

inspection at TVLA, Mr. Gillette destined all seven (7) of these cows to XL Four Star Beef, Inc. I believe that Mr. Gillette instead moved the cows on or about 12/10/10 . . . interstate to Morgan Avenue Feeders, L.L.C. in Ontario, OR. . . . Mr. Gillette then moved the cows interstate on 12/27/10 without proper identification to XL Four Star Beef, Inc. in Nampa, ID".<sup>23</sup> CX-20.

APHIS investigators obtained an XL Four Star Beef Inc. delivery sheet showing that 32 cows and two (2) bulls were delivered to XL Four Star on December 27, 2010.<sup>24</sup> CX-21. They also obtained the Idaho State Police Brand Inspector's Tally sheets, nos. B 187981 and B187982, that Mr. Scott and Deputy State Brand Inspector Flynt prepared for the cattle sold by Respondent to XL Four Star on December 27, 2010. CX-22. These documents listed Respondent as the seller of the cattle that arrived at XL Four Star on December 27. *Id.* The investigators also obtained the five (5) State of Oregon Livestock Brand Inspection certificates that Mr. Scott referenced in his affidavit, and these documents also listed Respondent as the primary owner of the cattle that were delivered to XL Four Star on December 27, 2010. CX-23. Mr. Scott had noted on the certificates the five (5) cows listed on these certificates that he was able to match to animals in Respondent's December 27 shipment,<sup>25</sup> and four (4) of these cows were listed on

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<sup>23</sup> As previously noted, Idaho State brand certificates for the movement of livestock, including certificate # CA 445326, state that they "shall be automatically cancelled and void 96 hours after time of issuance." *See* CX-9, CX-16, and CX-25. Certificate # CA 445326 (CX-25) was issued on December 10, 2010, so Respondent had to send the cows listed on this certificate to the slaughter plant no later than December 15, 2010, in order for this certificate to remain valid for said movement. However, the Idaho State Brand Inspectors at XL Four Star observed at least six (6) of these animals (back tag #s 505, 316, 717, 903, 902, and 036) being delivered to the slaughter plant on December 27, 2010, nearly two weeks after this certificate expired. *See* CX-20 and CX-22.

<sup>24</sup> This sheet appeared to list Mr. Ken Schwabauer as the trucker, so APHIS investigators interviewed Mr. Schwabauer at the Law Offices of Brian Zanotelli on May 19, 2014. Mr. Schwabauer's answers were generally evasive, but he did admit that "he thought that he had been driving for Mr. [Rick] Hoyt for approximately 10 years", that "the truck he drives belongs to Mr. Gillette and that Gillette and Mr. Hoyt are partners." CX-39 and CX-40. Mr. Schwabauer also "confirmed that he had hauled cows from Treasure Valley Livestock Auction to Morgan Avenue Feeders on multiple occasions" and that "he would load all the cattle that he had to pick up at TVLA into the trailer and then haul them to Morgan Avenue Feeders where he would unload them into the pens." CX-39 and CX-40. APHIS investigators also obtained a copy of Mr. Schwabauer's 2010 Form 1099-MISC showing that he worked for Morgan Avenue Feeders in 2010. CX-41.

<sup>25</sup> Mr. Scott also was able to match the two (2) bulls listed on certificate # 92\_001\_0006247\_Pro to the two bulls in the December 27 shipment. CX-23, page 5. However, this certificate was issued on December 16, 2010, and thus was expired on the date of the shipment. *Id.*

certificate # 92\_001-0006328\_Pro, which was issued on December 16, 2012, and thus had expired prior to the date of Respondent's shipment. CX-23, page 3. The fifth cow that Mr. Scott had been able to match to one of the certificates was listed on certificate # 92\_001\_0006321\_Pro, which had been issued on December 22, 2010. CX-23, page 2. Therefore, this certificate was the only one accompanying this shipment that both was still current on the date of the shipment and could be matched to a cow in the shipment. Finally, APHIS inspectors obtained another Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of December 27, 2010, showing that 33 head of cattle moved from the feedlot to XL Four Star on Monday, December 27. CX-24.

The Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of December 27, 2010 (CX-24), the XL Four Star delivery sheet dated December 27, 2010 (CX-21), Mr. Scott's affidavit (CX-20), and the record of the APHIS investigators' interview with Mr. Schwabauer (CX-39 and CX-40) prove that Respondent moved 32 cows that were two (2) years of age or older interstate from Oregon to Idaho on December 27, 2010. Mr. Scott's affidavit, which is supported by Mr. Oltman's affidavit (CX-26), further proves that the only documentation that accompanied this shipment was five (5) State of Oregon Livestock Brand Inspection certificates that matched only five (5) cows in the shipment and four (4) State of Idaho Livestock Brand Inspection certificates that were no longer valid on the date of movement. Furthermore, the Oregon livestock brand certificates were valid for only eight (8) days after they were issued, and the one that listed four (4) of the five (5) matching cows in the shipment was issued on December 16, 2010, so it was invalid on the date of movement. CX-23, page 3. The certificate that listed the other matching cow in the shipment was the only certificate accompanying this shipment that could be matched to an animal in the shipment and was still

current on the date of the movement. CX-23, page 2. Therefore, there is no dispute of material fact that on or about December 27, 2010, Respondent moved cattle that were two (2) years of age or older interstate from Oregon to 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 hack tag numbers or other approved identification applied to the cattle, in violation of C.F.R. § 9 C.F.R. § 71.18(a)(1)(i).

**ON OR ABOUT JANUARY 8, 2011, RESPONDENT MOVED OR ARRANGED THE MOVEMENT OF OVER 100 HEAD OF CATTLE FROM A FEED LOT IN OREGON TO A RANCH IN CALIFORNIA WITHOUT A VALID CERTIFICATE FOR THEIR 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 January 8, 2011, Respondent moved cattle that were test-eligible for brucellosis from Oregon to California without obtaining a valid certificate for this movement. On May 1, 2014, Mr. Ronny Yribarren, a family rancher who operates a cow calf ranch and stocker steer operation near Bishop, California, gave an APHIS investigator an affidavit in which he described a cattle purchase from Respondent that occurred in January, 2011. CX-27. Specifically, Mr. Yribarren stated that he purchased cattle from Respondent on January 6, 2011, after seeing Respondent's advertisement "in the Capital Ag press." Id. He stated that he travelled "to the Eastern Oregon and Western Idaho area" on January 6 to meet Respondent and look at the cattle, which he said were being advertised as "young bred spring calving cattle." Id. Mr. Yribarren stated that he arranged to purchase three (3) truckloads of cattle for \$1,125.00 per head and that Respondent was going to arrange the trucking but that he would pay the freight

charges for the trucking. Id. He also stated that Respondent was going “to obtain and pay for both the Certificate of Veterinary Inspection for the cattle and the brand inspections for the cattle” and ship the cattle to him on January 8. Id.

Mr. Yribarren stated that the cattle arrived at his ranch on January 8, 2011, and were transported in three (3) different trucks, one of which belonged to Respondent. CX-27. He also stated that he prepared check # 2413, made payable to Morgan Avenue Feeders, in the amount of \$1,829.00 in freight charges for the load of cattle that was transported in Respondent’s truck. Id. With respect to this load, APHIS investigators obtained copies of Morgan Avenue Feeders freight invoice # 6587 (CX-28) and a Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of January 3, 2011 (CX-30), both of which show that MAF transported 44 cows from its feedlot in Ontario, Oregon, to Bishop, California, on January 8, 2011. The former also shows that MAF charged Mr. Yribarren \$1,829.00 for this load, and APHIS investigators obtained a copy of check #2413 made payable to MAF in that amount. CX-29. APHIS investigators also obtained a copy of Morgan Avenue Feeders bill of lading (BOL) # 5761 (CX-31), which lists MAF as the point of origin for a load of 44 cows destined for Bishop, lists Respondent as the shipper and Mr. Yribarren as the receiver, and lists Mr. Ken Schwabauer as the driver.<sup>26</sup> Mr. Yribarren also stated that he prepared check # 2448, made payable to JVLX Livestock, in the amount of \$3,676.60 for the transportation of the other two loads of cattle that he bought from Respondent. CX-27. He was not able to provide APHIS investigators with a copy of this check, but he did give them a copy of JVLX Livestock Transport, Inc. (hereinafter, JVLX),

