UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 14-0041

In re: China Cargo Airlines, Co., Ltd., also known as China Cargo Airlines, Ltd., a subsidiary of China Eastern Airlines Corporation Limited, a corporation chartered in the People's Republic of China,

Respondent

Memorandum Opinion and Order

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) [hereinafter "the Act"], and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.*) [hereinafter "Regulations and Standards"]. The matter initiated on November 18, 2013 with a Complaint filed by the Administrator of the Animal Plant and Health Inspection Service of the United States Department of Agriculture [hereinafter "USDA"; "Complainant"] against China Cargo Airlines, Co., Ltd., also known as China Cargo Airlines, Ltd. [hereinafter "China Cargo"; "Respondent"]. The Complaint alleges that, on or about March 10, 2010, Respondent committed numerous violations of the Act and the Regulations and Standards during its acceptance and transportation of 566 live guinea pigs from Shanghai, People's Republic of China to Los Angeles, California (Compl. ¶¶ 1-2).

On December 3, 2013, Respondent filed a Consent Motion for an Extension of Time to File an Answer. On December 4, 2013, I entered an Order granting the Consent Motion and

allowing Respondent until January 23, 2014 to file an answer. On January 23, 2014, Respondent filed its Answer to the Complaint.

On February 25, 2014, I entered an Order directing Complainant to file with the Hearing Clerk by March 27, 2014 a list of exhibits and list of witnesses; directing Respondent to file with the Hearing Clerk by April 24, 2014 a list of exhibits and list of witnesses; and directing the parties to consult with each other and, no later than one week after the date of Respondent's exchange deadline, to file a Status Report with the Hearing Clerk. On March 18, 2014, Complainant filed its List of Exhibits and List of Witnesses with the Hearing Clerk. On April 24, 2014, Respondent filed its List of Exhibits and List of Witnesses with the Hearing Clerk.

On May 13, 2014, Complainant filed a Status Report requesting a two-day hearing. On June 11, 2014, Complainant filed: (1) a Motion for Adoption of Decision and Order by Reason of Default [hereinafter "Motion for Adoption"]; and (2) a Proposed Decision and Order by Reason of Default. On July 1, 2014, Respondent filed its Response and Objections to Complainant's Motion for Adoption of Decision and Order by Reason of Default [hereinafter "Response and Objections"]. In its Response, Respondent requested an oral argument "on all issues presented" (Resp., "Oral Argument Requested").

Presently before me are: (1) Complainant's "Motion for Adoption of Decision and Order by Reason of Default"; (2) Respondent's "Response and Objections to Complainant's Motion for Adoption of Decision and Order by Reason of Default;" and (3) a request for oral argument filed by Respondent.

Discussion

"It is well established that the Rules of Practice, 7 C.F.R. § 1.130 *et seq.*, rather than the Federal Rules of Civil Procedure apply to adjudicatory proceedings under the regulations promulgated under the Animal Welfare Act."[1] Pertinent to the case at bar, the Rules of Practice for the U.S. Department of Agriculture[2] [hereinafter "Rules of Practice"] establish that "an answer must be filed within 20 days after service of the complaint."[3] The Rules of Practice also provide that an answer "shall . . . [c]learly admit, deny, *or explain* each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent."[4] Per Rule 1.136, "failure to file an answer within [20 days] shall be deemed, for the purposes of the proceeding, an admission of the allegations in the Complaint," and "failure to deny *or otherwise respond* to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138."[5]

Rule 1.139 establishes the procedure upon a party's failure to file an answer or admission of facts:

> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that

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[1] *In re* Hamilton, 64 Agric. Dec. 1659, 1662 (U.S.D.A. 2005) (internal citations omitted); *see In re* Noell, 58 Agric. Dec. 130, No. 98-0033, 1999 WL 11230, at *9 (Agric. Dec. Jan. 6, 1999) ("The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act, in accordance with the Rules of Practice.").

