 46.2(aa)(5), (11). Oral and implied agreements are not a possible defense to disciplinary action under the PACA because the agency has specified times for payment through the administrative rulemaking. *Caito Produce Co.*, 48 Agric. Dec. at 610 (citing 37 Fed. Reg. 14,561 (1972) and 49 Fed. Reg. 45,735, 45,740 (1984)). Respondents have failed to assert that the agreements were in writing before the transactions at issue as the regulations require, and therefore Respondent's "custom and practice" defense fails.

Second, Respondents have defended that their bankruptcy cases have discharged the debts associated with the Complaint. (Answer at pg. 3-4 ¶ 8, pg. 4 ¶ 6.) Bankruptcy discharge does not alter the Respondents' duty under the PACA to pay fully and promptly. *See Marvin Tragash Co. v. United Sates Department of Agriculture*, 524 F.2d 1255 (5th Cir. 1975); *Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir. 1967). Partial payment is not sufficient under section 2(4) of the PACA. *Finer Foods Sales Co.*, 708 F.2d at 782; *Marvin Tragash Co.*, 524 F.2d at 1258. In this case, Respondents have failed to pay all of their produce creditors, and bankruptcy discharge does not alter this fact. Further, in disciplinary cases, the settlement of claims after the respondent has already failed to pay fully and promptly for produce is irrelevant. *See, e.g., In re Tom's Quality Produce, Inc.*, 56 Agric. Dec. 1033, 1033 (1996); *Full Sail Produce*, 52 Agric. Dec. at 619; s*ee also In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583, 588 (1989) *aff'd* 923 F.2d 862 (9th Cir. 1991) (citing cases). Therefore, Respondents' bankruptcy defenses fail.

Finally, Respondents have argued that the sequence of events leading to the filing of Bankruptcy lead to an "unexpected and severe loss of business." (Answer at pg. 3 ¶ 4.) "Even though a respondent has good

[1] A hearing is only required where an issue of material fact is joined by the pleadings. *See* 7 C.F.R. § 1.141(b).

excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful." *Caito Produce Co.*, 48 Agric. Dec. at 614. Respondents have failed to pay for fully and promptly for produce. Respondent's loss of customers because of the unexpected Salmonella poisoning of several of Respondent's ultimate consumers does not excuse Respondents from remaining undercapitalized so that they were unable to pay their produce creditors. *See, e.g., In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 567-68 n.2 (1989) (rejecting a respondent's defense that a city's exercise of eminent domain caused the respondent's customers to reduce their dealings with the respondent). In addition, the circumstances of this case do not negate the willfulness of the Respondents' action.

While a finding of willfulness is not required for a finding of repeated and flagrant violations of the PACA and the publication of the facts and circumstances of those violations, Respondents' violations were willful. *See In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 628-29 (1996); *Full Sail Produce*, 52 Agric. Dec. at 622 (1993). The Department follows the rule generally stated by *Hogan Distributing, Inc.*, 55 Agric. Dec. at 629: "A violation is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." To determine willfulness one looks to a respondent's violations of express requirements of the PACA and the regulations, the length of time during which the violations occurred, and the number and dollar amount of the transactions involved. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (1998).

The Fourth Circuit and the Tenth Circuit define the word "willfulness," as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States, 350 F.2d 67, 78-79* (10th Cir. 1965). Even under this more stringent standard, Respondents' actions were willful because Respondents knew or should have known that they were incapable of making full payment promptly. *See Five Star Food Distributors*, 56 Agric. Dec. 880, 897 (1997).

Respondents have failed to make full payment for over half a million dollars of over 700 lots of produce. This is an express violation of Sec. 2(4) of the PACA, which requires full payment promptly. Under these

circumstances, Respondents violations are willful, repeated and flagrant.

Findings of Fact

Respondent Coronet East is a corporation organized and existing under the laws of the State of West Virginia. Respondent Coronet East's business address is 15th & McColloch Sts, Wheeling, West Virginia 26003. Its mailing address is P.O. Box 6688, Wheeling, West Virginia, 26003.

Respondent Coronet East's PACA license was issued on January 18, 1966. This license terminated January 18, 2005, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)) when Respondent Coronet East failed to pay the required annual renewal fee. Respondent Coronet West is a corporation organized and existing under the laws of the State of California. Respondent Coronet West's business address is 20800 Spence Rd, Salinas, California 93219. Its mailing address is P.O. Box 6862, Wheeling, West Virginia, 26003.

Respondent Coronet West's PACA license issued April 25, 1990. This license terminated April 25, 2005, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)) when Respondent Coronet West failed to pay the required annual renewal fee.

Respondent Coronet East has failed to make full payment promptly to 15 of the 21 sellers listed in paragraph III of the Complaint in the amount of $357,567.90 for 306 lots of perishable agricultural commodities that Coronet East purchased, received and accepted in interstate commerce or foreign commerce during the period of September 2003, to September 2004.

Respondent Coronet West has failed to make full payment promptly to 17 of the 21 sellers listed in paragraph IV of the Complaint in the amount of $790,091.89 for 445 lots of perishable agricultural commodities that Coronet West purchased, received and accepted in interstate commerce during the period of July 2003 to September 2004.

Conclusions

Respondents' failure to make full payment promptly with respect to the transactions referred to in Finding of Fact 5 and 6 above constitutes willful flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondents Coronet East and Coronet West are found to have committed willful, repeated and flagrant violations of section 2(4) of the PACA, and the facts and circumstances of the violations set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service of it unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies of this Decision shall be served upon the parties.

In re: KLEIMAN & HOCHBERG, INC.
PACA Docket No. D-02-0021.
In re: MICHAEL H. HIRSCH.
PACA Docket No. APP-03-0005.
In re: BARRY J. HIRSCH.
PACA Docket No. APP-03-0006.
Decision and Order.
Filed April 5, 2006.

PACA – Perishable agricultural commodities – Bribery – Motive for payment to inspector – Liability of PACA licensee for officer's acts – Liability of PACA licensee not irrebuttable – Scope of employment – Knowledge of acts of an officer – Willful, flagrant, and repeated violations – Responsibly connected – Actively involved – Nominal – License revocation appropriate – Right to engage in occupation.

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson's decision concluding that Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) as a consequence of its vice president and part owner, John Thomas, paying bribes to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities. The Judicial Officer also concluded that Michael H. Hirsch, the president, a director, and a part owner, and Barry J. Hirsch, the treasurer and part owner, were responsibly connected with Kleiman & Hochberg, Inc., at the time Kleiman & Hochberg, Inc., violated the PACA. The Judicial Officer rejected Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's and Barry J. Hirsch's contentions that: (1) John Thomas' payments to United States

Department of Agriculture inspectors were not bribes, but, instead, the result of extortion; (2) Kleiman & Hochberg, Inc., did not violate the PACA when John Thomas paid United States Department of Agriculture inspectors because no produce supplier or grower was economically disadvantaged by John Thomas' payments; (3) John Thomas was not acting within the scope of his employment when he paid United States Department of Agriculture inspectors; (4) Kleiman & Hochberg, Inc., is not liable for John Thomas' payments to United States Department of Agriculture inspectors because Kleiman & Hochberg, Inc.'s other officers and owners had no knowledge of the payments; (5) Kleiman & Hochberg, Inc., could not avoid liability under 7 U.S.C. § 499p once John Thomas pled guilty to bribing United States Department of Agriculture inspectors; and (6) the imposition of employment sanctions on individuals responsibly connected with Kleiman & Hochberg, Inc., unconstitutionally violates their right to engage in a chosen occupation.

Charles L. Kendall and Christopher Young-Morales for the Agricultural Marketing Service and the Chief of the PACA Branch.
Mark C.H. Mandell, Annandale, NJ, and David H. Gendelman, New York, NY, for Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a Complaint on July 17, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); 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 Agricultural Marketing Service alleges Kleiman & Hochberg, Inc.: (1) during the period March 1999 through August 1999, through its employee, John Thomas, made illegal payments to a United States Department of Agriculture inspector in connection with 12 federal inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate or foreign commerce, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) prior to March 1999, made illegal payments to a United States Department of Agriculture inspector on numerous occasions, in willful,

flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V-VI). On September 17, 2002, Kleiman & Hochberg, Inc., filed an answer denying the material allegations of the Complaint and raising four affirmative defenses (Answer).

On February 12, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., during the period March 26, 1999, through August 4, 1999, when Kleiman & Hochberg, Inc., violated the PACA. On March 14, 2003, Michael H. Hirsch filed a Petition for Review of the Chief's determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's February 12, 2003, determination that he was responsibly connected with Kleiman & Hochberg, Inc. On March 14, 2003, Barry J. Hirsch filed a Petition for Review of the Chief's determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's February 12, 2003, determination that he was responsibly connected with Kleiman & Hochberg, Inc.

On April 4, 2003, former Chief Administrative Law Judge James W. Hunt consolidated the disciplinary proceeding, *In re Kleiman & Hochberg, Inc.*, PACA Docket No. D-02-0021, with the two responsibly connected proceedings, *In re Michael H. Hirsch*, PACA Docket No. APP-03-0005, and *In re Barry J. Hirsch*, PACA Docket No. APP-03-0006 (Order Consolidating Cases for Hearing).

On March 1 through March 4, and March 15 through March 18, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Charles L. Kendall and Christopher Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Mark C.H. Mandell and David H. Gendelman represented Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch.

On December 3, 2004, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when John Thomas, Kleiman & Hochberg, Inc.'s vice president and part owner, paid bribes to a United States Department of Agriculture produce inspector in connection with 12 federal

inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate and foreign commerce; (2) concluded Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; and (3) assessed Kleiman & Hochberg, Inc., a $180,000 civil penalty (Initial Decision at 18-19, 35).

On January 21, 2005, the Agricultural Marketing Service and the Chief appealed to the Judicial Officer. On January 24, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch appealed to, and requested oral argument before, the Judicial Officer. On March 16, 2005, the Agricultural Marketing Service and the Chief filed a response to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's appeal petition. On March 17, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On March 17, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[1] is refused because the parties have throughly briefed the issues and oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the Chief ALJ's conclusions that Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of the PACA and Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; however, I disagree with the sanction imposed on Kleiman & Hochberg, Inc., by the Chief ALJ. Therefore, I do not adopt the Chief ALJ's Initial Decision as the final Decision and Order.

The Agricultural Marketing Service exhibits are designated by "CX." Kleiman & Hochberg, Inc.'s exhibits are designated by "RX." Exhibits in the agency record upon which the Chief based his responsibly connected determination as to Michael H. Hirsch, which is part of the

[1] 7 C.F.R. § 1.145(d).

record in this proceeding,[2] are designated by "RCMH." Exhibits in the agency record upon which the Chief based his responsibly connected determination as to Barry J. Hirsch, which is part of the record in this proceeding,[3] are designated by "RCBH." Transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or

[2] 7 C.F.R. § 1.136(a).

[3] See note 2.

shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is

automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required).

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to

his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of

increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days[’] notice and an opportunity for a hearing, suspend or revoke the

license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b), (e), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

. . . .

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section–

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

. . . .

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever–

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent–

(A) to influence any official act[.]

. . . .

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

> (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or
>
> (C) being induced to do or omit to do any act in violation of the official duty of such official or person;
>
> . . . .
>
> shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A)(2).

DECISION

Decision Summary

I conclude Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), as a consequence of its vice president and owner of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paying bribes to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted in interstate or foreign commerce. Based on this conclusion, I revoke Kleiman & Hochberg, Inc.'s PACA license. I also conclude Michael H. Hirsch and Barry J. Hirsch were *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA. Accordingly, Michael H. Hirsch and Barry J. Hirsch are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Findings of Fact

1. Kleiman & Hochberg, Inc., is a New York corporation whose business and mailing address is 226-233 Hunts Point Terminal Market, Bronx, New York 10474 (Answer ¶ 3).

2. At all times material to this proceeding, Kleiman & Hochberg, Inc., was a licensee under the PACA. PACA license number 108036 was issued to Kleiman & Hochberg, Inc., on June 17, 1947. Kleiman & Hochberg, Inc., has renewed its PACA license annually. (Answer ¶ 3; CX 1.)

3. William J. Cashin was employed as a produce inspector at the Hunts Point Terminal Market, New York, office of the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, from July 1979 through August 1999 (Tr. 30).

4. William Cashin began inspecting produce at Kleiman & Hochberg, Inc., in 1979. At that time, William Cashin dealt with "Seymore," a salesman employed by Kleiman & Hochberg, Inc., who, beginning in the early 1980s, paid William Cashin in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. These payments were not made to the United States Department of Agriculture for normal inspection services, but were payments made to William Cashin personally. (Tr. 38-41.)

5. After "Seymore" retired from Kleiman & Hochberg, Inc., in the mid 1980s, William Cashin dealt with John Thomas when he performed inspections at Kleiman & Hochberg, Inc. Beginning in the late 1980s or early 1990s, John Thomas began making payments to William Cashin and other United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. John Thomas began by paying United States Department of Agriculture inspectors $25 for each inspection of perishable agricultural commodities, but in the 1990s, John Thomas increased the payments to $50 for each inspection. John Thomas continued making payments to William Cashin in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc, until August 4, 1999. These payments were not made to the United States Department of Agriculture for normal inspection services, but were payments made to William Cashin and other United States Department of Agriculture inspectors personally. (Tr. 41-48, 509-18.)

6. During the time in which John Thomas made payments to William Cashin in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc., John Thomas was the vice president and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. (CX 1; Tr. 41-42, 243).

7. On March 23, 1999, William Cashin was arrested by agents of the

Federal Bureau of Investigation and the United States Department of Agriculture, Office of the Inspector General. After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, agreeing to assist the Federal Bureau of Investigation with its investigation into payments to United States Department of Agriculture produce inspectors by PACA licensees located at the Hunts Point Terminal Market. (Tr. 50-52; CX 19.)

8. With the approval of the Federal Bureau of Investigation and the United States Department of Agriculture, Office of the Inspector General, William Cashin continued to perform his duties as a United States Department of Agriculture produce inspector in the same fashion as before his arrest. William Cashin surreptitiously recorded interactions with individuals at different produce houses using audio, audio/video, or video recording devices. At the end of each day, William Cashin would give Federal Bureau of Investigation agents his tapes, turn in any money he received from PACA licensees, and recount his activities. The Federal Bureau of Investigation agents would prepare a "302" report summarizing what William Cashin told them about that day's activities. (Tr. 51-56; CX 10.)

9. During the period March 26, 1999, through August 4, 1999, Kleiman & Hochberg, Inc., through John Thomas, Kleiman & Hochberg, Inc.'s vice president and 31.6 percent stockholder, made the following payments to a United States Department of Agriculture produce inspector in connection with 12 inspections of perishable agricultural commodities that Kleiman & Hochberg, Inc., purchased, received, and accepted from eight produce sellers in interstate or foreign commerce:

a. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the March 26, 1999, inspection of oranges shipped to Kleiman & Hochberg, Inc., by DNE World Food Sales reflected on United States Department of Agriculture Inspection Certificate Number K-678087-8.

b. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the March 26, 1999, inspection of pears shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-678088-6.

c. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the April 15, 1999, inspection of cantaloups shipped to Kleiman & Hochberg, Inc., by Central American Produce, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-679411-9.

d. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the April 15, 1999, inspection of cantaloups shipped to Kleiman & Hochberg, Inc., by I. Kunik Co. reflected on United States Department of Agriculture Inspection Certificate Number K-679412-7.

e. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the April 20, 1999, inspection of pears shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-679420-0.

f. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the April 29, 1999, inspection of grapes shipped to Kleiman & Hochberg, Inc., by Fisher Brothers Sales, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-679825-0.

g. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the April 29, 1999, inspection of strawberries shipped to Kleiman & Hochberg, Inc., by Dole Fresh Vegetables, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-680301-9.

h. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the May 28, 1999, inspection of cherry tomatoes shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-766208-3.

i. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the May 28, 1999, inspection of cherry tomatoes shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc.,

reflected on United States Department of Agriculture Inspection Certificate Number K-766209-1.

j. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 16, 1999, inspection of cantaloups shipped to Kleiman & Hochberg, Inc., by Robert Ruiz, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-767028-4.

k. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 16, 1999, inspection of cherry tomatoes shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-767030-0.

l. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the August 4, 1999, inspection of sweet cherries shipped to Kleiman & Hochberg, Inc., by Stemilt Growers, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-769886-3.

(Tr. 61-70; CX 10-CX 18; RX A-RX L.)

10.On October 21, 1999, the United States District Court for the Southern District of New York filed an indictment in which the grand jury charged John Thomas with seven counts of bribery of a public official in violation of 18 U.S.C. § 201(b). The indictment charges that John Thomas:

> [U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, JOHN THOMAS, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:

COUNT	DATE	AMOUNT OF BRIBE
ONE	3/26/99	$100

TWO	4/19/99	$100
THREE	4/22/99	$50
FOUR	4/29/99	$100
FIVE	5/28/99	$100
SIX	6/24/99	$50
SEVEN	8/5/99	$50

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 8A.

The bribes charged in the indictment cover the payments John Thomas made to William Cashin in connection with the 12 inspections of perishable agricultural commodities identified in Finding of Fact 9. (CX 10-CX 18.)

11. On October 17, 2001, John Thomas pled guilty to one count in an information which superceded the indictment referred to in Finding of Fact 10. Specifically, John Thomas pled guilty to bribery of public officials (18 U.S.C. § 201(b)). (CX 9.) The superceding information to which John Thomas pled guilty states, as follows:

> From in or about 1990 through on or about October 27, 1999, in the Southern District of New York, JOHN THOMAS, the defendant, unlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to public officials, with intent to influence official acts, to wit, JOHN THOMAS, the defendant, made cash payments to United States Department of Agriculture produce inspectors in order to obtain expedited inspections of fresh fruit and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York.
> (Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 8 at 2. John Thomas was sentenced to 2 years' probation and a $10,000 fine (CX 9).

12. During the period in which John Thomas paid bribes to William Cashin, Michael H. Hirsch was the president, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. (Tr. 1278; CX 1; RCMH 1).

13. During the period in which John Thomas paid bribes to William Cashin, Michael H. Hirsch was actively involved in the day-to-day management of Kleiman & Hochberg, Inc. Michael H. Hirsch's active involvement in the management of Kleiman & Hochberg, Inc., included the purchase, sale, and examination of perishable agricultural commodities; "[taking] care of credit, accounts receivable, and general daily problems of the business"; responsibility for inventory; applying for United States Department of Agriculture inspections of perishable agricultural commodities; interacting with United States Department of Agriculture produce inspectors; dealing with companies that shipped perishable agricultural commodities to Kleiman & Hochberg, Inc.; making price-after-sale arrangements with shippers of perishable agricultural commodities; reviewing and sending accountings to shippers; establishing procedures for the daytime operation of Kleiman & Hochberg, Inc.; ensuring that Kleiman & Hochberg, Inc., was run "smoothly" and "properly"; and, along with Barry J. Hirsch, running the daytime operations of Kleiman & Hochberg, Inc. (Tr. 1189, 1220, 1265-67, 1270-72, 1277-78.)

14. During the period in which John Thomas paid bribes to William Cashin, Michael H. Hirsch was usually at Kleiman & Hochberg, Inc.'s place of business from 7:30 a.m. to between 4:00 p.m. and 6:00 p.m. (Tr. 1266).

15. Michael H. Hirsch had no knowledge that John Thomas paid bribes to William Cashin or any other United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. (Tr. 519, 1267-69, 1274-75).

16. During the period in which John Thomas paid bribes to William Cashin, Barry J. Hirsch was the treasurer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. (Tr. 1181, 1214-15; CX 1; RCBH 1).

17. During the period in which John Thomas paid bribes to William Cashin, Barry J. Hirsch was actively involved in the day-to-day management of Kleiman & Hochberg, Inc. Barry J. Hirsch's active involvement in the management of Kleiman & Hochberg, Inc., included checking on the inventory of perishable agricultural commodities; ensuring that the inventory of perishable agricultural commodities was properly stored and rotated; buying, selling, and examining perishable agricultural commodities; establishing procedures for the daytime operation of Kleiman & Hochberg, Inc.; monitoring the activities of

Kleiman & Hochberg, Inc., employees; ensuring that shippers of perishable agricultural commodities were paid promptly; settling disputed claims with shippers; applying for United States Department of Agriculture inspections of perishable agricultural commodities; examining accountings sent to shippers; ensuring that Kleiman & Hochberg, Inc., was run "smoothly" and "properly"; and, along with Michael H. Hirsch, running the daytime operations of Kleiman & Hochberg, Inc. (Tr. 1181-82, 1189-95, 1208-11, 1215-22.)

18. Barry J. Hirsch had no knowledge that John Thomas paid bribes to William Cashin or any other United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. (Tr. 519, 1198-1205, 1211-14).

Conclusions of Law

1. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), John Thomas' payments of bribes to United States Department of Agriculture produce inspectors are deemed the acts of Kleiman & Hochberg, Inc.

2. Kleiman & Hochberg, Inc., engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform an implied duty arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce.

3. Michael H. Hirsch was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. Barry J. Hirsch was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Discussion

I. Kleiman & Hochberg, Inc., Willfully, Flagrantly, and Repeatedly Violated the PACA

A. John Thomas, an Officer and Major Stockholder of Kleiman & Hochberg, Inc., Paid Bribes to United States Department of Agriculture Produce Inspectors

Both John Thomas and William Cashin freely acknowledged that John Thomas made $50 payments to William Cashin in connection with 12 inspections of perishable agricultural commodities that Kleiman & Hochberg, Inc., purchased, received, and accepted from produce sellers. There was no dispute that these 12 payments were representative of a long-standing practice that went back until the late 1980s or early 1990s. John Thomas even testified that he paid William Cashin an additional $150 for three inspections of perishable agricultural commodities that were not included in the Complaint. It is likewise undisputed that John Thomas was the vice president of Kleiman & Hochberg, Inc., and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., at the time he paid William Cashin and other United States Department of Agriculture produce inspectors. (CX 1; Tr. 41-48, 243, 509-18.)

B. Kleiman & Hochberg, Inc., is Liable for John Thomas' Bribery

The relationship between a PACA licensee and persons acting for or employed by the PACA licensee is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his or her employment or office, shall in every case be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

John Thomas, the vice president and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., testified that he paid bribes to United States Department of Agriculture produce inspectors in order to ensure United States Department of Agriculture inspections of perishable agricultural commodities for Kleiman & Hochberg, Inc., were not delayed (Tr. 509-12). John Thomas stated the money used to pay the bribes came out of his own pocket (Tr. 547). John Thomas also stated, and Michael H. Hirsch and Barry J. Hirsch confirmed, that John Thomas acted without Michael H. Hirsch's or Barry J. Hirsch's

knowledge or approval (Tr. 519, 1198-1205, 1211-14, 1267-69, 1274-75). However, the purpose behind the bribes, even as expressed by John Thomas, was to benefit Kleiman & Hochberg, Inc., as the alleged threat of delayed United States Department of Agriculture produce inspections would harm Kleiman & Hochberg, Inc., as an entity. Even though John Thomas, as a nearly one-third owner of Kleiman & Hochberg, Inc., would obviously share in any benefit that Kleiman & Hochberg, Inc., received, it is evident that the bribes were designed to benefit Kleiman & Hochberg, Inc., in the conduct of its business. As long as John Thomas was acting within the scope of his employment, which he clearly was, acts committed by him are deemed to be acts committed by Kleiman & Hochberg, Inc. Thus, as a matter of law, the knowing and willful bribes by John Thomas are deemed to be knowing and willful bribes by Kleiman & Hochberg, Inc.[4]

Even if Michael H. Hirsch and Barry J. Hirsch were unaware of John Thomas' payment of bribes, the absence of actual knowledge is insufficient to rebut the burden imposed by section 16 of the PACA (7 U.S.C. § 499p). As a matter of law, violations by an officer and owner are violations by the employer even if the employer's other officers and owners had no actual knowledge of the violations and would not have condoned them.[5] The clear language of section 16 of the PACA (7 U.S.C. § 499p) would be defeated by any other interpretation.

C. Bribery of United States Department of Agriculture Produce Inspectors Violates the PACA

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[4]*Post & Taback, Inc. v. Department of Agric.*, 123 Fed. Appx. 406, 408 (D.C. Cir. 2005); *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869, 1885-86 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839,1851-52 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 782-83 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994), *aff'd*, 91 F.3d 173 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 16, 1996).

[5]*See In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 821 (2003) (stating, pursuant to the PACA, knowing and willful violations by an employee are deemed to be knowing and willful violations of the employing PACA licensee, even if the PACA licensee's officers, directors, and owners had no actual knowledge of the violations), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

The PACA does not expressly provide that a payment to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities is a violation of the PACA. However, the PACA provides that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity.[6]

John Thomas testified he bribed United States Department of Agriculture produce inspectors as alleged in the Complaint, but contends he paid the bribes only to obtain prompt inspections of Kleiman & Hochberg, Inc.'s perishable agricultural commodities (Tr. 509-12). Even if John Thomas only bribed United States Department of Agriculture inspectors in exchange for prompt inspections, Kleiman & Hochberg, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Bribery of a United States Department of Agriculture produce inspector, whatever the motive, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, even if it is only to obtain prompt inspection of perishable agricultural commodities, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of

[6]7 U.S.C. § 499b(4).

Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of bribes to United States Department of Agriculture produce inspectors.[7]

D. Kleiman & Hochberg, Inc.'s PACA Violations Were Willful, Flagrant, and Repeated

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.[8] John Thomas, and

[7]*In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec.1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

[8]*See, e.g., Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005); *In re JSG Trading Corp.* (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 430 (2002); *In re PMD Produce Brokerage Corp.* (Decision and Order on Remand), 60 Agric. Dec. 780, 789 (2001), *aff'd*, No. 02-1134, 2003 WL 21186047 (D.C. Cir. May 13, 2003); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 755 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal dismissed*, No. 98-5456 (11th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, (continued...)

therefore Kleiman & Hochberg, Inc., knew the bribes paid to William Cashin in the 12 inspections involved in this proceeding, as well as the countless additional payments over the previous decade, were illegal, but essentially decided that he needed to make these payments for the benefit of Kleiman & Hochberg, Inc. Clearly, John Thomas made a business decision to violate the PACA, rather than to pursue alternative measures. Kleiman & Hochberg, Inc.'s payments to United States Department of Agriculture produce inspectors were clearly intentional.

Likewise, Kleiman & Hochberg, Inc.'s violations were "flagrant." A violation of law is flagrant if it is "conspicuously bad or objectionable" or so bad that it "can neither escape notice nor be condoned."[9] The payment of a bribe to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities is a conspicuously bad and objectionable act that cannot escape notice or be condoned because, as discussed in this Decision and Order, *supra*, it undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States

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[8](...continued)
1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Kleiman & Hochberg, Inc.'s violations were willful.

[9]Merriam-Webster's Collegiate Dictionary 441 (10th ed. 1997).

Department of Agriculture produce inspector. The long-standing practice of Kleiman & Hochberg, Inc., bribing William Cashin and other United States Department of Agriculture produce inspectors, easily meets the definition of flagrant under applicable case law.

Moreover, I conclude, as a matter of law, Kleiman & Hochberg, Inc.'s violations are repeated because repeated means more than one.[10] John Thomas paid William Cashin and other United States Department of Agriculture produce inspectors multiple bribes in connection with numerous inspections of perishable agricultural commodities over approximately a 10-year period.

Thus, I conclude Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

II. The Appropriate Sanction Against Kleiman & Hochberg, Inc., Is License Revocation

John A. Koller, a senior marketing specialist employed by the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, testified that bribery of United States Department of Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that the United States Department of Agriculture recommends PACA license revocation as the only adequate sanction. Mr. Koller explained the United States Department of Agriculture's recommendation for PACA license revocation as follows:

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[10]*See, e.g.*, *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating violations are repeated under the PACA if they are not done simultaneously); *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding 51 violations of the payment provisions of the PACA fall plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Mktg. Serv.,* 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over $135,000 to be frequent violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving $19,059.08 occurring over 2½ months to be repeated); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding, because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA), *cert. denied*, 389 U.S. 835 (1967).

[BY MR. KENDALL:]

Q. Are you aware of the sanction Complainant recommends in this case?

[BY MR. KOLLER:]

A. Yes, I am.

Q. How are you aware of it?

A. I participated in development of the sanction recommendation.

Q. Have you heard the evidence presented at this hearing for this point?

A. Yes, I have.

Q. Are you now prepared to provide Complainant's sanction recommendation in this case?

A. Yes.

. . . .

Q. At this point what is the sanction recommendation in this case?

A. That would be a license revocation.

Q. What's the basis for Complainant's sanction recommendation?

A. The basis of Complainant's sanction recommendation is on various factors. One of the factors is that bribery payments did occur. As an aggregate factor Mr. Thomas' plea and Mr. Cashin's testimony shows that the bribery payments occurred as far back as 1990. The role of the inspection certificate as another factor is relied upon on the industry in terms of being able to

resolve contract disputes quickly.

Approximately 150,000 inspections are performed each year by the Fresh Products Branch. It is important that - and essential that the information that is reflected on these inspections are accurate and impartial. If there's any indication or any suspicion that the inspection has been tainted because of a bribery payment being made in order to obtain false information on the inspection undermines the role of that certificate.

If there's any question about the credibility of inspection and the process in which that inspection was performed in terms of how it reflects an impartial review in terms of the quality and condition of the product, would undermine the whole process and be disruptive.

If there's a question about that on the part of the shipper in terms of the reliability of the inspection would be detrimental to the whole process, and affect how disputes are resolved - hundreds of disputes are resolved - each day. As well as resolving thousands of dollars in unjustified price adjustments.

Another factor is where you have a wholesaler who's paying bribes to a produce inspector to obtain false information. Other wholesalers may feel that they have to make bribery payments as well. For example, what I mean by that is if you have a wholesaler on the market - on Hunts Point Market - who is making bribery payments to a produce inspector and they are able to use the results of that inspection to negotiate price adjustments to the transaction related to that inspection that would lower prices, then they would be in a position to sell the product at a lesser price. When you have other wholesalers on the market who would be selling the same product see that this is the only way that they can compete is by making bribery payments to a produce inspector, they may feel that that's what they'll have to do.

This would have an affect on the whole market in terms of its credibility, whether you've got firms that - where you have firms making bribery payments, but also in terms of firms that

aren't making bribery payments, it would affect them.

Also, the Department, for this type of violation, a strong sanction of license revocation is - would be appropriate in this case. Because not only would it deter Respondent, but it would also deter other members of the industry from contemplating making a serious violation such as that of making bribery payments to a produce inspector.

Q. Does the fact that it was Mr. Cashin, a USDA employee, who received the bribes, have any effect on Complainant's sanction recommendation?

A. No.

Q. Why not?

A. The Department believes that this violation is a serious violation under the PACA. That whether these bribery payments - in terms of bribery payments, whether these bribery payments were made to someone else in the industry or whether the bribery payments were made to a produce inspector, a violation of the Respondent making these bribery payments does not excuse that firm from that violation.

Q. Does Complaint recommend a civil penalty in this case as an alternative to license revocation?

A. No.

Q. Why not?

A. In terms of the seriousness of this violation a civil penalty would not be appropriate. By making bribery payments to a produce inspector is a serious violation and it affects the industry as a whole. A license revocation would be a revocation to seek - and, also, the industry needs to be put on notice that making bribery payments is not something that can be allowed.

Also, it has been consistent policy of the Department to

> recommend a license revocation in the situations where you have a serious violation of bribery payments taking place.

Tr. 349-53.

I find John Thomas' payment of bribes to United States Department of Agriculture produce inspectors within the scope of his employment are deemed to be the actions of Kleiman & Hochberg, Inc., and those bribes were so egregious that nothing less than PACA license revocation is an adequate sanction. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.[11] While sanctions in similar cases are not required to be uniform,[12] I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding.

III. Michael H. Hirsch and Barry J. Hirsch Were Responsibly Connected

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.[13] The record establishes Michael H. Hirsch was the president, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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[11]*In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 200
5).

[12]*Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1572 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 19
99).

[13]7 U.S.C. § 499a(b)(9).

The record also establishes Barry J. Hirsch was the treasurer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Michael H. Hirsch and Barry J. Hirsch to demonstrate by a preponderance of the evidence that they were not responsibly connected with Kleiman & Hochberg, Inc., despite their positions at, and ownership of, Kleiman & Hochberg, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

> The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

I find Michael H. Hirsch carried his burden of proof that he was not actively involved in the activities resulting in Kleiman & Hochberg,

Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). I also find Barry J. Hirsch carried his burden of proof that he was not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, I find Michael H. Hirsch failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. I also find Barry J. Hirsch failed to carry his burden of proof that he was only nominally an officer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc.

In order for a petitioner to demonstrate that he or she was only nominally an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and shareholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and failed to counteract or obviate the fault of others.[14]

The record establishes Michael H. Hirsch and Barry J. Hirsch each had an actual, significant nexus with Kleiman & Hochberg, Inc., during the violation period. Michael H. Hirsch and Barry J. Hirsch assert they actively managed Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA.[15] This fact refutes any possible contention that either Michael H. Hirsch or Barry J. Hirsch could prove

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[14]*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

[15]See Petitioners' Brief and Supplemental Proposed Findings of Fact, Conclusions of Law, and Order at 1 (stating in proposed finding of fact 1 "Barry Hirsch was the Treasurer and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint in PACA Docket No. D-02-0021"; stating in proposed finding of fact 2 "Michael Hirsch was the President and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint in PACA Docket No. D-02-0021").

he was not responsibly connected by demonstrating he was only nominal. Under the statutory definition of the term *responsibly connected*, the fact that Michael H. Hirsch and Barry J. Hirsch were not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA does not exonerate them unless they also prove by a preponderance of the evidence that their positions at, and ownership of, Kleiman & Hochberg, Inc., were nominal. Michael H. Hirsch has not established by a preponderance of the evidence that he was only nominally the president, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. Barry J. Hirsch has not established by a preponderance of the evidence that he was only nominally the treasurer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc.

Agricultural Marketing Service's and the Chief's Appeal Petition

The Agricultural Marketing Service and the Chief raise two issues in "Complainant's and Respondent's Appeal to the Decision and Order." First, the Agricultural Marketing Service and the Chief contend the Chief ALJ's assessment of a civil penalty, is error.

The Chief ALJ assessed Kleiman & Hochberg, Inc., a $180,000 civil penalty (Initial Decision at 35). While the Chief ALJ found Kleiman & Hochberg, Inc.'s payment of bribes to United States Department of Agriculture inspectors serious violations of the PACA, he found that revocation of Kleiman & Hochberg, Inc.'s PACA license was not warranted because John Thomas paid the bribes to obtain expedited United States Department of Agriculture inspections of perishable agricultural commodities for Kleiman & Hochberg, Inc., rather than to gain a competitive advantage over shippers or growers (Initial Decision at 25).

John Thomas' motivation for the payment of bribes to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities is not relevant to the sanction to be imposed against Kleiman & Hochberg, Inc. A PACA licensee's payment to a United States Department of Agriculture produce inspector to obtain an expedited inspection of perishable agricultural commodities negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence produce industry members and consumers place in the quality and condition determinations rendered by

the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from paying United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities. A PACA licensee's payment of bribes to a United States Department of Agriculture produce inspector, whether the payment is designed to obtain an expedited inspection or to obtain an economic advantage over shippers and growers, undermines the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors.

The record establishes that Kleiman & Hochberg, Inc.'s vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paid bribes to United States Department of Agriculture produce inspectors for approximately 10 years. Kleiman & Hochberg, Inc.'s violations of the PACA are egregious. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.[16] I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding. Therefore, I revoke Kleiman & Hochberg, Inc.'s PACA license.

Second, the Agricultural Marketing Service and the Chief contend the Chief ALJ's finding that Michael H. Hirsch and Barry J. Hirsch were not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA, is error.

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

> The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a

[16]See note 11.

> preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

I agree with the Chief ALJ that Michael H. Hirsch and Barry J. Hirsch demonstrated by a preponderance of the evidence that they were not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA. In their appeal petition, the Agricultural Marketing Service and the Chief cite numerous portions of the record which establish that Michael H. Hirsch and Barry J. Hirsch were actively involved in the day-to-day management of Kleiman & Hochberg, Inc.; however, there is no evidence that Michael H. Hirsch or Barry J. Hirsch participated in activities resulting in John Thomas' payment of bribes to United States Department of Agriculture produce inspectors. More to the point, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch proved by a preponderance of the evidence that Michael H. Hirsch and Barry J. Hirsch were not actively involved in activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA.

The Agricultural Marketing Service and the Chief also contend Michael H. Hirsch and Barry J. Hirsch were each actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA by virtue of the ownership of more than 10 percent of the outstanding stock of Kleiman & Hochberg, Inc. The Agricultural Marketing Service and the Chief essentially urge that I hold that any individual that owns more than 10 percent of the outstanding stock of a corporation is *per se* responsibly connected with that corporation. However, Congress has rejected the *per se* approach urged by the Agricultural Marketing Service and the Chief.

On November 15, 1995, the definition of the term *responsibly connected* in the PACA was amended by adding a rebuttable presumption standard which explicitly allows an individual who is a holder of more than 10 percent of the outstanding stock of a corporation to rebut his or her status as responsibly connected with the corporation. Specifically, section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 amends the definition of

the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) by adding a sentence to the definition which reads as follows:

> A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [the PACA] and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

The applicable House of Representatives Report states that purpose of the 1995 amendment to the definition of *responsibly connected* is "to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation."[17] The House of Representatives Report also contains the views of the administration set forth in a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture, House of Representatives, which states that the amendment to the definition of *responsibly connected* would "allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or shareholders and that they were uninvolved in the violation."[18] Michael H. Hirsch and Barry J. Hirsch each carried his burden of proof that he was not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Appeal Petition

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch raise six issues in "Respondent's and Petitioners' Joint Appeal Petition To the Judicial Officer Pursuant To 7 C.F.R. § 1.145 From the Decision of the Hon. Marc R. Hillson, C.A.L.J., Dated December 3, 2004." First,

[17]H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

[18]H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend Kleiman & Hochberg, Inc., did not violate the PACA because John Thomas did not pay bribes to United States Department of Agriculture produce inspectors, but, instead, was the victim of extortion by a corps of corrupt United States Department of Agriculture employees installed for more than a decade at the Hunts Point Terminal Market.

As an initial matter, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that John Thomas did not pay bribes to United States Department of Agriculture produce inspectors. The record contains substantial evidence that John Thomas paid bribes to United States Department of Agriculture inspectors, including evidence of John Thomas' plea of guilty to bribery of public officials over approximately a 10-year period (CX 8-CX 9). The information to which John Thomas pled guilty states, as follows:

> From in or about 1990 through on or about October 27, 1999, in the Southern District of New York, JOHN THOMAS, the defendant, unlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to public officials, with intent to influence official acts, to wit, JOHN THOMAS, the defendant, made cash payments to United States Department of Agriculture produce inspectors in order to obtain expedited inspections of fresh fruit and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York.
> (Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 8 at 2.

Moreover, even if I found that all of John Thomas' payments to United States Department of Agriculture produce inspectors were made as a result of extortion by United States Department of Agriculture employees (which I do not so find), I would conclude that Kleiman & Hochberg, Inc., violated the PACA. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity

of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, whether a bribe or the result of extortion, undermines the trust produce sellers place in the integrity of the United States Department of Agriculture inspector and the accuracy of the United States Department of Agriculture inspection certificate.[19]

The extortion cited by Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch (Tr. 509-11) is not a "reasonable cause," under section 2(4) of the PACA (7 U.S.C. § 499b(4)), for Kleiman & Hochberg, Inc.'s failure to perform the implied duty to refrain from paying United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities.

Second, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch argue that Kleiman & Hochberg, Inc., did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)), because John Thomas' payments to United States Department of Agriculture produce inspectors had no effect on Kleiman & Hochberg, Inc.'s produce transactions or Kleiman & Hochberg, Inc.'s produce suppliers. John Thomas testified that his payments of bribes to United States Department of Agriculture produce inspectors were designed only to obtain expedited United States Department of Agriculture inspections of perishable agricultural commodities. Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch have consistently argued that no produce supplier was economically disadvantaged by John Thomas' payments to United States Department of Agriculture produce inspectors.

Bribery of a United States Department of Agriculture produce inspector, even if the bribery does not economically disadvantage any produce seller or grower, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States

[19]*In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839, 1855 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005).

Department of Agriculture produce inspectors. A PACA licensee's payments to United States Department of Agriculture produce inspectors, even if the payments are only designed to obtain prompt inspection of perishable agricultural commodities, undermines the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. Therefore, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that Kleiman & Hochberg, Inc., did not violate the PACA because no produce supplier was economically disadvantaged as a result of John Thomas' payments to United States Department of Agriculture produce inspectors.

Third, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend John Thomas' payments to United States Department of Agriculture produce inspectors were not within the scope of John Thomas' employment with Kleiman & Hochberg, Inc.; therefore, Kleiman & Hochberg, Inc., is not liable for John Thomas' payments to United States Department of Agriculture produce inspectors.

Generally, the factors considered to determine whether conduct of an employee or agent is within the scope of employment are: (1) whether the conduct is of the kind the employee or agent was hired to perform;[20] (2) whether the conduct occurs during working hours; (3) whether the conduct occurs on the employment premises; and (4) whether the conduct is actuated, at least in part, by a purpose to serve the employer or principal.[21]

The record clearly establishes that John Thomas was within the scope of his employment with Kleiman & Hochberg, Inc., when he paid bribes to United States Department of Agriculture produce inspectors. John Thomas paid bribes to United States Department of Agriculture produce inspectors at Kleiman & Hochberg, Inc.'s place of business, during regular working hours, and in connection with the inspection of perishable agricultural commodities purchased, received, and accepted by Kleiman & Hochberg, Inc. John Thomas was authorized to apply for United States Department of Agriculture inspections of perishable

[20]Rarely will an employee's or agent's egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee's or agent's egregious act was committed while performing, or in connection with, his or her job responsibilities.

[21]*See generally* Restatement (Second) of Agency § 228 (1958).

agricultural commodities and the bribes John Thomas paid to United States Department of Agriculture produce inspectors were intended to benefit Kleiman & Hochberg, Inc. (Tr. 345-46, 392-93, 509, 518, 554; CX 10.) Therefore, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that John Thomas was not acting within the scope of his employment when he paid United States Department of Agriculture produce inspectors.

Fourth, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend Kleiman & Hochberg, Inc., is not liable for John Thomas' payments to United States Department of Agriculture produce inspectors because Michael H. Hirsch and Barry J. Hirsch did not know of John Thomas' violations until after his arrest in October 1999.

The relationship between a PACA licensee and persons acting for or employed by the PACA licensee is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a commission merchant, dealer, or broker, within the scope of his or her employment or office, shall *in every case* be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

Kleiman & Hochberg, Inc.'s vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., John Thomas, was acting within the scope of employment when he knowingly and willfully bribed United States Department of Agriculture produce inspectors. Thus, as a matter of law, the knowing and willful violations by John Thomas are deemed to be knowing and willful violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc.'s other officers and part owners had no actual knowledge of the bribery.[22] The United States Court of Appeals for the Sixth Circuit addressed the issue of identity of action between a corporate PACA licensee and the corporate PACA licensee's employees in a case

[22]*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 821 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 789-91 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4418 (2d Cir. Apr. 16, 1996).

involving alterations of United States Department of Agriculture inspection certificates by employees of a corporate PACA licensee, as follows:

> MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person." 7 U.S.C. § 499p. According to the Sixth Circuit, acts are "willful" when "knowingly taken by one subject to the statutory provisions in disregard of the action's legality." *Hodgins v. United States Dep't of Agric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). "Actions taken in reckless disregard of statutory provisions may also be considered 'willful.'" *Id*. (quotation and citations omitted). The MacClaren employees admitted to altering USDA inspection certificates and issuing false accounts of sale in knowing disregard of their actions' legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

H.C. MacClaren, Inc. v. United States Dep't of Agric., 342 F.3d 584, 591 (6th Cir. 2003).

Similarly, in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123 (2d Cir. 2003), the Court found that bribes made by a produce wholesaler's employee to a United States Department of Agriculture produce inspector to induce the inspector to falsify United States Department of Agriculture inspection certificates are, under the

PACA, deemed the acts of the produce wholesaler, as follows:

> Lastly, we address Koam's equitable argument that our failure to find in its favor would penalize Koam "simply because USDA sent a corrupt inspector to perform the inspection (a decision over which Koam had no control) at the time that Koam was employing a faithless employee [Friedman] (who played no role in any of the DiMare inspections)." . . . We view the equities differently from Koam, as its argument distorts the facts in at least three ways. . . . Third, Koam's attempt to distance itself from Friedman's criminality fails. Friedman was hardly a "faithless servant," since only Koam, not Friedman, stood to benefit from his bribes. Regardless, under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act omission, or failure of such commission merchant, dealer, or broker . . . ." 7 U.S.C. § 499p. Thus, Friedman's acts--bribing USDA inspectors--are deemed the acts of Koam.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 129-30 (2d Cir. 2003).

John Thomas, the vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paid bribes to United States Department of Agriculture produce inspectors. As a matter of law, the violations by Kleiman & Hochberg, Inc.'s officer and part owner are deemed to be violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc.'s other officers and part owners had no actual knowledge of John Thomas' bribes and would not have condoned those bribes had they known of them.[23] The clear language of section 16 of the PACA (7 U.S.C. § 499p) would be defeated by any other interpretation.

Fifth, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend once John Thomas pled guilty to bribing United States Department of Agriculture produce inspectors, Kleiman & Hochberg, Inc.'s liability for John Thomas' bribery became a foregone conclusion

[23]See note 5.

and an unconstitutional irrebuttable presumption.

