

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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A.Q. Docket No. 16-0024

In re:

Sweeny S. Gillette,

Respondent

Order Granting Complainant's Motion for Summary Judgment**I. Introduction**

This proceeding was instituted under the Animal Health Protection Act (7 U.S.C. § 8301 *et seq.*) (AHPA or Act) by a complaint filed by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA) (hereinafter, APHIS or Complainant) on November 20, 2015, alleging that Respondent Sweeny S. Gillette (hereinafter, Respondent), willfully violated the Act and the regulations promulgated thereunder (9 C.F.R. §§ 71.1 *et seq.* and 78.1-78.14) (the regulations) by the Secretary of Agriculture (the Secretary). Respondent filed an answer admitting that he currently resides in (b) (6) and that he owned and operated Gillette Livestock, Inc., located in Ontario, Oregon, from 2010-2011, but denying all the other allegations set forth in the complaint. However, the documents that Complainant has submitted in support of its motion for summary judgment filed on February 5, 2016 demonstrate that there is no dispute of material fact with respect to either the Secretary's jurisdiction over Respondent or the violations set forth in the complaint. Therefore, for the reasons discussed more fully herein below, Summary Judgment, is appropriate in this case.

II. Procedural History

The complaint was filed with the USDA hearing clerk on November 20, 2015. It alleged that Respondent and his father-in-law, Richard "Ric" D. Hoyt, were the co-owners of Morgan Avenue Feeders, L.L.C. (hereinafter, MAF), located at 4455 Hwy 201, Ontario, Oregon 97914, and that Respondent also owned and operated Gillette Livestock, Inc., located at 4312 S. Grandview Lane, Ontario, Oregon 97914 (hereinafter, Gillette Livestock), and G 7 Livestock, L.L.C., located at 849 Morgan Avenue, Ontario, Oregon 97914. The Complaint further alleged that Respondent had moved cattle that were test-eligible for brucellosis in interstate commerce without the documentation required by federal regulations. Specifically, it alleged that on or about December 3, 2010, Respondent purchased 78 head of cattle that were test-eligible for brucellosis at Cattleman's Livestock Auction, Inc. d/b/a Treasure Valley Livestock Auction in Caldwell, Idaho, and moved at least 29 head to MAF in Oregon without obtaining a valid certificate for said movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii). The complaint likewise alleged that on or about December 20, 2010, Respondent purchased 70 head of cattle that were test-eligible for brucellosis at the same livestock auction and again moved at least 19 head to MAF in Oregon without obtaining a valid certificate for said movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii). The complaint also alleged that, on or about December 27, 2010, Respondent moved 34 head of cattle that were two (2) years of age or older from MAF in Oregon to XL Four Star Beef, Inc., a commercial slaughter plant located in Nampa, Idaho (hereinafter, XL Four Star), accompanied by five (5) State of Oregon Brand Inspection Certificates that matched only seven (7) of the animals in the shipment and which had expired prior to the date of movement.

Accordingly, the complaint alleged that Respondent moved the animals in interstate commerce without any documents stating the point from which the cattle moved, their destination, the number of cattle being moved, the name and address of their owner at the time of the movement, the name and address of any previous owner(s) who might have owned the cattle within four (4) months prior to the movement, the name and address of the shipper, and the hack tag numbers or other approved identification applied to the cattle, in violation of 9 C.F.R. § 71.18(a)(1)(i).

Finally, the complaint alleged that on or about January 8, 2011, Respondent sold 132 head of cattle that were test-eligible for brucellosis to Ron Yribarren of Bishop, California, and moved or arranged the movement of the cattle from MAF in Oregon to Mr. Yribarren's ranch in Bishop.

The complaint alleged that the paperwork that accompanied this movement consisted of a Certificate of Veterinary Inspection (CVI) from the Oregon Department of Agriculture, # 92-79146, and an attached brucellosis test record, but the latter listed only 72 head of cattle.

Accordingly, the complaint alleged that Respondent moved well over 100 brucellosis test-eligible cattle in interstate commerce without obtaining a valid certificate for said movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii).

The USDA hearing clerk mailed copies of the complaint to Respondent at his Oklahoma and Oregon addresses by both certified mail, return receipt requested, and regular mail on or about the same day that it was filed. In accordance with section 1.136 of the rules of practice (7 C.F.R. § 1.136), Respondent's answer was due within twenty (20) days from the date on which he was served with the complaint. All of the copies of the complaint that were mailed by certified mail were returned to the USDA hearing clerk marked by the U.S Postal Service as

unclaimed¹ or unable to forward, and three (3) of the copies that were mailed by regular mail also were returned marked unable to forward, but the copy that was mailed to Respondent at his Oklahoma address by regular mail was not returned. Therefore, Respondent was served with the complaint at his Oklahoma address via regular mail, but Complainant was unable to determine the date on which Respondent was served and unable to compute the date on which Respondent's answer was due.

On December 10, 2015, Respondent, acting by and through his attorney of record, Mr. Brian Zanotelli, Esq., filed an answer and request for oral hearing with the USDA hearing clerk.² As previously noted, the answer admitted Respondent's Oklahoma mailing address and his ownership of Gillette Livestock as set forth in paragraph I of the complaint but denied all of the remaining allegations set forth in the complaint. The answer raised two affirmative defenses; specifically, it claimed that the complaint was time barred and that it was vindictive and retaliatory. Finally, the answer requested the scheduling of an oral hearing.