[2] 7 C.F.R. §§ 1.130-1.151 (2013).

[3] *Hamilton*, 64 Agric. Dec. at 1662 (citing 7 C.F.R. § 1.136); *cf.* FED. R. CIV. P. 12(a)(1)(A) (requiring a defendant to serve answer within 21 days of being served a summons or complaint or, if defendant has waived service timely per FED. R. CIV. P. 2(d), within 60 days after a request for waiver was sent or within 90 days of being sent to a defendant outside the United States).

[4] *Hamilton*, 64 Agric. Dec. at 1662 (emphasis added).

[5] 7 C.F.R. § 1.136(c) (2013) (emphasis added). *See* Morrow v. Dep't Agric., 65 F.3d 168, 168 (6th Cir. 1995) ("7 C.F.R. Secs. 1.136(c) and 1.139 clearly describe the consequences of failing to answer a complaint in a timely fashion. These sections provide for default judgments to be entered [and] for admissions absent an answer . . . . Furthermore, the failure to answer constitutes the waiver of the right to a hearing.") (internal citations omitted).

> meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. § 1.139.

With regard to the filing of answers, the Rules of Practice differ from the Federal Rules of Civil Procedure [hereinafter "Federal Rules"] in one technical yet significant aspect. While the Federal Rules provide that a responding party must "admit or deny the allegations asserted against it by an opposing party,"[6] they also establish that a "party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, *and the statement has the effect of a denial.*"[7] The Rules of Practice, contrarily, make no reference to a lack of knowledge or information; they simply direct a respondent to (1) admit, deny, *or explain* each allegation of the complaint and set forth any defenses; (2) admit all facts alleged in the complaint; or (3) admit the jurisdictional allegations and neither admit nor deny the remaining allegations, while consenting to the "issuance of an order without further procedure."[8] The key distinction is that while a defendant in federal court may claim lack of information and in effect "deny" an allegation, a respondent in our administrative proceedings must clearly deny or "otherwise respond" to each allegation as any other response treated will be treated as an admission.[9]

Here, Complainant seeks to take advantage of the disparity between the two rules by suggesting that, because Respondent did not explicitly deny each allegation in the Complaint, Respondent effectively admitted all claims. Specifically, Complainant asserts that Respondent's Answer "admitted, or did not deny, or did not otherwise respond to the material allegations of the complaint" and that "[p]ursuant to the Rules of Practice, those material allegations are deemed to

[6] FED. R. CIV. P. 7.1(b)(1)(B).
[7] FED. R. CIV. P. 7.1(b)(5) (emphasis added).
[8] 7 C.F.R. § 1.136(b)(1)(2)(3) (2013).
[9] *See* FED. R. CIV. P. 7(b); 7 C.F.R. § 1.136(b) (2013) (emphasis added).

be admitted by the respondent, for the purpose of the instant proceeding" (Mot. Adoption Decision ¶ I.A.), thereby "waiv[ing] the right to a hearing" (Mot. Adoption Decision ¶ I.A.4). Complainant's argument, however, lacks merit as Respondent did admit, deny, or *otherwise explain* each allegation of the Complaint pursuant to Rule 1.136.