Section 16 of the PACA (7 U.S.C. § 499p) does not create an irrebuttable presumption, as Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch assert. Kleiman & Hochberg, Inc., could avoid liability under the PACA for John Thomas' bribery either by showing John Thomas was not acting for or employed by Kleiman & Hochberg, Inc., at the time he bribed United States Department of Agriculture produce inspectors or by showing that John Thomas' bribes were not made within the scope of his employment or office. Therefore, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that once John Thomas pled guilty to bribing United States Department of Agriculture produce inspectors, Kleiman & Hochberg, Inc., was irrebuttably presumed to be liable for John Thomas' bribery.

Sixth, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend the imposition of employment sanctions violates Michael H. Hirsch's and Barry J. Hirsch's constitutional right to engage in their chosen occupation.

Individuals found to be responsibly connected with a commission merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.[24]

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.[25] Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of producers and shippers of perishable agricultural commodities. The status of being an officer, a director, or a holder of more than 10 percent

[24]*Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[25]H.R. Rep. No. 1041 (1930).

of the outstanding stock of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer, a director, or a holder of more than 10 percent of the outstanding stock may be deemed *responsibly connected* and subject to employment sanctions in the PACA.[26] Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Michael H. Hirsch's or Barry J. Hirsch's due process rights by arbitrarily interfering with Michael H. Hirsch's or Barry J. Hirsch's chosen occupation.

Contrary to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.[27] A number of courts have rejected constitutional challenges to employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.[28]

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

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[26]*Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

[27]*Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.,* 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

[28]*Hawkins v. Agricultural Mktg. Serv.,* 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee who has committed flagrant or repeated violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the Congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee who failed to pay a reparation award from employment in the field of marketing perishable agricultural commodities is not unconstitutional).

ORDER

1. Kleiman & Hochberg, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Kleiman & Hochberg, Inc.'s PACA license is revoked, effective 60 days after service of this Order on Kleiman & Hochberg, Inc.

2. I affirm the Chief's February 12, 2003, determination that Michael H. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Michael H. Hirsch is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Michael H. Hirsch.

3. I affirm the Chief's February 12, 2003, determination that Barry J. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Barry J. Hirsch is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Barry J. Hirsch.

RIGHT TO JUDICIAL REVIEW

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch must seek judicial review within 60 days after entry of the Order in this Decision and Order.[29] The date of entry of the Order in this Decision and Order is April 5, 2006.

In re: HALE-HALSELL COMPANY.
PACA Docket No. D-05-0019.
Decision and Order.

[29]See 28 U.S.C. § 2344.

Filed April 20, 2006.

PACA – Perishable agricultural commodities – Failure to file timely answer – Failure to pay – Willful, flagrant, and repeated violations – Publication of facts and circumstances.

The Judicial Officer issued a decision in which he found that Hale-Halsell Company (Respondent) violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Judicial Officer concluded Respondent failed to file a timely answer to the Complaint, and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), was deemed to have admitted the allegations in the Complaint and waived the opportunity for hearing. The Judicial Officer found Respondent's denial of the allegations in the Complaint in its appeal petition far too late to be considered. The Judicial Officer ordered the publication of the facts and circumstances of Respondent's PACA violations.

Ruben D. Rudolph, Jr., for Complainant.
Scott P. Kirtley, Tulsa, OK, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 16, 2005. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); 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].

Complainant alleges that Hale-Halsell Company [hereinafter Respondent], during the period August 6, 2003, through February 12, 2004, failed to make full payment promptly to 14 sellers of the agreed purchase prices in the total amount of $412,968.87 for 113 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V).

The Hearing Clerk served Respondent with the Complaint, the Rules

of Practice, and a service letter on August 23, 2005.[1] Respondent failed to file an answer to the Complaint within 20 days after service, as required by the Rules of Practice.[2]

On November 29, 2005, in accordance with the Rules of Practice,[3] Complainant filed a Motion for Decision Without Hearing By Reason of Default [hereinafter Motion for Default Decision] and a proposed Decision Without Hearing By Reason of Default [hereinafter Proposed Default Decision]. On December 6 and 7, 2005, the Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter.[4] Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by the Rules of Practice.[5]

On January 30, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision Without Hearing By Reason of Default [hereinafter Initial Decision]: (1) finding, during the period August 6, 2003, through February 12, 2004, Respondent purchased, received, and accepted in interstate commerce from 14 sellers, 113 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $412,968.87; (2) concluding Respondent willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) ordering publication of the facts and circumstances of Respondent's PACA violations (Initial Decision at 2-3).

On February 15, 2006, Respondent appealed to the Judicial Officer. On March 17, 2006, Complainant filed Complainant's Response to Respondent's Appeal. On March 21, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Initial Decision.

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[1]United States Postal Service Domestic Return Receipts for Article Number 7004 1160 0001 9223 2237 and Article Number 7004 1160 0001 9223 2244.

[2]See 7 C.F.R. § 1.136(a).

[3]See 7 C.F.R. § 1.139.

[4]United States Postal Service Domestic Return Receipts for Article Number 7004 2510 0003 7121 6193 and Article Number 7004 2510 0003 7121 6209.

[5]See 7 C.F.R. § 1.139.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section

499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. §§ 499b(4), 499h(a), (e).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES),

DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

DECISION

Statement of the Case

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)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Oklahoma. Respondent's business address is 9111 E. Pine Street, Tulsa, Oklahoma 74115. Respondent's mailing address is P.O. Box 52898, Tulsa, Oklahoma 74158-2898.

2. At all times material to this proceeding, Respondent was licensed under the provisions of the PACA. License number 19990802 was issued to Respondent on March 31, 1999. Respondent's PACA license terminated on March 31, 2005, when Respondent failed to pay the annual fee, as required by section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. During the period August 6, 2003, through February 12, 2004, Respondent purchased, received, and accepted in interstate commerce, from 14 sellers, 113 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $412,968.87.

Conclusion of Law

Respondent willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent's Appeal Petition

Respondent raises one issue in its Appeal of Decision Without Hearing By Reason of Default and Response to Motion for Decision Without Hearing By Reason of Default [hereinafter Appeal Petition]. Respondent denies that it committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Respondent's Appeal Pet. at 2).

Respondent's denial of the allegations in the Complaint comes far too late to be considered. Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because it failed to file an answer to the Complaint within 20 days after the Hearing Clerk served it with the Complaint. The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on August 23, 2005.[6] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.
>
> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer

[6]See note 1.

> of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.
>
> **§ 1.141 Procedure for hearing.**
>
> (a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondent of the consequences of failing to file a timely answer, as follows:

> [T]his complaint shall be served upon Respondent for the purpose of determining whether Respondent has willfully violated the PACA. Respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the Rules of Practice governing proceedings under the PACA (7 C.F.R. § 1.130 *et seq*.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 3.

Similarly, the Hearing Clerk informed Respondent in the service letter transmitting the Complaint and the Rules of Practice that a timely

answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

CERTIFIED RECEIPT REQUESTED

August 16, 2005

Hale-Halsell Company
9111 E. Pine Street
Tulsa, Oklahoma 74115

Hale-Halsell Company
P.O. Box 52898
Tulsa, Oklahoma 74158-2898

Gentlemen:

Subject: In re: Hale-Halsell Company, Respondent -
PACA Docket No. D-05-0019

Enclosed is a copy of a Complaint, which has been filed with this office under the Perishable Agricultural Commodities Act, 1930, as amended.

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

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

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

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

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

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

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Respondent's answer was due no later than September 12, 2005. Respondent's first and only filing in this proceeding is Respondent's Appeal Petition, which Respondent filed February 15, 2006, 5 months 3 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On November 29, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On December 6 and 7, 2005, the Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter.[7] The

[7]See note 4.

Hearing Clerk informed Respondent in the service letter transmitting Complainant's Motion for Default Decision and Complainant's Proposed Default Decision that objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision must be filed within 20 days after service, as follows:

CERTIFIED RECEIPT REQUESTED

November 30, 2005

Hale-Halsell Company
9111 E. Pine Street
Tulsa, Oklahoma 74115

Hale-Halsell Company
P.O. Box 52898
Tulsa, Oklahoma 74158-2898

Gentlemen:

Subject: In re: Hale-Halsell Company, Petitioner [sic]
-
PACA Docket No. D-05-0019

Enclosed is a copy of Complainant's Motion for a Decision Without Hearing by Reason of Default; together with a copy of the Decision Without Hearing by Reason of Default which has been received and filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office a response to the Motion.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On January 30, 2006, the ALJ issued an Initial Decision in which the

ALJ found Respondent admitted the allegations in the Complaint by reason of default. Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states the complainant does not object to setting aside the default decision,[8] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[9]

[8]*See In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

[9]*See generally In re Mary Jean Williams* (Decision as to Mary Jean Williams), 64 Agric. Dec. 1347 (2005) (holding the default decision was properly issued where the respondent's response to the complaint was filed almost 8 months after the respondent's answer was due and the respondent is deemed, by her failure to file a timely answer, to have admitted violations of the regulations issued under the Animal Welfare Act, as amended); *In re Alliance Airlines*, 64 Agric. Dec. 1595 (2005) (holding the default decision was properly issued where the respondent's response to the complaint was filed 2 months 6 days after the respondent's answer was due and the respondent is deemed, by its failure to file a timely answer, to have admitted violations of the Plant Protection
(continued...)

Respondent's first filing in this proceeding was filed with the Hearing Clerk 5 months 3 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly issued the Initial Decision.

Moreover, application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[10]

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

ORDER

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[9](...continued)
Act and regulations issued under the Plant Protection Act); *In re Herman Camara*, 62 Agric. Dec. 26 (2003) (holding the default decision was properly issued where the respondent's response to the complaint was filed 11 months 2 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violations of the Beef Promotion and Research Order and the Beef Promotion Regulations issued under the Beef Promotion and Research Act of 1985); *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. 83 (2003) (holding the default decision was properly issued where the respondent's response to the complaint was filed 11 months 16 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violations of the Horse Protection Act of 1970, as amended), *aff'd sub nom. Trimble v. United States Dep't of Agric.*, 87 F. App'x 456 (6th Cir. 2003); *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002) (holding the default decision was properly issued where the respondent's response to the complaint was filed 7 months 8 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violations of the Packers and Stockyards Act, 1921, as amended and supplemented), *aff'd*, 89 F. App'x 484 (6th Cir. 2003).

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

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's PACA violations shall be published. The publication of the facts and circumstances of Respondent's PACA violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent 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, 2343-2350. Respondent must seek judicial review within 60 days after entry of the Order in this Decision and Order.[11] The date of entry of the Order in this Decision and Order is April 20, 2006.

In re: COOSEMANS SPECIALTIES, INC.
PACA Docket No. D-02-0024.
In re: EDDY C. CRECES.
PACA Docket No. APP-03-0002.
In re: DANIEL F. COOSEMANS.
PACA Docket No. APP-03-0003.
Decision and Order.
Filed April 20, 2006.

PACA – Perishable agricultural commodities – Bribery – Willful, flagrant, and repeated violations – Responsibly connected – License revocation – Civil penalty – Administrative Procedure Act opportunity to comply inapplicable – Falsified USDA inspection certificate – Employment bar applicable to multiple PACA licensees – Interference with chosen occupation – Simultaneous disciplinary and responsibly connected proceedings.

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's decision concluding Cooseman Specialties, Inc., willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) as a consequence of its vice president and part owner, Joe Faraci, paying bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities. The Judicial Officer also concluded that Eddy C. Creces, the secretary, the treasurer, and a part owner, and Daniel F. Coosemans, the president and a part owner, were responsibly connected with

[11]See 28 U.S.C. § 2344.

Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA. The Judicial Officer held: (1) Coosemans Specialties, Inc.'s payments of bribes to a United States Department of Agriculture inspector violate the PACA, even if Coosemans Specialties, Inc., paid the bribes only to obtain prompt produce inspections; (2) Coosemans Specialties, Inc.'s payments of bribes were willful; therefore, the notice and opportunity to determine or achieve compliance provisions in the Administrative Procedure Act (5 U.S.C. § 558(c)), are inapplicable; (3) Coosemans Specialties, Inc.'s bribery of a United States Department of Agriculture inspector violates the PACA, even if the United States Department of Agriculture inspector did not falsify any United States Department of Agriculture inspection certificates; (4) bribery of a United States Department of Agriculture inspector is a serious violation of the PACA and, where willful, flagrant, and repeated, warrants revocation of the violator's PACA license; (5) the Administrative Procedure Act provisions relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) are not applicable to responsibly connected proceedings; (6) the employment bar in the PACA is not limited based upon the number of PACA licensees by whom the responsibly connected person is employed; (7) the imposition of employment sanctions under the PACA on persons responsibly connected with a PACA violator, does not unconstitutionally violate the right to engage in a chosen occupation; and (8) conducting an administrative disciplinary proceeding simultaneously with related responsibly connected proceedings does not violate the due process rights of persons determined to be responsibly connected.

Reuben D. Rudolph, Jr., for the Agricultural Marketing Service and the Chief of the PACA Branch.
Stephen P. McCarron, Washington, DC, for Coosemans Specialties, Inc., and Eddy C. Creces.
Martin Schulman, Woodside, NY, for Daniel F. Coosemans.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a Complaint on August 16, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); 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 Agricultural Marketing Service alleges Coosemans Specialties, Inc.: (1) during the period April 1999 through August 1999, made illegal payments to a United States Department of Agriculture inspector

in connection with 14 federal inspections of perishable agricultural commodities which Coosemans Specialties, Inc., purchased, received, and accepted from 13 sellers in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) prior to April 1999, made illegal payments to United States Department of Agriculture inspectors on numerous occasions, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V). On October 1, 2002, Coosemans Specialties, Inc., filed an answer denying the material allegations of the Complaint and raising five affirmative defenses (Answer ¶¶ 3-6, A-E).

On January 6, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., during the period April 1, 1999, through August 12, 1999, when Coosemans Specialties, Inc., violated the PACA. On February 6, 2003, Eddy C. Creces and Daniel F. Coosemans each filed a Petition for Review pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's January 6, 2003, determinations that they were responsibly connected with Coosemans Specialties, Inc.

On March 21, 2003, Administrative Law Judge Jill S. Clifton consolidated the disciplinary proceeding, *In re Coosemans Specialties, Inc.*, PACA Docket No. D-02-0024, with the two responsibly connected proceedings, *In re Eddy C. Creces*, PACA Docket No. APP-03-0002, and *In re Daniel F. Coosemans*, PACA Docket No. APP-03-0003.

On October 27-29, 2003, Administrative Law Judge Leslie B. Holt presided over a hearing in New York, New York. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Stephen P. McCarron, McCarron & Diess, Washington, DC, represented Coosemans Specialties, Inc., and Eddy C. Creces. Martin Schulman, Schulman & Schulman, Woodside, New York, represented Daniel F. Coosemans. Subsequent to the hearing, Administrative Law Judge Leslie B. Holt became unavailable and the proceeding was reassigned to Administrative Law Judge Victor W. Palmer [hereinafter the ALJ]. Coosemans Specialties, Inc., and Eddy C. Creces initially moved for a new hearing, and on March 19, 2004, the ALJ issued an order granting the motion for a new hearing. Subsequently, Coosemans Specialties, Inc., Eddy C. Creces, and

Daniel F. Coosemans waived their right to a new hearing and requested that the ALJ render a decision based upon the October 27-29, 2003, hearing. The ALJ scheduled briefing dates and the parties completed their post-hearing briefing on May 20, 2005.

On July 13, 2005, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ: (1) concluded Coosemans Specialties, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when Joe Faraci, Coosemans Specialties, Inc.'s vice president, director, and part owner, paid bribes to a United States Department of Agriculture inspector in connection with 14 federal inspections of perishable agricultural commodities which Coosemans Specialties, Inc., purchased, received, and accepted from 13 sellers in interstate and foreign commerce; (2) concluded Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA; and (3) revoked Coosemans Specialties, Inc.'s PACA license (Initial Decision at 8, 16-17).

On October 4, 2005, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans appealed to the Judicial Officer. On October 24, 2005, the Agricultural Marketing Service and the Chief filed a response to Coosemans Specialties, Inc.'s, Eddy C. Creces', and Daniel F. Coosemans' appeal petitions. On November 7, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the ALJ's Initial Decision.

Agricultural Marketing Service exhibits are designated by "CX." Coosemans Specialties, Inc.'s exhibits are designated by "RX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL

COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect

of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required).

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has

been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited

from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days[']notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business,

the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b), (e), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

. . . .

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section–

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

. . . .

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever–

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent–

(A) to influence any official act[.]

. . . .

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

. . . .

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A), (b)(2).

DECISION

Findings of Fact

1. On March 23, 1999, the Federal Bureau of Investigation arrested William J. Cashin, a produce inspector employed by the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, for taking bribes in violation of 18 U.S.C. § 201(b)(2). After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, agreeing to assist the Federal Bureau of Investigation with its investigation into payments to United States Department of Agriculture inspectors by PACA licensees at the Hunts Point Terminal Market. William Cashin participated by being wired by the Federal Bureau of Investigation with audio and audio/visual equipment he then used to tape the inspections he conducted at the Hunts Point Terminal Market. At the end of each day, William Cashin gave the tapes and the bribe money he received to the Federal Bureau of Investigation and was then de-briefed by Federal Bureau of Investigation agents who prepared FBI 302 reports that identified the person paying the cash bribe, the company that employed the person paying the bribe, the type of produce inspected, and the amount of the cash payment. For his cooperation, William Cashin plead guilty to one count of bribery for which he served no jail time and was not required to pay a fine. William Cashin was allowed to retain his future federal pension for serving as an inspector from July 1979 through August 1999, and the official reason given for his resignation from the United States Department of Agriculture was to "pursue a different career opportunity." (CX 11-CX 19; Tr. 131-37, Tr. 181.)

2. William Cashin was one of nine United States Department of Agriculture inspectors who were taking bribes for inspections they performed for Hunts Point Terminal Market wholesalers. United States Department of Agriculture supervisors assigned requested inspections so that the corrupt United States Department of Agriculture inspectors would perform the inspections for the bribe-paying wholesalers. For their participation, the United States Department of Agriculture supervisors received kickbacks. The bribery practices at the Hunts Point Terminal Market had existed for approximately 20 years when William Cashin was arrested. (Tr. 174-77, 186-87.)

3. Coosemans Specialties, Inc., is a New York corporation doing business at the Hunts Point Terminal Market with a mailing address of 249 Row B, NYC Terminal Market, Bronx, New York 10474. Coosemans Specialties, Inc., has held PACA license number 861254 since May 28, 1986, and has renewed the PACA license annually through the present. (CX 1, CX 1A; Tr. 41-42.)

4. In 1999, the three principal officers of Coosemans Specialties, Inc., were Daniel F. Coosemans, president; Eddy C. Creces, secretary and treasurer; and Joe Faraci, vice president. In 1999, Daniel F. Coosemans, Eddy C. Creces, and Joe Faraci each owned 33% percent of the outstanding shares of stock in Coosemans Specialties, Inc., until July 1, 1999, when Joe Faraci sold most of his shares of stock to Daniel F. Coosemans and Eddy C. Creces for $150,000 and reduced his ownership share to 9 percent. (CX 1 at 11, CX 4 at 1; Tr. 507.)

5. Since 1994, William Cashin dealt with Joe Faraci whenever Coosemans Specialties, Inc., requested an inspection of perishable agricultural commodities. Joe Faraci regularly made illegal payments of $50 to William Cashin for each inspection he performed from 1994 through 1999. In exchange for the $50 payments, William Cashin would "help" Coosemans Specialties, Inc., when needed, by preparing United States Department of Agriculture inspection certificates that he would falsify by (1) increasing the percentage of defects, (2) increasing the number of containers inspected, or (3) changing the temperatures of the load. William Cashin gave such "help" on 75 percent to 80 percent of the inspections he conducted for Coosemans Specialties, Inc. (Tr. 124-30.)

6. After becoming a participant in the investigation conducted by the Federal Bureau of Investigation, William Cashin conducted 14 inspections in 1999 for Coosemans Specialties, Inc., for which Joe Faraci paid him $60 for one inspection and $50 for each of the others. On October 21, 1999, the United States District Court for the Southern District of New York filed an indictment in which the grand jury charged Joe Faraci with eight counts of bribery of a public official in violation of 18 U.S.C. § 201(b). The indictment charges that Joe Faraci:

> [U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, JOE FARACI, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Cooseman Specialties, Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:

COUNT	DATE	AMOUNT OF BRIBE
ONE	4/1/99	$60

TWO	5/11/99	$350
THREE	5/20/99	$150
FOUR	5/26/99	$50
FIVE	7/26/99	$200
SIX	8/2/99	$50
SEVEN	8/4/99	$50
EIGHT	8/12/99	$50

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 7 at 1-2.

The bribes charged in the indictment cover the payments Joe Faraci made to William Cashin in connection with the 14 inspections of perishable agricultural commodities identified in Finding of Fact 8 (CX 11-CX 18).

7. Joe Faraci was arrested on October 27, 1999. On June 22, 2001, Joe Faraci pled guilty to count one of the indictment that alleged his payment of a bribe on April 1, 1999, at Coosemans Specialties, Inc.'s Hunts Point place of business. Joe Faraci was sentenced to 15 months in prison, 3 years of supervised release, and a $4,000 fine. Joe Faraci was also ordered to make restitution to victims pursuant to PACA proceedings. (CX 8.)

8. William Cashin testified that, in 1999, Joe Faraci paid him bribes in respect to 14 inspections of produce performed for Coosemans Specialties, Inc. There was no contradicting testimony. William Cashin's testimony, combined with the eight-count indictment filed against Joe Faraci, the FBI 302 reports, and the contemporaneous United States Department of Agriculture inspection certificates William Cashin prepared, establish that Joe Faraci paid bribes to William Cashin on behalf of Coosemans Specialties, Inc., in respect to the following 14 inspections William Cashin performed:

Inspection 1

On April 1, 1999, William Cashin performed one inspection of garlic at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $60 (CX 11).

Inspections 2 and 3

On May 11, 1999, William Cashin performed two inspections (one of mangoes and one of plantains) at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $350 that included bribe money for five prior inspections (CX 12).

Inspections 4, 5, and 6

On May 17, 1999, William Cashin performed three inspections (one of snow peas and sugar snap peas, one of Haitian mangoes, and one of sweet peppers) at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $150 (CX 13).

Inspection 7

On May 26, 1999, William Cashin performed one inspection of a load of radicchio at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $50 (CX 14).

Inspections 8, 9, 10, and 11

On July 23, 1999, William Cashin performed four inspections (one of radicchio, one of tomatoes, one of plum tomatoes, and one of mesculin) at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $200 (CX 15).

Inspection 12

On August 2, 1999, William Cashin performed one inspection of sweet peppers at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $50 (CX 16).

Inspection 13

On August 2 or 3, 1999, William Cashin performed one inspection of tomatoes at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $50 (CX 17).

Inspection 14

On August 12, 1999, William Cashin performed one inspection of

asparagus at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $50 (CX 18).

9. Coosemans Specialties, Inc., employs at its Hunts Point Terminal Market facilities approximately 40 people. Twenty-five of its employees are porters who load and unload produce and perform other warehouse duties. Eight or nine of Coosemans Specialties, Inc.'s employees are office workers and five are salespeople. (Tr. 428.)

10. There are 52 merchants at the Hunts Point Terminal Market. In comparison to the others, Coosemans Specialties, Inc., is medium-sized. Coosemans Specialties, Inc., owns four Hunts Point Terminal Market warehouse units and receives about 100 lots of produce on each of the 5 days per week it operates. Coosemans Specialties, Inc.'s 2002 gross revenue was just over $24,000,000 with an annual payroll of $2,100,000. (Tr. 427-29, 434.)

11. Daniel F. Coosemans, who principally resides in Miami, Florida, and Panama, came to the United States in the 1980's to introduce a marketing concept he started in Belgium for franchising the specialty fruit and vegetable business. He started his first company in Belgium. He then started businesses on a partnership basis in the United States. His method has been to identify a market, then start a new company in that market, and then find a partner who would run the company allowing Daniel F. Coosemans to start other companies elsewhere. Daniel F. Cooseman's first United States company was started in Los Angeles, California. He located his second company, which Eddy C. Creces runs for him, at the Hunts Point Terminal Market in New York. There are now 27 such companies around the world and 20 of them are in the United States. After he set up these companies, Daniel F. Coosemans' involvement with each of them has been to be its financing entity and to check its monthly statements to determine whether it is achieving the profits he believes to be appropriate. Altogether Daniel F. Coosemans' companies have 550 employees in the United States with overall weekly revenues in the tens of thousands. (Tr. 619-29.)

Discussion

Coosemans Specialties, Inc., Violated the PACA When Joe Faraci Paid Bribes to a United States Department of Agriculture Inspector

The record establishes that Joe Faraci, Coosemans Specialties, Inc.'s vice president, director, and partial owner during 1999, paid bribes to a United States Department of Agriculture produce inspector in respect to 14 inspections of perishable agricultural commodities performed at Coosemans Specialties, Inc.'s request. The United States Department of Agriculture produce inspector who received the bribes so testified. Joe Faraci, who was charged with eight counts of bribing a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Coosemans Specialties, Inc., and pled guilty to one count of the indictment, was not called to testify.

Section 16 of the PACA (7 U.S.C. § 499p) provides that the act, omission, or failure of any agent, officer, or any other person acting for, or employed by, any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker. Officers and owners of a PACA licensee, other than the bribing officer or owner need not have actual knowledge of the illegal payments by one officer or agent, for the PACA licensee to be held to have committed knowing and willful violations of the PACA.[1]

Coosemans Specialties, Inc., argues that the payment of a bribe to a United States Department of Agriculture inspector, though a reprehensible violation of other federal laws, is not a violation of the PACA. Even though *In re Post & Taback, Inc.*, has held otherwise, Coosemans Specialties, Inc., contends the case was wrongly decided and overstates the goals of the PACA.

Coosemans Specialties, Inc.'s argument is unpersuasive. First, *In re Post & Taback, Inc.*, as affirmed by the United States Court of Appeals for the District of Columbia Circuit, is binding in this proceeding. Second, Coosemans Specialties, Inc.'s premises are flawed.

Coosemans Specialties, Inc., argues that violations of the PACA are limited to "regulating conduct of licensees towards other merchants which results in some financial detriment on a specific transaction" (Brief of Respondent and Petitioner Creces at 21). Coosemans Specialties, Inc., further asserts the code of fair dealing between produce merchants, which the PACA was enacted to establish, was not violated by Joe Faraci's payments to a United States Department of Agriculture produce inspector (Brief of Respondent and Petitioner Creces at 22).

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[1] *See In re Post & Taback, Inc.,* 62 Agric. Dec. 802, 820-21(2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

To support these propositions, Coosemans Specialties, Inc., contends Joe Faraci's payments to William Cashin were really nothing more than tips for prompt service. However, the only evidence as to the reason for the payments is the testimony of the United States Department of Agriculture produce inspector that he was being paid bribes to "help" Coosemans Specialties, Inc., with the inspections. The person who actually paid the bribes did not testify to contradict the United States Department of Agriculture inspector. Coosemans Specialties, Inc., can only point to the statement by Joe Faraci at the time he pled guilty to bribing a United States Department of Agriculture produce inspector that he paid the bribes in order to obtain prompt United States Department of Agriculture inspections, as follows:

> [THE COURT:]
>
> Q. All right, Mr. Faraci, before I accept your plea, I have to be satisfied that you are in fact guilty of the charge to which you have just pleaded guilty. So tell me in your own words what it is you did that makes you guilty of this charge.
>
> [MR. FARACI:]
>
> A. Whenever we need an inspection I gave or I asked to insure them to come faster, I gave them a $50 gift. This way they will come faster to do the inspection.
>
> Q. You gave --
>
> A. The inspector, William Cashin.
>
> Q. Excuse me?
>
> A. I gave William Cashin $50 to come quicker to do the inspection.
>
> Q. And this was to do inspection of produce?
>
> A. Yes.
>
> Q. And this occurred at the Hunts Point Terminal Market?

A. Yes.

Q. On approximately how many occasions did you give him money to do these inspections?

MR. MORIARTY: May I interrupt for a half moment your Honor?

THE COURT: Sure.

MR. MORIARTY: Your Honor, under the terms discussed with the government, Mr. Faraci is prepared to admit that to each count of the indictment, to each inspection within that indictment that he had paid the $50 for the same conduct as just elicited concerning Count 1.

THE COURT: There was a total indictment then of $960.

MR. MORIARTY: I think that is correct.

Q. Did you pay $960 to this inspector as is alleged in the indictment?

A. Yes.

Q. And did you know it was illegal to do so at the time you did it?

A. Yes, your Honor.

Q. And did this occur in the year of '99?

A. Yes.

RX 15 at 14-15.

However, Joe Faraci's statement that he only paid bribes in order to obtain prompt inspections of perishable agricultural commodities was a self-serving statement designed to de-emphasize the seriousness of his crime and possibly reduce his sentence. Joe Faraci's statement made

during his allocution was contrary to his admission when he pled guilty to count one of the indictment that specified, as follows:

> JOE FARACI, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Cooseman Specialties, Inc., Hunts Point Terminal Market, Bronx, New York.

CX 7 at 1.

In addition to Joe Faraci's admission, William Cashin identified the ways in which he would falsify United States Department of Agriculture inspection certificates to "help" Coosemans Specialties, Inc., in respect to 75 percent to 80 percent of the inspections he conducted for Coosemans Specialties, Inc. (Tr.130). Even if there were contradicting, credible evidence showing that Coosemans Specialties, Inc.'s bribes were not given to influence the outcome of the inspections, Coosemans Specialties, Inc.'s bribing a United States Department of Agriculture inspector gave Coosemans Specialties, Inc., an unfair competitive advantage over its shippers who supplied it with produce. Coosemans Specialties, Inc., also gained an unfair advantage over competing wholesalers.

The PACA is designed to protect producers of perishable agricultural products who in many instances send their products to a buyer or commission merchant who is thousands of miles away. PACA was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct.[2]

The PACA seeks to bring about fair dealing between members of the produce industry who conduct interstate and foreign commerce long-distance, where shipments must move quickly to avoid losses caused by rot and decay. When the receiver tells the shipper that the value of the shipment has been lowered because of rot and decay, the distant out-of-state or foreign shipper has only the receiver's word as verified by a United States Department of Agriculture inspection certificate. A United States Department of Agriculture inspection

[2] *See Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967).

certificate that supports the receiver's claim that the produce has deteriorated can cause a shipper to accept a lower than anticipated price. A United States Department of Agriculture inspection certificate can also induce the shipper to continue to deal with the receiver in the future since a United States Department of Agriculture inspection certificate that supports the receiver's evaluation of the condition of perishable agricultural commodities on receipt makes the receiver appear to be reliable and trustworthy. Therefore, Coosemans Specialties, Inc.'s bribery of a United States Department of Agriculture inspector gave Coosemans Specialties, Inc., an unfair competitive advantage over the shippers and growers who supplied Coosemans Specialties, Inc., with produce as well as over competing wholesalers.

Even if the bribed inspector never falsified any United States Department of Agriculture inspection certificates, Coosemans Specialties, Inc.'s illegal payments to a United States Department of Agriculture inspector, standing alone, violated the PACA. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful for a PACA licensee in connection with any transaction involving any perishable agricultural commodity, which is received in interstate or foreign commerce to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with the transaction.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123 (2d Cir. 2003), upheld a reparation award rendered in favor of a shipper who accepted reduced prices from a receiver based on inspections by three of the United States Department of Agriculture inspectors at the Hunts Point Terminal Market who were convicted of accepting bribes. The Judicial Officer made a finding in the case that there was no showing that falsified inspections were issued as to the produce, but that nevertheless all of the price adjustments were voidable because of the shipper's mistake and the receiver's misrepresentation regarding the integrity of the inspection process. The United States Court of Appeals for the Second Circuit, in affirming the Judicial Officer, stated:

> It is clear that, when the parties agreed to the price adjustments, DiMare [the shipper] was mistaken as to both whether Koam [the receiver] had paid bribes to USDA inspectors to influence the outcome of inspections and whether the USDA inspectors who examined the tomatoes had accepted the bribes.
>
> . . . .

> Koam's fault obviously caused DiMare's mistake, as Koam knew that its employee had bribed USDA inspectors, yet Koam neglected to inform DiMare of this fact. In addition, in light of Koam's involvement in bribery (as demonstrated by [its employee] Friedman's guilty plea), it would be unconscionable to enforce the price-adjustment agreements, which resulted from the work of inspectors who had accepted bribes.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 127-28 (2d Cir. 2003).

As was the case in *Koam*, when Coosemans Specialties, Inc., paid bribes in respect to inspections without informing the shippers, Coosemans Specialties, Inc., violated its duty to inform the shippers of that fact. Coosemans Specialties, Inc.'s duty to inform shippers of the bribes it pays is found in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and its failure to inform the shipper each time a bribe was paid in respect to an inspection of perishable agricultural commodities was a separate violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Coosemans Specialties, Inc., paid bribes in connection with 14 inspections of perishable agricultural commodities in 1999. Coosemans Specialties, Inc.'s PACA violations were therefore repeated.[3] Coosemans Specialties, Inc.'s violations were also flagrant and willful.[4] Accordingly, I conclude Coosemans Specialties, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

PACA License Revocation is the Appropriate Disciplinary Sanction

Whenever the Secretary of Agriculture determines that a commission merchant, dealer, or broker has violated a provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)), the Secretary of Agriculture may publish the facts and circumstances of the violation, suspend the

[3]*See H.C. MacClaren v. United States Dep't of Agric.*, 342 F. 3d 584, 592 (6th Cir. 2003).

[4]*See In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828-30 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

violator's PACA license, or assess a civil penalty. Further, if the violation is flagrant or repeated, the Secretary of Agriculture may revoke the PACA license of the offender.[5]

Both Eddy C. Creces and Daniel F. Coosemans request, if Coosemans Specialties, Inc., is found to have violated the PACA, that I assess Coosemans Specialties, Inc., a civil penalty. They so request because, if they are determined to be "responsibly connected" to a PACA licensee that has had its license revoked, each will be barred from employment by PACA licensees for 1 year, and after 1 year, employment shall be conditioned upon the posting of a surety bond acceptable to the Secretary of Agriculture.[6]

Bribery is such an egregious violation of the PACA that the only appropriate sanction is one that will deter Coosemans Specialties, Inc., and other PACA licensees from paying bribes to United States Department of Agriculture inspectors in the future.

Daniel F. Coosemans also argues that the restrictions that revocation will place upon his participation in the activities of the 20 other PACA licensed companies in which he has an ownership interest is excessive and a consequence never intended by Congress. However, the language of the PACA is clear and unambiguous. If the PACA requires amendment, the amendments must come from Congress and may not be made here.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.,* 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993):

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

I have considered and discussed the nature of the violations as they relate to the purposes of the PACA and the various circumstances that I believe are relevant to an appropriate disciplinary sanction. My views accord with those of John Koller, the administrative official who

[5]7 U.S.C. § 499h(a), (e).

[6]7 U.S.C. § 499h(b).

testified at the hearing (Tr. 549-54).

John Koller stated that approximately 150,000 produce inspections are performed each year and if there is any suspicion that the inspections are tainted in any way, the entire industry is affected. Inasmuch as United States Department of Agriculture inspection certificates are used to resolve hundreds of disputes each day, the objectivity of the United States Department of Agriculture inspector should not be compromised by payments he or she receives from wholesalers nor should other wholesalers be made to feel that they too should make such payments in order to be competitive. The Agricultural Marketing Service recommends PACA license revocation to deter Coosemans Specialties, Inc., and any future potential violators from making illegal payments to United States Department of Agriculture produce inspectors. The recommendation is consistent with prior case law.[7] Accordingly, Coosemans Specialties, Inc.'s PACA license should be revoked.

Eddy C. Creces and Daniel F. Coosemans Were Responsibly Connected with Coosemans Specialties, Inc.

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.[8] The record establishes that, in 1999, Eddy C. Creces was the secretary, the treasurer, and a holder of 33% percent outstanding stock of Coosemans Specialties, Inc. On July 1, 1999, Eddy C. Creces increased the percentage of outstanding stock which he owned to 45½ percent. The record also establishes that, in 1999, Daniel F. Coosemans was the president and a holder of 33% percent outstanding stock of Coosemans Specialties, Inc. On July 1, 1999, Daniel F. Coosemans increased the percentage of outstanding stock which he owned to 45½ percent. The burden is on Eddy C. Creces and Daniel F. Coosemans to demonstrate by a preponderance of the evidence that they were not responsibly

[7] *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec.___ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec.1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

[8] 7 U.S.C. § 499a(b)(9).

connected with Coosemans Specialties, Inc., despite their positions at, and ownership of, Coosemans Specialties, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Neither Eddy C. Creces nor Daniel F. Coosemans proved by a preponderance of the evidence that he was merely a nominal officer or a nominal shareholder of Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA.

Nonetheless, Eddy C. Creces argues he should not be found to be responsibly connected with the Coosemans Specialties, Inc., because he did not willfully commit the bribery violations. But the payment of bribes by an employee of a PACA licensee is a willful violation of the PACA.[9]

Eddy C. Creces further argues that a determination of responsible connection would deprive him of his property, specifically his stock ownership, without due process in violation of the Fifth Amendment to the Constitution of the United States. A similar argument was advanced and rejected in *Zwick v. Freeman*, 373 F.2d 110, 118-19 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967). *Zwick* was followed and other constitutional objections to the employment bar provisions of the PACA were raised and rejected in *Bama Tomato Co. v. United States Dep't of Agric.*, 112 F.3d 1542, 1546-47 (11th Cir. 1997).

Daniel F. Coosemans similarly argues that the application of the employment bar provisions to him constitutes a denial of his constitutional rights. He cites in support of his argument various cases concerning constitutional restrictions on governmental regulation of other trades and professions. However, the cited cases are inapposite. *Zwick* and *Bama Tomato Co.* considered such arguments in the specific

[9] *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828-29 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

context of the PACA's employment bar provisions and found the arguments unavailing. Therefore, the argument that the PACA employment bar provisions are unconstitutional is again rejected as contrary to applicable case law.

For the foregoing reasons, I affirm the Chief's January 6, 2003, determinations that Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., during the period April 1, 1999, through August 12, 1999, when Coosemans Specialties, Inc., violated the PACA.

Appeal Petitions

Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans raise eight issues in Brief of Appellant-Petitioner Daniel F. Coosemans [hereinafter Appeal Petition of Daniel F. Coosemans] and Appeal Petition of Respondent and Petitioner Creces. First, Coosemans Specialties, Inc., and Eddy C. Creces contend the ALJ's conclusion that Coosemans Specialties, Inc.'s payments to a United States Department of Agriculture produce inspector in connection with inspections of perishable agricultural commodities constitute violations of the PACA, is error. Coosemans Specialties, Inc., and Eddy C. Creces assert the Agricultural Marketing Service did not allege that Coosemans Specialties, Inc.'s payments to William Cashin were designed to gain an unfair competitive advantage over shippers or wholesalers and the Agricultural Marketing Service did not prove that William Cashin falsified any United States Department of Agriculture inspection certificates issued in connection with the inspection of perishable agricultural commodities for Coosemans Specialties, Inc. (Appeal Pet. of Respondent and Petitioner Creces at 5-8.)

I disagree with Coosemans Specialties, Inc.'s and Eddy C. Creces' contentions that a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) may only be shown if Coosemans Specialties, Inc.'s payments to William Cashin were designed to gain an unfair competitive advantage over shippers or other wholesalers and that the Agricultural Marketing Service did not prove that William Cashin falsified any United States Department of Agriculture inspection certificates issued in connection with the inspection of perishable agricultural commodities for Coosemans Specialties, Inc.

The PACA does not expressly provide that a payment to a United States Department of Agriculture produce inspector in connection with

the inspection of perishable agricultural commodities is a violation of the PACA. However, the PACA provides that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity.[10]

Bribery of a United States Department of Agriculture produce inspector, whatever the motive, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, even if it is only to obtain prompt inspection of perishable agricultural commodities, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of unlawful gratuities and bribes to United States Department of Agriculture produce inspectors.[11]

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[10] 7 U.S.C. § 499b(4).

[11] *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

Second, Coosemans Specialties, Inc., and Eddy C. Creces contend the ALJ's finding that Coosemans Specialties, Inc.'s payments to a United States Department of Agriculture inspector are willful, is error. Coosemans Specialties, Inc., and Eddy C. Creces argue that, since Coosemans Specialties, Inc.'s violations were not willful, the ALJ erred by failing to dismiss the Complaint because the Agricultural Marketing Service did not comply with the notice and opportunity to demonstrate or achieve compliance provisions in the Administrative Procedure Act (5 U.S.C. § 558(c)). (Appeal Pet. of Respondent and Petitioner Creces at 7.)

The Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the licensee must be given notice of facts warranting revocation and an opportunity to achieve compliance, except in cases of willfulness, as follows:

> **§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses**
>
> . . . .
>
> (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given–
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c).

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or

carelessly disregards the requirements of a statute.[12] The record

[12]*See, e.g., Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___, slip op. at 28 (Apr. 5, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005); *In re JSG Trading Corp.* (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 430 (2002); *In re PMD Produce Brokerage Corp.* (Decision and Order on Remand), 60 Agric. Dec. 780, 789 (2001), *aff'd*, No. 02-1134, 2003 WL 21186047 (D.C. Cir. May 13, 2003); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 755 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal dismissed*, No. 98-5456 (11th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

(continued...)

clearly establishes that Joe Faraci intentionally made unlawful payments to William Cashin in connection with produce inspections, and thereby acted willfully. Therefore, the notice and opportunity to demonstrate or achieve compliance provisions in the Administrative Procedure Act (5 U.S.C. § 558(c)) are not applicable to this proceeding.

Third, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans contend the ALJ's finding that William Cashin falsified United States Department of Agriculture inspection certificates, is error (Appeal Pet. of Respondent and Petitioner Creces at 8-12; Appeal Pet. of Daniel F. Coosemans at 7-8).

Even if I were to find William Cashin's testimony lacked credibility and insufficient evidence to establish that William Cashin falsified any of the United States Department of Agriculture inspection certificates he provided to Coosemans Specialties, Inc., those findings would not change the disposition of this proceeding. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities, even if the payment does not result in a United States Department of Agriculture inspector's falsification of a United States Department of Agriculture inspection certificate, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of unlawful gratuities and

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[12](...continued)

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Coosemans Specialties, Inc.'s violations were willful.

bribes to United States Department of Agriculture produce inspectors.[13]

Fourth, Coosemans Specialties, Inc., and Eddy C. Creces contend the ALJ's failure to impose a civil money penalty, is error (Appeal Pet. of Respondent and Petitioner Creces at 13-16).

I find Joe Faraci's payment of bribes to a United States Department of Agriculture produce inspector within the scope of his employment are deemed to be the actions of Coosemans Specialties, Inc., and those bribes were so egregious that nothing less than PACA license revocation is an adequate sanction. Bribery of United States Department of Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary to deter Coosemans Specialties, Inc., from future similar violations of the PACA and to deter other PACA licensees from similar violations of the PACA. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.[14] While sanctions in similar cases are not required to be uniform,[15] I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding.

Fifth, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans contend Eddy C. Creces and Daniel F. Coosemans should not be found responsibly connected with Coosemans Specialties, Inc., because their actions were not willful and they received no notice and

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[13]*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec.1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

[14]*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec.1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

[15]*Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___, slip op. at 35 (Apr. 5, 2006); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1572 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999).

opportunity to demonstrate or achieve compliance as provided in the Administrative Procedure Act (5 U.S.C. § 558(c)) (Appeal Pet. of Respondent and Petitioner Creces at 16-17; Appeal Pet. of Daniel F. Coosemans at 17-18).

The Administrative Procedure Act provides, before institution of agency proceedings for the withdrawal, suspension, revocation, or annulment of a license, the licensee must given notice of facts warranting revocation and an opportunity to demonstrate or achieve compliance, except in cases of willfulness (5 U.S.C. § 558(c)).

Neither Eddy C. Creces nor Daniel F. Coosemans is a PACA licensee. The responsibly connected proceedings, *In re Eddy C. Creces*, PACA Docket No. APP-03-0002, and *In re Daniel F. Coosemans*, PACA Docket No. APP-03-0003, concern merely the determinations that Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA; they do not concern the withdrawal, suspension, revocation, or annulment of a PACA license held by Eddy C. Creces or Daniel F. Coosemans. Therefore, with respect to the responsibly connected proceedings, *In re Eddy C. Creces*, PACA Docket No. APP-03-0002, and *In re Daniel F. Coosemans*, PACA Docket No. APP-03-0003, I find the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance in 5 U.S.C. § 558(c), inapposite.

Sixth, Daniel F. Coosemans contends the ALJ erroneously ignores the fact that Congress did not intend to prevent a person such as Daniel F. Coosemans, who is involved with the ownership of 21 PACA licensees, from continuing as an employee and shareholder of those PACA licensees notwithstanding the fact that he is found responsibly connected with another PACA licensee, the license of which has been revoked or suspended (Appeal Pet. of Daniel F. Coosemans at 8-13).

The PACA defines the term responsibly connected as affiliated or connected with a commission merchant, dealer, or broker as partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.[16] The PACA bars all PACA licensees from employing persons who have been responsibly connected with any PACA licensee whose license has been

[16]7 U.S.C. § 499a(b)(9).

revoked by the Secretary of Agriculture.[17] The PACA contains no provision limiting the employment bar based upon the number of PACA licensees by whom the responsibly connected person is employed, as Daniel F. Coosemans contends.

Seventh, Daniel F. Coosemans contends preventing him from continuing employment in PACA licensee companies by finding him responsibly connected violates his substantive due process rights (Appeal Pet. of Daniel F. Coosemans at 13-15).