III. Points and Authorities

1. The Act and Regulations

The Animal Health Protection Act (7 U.S.C. §§ 8301-8316) authorizes the Secretary of Agriculture to promulgate regulations to protect human and animal health, the economic interests associated therewith, and the environment by, among other things, detecting certain animal pests

¹ The copy of the complaint that was mailed to Respondent's Oklahoma address by certified mail was the only one that was returned to the USDA hearing clerk marked unclaimed. All of the other copies that were returned to the hearing clerk were marked unable to forward, whether mailed by certified mail or regular mail.

² Because Complainant was and is unable to determine the date on which service was effected and unable to compute the date on which Respondent's answer was due, the answer to the complaint is presumed to have been timely filed.

and diseases and preventing their entry into or movement through the United States. *See, generally*, Section 10402 of the Act (7 U.S.C. § 8301). Section 10406 of the Act (7 U.S.C. § 8305) authorizes the Secretary to “prohibit or restrict the movement in interstate commerce of any animal, article, or means of conveyance if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction or dissemination of any pest or disease of livestock.” Pursuant to this authority, the Secretary has promulgated regulations to detect, control, and eradicate bovine brucellosis, a highly contagious bacterial disease that causes aborted pregnancies and impaired fertility in cattle and bison.³ The bovine brucellosis regulations are found in 9 C.F.R. Part 78.

APHIS Veterinary Services had designated multiple States, including the States of Oregon, Idaho, and California, as Class Free⁴ with respect to brucellosis in 2010 and 2011,⁵ but the interstate movement of cattle in those States was still subject to the regulatory requirements found in 9 C.F.R. § 78.9(a)(3)(iii), which governed the interstate movement of cattle that were from herds not known to be affected by brucellosis in order to facilitate the detection of any outbreak of the disease in such cattle and to trace the outbreak back to its source. At the time of

³ For information about the epidemiology of brucellosis, its potential impacts on animal health, public health, and the U.S. livestock industry, and USDA’s Brucellosis Eradication Program, see the Brucellosis Fact Sheet that can be found on-line at https://www.aphis.usda.gov/animal_health/animal_diseases/brucellosis/downloads/bruc-facts.pdf.

⁴ Section 78.1 of the brucellosis regulations contained a definition of the term “Class Free” and set out the standards for attaining and maintaining such status. Both the definition and the standards can be summarized as follows: a Class Free State or area is one that has eliminated or controlled brucellosis within its borders for at least 12 consecutive months by conducting brucellosis ring tests of all herds of domestic livestock within its borders; slaughtering or quarantining any animals that tested positive for the disease; and, with respect to the quarantined animals, has retested those animals and obtained negative results such that they were released from any State or Federal quarantine. The definition of and standards for attaining and maintaining Class Free status did not change from 2010 to 2011.

⁵ *See* 9 C.F.R. § 78.41(a) as set forth in the January 1, 2010, and January 1, 2011, editions of Title 9, Code of Federal Regulations, Parts 1 to 99.

the violations alleged in the complaint, 9 C.F.R. § 78.9(a)(3)(iii) stated, in pertinent part, the following:

Test-eligible cattle⁶ which originate in Class Free States or areas, are not brucellosis exposed, and are from a herd not known to be affected may be moved interstate from Class Free States or areas only as specified below: . . . (3) Such cattle may be moved interstate other than in accordance with paragraphs (a)(1) [governing movement to recognized slaughtering establishments] and (2) [governing movement to quarantined feedlots] of this section only if . . . (iii) Such cattle are moved interstate accompanied by a certificate which states . . . that the cattle originated in a Class Free State or area.⁷

Section 78.1(a) of the regulations (9 C.F.R. §78.1(a)) defined the term “certificate” as follows:

An official document issued by an APHIS representative, state representative, or accredited veterinarian at the point of origin of an interstate movement of animals. The certificate must show the official ear tag number, individual animal registered breed association registration tattoo, . . . brand, . . . registration number, or similar individual identification of each animal to be moved; the number of animals covered by the certificate; the purpose for which the animals are to be moved; the points of origin and destination; the consignor; and the consignee.

Section 78.1(a) required the identifying information listed in the definition of the term “certificate” to be typed or handwritten on the certificate. In lieu of placing this information on the certificate itself, section 78.1(b) and (c) also permitted the information to be listed on an

⁶ Section 78.1 of the brucellosis regulations defined “test eligible” as “(a) cattle and bison which are not official vaccinates and which have lost their first pair of temporary incisors (18 months of age or over), except steers and spayed heifers; (b) official calfhooed vaccinates 18 months of age or over which are parturient or postparturient; (c) official calfhooed vaccinates of beef breeds or bison with the first pair of permanent incisors fully erupted (2 years of age and over); and (d) official calfhooed vaccinates of dairy breeds with partial eruption of the first pair of permanent incisors (20 months of age or over).” Section 78.1 further defined the term “official vaccinate” as an adult animal or calf that has been vaccinated by an accredited veterinarian, State representative, or APHIS representative, and for which the person performing the vaccination completed an official vaccination certificate for that animal and forwarded said certificate to State animal health officials in the State in which the animal was vaccinated. Section 78.1 also defined the terms “postparturient” and “parturient” as animals that had given birth or were within two weeks of doing so, respectively. In summary, these definitions mean that a test-eligible animal is any cow over 18 months old that has not been vaccinated for brucellosis; any cow that was vaccinated as a calf and has given or is about to give birth; any animal of a dairy or beef breed of cattle that was vaccinated as a calf and is at least 20 months old or 24 months old, respectively; and any bison that was vaccinated as a calf and is at least 24 months old. These definitions did not change from 2010 to 2011.