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<sup>26</sup> When APHIS investigators interviewed Mr. Schwabauer at the Law Offices of Brian Zanotelli on May 19, 2014, they asked him if he drove this load of cattle. CX-39 and CX-40. Mr. Schwabauer was evasive in his answers, but he admitted that he filled out the Morgan Avenue Feeders Cattle Movement sheet for the week of January 3, 2011 (CX-30), and kept that document “in the truck to track which loads he hauled so that he could get paid.” CX-39 and CX-40.

shipping invoice # 673 showing that JVLX had shipped two (2) loads of cows from Ontario, Oregon, to Bishop, California, on January 8, 2011, and had charged \$1,838.30 per load for a total of \$3,676.60. CX-32. On May 21, 2014, the investigators interviewed the company's owner, Mr. John VanLith, and showed him the shipping invoice. CX-33. Mr. VanLith told the investigators that he brokered these loads for Respondent and he provided copies of two BOLs from Blessinger Co., L.L.C., of Caldwell, Idaho, for the loads. Id. One of the BOLs, #236, was dated January 9, 2011, and listed Respondent as the shipper, Mr. Yribarren as the consignee, and "Nysa OR (Morgan Feeder)" as the point of origin for 44 unspecified animals. CX-34. The other, #280, was dated January 8, 2011, and also appeared to list Respondent as the shipper, Mr. Yribarren as the consignee, and Bishop, California, as the point of origin for 44 cows. CX-35. Both documents referenced a brand inspection document, # C346658,<sup>27</sup> and both had been signed by Mr. Yribarren as the receiver of the respective loads. CX-34 and CX-35.

Mr. Yribarren stated that he paid Respondent for a total of 132 head of cattle and that he made this payment by wire transfer, but he was unable to find the exact amount in his records. CX-27. However, he provided APHIS investigators with a copy of Gillette Livestock hill of sale #7414 showing that on January 8, 2011, Respondent sold Mr. Yribarren 132 head of cattle at \$1,125.00 per head for a total purchase price of \$148,500.00 and that payment was to be wired to Respondent. CX-36.

Mr. Yribarren stated that the three loads of cattle were accompanied by Oregon CVI # 92-79146, "an accompanying sheet that listed all the cattle's individual identification numbers", Respondent's invoice for 132 head of cattle, and State of Oregon Brand Inspection Certificate #s

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<sup>27</sup> The brand inspection document number listed on BOL #236 (CX-34) is illegible but presumably is the same one that is listed on BOL # 280 (CX-35).

C 346658 and C 346659, and he gave copies of these documents to the APHIS investigators. CX-37, CX-36, and CX-38. The CVI had been prepared by Dr. Robert Derby, D.V.M., and listed Respondent as the shipper and Mr. Yribarren as the receiver of 132 cows, all of which were more than two (2) years old and bore legible tattoos showing that they had been vaccinated for brucellosis. CX-37. Accordingly, the interstate movement of even one of these cows had to be accompanied by a valid certificate for said movement, as required by 9 C.F.R. § 78.9(a)(3)(iii). The CVI had a note saying "see attached paperwork" and was accompanied by three (3) brucellosis test record continuation sheets, each of which bore Respondent's last name at the top and listed the back tag numbers, alphanumeric ear tag numbers, and the brucellosis vaccination status for animals in the shipment. *Id.*, pages 2-4. Some of the animals that were listed on these three sheets had been crossed off, and it is unclear if the animals that were crossed off had been or were supposed to have been in the three loads. *Id.* Assuming that they were, the sheets listed the back tag and ear tag numbers for only 70 of the cattle in the shipment; if they were not, then the sheets listed the tag numbers for only 60 of the cattle.<sup>28</sup> *Id.* The two brand inspection certificates were dated January 8, 2011; listed Respondent as the owner/seller of the cattle, Mr. Yriharren as the purchaser, and Bishop, California, as the destination of the cattle in these shipments; and indicated that the cattle had been inspected in Ontario, Oregon. CX-38. Finally, certificate # C 346658 had been prepared for 44 cows and certificate # C 346659 had been prepared for 88 cows. *Id.*

