Corrected Decision

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

OFPA Docket No. 08-0134

In re: PROMISELAND LIVESTOCK, LLC, and
ANTHONY J. ZEMAN,

Respondents

DECISION AND ORDER

Preliminary Statement

On June 4, 2008, Lloyd C. Day, the Administrator of the Agricultural Marketing Service (AMS), initiated this disciplinary proceeding against the Respondents Promiseland Livestock, LLC (Promiseland) and Anthony J. Zeman by filing a Complaint alleging willful violations of the Organic Foods Production Act of 1990, as amended (7 U.S.C. §6501, *et seq.*) (the "Act" or "OFPA") and the National Organic Program (the "NOP") regulations (7 C.F.R. §§205.1-205.690 (the "Regulations" or the "NOP Regulations").

On June 30, 2008, Counsel for the Respondents filed a Notice of Appearance[1]; an Answer and Statement of Defenses; a Motion to Strike and to Dismiss for Lack of Jurisdiction; and a Request to Establish a Briefing Schedule. Docket Entries 3-5. On July

[1] During the initial contacts by counsel with AMS, the Respondents were represented by William J. Friedman, Esquire, of Covington & Burling, LLP, Washington, D.C. Sometime prior to the filing of the Respondents' Answer, Friedman left Covington & Burling (subsequently returning) and eventually withdrew as the Respondents' attorney. As noted by Complainant, Friedman is frequently referred to by his middle name ("Jay"). *Fn.* 4, Complainant's Proposed Findings of Fact, Conclusions of Law and Order and Brief in Support Thereof. On June 9, 2009, Mark Mansour, Esquire of Bryan Cave LLP filed his Notice of Appearance and has represented the Respondents at the hearings and in post hearing matters.

18, 2008, the Complainant filed a Response to the Respondents' Motions.[2] Docket Entry 11. On November 14, 2008, a teleconference was conducted and a schedule for the exchange of witness lists and exhibit list and exhibits was established.[3]

On January 26, 2009, the Complainant filed an Amended Complaint. Both parties filed additional pleadings in the form of Status Reports and on February 17, 2009, the Respondent filed a Motion to Strike the Amended Complaint, a Request for Leave to File Provisional Answer to the First Amended Complaint under Seal. Docket Entries 27 and 28. The parties filed additional exchanges and on March 10, 2009, William Friedman filed a Notice of Attorney Withdrawal and Request for Stay of Pending Deadlines and Designation of Appropriate Time for Respondent[s] to Obtain Replacement Counsel. Docket Entry 39. On March 11, 2009, an Order was entered holding matters in abeyance for 30 days in order for the Respondents to secure replacement counsel. The Respondents failed to secure replacement counsel in the allotted period and on May 12, 2009 an Order was entered directing the Respondents to provide the Hearing Clerk and the Administrative Law Judge's Secretary with a telephone number at which they might be reached so that a teleconference could be conducted.

On May 20, 2009, a second teleconference was held. The Respondents were unrepresented at that time and Anthony J. Zeman participated individually and on behalf of Promiseland Livestock, LLC. The pending matters were addressed, the Motion to Strike was denied; the Provisional Answer was unsealed and ordered filed; the

[2] On July 16, 2008, the Hearing Clerk sent out a letter indicating that no response had been filed in response to Respondents' motion by the Complainant within the allotted time. Docket Entry 7. Rather than addressing the matter with the Hearing Clerk, Counsel for the Complainant filed a pleading responding to the Hearing Clerk's letter. Docket Entry 9. A subsequent letter was then sent by the Hearing Clerk indicating that the parties should disregard the July 16, 2008 letter. Docket Entry 10.

[3] The Complainant sought clarification of the Exchange Order and a Clarification of Summary and Order was entered on November 24, 2008. Docket Entries 14 and 15.