⁷ A copy of the 2010 version of 9 C.F.R. §§ 78.1-78.10 was attached to Complainant’s Motion for Summary Judgment as Attachment I. There was no change in this regulation from 2010 to 2011.

official brand inspection certificate or another state or APHIS form requiring individual identification of animals, provided that a legible copy of the brand inspection certificate or other state or APHIS form listing the information was attached to the original and each copy of the certificate.

The Secretary also has promulgated more generalized rules governing the interstate movement of animals and animal products in 9 C.F.R. part 71, including § 71.18, which establishes identification requirements for any cattle that are two years of age or older and moving in interstate commerce. At the time of the violations alleged in the complaint, section 71.18(a)(1)(i) stated the following:

No cattle 2 years of age or over, except steers and spayed heifers and cattle of any age which are being moved interstate during the course of normal ranching operations without change of ownership to another premises owned, leased, or rented by the same individual . . . , shall be moved in interstate commerce other than in accordance with the requirements of this section. . . . [C]attle subject to this section may be moved in interstate commerce from any point to any destination, if such cattle, when moved, . . . are accompanied by a statement signed by the owner or shipper of the cattle, or other document stating: (A) the point from which the animals are moved interstate; (B) the destination of the animals; (C) the number of animals covered by the statement, or other document; (D) the name and address of the owner at the time of the movement; (E) the name and address of the previous owner if ownership changed within four months prior to the movement of the cattle; (F) the name and address of the shipper; and (G) the identifying numbers of the backtags or other approved identification applied; *Provided*, that identification numbers are not required to be recorded on such statement or document for cattle moved from a stockyard posted under the provisions of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*) directly to a recognized slaughtering establishment as defined in § 78.1 of this chapter.⁸

Section 71.18(a)(2) stated, "The owner's or shipper's statement or other document . . . required by this section for cattle moved under paragraph (a)(1)(i) . . . of this section shall be delivered to

⁸ A copy of the 2010 version of 9 C.F.R. §§ 71.1-71.18 was attached to Complainant's Motion for Summary Judgment as Attachment II.

the management of the stockyard or slaughtering establishment at the time of delivery of the cattle.” A footnote further stated that the “other document” that may accompany the cattle in lieu of a signed owner’s or shipper’s statement “means a shipping permit, an official health certificate, an official brand inspection certificate, a bill of lading, a waybill, or an invoice on which is listed the required information.”

The sanctions that are available for violations of the regulations in 9 C.F.R. Parts 78 and 71 are governed by section 10414(b) of the AHPA (7 U.S.C. § 8313(b)). Section 10414(b) sets civil penalties for violations of the Act and its accompanying regulations and states in pertinent part:

[A]ny person that violates this subtitle . . . may, after notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of (A)(i) \$50,000 in the case of any individual, except that the civil penalty may not exceed \$1,000 in the case of an initial violation of this subtitle by an individual moving regulated articles not for monetary gain; (ii) \$250,000 in the case of any other person for each violation; and (iii) for all violations adjudicated in a single proceeding—(I) \$500,000 if the violations do not include a willful violation; or (II) \$1,000,000 if the violations include 1 or more willful violations. . . .^{9 10} In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider, with respect to the violator (A) the ability to pay; (B) the effect on ability to continue to do business; (C) any history of prior violations; (D)

⁹ The statute does not expressly say that the \$50,000 civil penalty for any individual and the \$1,000 civil penalty for an individual who has committed an initial violation involving the movement of regulated articles not for monetary gain are the maximum penalties permitted per violation. However, these penalties must be the maximum penalties permitted for individuals on a per violation basis rather than the maximum that is permitted for all violations committed by an individual because the statute further provides for a \$500,000.00 cap on all non-willful violations adjudicated in a single proceeding and a \$1,000,000.00 cap on all willful violations adjudicated in a single proceeding. There would be no way for a proceeding involving an individual to reach these statutory caps if the caps were already set at \$50,000 for any individual and \$1,000 for an individual committing an initial violation not for monetary gain.

¹⁰ The Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note, Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701 note, section 31001 of Pub. L. No. 104-134, 110 Stat. 1321), requires the Secretary to adjust for inflation the civil penalties that are available under the various statutes that he enforces at least once every 4 years. The Secretary’s adjustments of the civil penalties for violations of the AHPA are promulgated in 7 C.F.R. § 3.91(b)(2)(vi). In 2010, section 3.91(b)(2)(vi) was amended to increase the civil penalties for violations of the AHPA to \$60,000 in the case of any individual whose violation was not an initial violation involving the movement of a regulated article and was not for monetary gain. This increase applied only to those violations occurring after May 7, 2010. See 75 FR 17555 (April 7, 2010).

the degree of culpability; and (E) such other factors as the Secretary considers to be appropriate.

2. This Action Is Not Time-Barred

As previously noted, Respondent's answer asserts that this administrative action is time-barred. This claim has no merit. In In re: George A. Bargery, 61 Agric. Dec. 772 (2002), the Administrative Law Judge stated

28 U.S.C. § 2642 states in pertinent part, '[A]n action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ' Section 2462 applies to administrative penalty proceedings as well as judicial actions and the three circuits that have considered the issue have held that the five years in which an administrative enforcement proceeding must be instituted starts with the date the alleged violation occurred.