The Complaint contains four material "Alleged Violations" not relating to jurisdiction, each of which Respondent either denied or explained. Accordingly, the allegations may not be treated as "admitted" in the current proceeding. In response to Alleged Violation # 3 (*i.e.*, Respondent violated Regulations by "failing to handle 566 guinea pigs as expeditiously and carefully as possible" in mislabeling the containers of guinea pigs as "perishables, not containing live animals"), Respondent conceded that the shipping entity misidentified the containers of guinea pigs but further stated that it was "without sufficient knowledge and information as to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the Complaint, and therefore, neither admits or denies the same, but demands strict proof thereof." With respect to Alleged Violation # 4 (*i.e.*, Respondent violated Regulations by failing to satisfy Standards for humane treatment of guinea pigs by accepting 566 live guinea pigs for shipment more than four hours prior to scheduled conveyance), Respondent answered that it was "without sufficient knowledge and information as to form a belief as to the truth of the allegations . . . and therefore, neither admits or denies the same, but demands strict proof thereof." Similarly, in responding to Alleged Violation # 5 (*i.e.*, Respondent violated Regulations by failing to meet Standards in transporting the animals in "nonconforming primary enclosures"), Respondent stated that it was "without sufficient knowledge and information as to form a belief as to the truth of the allegations . . . and therefore, neither admits or denies the same, but demands strict proof thereof." Respondent also answered to Alleged Violation # 6 (*i.e.*, Respondent violated

Regulations by failing to meet Standards in failing to place 566 live guinea pigs in animal cargo space; failing to place enclosures containing the guinea pigs in the primary conveyance in a way in which they could be removed as soon as possible in an emergency situation; failing to provide the guinea pigs access to food or water for approximately 24 hours; accepting 566 live guinea pigs for transport without adequate food; failing to visually observe the guinea pigs when they were unloaded to ensure that they were receiving enough air for normal breathing; failing to place guinea pigs in an animal holding area upon arrival to Los Angeles, California as quickly as possible) by stating that it was "without sufficient information and belief as to the truth of the allegations . . . and therefore, neither admits or denies the same, but demands strict proof thereof."

Respondent also provided nine "affirmative defenses," one of which ("Tenth Defense") states: "Respondent *denies all allegations not specifically responded to,* and reserves the right to interpose additional defenses, if appropriate." Based upon the substance of Respondent's statements, it is plain that the Answer has, at minimum, explained or otherwise responded to each material allegation of the Complaint.[10] Accordingly, Respondent's pleadings will not be treated as admissions, and Respondent will not be deemed to have waived its right to a hearing.

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[10] In analyzing whether Respondent's statements constitute explanations or responses, the regular and ordinary definitions of the terms "explain," "respond," and "otherwise" will be used. *See* Nat'l Ass'n Home Builders v. Defenders Wildlife, 551 U.S. 644, 672 (2007) ("An agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation'. . .") (internal quotations omitted); Barnhart v. Walton, 535 U.S. 212, 212 (2002) ("Courts grant considerable leeway to an agency's interpretation of its own regulations . . .); Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 179 (1995) (stating that where an act does not define a certain term, that "term should be given its ordinary meaning"). The OALJ accepts the following definitions: (1) *explain* (verb): "to make known," "to make plain or understandable," "to give the reason for or cause of," or "to show the logical development or relationships of;"(2) *respond* (verb): "to say something in return: make an answer," "to react in response," "to show favorable reaction," or "to be answerable;" and (3) *otherwise* (adverb): "in a different way or manner," "in different circumstances," "in other respects," or "if not." *explain*, MERRIAM-WEBSTER.COM (2014), http://www.merriam-webster.com/dictionary/explain (last visited July 15, 2014); *answer*, MERRIAM-WESBTER.COM (2014), http://www.merriam-webster.com/dictionary/answer (last visited July 15, 2014); *otherwise*, MERRIAM-WEBSTER.COM (2014), http://www.merriam-webster.com/dictionary/otherwise (last visited July 15, 2014).

Complainant cites various cases that, upon analysis of each case in its entirety, are either inapplicable or plainly distinguishable from the present case.[11] Complainant cites these cases to support its contention that because "the respondent admitted, or did not deny, or did not otherwise respond to the material allegations of the complaint. . . . those material allegations are deemed to be admitted by the respondent, for the purpose of the instant proceeding."[12] However, as Respondent correctly submits in its Response and Objections, the cases "largely address situations in which Respondents failed to respond to a Complaint, failed to timely respond to a Complaint, and/or did not respond to allegations contained within a Complaint."[13] Those situations are markedly different from the case at bar. In attempting to apply those specific, fact-