Individuals found to be responsibly connected with a commission merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.[18]

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.[19] Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of producers and shippers of perishable agricultural commodities. The status of being an officer, a director, or a holder of more than 10 percent of the outstanding stock of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer, a director, or a holder of more than 10 percent of the outstanding stock may be deemed *responsibly connected* and subject to employment sanctions in the PACA.[20] Since the restriction on the employment of *responsibly connected* individuals is rationally related

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[17] 7 U.S.C. § 499h(b).

[18] *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[19] H.R. Rep. No. 1041 (1930).

[20] *Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Daniel F. Coosemans' due process rights by arbitrarily interfering with his chosen occupation.

Contrary to Daniel F. Coosemans' position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.[21] A number of courts have rejected constitutional challenges to the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.[22]

Eighth, Daniel F. Coosemans contends conducting a proceeding to determine whether he was responsibly connected with Coosemans Specialties, Inc., simultaneously with the proceeding to determine whether Coosemans Specialties, Inc., violated the PACA, violates Daniel F. Coosemans' procedural due process rights. Daniel F. Coosemans takes the position the disciplinary proceeding to determine whether Coosemans Specialties, Inc., violated the PACA must be concluded before beginning the responsibly connected proceeding to determine whether he was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA. (Appeal Pet. of Daniel F. Coosemans at 15-17.)

None of the cases cited by Daniel F. Coosemans support his contention that conducting a disciplinary proceeding to determine

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[21]*Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

[22]*Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee who has committed flagrant or repeated violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee, who failed to pay a reparation award, from employment in the field of marketing perishable agricultural commodities, is not unconstitutional).

whether a PACA licensee violated the PACA simultaneously with a related responsibly connected proceeding, violates the procedural due process rights of the person determined to be responsibly connected. Moreover, I cannot locate any case supporting Daniel F. Coosemans' contention. Further still, both Daniel F. Coosemans and Coosemans Specialties, Inc., have been provided notice and an opportunity to be heard. I find no violation of their due process rights merely because the disciplinary proceeding regarding the allegations of Coosemans Specialties, Inc.'s violations of the PACA and the responsibly connected proceeding regarding Daniel F. Coosemans' relationship to Coosemans Specialties, Inc., are conducted simultaneously.

Conclusions of Law

1. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), Joe Faraci's payments of bribes to a United States Department of Agriculture produce inspector are deemed the acts of Coosemans Specialties, Inc.

2. Coosemans Specialties, Inc., engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform an implied duty arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce.

3. Daniel F. Coosemans was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. Eddy C. Creces was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

1. Coosemans Specialties, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Coosemans Specialties, Inc.'s PACA license is revoked, effective 60 days after service of this Order on Coosemans Specialties, Inc.

2. I affirm the Chief's January 6, 2003, determination that Eddy C. Creces was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Eddy C. Creces is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Eddy C. Creces.

3. I affirm the Chief's January 6, 2003, determination that Daniel F. Coosemans was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Daniel F. Coosemans is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Daniel F. Coosemans.

RIGHT TO JUDICIAL REVIEW

Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans must seek judicial review within 60 days after entry of the Order in this Decision and Order.[23] The date of entry of the Order in this Decision and Order is April 20, 2006.

In re: JOSEPH T. CERNIGLIA.
PACA APP Docket No. 04-0012.
Decision and Order.
Filed May 4, 2006.

PACA -- Responsibly connected -- Alter ego -- Resignation ineffective -- de facto officer.

Charles Spicknall for Complainant.
Respondent Pro se.

[23]See 28 U.S.C. § 2344.

Decision and Order by Administrative Law Judge Victor W. Palmer.

DECISION AND ORDER

Joseph T. Cerniglia initiated this proceeding by filing a petition that seeks the reversal of a determination by the Chief of the PACA Branch of the Agricultural Marketing Service that Mr. Cerniglia, within the meaning of the Perishable Agricultural Commodities Act ("the PACA"; 7 U.S.C. § 499a (b)(9)), was "responsibly connected" with a corporation when it was found to have willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C.§ 499b(4)). The consequence of the Chief's determination is that Mr. Cerniglia becomes subject to restrictions upon his PACA licensing and employment as set forth at 7 U.S.C. § 499d and § 499h.

The PACA licensing and employment restrictions apply to any person who is a "responsibly connected…officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association" holding a PACA license as a commission merchant, dealer, or broker, that is found to have flagrantly or repeatedly violated section 2 of the PACA. The PACA's definition section further states, however, that "(a) person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee…or was not an owner of a violating licensee…which was the alter ego of its owners."(7 U.S.C. § 499a(b)(9)).

Although Mr. Cerniglia argues that he was not actively involved in the violations that the corporate licensee was found to have committed, his principal and most compelling argument is that before the commission of the violations, he had resigned all offices in the corporation and had relinquished all of his shares of its stock. Therefore, he cannot be said to come within the essential, first requirement of the "responsibly connected" definition of being an "officer, director, or holder of more than 10 per centum of the outstanding stock…." However, this is not a case of first impression. Controlling Departmental precedent is set forth in *Anthony L. Thomas,* 59 Agric. Dec. 367 (2000). Here, as in *Thomas*, the resignation as a corporate officer was incomplete and ineffective, and Mr. Cerniglia's active involvement as

a *de facto* officer of the corporate licensee continued through the time the corporation violated the PACA. Therefore, the determination by the Chief of the PACA Branch is being affirmed, and an order is being entered that Mr. Cerniglia was responsibly connected to the corporate licensee when it flagrantly and repeatedly violated section 2(4) of the PACA.

Procedural Background

On December 3, 2003, the PACA Branch filed a disciplinary complaint against Fresh Solutions, Inc. alleging that it was a corporation licensed under the PACA that had violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The complaint further alleged that a pending application for a new PACA license should be denied. The proceedings were initially assigned to Administrative Law Judge Leslie B. Holt and then reassigned to Administrative Law Judge Jill Clifton. They each held teleconferences with Mr. Cerniglia and others believed to be principals of the corporation. In the teleconference conducted by Judge Clifton, a previously scheduled hearing in respect to the disciplinary proceeding was cancelled in light of the fact that an answer had not been filed and the PACA Branch had moved for a decision by reason of default. Judge Clifton also ordered the PACA Branch to identify any responsibly connected proceedings that could be joined with the pending disciplinary proceeding. On February 13, 2004, the PACA Branch notified Mr. Cerniglia that it had made an initial determination of his responsible connection to Fresh Solutions, Inc. (RX-3). By letter dated February 19, 2004, Mr. Cerniglia responded, stating that he had resigned as an officer and a director of the corporation on January 1, 2002 when 100% of the stock of Fresh Solutions, Inc. was transferred to Morris Lewis. (RX-4). Mr. Cerniglia thereafter submitted documents in support of his contention that he was not an officer, director or shareholder of the corporation during the period of August 16, 2002 through April 29, 2003, when the disciplinary complaint alleged that Fresh Produce, Inc. failed to pay for $351,968.50 in produce purchased from eight produce sellers in violation of section 2(4) of the PACA. On April 12, 2004, Judge Clifton issued a decision against Fresh Produce, Inc. finding that because of its failure to pay produce dealers as alleged in the disciplinary complaint, it had committed willful, repeated and flagrant violations of section 2(4) of the PACA and ordered the publication of the facts and circumstances of the violations. Judge Clifton included in

her Order findings that Fresh Solutions, Inc. is unfit to be licensed and that its application for a PACA license was therefore refused. (RX-26). The decision was not appealed and became final on June 30, 2004. By letter dated July 7, 2004, the Chief of the PACA Branch notified Mr. Cerniglia that on behalf of the agency, the Chief had made a final determination that Mr. Cerniglia was responsibly connected to Fresh Solutions, Inc. during the period of the violations. On August 4, 2004, Mr. Cerniglia filed a petition for review of the agency's determination. Similar determinations of responsible connection were also made in respect to three other principals of Fresh Produce, Inc., i.e., E. Mason McGowin, III, Morris C. Lewis, III and Jonathan Scott Green. Mr. Green did not contest the determination against him. Messrs. McGowin and Lewis initially filed petitions for review, but their petitions were dismissed upon their own motions.

On January 11, 2006, I conducted an oral hearing in Atlanta, Georgia in respect to the one remaining proceeding, Mr. Cerniglia's petition for review of the PACA Chief's determination that he was responsibly connected with Fresh Produce, Inc. at the time of its violations of Section 2(4) of the PACA. Charles E. Spicknall, Esquire, Office of the General Counsel, USDA, Washington, D.C., represented the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture. Mr. Cerniglia represented himself *pro se*. In addition to the record of the proceeding conducted by the PACA Chief, respondent submitted exhibits at the hearing that were received in evidence and respondent's exhibits are designated (RX-__). Mr. Cerniglia testified and the hearing was transcribed (Tr.__). Exhibits submitted by Mr. Cerniglia and received at the hearing are designated (EX-__). Some of his exhibits, originally received as part of the Administrative Record, are designated as (PX-__). Both sides submitted post hearing briefs that have been considered in full, including Mr. Cerniglia's rebuttal brief that was received on April 14, 2006.

Findings of Fact

1. Joseph T. Cerniglia's current mailing address is 6730 Ulster Court, Alpharetta, Georgia 30005. (Tr. 18). Upon graduation from the University of West Georgia in 1972, with a degree in history and environmental science, Mr. Cerniglia joined his father's produce business, Cerniglia Produce Co., Inc. He worked there until 1989 when that corporation's PACA license was revoked for failing to pay sellers

for their produce. (Tr. 54; Tr. 58; and *In re Cerniglia Produce Co., Inc*., 48 Agric Dec. 1133 (1989)). From 1989 through 1991, Mr. Cerniglia was employed by Collins Brothers, a produce company. In 1990 or 1991, he was determined to be responsibly connected to Cerniglia Produce Co., Inc., and disqualified from employment in the produce industry for two years. (Tr. 59).

2. In 1993, Mr. Cerniglia returned to the produce industry as a sole proprietorship. He incorporated his business in 1994, and first obtained a PACA license for the business in or about 1995. (Tr. 18). In 1995, Jonathan Scott Green and John Green joined Mr. Cerniglia as owners of the business. (Tr. 89-96). The business was incorporated and, in 1996, was renamed Fresh Solutions, Inc. (Tr. 18; Tr. 59-61; EX-5, at 3). The corporation's stock ledger shows that, on July 2, 1996, Mr. Cerniglia, Jonathan Scott Green, and John Green, together with Mr. Cerniglia's father, Joseph Cerniglia, Sr, and Windsor Jordan, each owned twenty percent of the shares of the corporation. (PX-8). The minutes of the annual meeting of the shareholders and directors of Fresh Solutions, Inc. held on July 2, 1998, show that on that date, the authorized shares of stock in the company were increased and re-distributed so that of the total outstanding shares, Mr. Cerniglia owned 45%; Jonathan Scott Green owned 33%; John Green owned 20%; and Windsor Jordan owned 2%. (EX-1). In 2000-2001, transfers of outstanding shares in the corporation were made to two investors, Morris Lewis and Mason McGowin, resulting in each of them owning 20% of the total outstanding shares and decreasing Mr. Cerniglia's stock ownership to 29%. (PX-8; EX-2; RX-1, at 4). Morris Lewis invested $1 million dollars for his 667 shares that represented a 20% interest in the company. (RX-42, at 67).

3. The initial money to get the business going in 1993, came from a home equity loan Mr. Cerniglia obtained for a couple of thousand dollars, plus $19,000.00 of his personal savings and $30,000.00 from his wife's inheritance. (Tr. 65). He opened an account for Fresh Solutions at the Bank of America on September 26, 1994. (Tr. 66-67; RX-27). Through 2004, Mr. Cerniglia had exclusive signature authority over this account. (Tr. 69).

4. When Mr. Cerniglia started what would become Fresh Solutions, Inc., his concept was to help chain restaurants to better buy produce so

that each restaurant in a chain would obtain the same, right quality produce at the right price. (Tr. 60; Tr. 85). Initially, Mr. Cerniglia personally attended to all aspects of the business with some family help. He acted as a broker, recommending certain produce vendors for which his client chain restaurants would authorize the vendor to pay him 3 percent of the price of the purchased produce. (Tr. 83-84). After the Greens joined him, Jonathan Scott Green attended to the financial affairs of the company; John Green helped with sales to restaurants; and Mr. Cerniglia handled produce matters. (Tr. 95). Moreover, the Greens found new customers who desired a different business model from the pure commission one Mr. Cerniglia employed. Under the new model, Fresh Solutions, Inc. would take title to the selected produce and pay the distributors directly. Mr. Cerniglia acceded to adding this new business model, and Fresh Solutions, Inc. thereafter bought produce for various of its customers directly from 70 or 80 produce distributors. (Tr. 87-88). There was another change in the way Fresh Solutions serviced its customers. It undertook the development of hand-held computerized devices to allow chain restaurant customers to engage in on-line ordering of produce while checking on their inventories. (Tr. 115-116). These hand-held devices were discussed by Mr. Cerniglia with Morris Lewis at the time he contemplated investing in Fresh Solution, Inc. (Tr. 105). The tested models were sensitive to interference from microwaves and would not work in locations where there was a lot of metal. (Tr. 116). Fresh Solutions entered into expensive contracts with consultants to develop and correct the software. (Tr. 116-117).

5. The 2001 tax return filed for Fresh Solutions, Inc. shows it reported a net loss of $2, 267,291.00 for the year. (RX- 24). By the end of 2001, its investors, namely, Mason McGowin and Morris Lewis had paid-in capital to the corporation of $1,735,000.00 and an additional $1 million had been received pursuant to a loan guaranteed by Morris Lewis. (RX-24, at 5). The return also shows that its two highest compensated officers were Mr. Cerniglia who received $104, 369.00 and J. Scott Green who received $104, 286.00. (RX-24, at 3; Tr. 254). Mr. Cerniglia and other first tier officers also had expense accounts covering their travel and meals, and a $550.00 per month car allowance. (Tr. 256-257).

6. As a condition for continuing to fund the corporation, Morris Lewis required the other shareholders to sign their shares over to him,

relinquish their corporate offices and cease being directors, in order to convert Fresh Solutions, Inc. into a S-corporation allowing Morris Green to be its sole owner and entitled to personally take a tax loss in respect to the corporation's operations in 2002. (Tr. 154). Mr. Cerniglia understood that his shares of stock would be returned to him after the 2002 tax loss was taken. (Tr. 155). The S-corporation election was made and Morris Lewis was allowed by IRS to apply the $3,494.112.00 that Fresh Solutions, Inc. lost in 2002 against his personal income taxes for that year when he received a huge signing bonus as a professional football player. (Tr. 248-249). The documents supporting the S-corporation election accepted by the Internal Revenue Service, included:
(a) The minutes of a Special Meeting of the Directors of Fresh Solutions, Inc. held on December 28, 2001 that was conducted by Jonathan Scott Green, Chairman of the Board and recorded by Joseph T. Cerniglia, Jr., the secretary of the corporation. The Chairman announced that the purpose of the meeting was the resignation of Joseph T. Cerniglia and Jonathan Scott Green, as officers and Directors effective midnight January 1, 2002. After discussion and upon motion duly made and seconded, the resignations were unanimously accepted. The minutes were signed by all three Directors, John Green, Joseph T. Cerniglia and Jonathan Scott Green. They were dated: December 28, 2001. (RX-8).
(b). The stock ledger of Fresh Solutions, Inc. where it was recorded that on January 1, 2002, all of the 2000 outstanding shares of stock issued to shareholders other than Morris Lewis, III were transferred to Morris Lewis, III. (PX-8).
(c). The individual stock certificates showing their transfer on January 1, 2002 to Morris Lewis, III. (RX-7, at 1-4).
7. In 2001, prior to his resignation, Mr. Cerniglia was the secretary and treasurer of Fresh Solutions, Inc. and held 29% of its outstanding shares of stock. (Tr. 229). Mr. Cerniglia also had the working title of Chief Operating Officer, and in corporate filings with the State of Georgia, was identified as Chief Financial Officer. (Tr. 229; RX-11, at 2). At that time, Jonathan Scott Green was the CEO and 31% shareholder. Morris Lewis was a Vice President and 20% shareholder. (Tr. 230).

8. The corporate by-laws of Fresh Solutions, Inc. provided for a Board of Directors consisting of not less than one nor more than five directors as fixed by resolution of the shareholders. (EX-4, at 4). The by-laws provided for officers consisting of a Chairman of the Board who is the chief executive officer of the corporation; a President if the Board

has not appointed a Chairman or if a President is needed for other designated circumstances; Vice Presidents and Assistant Vice Presidents; a Secretary; and a Treasurer. (EX-4, at 8-10). Any person was permitted to hold two or more offices and no officer needed to be a shareholder. (RX-4, at 8).

9. The State of Georgia requires annual filings from corporations in which corporate officers are categorized as: Chief Executive Officer (CEO), Chief Financial Officer (CFO) and Secretary. *See http://www.sos.state.ga.us (Corporations-Annual Registration Q&A)*. In the filings for Fresh Solutions, Inc., Joseph T. Cerniglia was identified as Chief Financial Officer and Jonathan S. Green as Chief Executive Officer; no one was identified in these filings as secretary. (RX-11, at 2).

10. On August 16, 2002, when Fresh Solutions, Inc. was found to have stopped fully paying for produce, Mr. Cerniglia did not own any shares of its stock, was no longer one of its directors and had resigned as Secretary and Treasurer. He continued, however, to be recognized as and actively used the title of Chief Operating Officer. In 2002, Mr. Cerniglia learned upon speaking with an unpaid produce distributor who the receptionist referred to him for assistance, that produce distributors were not being paid. (Tr. 31). His continued actions as the Chief Operating Officer included visiting produce distributors to see if their premises and trucks were clean, and if they had good data processing capability. (Tr. 128). It also included resolving customer problems and bringing customer concerns to produce distributors. (Tr. 128-129). Furthermore, it included speaking to unpaid produce distributors. (Tr. 131). In and for the year 2002, Mr. Cerniglia's salary was increased by $13,000.00. (Tr. 255). In August, 2002, he also received a loan for $40,000.00 in order to purchase a new home that he paid back in September, 2002. (Tr. 258-259).

11. On January 10, 2001, three bank accounts were opened for Fresh Solutions, Inc. with First Union Bank. The signature cards for these accounts were signed by: Jonathan S. Green CEO, Joseph T. Cerniglia COO, Shari Green, Director of Finance and John D. Green SUP. (RX-28; RX-29; RX-30; Tr. 263-264). One account was designated as "checking acct./operating". (RX-28). "COO" was used to identify Mr. Cerniglia on the signature cards as the corporation's Chief Operating Officer. (Tr. 72-73). Mr. Cerniglia has testified that he gave Jonathan

Scott Green a signature stamp that was available to be used as necessary. (Tr. 271-272). The stamp was used to sign checks to produce suppliers during the period of August 16, 2002 through April 29, 2003 when Fresh Solutions, Inc. has been found to have not fully paid produce sellers. (Tr. 272-273). Sometimes the stamp would be locked away and, when asked, he personally signed checks during that period. (Tr. 273). Just before the period when produce distributors went unpaid, a check for $54,000.00, bearing Mr. Cerniglia's stamped signature, was issued on August 15, 2002, out of the operating account for paying suppliers at the First Union Bank, that was made out to Fresh Solutions, Inc. and then deposited into the Fresh Solutions, Inc. account at Bank of America where Mr. Cerniglia was the only authorized signatory. (Tr. 75-81; RX-19, at 22; RX-27). On July, 11, 2002, $10,000.00 had been similarly transferred. (Tr. 78; RX-19, at 299; RX-27). On July 18, 2002, $55,000.00 had also been similarly transferred. (Tr. 80-81; RX-19, 310; RX-27).

12.Mr. Cerniglia, on March 21, 2003, as Chief Operating Officer, "COO", signed service contracts for Fresh Solutions, Inc. with Automated Solutions Consulting Group, Inc. ("ASC").(RX-32, at 5; RX-33, at 2; Tr. 122). The contract was to keep computers owned by Fresh Solutions, Inc. running. (Tr.122). Mr. Cerniglia also signed checks to ASC on January 10, 2003 for $5,000.00 (RX-19, at 105); on January 17, 2003 for $2,000.00 (RX-19, at 107); and on January 31, 2003 for $2,000.00 (RX-19, at 157). These transactions occurred during the period of time that produce distributors were not being paid. In February, 2004, following Mr. Cerniglia's resignation from Fresh Solutions, Inc., his wife together with the wife of the president of ASC started a new produce firm under the name Fresh Works. For a short time, Mr. Cerniglia worked for that firm. (Tr.119-120).

13.Mr. Cerniglia never regained any of the shares of stock he transferred in 2002 to Morris Lewis. On May 16, 2003, Morris Lewis, as 100% Shareholder and Chairman, presided over a special meeting of the shareholders of Fresh Solutions, Inc. At the meeting, the then current Directors were removed; Morris Lewis was appointed Director of the corporation; and M. Darnell Jones was designated as secretary. Resolutions were also made to prohibit "the corporation, its Officers, Directors, Employees and/or agents" from entering into contracts, or hiring or employing anyone so as to create obligations or indebtedness.

(RX-36, at 1).

14. After May 16, 2003, M. Darnell Jones engaged a new payroll company and Mr. Cerniglia's salary was cut. Mr. Jones also withheld some payroll checks, and Mr. Cerniglia received salaried compensation in the high $30's for the year instead of his agreed $117,000.00 yearly salary. (Tr. 49-52). Mr. Cerniglia, together with Jonathan Scott Green, continued to represent Fresh Solutions, Inc. before the PACA Branch, and on October 2, 2003, they signed a letter to the PACA Branch advising that Fresh Solutions, Inc. was diligently working to pay and resolve the debts it owed to produce distributors. (EX-3, at 2). On a license application filed with the PACA Branch for Fresh Solutions, Inc. that Mr. Cerniglia admits he signed on October 8, 2003, he was identified as its Secretary, Treasurer, COO and 29% shareholder. (RX 2; Tr. 143-147). Mr. Cerniglia, Jonathan Scott Green and E. Mason McGowin did not notify the PACA Branch that there had been a change in ownership of Fresh Solutions, Inc. until May 2, 2004. (Tr. 259-260; RX-43).

15. On February 23, 2004, Mr. Cerniglia resigned from Fresh Solutions, Inc. and left its premises because he no longer had any hope that it was going to be saved and he had to feed his family. (RX-42, at 8-9; RX-42, at 33; Tr. 245).

16. On March 9, 2004, Fresh Solutions, Inc. by and through its sole shareholder, director and president, Morris C. Lewis, III, filed a voluntary petition under Chapter 7 for bankruptcy protection from its unpaid creditors that included produce sellers. (RX-17).

Conclusion

Joseph T. Cerniglia was responsibly connected with Fresh Solutions, Inc. at the time it committed flagrant and repeated violations of section 2 of the PACA.

Mr. Cerniglia argues that there are two reasons why he cannot be determined to be "responsibly connected" with Fresh Solutions, Inc. at the time it violated the PACA. Firstly, when the violations took place, he was no longer a corporate officer, director or holder of the corporation's stock as required by the PACA because he had previously

resigned all offices and given up his shares of stock. Secondly, he was not actively involved in the violations themselves.

The first argument is his principal one. He contends that he does not qualify under the PACA's definition of responsibly connected as an individual who was at the time of the violations, "an officer, director or holder of…outstanding stock". (7 U.S.C. § 499a(b)(9)). This is because several months before the violations, he had resigned as secretary, treasurer and director and transferred all of the shares of stock he owned to Morris Lewis. This was done to facilitate the conversion of the corporation to an S-type owned by Mr. Lewis who then took a tax credit against a huge signing bonus he received as a professional football player. Although it was everyone's intention to return the transferred stock back to Mr. Cerniglia and the others who had developed and would continue to operate the corporation after Morris Lewis received his 2002 tax break, this never happened. Mr. Cerniglia never again was made a director of the corporation or an officer holding one of the titles listed in the corporation's by-laws. He did continue to file documents with the State of Georgia as the corporation's Chief Financial Officer, but that was a misnomer. He never controlled financial matters for Fresh Solutions, Inc. from the time Jonathan Scott Green joined the corporation. Whenever he signed checks for the corporation or allowed his signature to be used for that purpose, he did so as a matter of convenience and at the direction of others.

At first this argument appears compelling. Historically, the Department of Agriculture has employed a strict reading of the PACA's language to determine who is subject to its licensing and employment restrictions as a person "responsibly connected" to a licensee that violated section 2 of the PACA. When its determinations were appealed to United States Circuit Courts, the Department argued that the plain meaning of the statute was unambiguous, and it proposed a *per se* rule that was adopted by various circuits other than the District of Columbia Circuit. *See Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966); and *Faour v. United States Dep't of Agric.*, 985 F.2d 217 (5th Cir. 1993). Under the *per se* rule, an individual was found to be responsibly connected if he fit one of the stated statutory categories. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194, 1196 (D.C.Cir.1998). The District of Columbia Circuit, however, rejected this approach and determined that the language only created a rebuttable rather than an absolute presumption that an officer, director or holder of more than 10 per centum of the outstanding stock was responsibly connected to the

corporation. *Quinn v. Butz*, 510 F.2d 743, 751 (D.C.Cir.1975); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 409 (D.C.Cir.1983); *Bell v. Dep't of Agric.,* 39 F.3d 1199 (D.C.Cir.1994).

The circuit split existed until 1995 when the Congress amended the definition of responsibly connected to 'permit individuals who are responsibly connected … the opportunity to demonstrate that they were not responsible for the specific violation,' Perishable Agriculture Commodities Act Amendments of 1995, H.R.Rep. No. 104-207, at 11 (1995) …. According to the amendment, Agriculture must first determine if an individual falls within one of the three statutory classifications. If so, the burden shifts to the individual to demonstrate that he was not actively involved and that he was either only a nominal officer or not an owner of a licensee within the meaning of the statute. *Norinsberg, supra,* at 1197. The 1995 amendment not only resolved the circuit split, it negated the harshness of the Department's unwavering strict application of the PACA's responsibly connected definition to everyone who was unable to appeal an adverse Departmental determination to the District of Columbia Circuit. The Department's historically consistent use of a plain meaning *per se* interpretation of the PACA definition of responsibly connected gives strength to Mr. Cerniglia's argument that his resignation of all offices and his transfer of stock before the corporation's violations of the PACA, places him outside of all three classifications of an individual who may be determined to be responsibly connected.

However, in a recent case where an officer and director resigned and gave up his stock in a corporation prior to its violation of section 2 of the PACA, the Department nonetheless held that individual to be a responsibly connected officer on the basis that he had not effectively resigned as an officer in light of the actual duties he continued to perform. *Anthony L. Thomas*, 59 Agric. Dec. 367, 385-388 (2000).

The underlying Administrative Law Judge decision that the Judicial Officer affirmed, had found that although the petitioner described himself to be an employee with little or no responsibilities over the actions taken by the corporation and had, on January 10, 1997, resigned all corporate positions, returned his stock and assumed the duties of dock supervisor, he continued to appear on PACA records as president of the corporation, failed to inform the State corporations office or the PACA Branch that he had resigned as an officer and director, and performed duties far beyond that of a dock supervisor. The duties the petitioner performed after the date of his resignation through late June

1997 when he terminated his affiliation, included acting as president, signing an agreement to sell the corporation's accounts receivable in which he identified himself as president and secretary/treasurer and signing other significant corporate documents as president after the date of his resignation. In addition he continued to be involved in significant day-to-day operations of the corporation that included issuing checks, entering into contracts and dealing with produce sellers seeking payments. *Thomas, supra*, at 375-378. On the basis of these findings, the Administrative Law Judge found that the petitioner served as either *de facto* or *de jure* president of the corporation from December 31, 1995 to late June 1997 (*Thomas, supra,* at 379), and concluded that he was responsibly connected during the entire violation period. *Thomas, supra*, at 382.

On appeal, the Judicial Officer discussed the petitioner's resignation as an officer in the context of the Administrative Law Judge's finding that he was not a nominal officer. *Thomas, supra*, at 385-388. The Judicial Officer agreed that the petitioner was not nominal because he did not meet the test most recently enunciated in *Maldonado v. Dep't of Agric.,* 39 F.3d 1086, 1088 (9th Cir. 1998) of being a person who "did not have an actual, significant nexus with the violating company during the violation period and, therefore, neither knew nor should have known of the corporation's misdeeds". The Administrative Law Judge had concluded that the petitioner did not meet this test because he held 49 per centum of the outstanding stock prior to January 10, 1997, and was directly involved in the corporation's day-to-day operations, having engaged in significant corporate activities. As part of this discussion, the Judicial Officer noted that: " … the ALJ found that Petitioner did not effectively resign as an officer on January 10, 1997, but continued to serve as president until he left … in late June 1997." The Judicial Officer then stated: "The ALJ's conclusion that Petitioner had an actual, significant nexus to … (the corporation) during the entire violation period is correct."
Thomas, supra, at 386. Accordingly, the Department employs the same test for whether an officer is merely nominal to determine whether an individual's resignation as an officer is effective. It is not effective if he continued to have an actual and significant nexus to the corporation during the period it violated section 2 of the PACA. The danger in this two-fold use of the same test is that it could lead to confusion respecting burden of proof. On the one hand, an individual who has been established to be an officer has the burden of proving that he was only

a nominal officer who comes within the exception added to the PACA definition by the 1995 amendment. On the other hand, the initial and principal burden of proving an individual to be an officer who is subject to the PACA's responsibly connected provisions rest entirely with the Department.

The evidence in this case, however, clearly establishes that both before and after his resignation, Mr. Cerniglia held himself out to be and was in every sense the Chief Operating Officer of Fresh Solutions, Inc. As such he meets the test expressed in *Thomas, supra,* for an officer who, despite a tendered resignation, continues to be subject as a responsibly connected person, to the PACA's licensing and employment restrictions. Just as is the case when a petitioner argues that his officer status was only nominal, the activities performed and not the title held are controlling when deciding whether a petitioner effectively resigned as an officer and was no longer responsibly connected with an offending corporation.

As was the case in *Thomas, supra*, at 384-385, Mr. Cerniglia was in no sense like Mr. Maldonado who the Ninth Circuit found was not actively involved in his firm's failure to pay for produce. *Maldonado, supra*, 154 F.3d at 1088. Mr. Cerniglia did not lack either the education or the management experience to understand that the corporation, as a PACA licensee, was violating basic statutory requirements. He is a college graduate with a lifetime of experience in the produce industry. In 1993, Mr. Cerniglia founded the underlying firm that became Fresh Solutions, Inc. At the end of 2001, he was the secretary and treasurer of Fresh Solutions, Inc. and held 29% of its outstanding shares of stock. He headed all of the corporation's produce matters from its inception until he left the corporation on February 23, 2004. In less than two weeks after he left, a petition under Chapter 7 of the Bankruptcy Act was filed. Though Mr. Cerniglia, as of January 1, 2002, transferred away his stock and resigned as a director of the corporation, he never ceased being its Chief Operating Officer. As such he resolved customer complaints and brought customer concerns to produce distributors. He spoke to unpaid produce dealers who told him they were not being paid. But he did nothing to stop the dissipation of the corporation's funds through the issuance of checks to persons other than unpaid produce sellers. From his past experience with his father's corporation when its PACA license was revoked for failing to pay produce sellers, he had personal and painful knowledge that the failure to make full and timely payments to produce sellers was a violation of Section 2 of the PACA that can lead

to licensing and employment restrictions. But he did nothing to stop that from happening. Moreover, he continued to represent the corporation in official filings with the State of Georgia and the PACA Branch. He never advised either government entity that his status with the corporation had changed. He never advised produce sellers that there was any change in his status with Fresh Solutions, Inc. The corporate by-laws of Fresh Solutions, Inc. permit persons other than shareholders to be officers, and in most meaningful ways, Mr. Cerniglia continued to act as an officer after he transferred away his shares of stock and after his recorded resignation. He signed a significant contract as Chief Operating Officer with an outside consultant to maintain the corporation's computers. He continued to permit his signature stamp to be used on checks that went to entities other than unpaid produce distributors. When his stamp was locked away and not conveniently available, he at times personally signed checks. These checks included payments to ASC, the outside computer consultant, whose president's wife would later go into business with Mr. Cerniglia's wife; a business that for a time would employ Mr. Cerniglia. Just before the period when produce distributors would go unpaid, approximately $129,000.00 was transferred out of the checking account used to pay their bills, and instead was put into another corporate bank account over which Mr. Cerniglia had exclusive control.

The evidence of record conclusively shows that Mr. Cerniglia continued to serve as the Chief Operating Officer after January 1, 2002. He participated in corporate activities that were beneficial to him and detrimental to unpaid produce distributors. He had an actual, significant nexus to Fresh Solutions, Inc. during the entire violation period. Under *Thomas,* he therefore did not effectively resign but continued to be a *de facto* officer of the corporation when it violated Section 2 of the PACA.

For these same reasons, he was not a nominal officer as that term is used in the definition section of the PACA

Mr. Cerniglia's second argument that he was not responsibly connected because he was not actively involved with Fresh Solutions, Inc. is likewise refuted by the activities he performed during the violation period as the corporation's Chief Operating Officer. His functions were in no sense "ministerial functions only" under the test the Department applies to determine whether an officer was "actively involved". *In re Norinsberg, final decision on remand*, 58 Agric, Dec. 604, 610-611 (1999). Again, as in *Thomas, supra*, at 382-384, the fact that someone else decided which, and how much, produce sellers are

paid does not mean an individual was not actively involved. Mr. Cerniglia was actively involved in that he executed significant contracts and was involved in other activities that enabled the corporation to buy produce from sellers who ultimately were not paid when he knew or should have known that their prompt and full payment was questionable.

The 1995 amendment to the PACA also allows an individual to defend against a responsibly connected determination on the basis that the offending corporation was in actuality another person's alter ego. Though Mr. Cerniglia has not raised this defense, respondent has addressed it. To be an alter ego of a corporation, a person must so dominate it as to negate its separate personality. *Thomas, supra,* at 391. Here, Morris Lewis, after becoming the 100% shareholder, still depended on Mr. Cerniglia and Jonathan Scott Green to run the corporation and his dependence continued throughout the violation period. Accordingly, Morris Lewis was not the corporation's alter ego. For these reasons, the following order is being issued.

ORDER

It is hereby found that Joseph T. Cerniglia was responsibly connected with Fresh Solutions, Inc., a PACA licensee, when it committed willful, repeated and flagrant violations of section 2(4) of the PACA (7U.S.C. § 499b(4)).

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision and Order shall become final without further proceedings, 35 days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service.

Copies of this Decision and Order shall be served upon the parties.

In re: KOAM PRODUCE, INC.
PACA Docket No. D-01-0032.
Decision and Order.
Filed June 2, 2006.

PACA – Perishable agricultural commodities – Bribery – Acts of employees and agents – Scope of employment – Willful, flagrant, and repeated violations – Publication of facts and circumstances.

The Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's decision concluding KOAM Produce, Inc. (Respondent), willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) as a consequence of its employee, Marvin Friedman, paying bribes to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities. The Judicial Officer rejected Respondent's contentions that: (1) Marvin Friedman's payments to the United States Department of Agriculture produce inspector were not bribes, but, instead, gratuities; (2) the United States Department of Agriculture had a conflict of interest in the proceeding; (3) Marvin Friedman was not acting within the scope of his employment when he paid the United States Department of Agriculture produce inspector; and (4) Respondent was not liable for Marvin Friedman's payments to the United States Department of Agriculture produce inspector because Respondent's officers and owners had no knowledge of the bribes. The Judicial Officer concluded that the ALJ's revocation of Respondent's PACA license was not an appropriate sanction because, 6 months prior to the ALJ's issuance of the Initial Decision, Respondent's PACA license had terminated due to Respondent's failure to pay the required annual PACA license renewal fee. The Judicial Officer ordered the publication of the facts and circumstances of Respondent's violations.

Ann K. Parnes, Andrew Y. Stanton, and Christopher P. Young-Morales, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

James R. Frazier, Acting Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, instituted this administrative proceeding by filing a Complaint on September 17, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). On May 3, 2002, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed an Amended Complaint.

Complainant alleges: (1) during the period April 1999 through July 1999, KOAM Produce, Inc. [hereinafter Respondent], through its employee, Marvin Friedman, made illegal payments to a United States Department of Agriculture produce inspector in connection with 42 federal inspections of perishable agricultural commodities which

Respondent purchased from 11 sellers in interstate or foreign commerce; (2) on September 20, 2000, the United States District Court for the Southern District of New York entered a judgment in which Marvin Friedman pled guilty to 10 counts of bribery of a public official, relating to the illegal payments to a United States Department of Agriculture produce inspector in connection with 42 federal inspections of perishable agricultural commodities; (3) Respondent made illegal payments to a United States Department of Agriculture produce inspector on numerous occasions prior to April 1999; and (4) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce (Amended Compl. ¶¶ III-VI). On July 29, 2002, Respondent filed an "Answer to Amended Complaint" denying the material allegations of the Amended Complaint.

On March 25, 2003, and November 17 and 18, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted an oral hearing in New York, New York. Ann K. Parnes, Andrew Y. Stanton, and Christopher P. Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Paul T. Gentile, Gentile & Dickler, LLP, New York, New York, represented Respondent. Complainant called three witnesses and submitted 19 exhibits, marked CX 1 through CX 19. Respondent called one witness and submitted four exhibits, marked RX 1 through RX 4. All the exhibits were admitted into evidence. Complainant's exhibits are designated in this Decision and Order by "CX." Transcript references are designated in this Decision and Order by "Tr."

On April 18, 2005, after Complainant and Respondent filed post-hearing briefs, the ALJ issued a Decision and Order. On June 1, 2005, Respondent filed a "Petition to Rehear and Reargue," and on July 1, 2005, Complainant filed "Complainant's Response to Respondent's Petition to Rehear and Reargue." On January 6, 2006, the ALJ issued a Decision and Order Following Reargument [hereinafter Initial Decision], which supercedes the ALJ's April 18, 2005, Decision and Order. The ALJ: (1) concluded, during the period April 1999 through July 1999, Respondent, through its employee and agent, paid unlawful bribes and gratuities to a United States Department of Agriculture produce inspector in connection with 42 federal inspections

of perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce; (2) concluded Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce; and (3) revoked Respondent's PACA license (Initial Decision at 25-27).

On March 30, 2006, Respondent appealed to the Judicial Officer, and on April 18, 2006, Complainant filed "Complainant's Response to Appeal Petition." On April 19, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision, except that I disagree with the sanction imposed on Respondent by the ALJ. Therefore, except for the sanction imposed by the ALJ, I affirm the ALJ's Initial Decision.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign

commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

. . . .

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or

broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499b(4), 499h(a), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

. . . .

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section–

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

. . . .

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever–

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been

> selected to be a public official to give anything of value to any other person or entity, with intent–
>
> (A) to influence any official act[.]
>
> . . . .
>
> shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. § 201(a)(1), (3), (b)(1)(A).

DECISION

Decision Summary

Respondent, during the period April 1999 through July 1999, willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), at the Hunts Point Terminal Market in the Bronx, New York, New York. Under the PACA, the act of an employee, within the scope of his or her employment, is deemed to be the act of the employer. Respondent's violations of the PACA were committed when its employee, Marvin Friedman, made 42 illegal cash payments to United States Department of Agriculture produce inspector William J. Cashin, in connection with federal inspections of perishable agricultural commodities which Respondent received or accepted in interstate or foreign commerce from 11 sellers. Respondent is responsible under the PACA for the conduct of its employee, Marvin Friedman, who, within the scope of his employment, paid bribes to the United States Department of Agriculture produce inspector, even if everyone at Respondent, except Marvin Friedman, was ignorant of Marvin Friedman's actions. Making illegal payments to a United States Department of Agriculture produce inspector was an egregious failure by Respondent to perform its duty under the PACA to maintain fair trade practices. The sanction of publication of the facts and circumstances of Respondent's violations is commensurate with the seriousness of Respondent's violations.

Findings Of Fact

1. I find credible the testimony of William Cashin, Sherry Thackeray, Basil W. Coale, Jr., and Jung Yong "C.J." Park.

2. Respondent is a New York corporation, incorporated on or about June 18, 1996, with an address of 238-241 Hunts Point Terminal Market, Bronx, New York, New York 10474 (CX 1).

3. On June 27, 1996, the Secretary of Agriculture issued Respondent PACA license number 961890. Respondent held PACA license number 961890 from June 27, 1996, until June 27, 2005, when it was terminated due to Respondent's failure to pay the required annual PACA license renewal fee. (CX 1; Complainant's unopposed Motion for Technical Amendment at 1.)

4. Respondent began doing business in the Hunts Point Terminal Market, in the Bronx, New York, New York, in about January 1997 (Tr. 270).

5. At all times material to this proceeding, and particularly in 1999, Jung Yong "C.J." Park and his wife, Kimberly S. Park, each owned 50 percent of Respondent (CX 1; Tr. 269, 283-84).

6. At all times material to this proceeding, and particularly in 1999, Jung Yong "C.J." Park was Respondent's vice president and secretary, Kimberly S. Park was Respondent's president and treasurer, and Respondent's only two directors were Jung Yong "C.J." Park and Kimberly S. Park (CX 1; Tr. 269, 283-84).

7. Respondent hired Marvin Friedman, also known as Marvin Steven Friedman, in about May 1998 to work as night produce salesman. Marvin Friedman became a produce buyer in October 1998. Marvin Friedman continued to work for Respondent at all times material to this proceeding, and particularly in 1999. (Tr. 270-71, 274.)

8. Marvin Friedman was arrested on or about October 27, 1999, for illegally paying money to a United States Department of Agriculture produce inspector (Tr. 271-72).

9. On October 21, 1999, the United States District Court for the Southern District of New York filed an indictment in which the grand jury charged Marvin Friedman with 10 counts of bribery of a public official, in violation of 18 U.S.C. § 201(b). The indictment charges that Marvin Friedman:

> [U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, MARVIN FRIEDMAN, the defendant, made cash payments to a United

States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at KOAM Produce, Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:

COUNT	DATE	AMOUNT OF BRIBE
ONE	4/6/99	$250
TWO	4/9/99	$100
THREE	4/15/99	$100
FOUR	4/30/99	$250
FIVE	6/3/99	$200
SIX	6/4/99	$350
SEVEN	6/15/99	$200
EIGHT	6/24/99	$50
NINE	6/28/99	$300
TEN	7/1/99	$300

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 3.

The bribes charged in the indictment cover the payments Marvin Friedman made to William Cashin in connection with the 42 inspections of perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce (CX 6-CX 15).

10. On February 25, 2000, Marvin Friedman pled guilty to, and was convicted of, each count of the 10-count indictment in *United States v. Friedman*, 99 Crim. 1095 (S.D.N.Y. 2000) (CX 3, CX 18).

11. On September 20, 2000, Marvin Friedman was found to have paid $29,550[1] in bribes to a United States Department of Agriculture produce inspector at the Hunts Point Terminal Market and was sentenced to the custody of the Bureau of Prisons for 12 months plus 1 day on each of the 10 counts, to run concurrently; followed by supervised release of 2 years on each count, to run concurrently; plus a $300 fine on each count, for a total of $3,000; plus a $100 special assessment on each count, for a total of $1,000 (CX 4, CX 19).

[1]The $29,550 in bribes paid by Marvin Friedman was determined through the sentencing process (CX 4 at 9, CX 19 at 20); the bribes specified in the indictment totaled $2,100 (CX 3).

12. The 10 counts of bribery of a public official from April 6, 1999, through July 1, 1999, of which Marvin Friedman was convicted, were based on the undercover work of William Cashin (CX 4; Tr. 115-97).

13. William Cashin was a United States Department of Agriculture agricultural commodities grader, also called produce inspector, at the Hunts Point Terminal Market from July 1979 until August 1999. For about 19 of those 20 years (from 1980 through August 1999), William Cashin, in the course of his United States Department of Agriculture work, accepted unlawful bribes and gratuities from many produce workers. (Tr. 115, 177-78, 192.)

14. William Cashin had agreed, immediately after having been arrested himself on March 23, 1999, to cooperate with the Federal Bureau of Investigation in its investigation of bribery of United States Department of Agriculture produce inspectors, by continuing to operate as he had in the past and reporting daily the payments he collected (Tr. 133-34; CX 16).

15. Beginning on March 23, 1999, William Cashin no longer kept the unlawful bribes and gratuities that were given to him, but instead gave them to law enforcement authorities at the end of each work day (Tr. 194).

16. More than half (approximately seven to eight) of the approximately 12 to 13 United States Department of Agriculture agricultural commodities graders who were working at the Hunts Point Terminal Market in March or April 1999, were convicted of taking bribes (including William Cashin) (Tr. 161-62).

17. In response to William Cashin's daily reports to the Federal Bureau of Investigation, the Federal Bureau of Investigation prepared FD-302 forms summarizing William Cashin's daily reports. (See CX 17.) The portions of the FD-302s which correlate to the bribes William Cashin received from Marvin Friedman are organized for each count of the indictment in *United States v. Friedman*, 99 Crim. 1095 (S.D.N.Y. 2000), together with applicable United States Department of Agriculture inspection certificates, which show Respondent as having applied for the inspections (Tr. 136-97; CX 6-CX 15).

18. Marvin Friedman was acting within the scope of his employment as a produce buyer for Respondent each time he paid a bribe to William Cashin, as reported in CX 6 through CX 15 and reflected in each of the 10 counts of which Marvin Friedman was convicted, regardless of whether anyone at Respondent directed him to make the unlawful payments, provided him the money to make the unlawful payments, or

was even aware that he was making the unlawful payments (Tr. 120-24, 128-29, 131-32, 146-47, 152-53, 155-56, 163-67, 178-80, 184-86, 193).