Respondents' Request to file further pleadings as either a consolidated reply or an amended motion was denied; and the matter was set for hearing in Bassett, Nebraska on June 23, 2009[4]. On June 17, 2009, an Order was entered cancelling the June 23, 2009 hearing and rescheduling it for July 14, 2009 in Washington, D.C.

On the day prior to the hearing, Counsel for the Respondents filed an Emergency Motion for Continuance, citing his recent retention as Counsel for the Respondent, his international travel which had interfered with his preparation for the hearing and the volume of exhibits involved in the case. The oral hearing commenced as scheduled on July 14, 2009, with the Complainant represented by Babak Rastgoufard, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. and the Respondents represented by Mark Mansour, Esquire and Patrice M. Hayden, Esquire, both of Bryan Cave, LLP, Washington, D.C. Following the entry of appearances of counsel, the Emergency Motion was heard and denied;[5] however, the Respondents were granted leave to delay presentation of their case until a later date. On July 14, 2009, following opening statements (Tr. 1@ 14-19), the Complainant introduced the testimony of four witnesses and 58 exhibits.[6] The following day, July 15, 2009, the Respondent Anthony J. Zeman testified, three of the Complainant's exhibits were introduced and admitted and one of the Respondents' exhibits was admitted. At the conclusion of the hearing on July 15, 2009, the hearing was recessed to be reset on a date to be agreed upon by the parties. Tr. 2@567-568.

[4] Both parties moved at different times to change the hearing location (Docket Entries 47 and 50).
[5] Counsel for the Respondents strenuously objected to the case proceeding as scheduled, suggesting that the hearing was "absolutely out of order at this point. It's unfair, it's prejudicial and we want it noted for the record." Tr. 1@10-11.
[6] References to the transcript of the proceedings will be indicated as Tr. 1 for July 14, 2009, Tr. 2 for July 15, 2009 and Tr. 3 for September 18, 2009 (with the page number). Complainant's exhibits are indicated as CX with the exhibit number; the Respondents' exhibits are indicated as RX and the number. Also admitted was Joint Exhibit 1, a Stipulation as to Authenticity of Exhibits. Tr. 1@13.

The hearing resumed on September 18, 2009 with the same counsel representing the parties as appeared at the earlier hearing. The Respondents again called Anthony J. Zeman and then introduced the testimony of two other witnesses. The Complainant recalled Dr. Barbara Robinson who had testified previously on July 14, 2009. The Respondents introduced two additional exhibits which were admitted. Both parties presented closing arguments. Tr. 3@ 64-75. Post hearing briefs have since been received from both parties and the matter is now ready for disposition.

Discussion

Despite the somewhat voluminous size of the record, the facts in this case are relatively simple.[7] The Complainant alleged that the Respondents willfully violated the Act and the NOP Regulations by refusing to provide AMS personnel access to Respondents' records (1) between January 22, 2007 and June 5, 2007; (2) June 5, 2007; and (3) June 10, 2007.

The record keeping requirement is set forth expressly in Section 2107 of the Act:

> (b) DISCRETIONARY REQUIRMENTS. - An organic certification program established under this title may –
>
> (1) provide for the certification of an entire farm or handling operation…if-
>
> ….
>
> (B) the operators of such farm or handling operation maintain records of all organic operations separate from records relating to other operations and make such records available **at all times** for inspection by the Secretary, the certifying agent, and the governing State official; … 7 U.S.C. §6506(b) (Emphasis added)

A similar provision is found in the NOP Regulations:

> (a) A certified operation must maintain records concerning the production,

[7] Respondents disagree, asserting instead that the Respondents made every attempt to cooperate and that the Complainant should have specified exactly what information was to be produced and that the request to produce records was an attempt to gather information without any real purpose. Tr. 1@18-19, 168-169.

harvesting, and handling of agricultural products that are or that are intended to be sold, labeled, or represented as "100 percent organic," "organic," or "made with organic(specified ingredients or food group(s))."