[11] Footnote 2 of Complainant's "Motion for Adoption of Decision and Order by Reason of Default" contains the following parenthetical citations: (1) *In re* Spring Valley Meats, Inc., 56 Agric. Dec. 1731 n.9 (U.S.D.A. 1997) (citing *In re* Kneeland, 50 Agric. Dec. 1571, 1572 (U.S.D.A. 1991) ("allegations of complaint are deemed admitted where answer does not deny material allegations of complaint"); (2) *In re* Henson, 45 Agric. Dec. 2246, 2260 (U.S.D.A. 1986) ("default decision was properly issued where answer failed to deny allegations of complaint"); (3) *In re Guffy*, 45 Agric. Dec. 1742, 1747 (U.S.D.A. 1986) ("where answer does not deny allegations of complaint, default decision is properly issued"); (4) *In re* Blaser, 45 Agric. Dec. 1727, 1728 (U.S.D.A. 1986) ("answer which admits one allegation of com plaint and fails to respond to other allegations is admission of all allegations in complaint"); (5) *In re* Stoltzfus, 44 Agric. Dec. 1161, 1162 (U.S.D.A. 1985) ("answer stating that 'no violation was intended' does not deny or otherwise respond to complaint and pursuant to 7 C.F.R. 1.136(c) is deemed admission of allegations of complaint"); (6) *In re* Lucas, 43 Agric. Dec. 1721, 1722, 1725 (1984) ("answer fails to admit, deny, or otherwise respond to allegations of complaint and is deemed admission of allegations of complaint"); (7) *In re* Lema, 58 Agric. Dec. 291 (1999) ("where respondent did not deny material allegations of Complaint and expressly admitted carrying 'acidic fruits' aboard aircraft on which he arrived in United States"); (8) *In re* Hardin Cnty. Stockyards, Inc., 53 Agric. Dec. 654, 656 (1994) (quoting: "Therefore, as respondent did not deny the allegations in the complaint, that he engaged in the conduct alleged to be prohibited, he is found to have willfully violated the Act. The Secretary's Rules of Practice . . . provide that when a respondent admits the material allegations in the complaint, complainant may seek a decision, as the complainant has done here, without a hearing."); (9) *In re* Dean Paul, 45 Agric. Dec. 556, 558-60 (1986) ("default decision was properly issued where respondent failed to file timely answer and in his late answer did not deny material allegations of complaint; by failing to file timely answer and to deny allegations in complaint, respondent is deemed to have admitted violations of the AWA and Regulations alleged in complaint"); (10) *In re* Reece, 70 Agric. Dec. 1061 (2011) ("late-filed answer admitted allegations by failing to specifically deny them"); (11) *In re* Aull, 50 Agric. Dec. 353 (1991) ("answer did not deny allegations"). The facts in these cases are manifestly distinct from those of the present case. Here, Respondent filed a timely, properly formatted Answer that either denied or otherwise explained—at some points stating that it lacked sufficient information and knowledge to form a belief as to the allegation's truth, which is a commonly accepted response under the Federal Rules of Civil Procedure—each material allegation of the Complaint. The Answer did not expressly admit to any material allegations, and it included a request for hearing per Rule 1.41.

[12] Mot. Adoption Decision & Order by Reason Default at 2.

[13] Resp. & Objections to Mot. Adoption Decision & Order by Reason Default at ¶10.

oriented holdings to the present situation, Complainant has misconstrued the language of the Rules of Practice and erred in seeking to employ the cited cases to support a default judgment.