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<sup>28</sup> One of the brucellosis test record continuation sheets that was attached to the CVI accompanying this shipment listed the vaccination status of 19 animals in the shipment as "NV", meaning that these animals had not been vaccinated for brucellosis at the time of their interstate movement, contrary to what the CVI seemed to indicate. Compare CX-37, page 4, to CX-37, page 1.

Mr. Yribarren's affidavit (CX-27), the Gillette Livestock bill of sale #7414 dated January 8, 2011(CX-36), and the copies of Oregon CVI # 92-79146 (CX-37) and Oregon Brand Inspection Certificate #s C 346658 and C 346659 (CX-38) clearly prove that Respondent sold Mr. Yribarren 132 head of cattle on or about January 6, 2011. The CVI also proves that the cattle were over two (2) years of age and brucellosis test eligible at the time of this sale. Mr. Yribarren's affidavit and the copies of Morgan Avenue Feeders freight invoice # 6587 (CX-28), the cattle movement sheet for the week of January 3, 2011 (CX-30), Morgan Avenue Feeders BOL # 5761 (CX-31), Mr. Yribarren's check # 2413 (CX-29), and Oregon Brand Inspection Certificate # C 346658 (CX-38) prove that Respondent moved 44 cows from MAF in Ontario, Oregon, to Mr. Yribarren's ranch in Bishop, California, on or about January 8, 2011. Mr. Yribarren's affidavit, the APHIS investigator's record of his interview with Mr. VanLith (CX-33), and the copies of JVLX shipping invoice # 673 (CX-32), the two Blessinger Co. BOLs (CX-34 and CX-35), and Oregon Brand Inspection Certificate # C 346659 (CX-38) prove that Respondent arranged the movement of 88 more cows from MAF to Mr. Yribarren's ranch on January 8, 2011. All 132 cows in this movement 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), because they were over two (2) years of age and test eligible for brucellosis, and they were accompanied by a CVI and attached brucellosis continuation sheets that listed the required identification information for the cattle. CX-37. However, the brucellosis continuation sheets that were attached to the certificate of veterinary inspection did not list and identify nearly half of the cows that Respondent sold to Mr. Yribarren and transported to his ranch. Id. Therefore, there is no dispute of material fact that on or about January 8, 2011, Respondent moved a shipment of cattle that were test eligible for brucellosis from Ontario, Oregon, to Bishop,

shipment of cattle that were test eligible for brucellosis from Ontario, Oregon, to Bishop, California, without obtaining a valid certificate for their movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii).

**V. Respondent's Response to Complainant's Motion for Summary Judgment Is Insufficient**

On February 5, 2016, Complainant filed the subject Motion for Summary Judgment. During a conference call convened by Administrative Law Judge Janice Bullard on February 24, 2016, Respondent's counsel, Mr. Brian Zanotelli, Esq., acknowledged that he had been served with Complainant's motion on February 22, 2016. On March 11, 2016, Respondent, acting by and through Mr. Zanotelli, filed Respondent's Response to Motion for Summary Judgment and Affidavit of Kendra Gillette in reply to Complainant's Motion for Summary Judgment (Response and Affidavit, respectively). On March 15, 2016, Complainant filed Complainant's Request for Leave to File a Reply to Respondent's Response to Motion for Summary Judgment and a proposed reply (Reply). On October 20, 2016, Complainant filed a Supplemental Reply to Respondent's Response (Suppl. Reply).