(b) Such records must:
(1) Be adapted to the particular business that the certified operation is conducting;
(2) Fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited;
(3) Be maintained for not less than 5 years beyond their creation; and
(4) Be sufficient to demonstrate compliance with the Act and the regulations in this part.

(c) The certified operation **must make such records available for inspection and copying during normal business hours** by authorized representatives of the Secretary, the applicable State program's governing State official, and the certifying agent. 7 C.F.R §205.103 Emphasis added.

A similar provision provides:

(d) Maintain all records applicable to the organic operation for not less than 5 years beyond their creation and **allow authorized representatives of the Secretary**, the applicable State organic program's governing official, and the certifying agent **access to such records during normal business hours for review and copying to determine compliance with the Act and the regulations** in this part…. 7 C.F.R. §205.400(d) Emphasis added.

The position of the Complainant is that despite the clear, absolute and unambiguous duty imposed by the language of both the Act and the NOP Regulations requiring that records be made available to representatives of the Secretary upon request,[8] the Respondents willfully failed to do so despite being given ample and multiple opportunities, considerable latitude and time in which to comply. In somewhat stark contrast to the testimony introduced during the course of the three days of hearing, the Respondents claim in their Post Trial Brief that access to the records was provided,

[8] Although the statute uses the word "at all times," the regulatory provision is somewhat more lenient and relaxes the duty to require only that the records be made available only during normal business hours. 7 U.S.C. §6506(b) and 7 C.F.R §205.103 and 205.400(d).

somehow equating creation of computer programs and generation of records with producing them for the Secretary's representatives.[9] Respondents' Post Trial Brief @ 2-4.

The testimony of David Trykowski, the Director of Compliance, Security and Safety Division of AMS (hereafter Compliance Office), explained that the National Organic Program differs from other programs managed by the Agricultural Marketing Service in that inspection and certification is performed by private or state certifying agents rather than having USDA inspectors in the field inspecting samples of commodities.[10] Tr. 1@25-29. The accredited certifying agents (ACAs) accept applications for organic certification which are accompanied by an organic systems plan which specifies how the entity will comply with the requirements of the Act and the NOP Regulations. Once the organic systems plan has been reviewed and accepted, the certifying agent conducts an on-site inspection of the facility to verify that the organic systems plan is being followed before the entity is certified as meeting the criteria to operate as a "certified organic farm or handling operation." Tr. 1@26-28. Thereafter, inspections are generally conducted annually by the certifying agent to insure continued compliance. *Id* @28. In addition to the inspections and routine audits of the organic operations, AMS has two individuals assigned to review any complaints which are received concerning participants in the program. Tr. 1@30-31.

Mr. Trykowski testified that Promiseland first came to his office's attention in March of 2006 when AMS received a complaint concerning the Respondents' operation.

[9] Respondents are correct only to the extent that the records pertaining to the Aurora investigation which had been originally requested on January 22, 2007 were produced on June 5, 2007; however, the records sufficient to conduct an audit have yet to be produced to Compliance Officers.

[10] Mr. Trykowski testified that there are approximately 95 certifying agents, most of which are private entities. At the time of the hearing, the certifying agents had certified in excess of 27,000 operations. Tr. 1@29.

Tr. 1@33. The complaint contained a number of allegations, including feeding non-organic feed to livestock, purchasing conventional grain, mislabeling it and reselling it as an organic product. CX-33, *Id* @33-34. Upon receipt of the complaint, AMS first determined that the Respondents' operation had been certified, identified the certifying agent as Quality Assurance International (QAI) and then consistent with the usual practice sent a letter to the certifying agent requesting that they investigate the allegations. CX-34, *Id* @34-35, 66. After not receiving inspection results from QAI by September of 2006 (a period of approximately six months), AMS sent a follow up letter.[11] CX-35, Tr. 1@71.