Even had Respondent's Answer lacked the degree of specificity preferred by Complainant, it may have been unethical for Respondent to answer in any other fashion. While the Rules of Practice instruct a respondent to explicitly admit, deny, or explain each material allegation of a complaint, the Model Rules of Professional Conduct and Federal Rules of Civil Procedure provide that a party *may not* admit or deny an allegation without sufficient information or evidence to do so.[14] The Federal Rules go so far as to permit a court to "impose an appropriate sanction on any attorney, law firm, or party that violate[s] the rule or is responsible for the violation."[15] Given that the present allegations occurred in China more than three years prior to the filing of the Complaint, it is unlikely that Respondent would have had the information and evidence necessary to provide a clear, specific, and definite admittance or denial without violating recognized ethical standards.

I find it inconceivable that Rule 1.136 was designed to afford parties an occasion to circumvent hearings via procedural tactics. As prior decisions have explained, "the requirement in the Rules of Practice that Respondents deny or explain any allegation of the Complaint and set forth any defense in a timely manner is necessary to enable USDA to handle its workload in an expeditious and economical matter."[16] Here, the method by which Respondent answered the Complaint does not hinder judicial efficiency. To the contrary, Complainant's attempt to evade a

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[14] *Compare* 7 C.F.R. § 1.136(b)(1) (2013) (answer must "clearly admit, deny, or explain each of the allegations of the Complaint") *with* MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (1983) (an attorney "shall not knowingly . . . make a false statement of fact or law to a tribunal . . . or . . . offer evidence that the lawyer knows to be false") *and* FED. R. CIV. P. 11(b) (a party or representative "presenting to the court a pleading, written motion, or other paper . . . certifies that to the best of the person's knowledge, information, and belief . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and . . . the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a belief or lack of information").

[15] FED. R. CIV. P. 11(c)(1).

[16] *In re* Noell, 58 Agric. Dec. 130, No. 98-0033, 1999 WL 11230, at *9 (Agric. Dec. Jan. 6, 1999).

hearing on the basis of procedural technicalities does so. If, as is suggested by Respondent, Complainant's objective was to compel Respondent to settle by precluding the opportunity for a hearing, a motion for summary judgment might have been a more proper course of action.[17]

I have on several occasions expressed my "displeasure with the [Department's] attempt to 'end run' around the merits of the case with procedural maneuvers."[18] Such an approach is inconsistent with the judicial preference for adjudication and the disfavor of default judgments, and it offends notions of fairness when utilized to impede a respondent's right to hearing.[19] Indeed, the Ninth Circuit has cautioned against "ignor[ing] the tenet that cases should be decided on their merits whenever possible" and "fail[ing] to consider the overall fairness of the proceedings given what [is] at stake."[20] Rather than dispose of proceedings on the basis of extraneous procedural issues, my fellow judges and I have repeatedly sought to "afford respondents a hearing on the merits where they felt there was good cause, noting the traditional preference for such disposition. To do otherwise loses sight of the basic tenet that fairness

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[17] "A motion for summary adjudication carries the potential to dispose of an entire claim or portion of it with finality and without trial . . . . While the current rules do not specifically provide for either the use or exclusion of summary judgment, the Judicial Officer has consistently ruled that hearings are futile and summary judgment is appropriate where there is no factual dispute of substance." Peter M. Davenport, *The Department of Agriculture Rules of Practice: Do They Still Serve Both the Department's and the Public's Needs?*, 33 J. NAT'L ASS'N ADMIN. L.J. 567, 583 (2013). As little of the underlying facts in the case appear to be in dispute, the use of a motion for summary judgment would have required Respondent to come forward with its evidence to rebut that advanced by Complainant in support of its motion as once a moving party supports its motion, the burden shifts to the non-moving party, who may not rest upon mere allegation or denial in pleadings, but must set forth specific facts supported by documentary material showing there is a genuine issue for trial. T. W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F. 2d 626, 630 (9th Cir. 1987), Muck v. United States, 3 F. 3d 1378, 1380 (10th Cir. 1993).