In the Response and Affidavit, Respondent opposed Complainant's motion for summary judgment on the ground, *inter alia*, that many of the documents that Complainant proffered as evidence in support of its motion for summary judgment were obtained during a police raid of Respondent's home and feedlot that allegedly violated Respondent's rights against unreasonable search and seizure as set forth in the Fourth Amendment of the U.S. Constitution and argued that they should be deemed inadmissible. The Response and Affidavit noted that Respondent was suing state and federal officials (including two of Complainant's potential witnesses in this matter, retired APHIS Investigator Kirk Miller and APHIS Investigator

Kenneth Hoover) in the U.S. District Court for the District of Oregon over these alleged violations. Respondent's lawsuit is captioned Sweeney Gillette, et al. v. Malheur County, et al., case # 2:14-CV-01542-SU.

On May 3, 2016, the U.S. District Court for the District of Oregon issued a Decision dismissing Respondent's federal claims with prejudice because Respondent failed to state a claim for relief (Decision). (See Decision, pp. 30 and 34, ft. 15 ...a copy of which is attached to Complainant's Reply as Attachment I and incorporated herein by reference for all purposes). The Court also declined to exercise supplemental jurisdiction over his state law tort claims and dismissed them without prejudice. (See Decision, pp. 34-36). I hereby take judicial notice of the subject Decision and direct that it be included in the official record of this case for all purposes including, but not limited to, support for the findings of fact and conclusion of law set forth in this Decision and Order.

Respondent filed a Notice of Appeal in the U.S. Court of Appeals for the Ninth Circuit on June 22, 2016, and his opening brief in support of his appeal was due on October 31, 2016. Appellees' answering brief was due on November 30, 2016, and Respondent's optional reply brief is due 14 days from the date of service of the answering brief. However, the Assistant U.S. Attorney who represented the federal defendants in Respondent's lawsuit has advised counsel for the Complainant that the Appellate Court could take 18-24 months to render a decision on Respondent's appeal. Until such time as the District Court's Decision is reversed, remanded, or otherwise modified by the Appellate Court, it is the law of the case and entitled to full deference as such.

In any event, regardless of the outcome of Respondent's appeal, Complainant's evidence is fully admissible in the present proceeding and will not be excluded because, as previously noted in the Complainant's Reply, only eight (8) of Complainant's exhibits in support of its Motion for Summary Judgment were obtained pursuant to the search warrant that Respondent disputes, specifically, these exhibits are the four MAF cattle movement sheets in CX-10, CX-17, CX-24, and CX-30, the XL Four Star delivery sheet in CX-21, the MAF freight invoice in CX-28, the MAF bill of lading in CX-31, and the 1099-MISC for Respondent's driver, Mr. Kenneth Schwabauer, in CX- 41. All but one of these documents are documents that Respondent prepared and used in the ordinary course of his business and they simply corroborate and are corroborated by the rest of Complainant's evidence, such that there would be no undue prejudice in admitting them into the record of this remedial administrative enforcement action even *assuming arguendo* that the subject warrant is ultimately set aside on appeal.

Based on the foregoing, Respondent's Response and Ms. Gillette's supporting affidavit fail to make "reference to depositions, documents, electronically-stored information, affidavits, declarations, stipulations, admissions, interrogatory answers, or other materials" that prove the existence of a "factual dispute of substance" regarding the material complaint allegations, as required by the standard set forth by the Judicial Officer in In re: Hope Knaust, an individual; Stan Knaust, an individual; and The Lucky Monkey, a partnership, 2014 WL 4311047, \*4 (April 9, 2014).

## **VI. Sanctions**

In light of the foregoing, there are no material issues of fact in dispute with respect to any of the allegations set forth in the complaint; therefore, an order of Summary Judgment is appropriate.