QAI responded to the follow up letter, indicating that their investigation was still under way, that they had been unable to conduct their audit which had been scheduled to be conducted on August 11, 2006 as the Respondent Promiseland Livestock, LLC had indicated that no one would be available that day, and that the audit would be rescheduled for October 10-12, 2006. CX-25, 36, Tr. 1@72-73, 75. When the QAI inspector attempted to perform his audit in October of 2006, he was informed that in the interim, the Respondents changed certifying agents[12] and that the inspector would not be provided access to any records. CX-26, 27, Tr. 1@77,78.

In order to change certifying agents, Promiseland was required to go through the entire certification process with the Indiana Certified Organic ("ICO"), the new accredited certifying agent, submitting a new application with supporting documentation

[11] QAI had provided AMS with a "Non-Compliant" letter that had been sent to Promiseland on March 16, 2006 as well as a notification of "Client Status-Suspension Pending" dated April 18, 2006, but had not provided the requested investigation results. CX-21, 23, and 35.

[12] A letter dated October 10, 2006 was sent via fax from Promiseland to QAI informing it that Promiseland Livestock, LLC had surrendered their certification for the Missouri location effective August 10, 2006. CX-27, Tr. 1@77-79.

and undergoing an on-site inspection by the new agent. As part of this process, Promiseland completed a handwritten "ICO Organic Farm Plan Questionnaire" dated June 6, 2006 indicating that June or July would be the best time to inspect their operation. CX-28. Promiseland completed additional typed questionnaires dated July 13, 2006 and which were signed on August 1, 2006 and submitted in connection with the application. CX-29, Tr. 1@81. ICO's on-site inspection of Promiseland's operation was conducted at the Falcon, Missouri location on August 2, the Grant City, Missouri location on August 3, and the Bassett, Nebraska location on August 10, 2006 by Ib Hagsten, an independent inspector.[13] CX-31, 32.

While certified organic operations are free to change their certifying agent at will, the timing of the change of Promiseland's agent and the significant change found in the evaluation of the operation's audit trail and record keeping[14] raised concerns with the Compliance Office as to whether there had been unacceptable application of the standards. Tr. 1@85-87. A few months later, the Compliance Office was asked by the National Organic Program to obtain records from Promiseland Livestock, LLC in connection with their transactions with another entity, Aurora Organic Dairy, an entity that was the subject of an investigation. Questions had been raised in that investigation

[13] It should be noted that Respondents indicated only that no one would be available on August 11, 2006 and made no mention that QAI's services were being terminated when QAI was attempting to schedule their inspection in August. Respondents met with ICO's inspector the day before on August 10, 2006, but QAI was not notified that they had been replaced until October. Although ICO's certification (CX-6, 7) was dated as being effective August 10, 2006 (the same date as the final portion of the on-site inspection), presumably it was issued sometime later as Hagsten's report was not created until August 13, 2006 at 8:17 PM. CX-31.

[14] While QAI had reported significant audit trail deficiencies for both 2005 and 2006 (CX-15, 20, 21, and 23), ICO found the Respondents' audit trail and record keeping to be more than acceptable. CX-31. Zeman testified that the differences were attributable to his significant investment in a records keeping system designed by David Konrad, a consultant employed by Promiseland.

concerning replacement livestock that Aurora had indicated that they had obtained from Promiseland. Tr. 1@88, 89.

In order to respond to the request involving the Aurora investigation, Mr. Trykowski directed one of the Compliance Officers, Terry Kaiser, to contact Promiseland for any documents needed in that investigation. Tr. 1@88-89. Despite repeated contacts by Mr. Kaiser between January 22, 2007 and June of 2007, Promiseland produced no records for inspection. CX-37, Tr. 1@90-91.