[18] Ramos v. U.S. Dep't Agric., 68 Agric. Dec. 60, 74 (U.S.D.A. 2009) (citing Oberstar v. Fed. Deposit Ins. Co., 987 F.2d 494, 504 (8th Cir. 1993); Lion Raisins, Inc. v. U.S. Dep't Agric., 354 F.3d 1072, Case No. CV-F-04-5844 (E.D. Ca. May 12, 2005); *see also* Davenport, *supra* note 17, at 577 ("Despite the frequently expressed, traditional judicial preference for fundamental fairness of adjudicatory proceedings, the Department's reliance upon aggressive use of procedural rules to achieve resolution is generally successful, even where the Department's administrative law judges have sought to afford a respondent a hearing on the merits where they believe good cause existed.").

[19] "The judicial preference for adjudication on the merits goes to the fundamental fairness of the adjudicatory proceedings. Fairness concerns are especially important when a government agency proposes to assess a quasi-criminal monetary penalty on a private individual." Oberstar v. Fed. Deposit Ins. Co., 987 F.2d 494, 504 (8th Cir. 1993).

[20] *Lion Raisins, Inc.*, 66 Agric. Dec. at 541-42.

concerns should be paramount where quasi-criminal sanctions may be imposed."[21] As Complainant here requests a civil penalty of $290,000.00[22] for the loss of approximately 560 guinea pigs—a sum sufficiently large to constitute a "quasi-criminal" sanction—I will defer ruling on the motion seeking a default decision and schedule a hearing on the substantive issues.[23]

In deferring my ruling, I acknowledge that Complainant, as representative of the Department, has an obligation to initiate disciplinary proceedings in a fair and straightforward manner.[24] This is obviously consistent with the Model Rules of Professional Conduct, which provide that attorneys have "a duty to use legal procedure to the fullest benefit of the client's case, but also a duty not to abuse legal procedure."[25]

Order

For the above reasons, it is **ORDERED:**

1. Complainant's Motion for Adoption of Decision and Order by Reason of Default is **DEFERRED.**

2. Respondent's Objections to the Complainant's Motion is also **DEFERRED.**

3. Respondent's Request for Oral Argument is **DENIED.**

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[21] *In re* Hamilton, 64 Agric. Dec. 1659, 1664-65 (U.S.D.A. 2005).

[22] While the value of the guinea pigs at the time of their flight is not readily available, current ads suggest a value of approximately $10-30 per animal.

[23] *See Lion Raisins, Inc.*, 66 Agric. Dec. at 542 (holding that USDA Judicial Officer abused discretion in entering default judgment against respondent due to "minor deviation from the Rules of Practice with no showing of prejudice to the USDA"). "The refusal to allow the late answer . . . deprived Lion Raisins of the hearing to which it was entitled." *Id.*

[24] *See Hamilton*, 64 Agric. Dec. at 1662 ("Government attorneys at all levels are charged with a very peculiar and awesome fiduciary responsibility when they are called upon to enforce the law or regulations, yet still being mindful of the fact that they are a servant of the people. While they indeed have an obligation to advance their cases with earnestness and vigor, every action taken must be in the context of seeing that justice is done. Measured against that yardstick, I cannot but express doubt that decisions to seek victories by procedural maneuvers thereby avoiding a hearing on the merits . . . are inconsistent with the principles and objectives of this Department, much less being inconsistent with what I have been advised by senior attorneys of the Department is agency policy.").

[25] MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt (1983).

4. This matter is set for oral hearing to commence **at 9:00 AM Local Time on September 9, 2014 in the United States Department of Agriculture Courtroom, Room 1037 South Building, 1400 Independence Avenue, SW, Washington DC 20250** and will continue from day to day until concluded or recessed.

Copies of this Memorandum Opinion and Order shall be served upon the parties by the Hearing Clerk.

August 6, 2014

Peter M. Davenport

Peter M. Davenport
Chief Administrative Law Judge

Copies to: Colleen Carroll, Esquire
Edward J. Longosz, II, Esquire
Neal R. Gross & Co., Inc.