Complainant requests, pursuant to section 10414(b) of the Act, that Respondent be assessed a civil penalty of forty thousand dollars (\$40,000.00). As previously noted, section 10414(b)(1)(A) of the Act, as modified by 7 C.F.R. § 3.91(b)(2)(vi) in 2010, permitted the Secretary to impose a civil penalty of up to \$60,000.00 per violation committed by any individual except when the individual has committed an initial violation involving the movement of regulated articles not for monetary gain. In the present matter, Respondent is an individual who committed an initial violation of the brucellosis regulations in 9 C.F.R. Parts 71 and 78 but, as demonstrated by CX-1 through CX-41, he clearly moved cattle in violation of the regulations for monetary gain, so the sanctions available to the Secretary are not capped at \$1,000.00 per violation for the purposes of this proceeding. Therefore, the Secretary may impose a civil penalty of up to \$60,000.00 per violation for Respondent's violations, provided that the Secretary has considered the statutory factors set forth in section 10414(b)(2). As previously noted, this section obligates the Secretary to consider the nature, circumstance, extent, and gravity of the Respondent's violations and gives him the discretion to consider the Respondent's ability to pay the civil penalty, the penalty's effect on his ability to continue to do business, any history of prior violations, and the Respondent's degree of culpability, as well as any other factors that the Secretary deems appropriate. An examination of these factors demonstrates that the proposed

civil penalty of \$40,000.00 is fully warranted by application of the law to the facts and circumstances of this case.

The documents in CX-1 through CX-41 clearly show that on three occasions in December, 2010, and January, 2011, Respondent moved or caused the movement, in interstate commerce, of cows that were more than two (2) years old and thus were test-eligible for brucellosis without obtaining a valid certificate for said movement, thereby violating the requirements for the interstate movement of such cows as set forth in 9 C.F.R. § 78.9(a)(3)(iii). The same documents also clearly show that in December, 2010, Respondent also moved or caused the movement of a shipment of cows that were more than two (2) years old from his feedlot in Oregon to a commercial slaughter plant in Idaho without obtaining the owner's or shipper's statement or other equivalent documentation, in violation of the more general requirements for the interstate movement of cows that are set forth in 9 C.F.R. § 71.18(a)(1)(i). These violations are very serious because they pose a grave threat to the health of U.S. livestock, the economic vitality of the U.S. livestock industry, and even the health of the American public.

CX-42. Prior to the creation of USDA's Brucellosis Eradication Program in the 1950s, brucellosis was widespread in the United States and caused the U.S. livestock and dairy industries to suffer losses in excess of \$400 million per year. CX-42. APHIS has carried out the Brucellosis Eradication Program for the last sixty years to eliminate the scourge of brucellosis in the United States by rigorously vaccinating calves, testing adult animals, and slaughtering infected animals, and it has been highly successful, such that all fifty States and some U.S. territories are now classified as Class Free with respect to brucellosis. CX-42.; *see also* the Brucellosis Fact Sheet referenced on page 7, fn. 4, of Complainant's Motion for Summary Judgment. The eradication of brucellosis in the United States has reduced the livestock and dairy

industries' annual losses stemming from this disease to less \$1 million today. CX-42; *see* Brucellosis Fact Sheet. However, the continuing eradication of this disease and the realization of the animal health, public health, and economic benefits resulting therefrom are contingent upon the creation of, and compliance with, an effective, nationwide identification, surveillance, and trace-back system. The regulations in sections 78.9 and 71.18 establish such a system, but Respondent's violations of these regulations frustrate the Brucellosis Eradication Program's ability to monitor for, detect, contain, and trace back any outbreaks of brucellosis that might occur and thus threaten to undermine the objectives set and undo the gains made by the program. CX-42.