In the present matter, the first violation alleged in the complaint occurred on or about December 3, 2010, so this matter had to be initiated by the filing of an administrative complaint no later than December 3, 2015. As previously noted, the complaint was filed on November 20, 2015. Therefore, this action was timely initiated and is not time-barred.

IV. There Are No Issues of Material Fact In Dispute

As noted above, Respondent's answer to the complaint denied all of the violations set forth in the complaint. However, during APHIS' investigation of Respondent's activities, APHIS investigators contacted a livestock auction, a commercial slaughter plant, and a rancher who did business with Respondent and collected or otherwise obtained invoices, shipping documents, cancelled checks, and other records of his transactions with them in December, 2010, and January, 2011. The investigators also contacted Oregon and Idaho State Brand Inspectors, a local veterinarian, and a local Sheriff's Office to obtain additional documents concerning Respondent's business activities involving the interstate movement of cattle. These records and

documents are summarized below and in Attachments III-V of Complainant's Motion for Summary Judgment and are attached thereto as Attachment VI, Complainant's Exhibits (CX) 1-42 in Support of Complainant's Motion for Summary Judgment.¹¹ These records and documents fully demonstrate that, notwithstanding Respondent's denials in his answer, there is no dispute of material fact with respect to any of the allegations set forth in the complaint. Therefore, an order of Summary Judgment is appropriate.

ON OR ABOUT DECEMBER 3, 2010, RESPONDENT MOVED CATTLE THAT WERE TEST-ELIGIBLE FOR BRUCELLOSIS FROM A LIVESTOCK AUCTION IN IDAHO TO A FEED LOT IN OREGON WITHOUT OBTAINING A VALID CERTIFICATE FOR SAID MOVEMENT, IN VIOLATION OF 9 C.F.R. § 78.9(a)(3)(iii).

The documents that APHIS investigators obtained during the course of their investigation clearly prove that on or about December 3, 2010, Respondent moved cattle that were test-eligible for brucellosis from Idaho to Oregon without obtaining a valid certificate for this movement. APHIS investigators obtained invoices from Cattleman's Livestock Auction, Inc. d/b/a Treasure Valley Livestock in Caldwell, Idaho (hereinafter, TVLA) showing that Respondent purchased 78 head of livestock, including 70 cows, on or about December 3, 2010. CX-4. The investigators also obtained copies of purchase order #s 319311 and 319312, both dated December 3, 2010 (CX-5), which listed the back tag numbers, metal ear tag numbers, vaccination status, and age of many of the animals shown on Respondent's invoices corresponding to orders 11 and 12 (CX-4, pages 4 and 2, respectively). Ms. Janice Thurman, TVLA's office manager, provided an affidavit in which she stated, "Our business and industry define [the term cow] as follows: A

¹¹ Attachments III-V of Complainant's Motion For Summary Judgment are declarations by the APHIS investigators who conducted the agency's investigation of Respondent and collected the records and documents that comprise Complainant's Exhibits 1-42 in Support of Complainant's Motion for Summary Judgment. CX-1 through CX-41 are evidentiary exhibits, while CX-42 is a declaration providing sanctions testimony by Complainant's sanctions witness.

mature female over the age of two (2) years.” CX-3. She further stated, “On the same date [on which he purchased the 78 head of livestock], Mr. Gillette requested forty-one (41) of the cows be examined by our veterinarian, Dr. Gordon Cooper and Dr. Cooper completed the examinations. . . . Mr. Gillette then had the cattle inspected by State of Idaho Deputy Brand Inspectors and loaded the cattle on trucks.” Id.

Dr. Cooper, the owner and operator of Caldwell Veterinary Hospital in Caldwell, Idaho, also provided an affidavit in which he stated generally that he examined cattle that Respondent purchased at TVLA and “documented the examinations by completing forms including purchase orders, brucellosis test record forms, and Saleyard Release forms.” CX-6. Dr. Cooper also stated, “When I use the term cow in my documentation I am referring to an animal over two (2) years of age. The cows I examined from Mr. Gillette were all over two (2) years of age.” Id.

Dr. Cooper further stated

“Mr. Gillette would purchase cows for buyers in the States of Idaho, Oregon, Washington, California, Wyoming, and Nevada. He would also purchase cattle for himself. After purchasing the cattle Mr. Gillette would load them on trucks and transport them interstate to Morgan Avenue Feeders in Ontario, OR. Prior to 2011, Mr. Gillette rarely asked me to issue Saleyard Releases/Certificates of Veterinary Inspection for cattle he purchased at TVLA”. Id.

In a subsequent interview with an APHIS investigator, Dr. Cooper reiterated that he had examined cattle purchased by Respondent at TVLA for several years and that he documented his examination results on purchase orders, brucellosis test record forms, and Saleyard Release forms. CX-7. He explained that he documented his examination results by listing the animals’ three (3) digit back tag numbers in one column and the alphanumeric numbers on their metal ear tags in the next column. Id. He stated that he indicated a given animal’s vaccination status in a third column by writing “NV” if the animal wasn’t vaccinated and writing “V” if it was,

followed by a numeral indicating the year of vaccination, if known. Id. Finally, he stated that he inspected the mouth of each animal and noted its age by writing "S" for animals that are four (4) to eight (8) years old, "WS" for animals that are nine (9) or ten (10) years old, "BM" for animals that are ten (10) to twelve (12) years old, and "G" for animals that are over twelve (12) years old. Id. Based on Dr. Cooper's explanation of his nomenclature, almost all of the animals that he examined for Respondent on December 3, 2010, and which were listed on purchase order #s 319311 and 319312 (CX-5) were cows that had been vaccinated for brucellosis and were well over two (2) years old.