19. Factors which show that Marvin Friedman was acting within the scope of his employment as a produce buyer for Respondent, when he paid the bribes, include the following: (a) Marvin Friedman paid the bribes while performing, or in connection with, his job responsibilities; (b) the bribes were incorporated into Marvin Friedman's regular work routine for Respondent; (c) Marvin Friedman was at his regular work place at Respondent's premises when he paid the bribes; (d) Marvin Friedman paid the bribes during his regular work hours for Respondent; (e) Marvin Friedman paid the bribes on a regular basis; (f) Marvin Friedman appeared to be acting on behalf of his employer, Respondent; and (g) the bribes could have benefited Respondent (Tr. 120-24, 128-29, 131-32, 146-47, 152-53, 155-56, 163-67, 307; CX 19 at 15-17).

20. There is no evidence that Marvin Friedman or anyone else at Respondent was intimidated or coerced into making the unlawful payments. The only evidence on that issue came from William Cashin, who testified that he never specified a payment amount and never pressured anyone at Respondent to pay. William Cashin testified he kept Marvin Friedman apprised of the number of inspections he had performed, and Marvin Friedman gave him $50 for each inspection. (Tr. 163-64, 178-80, 184-86, 193.)

Discussion

The record establishes that Respondent's employee, Marvin Friedman, paid bribes to United States Department of Agriculture produce inspector William Cashin during the period April 6, 1999, through July 1, 1999, in connection with produce inspections requested by Respondent. The only question is whether what Marvin Friedman did, causes his employer to suffer the consequences under the PACA.

The relationship between a PACA licensee and persons acting for, or employed by, a PACA licensee is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for, or employed by, any commission merchant, dealer, or broker, within the scope of his or her employment or office, shall in every case be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA

licensee and the PACA licensee's agents and employees.

Both the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Sixth Circuit have affirmed use of the PACA's principal-agency provision under circumstances like those in the instant proceeding.[2] William Cashin, the United States Department of Agriculture produce inspector, testified about the circumstances under which Marvin Friedman made payments to him, as follows:

> [MR. YOUNG-MORALES:]
>
> Q. Did you know Marvin Friedman before Koam?
>
> [MR. CASHIN:]
>
> A. Yes, I did.
>
> Q. And before Koam, did Marvin Friedman ever give you any money in connection with any of your inspections?
>
> A. No, he did not.
>
> Q. While he was at Koam, as an employee, did Marvin Friedman ever give you any money in connection with any of your inspections?
>
> A. Yes, he did.
>
> Q. Was the money that he gave you in payment of your normal inspection fee?
>
> A. No.
>
> Q. That you have described?
>
> A. Not at all. By the time Marvin came along, Koam had already established an account, and their billing -- they were on

[2] *Post & Taback, Inc. v. United States Dep't of Agric.*, 123 F. App'x 406, 408 (D.C. Cir. 2005); *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003).

the billing system.

Q. Were the payments made by Marvin Friedman, that you've described, done in connection with each inspection?

A. Yes, they were.

Q. How much were those payments per each inspection?

A. Fifty dollars per inspection.

Q. And approximately what year was it that Marvin Friedman started making payments to you?

A. Marvin came along, to the best of my recollection, about 1996 or '97.

Q. Just to back up very quickly, do you know, do you remember when Ralph died?

A. It wasn't long after the Company opened. It was some time in late '96 or early '97, as I recall.

Q. To your knowledge, were Ralph and Marvin Friedman at Koam at the same time ever?

A. No. Not that I was aware of.

Q. How would -- were payments give[n] you in connection with every inspection that you made?

A. Yes.

Q. Okay. How would Marvin Friedman go about making the payments to you?

A. After I was finished examining all the products, I used to write the inspections in the office upstairs. Marvin sat in the office all the way in the back. You go through the door, there's a few other offices, and he was in the back. And there was an

extra desk there, and it was warm and it was dry, and I would sit there at the desk and I would write -- and he would ask me how many and I would tell him, and he would count the money and hand it to me.

Q. Was anyone else ever present during that transaction that you've described?

A. No.

Q. What was your understanding as to why you were receiving payments in connection with your inspections at Koam?

A. I was helping Marvin.

Q. When you say help, what was your understanding of the meaning of help? What do you mean by help? In connection with an inspection.

A. Helping in connection with an inspection came in any one of three ways. Altering the percentage of defects, especially the condition defects, in such a way that it was over the good delivery marks. Frequently, someone like Marvin and Ralph, too, would examine product, see a few decayed specimens in a box or a couple of boxes, and then call an inspection, and want that particular load of product -- produce, written so that the percentage of defects, especially decay, was over the good delivery mark.

Another way of help was the number of containers. Frequently, the amount that was inside -- the amount present at the time when I would arrive to do the inspection was less than what it originally was unloaded or came in as, and they would want the number of containers increased so it more closely matched the manifest.

The other way was to alter the temperatures. They would want the temperatures recorded on, or written on the certificate to be of a more acceptable level so it would lend legitimacy to the certificate.

. . . .

Q. Okay. How would Marvin Friedman have let you know that he wanted help, any kind of help, on a particular load?

A. It was our, it was my policy with Marvin that when I arrived at Koam, I would find him, talk to him. Sometimes he was downstairs. Sometimes he was upstairs. And then we would discuss the various loads. And he would tell me I need a little help with this one. This one shows problems; you'll see it. This one -- and he and I would discuss the different things and he would tell me he needed help on things and what he needed help on.

Q. Were the figures that you had put down on an inspection, on an inspection certificate, when you gave help, an accurate reflection of the produce you were actually inspecting?

A. No.

. . . .

Q. If you -- and on what percentage of the loads that you inspected at Koam would you actually give help?

A. I would estimate 75 to 80 percent.

Q. If you did state the results inaccurately on any particular inspection back then, can you state today why you would have done so?

A. Yes, I can.

Q. Why?

A. It goes back to the original deal of help in any one of the three ways, help meaning the number of containers, help meaning to raise the percentage of defects, or to put down the temperatures at the correct level.

Q. In the event that -- well, even if the inspection certificates that you prepared were accurate, did you still get paid by Marvin Friedman?

A. Yes, I did.

Q. What was your understanding as to why that would occur?

A. I -- my understanding in that sense was either he was just saying thank you for helping in general, and also, it was my understanding that he was possibly paying for future help, just in general.

Tr. 123-26, 128-29, 131-32.

I find the testimony of William Cashin (Tr. 115-97) credible. There are factors that could impeach William Cashin's credibility. William Cashin is a convicted felon (convicted of taking bribes such as those at issue in the instant proceeding) and William Cashin admits to a 19-year history of taking unlawful bribes and gratuities (the last 5 months was for the benefit of the investigation of bribery at the Hunts Point Terminal Market by the Federal Bureau of Investigation) (Tr. 177-78, 192). William Cashin's taking of unlawful bribes and gratuities demonstrates a disregard for honesty and truthfulness in the past. Nevertheless, the ALJ found that William Cashin appeared to be truthful when he testified.

The incentives that motivated William Cashin to cooperate in the investigation and then to testify may well have included the hope of a lenient sentence (which he got) and favorable treatment from the United States Department of Agriculture (which he got). William Cashin did not need to report or testify untruthfully to receive the benefits of cooperating; he could receive the benefits of cooperating by reporting truthfully and testifying truthfully. There would have been no greater gain and thus, there was no incentive, to report or testify untruthfully.

Most persuasively, William Cashin's testimony was essentially consistent with all of the other evidence,[3] including the in-court

[3]There is one discrepancy between William Cashin's testimony and other evidence. William Cashin testified, when Marvin Friedman paid him, there was never anyone else from Respondent present (Tr. 166-67). William Cashin's testimony appears to conflict (continued...)

assertions of Marvin Friedman and his lawyer and the other documentary evidence, and the testimony of Jung Yong "C.J." Park and the other witnesses.

Marvin Friedman paid the bribes within the scope of his employment as Respondent's produce buyer. Marvin Friedman paid the bribes while performing, or in connection with, his job responsibilities;[4] Marvin Friedman's bribes were incorporated into his regular work routine for Respondent; Marvin Friedman was at his regular work place on Respondent's premises when he paid the bribes; Marvin Friedman paid the bribes during his regular work hours for Respondent; Marvin Friedman paid the bribes on a regular basis; Marvin Friedman appeared to be acting on behalf of Respondent when he paid the bribes; and Marvin Friedman's bribes could have benefited Respondent. These factors show that Marvin Friedman was acting within the scope of his employment as a produce buyer for Respondent, when he paid the bribes. (Tr. 120-24, 128-29, 131-32, 146-47, 152-53, 155-56, 163-67, 307; CX 19 at 15-17.)

Marvin Friedman was acting within the scope of his employment when he paid the bribes, even if Respondent did not authorize or direct him to do so and even if Respondent was unaware of his doing so. *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003).

Respondent argues that such criminal activity of an employee should not be imputed to his employer; that Marvin Friedman's criminal activity cannot have been within the scope of his employment and cannot become Respondent's violations of the PACA. Respondent's argument has already been addressed by the United States Court of Appeals for the District of Columbia Circuit, as follows:

> Post & Taback's argument that the Secretary should have looked to New York Penal Law § 20.20 to determine "when ... a

[3](...continued)
with one of the Federal Bureau of Investigation form FD-302s, which suggests that "C.J.," last name unknown, was present, or at least nearby, when Marvin Friedman paid William Cashin $300, on June 28, 1999 (CX 14 at 2). I find William Cashin's testimony reliable, despite the apparent conflict.

[4]Rarely will an employee's or agent's egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee's or agent's egregious act was committed while performing, or in connection with, his or her job responsibilities.

> criminal act [is] within the scope of employment such that the corporate entity may be held vicariously liable" is contrary to precedent. Brief of Petitioner at 13. When the Congress uses a common law concept, such as "the scope of employment," the Supreme Court has directed that we rely "on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). Moreover, even were it proper to incorporate New York law, it would not be the provision Post & Taback advances, as the proceedings before the Secretary were part of a regulatory licensing scheme rather than a criminal prosecution.

Post & Taback, Inc. v. United States Dep't of Agric., 123 F. App'x 406, 408 (D.C. Cir. 2005).

Respondent is responsible under the PACA for the bribes Marvin Friedman paid in connection with the produce inspections ordered by Respondent.[5]

After careful review of the evidence, I am unable to determine whether anyone at Respondent besides Marvin Friedman was involved in making the unlawful payments to William Cashin. I find it difficult to believe that Marvin Friedman paid the bribes out of his own pocket, even if he was the most highly compensated employee at Respondent, at about $50,000 per year (CX 5). He apparently received no bonuses in addition to his wages (Tr. 274-75). The evidence fails to prove whether the money Marvin Friedman gave unlawfully to a United States Department of Agriculture produce inspector was his own money, Respondent's money, Jung Yong "C.J." Park's money, Kimberly S. Park's money, or money from some other source.

Jung Yong "C.J." Park testified that neither he nor Kimberly S. Park, to his knowledge, at any time, authorized or directed Marvin Friedman to pay United States Department of Agriculture produce inspectors (Tr. 286). Jung Yong "C.J." Park testified that he had not known that Marvin Friedman was paying money to a United States Department of Agriculture produce inspector until after Marvin Friedman was arrested; that he was not present on June 28, 1999, when Marvin Friedman paid William Cashin, despite a notation to the contrary in the Federal Bureau

[5]See 7 U.S.C. § 499p.

of Investigation form FD-302 (CX 14 at 2); and that he was unaware that Marvin Friedman's attorney represented to the United States District Court for the Southern District of New York, during Marvin Friedman's sentencing, that Marvin Friedman's letter to the court said that his employer directed him to pay bribes (Tr. 271-72, 278-79, 283). The letter is not in evidence, as access to it is apparently restricted (Tr. 339). Perhaps, as Respondent argues, Marvin Friedman implicated his employer in an attempt to be sentenced more leniently. The prosecutor in the criminal case asserted to the United States District Court for the Southern District of New York that there was no factual support in the record that Marvin Friedman's employer directed the bribery (Tr. 328-29; CX 19 at 15-17).

Marvin Friedman was not a witness in this proceeding. The hearsay evidence, suggesting that someone at Respondent besides Marvin Friedman may have been involved in paying the bribes, is not sufficiently reliable. The evidence fails to prove Jung Yong "C.J." Park, Kimberly S. Park, or anyone else at Respondent knew Marvin Friedman was illegally paying money to a United States Department of Agriculture produce inspector. During Marvin Friedman's September 20, 2000, sentencing hearing, the prosecutor addressed the issue of the involvement of persons other than Marvin Friedman in the bribery of William Cashin, as follows:

> THE COURT: I will listen to you for anything the government would like to tell me in connection with sentence.
>
> MR. BARR: Thank you, your Honor, and I will be brief because most of my arguments have been set forth in some detail already in our memorandum.
>
> With respect to the minor role issue, your Honor, essentially Mr. Krantz's argument hinges on the way that he is framing the issue and the people involved. The government views it differently. This is really a two-person crime. There is a briber, mainly [sic] the businessman wholesaler, and a bribee, namely the produce inspector.
>
> The inclusion of Mr. Friedman's employer in the context here I think is inappropriate based on the record before your Honor. While Mr. Krantz has asserted it to the court there is no factual

> support in the record that the employer directed this scheme. Mr. Friedman did not provide the government or probation with any details on that allegation. So I think that is not really properly before the court. There is no factual foundation for it.
>
> It may be true but it is not something that has ever been set forth. And so we find ourselves at a loss to be able to reply to something like that.
>
> With respect to the relative culpability of the remaining players, namely, the inspector and the wholesaler, while it is certainly true that the public official has abused his or her trust when he or she commits bribery, that is an inherent component of the offense and under Mr. Krantz's logic essentially every bribe payer would be entitled to the inference of being less culpable than every bribe recipient. And I don't think that is the law and I don't think that it's even a fair inference.
>
> In this case the inspectors got $50 per inspection. The wholesaler got, we believe based on our efforts, something more than $50. Putting our finger on the exact amount, as we told probation and the court, is difficult, but it is surely in a magnitude far greater than $50.
>
> While it is true, as Mr. Krantz points out, that the primary beneficiary is the company that Mr. Friedman works for, it is quite clear to us that the individual salesman who helps the company make money looks better in the company's eyes and in a competitive atmosphere such as the Hunt Point Market that is a significant advantage for any salesman.

CX 19 at 15-17.

Whether Marvin Friedman's unlawful payments were, or were not, being made with Jung Yong "C.J." Park's or Kimberly S. Park's involvement or awareness, would make no difference in the sanction recommended by Complainant. Mr. Basil W. Coale, Jr., who was Complainant's sanction witness, testified, as follows:

> [MR. GENTILE:]

Q. Now the -- you've recommended on behalf of the Agency that the license for Koam, that it should be revoked; is that correct?

[MR. COALE:]

A. Correct.

Q. In doing so, have you taken into consideration the employment sanctions that follow such a sanction?

A. Yes.

Q. So it's your understanding that should the sanction be granted as you requested, that those responsibly connected with Koam Produce would not be permitted to be employed within the industry for at least a year; is that correct?

A. Correct.

Q. And that would include, by obvious definition, the active owners such as C.J. Park; is that correct?

A. Correct.

Q. And does that seem appropriate to you if Mr. Park was not aware, did not have knowledge of what Mr. Friedman was doing?

A. Under the Act, that's how it's written.

Q. But you've said you've taken into consideration that there is a sanction. Is it part of your consideration that he should, based upon your recommendation, not be permitted to work in this industry, even though he didn't know what was going on? Is that part of your recommendation?

A. The recommendation is that, based on the violations, that the license should be revoked, and now the sanctions are defined by the statute and flow from that finding.

Q. And if the sanction was a civil penalty, a fine, some sort of suspension, that would have a different effect on Mr. Park and anyone else responsibly connected; is that correct?

A. Correct.

Q. As part of your recommendation, have you taken into consideration whether or not Koam should lose its license or not based upon the actual knowledge of the owners of the Company?

A. The, that issue, we believe, was -- is dealt with in Section 16, is that the actions of the employees and the scope of their employment are the actions of the licensee.

Q. I understand what the section says. I've asked you whether or not you've taken into consideration whether or not the actual knowledge by the owner is a factor to be considered?

A. I guess you could say it's what we would recognize could be the position of someone, but it's not a driving factor that's considered, whether or not the principals knew or whether it's necessary to prove that the principals knew. It's that the actions of the employee and the scope of the employment are the actions of the licensee.

Q. Would you say, based upon what you just said, that it's the Agency's position that it's irrelevant as to whether or not there was actual knowledge by the owners?

A. I can't argue with that word.

Q. Does that mean yes or no? Does that mean you agree that it's the Agency's position that it's irrelevant --

A. Yes.

Q. -- as to whether or not the owners actually knew?

A. Yes.

Tr. 319-22.

Basil W. Coale, Jr., had previously testified to explain the seriousness of Respondent's violations and the appropriateness of a severe sanction, as follows:

[MR. YOUNG-MORALES:]

Q. Are you aware of the sanction recommendation that Complainant recommends in this case?

[MR. COALE:]

A. Yes, I am.

Q. How are you aware of the sanctions?

A. I participated in the development of the recommendation.

Q. And what is the recommendation in this case?

A. The revocation of PACA license.

Q. What's the basis for your sanction recommendation?

A. There are several factors that were considered. One is the evidence of paying as part of the criminal investigation conducted by the FBI in the 42 different inspection certificates involved with the bribery.

As an aggravating factor, there is William Cashin's testimony that the bribes were paid for a period much longer than that that is documented by the criminal investigation.

There is the factor to consider of the impact to the industry of bribes. The potential impact is very great. The fresh products branch of the Agricultural Marketing Services issues approximately 150,000 inspection certificates in a year. This come out to average out to hundreds a day. Shippers, growers, brokers, carriers, all use the results of those certificates to resolve

their disputes, to evidence that they met their contract terms or to document the condition of product or products.

Paying bribes to an inspector undermines the credibility of the entire inspection process, and can impact how these traders resolve their disputes.

In addition, there's the fact of in a competitive market, especially like Hunt's Point, if one firm would know, would be paying bribes and another firm finds out, a competitive firm, they may feel to [sic] need to pay bribes just to compete.

And then, in addition, there's the deterrent effect. The Agency wants to not only deter with sanctions, this individual from repeating, this respondent from repeating its violations, but, in addition, deter any other firms who may be considering similar violations.

Q. Now in this case, Complainant's intention is that the payment of bribes to William Cashin were a violation. Does the fact that Mr. Cashin would -- excuse me. Does the fact that Mr. Cashin was a USDA employee have any effect on Complainant's sanction recommendations?

A. No, it does not.

Q. Why doesn't it?

A. Paying a bribe is a very serious violation of the PACA. Whether the bribe is paid to another industry member, another trader, or to a USDA employee such as an inspector, the fact that the bribes in this case were paid to -- excuse me, to a USDA produce inspector, does not excuse the fact that the bribes were paid.

Q. Does Complainant recommend any kind of civil penalty in this case as an alternative, possible alternative, to license revocation? And this is based on your sanction recommendation and on what you've heard in the court case so far.

A. No, it does not believe that a monetary penalty would be appropriate in this situation.

Q. Why not?

A. Paying bribes is a very serious violation of PACA, and in this specific instance, it went on for a long period of time. There's a great potential for damage to the industry in the way it does business, and this calls for the, only the most severe sanction, and that sanction is revocation of PACA license.

Q. In the course of the proceedings as a whole, have you heard anything with respect to Marvin Friedman paying bribes for expedited access to inspectors?

A. Not that I recall.

Q. Are you aware that it's a potential defense of the Respondent in this case?

A. Yes, I am.

Q. And, Mr. Coale, with that potential defense in mind, have you reviewed CX-18? And do you have a copy in front of you?

A. I have the official copy right here.

Q. Have you read it in its entirety?

A. Yes, I have.

Q. Could I direct you to page 17 of that document? Well, first of all, what is this document?

A. This is a copy of the February -- a transcript of the February 25th proceeding involving United States of America v. Marvin Steven Friedman.

Q. Would this be the plea agreement transcript, so to speak?

A. Where Mr. Friedman entered his pleas to the criminal proceeding?

Q. Uh-huh.

A. Yes.

Q. If I could direct you to page 17. Well, excuse me. Let me direct you to page 16. Could I ask you -- and you may have to familiarize yourself with it again, but could I ask you who Mr. Krantz is in this transcript?

A. It is my understanding that he is Mr. Friedman's counsel.

Q. All right. And on line 19 -- excuse me, line 17, could you read the question by the Court?

A. The Court says, "Mr. Krantz, do you know of any valid defense that would prevail at a trial of Mr. Friedman?"

Q. And what is Mr. Krantz's response?

A. "No, Your Honor."

Q. And the Court's question?

A. The next question is, "Do you know any reason why Mr. Friedman should not be permitted to plead guilty?"

Q. And the answer?

A. "No."

Q. And the next question, and I"ll stop there.

A. It appears that the Court says, "Mr. Friedman, tell me in your own words what you did in connection with the crime to which you are entering a plea of guilty?"

Q. Could you please read his answer on the next page?

A. "The defendant: On approximately the dates stated in the indictment, I paid cash to an inspector of the United States Department of Agriculture. The purpose of the payments was to influence the outcome of the inspection of fresh fruit and produce conducted at Koam Produce, Inc., located in the Bronx. I was an employee of Koam at the time. I acted knowingly and intentionally, and I knew the payments were unlawful."

Q. And do you remember, ultimately, what Mr. Friedman pled guilty to when this transcript was all said and done? If not, I --

A. I believe it was 10 counts of bribery.

Thank you, Your Honor. I have no further questions. Well, I may have -- well, yes.

Q. Even absent this, the evidence in this transcript, or the information contained in this transcript, and absent the evidence that we have heard, much of the evidence that we've heard so far, if Respondent were to have shown that Marvin Friedman paid bribes to William Cashin for expedited inspections, would that change, do you think, your recommended sanction today?

A. No.

Q. Why?

A. Illegal payments made to a produce inspector undermine the credibility of the inspection process and therefore that could lead to industry-wide impact. And, in addition, even if the inspections themselves are not fraudulent factually, times, dates, temperatures, count, all that is still correct, it's still not a fair trading practice because other competitors on the market, then someone is moved getting moved to the back of the line and somebody else is moving to the front to get expedited treatment. So that's an unfair advantage as well.

Tr. 309-15.

Conclusions of Law

1. Marvin Friedman, an employee of Respondent, paid bribes to a United States Department of Agriculture produce inspector, during the period April 1999 through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce (7 U.S.C. § 499p).

2. Marvin Friedman was acting as Respondent's agent, when he paid bribes to a United States Department of Agriculture produce inspector, during the period April 1999 through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce (7 U.S.C. § 499p).

3. Marvin Friedman was acting within the scope of his employment, when he paid bribes to a United States Department of Agriculture produce inspector, during the period April 1999 through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce (7 U.S.C. § 499p).

4. Marvin Friedman's willful violations of the PACA are deemed to be Respondent's willful violations of the PACA. *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 756-57 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003).

5. Respondent, through its employee and agent, Marvin Friedman, paid bribes to a United States Department of Agriculture produce inspector, during the period April 1999 through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. Under the PACA, Respondent is responsible for Marvin Friedman's bribery of the United States Department of Agriculture produce inspector, even if ignorant of the bribery. *Post & Taback, Inc. v. United States Dep't of Agric.*, 123 F. App'x 406, 408 (D.C. Cir. 2005).

7. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during April 1999 through July 1999, by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce (7 U.S.C. § 499b(4)).

8. Respondent's violations of the PACA were egregious, requiring the sanction of publication of the facts and circumstances of Respondent's PACA violations.

9. Publication of the facts and circumstances of Respondent's PACA violations is commensurate with the seriousness of Respondent's violations of the PACA. Respondent's violations were so egregious as to warrant publication of the facts and circumstances of Respondent's PACA violations whether Marvin Friedman's unlawful cash payments (a) were a bribe or were a gratuity; (b) were associated with United States Department of Agriculture inspection certificates that were falsified or with United States Department of Agriculture inspection certificates that were accurate; (c) were or were not paid in response to intimidation or coercion (and the evidence in this proceeding fails to prove intimidation or coercion); and (d) were or were not known to Jung Yong "C.J." Park, Kimberly S. Park, or anyone else at Respondent (and the evidence in this proceeding fails to prove that Jung Yong "C.J." Park, Kimberly S. Park, or anyone else at Respondent knew Marvin Friedman was illegally paying money to a United States Department of Agriculture produce inspector).

10. Any lesser sanction than publication of the facts and circumstances of Respondent's violations would not be commensurate with the seriousness of Respondent's violations, even though many of Respondent's competitors were committing like violations and even though the United States Department of Agriculture produce inspectors who took the bribes and gratuities were arguably more culpable than those that paid them.

Respondent's Appeal Petition

Respondent raises four issues in Respondent's Appeal Petition.[6] First, Respondent contends the ALJ erroneously omitted material findings of fact. Specifically, Respondent asserts the record supports the following findings of fact: (1) William Cashin was unable to identify which United States Department of Agriculture inspection certificates

[6]Respondent appeals the ALJ's April 18, 2005, Decision and Order (Respondent's Appeal Pet. at 1). However, on January 6, 2006, the ALJ issued the Initial Decision, which supercedes the ALJ's April 18, 2005, Decision and Order. Based on the record before me, I find Respondent's appeal of the ALJ's April 18, 2005, Decision and Order is inadvertent error and Respondent intends to appeal the ALJ's January 6, 2006, Initial Decision.

he falsified for Respondent; (2) when William Cashin inspected produce at Respondent's premises, Marvin Friedman made payments to William Cashin even on occasions in which Marvin Friedman had not requested inspection; (3) William Cashin received gifts from wholesalers for his birthday, for Christmas, and upon leaving the Hunts Point Terminal Market; (4) William Cashin spent large sums of money on a car, care for his 19 cats, payments to his supervisor, and gifts for his girlfriend and sister; (5) William Cashin accepted money from wholesalers during his entire 20-year career as a United States Department of Agriculture produce inspector; (6) the United States Department of Agriculture permitted William Cashin to retire with a pension; and (7) William Cashin is a felon (Respondent's Appeal Pet. at 3-4).

Respondent fails to cite the portions of the record that support Respondent's listed findings of fact. Even if I were to conclude each of Respondent's listed findings of fact is supported by the record, that conclusion would not alter the disposition of this proceeding. Therefore, I find the issue of whether the ALJ should have included Respondent's listed findings of fact in the Initial Decision, moot.

Second, Respondent contends the United States Department of Agriculture permitted William Cashin to receive payments and make false inspection reports; thus, the United States Department of Agriculture acted in complicity with William Cashin and has a conflict of interest in this proceeding (Respondent's Appeal Pet. at 4).

After having been arrested, William Cashin agreed to cooperate with the Federal Bureau of Investigation in its investigation of bribery of United States Department of Agriculture produce inspectors at the Hunts Point Terminal Market by continuing to operate as he had in the past and reporting daily the payments he collected (Tr. 133-34, 169-70; CX 16). The record does not show that Marvin Friedman was induced to make unlawful payments by the United States Department of Agriculture or that he was doing anything that he had not been doing before William Cashin agreed to cooperate with law enforcement officials. William Cashin testified that he had been receiving illegal payments from Marvin Friedman on a regular basis from the time Marvin Friedman began to work for Respondent (Tr. 121-24). During the investigation of wholesalers and inspectors at the Hunts Point Terminal Market by the Federal Bureau of Investigation, William Cashin continued to do what he had previously been doing, collecting bribes from Respondent in connection with his inspection of produce on Respondent's premises. I do not find the United States Department of Agriculture has a conflict

of interest in this proceeding merely because William Cashin was allowed to continue to act as he had prior to his arrest in order to obtain evidence of bribery in the Hunts Point Terminal Market.

Third, Respondent contends Complainant did not prove Marvin Friedman bribed William Cashin. Respondent asserts Marvin Friedman's payments to William Cashin were nothing more than solicited gratuities given for the purpose of receiving prompt inspections. (Respondent's Appeal Pet. at 5.)

I disagree with Respondent's contention that Complainant did not prove Marvin Friedman bribed William Cashin. The only testimony as to the reason for Marvin Friedman's payments to William Cashin is the testimony of William Cashin that he was being paid bribes to provide Respondent "help" with respect to the inspections. William Cashin identified the ways in which he would falsify United States Department of Agriculture inspection certificates to help Respondent with respect to 75 percent to 80 percent of the inspections he conducted for Respondent (Tr. 125-32). Marvin Friedman, the person who actually made the payments, did not testify to contradict William Cashin. Moreover, Marvin Friedman pled guilty to 10 counts of bribery in connection with his payments to William Cashin for inspections of Respondent's produce (CX 4, CX 18).

Even if I were to find Marvin Friedman's payments to William Cashin were gratuities paid to obtain prompt inspection of Respondent's produce, I would conclude Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). A commission merchant's, dealer's, or broker's payment of gratuities to a United States Department of Agriculture produce inspector, whatever the motive, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, even if it is only to obtain

prompt inspection of perishable agricultural commodities, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of bribes and gratuities to United States Department of Agriculture produce inspectors.[7]

Fourth, Respondent contends, as Marvin Friedman's payments to William Cashin were only gratuities, only a civil penalty is warranted in this proceeding (Respondent's Appeal Pet. at 6).

As discussed in this Decision and Order, *supra*, Complainant proved that Marvin Friedman's payments to William Cashin were bribes. However, even if I were to find Marvin Friedman's payments to William Cashin were gratuities, I would order the publication of the facts and circumstances of Respondent's violations. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.[8] While sanctions in similar cases are not required to be uniform,[9] I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding.

The ALJ's Revocation of Respondent's PACA License

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[7]*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

[8]*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

[9]*Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1572 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999).

The ALJ revoked Respondent's PACA license (Initial Decision at 27); however, more than 6 months prior to the ALJ's issuance of the Initial Decision, Respondent's PACA license had terminated due to Respondent's failure to pay the required annual PACA license renewal fee (Complainant's unopposed Motion for Technical Amendment at 1). As Respondent's PACA license had terminated prior to the issuance of the ALJ's Initial Decision, revocation of Respondent's non-existent PACA license was not an appropriate sanction.

Nonetheless, I agree with the ALJ's conclusion that a severe sanction is justified by the facts. Publication of the facts and circumstances of Respondent's violations has the same effect on Respondent and persons responsibly connected with Respondent as revocation of Respondent's PACA license;[10] therefore, I order the publication of the facts and circumstances of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's violations shall be published. The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order issued in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Respondent must seek judicial review within 60 days after entry of the Order issued in this Decision and Order.[11] The date of entry of the Order in this Decision and Order is June 2, 2006.

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[10]*In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869, 1902 (2005); *In re JSG Trading Corp.* (Ruling as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion to Stay; and (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 424-27 (2002).

[11]See 28 U.S.C. § 2344.

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In re: PHILIP J. MARGIOTTA.
PACA-APP Docket No. 03-0007.
Decision and Order.
Filed June 21, 2006.

PACA – Perishable agricultural commodities – Responsibly connected – Actively involved in activities resulting in violation – Nominal officer – Alter ego – Right to engage in occupation – APA right to notice and opportunity to achieve compliance – Purpose of PACA's responsibly connected provisions.

The Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's decision concluding Philip J. Margiotta (Petitioner) was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA. The Judicial Officer found M. Trombetta & Sons, Inc., during the period April 1999 through July 1999, willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4). During the violation period, Petitioner was the secretary of M. Trombetta & Sons, Inc. The Judicial Officer stated the burden was on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with M. Trombetta & Sons, Inc., despite his being the secretary of M. Trombetta & Sons, Inc. The PACA provides a two-prong test which a petitioner must meet in order to demonstrate he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The Judicial Officer concluded Petitioner failed to prove by a preponderance of the evidence that he met the second prong of the two-prong test. The Judicial Officer also held: (1) employment restrictions in 7 U.S.C. § 499h(b) imposed on a responsibly connected person do not violate the constitutional right to engage in a particular occupation; (2) the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is not applicable to responsibly connected proceedings under the PACA; (3) Petitioner was not irrebuttably presumed to be responsibly connected with M. Trombetta & Sons, Inc.; and (4) imposing employment sanctions on Petitioner carries out the purpose of the Perishable Agricultural Commodities Act.

Andrew Y. Stanton for Respondent.
Mark C. H. Mandell, Annandale, NJ, for Petitioner.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On February 11, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Philip James Margiotta [hereinafter Petitioner] was responsibly connected with M. Trombetta & Sons, Inc., during the period April 20, 1999, through July 7, 1999, when M. Trombetta & Sons, Inc., violated the PACA.[1] On March 20, 2003, Petitioner filed a "Petition for Review of Chief's Determination" pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; 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] seeking reversal of Respondent's February 11, 2003, determination that Petitioner was responsibly connected with M. Trombetta & Sons, Inc.

On April 15, 2003, and May 6, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] consolidated for hearing the instant proceeding with three related proceedings, a disciplinary proceeding, *In re M. Trombetta & Sons, Inc.*, PACA Docket No. D-02-0025, and two responsibly connected proceedings, *In re Stephen Trombetta*, PACA-APP Docket No. 03-0008, and *In re P.J. Margiotta*, PACA-APP Docket No. 03-0012.[2] On July 14 through July 18, 2003, July 21 through July 23, 2003, and August 21, 2003, the ALJ presided over a hearing in New York, New York. Mark C. H. Mandell, Law Firm of Mark C. H. Mandell, Annandale, New Jersey, represented Petitioner. David A. Richman, Office of the General Counsel, United States Department of Agriculture, represented Respondent.[3]

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[1]During the period April 20, 1999, through July 7, 1999, M. Trombetta & Sons, Inc., through its employee, Joseph Auricchio, made seven illegal cash payments to United States Department of Agriculture produce inspector William J. Cashin, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005).

[2]Order Consolidating Cases for Hearing, and Amending Case Caption filed April 15, 2003, and Order Consolidating Cases for Hearing, and Amending Case Caption filed May 6, 2003.

[3]On January 31, 2005, Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, entered an appearance on behalf of Respondent, replacing David A. Richman as counsel for Respondent (Notice of Appearance filed January 31, 2005).

(continued...)

Petitioner and M. Trombetta & Sons, Inc., submitted 22 exhibits, RX A through RX V. Petitioner and M. Trombetta & Sons, Inc., called 11 witnesses: (1) Petitioner (Tr. 498-551, 574-851, 996-1163, 1338-81, 1390-1408, 1535-45); (2) Peter Silverstein (Tr. 872-924); (3) Max Montalvo (Tr. 932-74); (4) Frank Falletta (Tr. 1199-1221); (5) Matthew John Andras (Tr. 1221-65); (6) Harlow E. Woodward, III (Tr. 1266-1300); (7) Stephen Trombetta (Tr. 1311-36); (8) Martin A. Shankman (Tr. 1412-23); (9) Patricia Baptiste (Tr. 1424-33); (10) Philip Lucks (Tr. 1616-38); and (11) Philip Joseph Margiotta (Tr. 1651-81).

Respondent submitted the exhibits in the certified agency record upon which Respondent based his February 11, 2003, determination, CARX, and 13 additional exhibits, CX 1 through CX 10, AX 1, AX 2, and AX 3. Respondent called three witnesses: (1) Joan Marie Colson (Tr. 25-127); (2) William J. Cashin (Tr. 127-60, 172-358); and (3) John Aloysius Koller (Tr. 359-71, 378-495, 1441-1532, 1546-96, 1683-1725). The ALJ admitted into evidence all of the parties' exhibits and also ALJX 1.

On May 11, 2005, the ALJ severed the four proceedings from one another.[4] On January 31, 2006, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ concluded Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA (Initial Decision at 1, 11-12).

On March 8, 2006, Petitioner appealed to the Judicial Officer. On March 27, 2006, Respondent filed a response to Petitioner's appeal petition. On June 7, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's conclusion that Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA; however, I disagree with the ALJ's conclusion that Petitioner was actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA.

Petitioner's exhibits are designated by "RX." Respondent's exhibits are designated by "CX" and "AX." Exhibits in the agency record upon which Respondent based his February 11, 2003, responsibly connected

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[3](...continued)

[4]Order Severing Cases filed May 11, 2005.

determination as to Petitioner, which is part of the record in this proceeding,[5] are designated by "CARX." The Administrative Law Judge's exhibit is designated "ALJX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

[5] 7 C.F.R. § 1.136(a).

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered

by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required). . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after

the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall

employ any person, or any person who is or has been responsibly connected with any person–

> (1) whose license has been revoked or is currently suspended by order of the Secretary;
>
> (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or
>
> (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a

responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b), 499p.

DECISION

Decision Summary

I conclude Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA. Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Findings of Fact

1. After careful consideration of all the evidence, I find credible the testimony of Joan Marie Colson; William J. Cashin; John Aloysius Koller; Petitioner; Peter Silverstein; Max Montalvo; Frank Falletta; Matthew John Andras; Harlow E. Woodward, III; Stephen Trombetta; Martin A. Shankman; Patricia Baptiste; Philip Lucks; and Philip Joseph Margiotta.

2. Petitioner is an individual who was born on August 13, 1949, and whose mailing address was, at all times material to this proceeding, 41 Bellain Avenue, Harrison, New York 10528 (Tr. 498-500, 1607-08, 1684; CARX 3; AX 1).

3. M. Trombetta & Sons, Inc., was started in the 1890s, and the fifth generation of the family is now in the business. M. Trombetta & Sons, Inc., has two facilities, one at the Hunts Point Terminal Market, New York, New York, and the other at the Bronx Terminal Market, New York, New York. At all times material to this proceeding, Petitioner was employed by M. Trombetta & Sons, Inc., as the manager of the facility at the Hunts Point Terminal Market, and Stephen Trombetta was employed by M. Trombetta & Sons, Inc., as the manager of the facility at the Bronx Terminal Market. (Tr. 499-500, 504, 1338, 1342, 1677.)

4. At all times material to this proceeding, Philip Joseph Margiotta was the holder of 60 percent of the stock of M. Trombetta & Sons, Inc.; Stephen Trombetta was the holder of 40 percent of the stock of M. Trombetta & Sons, Inc.; and Petitioner was not a holder of stock of M. Trombetta & Sons, Inc. (Tr. 1676-77).

5. At all times material to this proceeding, Philip Joseph Margiotta was the president and treasurer of M. Trombetta & Sons, Inc.; Stephen Trombetta was the vice president of M. Trombetta & Sons, Inc.; and Petitioner was the secretary of M. Trombetta & Sons, Inc. (CX 1; CARX 1; Tr. 499, 1338, 1662, 1679).

6. Philip Joseph Margiotta retired from active participation in M. Trombetta & Sons, Inc., in 1993. At the time of the hearing, Philip Joseph Margiotta had not drawn a salary from M. Trombetta & Sons, Inc., for more than 10 years. Stephen Trombetta had visited M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility only about once during the 10 years prior to the hearing. (Tr. 1312, 1653, 1672, 1680.)

7. M. Trombetta & Sons, Inc., through its employee, Joseph Auricchio, paid unlawful bribes and gratuities to William Cashin, a United States Department of Agriculture produce inspector, at M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility during the period April 1999 through July 1999 (CX 4, CX 6-CX 9; RX N; ALJX 1).[6]

8. Joseph Auricchio was acting in the scope of his employment as M. Trombetta & Sons, Inc.'s produce salesperson when he paid unlawful bribes and gratuities to a United States Department of Agriculture produce inspector. Mr. Auricchio's payments of bribes and gratuities to a United States Department of Agriculture produce inspector are deemed to be M. Trombetta & Sons, Inc.'s willful,

[6] *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005).

flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).[7] (Tr. 363-65.)

9. M. Trombetta & Sons, Inc., was responsible under the PACA, notwithstanding any ignorance of the employee's actions, for the conduct of its employee who paid the unlawful bribes and gratuities to a United States Department of Agriculture produce inspector in connection with federal inspections of perishable agricultural commodities.[8]

10. At all times material to this proceeding, Petitioner oversaw M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility. Petitioner bought produce on behalf of M. Trombetta & Sons, Inc., negotiated with the shippers, managed the transactions with the shippers, settled with the shippers, and sometimes arranged transportation. Petitioner observed the produce as it was received from shippers and sold to customers. Petitioner ensured M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility was clean and neat and the produce at M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility was not lost due to negligence. Petitioner decided which shippers to pay and, after consultation with the shippers, how much to pay them. (Tr. 499, 1340, 1342-44, 1369-70.)

11. Petitioner observed the work of the foreman (who watches the porters) and the other employees. Petitioner was responsible for addressing any union problems. Petitioner supervised the office employees, to ensure that M. Trombetta & Sons, Inc.'s purchases and sales were properly recorded. Petitioner hired the sales staff, including Joseph Auricchio. Petitioner supervised the sales staff and advised them what product was coming into M. Trombetta & Sons, Inc., and what Petitioner thought the market would be for the various perishable agricultural commodities handled by M. Trombetta & Sons, Inc. (Tr. 505, 1343-47.)

12. Joseph Auricchio was one of M. Trombetta & Sons, Inc.'s employees monitored by Petitioner. Petitioner was not aware that Mr. Auricchio paid bribes to a United States Department of Agriculture produce inspector until Mr. Auricchio pled guilty to bribery in 2000. (Tr. 508, 525-30, 550, 1358; ALJX 1.)

13. Petitioner worked through the union to terminate two employees

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[7] *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869, 1892 (2005). *See In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 756-57 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003).

[8] *Post & Taback, Inc. v. Department of Agric.*, 123 F. App'x 406 (D.C. Cir. 2005).

of M. Trombetta & Sons, Inc., who had engaged in theft. Petitioner terminated Joseph Auricchio from employment with M. Trombetta & Sons, Inc., after Petitioner learned that Mr. Auricchio pled guilty to paying bribes to a United States Department of Agriculture produce inspector. (Tr. 1152, 1344-45.)

14. Petitioner signed, as corporate secretary, M. Trombetta & Sons, Inc.'s PACA license renewal applications for 2001-2002 (CARX 1 at 7), 2000-2001 (CARX 1 at 11), 1999-2000 (CARX 1 at 15), 1998-1999 (CARX 1 at 19), and 1997-1998 (CARX 1 at 23) (Tr. 1362-63).

15. Petitioner was authorized by M. Trombetta & Sons, Inc., to sign checks and was on the signature card of M. Trombetta & Sons, Inc.'s bank. Petitioner signed most of the checks generated by M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility. (Tr. 1338-39; CARX 5 at 3, CARX 8.)

16. Among M. Trombetta & Sons, Inc.'s checks signed by Petitioner were checks in payment for M. Trombetta & Sons, Inc.'s annual PACA license renewals, covering the years 1997-1998 through 2001-2002 (CARX 1 at 8, 12, 16, 20, 24).

17. On April 8, 1998, and March 22, 1999, Petitioner, identifying himself as secretary of M. Trombetta & Sons, Inc., signed two renewal applications for M. Trombetta & Sons, Inc.'s New York State Farm Products Dealer License, covering the periods May 1, 1998, through April 30, 1999, and May 1, 1999, through April 30, 2000 (CARX 6).

18. The April 1999, 145th edition of The Blue Book identified Petitioner as supervisor of sales for M. Trombetta & Sons, Inc. (CARX 9).

Discussion

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.[9] The record establishes Petitioner was the secretary of M. Trombetta & Sons, Inc., during the period April 1999 through July 1999, when M. Trombetta & Sons, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not

[9] 7 U.S.C. § 499a(b)(9).

responsibly connected with M. Trombetta & Sons, Inc., despite his being an officer of M. Trombetta & Sons, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

> The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

I find Petitioner carried his burden of proof that he was not actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, I find Petitioner failed to carry his burden of proof that he was only nominally an officer of M. Trombetta & Sons, Inc. Further, while Petitioner demonstrated he was not an owner of M. Trombetta & Sons, Inc., he did not demonstrate that M. Trombetta & Sons, Inc., was the alter ego of its two owners, Philip

Joseph Margiotta and Stephen Trombetta.

In order for a petitioner to demonstrate that he or she was only nominally an officer of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating corporation during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, even though they may not have been actively involved in the activities resulting in a violation of the PACA, because their status with the corporation requires that they knew, or should have known, about the violation being committed and failed to counteract or obviate the fault of others.[10]

The record establishes Petitioner had an actual, significant nexus with M. Trombetta & Sons, Inc., during the violation period. Petitioner actively managed M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA. At all times material to this proceeding, Petitioner oversaw M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility. Petitioner bought produce on behalf of M. Trombetta & Sons, Inc., negotiated with the shippers, managed the transactions with the shippers, settled with the shippers, and sometimes arranged transportation. Petitioner observed the produce as it was received from shippers and sold to customers. Petitioner ensured M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility was clean and neat and the produce at M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility was not lost due to negligence. Petitioner decided which shippers to pay and, after consultation with the shippers, how much to pay them. (Tr. 499, 1340, 1342-44, 1369-70.)

Petitioner observed the work of the foreman and the other employees. Petitioner was responsible for addressing any union problems. Petitioner supervised the office employees, to ensure that M. Trombetta & Sons, Inc.'s transactions were properly recorded. Petitioner hired the sales staff. Petitioner supervised the sales staff and advised them what product was coming into M. Trombetta & Sons, Inc., and what Petitioner thought the market would be for the various perishable agricultural commodities handled by M. Trombetta & Sons, Inc. (Tr. 505, 1343-47.)

Petitioner worked through the union to terminate two employees of M. Trombetta & Sons, Inc., who had engaged in theft. Petitioner also

[10]*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

terminated Joseph Auricchio from employment with M. Trombetta & Sons, Inc., after Mr. Auricchio pled guilty to bribing a United States Department of Agriculture produce inspector. (Tr. 1152, 1344-45.)