Although the complaint lists only four (4) shipments whereby Respondent violated the regulations, these shipments occurred in the span of a month and at least one of them, the January, 2011, shipment from Ontario, Oregon, to Bishop, California, involved a significant number of cows that were rendered effectively untraceable by Respondent's blatant disregard for the regulations. CX-42. Furthermore, the four (4) violations listed in the complaint likely do not reflect the full extent of Respondent's violations of the regulations. Dr. Gordon Cooper told APHIS investigators, "*Over the years, I have seen [Respondent] intentionally do things that fail to properly identify cattle and potentially put the State of Idaho and other States at risk for the spread of animal disease*" (emphasis added). CX-6. He further stated, "Based on my experience with Mr. Gillette, I have no doubt that *between 2010 and 2012 he was transporting cattle interstate without proper identification*" (emphasis added). CX-6.. Mr. Leonard Oltman likewise indicated that Respondent's December 27, 2010, shipment to XL Four Star was not the first and only one in which he moved cattle interstate to the slaughter plant with documents that did not match the animals in the shipment. CX-26.

Respondent also is highly culpable for his violations of the regulations because the Complainant's evidence demonstrates that he was fully aware of the regulatory requirements for the interstate movement of cattle but violated them anyway. CX-42. Dr. Cooper told APHIS investigators, "To my knowledge Mr. Gillette was aware of . . . USDA . . . requirements for the movement of cattle, but chooses to ignore the rules." CX-6. As noted above, Dr. Cooper also told APHIS investigators that Respondent's regulatory violations were intentional. CX-6. These statements are corroborated by the fact that Respondent asked Dr. Cooper to inspect the cattle that he purchased at TVLA on December 3, 2010, and December 10, 2010 (CX-3, CX-5, CX-12, CX-14) but did not ask Dr. Cooper to issue certificates for their release, as demonstrated by Dr. Cooper's statement that Respondent rarely asked him to issue such certificates prior to 2011 (CX-6) and the fact that the custodian of the State of Idaho Department of Agriculture's records related to cattle movement in that State could find no record of Dr. Cooper having done so for those shipments (CX-11 and CX-18). Dr. Cooper's statements that Respondent knew but intentionally ignored the regulations are further corroborated by the fact that Respondent did obtain a CVI for the 132 cows that he moved from MAF to Bishop, California, on January 8, 2011, and that the CVI and its attached documentation listed approximately half of the animals in the shipment. CX-27 and CX-37. Finally, his statements receive further corroboration from Mr. Oltman's statement that Respondent's shipments to XL Four Star "generally arrived with combinations of State of Idaho and Oregon Brand Certificates" that occasionally did not match the animals in the shipments. CX-26. Respondent's actions clearly demonstrate that he was aware that certain types of documents needed to accompany his interstate cattle shipments but that he did not make every effort to obtain those documents or to make certain that the

documents that accompanied his shipments accurately reflected the animals in those shipments. CX-42.

The nature, extent, and gravity of Respondent's violations, coupled with his high degree of culpability, warrant a severe penalty in order to deter Respondent and similarly-situated others from committing the same or similar violations in the future. CX-42. "It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or are regarded by the Department and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the Respondents, but also to other potential violators." In re: Hugh T. (Tip) Hennessey, 48 Agric. Dec. 320, 326 (1989). Per section 10414(b) of the Act as modified by the Federal Civil Penalties Inflation Adjustment Act and 7 C.F.R. § 3.91(b)(2)(vi), APHIS is entitled to seek a maximum civil penalty of sixty thousand dollars (\$60,000.00) for each of Respondent's violations, for a total of two hundred and forty thousand dollars (\$240,000.00) for all of the violations that are being adjudicated in this proceeding. CX-42. However, after due consideration of both the factors referenced above and the Department's severe sanctions policy, APHIS has determined that the facts and circumstances of this case warrant a civil penalty of fifteen thousand dollars (\$15,000.00) for each of Respondent's violations, for a total civil penalty of sixty thousand dollars (\$60,000.00) for all of the violations adjudicated in this proceeding. CX-42.