Confronted now with a lack of cooperation involving two separate outstanding investigations concerning the Respondents,[15] Mr. Trykowski dispatched two teams from his office to conduct independent unannounced inspections, one to the operation in Falcon, Missouri and the other to Grant City, Missouri. Tr. 1@89-92, 94-102. The Compliance Officers sent to Falcon, Missouri were provided with a letter addressed to Mr. Zeman signed by Mr. Trykowski, citing the efforts that had been made to secure records in connection with the Aurora inquiry, providing the authority for requesting the information, and including the following language in the penultimate paragraph:

> If you, or any representative of your organization, fail to make your records available for inspection and copying, I will request that the National Organic Program Manager within 48 hours propose your suspension from the National Organic Program in accordance with 7 CFR §205.660(b)(1). CX-39.

The team sent to the Falcon, Missouri had been charged with two missions, the first to obtain the documents needed for the Aurora investigation and the second, to audit the organic system plan. Tr. 1@202-205. Eleanor "Shelly" Scott, one of the Compliance Officers sent to Falcon, Missouri testified that while the records requested in connection

[15] QAI eventually notified AMS that due to Promiseland's surrender of their certification through QAI, they were no longer able to conduct the requested investigation. Tr. 1@95-96. As noted above, despite repeated efforts from January to the first part of June of 2007, no progress had been made in securing the records needed in the Aurora investigation.

with the Aurora investigation were produced and provided, the records necessary to audit the organic systems plan were not.[16] Tr. 1@199-204. Another attempt to conduct the audit of the Respondents' Falcon, Missouri organic systems plan was made on June 10, 2008 by Ms. Scott and Ross Laidig, another Compliance Officer at which time the officers were denied access to the records by Anthony J. Zeman. Tr. 1@208-209.

The three Compliance Officers sent to the Grant City, Missouri facility received a more cooperative reception and were able to interview Adam Zeman concerning the operation there and allegations contained in the Complaint which had been received by AMS.[17] Tr. 2@266-271. As the Complaint in this action involves denial of access to records, and it appears that the younger Zeman cooperated with the Compliance Officers, further discussion of those allegations appears unnecessary to the resolution of the issues in this action.

Similarly, both parties introduced testimony concerning a further attempt to secure necessary records at a meeting between the Respondents, his attorney at the time, William J. Friedman, and representatives from the Compliance Office at law offices located in Washington, D.C. in May of 2008. At that meeting, the Respondents apparently had the records available, but again failed to produce them for review and

[16] Ms. Scott testified that she and Richard Matthews arrived at the Respondents' location in Falcon, Missouri on June 5, 2007. After some initial difficulty effecting contact with anyone, they were able to contact Leslie Ehnis. After identifying themselves to Ms. Ehnis and explaining the reason for their visit and giving her a copy of Mr. Trykowski's letter, they were asked to return that afternoon at which time the Aurora documents were provided. When the subject of the audit was discussed, Ms. Ehnis indicated that she had a lot of farm work to do and that she needed to talk with Mr. Zeman about the audit. Ms. Scott and Mr. Matthews then indicated that they would return the following day on June 6, 2007. On June 6, 2007, they were denied access to the records. Tr. 1@197-207, CX-38.

[17] The team sent to Grant City, Missouri included Compliance Officers Ross Laidig, Terry Kaiser and Pablo Orozco. Tr. 1@266. Anthony Zeman testified that the Grant City operation was never operated as organic, but rather was a conventional operation operated by his son, Adam (Tr. 2@486-487), a claim somewhat inconsistent with ICO's inspection of all three sites (Falcon, Missouri, Bassett, Nebraska and Grant City, Missouri). Additionally, although Zeman testified that the last animal that Promiseland had there was in 2005 (Tr. 2@ 431-432), Ib Hagsten's report indicates that the animals raised on Promiseland grass are finished out 70-75 days at the Grant City feedlot. CX-31.

copying;[18] however, as the Complaint contains no allegation of further violation other than June 10, 2008, other than mentioning the event in passing, further discussion of it is also considered unnecessary.