Petitioner signed, as corporate secretary, M. Trombetta & Sons, Inc.'s PACA license renewal applications for 2001-2002 (CARX 1 at 7), 2000-2001 (CARX 1 at 11), 1999-2000 (CARX 1 at 15), 1998-1999 (CARX 1 at 19), and 1997-1998 (CARX 1 at 23) (Tr. 1362-63). Petitioner was authorized by M. Trombetta & Sons, Inc., to sign checks and was on the signature card of M. Trombetta & Sons, Inc.'s bank. Petitioner signed most of the checks generated by M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility. (Tr. 1338-39; CARX 5 at 3, CARX 8.) Among M. Trombetta & Sons, Inc.'s checks signed by Petitioner were checks in payment for M. Trombetta & Sons, Inc.'s annual PACA license renewals, covering the years 1997-1998 through 2001-2002 (CARX 1 at 8, 12, 16, 20, 24).

On April 8, 1998, and March 22, 1999, Petitioner, identifying himself as secretary of M. Trombetta & Sons, Inc., signed two renewal applications for M. Trombetta & Sons, Inc.'s New York State Farm Products Dealer License, covering the periods May 1, 1998, through April 30, 1999, and May 1, 1999, through April 30, 2000. The April 1999, 145th edition of The Blue Book identified Petitioner as supervisor of sales for M. Trombetta & Sons, Inc. (CARX 6 , CARX 9.)

Under the statutory definition of the term *responsibly connected*, the fact that Petitioner was not actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA does not exonerate him unless he also proves by a preponderance of the evidence that his position at M. Trombetta & Sons, Inc., was nominal. Petitioner has not demonstrated by a preponderance of the evidence that he was only the nominal secretary of M. Trombetta & Sons, Inc.

Petitioner's Appeal Petition

Petitioner raises seven issues in "Petitioner's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R. § 1.145 From the Decision of the Hon. Jill S. Clifton, A.L.J., Dated January 31, 2006" [hereinafter Petitioner's Appeal Petition]. First, Petitioner contends the ALJ erroneously found Petitioner was actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA (Petitioner's Appeal Pet. at 2-3).

I agree with Petitioner's contention that the ALJ erroneously found

Petitioner was actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA. Petitioner demonstrated by a preponderance of the evidence that he was not actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA.

M. Trombetta & Sons, Inc.'s former employee, Joseph Auricchio, acted alone in paying the unlawful bribes and gratuities to a United States Department of Agriculture produce inspector. There is no evidence suggesting that anyone at M. Trombetta & Sons, Inc., other than Mr. Auricchio, was involved in paying the unlawful bribes and gratuities. Mr. Auricchio did not implicate Petitioner (RX N; ALJX 1). The evidence does not prove that anyone at M. Trombetta & Sons, Inc., other than Mr. Auricchio, knew Mr. Auricchio was illegally paying money to a United States Department of Agriculture produce inspector.

A determination from the related disciplinary case, which was consolidated with the instant proceeding for hearing, refers to the lack of culpability of anyone within M. Trombetta & Sons, Inc., except Joseph Auricchio, as follows:

> Considering all of the evidence, [M. Trombetta & Sons, Inc.], but for the actions of Joseph Auricchio, appears to have been trustworthy, honest, and fair-dealing. For the purpose of this Decision and Order, I find no culpability on the part of anyone within [M. Trombetta & Sons, Inc.,] other than Joseph Auricchio. Of particular significance is that United States Department of Agriculture produce inspector William J. Cashin, who had been collecting bribes at Hunts Point Terminal Market for about 20 years and had been inspecting at [M. Trombetta & Sons, Inc.'s] place of business for about 20 years, collected no bribes from [M. Trombetta & Sons, Inc.,] until Joseph Auricchio started to work as a salesperson for [M. Trombetta & Sons, Inc.,] in 1997. Also significant is that Mr. Cashin had already begun a bribe-taking relationship with Joseph Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working for [M. Trombetta & Sons, Inc.] Nevertheless, I hold [M. Trombetta & Sons, Inc.,] responsible for the actions of Joseph Auricchio, just as if [M. Trombetta & Sons, Inc.,] itself had performed each of Mr. Auricchio's acts.

In re M. Trombetta & Sons, Inc., 64 Agric. Dec.1869, 1893 (2005).

The record contains no evidence that Petitioner knew of, or contributed to, the payment of unlawful bribes and gratuities by M. Trombetta & Sons, Inc.'s employee Joseph Auricchio (Tr. 1152-53, 1358, 1360). Moreover, when Mr. Auricchio suggested bribing a United States Department of Agriculture produce inspector in order to obtain expedited inspection of perishable agricultural commodities, Petitioner emphatically explained to Mr. Auricchio that M. Trombetta & Sons, Inc., did not engage in that behavior and, if Mr. Auricchio did engage in that behavior, his employment with M. Trombetta & Sons, Inc., would be terminated (Tr. 521, 524-25).

Joseph Auricchio worked in a partially glass sales booth (a portable room made out of metal and glass), located in the downstairs section of M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility (Tr. 509, 515, 1126, 1150, 1345, 1348). The record establishes that Petitioner monitored M. Trombetta & Sons, Inc.'s employees, including Joseph Auricchio, at the Hunts Point Terminal Market facility (Tr. 520-27, 1161, 1346-58). Nevertheless, Mr. Auricchio was able to pay unlawful bribes and gratuities to a United States Department of Agriculture produce inspector without being observed (Tr. 137-38, 538-39, 543-44, 549-51, 1114-31).

The activities that resulted in a violation of the PACA are not limited to Joseph Auricchio's activities of wrongdoing. Being actively involved in innocent activities can result in a violation of the PACA; however, I find, under the circumstances in the instant proceeding, Petitioner's management of M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility alone is not sufficient to constitute active involvement in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA.

Second, Petitioner contends the record contains no evidence that M. Trombetta & Sons, Inc., "was operating as the alter-ego of Petitioner" (Petitioner's Appeal Pet. at 3).

I agree with Petitioner's contention that the record contains no evidence that M. Trombetta & Sons, Inc., was operating as Petitioner's alter ego. However, I do not find Petitioner's contention relevant to this proceeding. The second prong of the two-prong responsibly connected test requires a petitioner to demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA

licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The record establishes that Philip Joseph Margiotta and Stephen Trombetta were the only owners of M. Trombetta & Sons, Inc. Therefore, Petitioner's contention that the record contains no evidence that M. Trombetta & Sons, Inc., was operating as Petitioner's alter ego does not address the second alternative of the second prong of the responsibly connected test, and the issue of whether M. Trombetta & Sons, Inc., was Petitioner's alter ego is not relevant to this proceeding.

Third, Petitioner contends he was only a nominal officer of M. Trombetta & Sons, Inc. (Petitioner's Appeal Pet. at 4-5).

I disagree with Petitioner's contention that he was only a nominal officer of M. Trombetta & Sons, Inc. In order for a petitioner to demonstrate that he or she was only nominally an officer of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating corporation during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, even though they may not have been actively involved in the activities resulting in a violation of the PACA, because their status with the corporation requires that they knew, or should have known, about the violation being committed and failed to counteract or obviate the fault of others.[11]

The record establishes Petitioner had an actual, significant nexus with M. Trombetta & Sons, Inc., during the violation period. As discussed in this Decision and Order, *supra*, at all times material to this proceeding, Petitioner managed M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility and executed numerous documents and issued numerous checks in his capacity as secretary of M. Trombetta & Sons, Inc. (Tr. 499, 505, 1152, 1338-40, 1342-47, 1362-63, 1369-70; CARX 1, CARX 5, CARX 6, CARX 8, CARX 9).

Fourth, Petitioner contends a finding that he is responsibly connected with M. Trombetta & Sons, Inc., would subject him to employment restrictions in violation of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States (Petitioner's Appeal Pet. at 6).

Individuals found to be responsibly connected with a commission

[11]See note 10.

merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.[12]

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.[13] Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of producers and shippers of perishable agricultural commodities. The status of being an officer of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer may be deemed *responsibly connected* and subject to employment sanctions in the PACA.[14] Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Petitioner's due process rights by arbitrarily interfering with Petitioner's chosen occupation.

Contrary to Petitioner's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.[15] A number of courts have rejected constitutional challenges to employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals

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[12]*Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[13]H.R. Rep. No. 1041 (1930).

[14]*Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

[15]*Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.,* 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

found to be responsibly connected with PACA violators.[16]

Fifth, Petitioner asserts the government of the United States knew on April 20, 1999, that Petitioner had no knowledge of Joseph Auricchio's illegal payments to a United States Department of Agriculture produce inspector, and, under this circumstance, the government of the United States was obligated under the Administrative Procedure Act (5 U.S.C. § 558(c)) to inform Petitioner of Mr. Auricchio's activities and to provide Petitioner with an opportunity to bring M. Trombetta & Sons, Inc., into compliance with the PACA (Petitioner's Appeal Pet. at 6-7).

As an initial matter, the record does not establish that the government of the United States knew on April 20, 1999, that Petitioner had no knowledge of Joseph Auricchio's illegal payments to a United States Department of Agriculture produce inspector. However, even if I found that the government of the United States knew on April 20, 1999, that Petitioner had no knowledge of Mr. Auricchio's illegal payments, I would not conclude that the government was obligated under the Administrative Procedure Act (5 U.S.C. § 558(c)) to provide Petitioner with notice of facts which may warrant license revocation and an opportunity to achieve compliance with the PACA, as Petitioner asserts.

The Administrative Procedure Act provides, before institution of agency proceedings for the revocation of a license, the licensee must be given notice of the facts which may warrant revocation and an opportunity to demonstrate or achieve compliance, except in cases of willfulness (5 U.S.C. § 558(c)).

Petitioner is not a PACA licensee. This responsibly connected

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[16] *Hawkins v. Agricultural Mktg. Serv.,* 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee who has committed flagrant or repeated violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee who failed to pay a reparation award from employment in the field of marketing perishable agricultural commodities is not unconstitutional).

proceeding concerns merely Respondent's February 11, 2003, determination that Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA; it does not concern the revocation of a PACA license held by Petitioner. Therefore, with respect to this responsibly connected proceeding, I find the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance in 5 U.S.C. § 558(c), inapposite.[17]

Sixth, Petitioner asserts the irrebuttable presumption that he was responsibly connected with M. Trombetta & Sons, Inc., is unconstitutional (Petitioner's Appeal Pet. at 7-10).

I disagree with Petitioner's assertion that he is irrebuttably presumed to have been responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA. Under the PACA, an individual who is affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association is presumed to be responsibly connected with that commission merchant, dealer, or broker. However, section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association may rebut the presumption that he or she is responsibly connected. Specifically, section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test by which a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association may rebut the presumption that he or she is responsibly connected with the commission merchant, dealer, or broker. As discussed in this Decision and Order, *supra*, Petitioner failed to prove by a preponderance of the evidence that he met the second prong of the two-prong test.

Seventh, Petitioner contends any sanction imposed on him for Joseph Auricchio's payments to a United States Department of Agriculture produce inspector violates the due process clause of the Fifth Amendment to the Constitution of the United States. Petitioner asserts Mr. Auricchio's payments were not authorized by M. Trombetta & Sons, Inc., Mr. Auricchio's payments did not benefit M. Trombetta & Sons, Inc., and Mr. Auricchio's payments did not harm any of

[17]*In re Coosemans Specialties, Inc.*, __ Agric. Dec. ___, slip op. at 39-40 (Apr. 20, 2006).

M. Trombetta & Sons, Inc.'s shippers. Petitioner contends, under these circumstances, finding Petitioner responsibly connected would not have any rational basis because it would be unrelated to the goal of the PACA to promote fair trade. (Petitioner's Appeal Pet. at 11-15.)

Even if Mr. Auricchio's payments were not authorized by M. Trombetta & Sons, Inc., Mr. Auricchio's payments did not benefit M. Trombetta & Sons, Inc., and Mr. Auricchio's payments did not harm M. Trombetta & Sons, Inc.'s shippers, these circumstances would not be relevant to the determination of whether Petitioner was responsibly connected. While the overall purpose of the PACA is to suppress unfair and fraudulent practices in the produce industry,[18] the purpose of the PACA responsibly connected provisions is to prevent circumvention of the sanctions imposed for violations of the PACA. The purpose of the responsibly connected provisions of the PACA was explained by the United States Court of Appeals for the District of Columbia Circuit , as follows:

> As originally enacted in 1930, Section 8 empowered the Secretary to suspend or revoke the authority of a licensee to do business under the Act, but contained no provision enabling restrictions on future employment of those who were violators in an employee capacity. Thus, for example, a violator could circumvent the Act by the subterfuge of acting as an "employee" of a dummy corporation newly licensed. By enactment of what is now Section 8(b) in 1934 and amendment thereof in 1956, the Secretary was authorized to revoke a license when the licensee, after notice from the Secretary, continued to employ in a "responsible position" one whose own license had been revoked or suspended or one who had been "responsibly connected" with a licensee who incurred revocation or suspension. These charges, however, left to the Secretary the task of ascertaining what in the way of new employment constituted a "responsible position," and who in the way of old employment had been "responsibly connected" with a violating licensee.
>
> It was to ameliorate the problems incidental to such determination that Congress in 1962 again amended Section 8(b). . . .

[18] *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966).

. . . .

> Simultaneously with the 1962 amendment of Section 8(b), Congress added the present Section 1(9) as a new provision of the Act. The explanation for this addition was sparse. When the Committee reported the bill out favorably, it stated merely that Section 1(9) would give the term "responsibly connected" and others "specific meaning, thus avoiding possible confusion as to interpretations."

Quinn v. Butz, 510 F.2d 743, 753-54 (D.C. Cir. 1975) (footnotes omitted).

Therefore, in determining whether a person is responsibly connected, the focus is on whether the person meets the criteria set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)). This approach is entirely consistent with the purpose of the responsibly connected provisions of the PACA, to prevent the partnership, corporation, or association that has violated the PACA from circumventing the suspension or revocation sanctions issued under the PACA by continuing to operate within the perishable agricultural commodities industry through individuals who were responsibly connected with the partnership, corporation, or association when the partnership, corporation, or association violated the PACA.

Petitioner contends that Congress, when it amended the PACA in 1995 by establishing the two-prong test in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), did not account for circumstances present in this case, where the violating employee acted without authorization and in a manner undetectable by the PACA licensee's management. Petitioner asserts that, holding him responsibly connected under these circumstances "is therefore not rationally related to the [1995] amendment's purpose of exonerating non-culpable corporate principals to find as responsibly connected the manager who, even with oversight, could not have uncovered and prevented the alleged violations." (Petitioner's Appeal Pet. at 13-14.)

I agree with Petitioner that section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995, establishing the two-prong responsibly connected test, did not specifically address the factual circumstances surrounding M. Trombetta & Sons, Inc.'s PACA violations. However, my agreement with Petitioner's assertion does not

mean that holding Petitioner responsibly connected under the facts of this case would violate the purpose of the Perishable Agricultural Commodities Act Amendments of 1995, as the actual purpose of the Perishable Agricultural Commodities Act Amendments of 1995 differs from the purpose asserted by Petitioner. As noted in the section-by-section analysis of the relevant House Report, the purpose of section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 is "to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation."[19] The House Report includes the United States Department of Agriculture's comments regarding the amendment to the definition of the term *responsibly connected*, as follows:

> H.R. 1103, as amended, also would amend the current definition of "responsibly connected" in the Act to allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or shareholders and that they were uninvolved in the violation.

H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66. Thus, the purpose of section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 is to provide each alleged responsibly connected person the opportunity to rebut the presumption of responsible connection based on his or her position with a violating company by meeting certain criteria. This responsibly connected proceeding has been conducted consistent with section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995.

Petitioner contends section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 is unconstitutional if applied in the way urged by Respondent, as this would resurrect the "per se" rule (Petitioner's Appeal Pet. at 15). However, the "per se" rule, which held that a person was automatically responsibly connected if he or she was a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the stock of a corporation or association, has not been in effect since enactment of the Perishable Agricultural Commodities Act Amendments of 1995. In accordance with the PACA and the Rules

[19]H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

of Practice, a person alleged to be responsibly connected has the right to a hearing to present evidence that he or she was not responsibly connected. Petitioner has fully availed himself of this right in the course of the instant proceeding. I find Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA because Petitioner has failed to present sufficient evidence to rebut the presumption of responsible connection stemming from his position as secretary of M. Trombetta & Sons, Inc., based on the criteria in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), not because Petitioner has been automatically considered responsibly connected under a "per se" rule.

Conclusions of Law

1. During the period April 1999 through July 1999, M. Trombetta & Sons, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to perform its duty to maintain fair trade practices required by the PACA.

2. Petitioner proved by a preponderance of the evidence that he was not actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

3. During the period April 1999 through July 1999, Petitioner was the secretary of M. Trombetta & Sons, Inc. Petitioner failed to prove by a preponderance of the evidence that he was only a nominal officer of M. Trombetta & Sons, Inc.

4. Petitioner proved by a preponderance of the evidence that he was not an owner of M. Trombetta & Sons, Inc.

5. Petitioner failed to prove by a preponderance of the evidence that M. Trombetta & Sons, Inc., was the alter ego of its owners, Philip Joseph Margiotta and Stephen Trombetta.

6. Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

I affirm Respondent's February 11, 2003, determination that Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner 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. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order.[20] The date of entry of the Order in this Decision and Order is June 21, 2006.

_____

[20]See 28 U.S.C. § 2344.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISION

MAYOLI, INC. v. WEIS-BUY SERVICES, INC.
PACA Docket No. R-03-0090.
Decision and Order.
Filed January 18, 2006.

PACA --
Mayoli, Inc. v. Weis-Buy Services, Inc., PACA Docket No. R-03-0090

Meeting of the Minds

When the President of Complainant grower signed and faxed back Respondent grower's agent's written marketing agreement authorizing Respondent to sell Complainant's peppers, this was deemed to reflect a meeting of the minds regarding the contract terms and the written marketing agreement was found to constitute the contract between the parties, rather than the conditions orally conveyed by Complainant's President to Respondent's employee several days earlier.

Grower's Agent

While the terms of the written marketing agreement between Complainant grower and Respondent, the grower's agent, gave Respondent broad discretion to sell Complainant's peppers, Respondent was held to have acted negligently by making large price concessions purportedly based on condition problems without obtaining federal inspections. Regarding those sales in which Respondent did not act negligently, Respondent was held not to be required to obtain the prevailing market price for Complainant's peppers.

Fees and Expenses

Although Complainant was awarded only a small percentage of the damages claimed, Complainant prevailed on the issues upon which most time was spent at the oral hearing and was found to be the prevailing party in whose favor fees and expenses were awarded.

Paul Gentile, Michael Kriences, Allan Robert Kahan for Petitioner.
Michael Keaton for Respondent.
Presiding officer Andrew Stanton, Office of General counsel.
Decision and Order by Judicial Officer William R. Jenson.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (hereinafter, "PACA"). A timely informal complaint was filed with the Department in which Complainant sought a reparation award against Respondent in the amount of $144,660.80, which was alleged to be past due and owing in connection with multiple shipments of green bell peppers handled by Respondent in the course of interstate commerce.

A Report of Investigation was prepared by the Department and served upon the parties. Complainant filed a formal complaint, alleging damages of $68,764.81. Complainant also requested an oral hearing. A copy of the formal complaint was served upon the Respondent, which filed an answer thereto, denying liability to Complainant. Complainant subsequently moved to amend its complaint, alleging that its damages were either $95,630.45 or $206,378.45, depending on the method of calculation, and its motion to amend was granted.

The oral hearing was held in Fort Myers, Florida on May 19 through 21, 2004, and November 17 and 18, 2004. Complainant was initially represented by attorney Paul Gentile, Gentile and Dickler, New York, New York. Prior to the November portion of the hearing, Mr. Gentile was replaced by attorney Leonard Kreinces, Kreinces and Rosenberg, Westbury, New York. After the November portion of the hearing, Mr. Kreinces was replaced by attorney Allan Robert Kahan, Silver Spring, Maryland. Respondent was represented throughout the proceeding by Michael J. Keaton, Palatine, Illinois. Andrew Y. Stanton, attorney with the Office of the General Counsel, Department of Agriculture, served as the Presiding Officer. Complainant submitted 21 exhibits into evidence and Respondent submitted 16 exhibits into evidence. Additional evidence is contained in the Department's Report of Investigation.

At the hearing, two witnesses testified for Complainant and three witnesses testified for Respondent. A transcript of the hearing was

prepared[1]. At the hearing, Complainant amended its claim for damages to $144,660.80 (Tr. May, at 306-308).

Both parties filed briefs and claims for fees and expenses. In Complainant's brief, it amended its claim for damages to $59,436.75. Respondent objected to Complainant's claim for fees and expenses and Complainant filed a Reply to Respondent's objection.

Findings of Fact

1. Complainant, Mayoli, Inc., is a corporation whose business address is 787 Washington Street, Newton, Massachusetts 02460. Complainant, in association with a related company, Bitt International Company, Inc., Newton, Massachusetts, grows and sells perishable agricultural commodities. Among the commodities grown by Complainant in 2001 was a field of green peppers located in Americus, Georgia. At the times of the transactions alleged in the complaint, Complainant was licensed under the PACA.
2. Respondent, Weis-Buy Services, Inc., is a corporation whose business address is 6225 Presidential Court Suite D, Fort Myers, Florida 33919. At the times of the transactions alleged in the complaint, Respondent was licensed under the PACA.
3. In approximately the third week of October 2001, Complainant's president, Mr. Arnon Blumenfeld, and Respondent's president, Mr. Charles Weisinger, had a telephone conversation in which they discussed the possibility of Respondent handling, as a grower's agent, a field of green peppers that Complainant owned, located in Americus, Georgia (Tr. May, at 21-22). Mr. Weisinger said that, before he would make any commitments, he would send an employee of Respondent, Hank Douglas, to examine the field of peppers (Tr. May, at 22).
4. Sometime during the last few days of October 2001, Mr. Douglas visited Americus, Georgia and, accompanied by Mr. Blumenfeld, examined Complainant's field of green peppers (Tr. May, at 22, 537).

[1]The portion of the transcript covering the hearing dates of May 19, 20 and 21, 2004, bear page numbers 1-865 and will be referred to as "Tr. May, at ___". The portion of the transcript covering the hearing date of November 17, 2004, bears page numbers 1-186 and will be referred to as "Tr. Nov. 17, at ___". The portion of the transcript covering the hearing date of November 18, 2004, bears page numbers 1-217 and will be referred to as "Tr. Nov. 18, at ___".

Mr. Blumenfeld informed Mr. Douglas how the sale of the peppers should be handled. Mr. Blumenfeld said that wanted the prices to be f.o.b. Americus, Georgia, the buyers to be only those listed in the Red Book and Blue Book (two publications that contain information about produce companies), the buyers to have ratings of at least three stars, and payment to be made within 10 days after acceptance (Tr. May, at 23). Mr. Blumenfeld and Mr. Douglas also discussed how Respondent would handle Complainant's peppers (Tr. May, at 22-27, 539). Complainant would pick the peppers and bring them to the cooler, which was about six miles from the field (Tr. May, at 23-24). At night, Mr. Blumenfeld would send a fax to Respondent, indicating how much was picked during that day and stored in the cooler (Tr. May, at 24). The following day, Respondent would send Complainant a fax containing Respondent's purchase order for the peppers in the cooler, which were referenced in Complainant's fax the previous evening (Tr. May, at 25). Respondent's truck would then pick up the peppers from the cooler (Id.). Mr. Douglas made clear to Mr. Blumenfeld that Respondent's decision whether or not to handle Complainant's peppers would be made by Mr. Weisinger (Tr. May, at 28, 539).

5. The day after Mr. Douglas visited Complainant's field to examine the peppers, on approximately October 30, 2001, Mr. Weisinger called Mr. Blumenfeld and stated that Respondent would handle Complainant's peppers as a grower's agent (Tr. May, at 29-30).

6. On approximately November 1, 2001, Mr. Blumenfeld, who was then at the Atlanta airport, received a call on his cell phone from Mr. Douglas (Tr. May, at 34). Mr. Douglas indicated that Respondent would not be able to sell Complainant's peppers until the parties had a written marketing agreement (Id.). Respondent sent a proposed marketing agreement to Mr. Blumenfeld at a hotel at the Atlanta airport (Tr. May, at 35, 561-564). Mr. Blumenfeld reviewed the proposed marketing agreement, made a change in the payment terms from 60 days after shipment to 30 days, signed it, and faxed it back to Respondent (Tr. May, at 36, 276-277, 456-458) (RX 1-1 through RX 1-6).

7. The record contains three versions of a written market agreement (CX 23, RX 1-1 through 1-3, and RX 1-4 through 1-6). All three versions consist of Respondent's standard marketing agreement and contain the same printed terms, with blank spaces for handwritten inserts to be made. All three versions contain a handwritten change to the required time for payment in section III, from 60 days to 30 days

after the grower's shipment of the product. All three versions bear Mr. Blumenfeld's signature.

a. One version (RX 1-4 through 1-6) states that it is "made and entered into in Fort Myers, Florida, effective this 01 day of November, 2001 between Weis-Buy Services, Inc., a Florida corporation ("Agent") and Mayoli, Inc. ("grower")." The agreement also states that it is "executed this 01 day of November 2001, in the State of Georgia." The agreement is signed by Mr. Blumenfeld for Complainant (Tr. May, at 276). The sections for Respondent's name and signature are blank. Mr. Blumenfeld changed Paragraph III with a handwritten notation to reflect that payment is due the grower within 30 days, rather than 60 days (Tr. May, at 274). The document bears a printed notation at the top which indicates that it was faxed on November 2, 2001. The notation does not show who faxed the document.

b. Another version (RX 1-1 through 1-3) states that it is "made and entered into in Fort Myers, Florida, effective this 20 day of Nov., between Weis-Buy Services, Inc., a Florida corporation ("Agent") and Mayoli Inc ("grower")." The space for the year is left blank. The agreement also states that it is "executed this 2 day of November 2001, in the State of Georgia." This document is signed by Mr. Blumenfeld for Complainant (Tr. May, at 273) and Mr. Weisinger for Respondent (Tr. May, at 776) and also bears the handwritten alteration reflecting that payment is due the grower within 30 days, rather than 60 days, although the alteration appears to be in a different handwriting than the version at RX 1-4 through 1-6 and bears the initials "cw". This document bears a printed notation at the bottom which indicates that it was faxed from Respondent on November 2, 2001. Otherwise, this version is identical to the first version of the marketing agreement.

c. The third version of the marketing agreement (CX 23) appears to be a photocopy of RX 1-1 through 1-3, except that it does not bear the printed notation at the bottom found in RX 1-1 through 1-4 but instead bears a printed notation at the top which indicates that it was faxed from Respondent on December 5, 2001.

8. All three versions of the marketing agreement contain 11 paragraphs, including the following:

> II. Services. Agent agrees to use its best efforts to market the Produce, arrange for its sale, arrange for shipping and recovery of the payment for the Produce sold by Grower to the buyer. Grower hereby confers upon Agent all requisite authority, which shall be sole and exclusive, to determine the manner and

timing of the sales of the Produce, the price at which it is sold and the market or customer to which the Produce is sold.

III.Payment. Agent will tender full payment for any and all sales of Produce to the Grower promptly upon receipt of payments from the buyer of each such delivery, subject only to the terms and conditions as stated herein. In the absence of a negotiated price reduction due to arrival problems, Agent shall remit the buyer's payment to Grower no later than thirty (30) days following the Grower's shipment of the Produce and the buyer's acceptance of the Produce. Grower agrees and consents to Agent retaining its commission of eight percent (8%) out of the gross sale proceeds of any load of Produce, in addition to any and all expenses for such items as third party storage, freight and freight related expenses, handling fees or similar items.

IV.Quality on Arrival. The Grower shall, at all times relevant to this agreement, bear sole responsibility and accountability for the Produce meeting good arrival standards under each contract for the sale of Produce which Agent handles for the Grower. If any buyer questions the quality of the Produce upon arrival, Grower hereby confers upon Agent all requisite authority, which shall be sole and exclusive, to determine the best manner in which to address and resolve the arrival problem. Such actions shall include, but are not limited to, Agent's election to have the buyer call for a USDA federal inspection, survey by an accredited body in the case of international shipments, or a negotiated credit or other unit price reduction on the Produce. All such negotiations shall be conducted by Agent in the Grower's name and shall be binding upon the Grower. Agent shall utilize its best efforts to promptly notify Grower of any such arrival problems, the status of negotiations over any proposed credits, the election to call for a USDA federal inspection or accredited body survey on any international shipments and, if so, the results of any such inspection or survey.

V. Risk of Loss. Grower shall remain obligated to honor any and all negotiated price reductions with the full understanding such reductions may result in a remittance back to the Grower of less than the full sales price. Grower also understands Agent may consent to such price reductions on behalf of the Grower with or without a USDA federal inspection or accredited body

> survey on any international shipments. In the event the Produce sold under any transaction fails to meet good arrival standards in accordance with USDA-PACA Branch rules and regulations, the Grower shall remain liable for any and all expenses, costs or other losses incurred as a result of the Produce failing to meet the good arrival standards applicable to the given transaction.

9. Respondent picked up 32 loads of peppers from Complainant's cooler from October 30, 2001, through November 15, 2001 (CX 9).

10. On approximately November 14, 2001, Complainant's picking crew left (Tr. May, at 54-55). Complainant stopped irrigating the pepper field and turned off the cooler (Tr. May, at 56). However, there were additional peppers left in the field (Id.).

11. On approximately November 15, 2001, Mr. Blumenfeld and Respondent's salesman, Mr. Douglas, had a telephone conversation about Complainant's inability to pick any additional peppers since Complainant's picking crew had left (Tr. May, at 57, 552, 614-618). Mr. Douglas indicated that he might be able to find another picking crew and Mr. Blumenfeld said that this would be fine (Tr. May, at 57, 617-618). Respondent obtained Georgia Vegetable Company, Tifton, Georgia, to do the picking and either Mr. Douglas or Mr. Weisinger informed Mr. Blumenfeld of this (Tr. May, at 618).

12. Between November 15, 2001, and November 21, 2001, Respondent picked up approximately five loads of green peppers from Complainant's field.

13. Respondent made payments to Complainant by means of a check, dated November 7, 2001, for $15,000 (RX 14-1); and by wire transfers on November 27, 2001, in the amount of $15,000; December 7, 2001, in the amount of $35,000; and December 19, 2001, in the amount of $17,289.20 (RX 14-2 through 14-4), for total payments of $82,289.20.

14. On December 26, 2001, Respondent sent Complainant a Grower Analysis, setting forth the results of Respondent's sales of Complainant's peppers (RX 9-1 through 9-2). Respondent's Grower Analysis showed that Respondent had sold 27,158 boxes of Complainant's peppers for net proceeds of $82,289.20 and that Respondent had made payments to Complainant totaling $82,289.20, leaving nothing additional that was due and owing to Complainant.

15. Complainant filed an informal complaint on March 11, 2002 (Report of Investigation, Ex. 4), which was within nine months from the time the alleged cause of action accrued.

16.An investigation of this matter was conducted by Ivelisse Valentin, Marketing Specialist with the Manassas, Virginia office of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service of the United States Department of Agriculture (Report of Investigation, EX 7, 8 and 9). The investigation took place between July 29, 2002, and August 5, 2002. Ms. Valentin utilized the contract terms found in the written marketing agreement (Report of Investigation, EX 7, pages 2-3). Ms. Valentin found as follows:

a. Respondent actually sold 26,960 boxes of Complainant's peppers, rather than the 27,158 boxes which Respondent had reported to Complainant. These 26,960 boxes generated gross returns of $100,681.85 (Report of Investigation, EX 7, pages 5-6).

b. There was insufficient support for Respondent's returns of $19,131.55 for 7,822 boxes of Complainant's peppers, due largely to the absence of inspection certificates (Report of Investigation, EX 7, pages 9-11). For these 7,822 boxes, Ms. Valentin calculated the returns which Respondent should have obtained by using the average sales prices of peppers sold by Respondent that were similar to those sold on behalf of Complainant, during the same period of time (Report of Investigation, EX 7, page 6). Using the average sales prices, Ms. Valentin found that the Respondent's returns should have been $43,996.70, or $24,865.15 more than the $19,131.55 reported to Complainant by Respondent (Report of Investigation, EX 7, pages 11-12, EX 8f and g, EX 9f and g), as set forth below:

(See Landscape oriented tables on following two pages -- Editor)

Invoice No.	No. of Boxes and Size	Respon-dent's Returns Per Box	Respon-dent's Returns Per Lot	Reason Disallowed	Ave. Sales Price Per Box	Adjusted Returns Per Lot
27040	259 choice	$2.50	$647.50	Unjustified return - no inspection	$6.5000	$1,683.5000
27042	600 extra large	$2.25	$1,350.00	Unjustified return - inspection shows damage within tolerance	$4.6021	$2,761.2600
27043	230 large	$0	$0	Unjustified return - no inspection	$4.6021	$1,058.4830
27045	998 extra large	$2.85	$2,844.30	Unjustified return - no inspection	$4.6021	$4,592.8958
27087	300 choice	$2.33	$699.00	Unjustified return - no inspection	$6.5000	$1,950.0000
27096	1440 jumbo	$2.00	$2,880.00	Unjustified return - no inspection	$7.1000	$10,224.0000
27098	500 extra large	$3.85	$1,925.00	Unjustified return - no inspection	$4.6021	$2,301.0500
27162	360 extra large	$2.80	$1,008.00	Unjustified return - no inspection	$4.6021	$1,656.7560
27162	960 jumbo	$2.80	$2,688.00	Unjustified return - no	$7.1000	$6,816.0000

Invoice No.	No. of Boxes and Size	Respon-dent's Returns Per Box	Respon-dent's Returns Per Lot	Reason Disallowed	Ave. Sales Price Per Box	Adjusted Returns Per Lot
				inspection		
27162	11 chopper	$2.00	$22.00	Unjustified return - no inspection	$3.43	$37.6937
27162	159 suntan	$2.00	$318.00	Unjustified return - no inspection	$2.7500	$437.2500
27187	600 jumbo	$3.50	$2,100.00	Unjustified return - no inspection	$7.1000	$4,260.0000
27268	77 suntan	$0	$0	Unjustified return - no inspection	$2.7500	$211.7500
27268	14 mixed red	$0	$0	Unjustified return - no inspection	$2.7500	$38.5000
27268	87 chopper	$2.25	$195.75	Unjustified return - no inspection	$3.4267	$298.1229
27353	1118 extra large	$2.00	$2,236.00	Product subjected to reworking - low return	$4.6021	$5,145.1478
27353	109 medium	$2.00	$218.00	Product subjected to reworking - low return	$4.8100	$524.2900
Totals	**7,822**		**$19,131.55**			**$43,996.6992**

Difference between $19,131.55 and $43,996.6992 = $24,865.15.

c. Ms. Valentin added $24,865.15 to Respondent's gross returns of $100,681.85, resulting in adjusted gross returns of $125,547.00. From this sum, Ms. Valentin deducted Respondent's commission of 8%, or $10,043.76, and $6,843.00 for repacking expenses, resulting in an adjusted net return of $108,660.24. The difference between the adjusted net return of $108,660.24 and the $82,289.20 paid to Complainant by Respondent comes to $26,371.00 (Report of Investigation, EX 7, page 6).

17.Complainant filed a formal complaint on January 17, 2003. Complainant also paid a handling fee of $300.00 which is required to file a formal reparation complaint.

Conclusions

The dispute in this proceeding concerns Respondent's performance of its duties as a grower's agent for Complainant in marketing Complainant's peppers harvested from a field located in Americus, Georgia, during October and November of 2001. Complainant claims Respondent mishandled its sale of the peppers, in violation of the terms of their oral agreement, and returned less than it should have. Complainant has asserted several different amounts as its damages. Complainant initially claimed, in its formal complaint, that it incurred damages of $68,764.81. Complainant subsequently moved to amend its formal complaint, increasing the amount of its claim to either $95,630.45 or $206,378.45, depending on the method of calculation, and its motion to amend was granted. At the hearing, Complainant changed the amount of its claimed damages to $144,660.80 (Tr. May, at 306-308) and, in its brief, changed the amount of its claimed damages to $59,436.75. Respondent denies breaching any of its duties as a grower's agent and asserts that it acted in conformity with the terms of a written marketing agreement which Respondent alleges was agreed to by both parties.

The Department's regulations, at 7 C.F.R. 46.32(a), state as follows, with regard to the duties of a grower's agent:

> The duties, responsibilities, and extent of the authority of a growers' agent depend on the type of contract made with the growers. Agreements between growers and agents should be reduced to a written contract clearly defining the duties and responsibilities of both parties and the extent of the agent's authority in distributing the produce. When such agreements

> between the parties are not reduced to written contracts, the agent shall have available a written statement describing the terms and conditions under which he will handle the produce of the grower during the current season and shall mail or deliver this statement to the grower on or before receipt of the first lot. A grower will be considered to have agreed to these terms if, after receiving such statement, he delivers his produce to the agent for handling in the usual manner.

The first issue to be resolved concerns the terms of the contract between the parties. Respondent claims that the parties entered into a written marketing agreement (Respondent's Brief, at page 6). Complainant claims that the written marketing agreement was not effectuated until December 5, 2001, after Respondent had picked up all of Complainant's peppers and, therefore, the proposed terms orally conveyed by Mr. Blumenfeld to Respondent's representatives were binding (Complainant's Brief, page 19).

A contract is not in effect unless and until there is a meeting of the minds as to the material contract terms. Griffin-Holder Co. v. Joseph Mercurio Produce Corp., 40 Agric. Dec. 1002 (1981); Independent Grayse Distributors v. Barbera Packing Corp., 25 Agric. Dec. 1144 (1966). However, a literal and subjective meeting of the minds is not necessary to the formation of a contract. If it were, anyone could escape being bound by an agreement by claiming to have some unique understanding of otherwise unequivocal terminology. As stated in M. Offutt Co., Inc. v. Caruso Produce Co., Inc., 49 Agric. Dec. 596, 606 (1990):

> It follows from the principle that manifested mutual assent rather than actual mental assent is the essential element in the formation of contracts, that a mistaken idea of one or both parties in regard to the meaning of an offer or acceptance will not prevent the formation of a contract. Anonymous, 8 Agric. Dec. 374 (1949).

Therefore, in order to determine whether there was a "manifested mutual assent" regarding the material contract terms, we must examine the interaction between the parties.

There is no dispute that, in approximately the third week of October 2001, Mr. Blumenfeld engaged in a telephone conversation with Respondent's president, Charles Weisinger, about the possibility of Respondent marketing Complainant's peppers, and that Mr. Weisinger stated that, before he would make any commitment, he

would send Respondent's salesman, Hank Douglas, to examine the field of peppers (Tr. May, at 22, 662). During the last few days of October 2001, Mr. Douglas visited to Americus, Georgia and, accompanied by Mr. Blumenfeld, examined Complainant's pepper field (Tr. May, at 22, 537). Mr. Blumenfeld testified concerning certain topics he discussed with Mr. Douglas at that time. Mr. Blumenfeld said he told Mr. Douglas that the price was to be f.o.b. Americus, Georgia (Tr. May, at 23), that the buyers should be those listed in the Red Book and Blue Book (two publications that contain information about produce companies), that the buyers should have ratings of at least three stars (Id.), and that payment should be made within 10 days after acceptance (Id.). Mr. Blumenfeld informed Mr. Douglas that Complainant would pick the peppers and bring them to the cooler, which was about six miles from the field (Tr. May, at 23-24). At night, Mr. Blumenfeld would send a fax to Respondent, indicating how much was picked during that day and stored in the cooler (Tr. May, at 24). The following day, Respondent would send Complainant a fax containing Respondent's purchase order for the peppers in the cooler, which were referenced in Complainant's fax the previous evening (Tr. May, at 25). Respondent's truck would then pick up the peppers from the cooler (Id.). Mr. Douglas told Mr. Blumenfeld that Respondent's decision whether or not to handle Complainant's peppers would be made by Mr. Weisinger (Tr. May, at 28-29, 539).

The parties also do not dispute that, the day after Mr. Douglas visited Complainant's field to examine the peppers, on approximately October 30, 2001, Mr. Weisinger called Mr. Blumenfeld and said that Respondent was "willing to go ahead" with the handling of Complainant's peppers as a grower's agent (Tr. May, at 29-31). Approximately at that time, Respondent began faxing purchase orders to Complainant (Tr. May, at 30) and Respondent's truck began picking up Complainant's peppers from the cooler (Tr. May, at 31). It is Complainant's position that Mr. Weisinger's agreement to proceed, and Respondent's actions in picking up the peppers, constituted an agreement by Respondent that the contract terms proposed by Mr. Blumenfeld to Mr. Douglas were to be in effect. We do not agree with Complainant, as the evidence reveals that, a day or two after Mr. Weisinger's October 30, 2001, telephone call to Mr. Blumenfeld, the parties agreed to the terms of a written contract.

Mr. Blumenfeld testified that, on approximately November 1, 2001, he received a call on his cell phone from Mr. Douglas (Tr. May, at 34). Mr. Douglas indicated that Respondent would not be able to sell

Complainant's peppers until the parties had a written marketing agreement (Id.). Mr. Douglas then faxed a proposed marketing agreement to Mr. Blumenfeld at a hotel at the Atlanta airport (Tr. May, at 35, 561-564). Mr. Blumenfeld reviewed the proposed marketing agreement, made a change in the payment terms from 60 days after shipment to 30 days, signed it, and faxed it back to Respondent (Tr. May, at 36, 276-277, 456-458). Complainant contends that it never received copy of the marketing agreement, as revised by Mr. Blumenfeld, containing both the signatures of Mr. Blumenfeld and Mr. Weisinger, until December 5, 2001, after Respondent had picked up all of Complainant's peppers (Complainant's brief, at page 19) and, therefore, the written marketing agreement never went into effect.

The record contains three versions of a written market agreement between the parties (CX 23, RX 1-1 through 1-3, and RX 1-4 through 1-6). All three versions consist of Respondent's standard marketing agreement (Tr. May, at 663) and contain the same printed terms, with blank spaces for handwritten inserts to be made. All three versions contain a handwritten change to the required time for payment in section III, from 60 days to 30 days after the grower's shipment of the product. All three versions bear Mr. Blumenfeld's signature (Tr. May, at 273, 276). One version (RX 1-4 through 1-6), contains only the signature of Mr. Blumenfeld, states that it is effective on November 1, and contains a printed notation, at the top, that it was faxed on November 2, 2001, although there is no indication where the fax originated. Another version (RX 1-1 through 1-3) contains the signatures of both Mr. Weisinger and Mr. Blumenfeld, states that it is effective November 20, and contains a printed notation at the bottom indicating that it was faxed from Respondent on November 2, 2001. The third version (CX 23) appears to be a photocopy of RX 1-1 through 1-3, except that it bears a printed notation at the top that it was faxed from Respondent on December 5, 2001. While it is unclear which version is the actual document the parties agreed to, the fact that the three versions are virtually identical makes it unnecessary to make this determination. When Mr. Blumenfeld signed the written agreement faxed to him by Mr. Douglas on November 1, 2001, he expressed his intention that Complainant would be bound by the terms of the agreement, so long as the time for payment was 30 days after shipment, rather than 60 days. Respondent never made any objection to Mr. Blumenfeld's change from 30 to 60 days. Therefore, we conclude that the actions of the parties reflected a "manifested

mutual assent" to be bound by the terms of the written marketing agreement as changed by Mr. Blumenfeld.

The next issue is whether Respondent complied with the terms of the written marketing agreement. An investigation of Respondent's handling of Complainant's peppers was conducted by Ivelisse Valentin, Marketing Specialist with the Manassas, Virginia office of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service of the United States Department of Agriculture, between July 29, 2002, and August 5, 2002 (Report of Investigation, EX 7, 8 and 9). Ms. Valentin utilized the contract terms found in the written marketing agreement (Report of Investigation, EX 7, page 3) to determine that Respondent actually sold 26,960 boxes of Complainant's peppers, rather than the 27,158 boxes which Respondent had reported to Complainant, and that these 26,960 boxes generated gross returns of $100,681.85 (Report of Investigation, EX 7, pages 5-6).

Ms. Valentin further determined that, for 7,822 of the 26,960 boxes sold by Respondent, the returns which Respondent reported to Complainant, $19,131.55, were insufficient, due mostly to the absence of any inspection certificates justifying such low returns (Report of Investigation, EX 7, pages 11-12, EX 8f and g, EX 9f and g). For 1,227 boxes of peppers in invoice number 27353, Ms. Valentin determined that the prices obtained by Respondent were excessively low because the original load of 1,516 boxes had been reworked, so that the remaining 1,227 boxes should have been in a condition that warranted a higher return. Ms. Valentin's conclusion is supported by the fact that the inspection certificate (CX 40, page 71) shows that the peppers were in the type of condition that did not justify granting a large price discount. Overall, for these 7,822 boxes, Ms. Valentin calculated the returns which Respondent should have obtained by using the average sales prices of peppers sold by Respondent, other than from Complainant, during the same time period as Respondent's sales of Complainant's peppers (Report of Investigation, EX 7, page 6). Using the average sales prices, Ms. Valentin found that the Respondent's returns should have been $43,996.70, or $24,865.15 more than the $19,131.55 reported to Complainant by Respondent (Report of Investigation, EX 7, pages 11-12, EX 8f and g, EX 9f and g). Adding $24,865.15 to Respondent's gross returns of $100,681.85 results in adjusted gross returns of $125,547.00. From this sum, Ms. Valentin deducted Respondent's commission of 8%, or $10,043.76, and $6,843.00 for legitimate repacking expenses, resulting in an adjusted net return of

$108,660.24. The difference between the adjusted net return of $108,660.24 and the $82,289.20 paid to Complainant by Respondent comes to $26,371.00, which Ms. Valentin determined to be the amount Respondent owed to Complainant (Report of Investigation, EX 7, page 6).