Ms. Celina C. Wright, a Deputy State Brand Inspector for the Idaho Department of Brand Inspection, Idaho State Police, provided an affidavit in which she stated that Idaho State Brand Inspectors inspected cattle sold to Respondent at TVLA on December 3, 2010. CX-8. She further stated

"During the inspection process, Mr. Gillette represented to Deputy State Brand Inspectors that . . . thirty-three (33) [head of cattle] were destined to Morgan Avenue Feeders in Ontario, OR. . . . On each of the State of Idaho Brand Certificates Deputy Brand [sic] State Brand Inspectors documented the sex, back tag number, brand, location of the brand, and color of each animal. Deputy State Brand Inspectors then provided copies of the inspection documents to Mr. Gillette and retained a copy for our file. Deputy State Brand Inspectors define the terms used on the State of Idaho Brand Certificates as follows: Cow: A mature female over the age of two (2) years". Id.

APHIS investigators obtained copies of State of Idaho Livestock Brand Inspection certificate #s CA 445195, CA 445304, CA 445188, CA 445097, CA 445080, and CA 445153, which had been prepared at TVLA on December 3, 2010, and these certificates listed Respondent as the new owner of at least 19 head of cattle, including at least 15 cows, that were destined for Ontario, Oregon. CX-9. All of the cows that were listed on certificate # CA 445080 also were listed on Respondent's TVLA invoice, order 11, dated December 3, 2010 (see

CX-4, page 4) and on purchase order #s 319311 and 319312 (CX-5),¹² showing that Respondent had purchased these cows at TVLA on December 3 and that Dr. Cooper had inspected them for him on that date. The investigators also obtained a copy of a Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of November 29, 2010, showing that 29 head of cattle were moved from Caldwell, Idaho, to MAF in Ontario, Oregon, on Friday, December 3, 2010. CX-10. Finally, Ms. Denise Walters, an administrative assistant for the State of Idaho Department of Agriculture, provided an affidavit stating that she searched "State of Idaho records for Saleyard Releases and/or Certificates of Veterinary Inspection issued to Sweeney Gillette for cattle movements on 12/3/10 . . . [and] found twelve (12) . . . issued by Dr. Gordon Cooper at Treasure Valley Livestock, but none listing Sweeny Gillette as the shipper." CX-11.

The TVLA invoices in CX-4 and Ms. Thurman's affidavit in CX-3 prove that Respondent purchased cattle at TVLA on December 3, 2010. Ms. Thurman's affidavit, Ms. Wright's affidavit (CX-8), Dr. Gordon's affidavit (CX-6) and subsequent statement to an APHIS investigator (CX-7), and purchase order #s 319311 and 319312 (CX-5) prove that the cows that Respondent purchased at TVLA on December 3 were over two (2) years of age and thus were test-eligible for brucellosis as defined by 9 C.F.R. § 78.1. Ms. Wright's affidavit and the six (6) State of Idaho Livestock Brand Inspection certificates that were prepared at TVLA on December 3, 2010 (CX-9), further prove that Respondent represented to Idaho State Brand Inspectors that he intended to move at least some of the cattle that he purchased at TVLA to MAF in Oregon, and the Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of November 29, 2010 (CX-10), proves that cattle did in fact move interstate from Idaho to Oregon on December

¹² The two (2) cows that were listed on CA 455188 and CA 445153 as destined for Ontario, Oregon, also were listed on Respondent's TVLA invoice (see CX-4, pages 5 and 10, respectively).

3. Ms. Thurman's affidavit (CX-3), Dr. Cooper's affidavit (CX-6), and Ms. Wright's affidavit (CX-8) provide additional proof that Respondent either moved the cattle interstate on December 3, 2010, or caused said movement. If even one cow in this movement were over two (2) years of age and thus test-eligible for brucellosis, that animal had to be accompanied by a valid certificate for interstate movement, as defined by 9 C.F.R. § 78.1 and required by 9 C.F.R. § 78.9(a)(3)(iii). However, Dr. Cooper's affidavit (CX-6) and Ms. Walters' affidavit (CX-11) demonstrate that Respondent failed to obtain a valid certificate for the interstate movement of the cattle that he purchased at TVLA on December 3, 2010. Therefore, there is no dispute of material fact that on or about December 3, 2010, Respondent moved a shipment of cattle that were test eligible for brucellosis from Caldwell, Idaho, to Ontario, Oregon, without obtaining a valid certificate for their movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii).

ON OR ABOUT DECEMBER 10, 2010, RESPONDENT MOVED CATTLE THAT WERE TEST-ELIGIBLE FOR BRUCELLOSIS FROM A LIVESTOCK AUCTION IN IDAHO TO A FEED LOT IN OREGON WITHOUT OBTAINING A VALID CERTIFICATE FOR SAID MOVEMENT, IN VIOLATION OF 9 C.F.R. § 78.9(a)(3)(iii).