Despite a clearly Manichean duty to produce records on request during normal business hours, Anthony J. Zeman seeks to excuse his and Promiseland's record production delicts on the differing occasions on the basis that he was too busy coping with the impact of natural events (an ice storm which took out the electricity for 13 days in January of 2006 [Tr. 2@501]), his dissatisfaction and subsequent firing of QAI as Promiseland's accredited certifying agent[19] [Tr. 2@ 441-443, 464-470, 474-475, 526](at the same time taking the multiple days to become certified by another accrediting agent), the demands on his time at multiple locations during the planting season (Tr. 2@504-507, 530), the perceived vagueness of the request for the records necessary to conduct an audit coming from individuals who "did not understand farming" (Tr. 2@441-443), and lastly, upon the advice of counsel (Tr. 2@513, 531, 538). Given the sheer size and volume of the Respondents' operation,[20] such excuses over the prolonged period of time involved in this action cannot be countenanced. While the Compliance Office may well exercise substantial latitude or leniency in exacting cooperation in the production of requested records in individual cases where warranted, the Secretary and his representatives have

[18] The meeting was set up by William Friedman in the Washington, D.C. offices of Crowell & Moring, LLP in May of 2008. Anthony Zeman testified that although he brought all of the operation's records with him to the meeting including a binder or binders as well several CDs or DVDs containing the computerized programs, his attorney put them in his brief case and never proffered access to them. In any event, records sufficient to conduct an audit were yet again not produced. Tr. 1@114-115, 238; Tr. 2@535-536.

[19] The failure to make records available on August 11, 2006, although not alleged as a violation constitutes another instance in which the Respondents failed to make records available to an individual authorized under the NOP Regulations to review and copy records. ICO's certification appears to have been backdated as the report on which it was based was not prepared until August 13, 2006. CX-6, 7, 31.

[20] The ICO certificates indicate that Promiseland's operation involved 13,000 acres on which multiple crops were raised and 22,000 head of cattle. CX- 6, 7. The dollar volume of the operation is significant, well in excess of seven figures. Tr. 1@218-220. As such, the Respondents' operation well exceeds the threshold definition of a small agricultural producer set forth in 13 C.F.R. §121.201,

an unfettered and absolute right under the Act and the NOP Regulations to have records produced upon request without the type of delay, obstruction, and willful withholding that has been manifested by the Respondents in this action. Operation under the auspices of the USDA NOP is a privilege rather than a right and requires that USDA be granted access to NOP related records upon request. The Respondents cannot seek refuge from this obligation invoking advice of counsel,[21] as the Judicial Officer has held that reliance on erroneous advice is misplaced. *In re: Arab Stock Yard, Inc.*, 37 Agric. Dec. 293,306 (1978), *aff'd sub nom. Arab Stock Yard v. United States*, 582 F.2d 39 (5th Cir. 1978). Similarly, efforts by counsel to limit the scope of review, to require definition of the specific records sought to be reviewed, or to have either an attorney or a specific corporate officer present when the records are produced cannot abrogate, modify or mitigate the duty to make the records available for review and copying upon request.[22]

Based upon all of the evidence in this action, including the testimony of the witnesses and exhibits admitted during the hearing, the following Findings of Fact, Conclusions of Law and Order will be entered.

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[21] Even were advice of counsel a defense, it is manifestly clear that the Respondents had not retained Mr. Friedman until sometime after June 5, 2006 as Friedman's conversation with Ms. Scott indicated that he had not been retained at that point. Tr. 1@223, CX-42. By June 7, 2006, Friedman had been retained. CX-51. Rather than facilitating compliance, his efforts to limit the scope of review and to superimpose the need for his presence during any contact with USDA served only to continue to frustrate the efforts of the AMS officers to obtain information that they were clearly entitled to under the Act's mandate. CX-51, 53, 58, 63 & 73. Moreover, his offensive characterization in his letter of June 29, 2006 to Lloyd C. Day of the conduct of the Compliance Officers' visit as "badge-toting AMS agents demanding to rummage around a farmer's home" is flatly contradicted by the testimony of his own client Anthony Zeman ("…To her credit, she was very congenial." Tr. 2@507) and did little to promote a favorable settlement environment. CX-55.