Respondent takes issue with Ms. Valentin's audit. Respondent claims that it had the authority, under sections II and V of its marketing agreement, to grant price reductions with or without an inspection (Respondent's Brief, pages 7-8). Respondent points to the following language in sections II and V:

> [II] Grower hereby confers upon Agent all requisite authority, which shall be sole and exclusive, to determine the manner and timing of the sales of the Produce, the price at which it is sold and the market or customer to which the Produce is sold.
>
> * * * *
>
> [V] Grower shall remain obligated to honor any and all negotiated price reductions with the full understanding such reductions may result in a remittance back to the Grower of less than the full sales price. Grower also understands Agent may consent to such price reductions on behalf of the Grower with or without a USDA federal inspection or accredited body survey on any international shipments.

While the contractual language in sections II and V gives Respondent broad discretion to market Complainant's peppers and to grant price reductions without an inspection, it does not permit Respondent to act negligently. It has long been held that "[w]hile an agent does not insure the success of an undertaking or a guarantee against mistakes or errors of judgment, he may be liable to his principal for damages resulting from his failure to exercise ordinary and reasonable care, diligence, and skill in the performance of his duties." Akers Marketing Co., Inc. v. Anthony Lobue Packing Co., 39 Agric. Dec. 1184, 1189 (1980); Mission Shippers, Inc. v. Edward Milton Hall, d/b/a Dixie Brokerage Co., 32 A.D. 1849, 1851 (1973). See also Arnold Sousa & Francis Sousa d/b/a Sousa Farms v. San Joaquin Tomato Growers, Inc., 46 Agric. Dec. 709, 716 (1987).

The invoices noted by Ms. Valentin as lacking sufficient justification to warrant the sales prices of Complainant's peppers were those in which the prices per box were much less than the prices per box Respondent obtained from the contemporaneous sale of

similar peppers (see Finding of Fact 16b). While the language in sections II and V of the marketing agreement may have relieved Respondent of liability for any mistakes in judgment leading to adjustments in price or allowances, it would not relieve Respondent for any negligent actions it might have made. Arnold Sousa & Francis Sousa d/b/a Sousa Farms v. San Joaquin Tomato Growers, Inc., supra at 716. It is our conclusion that, with respect to the invoices noted by Ms. Valentin for which she determined that there was insufficient objective evidence justifying the prices obtained by Respondent, such as a federal inspection, Respondent negligently handled Complainant's peppers.

Respondent puts forward several arguments why its actions regarding its sales of Complainant's peppers were not negligent. Respondent claims that Complainant's peppers were the "end of the crop" (Respondent's Brief, page 12) and notes Mr. Blumenfeld's admission that three brokers had sold peppers from Complainant's field prior to Complainant contacting Respondent (Tr. May, at 396-397). However, Respondent has not shown why the fact that three brokers had sold peppers from Complainant's field prior to Respondent justifies a lower sales price for the peppers sold by Respondent. Respondent states that Mr. Billy Thomas, president of Georgia Vegetable Company, which picked some of the peppers from Complainant's field, testified that the peppers were later pickings and, therefore, were smaller and brought less money (Respondent's Brief, page 13) (Tr. May, at 166-167). However, examination of Respondent's invoices to Complainant (CX 4) shows that most of the peppers harvested were extra large and jumbo. Therefore, we reject Respondent's contention that the low prices received for Complainant's peppers were justified because peppers had been harvested from the field prior to Respondent's involvement and that the remaining peppers were small.

Respondent claims that there were temperature-related problems, citing the testimony of its salesman, Mr. Douglas (Respondent's Brief, page 13) (Tr. May, at 540). Respondent also refers to the testimony of its president, Mr. Weisinger, that he had engaged in a conversation with a Mr. Buzz Miller, who Mr. Weisinger had asked to look at Complainant's pepper field (Respondent's Brief, page 13) (Tr. May at 724-726). Mr. Weisinger testified that Mr. Miller had told him that Complainant's peppers showed frost damage (Tr. May, at 725). Mr. Douglas and Mr. Weisinger, as Respondent's employees, are obviously not objective and their testimony cannot be given significant weight. Further, Mr. Weisinger's testimony about

his alleged conversation with Mr. Miller is hearsay and Respondent has not presented a good reason why Mr. Miller could not be present at the hearing to testify under oath and subject to cross examination. Respondent's counsel asserted at the hearing that Mr. Miller could not be present to testify because he was closing on the sale of his farm (Tr. May, at 727-728). However, the hearing lasted five days over a six month period, so there no good reason why Respondent could not have had Mr. Miller testify at some point during the course of the hearing.

Respondent alleges that, at the time it sold Complainant's peppers, there were peppers from other regions available that were larger and not subjected to bad weather, which depressed the price for Complainant's peppers (Respondent's Brief, page 13). Respondent's evidence to support these allegations consists solely of the testimony of Mr. Weisinger (Tr. May, at 733-736) and Mr. Douglas (Tr. May, at 639), who are not objective witnesses and whose testimony will not be given significant weight.

Respondent contends that Complainant's peppers could not be sold to chain stores or retail outlets because they were undersized (Respondent's Brief, pages 13-14). Respondent's only evidence in support of this contention consists of the testimony of Mr. Weisinger (Tr. May, at 737-743) and Mr. Douglas (Tr. May at 638-642), and will not be given significant weight.

Respondent has failed to provide credible, objective evidence to justify the low sales prices of Complainant's peppers in those invoices noted by PACA Marketing Specialist Ivelisse Valentin. Therefore, we conclude that Respondent's low returns for these invoices reflect negligent handling by Respondent and, therefore, these returns should be disallowed.

Complainant contends that Respondent's returns on virtually all of the peppers it handled for Complainant were excessively low, and argues that it should be awarded the difference between Respondent's returns and the prices for peppers that are shown in the appropriate Market News Service reports (Complainant's Brief, page 26 and Appendix A). Use of the Market News Service reports is appropriate when a seller sells produce to a buyer and the contract price has not been agreed to. However, in this case, Complainant did not sell its peppers to Respondent but agreed that Respondent would act as Complainant's agent. The marketing agreement did not specify that Respondent was required to obtain the market price for the peppers, as reflected by the Market News Service reports, but, as set forth in

paragraph II, that Respondent would "use its best efforts to market the Produce." As Complainant knowingly selected Respondent to act as Complainant's agent, Complainant must bear the risk of Respondent not being able to sell the peppers for the prices reflected by the Market News Service reports, so long as Respondent does not act negligently. Bonanza Farms, Inc. a/t/a Bonanza Packing Co. v. Tom Lange Company, Inc. and/or Wm. Rosenstein & Sons Co., 51 Agric. Dec. 839, 847 (1992). See also Arnold Sousa & Francis Sousa d/b/a Sousa Farms v. San Joaquin Tomato Growers, Inc., supra at 716. Therefore, use of the Market News Service reports to determine the prices Respondent should have obtained is not appropriate here.

Complainant also alleges that Respondent improperly arranged for Georgia Vegetable Company, Tifton, Georgia, to remove peppers from Complainant's field (Complainant's Brief, pages 24-25). However, the record does not indicate that Respondent's actions were improper in any way. According to the testimony of both Mr. Blumenfeld and Mr. Douglas, on approximately November 15, 2001, Mr. Blumenfeld and Mr. Douglas had a telephone conversation about Complainant's inability to pick any additional peppers since Complainant's picking crew had recently left (Tr. May, at 57, 552, 614-618). Mr. Douglas indicated that he might be able to find another picking crew and Mr. Blumenfeld agreed that this would be fine (Tr. May, at 57, 617-618). Respondent obtained Georgia Vegetable Company to do the picking and either Mr. Douglas or Mr. Weisinger informed Mr. Blumenfeld of this (Tr. May, at 618). Even if Respondent exceeded its authority by arranging for Georgia Vegetable Company to pick additional peppers, Complainant has not alleged any damages specifically resulting from this action.

We conclude that Respondent failed to exercise ordinary and reasonable care, diligence, and skill in the performance of his duties in handling Complainant's peppers for the invoices documented in Ms. Valentin's audit, and that Respondent is liable to Complainant in the amount found by Ms. Valentin of $26,371.00. Respondent's failure to pay this amount to Complainant is a violation of section 2 of the PACA (7 U.S.C. § 499b), for which reparation should be awarded. Section 5(a) of the PACA (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Since the Secretary is charged with the duty of awarding damages, the Secretary also has the duty, where appropriate, to award interest at a reasonable rate as a part of each

reparation award.[2] We have determined that a reasonable rate is 10 percent per annum. Respondent is also required to reimburse Complainant for the $300.00 handling fee Complainant paid to file its formal complaint, pursuant to section 5(a) of the PACA.

Section 7(a) of the PACA (7 U.S.C. § 499g(a)) states that, after an oral reparation hearing under the PACA, the "Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any such hearing." We have decided that Complainant should be awarded $26,371.00, which is approximately 28% and 13%, respectively, of the $95,630.45 and $206,378.45 claimed as alternative damages by Complainant in its amended complaint, and 18% of the $144,660.80 alleged as damages by Complainant at the hearing (Tr. May, at 306-308). As we have awarded Complainant only a small percentage of the damages claimed, the first question we must answer is whether Complainant should still be considered "the prevailing party".

The term "prevailing party" has been defined to be the party in whose favor judgment is entered whether or not the party has recovered its entire claim. East Produce, Inc. v. Seven Seas Trading Co., Inc., 59 Agric. Dec. 853, 864 (2000); Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc., 48 Agric. Dec. 707, 715 (1989). However, there are circumstances in which the party against whom the reparation order is issued has been found to be the prevailing party. Newbern Groves, Inc. v. C. H. Robinson Company, 53 Agric. Dec. 1766, 1855 (1994), petition for reconsideration denied, 54 Agric. Dec. 1444 (1995). In determining the identity of the prevailing party, "the amount of effort put forth at the hearing in support of certain allegations is a significant factor." Anthony Vineyards v. Sun World International, Inc., 62 Agric. Dec. 342, 356 (2001).

We have rejected Complainant's allegations that the parties had an oral contract, that Respondent improperly instructed Georgia Vegetable Company to harvest Complainant's peppers and that Complainant's damages should be calculated based on the Market News Service reports prices. However, these were relatively minor

[2] L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co., 269 U.S. 217 (1925); L & N Railroad Co. v. Ohio Valley Tie Co., 242 U.S. 288 (1916). See also Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc., 29 Agric. Dec. 978 (1970); John W. Scherer v. Manhattan Pickle Co., 29 Agric. Dec. 335 (1970); and W. D. Crockett v. Producers Marketing Association, Inc., 22 Agric. Dec. 66 (1963).

issues at the hearing. The issues on which the parties spent most of the hearing time were whether Respondent had any limits on its authority to handle Complainant's peppers, what kind of limits did Respondent have, and whether Respondent failed to exercise ordinary and reasonable care, diligence, and skill. On these issues, we have decided in Complainant's favor. Therefore, we hold that Complainant was the prevailing party herein.

Fees and expenses will be awarded to the prevailing party to the extent that they are reasonable. East Produce, Inc. v. Seven Seas Trading Co., Inc., supra at 864; Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc., supra at 715. Complainant has filed a claim for fees and expenses in the amount of $57,641.70. These claims include expenses incurred in connection with the three attorneys which represented Complainant, Paul T. Gentile, Leonard Kreinces and Alan R. Kahan. Respondent objects to Complainant's claim for fees and expenses.

With respect to the $25,304.79 claimed for the legal services of Mr. Gentile, Respondent contends that much of the charges was for work that was not done specifically in connection with the oral hearing. Expenses which would have been incurred in connection with a case if that case had been heard by the documentary procedure may not be awarded under section 7(a) of the Act. East Produce, Inc. v. Seven Seas Trading Co., Inc., supra at 864. Mr. Gentile's invoices to Complainant reveal many charges for legal services that do not indicate that they specifically relate to his preparation for the hearing. Therefore, it will be assumed that all such charges prior to November 25, 2003, when Mr. Gentile agreed to a proposed hearing date, are for legal services that are not in connection with the hearing in this case, and will be disallowed. These charges total $7,652.70. We will also disallow the charges for time spent traveling to and returning from the hearing, which amounts to 13 hours at $300 per hour, or $3,900.00, as it not our policy to include fees paid an attorney for time spent traveling to and from the hearing in an award of fees and expenses. East Produce, Inc. v. Seven Seas Trading Co., Inc., supra at 865. Respondent contends that a $216.88 charge for telephone calls between May 18, 2004 and May 21, 2004, is excessive, as Mr. Gentile was in the same hotel as Mr. Blumenfeld at the time. However, Mr. Gentile's invoice shows that, during the period May 18-21, 2004, he made telephone calls only on May 18, 2004, to "Mike at Chase", "Arnon [Mr. Blumenfeld] (2x)" and "Lynn Kelly (3x) re: Billy Thomas." The call to Mr. Blumenfeld may have been made prior to the time Mr. Gentile and Mr. Blumenfeld were both checked

into their hotel. While a charge of $216.88 for these telephone calls seems high, the calls may have lasted several hours. Under the circumstances, the charge is considered reasonable and will be allowed. All other charges by Mr. Gentile are properly included in Complainant's claim. Thus, we will include attorney's fees to Mr. Gentile in the amount of $25,304.79 less $7,652.70 and $3,900.00, or $13,752.09.

Regarding the $17,144.90 claimed for the legal services of Mr. Kreinces, Respondent contends that the only charges that relate to the oral hearing are for 16.5 hours on November 17, 2004, and November 18, 2004, when the second portion of the hearing took place. Respondent contends that all other charges concern the attorney's review of the first portion of the hearing in May 2004, which would not have been necessary but for Complainant's decision to change counsel. We agree with Respondent that charges connected with the review of documents or transcripts related to the first portion of the hearing should not permitted, as such a review would probably not have been necessary had Complainant not elected to change counsel. Therefore, all of Mr. Kreinces' charges that include a review of documents or transcripts related to the first portion of the hearing will be disallowed. This totals 17.5 hours at $300 per hour, or $5,250. All other charges appear to be reasonable and will be permitted, which results in permissible attorney's fees of $17,144.90 less $5,250.00, or $11,894.90.

With respect to the $10,227.26 claimed for the legal services of Mr. Kahan, Respondent contends that all of these expenses relate to the preparation of Complainant's brief and claim for fees and expenses, which may not be awarded under existing case precedent. Respondent is correct, as expenses which would have been incurred under the documentary procedure are not recoverable under section 7(a) of the PACA, which would include proposed findings of fact, conclusions of law and post hearing briefs. East Produce, Inc. v. Seven Seas Trading Co., Inc., supra at 865.

Complainant claims expenses of $3,074.30 for preparing the transcript of the hearing and depositions taken in connection with the hearing, $64.50 for copies of exhibits, $1,256.26 for transportation to and from the hearing, $549.02 for lodging in connection with the hearing, and $20.67 for a federal express shipment. Respondent takes no position on the acceptability of these claims.

Complainant has submitted sufficient documentation supporting its claim of $1,893.80 for preparation of the hearing transcript, which will be allowed. Complainant has also submitted documentation

supporting its claim of $637.05 for the transcript of the deposition of Respondent's president, Mr. Weisinger, and $543.45 for the transcripts of the depositions of Complainant's employee, Plez Hardin, and of the president of Georgia Vegetable Company, Mr. Thomas. Although the deposition of Mr. Hardin was submitted into evidence (RX 16), the depositions of Mr. Weisinger and Mr. Thomas never were. Complainant never made any attempt to utilize the deposition testimony to either impeach or refresh the recollections of Mr. Weisinger or Mr. Thomas when they testified at the hearing. Under these circumstances, awarding expenses to Complainant for the depositions of Mr. Weisinger and Mr. Thomas would not be reasonable. Therefore, only Complainant's expenses for preparing the transcript of Mr. Hardin's deposition will be allowed, which amounts to $53.90. Complainant's claim of $64.50 for copies of exhibits is unsupported by documentation and will not be allowed. With respect to Complainant's claim of transportation to and from the hearing in the amount of $1,256.26, the only documents Complainant has submitted which cover transportation to and from the hearing consists of a bill for an airline ticket issued to Mr. Gentile on April 24, 2004, in the amount of $141.00, and bills for airline tickets issued on November 18, 2004, to Mr. Blumenfeld in the amount of $212.17 and to Mr. Kreinces in the amount of $298.70, for a total of $651.87. Complainant's award for transportation expenses in connection with the hearing will be limited to this sum. Regarding Complainant's claim for lodging in connection with the hearing of $549.02, the only hotel bills submitted by Complainant that cover lodging for the hearing consists of a bill for Mr. Blumenfeld covering the period May 18-21, 2004, in the amount of $191.63, and bills for Mr. Kreinces and Mr. Blumenfeld covering the period November 16-18, 2004, in the amount of $141.43 each, for a total of $474.49. Complainant's award for lodging in connection with the hearing will be limited to this sum. Complainant's claim for $20.67 for federal express is supported by a bill dated July 19, 2004, which appears to be for shipment to Complainant of the May 18-21, 2004, transcript from R&S Typing Service, Gilmer, Texas. This expense is reasonable and in connection with the hearing, and will be awarded.

Therefore, the amount of fees and expenses which we will award Complainant consists of $13,752.09 for the legal services of Mr. Gentile, $11,894.90 for the legal services of Mr. Kreinces, $1,893.80 for the transcript of the hearing, $53.90 for the transcript of Mr. Hardin's deposition, $651.87 for transportation to and from the hearing, $474.49 for lodging in connection with the hearing, and

$20.67 for federal express relating to shipment of the hearing transcript, for a total of $28,741.72.

Order

Within 30 days from the date of this Order, Respondent shall pay to Complainant, as reparation, $26,371.00, with interest thereon at the rate of 10% per annum from January 1, 2002, until paid, plus $300.00 as reimbursement for Complainant's handling fee.

Within 30 days from the date of this Order, Respondent shall pay to Complainant, as additional reparation for fees and expenses, $28,741.72, with interest thereon at the rate of 10% per annum from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.

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PGB INTERNATIONAL, LLC. CO v. BAYCHE COMPANIES, INC.
PACA Docket No. R-05-118.
Reparation Order on Reconsideration.
Filed February 21, 2006.

PACA -- Order on Reconsideration – Interest rate – Calculations.

Decision and Order by William G. Jensen, Judicial Officer

Decision

Reparation claimants before the Secretary seek damages suffered due to a violation of Section 2 of the PACA, a federal regulatory statute. By choosing to bring its claim before the Secretary, a complainant invokes the jurisdiction of a federal agency, and the matter is adjudicated in a federal administrative forum. There should be consistency in the rate of interest on monetary judgments awarded in all federal forums. Since the claim could have been brought in a federal district court, and since the decision of the Secretary is appealable to the federal district courts, it is appropriate for the Secretary to follow the federal statue for assessing interest on money judgments in a civil case recovered in a district court, as well as final judgments against the United States in the United States Court of

Appeals for the Federal circuit, and judgments of the United States Court of Federal Claims, as set forth in 28 U.S.C. § 1961.

Interest rate – avoid unjust enrichment

The award of interest in reparation cases is intended to make the injured party whole. In order to avoid unjustly enriching a complainant, interest should be based on the prevailing money market conditions on the date of issuance of the reparation award. The interest rate shall be calculated on the date of the Order, at a rate equal to the weekly average one-ear constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order, in accordance with 28 U.S.C. § 1961.

Preliminary Statement

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.)(hereinafter "Act" or "PACA"), a Decision and Order was issued on November 14, 2005, in which Respondent was ordered to pay Complainant as reparation $7,275.18, with interest thereon at the rate of 10% per annum from February 1, 2004, until paid, plus the amount of $300.00. On December 2, 2005, the Department received from Respondent a Petition for Reconsideration of the Order. Respondent's petition was served upon the Complainant, who filed a response in opposition to the petition.

In the petition, Respondent argues that the 10% interest rate applied to the award is inconsistent with 28 U.S.C. § 1961. Specifically, Respondent states that 28 U.S.C. § 1961 provides that interest shall be "calculated from the date of entry of the judgment, at a rate equal to the weekly average one year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week proceeding [sic] the date of the judgment." While acknowledging that this is not a civil action, Respondent argues that the same analysis should apply. On this basis, Respondent argues that the interest applied to the award should not exceed 4.32%, which is the rate for one-year treasury constant maturities according to the Federal Reserve Statistical Release dated November 7, 2005.

28 U.S.C. § 1961 sets forth a uniform rate of interest on any monetary judgment in a civil case recovered in a district court, as well as final judgments against the United States in the United States Court of Appeals for the Federal circuit, and judgments of the United States Court of Federal Claims. Subsection (4) of 28 U.S.C. § 1961, states specifically that this section "shall not be construed to affect the interest on any judgment of any court not specified in this section." Nevertheless, we conclude that we should follow the formula contained in 28 U.S.C. § 1961 to calculate the rate of interest to be assessed on reparation orders issued by the Secretary.

A person who believes that he or she has been injured by the violation of Section 2 of the Act by a commission merchant, dealer or broker may seek damages for such injury. Section 5(b) of the Act (7 U.S.C. § 499e(b)) provides that:

> Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies.

The federal district courts are courts of competent jurisdiction under the PACA because both "can issue an enforceable award in money damages based upon breach of a contractual duty which runs against a party to the suit."[3] It is reasonable, then, to calculate the interest rate on a reparation award in the same way a federal district court would calculate the interest rate on a monetary award. In *Sherwood v. Madda Trading Co., and Christopher Jankowski*, 1979 WL 11487 (C.F.T.C.), the Commodity Futures Trading Commission, holding that it acts as a "virtual replacement of a federal district court in reparations cases," stated:

> Interest is nothing more than an adjunct to the award of damages, a differential paid to compensate for the loss of the use of a sum of money for a period of time. A complainant is no less damaged and suffers no less loss as the result of his

[3] *Han Yang Trade Co., Inc. d/b/a H.Y. Produce Co. v. A.F. & Sons Produce, Inc.,* 52 Agric. Dec. 765, 769 (1993).

> claim having been made before the Commission, as opposed to a court.

Id., at *12.

Reparation claimants before the Secretary seek damages suffered due to a violation of Section 2 of the PACA, a federal regulatory statute. By choosing to bring its claim before the Secretary, a complainant invokes the jurisdiction of a federal agency, and the matter is adjudicated in a federal administrative forum. There should be consistency in the rate of interest on monetary judgments awarded in all federal forums. Since the claim could have been brought in a federal district court, and since the decision of the Secretary is appealable to the federal district courts, we find that it is appropriate for the Secretary to follow the procedural statute for assessing interest on money judgments in a civil case recovered in a district court, as well as final judgments against the United States in the United States Court of Appeals for the Federal circuit, and judgments of the United States Court of Federal Claims, as set forth in 28 U.S.C. § 1961.[4]

We also note that the Secretary's authority to award interest is incident to the statutory duty to award the injured party "the full amount of damages sustained in consequence of such violations."[5] In other words, the award of interest is intended to make the injured party whole. Given the prevailing money market conditions on the date the Decision and Order was issued, November 14, 2005, the 10% interest rate applied to the award clearly exceeded that purpose. Therefore, in order to avoid unjustly enriching the Complainant in this case, we are granting Respondent's petition. Accordingly, the interest rate applicable to this award, and to all reparation awards issued subsequent to this Order, until such time as the Department publishes a Final Rule establishing a different methodology for awarding such interest, shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated on the date of the Order, at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the

[4] Other federal agencies have also determined that it is appropriate to utilize the formula stated in 28 U.S.C. § 1961 to set the interest rate on monetary awards made in an administrative forum. See, e.g., On behalf of *Dionne Staples v. Michael P. Kelly and John T. Kelly,* 1994 WL 678738 (H.U.D.A.L.J.); *Leon Newman v. Bache Halsey Stuart Shield*, Inc., et al*.,* 1984 WL 48706 (C.F.T.C.).

[5] 7 U.S.C. § 499e(a).

Federal Reserve System, for the calendar week preceding the date of the Order. The interest rate on one-year constant maturity treasuries for the week ending November 11, 2005, was 4.35%. The Decision and Order issued November 14, 2005, should, therefore, be amended to award interest at a rate of 4.35%.

There will be no further stays of this Order based on further petitions for reconsideration to this forum. The parties' right to appeal to the district court is found in Section 7 of the Act.

Order

Within 30 days from the date of this Order Respondent shall pay Complainant as reparation $7,275.18, with interest thereon at the rate of 4.35% per annum from February 1, 2004, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

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G.W. PALMER & CO., INC., V. SUN VALLEY POTATO GROWERS, INC.
PACA Docket No. R-05-071.
Decision and Order.
Filed April 27, 2006.

Requirements contract – definition.

A requirements contract is a contract which calls for one party to furnish materials or goods to another party to the extent of the latter's requirements in business. A buyer's contract to obtain its requirements from a seller is enforceable when the seller agrees to provide the buyer with a quantity based on a stated estimate or based on the prior requirements of the buyer. In a requirements contract, it is the seller's duty to provide the requirements of the buyer and it is the buyer's duty to obtain those requirements in good faith and according to commercial standards of fair dealing in the trade.

Requirements contract – minimum quantity not required.

A stated minimum is not required to enforce a requirements contract, because U.C.C. Sec. 2-306(1) allows a buyer to require a seller to provide a good faith quantity that is not unreasonably disproportionate to stated estimates. Reasonable elasticity in requirements contracts is permitted, even where a complete discontinuance may occur.

Requirements contract – formation.

Where the oral contract called for Respondent to sell "up to" one truckload of 60 count cartons of Idaho Russet potatoes as Complainant required per week at a fixed price per-carton, such terms provide the basis of a requirements contract and were not too vague to be enforced. Because U.C.C. Sec. 2-306(1) permits all quantities that are not unreasonably disproportionate to stated estimates, the lack of a stated minimum quantity in the estimate did not prevent enforcement of the good faith requirements of the buyer.

Cover – expenses saved in consequence of breach.

Under U.C.C. Sec. 2-712, when a buyer obtains cover for a seller's breach, the buyer may recover the difference between the cost of cover and the contract price together with any incidental or consequential damages but less expenses saved in consequence of the breach. Where Complainant purchased potatoes at a delivered price to cover for Respondent's breach and the original contract was made at f.o.b. prices, Complainant's $2.75 per carton shipping cost for the f.o.b. contract was an expense Complainant saved in consequence of the breach. This expense was deducted from the cost of cover at the delivered price and the f.o.b. contract price.

Decision and Order by Judicial Officer, William G. Jenson

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) ("Act"). A timely complaint was filed with the Department within nine months from the accrual of the cause of action, [1] in which Complainant seeks a reparation award against Respondent in the amount of $23,300.50 in connection with a contract for the sale and shipment of multiple truckloads of potatoes in interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

Since the amount claimed in the formal Complaint does not exceed $30,000.00, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement

[1] The complaint was timely filed with respect to the majority of the amount claimed (see Finding of Fact 6).

in Reply. Respondent filed an Answering Statement. Respondent also submitted a Brief.

Findings of Fact

1. Complainant, G.W. Palmer & Co., Inc., is a corporation whose post office address is 1080 W. Rex Road, Suite 100, Memphis, Tennessee, 38119-3820.
2. Respondent, Sun Valley Potato Growers, Inc., is a corporation whose post office address is 375 W. 75th S., Rupert, Idaho, 83350. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. During the month of August 2003, Complainant and Respondent entered an oral contract whereby Respondent agreed to sell to Complainant multiple loads of U.S No. 1 Idaho Russet potatoes in 60-count cartons between September 1, 2003 and July 1, 2004 for $7.25 per carton, less $0.15 per carton for Complainant's brokerage, or a net amount of $7.10 per carton. Complainant negotiated the purchase of the potatoes from Respondent while acting in the capacity of a buying broker on behalf of its customer, Sharon's Produce, of Jackson, Mississippi.
4. On August 15, 2003, Complainant's Mr. Parks Dixon sent Ms. Joyce Ainsworth, of Sharon's Produce, a fax message stating:

> This is to confirm a contract price for the period between September 1st of 2003 and July 1st of 2004 with Sun Valley Potato. The 60 count russets will be $7.25 FOB and freight @ $2.75 (through Kevin at TNC). Other carton russets to fill the loads will be at the "mostly market." Thank you for your support. (See Report of Investigation Exhibit No. 3a).

5. Between August 25, 2003 and October 20, 2003, and between March 1, 2004 and June 23, 2004, Complainant purchased multiple truckloads of potatoes from Respondent in accordance with the parties' agreement. Between October 21, 2003 and March 1, 2004, when Respondent was unable to supply Complainant with 60-count cartons of Idaho Russet potatoes at the contract price, Complainant purchased nine partial truckloads of Idaho Russet potatoes in 60-count cartons from other suppliers to fulfill its commitment to Sharon's Produce. The prices paid by Complainant for these nine

truckloads of potatoes exceeded the contract price negotiated with Respondent by a total of $27,130. On June 23, 2004, Complainant issued invoice number 29737A billing Respondent for $23,300.50.

6. The informal complaint was filed on September 3, 2004, which is within nine months from the accrual of the cause of action for the six partial trucklots of potatoes purchased by Complainant between January 13, 2004 and March 1, 2004, involving a total of Complainant's claim for $15,330.50. For the remaining three partial trucklots of potatoes that Complainant purchased in October of 2003, involving a total of Complainant's claim of $7,970.00, the Complaint was not timely filed within nine months from the accrual of the cause of action.

Discussion

Complainant brings this action to recover $23,300.50 from Respondent for the additional costs it incurred to purchase 60-count cartons of Idaho Russet potatoes to replace those that Respondent allegedly failed to supply in accordance with the parties' agreement.[2] Specifically, Complainant maintains that the oral contract negotiated with Respondent called for Respondent to supply Complainant with up to one truckload (approximately 840 cartons) weekly of U.S. No. 1 60-count Idaho baking potatoes at the agreed price of $7.25 per 50-pound carton FOB, less $0.15 per carton for Complainant's brokerage. Beginning in September of 2003, and continuing through the end of June 2004, Complainant states each truckload was to load every Monday at Respondent's facility in Rupert, Idaho, on a truck contracted by Complainant through the Northwest Connection, LLC, a trucking/truck brokerage company located in Twin Falls, Idaho. Complainant states the potatoes were to be delivered to Sharon's Produce ("Sharon's") in Jackson, Mississippi the following Thursday, thereby enabling the driver to re-load in Laurel, Mississippi, and return to Idaho for the next Monday's load. Per the agreement, Complainant states that if Sharon's did not need a full truckload of 60-count potatoes, the balance could be filled with potatoes of other sizes at the prevailing weekly market price, per Sharon's instructions. According to Complainant, Respondent failed to ship the potatoes called for in the contract on nine different occasions, so Complainant was forced to purchase 60-count cartons of Idaho Russet potatoes on the open market at higher prices.

[2] The Secretary's jurisdiction is limited to $15,330.50 of this amount, as the complaint was not timely filed with respect to the remainder of Complainant's claim. See Finding of Fact 6, and this opinion's discussion of damages *infra*.

In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it asserts first that Complainant fails to state a cause of action against Respondent upon which relief can be granted. However, the Complainant alleges a failure on the part of Respondent, without reasonable cause, to deliver potatoes in accordance with the terms of the contract. This failure would constitute a violation by Respondent of Section 2 of the Act. Moreover, Complainant has standing as a buying broker to pursue this claim against Respondent because Complainant negotiated the purchase of the potatoes in its own name and was responsible for payment of the purchase price to Respondent.[3]

In its defense, Respondent admits that it agreed to sell 60-count potatoes to Complainant during the period of September 2003, through June 2004, at $7.25 per carton; however, Respondent states there was no quantity of potatoes or frequency of shipment agreed upon between the parties. Respondent states the contract was entered into prior to harvest, so Respondent did not know at that time what the volume and size profile of the crop would be. Respondent asserts that the agreement was that amount of potatoes supplied would be based on weekly discussions of what potatoes were available. (Answering Statement at 3.) In support of this assertion, Respondent notes that the written confirmation prepared by Complainant's Mr. Parks Dixon makes no mention of the quantity of potatoes to be supplied or the frequency of shipments. (See Finding of Fact 4.)

Complainant, as the party alleging that the contract called for Respondent to supply up to a truckload of 60-count cartons of Idaho Russet potatoes on a weekly basis during the contract period, has the burden to prove this allegation by a preponderance of the evidence. *See, e.g., Esch Farm v. Packers Canning Co.*, 50 Agric. Dec. 930, 933 (1991) ("The burden is on the moving party . . . to prove the contract terms by a preponderance of the evidence.") The most convincing evidence Complainant submitted is the sworn statements of Respondent's competitors: Ms. Kamille Klassen, of Sun River of Idaho, Inc., and Mr. Ryan Wahlen, of Pleasant Valley Potato, Inc.[4] Ms. Klassen and Mr. Wahlen acted on behalf of their respective firms in negotiating with Complainant to supply potatoes during both the

[3] See 7 C.F.R. § 46.28(c).

[4] See Formal Complaint Exhibits 10 and 11.

2002-2003 and 2003-2004 seasons. Ms. Klassen's statement reads, in pertinent part, as follows:

> I was contacted by Mr. Parks Dixon of G. W. Palmer & Co., Inc. and asked if my company was interested in offering a season long FOB price for up to one load of sixty-count Idaho potatoes to be shipped weekly. Any shortage on the truck, should Sharon's not require all sixty-count, would be filled with other count cartons at the prevailing market price. Transportation was to be provided each Monday primarily by Mr. Charlie Scott, an independent trucker brokered by Mr. Kevin Adam of The Northwest Connection.

After some inter-office consultation an offer was tendered and ultimately accepted by Mr. Dixon over the phone on behalf of Sharon's Produce. Shipments began that first Monday in September of 2002 and continued weekly until June 30th of 2003. The contract terms, offer, and acceptance were confirmed verbally.

> In August of 2003, I was again approached by Mr. Dixon to bid on the 2003-2004 Sharon's contract based on the same stipulated terms as the previous year. Mr. Scott was still to load each Monday and all other conditions were confirmed as being the same. I called Mr. Dixon with the offer from Sun River and was notified shortly thereafter that we were unsuccessful in winning the bid for that second season.

The second statement, from Mr. Ryan Wahlen, of Pleasant Valley Potato, Inc., reads, in pertinent part, as follows:

> In the late summer of both 2002 and 2003, Parks Dixon of GWP contacted me by phone and related the particulars of a contract bid that he was shopping among various Idaho shippers. I was asked to give a firm, season long price (September 1st through June 30the of the next calendar year) for the weekly shipment of up to a truck load of sixty-count Idaho potatoes (eight hundred and forty boxes of truck capacity). Any room left on the truck, should Sharon's Produce not require all sixty-count, would be filled with other carton sizes at the prevailing market price. Transportation had been secured with a reliable trucker for loading on Monday of each week.

These terms were clearly stated and unchanged from 2002 to 2003. After presenting my best offer verbally to Mr. Dixon, I was notified some time later that my offer had not been accepted by Sharon's Produce for that year.

As Respondent was bidding on the same contract as Sun River of Idaho, Inc. and Pleasant Valley Potato, Inc. for the 2003-2004 season, there is certainly strong evidence that the terms upon which Complainant negotiated with Respondent, other than price, were the same, or virtually the same, as the terms described in Ms. Klassen's and Mr. Wahlen's statements set forth above. Therefore, we find that Respondent orally contracted to sell up to one truckload per week of 60-count cartons of Idaho russet potatoes as Complainant required during the contract period, with assorted potatoes to fill the load at "mostly market."

Because this contract is an oral one, we must first address Respondent's claim in its Brief that under the U.C.C. § 2-201 (the U.C.C. Statute of Frauds) that enforcement of this contract is limited to the quantity of goods present in the confirmatory memorandum.[5] In general, the Statute of Frauds only acts as a bar to reparations enforcement under the Act when the state Statute of Frauds in question is substantive, and not procedural, in nature. *See Hegel Branch v. Mission Shippers*, 35 Agric. Dec. 726 (1976). A Statute of Frauds is substantive when it would void or invalidate a contract, but it is procedural when it would simply prevent enforcement by a court. *See Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 527 (3d Cir. 1950). Reparations precedent presumes that the Statute of Frauds in the U.C.C. is procedural, and not substantive. *See Faris Farms v. Lassen Farms*, 59 Agric. Dec. 471, 478-79 (2000); *Woods v. Conagra Inc.*, 50 Agric. Dec. 1018, 1021 (1991). Therefore U.C.C. § 2-201 does not prevent full enforcement of an otherwise valid contract

[5] A Statute of Frauds merely requires that certain types of contracts be in writing to be enforced. "[T]he primary theory of statutes of frauds, past and present, is that they are a means to the end of preventing successful courtroom perjury. This means is simply the requirement of a writing signed by the party to be charged . . . ." 1 James J. White & Robert S. Summers, *Uniform Commercial Code* § 2-8 (4th ed. 1995). Comment 4 to U.C.C. § 2-201 elaborates on this policy: "Failure to satisfy the requirements of this [Statute of Frauds] does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract."

under the Act. *See Faris Farms*, 59 Agric Dec. at 478-79. We have long held that "the [Act] intends to grant a new remedy which is not dependant upon . . . other remedies as may be available" in state laws. *Id*. (quoting *Hegel Branch*, 35 Agric. Dec. 726). However, Respondent may overcome the presumption when it can show that the state Statute of Frauds is substantive. *Id.*; *Woods*, 50 Agric. Dec. at 1021 (1991). In this case, we will enforce the oral agreement, because Respondent has failed to present any case law or other authority that the state Statute of Frauds is substantive.

Moreover, the lack of a specific quantity terms in the confirmatory memoranda, or in the oral communications between the parties, does not cause this contract to be too vague to be enforced. It appears from the evidence that the parties intended to make an oral requirements contract. The absence of a specific quantity term does not void a requirements contract.

As one court has succinctly described it: "A requirements contract is a contract which calls for one party to furnish materials or goods to another party to the extent of the latter's requirements in business." *Orchard Group v. Konica Medical Corp.*, 135 F.3d 421, (6th Cir. 1998). The U.C.C. § 2-311(1) allows contracts to "leave[] [the] particulars of performance to be specified by one of the parties." The specification need only be "made in good faith and within limits set by commercial reasonableness." The U.C.C. § 2-306(1) further describes this aspect of requirements contracts:

A term which measures the quantity by the output of the seller *or the requirements of the buyer* means such actual output or requirements as may occur in good faith, *except that no quantity unreasonably disproportionate to any stated estimate* or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded. (italics added)

Thus, a buyer's contract to obtain its requirements from a seller is enforceable when the seller agrees to provide the buyer with a quantity based on either the prior requirements of the buyer, or a stated estimate. Under a requirements contract it is the seller's duty to provide the requirements of the buyer, and the buyer's duty to purchase those requirements "in good faith and according to commercial standards of fair dealing in the trade." *See* U.C.C. § 2-306 Comment 2; *General Motors Corp. v. Paramount Metal Products Co.*, 90 F.Supp.2d 861, 873 (E.D. Mich. 2000).

First, we reject the Respondent's implication that a stated minimum amount is necessary to enforce a requirements contract. (See Closing Brief at 7-8.) The clear language of U.C.C. § 2-306(1) allows a party to a requirements contract to fulfill the contract terms by requesting any quantity that is not unreasonably disproportionate to stated estimates. This view is supported by comment 2 to U.C.C. § 2-306 that specifically allows a reasonable elasticity in a requirements contract, even where a complete discontinuance may occur. For these reasons, no minimum amount needs to be stated in a requirements contract for a valid contract to exist.

Second, Respondent's statement that "it was unknown what percentage of the crop was going to have a large profile" (Answering Statement at 2) does not negate the evidence that the parties entered into a requirements contract. Complainant's purpose was to supply the volume needs of a client at a stable price, and in seeking to supply those needs, entered into a requirements contract to ensure supply regardless of fluctuations in crop yield. (See Opening Statement at 1.) If the crop percentages had been reversed, with an overabundance of 60-count potatoes, Complainant would have had to purchase its good faith requirements from the Respondent at a higher price than would have been available on the open market. Requirements contracts necessarily involve a risk that there will be fluctuation in supply which may cause a party to incur a loss.

Finally, we discount Respondent's assertions in the Answering Statement at pg. 3, that Respondent would provide as many 60 count boxes on the truck as Respondent had available; because this term is contrary to the evidence supporting Complainant's need for a requirements contract. The evidence indicates there would have been no agreement if Respondent had offered only to provide what it had available, because Complainant would not have obtained the requisite price stability throughout the season.

Based on the evidence considered above, Complainant has proved that there was a valid oral requirements contract.

Complainant alleges that Respondent breached the oral requirements contract. The parties agree that Respondent failed to supply some of the weekly shipments of 60-count cartons of Idaho Russet potatoes between October 20, 2003 and March 1, 2004. Respondent admitted that during the period that it did not produce 60-count potatoes, it did not supply Complainant with any potatoes.

(Answering Statement at 4.) Respondent's failures were a breach of its duty to deliver Complainant's requirements for that period.

Complainant timely filed the informal complaint for Respondent's breach of contract occurring in January through March of 2004, but not for those occurring in October 2003. The Act requires that reparations claims be made within nine months from the time that the cause of action accrues. 7 U.S.C. §§ 499f(a)(1). The filing of an informal complaint tolls the statute of limitations. *W.T. Holland & Sons, Inc. v. Clair Sensenig*, 52 Agric. Dec. 1705, 1707 (1993). "A cause of action accrues when judicial proceeding may first be legally instituted upon it." *Prime Commodities, Inc. v. J. V. Campisi, Inc.*, 59 Agric. Dec. 461, 464 (2000). Complainant would have been able to seek damages on each occasion on which Respondent informed Complainant that it would not make delivery as scheduled in the contract. Therefore, the cause of action accrued in each instance when Respondent breached the contract by failing to ship the potatoes and Complainant was forced to contract for delivery from other suppliers. Complainant has provided credible invoices for the potatoes that it ordered to cover Respondent's failures. (formal Complaint at Exhibits 1-9.) The informal complaint was filed on September 3, 2004, and thus any failure of Respondent to deliver occurring before December 2003, is barred by the statute of limitations. According to the summary invoice prepared by Complainant, (formal Complaint at Exhibit 12) and compared to the invoices from the suppliers, (formal Complaint at Exhibits 1-9) it appears that Complainant has claimed $7,970.00 in damages for October cover invoices which must be excluded from the total amount of $23,300.50 claimed in the Complaint. Therefore we consider only the claimed amount of $15,330.50 for cover purchases made in January through March of 2004.

Concerning the specific amount of damages, U.C.C. § 2-711 allows buyers to "cover" losses when sellers fail to deliver. Under § 2-712(1), a buyer, without unreasonable delay, may make a good faith purchase to "cover" the cost of the seller's breach. When the buyer obtains "cover," the buyer may recover "the difference between the cost of cover and the contract price together with any incidental or consequential damages [as described in § 2-715] . . . but less expenses saved in consequence of the breach." U.C.C. § 2-712(2); *see also All Foods, Inc. v. Richard A. Shaw, Inc.*, 40 Agric. Dec. 1574, 1582 (1981).

Respondent argues in its Brief that the Complainant failed to mitigate damages by refusing to accept Colorado potatoes. (Closing Brief at 9-

10.) The oral contract required Idaho potatoes and Respondent failed to deliver the specified type of potatoes. Respondent's remaining contentions in its Brief are also without merit.

After first contacting the Respondent to determine if Respondent could make delivery of Idaho 60-count russet potatoes and learning that Respondent could not do so,[6] Complainant made the following purchases of potatoes as "cover" for Respondent's breach:[7]

Supplier	Quantity of Cartons	Total "Cover"	Date of Invoice
Garnand Marketing, LLC	630	$6,457.50	37999
Garnand Marketing, LLC	630	$7,087.50	38014
Garnand Marketing, LLC	714	$7,389.90	38025
Garnand Marketing, LLC	756	$10,281.60	38033
Garnand Marketing, LLC	588	$8,364.30	38041
Pleasant Valley Potato	724	$8,217.40	38046
Total:	4042	$47,798.20	

The net contract price that would be paid to Respondent was $7.10 per carton. (Finding of Fact 3.) Complainant would have paid $28,698.20 (4042 cartons * $7.10) for the same number of potatoes, had Respondent delivered them. The $47,798.20 that Complainant paid in cover, minus the contract price of $28,698.20, leaves a total of $19,100.00 in total cost of cover. In addition, Complainant did not claim or present evidence of consequential damages which may have arisen because of Respondent's breach.

However, for two transactions, Complainant saved an "expense" in consequence of Respondent's breach: the expense of shipping costs to be paid to The Northwest Connection ("TNC") when Complainant entered into delivered transactions. *See* 1 White and Summers,

[6] Opening Statement, at

[7] Opening Statement, at 4; Opening Statement at Exhibit H; *see also* Complaint at Exhibits 4-9. The numbers in the table are taken from the sellers' invoices attached to the Opening Statement.

Uniform Commercial Code, § 6-3 (4th ed. 2006) (discussing damages in light of a breach in an f.o.b. shipping point contract and cover through an f.o.b. delivery point contract). The original contract was f.o.b., with Complainant incurring an expense of $2.75 per carton in shipping that it paid to TNC. (See Finding of Fact 4.) For the first transaction, Garnand's invoice to Complainant, issued February 17, 2004, bills Complainant for a purchase of 756 cartons of U.S. No. 1 60-count russet potatoes at $13.60 per carton delivered, or $6.50 per carton more than Complainant would have paid Respondent pursuant to their contract. In that delivered transaction, the expense of $2.75 Respondent would have incurred reduces the amount Complainant actually paid in cover by $2,079.00 ($2.75*756). For the second transaction, on Garand's invoice to Complainant, issued February 25, 2004, Complainant was billed for 588 cartons of 60-count potatoes at $14.225 per carton delivered, or $7.125 per carton over the contract price. Likewise, for that delivered transaction, Complainant did not incur the $2.75 per carton shipping expense, and therefore the amount paid in cover is reduced by $1,617.00 (2.75*588). In total, Complainant saved $3,696 in shipping charges that it would have otherwise paid to TNC, reducing Complainant's total damages under UCC § 2-712 to $15,404.00.