The documents that APHIS investigators obtained during the course of their investigation clearly prove that on or about December 10, 2010, Respondent again moved cattle that were test-eligible for brucellosis from Idaho to Oregon without obtaining a valid certificate for this movement. APHIS investigators obtained additional invoices from TVLA showing that Respondent purchased 70 head of livestock, including 59 cows, on or about December 10, 2010. CX-13. The investigators also obtained copies of purchase order #s 319332, 319333, and 319334, all dated December 10, 2010 (CX-14), which listed the back tag numbers, metal ear tag numbers, vaccination status, and age of many of the animals shown on Respondent's invoices corresponding to orders 11, 13, and 22 (CX-13, pages 3, 4, and 5, respectively). Ms. Janice

Thurman provided another affidavit in which she confirmed that Respondent purchased cattle at TVLA on December 10.¹³ CX-12. She stated that Respondent once again asked Dr. Cooper to examine 31 of the cows,¹⁴ had an unspecified number of the cattle inspected by Idaho State Deputy Brand Inspectors, and loaded the animals onto trucks. Id. She also reiterated that the term “cow” had a specific meaning within her business and the industry, namely, a mature female over the age of two (2) years. Id.

Ms. Celina Wright also provided another affidavit in which she stated that Respondent told Idaho State Brand Inspectors that he was sending 18 head of cattle to MAF and that the Brand Inspectors inspected his cattle and prepared State of Idaho Brand Certificates following the same procedures that she outlined in her first affidavit.¹⁵ CX-15. APHIS investigators obtained copies of State of Idaho Livestock Brand Inspection certificate #s CA 445316, CA 445342, CA 445379, and CA 445396, which had been prepared at TVLA on December 10, 2010, and listed Respondent as both the buyer and the new owner of at least seven (7) head of cattle, including one (1) cow, that were destined for Ontario, Oregon (CX-16, pages 1-4). The investigators also obtained a copy of State of Idaho Livestock Brand Inspection certificate # CA445318, which also had been prepared at TVLA on December 10, 2010,¹⁶ and listed Respondent as the buyer and Mr. Rick Hoyt as the new owner of at least eleven more (11) head

¹³ Ms. Thurman’s second affidavit erroneously states that Respondent purchased “fifty-two (61) [sic] cows” on December 10, 2010, but the invoices in CX-13 show that he purchased 50 cows and that his partner, Ric Hoyt, purchased nine (9) cows on December 10, for a total of 59 head. .

¹⁴ As previously noted, Dr. Cooper stated in his affidavit that he examined the cattle that Respondent purchased at TVLA, that all of them were over two (2) years of age, and that Respondent subsequently loaded them onto trucks for transportation to MAF but rarely requested the issuance of Saleyard Releases/Certificates of Veterinary Inspection for his cattle prior to 2011. CX-6.

¹⁵ Ms. Wright also reiterated that the Brand Inspectors use the term “cow” to refer to a mature female more than two years old. CX-15.

¹⁶ Certificate # CA 445318 was signed by Ms. Charlene Hanners of the Idaho State Brand Office-TVLA. CX-16, page 5.

of cattle, including nine (9) cows, that also were destined for Ontario, Oregon. CX-16, page 5. Two (2) of the cows that were listed on certificate # CA 445318, tag #s 597 and 743, also were listed on Respondent's TVLA invoice, order 20, dated December 10, 2010 (see CX-13, page 1), and on purchase order #s 319332 and 319333 (CX-14), showing that Respondent had purchased these cows at TVLA on December 10 and that Dr. Cooper had inspected them for him on that date. Six (6) other cows that were listed on certificate # CA 455318 (tag #s 638, 640, 286, 378, 546, 923, and 346) and the cow that was listed on certificate # CA 445396 also were listed on Respondent's TVLA invoice, orders 20¹⁷ and STKC (see CX-13, pages 1 and 10, respectively). Ms. Wright also told APHIS investigators that Respondent informed the Idaho State Brand Inspectors that he was sending some of the cattle that he purchased at TVLA on December 10 to XL Four Star and that the Brand inspectors prepared State of Idaho Brand Certificates reflecting this movement. CX-15. She gave the investigators one such certificate, CA 445326 (CX-25), which listed Respondent as the buyer and new owner of nine (9) cows that were destined for Nampa and also were listed on Respondent's invoice corresponding to order STRT (CX-13, page 11). Other Idaho State Brand Inspectors subsequently observed one of Respondent's trucks delivering at least six (6) of the animals listed on CA 445326 (back tag #s 505, 316, 717, 903, 902, and 036) to the XL Four Star on December 27, 2010, more than two weeks after Mr.

¹⁷ There is a slight discrepancy in these documents concerning who was the buyer of these cows. As noted above, eight (8) cows (tag #s 638, 640, 286, 378, 546, 923, 346, 597, and 743) are listed on certificate # CA 455318, which lists Respondent as the buyer and Ric Hoyt as the new owner of these cows (CX-16, page 5). However, the same eight (8) cows are listed on Respondent's invoice corresponding to order 20, which names Ric Hoyt of Ontario, Oregon, as the buyer (CX-13, page 1). It ultimately does not matter whether Respondent or Mr. Hoyt purchased these cows, as they were business partners in the MAF feed lot (see p. 21, fn. 22, and p. 23, fn. 25, of Complainant's Motion for Summary Judgment). This business arrangement is corroborated by the fact that purchase order #s 319332 and 319333 (CX-14, pages 1 and 2) show that Dr. Cooper inspected the two cows with tag #s 597 and 743 during his inspection of a large number of cattle that Respondent purchased on December 10, 2010, even though those two cattle were listed on the invoice corresponding to order 20 for Ric Hoyt (compare the cows listed on purchase order #s 319322 and 319333 (CX-14, pages 1 and 2) to those listed on Respondent's invoices corresponding to orders 11, 13, and 22 (CX-13, pages 3-5)).