[22] *See:* 7 U.S.C. §6506(b). In his testimony on July 15, 2009, Anthony Zeman indicated "…My deal is that I never have to be smart, I just have smart people around me." Tr. 2@462. His testimony and the exhibits clearly indicate that Leslie Ehnis took care of most of the correspondence and record keeping and not only had superior knowledge of how the records were organized and would have been the logical individual rather than Zeman himself to make records available to individuals needing access. Tr. 2@480, 552-553, 556-557; CX-17, 18, 21, 22, 24, 27, 28, & 40. Her testimony indicates that the duties of her job continued to evolve, starting with paying bills on the day to day level and progressing to the point where the operation's administrative matters consume approximately 30-40% of her time. Tr. 3@10-15. She went on to say that with the help of others, Promiseland had developed its own computer program for the crop and livestock records. Tr. 3@16-19.

Findings of Fact

1. Respondent Promiseland Livestock, LLC is a limited liability company, incorporated under the laws of the State of Missouri, with its principal place of business in Bassett, Nebraska. CX-1-3. At various points in time since 2002, the LLC has maintained certified organic facilities at the following locations: Promiseland Heifer Ranch, Falcon, Missouri; Promiseland Empire; Lebanon, Missouri; Promiseland Elkland, Elkland, Missouri; Promiseland Bassett, Bassett, Nebraska; and the Promiseland Feedlot, Grant City, Missouri. The size, scope and multi-million dollar volume of the Respondent's operation is significant, well in excess of the definitional threshold for a small agricultural producer.

2. Respondent Anthony J. Zeman, also known as Anthony Zeman and "Tony" Zeman, resides in Bassett, Nebraska and is the sole organizer, agent for service of process and chief operating officer of Promiseland Livestock, LLP. CX-1, 3.

3. Quality Assurance International (QAI) and Indiana Certified Organic, LLP (ICO) are both accredited certifying agents authorized to certify operations as a "certified organic farm or handling operation" under the Act and the NOP Regulations by AMS.

4. QAI certified Promiseland's and Tony Zeman's livestock and crop operations as meeting the requirements under the Act and the NOP Regulations to operate as a certified organic farm operation from April 29, 2002 until sometime in 2006. For the 2006 crop year, the certified livestock operation included non-slaughter dairy heifers, and slaughter cattle including Angus, Wagyu and Wangus Beef and the certified crops included pasture, alfalfa hay, soybeans and yellow corn. CX-4-5.

5. ICO certified Anthony Zeman's and Promiseland's livestock and crop operations as meeting the requirements under the Act and the NOP Regulations to operate as a certified organic farm operation from and after August 10, 2006. For the 2006 crop year, the certified livestock operation included 12,000 dairy heifers, and 10,000 head of slaughter cattle and the certified crops included 2500 acres of corn, 2500 acres of soybeans, 1500 acres of sunflowers, and 7500 acres of grass and alfalfa. CX-6, 7.

6. On November 12, 2007, ICO certified Anthony Zeman's and Promiseland's livestock and crop operations as meeting the requirements under the Act and the NOP Regulations to operate as a certified organic farm operation for the 2007 crop year, with the certified livestock operation including dairy replacement heifers, and beef slaughter stock and beef calves and the certified crops including 1081 acres of corn, 548 acres of corn silage, 1254 acres of pasture, 4471 acres of permanent pasture, 868 acres of soybeans and 345 acres of yellow corn. CX-8, 9.

7. In March of 2006, the Compliance Office at AMS received a complaint indicating that Respondents were not complying with the requirements of the organic program, including allegations of feeding non-organic feed to livestock, and purchasing conventional grain, mislabeling it and reselling it as an organic product. CX-33.