Further, there is no evidence that the cost of cover was unreasonable under U.C.C. § 2-712. When we compare the USDA Market News daily service reports[8] for the Upper Valley Twin-Falls/Burley District of Idaho for shipping point potatoes on the shipment dates with Respondent's formal Complainant at Exhibit 12, it appears that the price per carton of 60-count potatoes that Complainant obtained was greater than the high market price only three times, the January 14, 2004 invoice (0.25 greater), the February 17, 2004 invoice ($2.60 greater[9]), and the February 25, 2004 invoice ($2.725 greater).[10] On the remaining two shipments Complainant

[8] The reports can be found at <http://marketnews.usda.gov/portal/fv> and we take judicial notice of them. *See Triton Imports, Inc. v. S. C. Distributing Co.*, 52 Agric. Dec. 1674, 1681 (1993); *Teixtra Farms, Inc. v. Community Suffolk, Inc.*, 52 Agric. Dec. 1696, 1699 (1993).

[9] When the invoice price is compared to the market price of the closest corresponding date: Feb. 17, 2004.

[10] In two of these instances, the Feb. 16 and the Feb. 23 invoices, the price was "delivered" and therefore some shipping cost was likely present in the invoice price. We have already reduced the damages in light of the shipping expenses saved in (continued...)

purchased potatoes to cover at less than the market high price. Considering all of the circumstances, particularly that Complainant was under considerable time pressure due to the tight shipping schedule, and the high prices for 60-count Idaho Russet potatoes at the time, Complainant's cover was reasonable. *Cf. R&R Produce, Inc. v. Fresh Unlimited, Inc.*, 56 Agric. Dec. 997, 1009-10 (1997) (discussing cover in light of the immediate need of a purchaser); *see also Feldman Brothers Produce Co. v. A. Pellegrino & Sons*, 32 Agric. Dec. 1845 (1973) (allowing reasonable cover when the contracted volume was not precise); *Produce Distributors v. Mutual Vegetable Sales*, 29 Agric. Dec. 1105, 1108 (1970) (finding a price greater than the cover price reasonable without reference to market price).

Ordinarily, the total amount we would award in damages would be $15,404.00 according to the formula in U.C.C. § 2-712, but Complainant only sought damages of $15,330.50. The difference of $73.50 appears to be due to Complainant's miscalculation of the expense it saved in consequence of the breach. In the invoice Complainant issued to Respondent for the cost of its cover purchases, which is the basis of its claim (formal Complaint at Exhibit 12), Complainant shows an amount due for two of the cover purchases it made from Garnand Marketing, LLC, that are considerably lower than the cost listed on Garnand's invoices to Complainant, which are attached to Complainant's Opening Statement as Exhibit H, pages 5 and 6. As discussed above, both of those transactions were delivered and not f.o.b. as the parties' had agreed. First, Complainant's invoice to Respondent for the February 17 cover purchase shows the cost of cover as $3.75 per carton. Subtracting the shipping expense of $2.75 that Complainant saved by entering into the delivered transaction from the $6.50 that was the amount over the original contract price invoiced from Garnand, results in the same price in cover as Complainant listed on its invoice to Respondent: $3.75 per carton. However, on Garand's invoice to Complainant, issued February 25, 2004, Complainant was billed for 588 cartons of 60-count potatoes at $7.125 per carton over the contract price. Subtracting the $2.75 in shipping that was an expense that Complainant saved in consequence

[10](...continued)
consequence of Respondent's breach on these two loads. Further, Complainant did not actually claim the full amount on the invoices, and chose instead to claim amounts that are below the market high prices.

of the breach, Complainant had $4.375 per carton in damages on that load. On the other hand, Complainant's invoice to Respondent for this cover purchase shows the cost of cover as $4.25 per carton. The difference is $73.50 (($ 4.375 – $4.25)*588 cartons). This difference between the cover based on Garnand invoices to Complainant and the cover showed on Complainant's invoice to Respondent equals the difference between our calculation of damages of $15,404.00, and the amount sought by Complaint of $15,330.50. However, we can only award Complainant the amount of damages it sought in its formal Complaint, or $15,330.50. *See Mendelson-Zeller Co. v. M.K. Hall Produce*, 28 Agric. Dec. 1169 (1969).

Respondent's failure to deliver the potatoes according to the contract terms is a violation of Section 2 of the Act. The total amount owed by Respondent for the 7 loads of potatoes that Complainant had to purchase to cover Respondent's breach is $15,330.50. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of Section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Because the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest at a reasonable rate as part of each reparation award. *See Thomas Produce Co. v. Lange Trading Co.*, 62 Agric. Dec. 331, 341-42 (2003); *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, 29 Agric. Dec. 978 (1970); *Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); *W.D. Crockett v. Producers Marketing Ass'n, Inc.*, 22 Agric. Dec. 66 (1963). Interest will be determined in accordance with the method set forth in 28 U.S.C. § 1961, i.e., the rate of interest will equal the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week ending prior to the date of the Order.

Complainant was required to pay a $300.00 handling fee to file its formal Complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order Respondent shall pay to Complainant, as reparation, $15,630.50 with interest thereon at the rate of **4.90%** per annum from March 1, 2004.

Copies of this Order shall be served upon the parties.

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SOL FRESH PRODUCE, INC. v. LA REPACK, INC.
PACA Docket No. R-06-036.
Decision and Order.
Filed June 14, 2006.

PACA – Jurisdiction - Respondent unlicensed but Operating Subject to License.

Where it was established from evidence regarding the transactions that are the subject of the reparation complaint, along with evidence regarding transactions that are not the subject of the complaint, that Respondent was operating subject to license during the time period of the transactions contained in the complaint, Respondent held liable for the reasonable value of tomatoes received and sold on behalf of Complainant.

Decision and Order by William R. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.). A timely complaint was filed with the Department within nine months from the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of $15,087.15 in connection with two truckloads of tomatoes shipped in the course of interstate commerce.

A copy of the formal Complaint was served upon the Respondent, who was afforded twenty days from receipt of the formal Complaint to file an answer. After Respondent failed to submit an answer within the requisite period of time, a Default Order was issued on January 31, 2005, awarding Complainant the full amount of its claim. The Department subsequently received from Respondent a motion to vacate the Default Order because Respondent did not have notice of either the Complaint or the Default Order due to a wrongful eviction that prevented Respondent from accessing its business premises. Since service of the Complaint and the Default Order therefore was not completed, Respondent's motion was granted and the Default Order was vacated on June 9, 2005. Respondent thereafter submitted

an Answer to Complaint and Counterclaim. Respondent's Counterclaim was not, however, accompanied by the requisite $300.00 handling fee. Respondent was afforded an opportunity to either submit the $300.00 handling fee or resubmit its Answer, removing the Counterclaim. Respondent did neither, so the Answer to Complaint and Counterclaim was served upon Complainant, although Complainant was advised that only the Answer was being served, as the Counterclaim could not be considered absent the submission of the required $300.00 handling fee.

The amount claimed in the formal Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Both parties also submitted a Brief.

Findings of Fact

1. Complainant, Sol Fresh Produce, Inc., is a corporation whose post office address is 2300 Vo-Tech Drive, Weslaco, Texas, 78596-9025. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, LA Repack, Inc., is a corporation whose post office address is 1956 E. 20th Street, Los Angeles, California, 90058. At the time of the transactions involved herein, Respondent was not licensed but was operating subject to license under the Act.
3. On January 14, 2004, Complainant shipped from loading point in the state of Texas, to Respondent in Los Angeles, California, one truckload of tomatoes comprised of 435 cartons of extra large Roma tomatoes, 640 cartons of large Roma tomatoes, 305 cartons of medium Roma tomatoes, and 60 cartons of small Roma tomatoes.
4. On January 19, 2004, Complainant shipped from loading point in the state of Texas, to Respondent in Los Angeles, California, one truckload of tomatoes comprised of 398 cartons of extra large Roma tomatoes, 480 cartons of large Roma tomatoes, 251 cartons of medium Roma tomatoes, and 10 cartons of small Roma tomatoes.
5. On February 2, 2004, Complainant issued invoice number NS-0430 billing Respondent for the 1,440 cartons of tomatoes shipped on January 14, 2004 at $5.85 per carton, for a total invoice price of

$8,424.00. On the same date, Complainant issued invoice number NS-0475 billing Respondent for the 1,139 cartons of tomatoes shipped on January 19, 2004 at $5.85 per carton, for a total invoice price of $6,663.15. Respondent has not paid Complainant for either invoice.

6. The informal complaint was filed on November 10, 2004, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the invoice price for two truckloads of tomatoes allegedly sold and shipped to Respondent. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since failed and refused to pay the agreed purchase prices totaling $15,087.15. As evidence in support of this contention, Complainant attached to the formal Complaint copies of its invoices billing Respondent for the tomatoes.[1]

In response to the complaint and evidence submitted by Complainant, Respondent filed a sworn Answer wherein it denies purchasing the tomatoes from Complainant and asserts that it merely agreed to store the tomatoes at its facility. Respondent states specifically that during the time period in question, Complainant caused produce to be delivered to the storage facility maintained by Respondent in Los Angeles. According to Respondent, the authorized representative of Complainant, Balthazar Valencia, explained to Respondent's Martin Maldonado that Complainant had been unable to sell the produce to the third party purchasers with whom it originally contracted due to the condition of the produce. Respondent states Mr. Valencia asked that Respondent unload the produce in question and store it at Respondent's facility, and agreed to pay Respondent's standard unloading and storage charges. After the produce was unloaded and stored, Respondent states that Complainant, through Balthazar Valencia, requested that Respondent maintain the produce at its facility and allow produce purchasers to come to the facility to purchase the produce on a salvage basis. Respondent states Mr. Valencia authorized Respondent to apply any sales proceeds to its unloading and storage charges, and requested that any balance be remitted to him for payment on behalf of

[1] See Formal Complaint, Exhibit No. 1.

Complainant. Respondent states Martin Maldonado agreed to this arrangement but advised Mr. Valencia that no purchasers for the produce would be solicited. Subsequent to the agreement between Mr. Valencia and Mr. Maldonado, Respondent states limited sales of the produce delivered by Complainant took place and the proceeds were applied to Respondent's unloading and storage charges.

For its Opening Statement, Complainant submitted an affidavit from its Vice-President, Kathy DeBerry. In her affidavit, Ms. DeBerry explains that her responsibilities include the monitoring of the sale of perishable agricultural commodities, including those sales that are the subject of this dispute. Ms. DeBerry states that on January 27, 2004, she approved the sale of 1,440 cartons of various tomatoes to Respondent, all priced at $5.85 per carton, for a total amount of $8,424.00. Ms. DeBerry states further that the tomatoes were shipped to Respondent on February 2, 2004, and that true and correct copies of the invoice and bill of lading are attached to her affidavit as Exhibits 1 and 2. Upon review of these documents, however, we note that while the invoice lists a sale date of January 27, 2004, and a ship date of February 2, 2004, as stated by Ms. DeBerry in her affidavit, the bill of lading shows that the tomatoes were shipped from Complainant's place of business in Weslaco, Texas, on January 14, 2004. For the second shipment, we encounter a similar discrepancy. Ms. DeBerry states in her affidavit that on January 27, 2004, Complainant sold and delivered to Respondent 1,139 cartons of various tomatoes, all priced at $5.85 per carton, for a total amount of $6,663.15. Ms. DeBerry states further that true and correct copies of the invoice and bill of lading are attached to her affidavit as Exhibits 3 and 4. Review of these documents discloses, however, that the invoice lists a sale date of January 27, 2004, and a ship date of February 2, 2004, but the bill of lading shows that the tomatoes were shipped from Complainant's place of business in Weslaco, Texas, on January 19, 2004.

In response to the Opening Statement, Respondent submitted an affidavit from its President, Martin Maldonado, for its Answering Statement. In his affidavit, Mr. Maldonado explains that Respondent, which is no longer in business, was a corporation primarily engaged in the repackaging and storage of merchant goods and produce, and that Respondent was never involved in the purchase and sale of produce. Mr. Maldonado states that occasionally, at the request of a repackaging client, Respondent would facilitate a sale on behalf of the client. With respect to the two loads of tomatoes in question, Mr. Maldonado states that after the tomatoes were unloaded and stored,

Complainant's Balthazar Valencia instructed Mr. Maldonado to keep them there and allow any purchasers coming through Respondent's facility to make a salvage level purchase offer for them, and to apply anything received to Respondent's unloading and storage charges. In response, Mr. Maldonado states he told Mr. Valencia that he would not solicit any buyers but that he would tell anyone who inquired that the produce was available for sale and that an offer of purchase could be made. Mr. Maldonado states a few buyers bought a small amount of Complainant's produce, and that Respondent threw out what did not sell. According to Mr. Maldonado, Respondent received approximately $5,000.00 to $6,000.00 for the produce, which was slightly less than what Respondent was owed for its unloading and storage charges.

In response to the Answering Statement, Complainant submitted a second affidavit from Kathy DeBerry for its Statement in Reply. In this affidavit, Ms. DeBerry states she has reviewed the affidavit of Martin Maldonado, and that she denies his assertion that Respondent was not involved in the purchase and sale of produce. Ms. DeBerry also denies that Respondent merely agreed to store the subject tomatoes pursuant to an alleged agreement between a former representative of Complainant, Balthazar Valencia, and Mr. Maldonado. Ms. DeBerry states the invoices attached to her prior affidavit establish that Rodrigo Castro, not Balthazar Valencia, was the salesperson involved in the transactions at issue. We note, however, that while Ms. DeBerry's testimony concerning the invoices is correct, the bills of lading for the same shipments list the salesman as "Baltazar." Nevertheless, Ms. DeBerry states that neither Mr. Castro nor Mr. Valencia were authorized to enter into the storage agreement Mr. Maldonado describes, and denies that such an agreement was entered into. Ms. DeBerry asserts, to the contrary, that Respondent purchased the produce at issue, accepted delivery, exercised dominion and control over the product, and has failed to account for or remit any monies for the produce.

Upon review of the statements and other evidence presented, we find that Complainant has failed to sustain its burden to prove that Respondent agreed to purchase the subject tomatoes under the terms and at the prices asserted in the formal Complaint. The only evidence Complainant offers to prove the existence of such an agreement is the testimony of Kathy DeBerry, an individual who does not appear to have any firsthand knowledge of the negotiations that Respondent alleges took place between Complainant's Balthazar Valencia and

Respondent's Martin Maldonado concerning the subject tomatoes. Rather, Ms. DeBerry appears to have based her testimony upon the invoices prepared by Complainant, which were prepared well after the tomatoes were shipped, and which contain information that, as we already noted, conflicts with the information that appears on the bills of lading prepared at the time of shipment.

Although we have not found the existence of an agreement by Respondent to purchase the tomatoes under the terms and at the prices invoiced, it is apparent that Respondent did more than unload and store the tomatoes for Complainant. Respondent acknowledges that while the tomatoes were stored at its facility they were offered for sale. Moreover, Respondent does not allege that Complainant had an agent present at its facility to effect such sales. On the contrary, Respondent admits that it collected proceeds from the sale of the tomatoes on behalf of Complainant. While Respondent makes much of the fact that it did not solicit any sales, it makes no difference whether or not Respondent actively attempted to sell the tomatoes or not. The fact that sales were made and proceeds collected by Respondent on Complainant's behalf creates a sales agency relationship between the parties.

While Respondent was not licensed at the time of the transactions in question, it nevertheless appears that Respondent was operating subject to license under the Act. The Act defines the term "commission merchant" as meaning, "any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, *or for or on behalf of another*."[2] **(emphasis supplied). In addition to the two transactions at issue in this complaint, Respondent submitted evidence of two instances in March and April of 2004, when it received truckload quantities of tomatoes from Four Seasons Trading Co., Donna, Texas.**[3] **Included in this evidence is a copy of an "Adjustment Memo" prepared by Four Seasons Trading Co. on April 3, 2004, that reads, "[p]lease bill L.A. Repack was rejected at Farmers Link will work for our account." On the basis of this and the other evidence submitted in connection with the transactions at issue in this dispute, we conclude that there is sufficient proof in the record to establish that Respondent was engaged in business as a commission merchant. Section 3(a) of**

[2] See 7 U.S.C. § 499a(5).

[3] See Answering Statement, Exhibit A.

the Act states, "no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time."[4] Respondent was, therefore, operating subject to license under the Act.

A party who accepts goods for sale on behalf of another, *i.e.*, a consignee, has the duty to promptly and properly resell the goods, render an accounting and pay the net proceeds. *Stoops & Wilson, Inc. v. Wholesale Produce Exchange*, 41 Agric. Dec. 290 (1982); *Collins Bros. Produce Co. v. Dixieland Produce*, 38 Agric. Dec. 1031 (1979). In this regard, Respondent states the tomatoes sold for approximately $5,000.00 to $6,000.00, and that its storage and unloading expenses exceeded this amount. Respondent did not, however, submit an account of sales to substantiate this contention. In the absence of an accounting, we will refer to relevant USDA Market News reports to determine a reasonable value for the tomatoes that Respondent sold on Complainant's behalf.

The Los Angeles Terminal Price Report for January 16, 2004, the date we estimate the first shipment of tomatoes was available for resale, shows that 25-pound cartons of loose Roma tomatoes originating from Mexico were selling for $7.00 to $10.00 per carton for extra large size; $7.00 to $9.00 per carton for large size; and $6.50 to $8.00 per carton for medium size. Since Complainant did not submit a statement from Balthazar Valencia to refute Martin Maldonado's sworn contention that Mr. Valencia sent the tomatoes to Respondent's facility to be sold on a salvage basis, we assume that the tomatoes in question were in less than average marketable condition.[5] We will, therefore, use the lowest reported price for each size of tomato to determine their reasonable value. On this basis, we find that the 435 cartons of extra large tomatoes in this shipment had a reasonable value of $7.00 per carton, or $3,045.00; the 640 cartons of large tomatoes had a reasonable value of $7.00 per carton, or $4,480.00; and the 305 cartons of medium tomatoes had a reasonable value of $6.50 per carton, or $1,982.50.

The Market News report just referenced does not list prices for small Roma tomatoes originating from Mexico. We note, however, that the

[4] 7 U.S.C. § 499c.

[5] A sworn statement that has not been controverted must be taken as true in the absence of other persuasive evidence. See *Sun World International, Inc. v. Bruno Dispoto Co*., 42 Agric. Dec. 1675 (1983); *See, also, Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265 (1982).

shipping point price report issued by Market News for the date these tomatoes were shipped lists the same range of prices for both medium and small Roma tomatoes originating from Mexico.[6] On this basis, we find that the terminal market prices listed for medium Roma tomatoes present the best available measure of the value of the small Roma tomatoes in this shipment. On this basis, we find that the 60 cartons of small Roma tomatoes in question had a reasonable value of $6.50 per carton, or a total of $390.00. The shipment of tomatoes as a whole, therefore, had a total reasonable value of $9,897.50. From this amount, Respondent is entitled to deduct 15%, or $1,484.63, for commission at the usual and customary rate. Respondent is not entitled to a deduction for its unloading and storage expenses because Respondent did not submit any evidence showing the amount of the expenses incurred, nor did Respondent allege that the parties agreed to a specific rate of recovery for these expenses. After deducting Respondent's commission from the reasonable value of the tomatoes, there remains an amount due Complainant from Respondent for this shipment of tomatoes of $8,412.87.

For the tomatoes shipped January 19, 2004, we refer to the Los Angeles Terminal Report for January 21, 2004, the date we estimate that this shipment of tomatoes was available for resale. That report shows that 25-pound cartons of loose Roma tomatoes originating from Mexico were selling for $7.00 to $10.00 per carton for extra large size, $7.00 to $9.00 per carton for large size, and $6.50 to $8.00 per carton for medium size. Once again, we will use the lowest of the reported prices for each size of tomato to determine their reasonable value. On this basis, we find that the 398 cartons of extra large tomatoes in this shipment had a reasonable value of $7.00 per carton, or $2,786.00; the 480 cartons of large tomatoes had a reasonable value of $7.00 per carton, or $3,360.00; and the 251 cartons of medium tomatoes had a reasonable value of $6.50 per carton, or $1,631.50. Since the Market News report just referenced does not list prices for small Roma tomatoes originating from Mexico, we will, once again, use the prices listed for medium Roma tomatoes to determine the reasonable value of the small Roma tomatoes in this shipment. On this basis, we find that the 10 cartons of small Roma tomatoes in question had a reasonable value of $6.50 per carton, or a total of $65.00. The shipment of tomatoes as a whole, therefore, had

[6] Recap of Available Vegetable Fobs for Wednesday, January 14, 2004, available on the Internet at http://www.ams.usda.gov/mnarchive/2004/jan/01%2D14%2D2004/wa%5Ffv102.txt.

a total reasonable value of $7,842.50. From this amount, Respondent is entitled to deduct 15%, or $1,176.38, for commission at the usual and customary rate. This leaves an amount due Complainant from Respondent for this shipment of tomatoes of $6,666.12. This amount added to the amount due for the January 14, 2004 shipment of tomatoes results in a total amount due Complainant from Respondent for the two shipments of tomatoes in question of $15,078.99.

Respondent's failure to pay Complainant $15,078.99 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of Section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bache Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. ____ (2006).

Complainant in this action paid $300.00 to file its formal complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $15,078.99, with interest thereon at the rate of 5.04% per annum from March 1, 2004, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS DECISIONS

In re: HUNTS POINT TOMATO CO., INC.
PACA Docket No. D-03-0014.
Order Denying Petition to Reconsider.
Filed January 9, 2006.

PACA – Perishable agricultural commodities – Failure to pay – Exact amount owed – Burden of proof – Preponderance of the evidence – Settlement offers – Publication of facts and circumstances.

The Judicial Officer denied Respondent's petition to reconsider *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005). The Judicial Officer rejected: (1) Respondent's contention that the finding that Respondent violated 7 U.S.C. § 499b(4) was not supported by the evidence; (2) Respondent's contention that the Judicial Officer's conclusion that Chief Administrative Law Judge Marc R. Hillson was not required to determine the exact amount of money Respondent failed to pay its produce sellers in accordance with the PACA, was error; (3) Respondent's assertion that the Judicial Officer imposed employment restrictions against Respondent in *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005); (4) Respondent's contention that it cannot be found to have violated the prompt payment provision of the PACA because its produce sellers and the United States District Court for the Southern District of New York determined the timing and the amount of Respondent's payments for produce; (5) Respondent's suggestion that Complainant was required to accept Respondent's settlement offer; and (6) Respondent's suggestion that the Judicial Officer has authority under the Rules of Practice to direct a party to accept another party's settlement offer.

Andrew Y. Stanton, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on March 31, 2003. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); 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].

Complainant alleges Hunts Point Tomato Co., Inc. [hereinafter Respondent], during the period September 2001 through June 2002, failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of $795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). On August 7, 2003, Respondent filed an Answer denying the material allegations of the Complaint (Answer ¶¶ 3-4).

On August 10, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On October 15, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on November 17, 2004, Respondent filed Respondent's Proposed Findings of Fact and Law. On December 6, 2004, Complainant filed Complainant's Reply Brief.

On April 21, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision]: (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; and (2) ordering the publication of the facts and circumstances of Respondent's violations (Initial Decision at 7-8, 12).

On October 7, 2005, Respondent appealed to the Judicial Officer. On October 17, 2005, Complainant filed Complainant's response to Respondent's appeal petition. On October 25, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On November 2, 2005, I issued a Decision and Order: (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; and

(2) ordering the publication of the facts and circumstances of Respondent's violations.[1]

On December 12, 2005, Respondent filed a Petition to Reconsider *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005). On January 3, 2006, Complainant filed Complainant's Response to Petition to Reconsider. On January 5, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition to Reconsider. Based upon a careful consideration of the record, I deny Respondent's Petition to Reconsider.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a

[1] *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914, 1934 (2005).

preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days,

except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

. . . .

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499h(a), (e), 499p.

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises five issues in Respondent's Petition to Reconsider. First, Respondent contends the finding that Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of $795,878.80 for 118 lots of perishable agricultural commodities, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), is not supported by the evidence (Respondent's Pet. to Reconsider at 2).

Complainant conducted an investigation of Respondent after Complainant received at least 10 complaints that Respondent was not paying for perishable agricultural commodities. As part of this investigation, Wayne Shelby, a marketing specialist employed by the United States Department of Agriculture, and Timothy Swainhart, an assistant regional director for the Perishable Agricultural Commodities Branch, United States Department of Agriculture, went to Respondent's place of business on July 24, 2002. Wayne Shelby and Timothy Swainhart met with Lenny Guerra, Respondent's office manager, who identified and provided for copying Respondent's accounts payable files. (Tr. 23-24, 27-28, 31-35.)

The accounts payable files, which Respondent provided to Complainant, indicate that, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of $795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce (CX 3-CX 35; Tr. 37-49). At an exit conference on August 7, 2002, Respondent's president, sole director, and sole shareholder, Anthony Guerra, acknowledged that Respondent owed more than $1,000,000 for produce purchased and received, some of which was not in interstate or foreign commerce (Tr. 46).

Respondent did not rebut the evidence introduced by Complainant to prove that Respondent violated the prompt payment provision of the PACA. Therefore, I reject Respondent's contention that the finding that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) is not supported by the evidence. Instead, I find Complainant proved by a preponderance of the evidence[2] that, during

[2]Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative (continued...)

the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of $795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and

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[2](...continued)
Procedure Act is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re PMD Produce Brokerage Corp.* 60 Agric. Dec. 780, 794 n.4 (2001) (Decision on Remand), *aff'd*, No. 02-1134, 2003 WL 211860247 (D.C. Cir. May 13, 2003); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 399 n.2 (2000), *appeal voluntarily dismissed*, No. 00-1465 (D.C. Cir. Aug. 15, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999), *printed in* 58 Agric. Dec. 999 (1999), *cert. denied*, 531 U.S. 928 (2000); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *final decision on remand*, 58 Agric. Dec. 1041 (1999), *aff'd*, 235 F.3d 608 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

accepted in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Second, Respondent contends the Judicial Officer's conclusion that the Chief ALJ was not required to find the exact amount Respondent failed to pay its produce sellers in accordance with the prompt payment provision of the PACA, is error (Respondent's Pet. to Reconsider at 3).

The Chief ALJ found, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 produce sellers of the agreed purchase prices in a total amount "over $795,000" for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce (Initial Decision at 7-8). Since this finding alone is sufficient to conclude that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and $795,000 is more than a de minims amount of money, I reject Respondent's contention that my conclusion that the Chief ALJ was not required to find the exact amount Respondent failed to pay its produce sellers in accordance with the PACA, is error.[3]

Third, Respondent asserts the sanction in this proceeding involves severe employment restrictions. Respondent contends, in order to justify severe employment restrictions, Complainant must prove the amount of money Respondent failed to pay produce sellers in accordance with the PACA is not de minims and a person responsibly connected with Respondent caused Respondent's failure to comply with the PACA. (Respondent's Pet. to Reconsider at 3.)

I disagree with Respondent's assertion that I imposed employment restrictions in this proceeding. Based on my conclusion that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), I ordered the publication of the facts and circumstances of Respondent's violations. *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914, 1934 (2005). Moreover, Complainant proved by a preponderance of the evidence[4] that, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 sellers of the

[3]I also note, while the Chief ALJ did not find the exact amount Respondent failed to pay its produce sellers in accordance with the prompt payment provision of the PACA, I found Respondent failed to make full payment to 33 sellers of the agreed purchase prices in the total amount of exactly $795,878.80. *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914, 1920, 1923, 1931-32 (2005).

[4]See note 2.

agreed purchase prices in the total amount of $795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce. I find $795,878.80 is not a de minims amount of money. Finally, PACA does not require that a responsibly connected[5] person cause the PACA licensee to violate the PACA. Section 16 of the PACA (7 U.S.C. § 499p) explicitly provides that a PACA licensee is liable for the acts or omissions of any agent, officer, or other person acting for, or employed by, the PACA licensee.

Fourth, Respondent asserts it cannot be found to have violated the prompt payment provision of the PACA because Respondent's creditors and the United States District Court for the Southern District of New York determined the timing and the amount of Respondent's payment for produce (Respondent's Pet. to Reconsider at 3).

On May 31, 2002, two of the produce sellers listed in the Complaint, Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., instituted an action against Respondent pursuant to section 5(c) of the PACA (7 U.S.C. § 499e(c)), to enforce payment for produce from the PACA trust. On May 31, 2002, Judge Richard Conway Casey issued a Temporary Restraining Order restraining Respondent from dissipating, paying, transferring, assigning, or selling assets covered by the trust provisions of the PACA without agreement of Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., or until further order of the United States District Court for the Southern District of New York (RX 2).

On October 2, 2002, Judge Lawrence M. McKenna issued a Preliminary Injunction and Order Establishing PACA Trust Claims Procedure, superseding and replacing Judge Casey's Temporary Restraining Order on behalf of 16 plaintiff companies. The Preliminary Injunction and Order Establishing PACA Trust Claims Procedure: (1) recognized that Respondent was in possession of 100 percent of the PACA trust assets at issue; (2) established a PACA trust account into which all of Respondent's PACA trust assets would be deposited; (3) appointed an escrow agent; and (4) established procedures for proof of claims and distribution of trust assets. (RX 1.)

While Judge Lawrence M. McKenna enjoined Respondent from disbursing any of its PACA trust assets other than through the actions of the court-appointed escrow agent operating the PACA trust, the

[5]The term "responsibly connected" is defined in 7 U.S.C. § 499a(b)(9).

injunction is not a defense to Respondent's failures to comply with the prompt payment provision of the PACA. Since the PACA trust action arose directly from Respondent's failures to pay its produce sellers in the first place, to allow the PACA trust action as a defense to Respondent's failures to comply with the prompt payment provision of the PACA would be counter to the clear purposes of the PACA.

Fifth, Respondent asserts it offered to make full payment to its produce sellers to resolve this proceeding. Respondent further asserts Complainant's failure to accept Respondent's settlement offer "defied common sense" and "is 'arbitrary and capricious.'" Respondent also asserts, by affirming Complainant's failure to accept Respondent's settlement offer, the Judicial Officer "failed to breathe life into a rule that is as rigid as a corpse" and "decided that he and the case law surrounding the Rules of Practice are powerless to prevent 'arbitrary and capricious' behavior." (Respondent's Pet. to Reconsider at 4.)

Voluntary settlements are highly favored in proceedings under the Rules of Practice.[6] However, the Rules of Practice do not require a party to accept a settlement offer made by another party, as Respondent suggests. Complainant had complete discretion to accept or reject Respondent's settlement offer. Respondent's assertion that Complainant's failure to accept Respondent's settlement offer defied common sense and is arbitrary and capricious, is without merit.

Moreover, the Judicial Officer has no authority under the Rules of Practice to direct a party to accept another party's settlement offer. Therefore, even if I were to find that Complainant's failure to accept Respondent's settlement offer defied common sense and was arbitrary and capricious (which I do not so find), I would have no authority to require Complainant to accept Respondent's settlement offer.

For the foregoing reasons and the reasons set forth in *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005), Respondent's Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent's Petition to Reconsider was timely filed and automatically stayed *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005). Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order

[6]*In re Gwain Wilson*, 64 Agric. Dec. 1696, 1698 (2005) (Remand Order as to John R. LeGate, Sr.); *In re Gwain Wilson*, 64 Agric. Dec. 1693, 1695 (2005) (Remand Order as to William Russell Hyneman).

in *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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

ORDER

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's violations shall be published. The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Order Denying Petition to Reconsider in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Respondent must seek judicial review within 60 days after entry of the Order in this Order Denying Petition to Reconsider.[7] The date of entry of the Order in this Order Denying Petition to Reconsider is January 9, 2006.

In re: CHARLES R. BRACKETT AND TOM D. OLIVER.
PACA Docket No. APP-03-0004.
Ruling on Respondent's Appeal Limited to Procedural Issue.
Filed April 4, 2006.

PACA-APP – Perishable agricultural commodities – Responsibly connected – Disciplinary proceeding – Joinder – Due process.

The Judicial Officer vacated Chief Administrative Law Judge Marc R. Hillson's (Chief ALJ) ruling providing Petitioners an opportunity to raise defenses to the Perishable Agricultural Commodities Act (PACA) violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003). The Judicial Officer rejected the Chief ALJ's conclusion that denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with the PACA, the Rules of Practice, and Petitioners' due process rights.

[7]See 28 U.S.C. § 2344.

Andrew Y. Stanton for Respondent.
Andrew M. Greene, Atlanta, GA, for Petitioners.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On February 12, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued determinations that Charles R. Brackett and Tom D. Oliver [hereinafter Petitioners] were responsibly connected with Atlanta Egg & Produce Co. during the period February 2001 through March 2002, when Atlanta Egg & Produce Co. violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]. On March 13, 2003, Petitioners filed a Petition For Review pursuant to the PACA 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] seeking reversal of Respondent's February 12, 2003, determinations that Petitioners were responsibly connected with Atlanta Egg & Produce Co.

On September 30, 2003, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] held a conference call with Petitioners and Respondent. During the conference call Petitioners requested an opportunity to introduce evidence that Atlanta Egg & Produce Co. had not violated the PACA as alleged in a complaint filed in the disciplinary administrative proceeding instituted against Atlanta Egg & Produce Co. on October 23, 2002, and to argue Petitioners were not responsibly connected with Atlanta Egg & Produce Co. because it had not violated the PACA. On October 2, 2003, the Chief ALJ ordered that Petitioners and Respondent submit briefs regarding Petitioners' request.

After Petitioners and Respondent submitted briefs,[1] the Chief ALJ: (1) issued a decision in *In re Atlanta Egg & Produce Co.*, 63 Agric.

[1]"Brief of the PACA Branch Regarding Petitioners' Request to Assert the Alleged Defenses of Atlanta Egg & Produce Co., Inc.," filed by Respondent on October 15, 2003; "Reply Brief of Charles R. Brackett and Tom D. Oliver to Complainant's Response in Opposition to Petitioners' Request to Intervene in the Matter of Atlanta Egg & Produce Co., Inc.," filed by Petitioners on October 30, 2003; "Notice of Errors in Petitioners' Reply Brief," filed by Respondent on November 3, 2003; and "Response of Charles R. Brackett and Tom D. Oliver to Complainant's Notice of Errors in Petitioner's Reply Brief," filed by Petitioners on November 5, 2003.

Dec. 459 (2003), concluding Atlanta Egg & Produce Co. failed to make full payment promptly to 80 sellers of the agreed purchase prices in the total amount of $923,475.96 for 683 lots of perishable agricultural commodities in violation of the PACA; and (2) granted Petitioners' request for an opportunity to introduce evidence that Atlanta Egg & Produce Co. had not violated the PACA and to argue Petitioners were not responsibly connected with Atlanta Egg & Produce Co. because it had not violated the PACA.[2]

On June 30, 2004, the Chief ALJ conducted an oral hearing in Atlanta, Georgia. Andrew M. Greene, Troutman Sanders, LLP, Atlanta, Georgia, represented Petitioners. Andrew Y. Stanton, Office of the General Counsel, Washington, DC, represented Respondent. On March 17, 2005, after Petitioners and Respondent filed post-hearing briefs, the Chief ALJ filed a Decision: (1) concluding Petitioners were responsibly connected with Atlanta Egg & Produce Co. during the period February 2001 through March 2002, when Atlanta Egg & Produce Co. violated the PACA; and (2) ruling Petitioners have the right to introduce evidence that Atlanta Egg & Produce Co. had not violated the PACA and to argue Petitioners were not responsibly connected with Atlanta Egg & Produce Co. because it had not violated the PACA (Chief ALJ's Decision at 11-12, 23-24).

On April 13, 2005, Respondent appealed to the Judicial Officer, but limited the appeal to the Chief ALJ's ruling providing Petitioners an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003). Petitioners did not file a response to Respondent's appeal petition, and on July 14, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and a ruling.

Exhibits in the agency record upon which Respondent based his responsibly connected determination as to Petitioner Charles R. Brackett, which is part of the record in this proceeding,[3] are designated "BCRX"; and exhibits in the agency record upon which Respondent based his responsibly connected determination as to Petitioner Tom D. Oliver, which is part of the record in this proceeding,[4] are designated "OCRX."

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[2]"Three Rulings," filed by the Chief ALJ on December 5, 2003.
[3]See 7 C.F.R. § 1.136(a).

[4]See note 3.

APPLICABLE STATUTORY PROVISION

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

RESPONDENT'S APPEAL PETITION

Respondent contends the Chief ALJ erroneously provided Petitioners an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003) (Respondent's Appeal Pet. Limited to Procedural Issue).

The Chief ALJ permitted Petitioners to introduce evidence contesting the PACA violations previously found to have been committed by Atlanta Egg & Produce Co. (Chief ALJ's Decision at 2). However, the Chief ALJ concluded the issue of whether

Petitioners should be allowed to introduce evidence that Atlanta Egg & Produce Co. did not violate the PACA is largely moot, since Petitioners failed to introduce evidence establishing that Atlanta Egg & Produce Co. did not violate the PACA (Chief ALJ's Decision at 7, 11). I agree with the Chief ALJ's conclusion that the issue is moot. However, this issue has come before me in the recent past,[5] and the issue may arise in future PACA responsibly connected proceedings. Therefore, despite my agreement with the Chief ALJ that the issue is moot, I briefly address the issue.

The Chief ALJ states denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with the PACA, the Rules of Practice, and Petitioners' due process rights (Chief ALJ's Decision at 11-12).

I disagree with the Chief ALJ's conclusion that denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with the PACA. The Chief ALJ does not cite and I cannot locate any provision of the PACA that provides a person alleged to have been responsibly connected with a commission merchant, dealer, or broker, which has previously been found to have violated the PACA, an opportunity to introduce evidence in the responsibly connected proceeding that the commission merchant, dealer, or broker has not violated the PACA. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) defines the term *responsibly connected* as a person affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association. The burden is on a petitioner, who is a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association to demonstrate by a preponderance of the evidence that he or she was not responsibly connected with the commission merchant, dealer, or broker, despite his or her position at, or ownership of, the commission merchant, dealer, or broker.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to

[5]See *In re Glenn Mealman*, 64 Agric. Dec. 1802 (2005).

demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The only issue in a responsibly connected proceeding in which the petitioner admits that he or she is a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association, is whether the petitioner has met his or her burden, as set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), to rebut the determination that the petitioner was responsibly connected.

I also disagree with the Chief ALJ's conclusion that denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with the Rules of Practice. The Chief ALJ cites section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)) as the basis for his conclusion.

Section 1.137(b) of the Rules of Practice requires joinder of pending responsibly connected proceedings and any related pending PACA disciplinary proceeding instituted against a commission merchant, dealer, or broker alleged to have violated the PACA, as follows:

> **§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.**
>
> . . . .
>
> (b) *Joinder*. The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq*., any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et*

> *seq*., but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. § 1.137(b). The Chief ALJ filed his Decision in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), on December 5, 2003, and the Chief ALJ's Decision became final and effective in January 2004. Therefore, at the time of the hearing in the instant responsibly connected proceeding, *In re Atlanta Egg & Produce Co.* was not pending and section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)) requiring joinder of a pending disciplinary proceeding with related responsibly connected proceedings is not applicable. Thus, section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)) provides no basis for the Chief ALJ's ruling permitting Petitioners to raise defenses to Atlanta Egg & Produce Co.'s PACA violations.

Finally, I disagree with the Chief ALJ's conclusion that denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with Petitioners' due process rights.

Atlanta Egg & Produce Co. and Petitioners were afforded due process. The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, instituted the disciplinary administrative proceeding against Atlanta Egg & Produce Co. by filing a complaint on October 23, 2002. The Hearing Clerk served Atlanta Egg & Produce Co. with the complaint, but Atlanta Egg & Produce Co. elected not to file an answer resulting in the Chief ALJ's filing a decision without hearing by reason of default on December 5, 2003. Atlanta Egg & Produce Co. did not appeal the Chief ALJ's December 5, 2003, Decision and the Chief ALJ's Decision became final and effective in January 2004.

On October 29, 2002, Bruce W. Summers, Assistant Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, issued initial determinations that Petitioners were responsibly connected with Atlanta Egg & Produce Co., when Atlanta Egg & Produce Co. violated the PACA and provided Petitioners the opportunity to request determinations by Respondent (BCRX 6; OCRX 6). Petitioners requested determinations by Respondent, who, on

February 12, 2003, issued determinations that Petitioners were responsibly connected with Atlanta Egg & Produce Co., when Atlanta Egg & Produce Co. violated the PACA. Respondent informed Petitioners in the February 12, 2003, determination letters that they had the right to file petitions for review (BCRX; OCRX). On March 13, 2003, Petitioners filed a Petition For Review pursuant to the Rules of Practice seeking reversal of Respondent's February 12, 2003, determinations that Petitioners were responsibly connected with Atlanta Egg & Produce Co. Thereafter, Petitioners fully participated in a responsibly connected proceeding conducted by the Chief ALJ in accordance with the Rules of Practice. Even if the Chief ALJ had not afforded Petitioners an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co., Petitioners would have been afforded due process in accordance with the Constitution of the United States. A responsibly connected proceeding is not the proper forum to relitigate factual or legal issues resolved in an earlier PACA disciplinary proceeding and the denial of a petitioner's request to relitigate issues resolved in an earlier PACA disciplinary proceeding does not violate that petitioner's right to due process.

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

RULING

The Chief ALJ's ruling providing Petitioners an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), is vacated.

In re: PERFECTLY FRESH FARMS, INC.; PERFECTLY FRESH CONSOLIDATION, INC.; PERFECTLY FRESH SPECIALTIES, INC.
PACA Docket No. D-05-0001
PACA Docket No. D-05-0002
PACA Docket No. D-05-0003
PACA APP Docket No. 05-0010
PACA APP Docket No. 05-0011
PACA APP Docket No. 05-0012
PACA APP Docket No. 05-0013
PACA APP Docket No. 05-0014

PACA APP Docket No. 05-0015
and
JAIME O. ROVELO; JEFFREY LON DUNCAN; and THOMAS BENNETT.
Order.
Filed April 19, 2006.

PACA - APP – Service.

Christopher Young-Morales, for Complainant.
Jaime Rovelo and Douglas B. Kerr and Christopher F. Bryan, for Respondent.
Order by Administrative Law Judge Peter M. Davenport.

ORDER

These three disciplinary proceedings were brought by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture alleging willful, flagrant and repeated violations of the Perishable Agriculture Commodities Ac, 1930, as amended (7 U.S.C. § 499a *et seq*.) (hereafter "PACA") and the regulations promulgated thereunder (7 C.F.R. § 46.1 *et seq*.) (hereafter "Regulations"). Subsequent to the filing of the three disciplinary complaints, the Chief of the PACA Branch determined that the three individual Petitioners, Jaime Rovelo, Thomas Bennett and Jeffrey Duncan, were "responsibly connected" to one or more of the Perfectly Fresh entities.[1] The three individuals have contested those determinations and filed petitions for review in each instance. As the corporations all appeared inter-related,[2] I consolidated the disciplinary case in which the service deficiency had been detected with the six responsibly connected cases.

[1] Jaime Rovelo was found to be responsibly connected to all three of the entities; Thomas Bennett was found to be responsibly connected to Perfectly Fresh Farms, Inc.; and Jeffrey Duncan was found to be responsibly connected to Perfectly Fresh Consolidations, Inc. and Perfectly Fresh Specialties, Inc.

[2] Each of the corporations had the same address as well as some commonality of officers and or directors. The extent to which the corporations were inter-related appears to have been an issue before the bankruptcy court.

Review of the records in each of the disciplinary cases however reflects that in each case, service was attempted by certified mail and the certified mail was returned as other than unclaimed or refused. Notwithstanding this deficiency, in error, default decisions were entered by me in Perfectly Fresh Consolidations, Inc. and Perfectly Fresh Specialties, Inc. My error in entering decisions in those two cases will now be corrected and those decisions will be vacated as part of this Order.

Counsel for the Complainant in the disciplinary cases has argued that service of the disciplinary complaint upon the individuals in the responsibly connected proceedings by means "other than by mail" should be considered as service in the disciplinary cases. I rejected that argument in my Order of March 10, 2006 and directed the Complainant to show cause why the disciplinary case should not be dismissed for failure to effect service and for failure to comply with the Order of August 22, 2005 directing exchange of witness and exhibit lists.[3]

A Response to the Show Cause Order (which was entered on March 10, 2006) was filed on April 17, 2006 with the explanation that counsel failed to receive a copy of the Order and was unaware of its existence until April 6, 2006. While the record does contain a Document Distribution Form indicating that a copy of the order was sent to counsel by Inter-Office Mail, counsel's representation that he did not receive his copy will be accepted.

As counsel for the Complaint in each of the disciplinary cases has proposed to re-serve the disciplinary complaints, leave will be granted to allow him to do so, notwithstanding the unopposed general stay of proceedings entered as part of the Order of March 10, 2006.[4]

Being sufficiently advised, it is **ORDERED** as follows:

1. The Default Decision entered on March 31, 2005 in the case of *In re Perfectly Fresh Consolidation, Inc.,* PACA Docket NO. D-05-0002 is **VACATED.**

[3] Although the Response filed on April 17, 2006 now indicates a willingness to file at least a partial exhibit and witness list, the Complainant/Respondent to date has not complied with the Order entered on August 22, 2005 concerning exchange of witness and exhibit lists.