Gillette purchased them at TVLA. See CX-20 and CX-22. Based on the foregoing, they concluded that Respondent moved these six (6) cows from TVLA to MAF on or about December 10 before moving them back across the border to XL Four Star on December 27.¹⁸ CX-20. The APHIS investigators obtained a copy of another Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of December 6, 2010, showing that 19 head of cattle were moved from Caldwell, Idaho, to Morgan Avenue Feeders in Ontario, Oregon, on Friday, December 10, 2010. CX-17. Finally, Ms. Denise Walters provided a second affidavit stating that she searched “State of Idaho records for Saleyard Releases and/or Certificates of Veterinary Inspection issued to Sweeney Gillette for cattle movements on 12/10/10 . . . [and] found thirteen (13) . . . issued by Dr. Gordon Cooper at Treasure Valley Livestock, but none listing Sweeny Gillette as the shipper.” CX-18.

Here again the TVLA invoices in CX-13 and Ms. Thurman’s second affidavit in CX-12 prove that Respondent purchased cattle at TVLA on December 10, 2010. Ms. Thurman’s second affidavit, Ms. Wright’s second affidavit (CX-15), Dr. Gordon’s affidavit (CX-6) and subsequent statement to an APHIS investigator (CX-7), and purchase order #s 319332, 319333, and 319334 (CX-14) likewise prove that the cows that Respondent purchased at TVLA on December 10 were over two (2) years of age and thus were test-eligible for brucellosis as defined by 9 C.F.R. § 78.1. Ms. Wright’s second affidavit and five (5) State of Idaho Livestock Brand Inspection certificates that were prepared at TVLA on December 10, 2010 (CX-16) prove that Respondent represented to Idaho State Brand Inspectors that he intended to move at least some of the cattle that he purchased at TVLA to MAF and the Morgan Avenue Feeders, LLC, Cattle Movement

¹⁸ See also pp. 20-25, *infra*.

sheet for the week of December 10, 2010 (CX-17), proves that cattle did in fact move interstate from Idaho to Oregon on December 10. The fact that at least six (6) of the cows listed on State of Idaho Livestock Brand Inspection certificate # CA 445326 as being destined for XL Four Star in Nampa (CX-25) did not arrive in Nampa until December 27 (CX-20 and CX-22) proves that some of the cows that Respondent said that he was keeping in Idaho were in fact initially diverted to Oregon on or about December 10. Ms. Thurman's second affidavit (CX-12), Dr. Cooper's affidavit (CX-6), and Ms. Wright's second affidavit (CX-15) offer additional proof that Respondent either moved the cattle interstate on December 10, 2010, or caused said movement. Once again, any cow in this movement that was over two (2) years of age and thus test-eligible for brucellosis had to be accompanied by a valid certificate for interstate movement, as defined by 9 C.F.R. § 78.1 and required by 9 C.F.R. § 78.9(a)(3)(iii), yet Dr. Cooper's affidavit (CX-6) and Ms. Walters' second affidavit (CX-18) demonstrate that Respondent failed to obtain a valid certificate for the interstate movement of the cattle that he purchased at TVLA on December 10. Therefore, there is no dispute of material fact that on or about December 10, 2010, Respondent moved a second shipment of cattle that were test eligible for brucellosis from Caldwell, Idaho, to Ontario, Oregon, without obtaining a valid certificate for their movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii).

ON OR ABOUT DECEMBER 27, 2010, RESPONDENT MOVED 34 HEAD OF CATTLE THAT WERE TWO YEARS OF AGE OR OLDER FROM A FEED LOT IN OREGON TO A COMMERCIAL SLAUGHTER PLANT IN IDAHO WITHOUT DOCUMENTS THAT ACCURATELY STATED THE POINT FROM WHICH THE CATTLE MOVED, THEIR DESTINATION, THE NUMBER OF CATTLE BEING MOVED, THE NAME AND ADDRESS OF THEIR OWNER AT THE TIME OF THE MOVEMENT, THE NAME AND ADDRESS OF ANY PREVIOUS OWNER(S) WHO MIGHT HAVE OWNED THE CATTLE WITHIN FOUR (4) MONTHS PRIOR TO THE MOVEMENT, THE NAME AND ADDRESS OF THE SHIPPER, AND THE BACK TAG NUMBERS OR OTHER APPROVED IDENTIFICATION APPLIED TO THE CATTLE, IN VIOLATION OF 9 C.F.R. § 71.18(a)(1)(i).

The documents that APHIS investigators obtained during the course of their investigation clearly prove that on or about December 27, 2010, Respondent moved cattle that were two years of age or older from MAF to XL Four Star in Nampa, Idaho, without current documentation that accurately stated the point from which the cattle moved, their destination, the number of cattle being moved, the name and address of their owner at the time of the movement, the name and address of any previous owner(s) who might have owned the cattle within four (4) months prior to the movement, the name and address of the shipper, and the back tag numbers or other approved identification applied to the cattle. Mr. Ron Scott, a Deputy State Brand Inspector for the Idaho Department of Brand Inspection, Idaho State Police, provided an affidavit (CX-20)¹⁹ in which he stated

“[O]n 12/27/10, I inspected thirty (32) [sic] cows and two (2) bulls delivered to XL Four Star Beef, Inc., by a truck owned by Sweeny Gillette. The driver provided several Livestock Brand Certificates from . . . the State of Oregon, but did not present any other documents.²⁰ I believe the cattle came from Morgan Avenue Feeders, L.L.C., a feedlot near Ontario, OR. Mr. Gillette owns the Morgan Avenue Feeder [sic], L.L.C., feedlot²¹ and based on my past experience generally sends his slaughter cattle from the feedlot in Ontario, OR to XL Four Star Beef, Inc., in Nampa, ID. . . . The driver . . . presented five (5)

¹⁹ This affidavit is dated March 27, 2014. Mr. Scott also provided an earlier affidavit dated January 14, 2011, that is referenced in his 2014 affidavit and is offered into evidence as CX-19. The March 27, 2014, affidavit is a clarification of the one dated January 14, 2011.