Complainant's determination of the appropriate civil penalty has been further informed by consideration of Respondent's ability to continue in business if the proposed penalty is imposed. CX-42. The three (3) businesses in Ontario, Oregon, that Respondent owned when he committed the violations set forth in the complaint have been dissolved, and Complainant believes that he currently owns only one (1) business, Gillette Livestock, L.L.C. CX-42.

Therefore, in consideration of Respondent's ability to continue to continue in business either as an individual or as his new business, Complainant has mitigated the recommended civil penalty referenced above by ten thousand dollars (\$10,000.00). CX-42. Respondent has no prior history of adjudicated violations of the regulations governing the interstate movement of cattle, so Complainant has mitigated the recommended civil penalty by another ten thousand dollars (\$10,000.00). CX-42. Complainant thus has mitigated the recommended civil penalty by a total of twenty thousand dollars (\$20,000.00), for a final recommended civil penalty of forty thousand dollars (\$40,000.00). CX-42. APHIS believes that this civil penalty is sufficiently severe to deter Respondent and like-minded others from committing violations of the regulations in the future while striking an appropriate balance between the nature, gravity, and extent of Respondent's violations, his culpability for the same, his ability to continue in business, and his lack of prior adjudicated violations.

## **VII. Findings of Fact and Conclusions of Law**

In accordance with the evidence of record in this docket, the following findings of fact and conclusions of law are hereby adopted:

1. (a) Respondent is an individual who resides in the state of [REDACTED] and has a mailing address of (b) (6) [REDACTED]

(b) At all times material herein, 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.

(c) At all times material herein, Respondent also owned and operated Gillette Livestock, Inc., located at 4312 S. Grandview Lane, Ontario, Oregon 97914, and G 7 Livestock, L.L.C., located at 849 Morgan Avenue, Ontario, Oregon 97914.

2. On or about December 3, 2010, Respondent purchased 78 head of cattle that were test-eligible for brucellosis at 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).

3. On or about December 10, 2010, Respondent purchased 70 head of cattle that were test-eligible for brucellosis at Treasure Valley Livestock Auction in Idaho and moved at least 19 head to Morgan Avenue Feeders in Oregon without obtaining a valid certificate for said movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii).

4. On or about December 27, 2010, Respondent moved 34 head of cattle (32 cows and 2 bulls) that were two years of age or older from Morgan Avenue Feeders in Oregon to XL Four Star Beef, Inc., a commercial slaughter plant located in Nampa, Idaho. The paperwork that accompanied this movement consisted of five (5) State of Oregon Brand Inspection Certificates but only five (5) cows and the two (2) bulls in the shipment could be matched to the certificates. In addition, the Brand Inspection Certificates that listed four (4) of the five (5) matching cows and the two (2) bulls were issued on December 16, 2010, and were valid for only eight (8) days from the date of issuance, so they had expired prior to the date of the movement. Respondent thus moved cattle that were two years of age or older 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 back tag numbers or other approved identification applied to the cattle, in violation of 9 C.F.R. § 71.18(a)(1)(i).

5. 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 paperwork that accompanied this movement consisted of a Certificate of Veterinary Inspection from the Oregon Department of Agriculture, # 92-79146 and an attached brucellosis test record, but the latter listed at most only 70 head of cattle. Respondent thus 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).

#### **ORDER**

In accordance with 10414(b) of the Act (7 U.S.C. § 8312(b)), Respondent Sweeny S. Gillette is assessed a civil penalty in the amount of forty thousand dollars (\$40,000.00). Respondent shall send a certified check or money order for forty thousand dollars (\$40,000.00), payable to the U.S. Department of Agriculture, to USDA GIPSA, P. O. Box 790335, St. Louis, Missouri 63179-0335 within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 16-0024.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order 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 of this Decision and Order shall be served upon parties.

Done at Washington, D.C.  
this 5<sup>th</sup> day of December, 2016



Bobbie J. McCartney  
Chief Administrative Law Judge