[4] Although counsel in his Response to the Show Cause Order indicated that he had intended to contest the Stay sought by the Petitioners, no pleading was ever filed setting forth the Complainant/Respondent position.

2. The Default Decision entered on March 31, 2005 in the case of *In re Perfectly Fresh Specialties, Inc.,* PACA Docket No. D-05-0003 is **VACATED.**

3. So much of the general stay that was entered on March 10, 2006 is **LIFTED** for the limited purpose of effecting service of the complaint in *In re Perfectly Fresh Farms, Inc.,* PACA Docket No. D-05-0001, but otherwise shall remain in full force and effect, until an appropriate Motion is filed requesting its relief.

4. Counsel for the parties are directed to consult with each other and in the event a Joint Status Report cannot be agreed to, each is directed to file a Status Report on or before June 1, 2006.

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

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In re: BAIARDI CHAIN FOOD CORP.
PACA Docket No. D-01-0023.
Stay Order.
Filed May 15, 2006.

PACA – Perishable agricultural commodities – Stay order.

Christopher Young-Morales, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On September 2, 2005, I issued a Decision and Order concluding Baiardi Chain Food Corp. [hereinafter Respondent] violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s), and ordering publication of the facts and circumstances of Respondent's violations.[1] On October 21, 2005, Respondent filed a petition for reconsideration, which I denied.[2]

On January 11, 2006, Respondent filed a petition for review of *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822 (2005), and *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1994 (2005) (Order Denying Pet. for Recons.), with the United States Court of Appeals

[1] *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832, 1835, 1839 (2005).

[2] *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1994 (2005) (Order Denying Pet. for Recons.).

for the Third Circuit. On May 12, 2005, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a "Motion for a Stay Order as to Respondent Baiardi Food Chain Corp." [hereinafter Motion for Stay] requesting a stay of the Orders in *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822 (2005), and *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1994 (2005) (Order Denying Pet. for Recons.), pending the outcome of proceedings for judicial review. On May 12, 2006, Respondent informed the Office of the Judicial Officer, by telephone, that it has no objection to Complainant's Motion for Stay.

In accordance with 5 U.S.C. § 705, Complainant's Motion for Stay is granted.

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

ORDER

The Orders in *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822 (2005), and *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1994 (2005) (Order Denying Pet. for Recons.), are stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: DAL-DON PRODUCE.
PACA Docket D-04-0026.
Order Vacating Finding.
Filed June 1, 2006.

PACA – Publication of PACA violations – Satisfaction of Consent Order conditions.

Charles Kendall for Complainant.
Respondent, Pro se.
Ruling by Administrative Law Judge Victor W. Palmer.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) ("the Act") and the regulations issued thereunder (7 C.F.R. Part 46)("the Regulations"), instituted by a Complaint filed on September 29, 2004

by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleged that Respondent Dal-Don Produce Co., Inc. (hereinafter "Respondent") failed to make full payment promptly in the total amount of $46,644.55 to seven (7) sellers for 19 lots of perishable agricultural commodities which it purchased, received, and accepted in or in contemplation of interstate commerce during the period January 15, 2003 through January 30, 2003, and that Respondent, while acting as a growers' agent, failed to remit net proceeds in the total amount of $511,272.14 to nine (9) growers for 203 lots of watermelons which it received, accepted, and sold in interstate commerce or in contemplation of interstate commerce during the period August 20, 2003 through December 26, 2003.

Complainant requested that the Administrative Law Judge find that Respondent has wilfully, flagrantly and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances of these violations be published.

The parties agreed to the entry of a Decision Without Hearing by Reason of Consent, and a Decision was issued by Administrative Law Judge (ALJ) Victor W. Palmer on February 10, 2006. The Decision found that Respondent engaged in repeated and flagrant violations of section 2(4) of the PACA; however, that finding and the publication of the facts and circumstances of the violations were held in abeyance in accordance with the terms of the Understanding Regarding the Consent Decision (hereinafter "Understanding") entered into between Complainant and Respondent. The Decision also found that Respondent completed making fill payment to the sellers and growers listed in the Complaint on February 3, 2006.

Respondent having satisfied the terms of the Understanding, Complainant requests that the Administrative Law Judge issue an order, effective immediately, vacating the finding and publication which were held in abeyance. Therefore, the Order below is issued.

Order

The finding that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b) is hereby vacated.

This order shall take effect immediately.

Pursuant to the Rules of Practice, this decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

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In re: KLEIMAN & HOCHBERG, INC.
PACA Docket No. D-02-0021.
In re: MICHAEL H. HIRSCH.
PACA Docket No. APP-03-0005.
In re: BARRY J. HIRSCH.
PACA Docket No. APP-03-0006.
Order Denying Petition to Reconsider.
Filed June 2, 2006.

PACA – Perishable agricultural commodities – Liability of PACA licensee for officer's acts – Ability to control acts of an officer – Responsibly connected – Right to engage in occupation.

The Judicial Officer denied Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's petition to reconsider. The Judicial Officer rejected Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contentions that: (1) Kleiman & Hochberg, Inc., did not violate the PACA when John Thomas paid a United States Department of Agriculture produce inspector because Kleiman & Hochberg, Inc., had no means to control John Thomas' payments to the United States Department of Agriculture produce inspector; and (2) the imposition of employment sanctions on Michael H. Hirsch and Barry J. Hirsch unconstitutionally violates their right to engage in their chosen occupation.

Charles L. Kendall and Christopher Young-Morales for the Agricultural Marketing Service and the Chief of the PACA Branch.
Mark C.H. Mandell, Annandale, NJ, and David H. Gendelman, New York, NY, for Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a

Complaint on July 17, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); 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 Agricultural Marketing Service alleges Kleiman & Hochberg, Inc.: (1) during the period March 1999 through August 1999, through its employee, John Thomas, made illegal payments to a United States Department of Agriculture produce inspector in connection with 12 federal inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate or foreign commerce, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) prior to March 1999, made illegal payments to a United States Department of Agriculture produce inspector on numerous occasions, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V-VI). On September 17, 2002, Kleiman & Hochberg, Inc., filed an answer denying the material allegations of the Complaint (Answer).

On February 12, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., during the period March 26, 1999, through August 4, 1999, when Kleiman & Hochberg, Inc., violated the PACA. On March 14, 2003, Michael H. Hirsch and Barry J. Hirsch each filed a Petition for Review of the Chief's determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's February 12, 2003, determination that he was responsibly connected with Kleiman & Hochberg, Inc.

On April 4, 2003, former Chief Administrative Law Judge James W. Hunt consolidated the disciplinary proceeding, *In re Kleiman & Hochberg, Inc.*, PACA Docket No. D-02-0021, with the two responsibly connected proceedings, *In re Michael H. Hirsch*, PACA Docket No. APP-03-0005, and *In re Barry J. Hirsch*, PACA Docket No. APP-03-0006 (Order Consolidating Cases for Hearing).

On March 1 through March 4, and March 15 through March 18, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York.

Charles L. Kendall and Christopher Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Mark C.H. Mandell and David H. Gendelman represented Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch.

On December 3, 2004, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when John Thomas, Kleiman & Hochberg, Inc.'s vice president and part owner, paid bribes to a United States Department of Agriculture produce inspector in connection with 12 federal inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate and foreign commerce; (2) concluded Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; and (3) assessed Kleiman & Hochberg, Inc., a $180,000 civil penalty (Initial Decision at 18-19, 35).

On January 21, 2005, the Agricultural Marketing Service and the Chief appealed to the Judicial Officer. On January 24, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch appealed to the Judicial Officer. On March 16, 2005, the Agricultural Marketing Service and the Chief filed a response to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's appeal petition. On March 17, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On March 17, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On April 5, 2006, I issued a Decision and Order: (1) concluding Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluding Michael H. Hirsch and Brian J. Hirsch were *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; and (3) revoking Kleiman & Hochberg, Inc.'s PACA license.[1]

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[1]*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___, slip op. at 22-23, 55-56 (Apr. 5, 2006).

On April 24, 2006, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch filed "Respondent's and Petitioners' Joint Petition Under § 1.146(a) for Reconsideration of the Decision and Order of the Judicial Officer Dated April 5, 2006" [hereinafter Petition to Reconsider] and requested oral argument before the Judicial Officer. On May 12, 2006, the Agricultural Marketing Service and the Chief filed a response to the Petition to Reconsider. On May 26, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Request for Oral Argument

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's request for oral argument before the Judicial Officer is denied because the issues are not complex and oral argument would appear to serve no useful purpose.

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch raise two issues in the Petition to Reconsider. First, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend Kleiman & Hochberg, Inc., did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) because Kleiman & Hochberg, Inc., had no means to control John Thomas' payments to a United States Department of Agriculture produce inspector (Pet. to Reconsider at 2-5).

The relationship between a PACA licensee and persons acting for, or employed by, the PACA licensee is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for, or employed by, a commission merchant, dealer, or broker, within the scope of his or her employment or office, shall *in every case* be

deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

Kleiman & Hochberg, Inc.'s vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., John Thomas, was acting within the scope of employment when he knowingly and willfully bribed a United States Department of Agriculture produce inspector. Thus, as a matter of law, the knowing and willful violations by John Thomas are deemed to be knowing and willful violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc., had no means to control John Thomas' payments to the United States Department of Agriculture produce inspector. The United States Court of Appeals for the Sixth Circuit addressed the issue of identity of action between a corporate PACA licensee and the corporate PACA licensee's employees in a case involving alterations of United States Department of Agriculture inspection certificates by employees of the corporate PACA licensee, as follows:

> MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person." 7 U.S.C. § 499p. According to the Sixth Circuit, acts are "willful" when "knowingly taken by one subject to the statutory provisions in disregard of the action's legality." *Hodgins v. United States Dep't of Agric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). "Actions taken in reckless disregard of statutory provisions may also be considered 'willful.'" *Id.* (quotation and citations omitted). The

> MacClaren employees admitted to altering USDA inspection certificates and issuing false accounts of sale in knowing disregard of their actions' legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

H.C. MacClaren, Inc. v. United States Dep't of Agric., 342 F.3d 584, 591 (6th Cir. 2003).

Similarly, in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123 (2d Cir. 2003), the Court found that bribes made by a produce wholesaler's employee to a United States Department of Agriculture produce inspector to induce the inspector to falsify United States Department of Agriculture inspection certificates are, under the PACA, deemed the acts of the produce wholesaler, as follows:

> Lastly, we address Koam's equitable argument that our failure to find in its favor would penalize Koam "simply because USDA sent a corrupt inspector to perform the inspection (a decision over which Koam had no control) at the time that Koam was employing a faithless employee [Friedman] (who played no role in any of the DiMare inspections)." . . . We view the equities differently from Koam, as its argument distorts the facts in at least three ways. . . . Third, Koam's attempt to distance itself from Friedman's criminality fails. Friedman was hardly a "faithless servant," since only Koam, not Friedman, stood to benefit from his bribes. Regardless, under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act omission, or failure of such commission merchant, dealer, or broker . . . ." 7 U.S.C. § 499p. Thus, Friedman's acts--bribing USDA inspectors--are deemed the acts of Koam.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 129-30 (2d Cir. 2003).

John Thomas, the vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paid bribes to a United States Department of Agriculture produce inspector. As a matter of law, the violations by Kleiman & Hochberg, Inc.'s officer

and part owner are deemed to be violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc., had no means to control John Thomas' payments to the United States Department of Agriculture produce inspector. The clear language of section 16 of the PACA (7 U.S.C. § 499p) would be defeated by any other interpretation.

Second, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend, since Michael H. Hirsch and Barry J. Hirsch had no ability to obtain knowledge of or to control John Thomas' payments to a United States Department of Agriculture produce inspector, they cannot be found to be responsibly connected with Kleiman & Hochberg, Inc., without violating their constitutional right to engage in their chosen occupation (Pet. to Reconsider at 6-14).

Individuals found to be responsibly connected with a commission merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.[2]

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.[3] Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of growers and shippers of perishable agricultural commodities. The status of being an officer, a director, or a holder of more than 10 percent of the outstanding stock of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer, a director, or a holder of more than 10 percent of the outstanding stock may be deemed *responsibly connected* and subject to the employment sanctions in the PACA.[4] Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose

[2]*Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[3]H.R. Rep. No. 1041 (1930).

[4]*Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Michael H. Hirsch's or Barry J. Hirsch's due process rights by arbitrarily interfering with Michael H. Hirsch's or Barry J. Hirsch's chosen occupation.

Contrary to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.[5] A number of courts have rejected constitutional challenges to employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.[6]

For the foregoing reasons and the reasons set forth in *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___ (Apr. 5, 2006), Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider was timely filed and automatically stayed *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___ (Apr. 5, 2006). Therefore, since Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order

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[5]*Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.,* 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

[6]*Hawkins v. Agricultural Mktg. Serv.,* 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee that has committed violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee that failed to pay a reparation award from employment in the field of marketing perishable agricultural commodities is not unconstitutional).

in *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___ (Apr. 5, 2006), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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

ORDER

1. Kleiman & Hochberg, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Kleiman & Hochberg, Inc.'s PACA license is revoked, effective 60 days after service of this Order on Kleiman & Hochberg, Inc.

2. I affirm the Chief's February 12, 2003, determination that Michael H. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Michael H. Hirsch is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Michael H. Hirsch.

3. I affirm the Chief's February 12, 2003, determination that Barry J. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Barry J. Hirsch is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Barry J. Hirsch.

RIGHT TO JUDICIAL REVIEW

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch have the right to seek judicial review of the Order in this Order Denying Petition to Reconsider in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch must seek judicial review within 60 days after entry of the Order in this Order

Denying Petition to Reconsider.[7] The date of entry of the Order in this Order Denying Petition to Reconsider is June 2, 2006.

_____

In re: HUNTS POINT TOMATO CO., INC.
PACA Docket No. D-03-0014.
Stay Order.
Filed June 2, 2006.

PACA – Perishable agricultural commodities – Stay order.

Andrew Y. Stanton, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

On November 2, 2005, I issued a Decision and Order concluding Hunts Point Tomato Co., Inc. [hereinafter Respondent], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s), and ordering publication of the facts and circumstances of Respondent's violations.[1] On December 13, 2005, Respondent filed a "Petition to Reconsider," which I denied.[2]

On March 8, 2006, Respondent filed a petition for review of *In re Hunts Point Tomato Co., Inc.*, 64 Agric. Dec. 1914 (2005), and *In re Hunts Point Tomato Co., Inc.*, 65 Agric. Dec. ___ (Jan. 9, 2006) (Order Denying Pet. to Reconsider), with the United States Court of Appeals for the Second Circuit. On May 31, 2006, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a "Motion for a Stay Order" requesting a stay of the Orders in *In re Hunts Point Tomato Co., Inc.*, 64 Agric. Dec. 1914 (2005), and *In re Hunts Point Tomato Co., Inc.*, 65 Agric. Dec. ___ (Jan. 9, 2006) (Order Denying Pet. to Reconsider), pending the outcome of proceedings for judicial review. On June 1, 2006, Respondent informed the Office of the Judicial Officer, by telephone, that it has no objection to Complainant's Motion for a Stay Order.

[7]See 28 U.S.C. § 2344.

[1]*In re Hunts Point Tomato Co., Inc.*, 64 Agric. Dec. 1914, 1919-20, 1934 (2005).

[2]*In re Hunts Point Tomato Co., Inc.*, 65 Agric. Dec. ___ (Jan. 9, 2006) (Order Denying Pet. to Reconsider).

In accordance with 5 U.S.C. § 705, Complainant's Motion for a Stay Order is granted.

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

ORDER

The Orders in *In re Hunts Point Tomato Co., Inc.*, 64 Agric. Dec. 1914 (2005), and *In re Hunts Point Tomato Co., Inc.*, 65 Agric. Dec. ___ (Jan. 9, 2006) (Order Denying Pet. to Reconsider), are stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

_____

In re: PERFECTLY FRESH FARMS, INC.; PERFECTLY FRESH CONSOLIDATION, INC.; PERFECTLY FRESH SPECIALTIES, INC.
AND JAIME O.ROVELO; JEFFREY LON DUNCAN; AND THOMAS BENNETT.
PACA Docket No. D-05-0001.
PACA Docket No. D-05-0002.
PACA Docket No. D-05-0003.
PACA APP Docket No. 05-0010.
PACA APP Docket No. 05-0011.
PACA APP Docket No. 05-0012.
PACA APP Docket No. 05-0013.
PACA APP Docket No. 05-0014.
PACA APP Docket No. 05-0015.
Ruling.
Filed June 4, 2006.

PACA -- Responsibily Connected.

Christopher Young-Morales for Complainant
Jaime Rovelo, Douglas B. Kerr, Christopher F. Bryan for Respondent(s).
Ruling by Administrative Law Judge Peter M. Davenport.

ORDER

These three disciplinary proceedings were brought by the Associate Deputy Administrator, Fruit and Vegetable Programs,

Agricultural Marketing Service, United States Department of Agriculture alleging willful, flagrant and repeated violations of the Perishable Agriculture Commodities Ac, 1930, as amended (7 U.S.C. § 499a *et seq*.) (hereafter "PACA") and the regulations promulgated thereunder (7 C.F.R. § 46.1 *et seq*.) (hereafter "Regulations"). Subsequent to the filing of the three disciplinary complaints, the Chief of the PACA Branch determined that the three individual Petitioners, Jaime Rovelo, Thomas Bennett and Jeffrey Duncan, were "responsibly connected" to one or more of the Perfectly Fresh entities.[1] The three individuals have contested those determinations and filed petitions for review in each instance. As the corporations all appeared inter-related,[2] I consolidated the disciplinary case in which the service deficiency had been detected with the six responsibly connected cases.

Review of the records in each of the disciplinary cases however reflects that in each case, service was attempted by certified mail and the certified mail was returned as other than unclaimed or refused. Notwithstanding this deficiency, in error, default decisions were entered by me in Perfectly Fresh Consolidations, Inc. and Perfectly Fresh Specialties, Inc. My error in entering decisions in those two cases will now be corrected and those decisions will be vacated as part of this Order.

Counsel for the Complainant in the disciplinary cases has argued that service of the disciplinary complaint upon the individuals in the responsibly connected proceedings by means "other than by mail" should be considered as service in the disciplinary cases. I rejected that argument in my Order of March 10, 2006 and directed the Complainant to show cause why the disciplinary case should not be dismissed for failure to effect service and for failure to comply with the Order of August 22, 2005 directing exchange of witness and exhibit lists.[3]

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[1] Jaime Rovelo was found to be responsibly connected to all three of the entities; Thomas Bennett was found to be responsibly connected to Perfectly Fresh Farms, Inc.; and Jeffrey Duncan was found to be responsibly connected to Perfectly Fresh Consolidations, Inc. and Perfectly Fresh Specialties, Inc.

[2] Each of the corporations had the same address as well as some commonality of officers and or directors. The extent to which the corporations were inter-related appears to have been an issue before the bankruptcy court.

[3] Although the Response filed on April 17, 2006 now indicates a willingness to file at least a partial exhibit and witness list, the Complainant/Respondent to date has not (continued...)

A Response to the Show Cause Order (which was entered on March 10, 2006) was filed on April 17, 2006 with the explanation that counsel failed to receive a copy of the Order and was unaware of its existence until April 6, 2006. While the record does contain a Document Distribution Form indicating that a copy of the order was sent to counsel by Inter-Office Mail, counsel's representation that he did not receive his copy will be accepted.

As counsel for the Complaint in each of the disciplinary cases has proposed to re-serve the disciplinary complaints, leave will be granted to allow him to do so, notwithstanding the unopposed general stay of proceedings entered as part of the Order of March 10, 2006.[4]

Being sufficiently advised, it is **ORDERED** as follows:

1. The Default Decision entered on March 31, 2005 in the case of *In re Perfectly Fresh Consolidation, Inc.,* PACA Docket NO. D-05-0002 is **VACATED.**

2. The Default Decision entered on March 31, 2005 in the case of *In re Perfectly Fresh Specialties, Inc.,* PACA Docket No. D-05-0003 is **VACATED.**

3. So much of the general stay that was entered on March 10, 2006 is **LIFTED** for the limited purpose of effecting service of the complaint in *In re Perfectly Fresh Farms, Inc.,* PACA Docket No. D-05-0001, but otherwise shall remain in full force and effect, until an appropriate Motion is filed requesting its relief.

4. Counsel for the parties are directed to consult with each other and in the event a Joint Status Report cannot be agreed to, each is directed to file a Status Report on or before June 1, 2006.

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

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[3](...continued)
complied with the Order entered on August 22, 2005 concerning exchange of witness and exhibit lists.

[4] Although counsel in his Response to the Show Cause Order indicated that he had intended to contest the Stay sought by the Petitioners, no pleading was ever filed setting forth the Complainant/Respondent position.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: HALE-HALSELL COMPANY.
PACA Docket No. 05-0019.
Decision Without Hearing By Reason of Default.
Filed January 30, 2006.

PACA -- Default.

Ruben Rudolph for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge, Peter M. Davenport.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), [hereinafter referred to as the "Act"], instituted by a complaint filed on August 16, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period of August 6, 2003, through February 12, 2004, Respondent Hale-Halsell Company, [hereinafter the "Respondent"], failed to make full payment promptly to fourteen (14) sellers of the agreed purchase prices in the total amount of $412,968.87 for 113 lots of perishable agricultural commodities that it purchased, received and accepted in interstate commerce.

A copy of the complaint filed on August 16, 2005, was sent to the Respondent at 9111 E. Pine Street, Tulsa, Oklahoma 74115, and its mailing address of P.O. Box 52898, Tulsa, Oklahoma 74158-2898, by certified mail. The complaint was received by the Respondent, and signed for, at both addresses on August 23, 2005. No answer to the complaint has been received. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a default decision, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.139).

Findings of Fact

1. The Respondent is a corporation organized and existing under the laws of the State of Oklahoma. Respondent's business address is 9111 E. Pine Street, Tulsa, Oklahoma 74115. Respondent's mailing address is P.O. Box 52898, Tulsa, Oklahoma 74158-2898.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 19990802 was issued to Respondent on March 31, 1999. This license terminated on March 31, 2005 when Respondent failed to pay the required annual fee as required by section 4(a) of the Act (7 USC § 499d(a)).

3. As more fully set forth in paragraph III of the complaint, during the period August 6, 2003, through February 12, 2004, the Respondent purchased, received and accepted in interstate commerce, from fourteen (14) sellers, 113 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $412,968.87.

Conclusions

The Respondent's failure to make full payment promptly with respect to the 113 transactions described in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

Order

A finding is made that the Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

_____

In re: PENN PRODUCE, INC.
PACA Docket No. D-05-0025.
Default Decision.
Filed February 2, 2006.

PACA -- Default.

Gary F. Ball for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Jill S Clifton.

Decision and Order by Reason of Default

Procedural History

This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (herein frequently, "the PACA" or the "Act"), by a Complaint filed on September 30, 2005.

The Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently, "AMS" or "Complainant"), is represented by Gary F. Ball, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.

The Complaint alleges, among other things, that during October 2004 through March 2005, Penn Produce, Inc. (herein frequently "Penn Produce" or "Respondent") failed to make full payment promptly of the agreed purchase prices totaling $274,037.51, to 35 sellers of perishable agricultural commodities in 239 lots, which Respondent purchased, received, and accepted in the course of interstate or foreign commerce.

A copy of the Complaint was sent to Penn Produce, Inc. at 7168 Daniels Drive, Fogelsville, Pennsylvania 18051 by certified mail on October 3, 2005. The Complaint was delivered and signed for on October 6, 2005. No answer to the Complaint has been received. The time for filing an answer expired on October 26, 2005.

The Complainant's Motion for the issuance of a decision by reason of default is before me. 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 Penn Produce'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

1. Penn Produce, Inc. is a Pennsylvania corporation with a business and mailing address of 7168 Daniels Drive, Fogelsville, Pennsylvania 18051.

2. Penn Produce, Inc. was licensed under the provisions of the PACA at all times material to the allegations of the Complaint. License number 1985-0367 was issued to Penn Produce, Inc. on December 17, 1984. This license has been renewed annually and was last subject to renewal by December 17, 2005.

3. Penn Produce, Inc., during October 2004 through March 2005, failed to make full payment promptly to 35 sellers of the agreed purchase prices in the amount of $274,037.51 for 239 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate or foreign commerce.

Conclusions

1. The Secretary of Agriculture has jurisdiction.

2. Penn Produce, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by willfully failing to make full payment promptly to 35 sellers of the agreed purchase prices in the total amount of $274,037.51, for 239 lots of fruits and vegetables, all being perishable agricultural commodities, which it purchased, received, and accepted in interstate or foreign commerce during October 2004 through March 2005.

Order

1. Penn Produce, Inc. committed willful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and its PACA license, number 1985-0367 issued December 17, 1984, is revoked.

2. In the alternative, in the event Penn Produce, Inc. failed to renew its license, the facts and circumstances of Penn Produce's PACA violations shall be published.

3. This Order shall take effect on the 11th day after this Decision becomes final.

Finality

This Decision and Order shall have the same force and effect as if entered after a full hearing and 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.

* * *

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: MIEZE JET AIR SALES, INC.
PACA Docket No. D-05-0007.
Decision Without Hearing by Reason of Default.
Filed February 2, 2006.

PACA -- Default.

Chris Young-Morales for Complainant.
Respondent, Pro se..
Decision and Order filed by Chief Administrative Law Judge Marc R. Hillson.

DEFAULT DECISION

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C.§ 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on March 3, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period October 6, 2003 through May 10, 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 41 sellers, 376 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $1,263,527.13.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail on July 14, 2005, and was signed for by Respondent's representative on July 18, 2005. Therefore, the Hearing Clerk served the complaint upon Respondent pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147, hereinafter referred to as the "Rules of Practice), as of July 18, 2005. Respondent did not file an answer to the complaint within the 20 day time period prescribed by Section 1.136 of the Rules of

Practice. Complainant moved for the issuance of a Decision Without Hearing by the Administrative Law Judge, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. §1.139). As Respondent failed to answer the complaint within the 20 day time period prescribed by the Rules of Practice, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Pennsylvania. Its business mailing address is 21 Smallman Street, Pittsburgh Terminal Produce Market, Pittsburgh, PA15222.

2.At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 20010366 was issued to Respondent on December 5, 2000. This license terminated pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee on December 5, 2005.

3.During the period October 6, 2003 through May 10, 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 41 sellers, 376 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of $1,263,527.13.

Conclusions

Respondent's failure to make full payment promptly with respect to the 376 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

_____

In re: RAWLS BROKERAGE, INC.
PACA Docket No. D-05-0006.
Decision and Order by Reason of Default.
Filed February 3, 2006.

PACA -- Default.

Chris Young-Morales for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Procedural History

This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (herein frequently, "the PACA" or "the Act"), by a Complaint filed on March 4, 2005. The Complaint alleges, among other things, that during September 2003 through February 2004, Respondent Rawls Brokerage, Inc., failed to make full payment promptly to 100 sellers of the agreed purchase prices, totaling $2,082,245.93 for 786 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce.

The Complainant is the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently, "AMS" or "Complainant"). AMS is represented by Christopher Young-Morales, Esq., 202/720-5191, Trade Practices Division, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

Respondent Rawls Brokerage, Inc. (herein frequently, "Rawls Brokerage" or "Respondent"), is an Alabama corporation, formerly doing business at 3057 Lorna Road, Suite 210, Birmingham, Alabama 35216. Rawls Brokerage is represented by Lewis B. Hickman, Jr., Esq., 334/264-1441, 915 S. Hull St., Montgomery, Alabama 36104.

The Complaint was served upon Rawls Brokerage on May 20, 2005.[1] No answer to the Complaint has been received. The time for filing an answer expired on June 9, 2005. 7 C.F.R. § 1.136(a).

On August 30, 2005, this case was assigned to me, Jill S. Clifton, United States Administrative Law Judge.

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. AMS filed a Motion for a Decision Without Hearing by Reason of Default on July 22, 2005.

AMS claims that Rawls Brokerage's failure to pay promptly the agreed purchase prices of perishable agricultural commodities in the transactions set forth in the Complaint constitutes willful, flagrant, and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)). AMS requests that a finding be made that Rawls Brokerage has committed willful, flagrant, and repeated violations of the PACA, and that an order be entered that the facts and circumstances of the violations be published, pursuant to the authority of Section 8(a) of the Act (7 U.S.C. § 499h(a)).

Rawls Brokerage filed an Objection on August 22, 2005, and had previously filed a letter dated August 1, 2005, on August 9, 2005. In response to my Request, Rawls Brokerage filed a letter dated January 23, 2006, on January 30, 2006. These documents filed by Rawls

[1] On March 7, 2005, the Hearing Clerk sent to Rawls Brokerage, Inc., 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). Rawls Brokerage was informed in the service letter and in the Complaint 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. The envelope containing these items was returned to the Hearing Clerk's Office on April 26, 2005, marked "Return to Sender - UNCLAIMED" by the U.S. Postal Service. The Hearing Clerk staff then, on May 20, 2005, sent the copy of the Complaint with accompanying documents to Rawls Brokerage via ordinary mail. The Complaint was thereby deemed to have been received by Rawls Brokerage on May 20, 2005. 7 C.F.R. § 1.137.

Brokerage show Rawls Brokerage PACA Trust Account Payments in 2004 totaling approximately $1,250,100.00, largely pursuant to an Order for an Interim Distribution in the pending PACA litigation in the U.S. District Court for the Northern District of Alabama. (Nearly all those disbursements were dated September 29, 2004, with the exception of $21,105.38 dated November 3, 2004.) The Rawls Brokerage filings indicate that another $430,000.00 in funds on deposit awaits the next Order for distribution, and that Rawls Brokerage continues its efforts to collect additional money.

The Complaint incorporates Exhibit A, which details the $2,082,245.93 "Past Due & Unpaid" by Rawls Brokerage. Exhibit A fails to show the date on which those outstanding balances were tallied, except that it was prior to the filing of the Complaint (March 4, 2005). The last payment due date shown on Exhibit A is 02/09/04, so the $2,082,245.93 was tallied after that date. Even if I were to assume that the $2,082,245.93 was tallied before the $1,250,100.00 was disbursed, and I were consequently to credit the $1,250,100.00 against the $2,082,245.93, I would find that the Sellers identified on Exhibit A still were not fully paid, and the Sellers identified on Exhibit A still were not promptly paid.

Also, Rawls Brokerage failed to come into full compliance with the PACA within 120 days after the Complaint was served. The date by which Rawls Brokerage would have had to be in full compliance with the PACA, to be regarded as "slow pay" instead of "no pay," was September 17, 2005. That date was four months ago.

Findings of Fact

1. Rawls Brokerage, Inc. is an Alabama corporation, formerly doing business at 3057 Lorna Road, Suite 210, Birmingham, Alabama 35216.

2. Rawls Brokerage, Inc. was licensed under the provisions of the PACA at all times material to the allegations of the Complaint. PACA license number 1979-0084 was issued to Rawls Brokerage, Inc. on October 12, 1978. This license was terminated on October 12, 2004, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)), when Rawls Brokerage failed to pay its required annual license renewal fee.

3. Rawls Brokerage, Inc., during September 2003 through February 2004, failed to make full payment promptly to 100 sellers of the agreed purchase prices in the total amount of $2,082,245.93, or

balances thereof, for 786 lots of fruits and vegetables, all being perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce.

Conclusions

1. The Secretary of Agriculture has jurisdiction.

2. Rawls Brokerage, Inc. willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), by willfully failing to make full payment promptly to 100 sellers of the agreed purchase prices totaling $2,082,245.93, or balances thereof, for 786 lots of fruits and vegetables, all being perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce during September 2003 through February 2004.

Order

1. Rawls Brokerage, Inc. committed willful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)) during September 2003 through February 2004, and the facts and circumstances of the violations shall be published.

2. This Order shall take effect on the 11th day after this Decision becomes final.

Finality

This Decision and Order shall have the same force and effect as if entered after a full hearing and 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.

_____

In re: INDIAN ROCK PRODUCE INC.
PACA Docket No. D-05-0020.
Default Decision.
Filed February 10, 2006.

PACA -- Default.

Tonya Keusseyan for Complainant.
Respondent, Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision Without Hearing by Reason of Default

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter "Act" or "PACA"), instituted by a Complaint filed on August 29, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period October 2002 through December 2003, Respondent Indian Rock Produce Inc., (hereinafter "Respondent") failed to make full payment promptly to 27 sellers of the agreed purchase prices in the total amount of $267,931.65 for 313 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

On August 29, 2005, a copy of the Complaint was mailed to Respondent via certified mail to its business mailing address. The Complaint was received on September 6, 2005 and signed for by LuAnn Buehrer who was then an officer of Respondent. Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 (7 C.F.R § 1.139) of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Delaware. Its business mailing address is 530 California Road, P.O. Box 317, Quakertown, Pennsylvania 18951.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. PACA license number 19871403 was issued to Respondent on June 9, 1987. That license terminated on June 9, 2004, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period October 2002 through December 2003, Respondent purchased, received and accepted in interstate commerce from 27 sellers, 313 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $267,931.65.

Conclusions

Respondent's failure to make full payment promptly with respect to the 313 transactions set forth in Finding of Fact No. 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

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In re: SOUTH PEAK PRODUCE, INC.
PACA Docket No. D-05 - 0017.
Decision Without Hearing by Reason of Default.
Filed March 27, 2006.

PACA – Default.

Charles Kendall For Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (the "Act"), instituted by a Complaint filed on July 22, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period February 3, 2002 through May 24, 2004, Respondent South Peak Produce, Inc. (hereinafter "Respondent") failed to make full payment promptly to seven (7) sellers of the agreed purchase prices, or balances thereof, in the total amount of $188,552.73 for 92 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

A copy of the Complaint was mailed to Respondent by certified mail at its last known principal place of business, its PACA address of record (see 7 CFR § 46.1 3(a)(1)) on July 22, 2005, and was returned by the Postal Service to the Department of Agriculture on August 8, 2005 marked "Undeliverable as Addressed".

Research of Auto Track Corporate Records by the PACA Branch of the Fruit and Vegetable Programs, Agricultural Marketing Service indicated that the registered agent for Respondent is Respondent's president, Steven R. Lewandowski (Attachment A). The records further indicated that Mr. Lewandowski's address is 1 Pennwood Lane, Greenville, South Carolina (Attachment B). On September 9, 2005, counsel for Complainant notified the Hearing Clerk of the address of Respondent's registered agent (Attachment C), and the Hearing Clerk sent a copy of the Complaint to that address by certified mail.

The Postal Service returned the certified mailing addressed to Respondent's registered agent to the Department of Agriculture marked "Return to Sender" and "Unclaimed". The Hearing Clerk remailed a copy of the Complaint to Respondent's registered agent at the same address by ordinary mail on December 7, 2005 pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 et seq., hereinafter "Rules of Practice") (Attachment D). Respondent has not answered the Complaint. The

time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation incorporated in the state of South Carolina. Its business mailing address is 1354 Rutherford Road, Greenville, South Carolina 29609.

2. Respondent is not, and has never been, licensed under the PACA. At all times material herein, Respondent has conducted business subject to the PACA.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth in paragraph III of the Complaint, during the period February 3, 2002 through May 24, 2004, Respondent purchased, received, and accepted in interstate commerce, from seven (7) sellers, 92 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $188,552.73.

Conclusions

Respondent's failure to make full payment promptly with respect to the 92 lots set forth in Finding of Fact No. 4 above constitutes wilful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent has committed wilful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances of the violations shall be published.
This order shall take effect on the 11 day after this Decision becomes final.
Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless

appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).
Copies hereof shall be served upon parties.

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In re: SUPERIOR PRODUCE EXCHANGE, LLC.
PACA Docket. D-04-0023.
Decision Without Hearing by Reason of Default.
Filed May 24, 2006.

PACA -- Default.

Charles Kendall for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.)(the "Act"), instituted by a Complaint filed on September 24, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period June 17, 2002 through May 7,2003, Respondent Superior Produce Exchange, LLC (hereinafter "Respondent") failed to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of $668,311.27 for 248 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

In accordance with the Order issued by Administrative Law Judge Peter M. Davenport on February 17, 2006 and the previous orders referenced therein, a copy of the Complaint with a cover letter from the Hearing Clerk and a copy of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq*., hereinafter "Rules of Practice") was delivered to Respondent's registered agent, Tawab Nassery, by Federal Express (See Attachment A) on February 20,2006. Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following

Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a limited liability company organized in the state of New Jersey on May 8,2001. Its business mailing address is 4 Dundee Avenue, Paterson, New Jersey 07503-1206. The address of its registered agent is 46 Highview Avenue, Totowa, New Jersey 07512.

2. At all times material to the allegations in the complaint, Respondent was licensed under the PACA. License number 2002045 1 was issued to Respondent on January 1 1,2002. This license terminated on January 11,2004, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. During the period June 17,2002 through May 7,2003, Respondent purchased, received, and accepted in interstate commerce, from 15 sellers, 248 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $668,311.27.

Conclusions

Respondent's failure to make full payment promptly with respect to the 248 lots set forth in Finding of Fact No. 4 above constitutes wilful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent has committed wilful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances of the violations shall be published. This order shall take effect on the 1lth day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and 1.145).

Copies hereof shall be served upon parties.

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APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or

authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument*. A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument*. Argument to be heard on appeal, whether oral or on brief,

shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given

reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

In re: ADAMS APPLE PRODUCE, INC.
PACA Docket No. D-05-0016.
Decision Without Hearing by Reason of Default.
File June 15, 2006.

PACA – Default.

Christopher Young Morales for Complainant.
Karla Whalen for Respondent.

Decision and order by Administrative Law Judge Peter M. Davenport.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) hereinafter referred to as the "Act", instituted by a complaint filed on July 22, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period May 2003 through September 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 37 sellers, 164 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $887,507.77.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail and was signed for by Respondent's representative on August 3, 2005. Subsequently, however, a copy of the complaint was returned by the U.S. Postal Service with a forwarding address. Although the complaint had already been signed for by certified mail, Complainant re-served the complaint to that forwarding address by certified mail, and the complaint was signed for by Respondent's representative on April 11, 2006. Therefore, the Hearing Clerk served the complaint upon Respondent pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147, hereinafter referred to as the "Rules of Practice), as of August 3, 2005. Respondent did not file an answer to the complaint within the 20 day time period prescribed by Section 1.136 of the Rules of Practice. Complainant moved for the issuance of a Decision Without Hearing by the Administrative Law Judge, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). As Respondent failed to answer the complaint within the 20 day time period prescribed by the Rules of Practice, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Tennessee. Its business address is 3625 County Road, Flatrock, Alabama 35966. Its mailing address is P.O. Box 219,

Higdon, Alabama 35979-0219. The corporation's Registered Agent is Paul Thornton. Mr. Thornton's address is 719 Kentucky Avenue, Signal Mountain, Tennessee 37377. Mr. Thornton's alternate address is 1107 Montvale Circle, Signal Mountain, Tennessee 37377.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 1997-2047 was issued to Respondent on August 25, 1997. This license terminated pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee on August 25, 2004.

3. During the period May 2003 through September 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 37 sellers, 164 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of $887,507.77.

Conclusions

Respondent's failure to make full payment promptly with respect to the 164 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

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In re: MARINE PARK FARMERS MARKET INC.
PACA Docket No. D-06-0004.
Decision and Order.
Filed June 19, 2006.

PACA -- Default.

Andrew Stanton for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Jill S. Clifton

Decision and Order by Reason of Default

This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (herein frequently "the PACA" or "the Act"), by a complaint filed on December 20, 2005.

The Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS" or "Complainant"), is represented by Andrew Y. Stanton, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.

The complaint alleged, among other things, that during August 2002 through November 2004, the Respondent, Marine Park Farmers Market, Inc. (herein frequently "Marine Park" or "Respondent"), failed to make full payment promptly to four sellers of the agreed purchase prices, or balances thereof, in the total amount of $269,455.05 for 43 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and/or foreign commerce or in contemplation of interstate or foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The complaint requested that the Administrative Law Judge find that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order Respondent's PACA license revoked.

A copy of the complaint was mailed, by certified mail, together with the Hearing Clerk's Notice Letter dated December 20, 2005, to Marine Park's business mailing address at 2961 Avenue U, Brooklyn, New York 11229. The complaint was delivered and signed for on

December 23, 2005. No answer to the complaint has been received. The time for filing an answer expired on January 12, 2006. *See* section 1.136(a) (7 C.F.R. § 1.136(a)) of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (hereinafter, "Rules of Practice").

The Complainant's Motion for Decision Without Hearing by Reason of Default is before me. 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 Marine Park'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

1. Marine Park Farmers Market, Inc. is a corporation organized and existing under the laws of the State of New York. Marine Park's business address is 2961 Avenue U, Brooklyn, New York 11229.

2. At all times material herein, Marine Park was licensed under the provisions of the PACA. License number 19981578 was issued to Marine Park on July 9, 1998. This license has regularly been renewed and is effective through its anniversary date in July 2006.

3. Marine Park's license was automatically suspended on October 1, 2003, pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)), due to Marine Park's failure to pay an August 26, 2003, reparation award issued in favor of Nathel & Nathel, Inc., Bronx, New York, in the amount of $50,955.00, plus interest. An additional reparation award was issued against Marine Park in favor of Nathel & Nathel, effective February 25, 2004, in the amount of $47,157.00, plus interest. These reparation awards have not been satisfied and, consequently, the suspension of Marine Park's PACA license remains in effect.

4. As more fully set forth in paragraph III of the complaint, Marine Park, during August 2002 through November 2004, failed to make full payment promptly to four sellers of the agreed purchase prices, or balances thereof, in the total amount of $269,455.05, for 43 lots of perishable agricultural commodities which it purchased, received, and accepted in the course of interstate and/or foreign commerce or in contemplation of interstate or foreign commerce.

Conclusions

1. The Secretary of Agriculture has jurisdiction.

2. Marine Park Farmers Market, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by willfully failing to make full payment promptly to four sellers of the agreed purchase prices in the total amount of $269,455.05, for 43 lots of fruits and vegetables, all being perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce during August 2002 through November 2004.

Order

1. Marine Park Farmers Market, Inc. committed wilful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and its PACA license, number 19981578 issued July 9, 1998, is revoked.

2. This Order shall take effect on the 11th day after this Decision becomes final.

Finality

This Decision and Order shall have the same force and effect as if entered after a full hearing and 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.

* * *

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: GALLO PRODUCE AND FOOD PRODUCTS, INC.
PACA Docket No. D-05-0022.
Default Decision.
Filed June 21, 2006.

PACA -- Default.

Chris Young-Morales for Complainant.
Respondent, Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision Without Hearing by Reason of Default

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on September 22, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period September 2002 through May 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 112 sellers, 924 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $2,292,989.81. The complaint further alleges that during the period December 2002 through April 2003, Respondent failed to make full payment promptly to 2 brokers in the total amount of $7,587.50 for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was mailed by the Hearing Clerk to Respondent's Registered Agent by certified mail and was signed for by Respondent's representative on September 30, 2005. Therefore, the Hearing Clerk served the complaint upon Respondent pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147, hereinafter referred to as the "Rules of Practice), as of September 30, 2005. Respondent did not file an answer to the complaint within the 20 day time period prescribed by Section 1.136 of the Rules of Practice. Complainant moved for the issuance of a Decision Without Hearing by the Administrative Law Judge, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). As

Respondent failed to answer the complaint within the 20 day time period prescribed by the Rules of Practice, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Missouri. Its business address is 1010 N. Century, Kansas City, Missouri 64120. Its mailing address is P.O. Box 33870, Kansas City, Missouri 64120-3870. The name and address of Respondent's registered agent is Michael Messina, 111 W. 75th Street, Kansas City, MO 64114.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 19730258 was issued to Respondent on September 6, 1973. This license terminated pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee on September 6, 2003.

3. During the period September 2002 through May 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 112 sellers, 924 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of $2,292,989.81.

4. During the period December 2002 through April 2003, Respondent failed to make full payment promptly to 2 brokers in the total amount of $7,587.50 for perishable agricultural commodities purchased, received, and accepted, in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 3 and 4, above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. ' 499b(4)), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

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CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Fresh Fare, Inc. PACA Docket No. D-04-0020. 2/6/06.

Lion Heart Group, Inc. PACA Docket No. D-05-0024. 2/8/06.

Dal-Don Produce Co., Inc. PACA Docket No. D-04-0026. 2/10/06.

John A. Foster d/b/a Foster Farm Fresh Produce. PACA Docket No. D-06-0006. 3/1/06.

P.J. Produce, Inc. and Frank J. Falletta. PACA Docket No. D-05-0023. 3/15/06.

Pieter Schoonveld d/b/a Dayton Trading Company. PACA Docket No. 06-0009. 4/10/06.

Alderiso Bros. Inc. PACA Docket No. D-06-0013. 5/11/06.

R & R Fresh Fruits and Vegetables, Inc. PACA Docket No. D-04-0009. 5/15/06.

AGRICULTURE DECISIONS

Volume 65

January - June 2006
Part Four
List of Decisions Reported (Alphabetical Listing)
Index (Subject Matter)

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*.

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

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket 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*.

Consent decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions*. However, a list of consent decisions is included in the printed edition. Since Volume 62, the full text of consent decisions is posted on the USDA/OALJ website (See url below). Consent decisions are on file in portable document format (pdf) format and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (ALJ).

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

Beginning in Volume 60, each part of *Agriculture Decisions* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The Alphabetical List of Decisions Reported and the Subject Matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Volumes 57 (circa 1998) through the current volume of *Agriculture Decisions* are also available online at http://www.usda.gov/da/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 56 (circa 1997) have been scanned and will appear in pdf on the same OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order.

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PERISHABLE AGRICULTURAL COMMODITIES ACT