²⁰ Deputy Brand Inspector Scott stated that the driver also presented four (4) State of Idaho Livestock Brand Certificates that had been issued by Idaho Livestock Brand Inspectors at the Nampa Livestock Auction in Nampa, Idaho, on December 11, 2010, and December 18, 2010. CX-20. He noted that State of Idaho Livestock Brand Certificates are automatically cancelled and void 96 hours after they are issued and that the Idaho certificates presented with this shipment thus had expired prior to the date of this shipment. *Id.*; see also CX-9, CX-16, and CX-25.

²¹ The complaint alleges that Respondent and Mr. “Ric” Hoyt co-owned and operated MAF, but Respondent’s answer denies this allegation. However, on March 9, 2009, Respondent provided an affidavit in which he stated, “I own and operate Morgan Ave. Feedlot, 845 Morgan Ave., Ontario, OR 97914. . . . I buy cattle for my own account. Most are fed for slaughter.” CX-1. In April, 2011, the Malheur County Sheriff’s Office in Vale, Oregon, initiated an investigation of Respondent’s livestock activities that included, but was not limited to, “alleged violations of Federal regulations including the interstate movement of cattle without proper identification.” CX-2. The investigators determined that Respondent owned Morgan Avenue Feeders, L.L.C., Gillette Livestock, L.L.C., and G 7 Livestock, L.L.C. *Id.* They also determined that Respondent’s father-in-law, Mr. Richard “Ric” Hoyt, was Respondent’s partner in the feedlot and an unspecified trucking company. *Id.*

Oregon Livestock Brand Certificates issued by Livestock Brand Inspectors at Producers Livestock Auction in Vale, OR. The certificates numbered 92_001_0006323_Pro, 92_001_0006326_Pro, 92_001_0006321_Pro were issued on 12/22/10 and certificate numbers 92_001_0006328_Pro and 92_001_0006427_Pro were issued on 12/16/2010. State of Oregon Livestock Brand Certificates for the movement of livestock are only valid for eight (8) days therefore the two (2) Livestock Brand Certificates issued on 12/16/10 were expired and the three (3) Livestock Brand Certificates issued on 12/22/10 were five (5) days old. I inspected the cattle and discovered there were very few cows that matched the Livestock Brand Certificates Mr. Gillette presented.²² With the help of Idaho State Police, Department of Brand Inspection, Deputy State Brand Inspector Skyler Flint, I ran the cattle through a chute at XL Four Star Beef, Inc., and individually inspected each animal. . . . When we inspected the thirty-two (32) cows we found five (5) animals that matched the identifying information on the State of Oregon Livestock Brand Certificates presented by the truck driver representing Mr. Gillette. . . . Livestock Brand Inspector Flint and I documented the cattle on State of Idaho Brand Inspector's Tally sheets numbered No. B187981 and B187982. . . . Based on my experience with livestock, the cows SG delivered on 1/27/10 to XL Four Star Beef, Inc., were all over two (2) years of age. . . . [APHIS] Investigator Soberanes asked me to compare USDA back tag numbers, brand information, and breed/color information listed on State of Idaho Brand Inspector's Tally sheets [No. B 187981 and B 187982] for . . . thirteen (13) cows moved interstate on 12/27/10 with the USDA back tag numbers, brand information, and breed/color information listed for cows on Idaho Livestock Brand Inspection Certificate number CA445326 dated 12/10/10. Investigator Soberanes noted seven (7) cows bearing USDA back tag numbers 505, 316, 717, 839, 903, 902, and 036 to [sic] appear on both documents and requested I confirm they were the same animals. I compared the USDA official identification backtag [sic] numbers, the physical description of the animals along with the brands recorded by the State Livestock Brand Inspectors and believe six (6) of the cows listed on both documents are the same animals. I'm not sure about number 839. . . . I noted on the Idaho Livestock Brand Inspections Certificates that at the time of the

²² Mr. Leonard Oltman, the stockyard supervisor at XL Four Star from August, 2007, through June, 2011, provided an affidavit in which he stated

"During my employment at XL Four Star Beef, Inc. we accepted cattle from Sweeny Gillette. The cattle were delivered mostly by trucks from Morgan Avenue Feeders in Ontario, OR. When trucks arrived carrying Mr. Gillette [sic] cattle, they generally arrived with combinations of both State of Idaho and Oregon Brand Certificates. I don't remember any other documents accompanying the cattle. Occasionally, Mr. Gillette would deliver cattle to XL Four Star Beef, Inc. that failed to match the identifying information on the State Brand Certificates I [sic] would hold his cattle and we would contact the State Brand Office. On a few occasions, Mr. Gillette got very upset with me because I was holding his cattle". CX-26.