8. After determining that Respondents were in fact certified under the NOP, consistent with usual practice, the Compliance Office requested that the ACA, QAI investigate the allegations. CX-34. QAI contacted Respondents to schedule an on-site inspection visit of the operation on August 11, 2006, but were informed that no one would be available that date and the inspection visit was rescheduled for October 10-12, 2006. CX-25, 36. When the QAI inspector arrived on October 10, 2006, he was advised

that as a result of being dissatisfied with the service provided Promiseland had replaced QAI with another ACA and that no records would be produced. CX-26, 27. QAI subsequently advised the Compliance Office that as a result of the termination of their services as Promiseland's ACA that they would be unable to conduct the requested investigation.

9. Sometime thereafter, the Compliance Office received a request to obtain records from Promiseland concerning their transactions with Aurora Organic Dairy in connection with an ongoing investigation of that entity. Compliance Officer Terry Kaiser was assigned the task of getting records; however, despite his repeated efforts between January 22, 2007 and June 5, 2007, no records were produced by Promiseland. CX-37, Tr. 1@90-91.

10. With two separate outstanding investigations concerning the Respondents, the Compliance Office dispatched two teams to conduct their own inspections, one to the operation in Falcon, Missouri and the other to Grant City, Missouri. Tr. 1@89-92, 94-102.

11. Eleanor "Shelly" Scott and Richard Matthews were sent to Falcon, Missouri and were provided with a hand carried letter dated June 5, 2007 addressed to Mr. Zeman signed by Mr. Trykowski, citing the efforts that had been made to secure records in connection with the Aurora inquiry, providing the authority for requesting the information, and including language of action that could be taken in the event of a continued failure to produce the records. CX-39.

12. Ms. Scott's inspection visit to the Falcon, Missouri location on June 5, 2007 was to serve two purposes, the first being to obtain the records pertaining to the Aurora

investigation, and the second being to conduct an audit of the organic systems plan to determine if the requirements of the Act and the NOP regulations were being met, a concern raised by the disparity of the record keeping evaluations by QAI and ICO. Although the Aurora records were produced on June 5, 2007, access to the necessary records required for an audit was denied on June 6, 2007 by Leslie Ehnis, acting on instructions from Anthony Zeman.

13. On June 10, 2008, another inspection was attempted by Compliance Officers Scott and Ross Laidig and access to the records was again denied by Anthony Zeman.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The obligation to maintaining organic operation's records and making such records available to individuals designated under the Act and NOP Regulations for the purpose of determining compliance with the Act and the NOP Regulations is critical to the enforcement of the integrity of the National Organic Program.

3. The Respondents Promiseland Livestock LLC and Anthony J. Zeman willfully and in violation of 7 U.S.C. §6506(b), 7 C.F.R §205.103 and §205.400(d) failed to make requested records available and denied the Secretary's representatives access to review and copy organic operation records required to determine compliance with the Act and the NOP Regulations on the following occasions:

a. January 22, 2007 to June 5, 2007, inclusive,

b. June 6, 2007, and

c. June 10, 2008

Order

1. The organic certifications of Respondents Promiseland Livestock, LLC and Anthony J. Zeman are suspended, pursuant to 7 C.F.R. §205.662(f)(1), for a period of 4 years.

2. The Respondents Promiseland Livestock, LLC and Anthony J. Zeman, and any person responsibly connected with Respondents' certified organic operation are disqualified, pursuant to 7 U.S.C. §6519, from receiving certification under the Act for a period of 4 years.

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

Copies of this Decision and Order shall be served upon the Parties by the Hearing Clerk's Office.

Done at Washington, D.C.
November 25, 2009

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PETER M. DAVENPORT
Administrative Law Judge

Copies to: Babak Rastogoufard, Esquire
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